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Volume 11

Legal Philosophy in the Twentieth Century: The Common Law World

by

Gerald J. Postema

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Linda T. Postema
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IN MEMORIAM

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A NOTE ON THE AUTHOR

Gerald J. Postema is Cary C. Boshamer Professor of Philosophy and Professor of Law at the University of North Carolina at Chapel Hill, where he served as Chair of the Department of Philosophy from 1989 to 1996. He is a Guggenheim Fellow, Rockefeller Foundation Fellow, Fellow of the Netherlands Institute for Advanced Studies, Medlin Fellow at the National Humanities Center, and Visiting Fellow at the Research School of Social Sciences, Australian National University. He served as Editor of Cambridge Studies in Philosophy and Law (1997–2006) and Special Issues Editor of *Law and Philosophy* (1996–2001). He is Associate Editor of *Treatise of General Jurisprudence and the Philosophy of Law.* He has written widely in legal and political philosophy, ethics, the history of philosophy, and the history of legal theory. His major publications include *Bentham and the Common Law Tradition* (Clarendon Press, 1986), *Philosophy and the Law of Torts* (Cambridge, 2001), *Jeremy Bentham: Moral, Political, and Legal Philosophy* (Dartmouth, 2002), "Coordination and Convention at the Foundations of Law," *Journal of Legal Studies*, (1982), "Self-Image, Integrity, and Professional Responsibility," in *The Good Lawyer* (1983), "'Protestant' Interpretation and Social Practices," *Law and Philosophy* (1987), "Implicit Law," *Law and Philosophy* (1995), "Integrity: Justice in Workclothes," *Iowa Law Review* (1997), "Objectivity Fit for Law," in *Objectivity in Morality and Law*, (2000). "Classical Common Law Jurisprudence" *Oxford University Commonwealth Law Journal* (2002, 2003), "Custom in International Law: A Normative Practice Account," in *The Nature of Customary Law: Legal, Historical and Philosophical Perspective* (2007), "A similibus ad similia: Analogical Thinking in Law" in *Common Law Theory* (2007), "Conformity, Custom and Congruence: Rethinking the Efficacy of Law" in *The Legacy of Hart* (2008), "Law's Ethos: Reflections on a Pubic Practice of Illegality," *Boston University Law Review*, (2010). He is currently preparing *On the Law of Nature, Reason, and the Common Law: Selected Jurisprudential Writings of Sir Matthew Hale*, (OUP, 2012).

GENERAL EDITOR'S PREFACE TO VOLUMES 11 AND 12 OF THE TREATISE

I am very pleased to present here Volume 11 of the *Treatise of Legal Philosophy and General Jurisprudence*. A special thanks goes to Gerald Postema for this Volume 11, which is so well integrated and complete as to offer an overview of 20th-century legal philosophy in the entire English-speaking world. This he did in addition to the invaluable work that with especial effectiveness he has done in his role as associate editor in helping to work out a series of editorial issues relative to the *Treatise* by contributing ideas, advice, and oversight.

The *Treatise* put forth its first five volumes in 2005: These are the theoretical ones, by Enrico Pattaro, Hubert Rottleuthner, Roger A. Shiner, Aleksander Peczenik, and Giovanni Sartor. After these five volumes, another five—all historical—appeared in 2007 (Volumes 6, 7, and 8) and in 2009 (Volumes 9 and 10). These five historical volumes account for the history of legal philosophy from ancient Greece to the entire 19th century, with several references to the 20th century.

With the present Volume 11 by Gerald Postema and the following Volume 12 edited by Enrico Pattaro and Corrado Roversi—which respectively present the history of legal philosophy in the 20th century in the common-law world, on the one hand, and in the civil-law world, on the other—the wheel is come full circle. Indeed, the theoretical volumes published in 2005 in a way inevitably reflected the state of research in legal philosophy at the beginning of the 21st century, and Volumes 11 and 12, in completing the diachronic treatment of legal philosophy up to the entire 20th century, take us again to the 21st century: The *Treatise* plan thus reaches its completion.[1]

My thanks go in the first place to the members of the *Treatise*'s advisory board: the late Norberto Bobbio, Ronald Dworkin, Lawrence Friedman, and Knud Haakonssen. I also wish to acknowledge my indebtedness to Peter Stein, who is the other associate editor of the *Treatise* along with Gerald Postema. A debt of gratitude is owed as well to Antonino Rotolo and Corrado Roversi for their important and effective work. Finally, I would like to thank Neil Olivier, of Springer, for the kindly and collaborative spirit with which he has followed the project in recent years.

Enrico Pattaro

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[1] On the *Treatise*'s overall framework, see the General Editor's prefaces in Volume 1, xix–xxx; Volume 6, xv–xviii; and Volume 9, xv–xvii.

PREFACE TO VOLUME 11

The story of Anglophone general jurisprudence and legal philosophy in the twentieth century can be told as a tale of two Boston lectures, separated by sixty years, and their respective legacies.

In 1897, Oliver Wendell Holmes, Jr., then Associate Justice of the Supreme Judicial Court of Massachusetts, delivered a lecture to the students of Boston University Law School, which was later published by the *Harvard Law Review* under the title, "The Path of Law." Intended largely as advice to young men embarking on the practice of law, the lecture initiated a dynamic new direction for theorizing about law. Although Holmes did not single-handedly turn the ship of American jurisprudence, the thoughts expressed in this essay launched an approach to legal theory that was bold, iconoclastic, pragmatic, and largely innocent of systematic legal philosophy and its history. In the early decades of the twentieth century it inspired progressive-minded legal academics who formed a rag-tag movement which had such a distinctively American cast that it came to be called "American legal realism."

Throughout the first half of the twentieth century, the movement Holmes sired stayed home on American soil. At the same time, the rest of the common-law world, led by England, was content to pursue mundane jurisprudential tasks within the comfortable precincts of the province John Austin determined. However, in 1952, H.L.A. Hart's inaugural lecture, "Definition and Theory in Jurisprudence," jolted English jurisprudence out of its Austinian complacency and reintroduced it to philosophy. Five years later Hart brought his revived and revised positivist theory to the United States.

In 1957, H.L.A. Hart delivered to students of the Harvard Law School his Holmes lecture, later published by the *Harvard Law Review* under the title, "Positivism and the Separation of Law and Morals." This essay, and even more its book-length sequel, the classic *Concept of Law* (1962), launched a revitalized enterprise of philosophically sophisticated jurisprudence that took hold first in Britain and not long after in the United States, Canada, and the rest of the common-law world.

In these two lectures we find the headwaters of two distinct streams of Anglophone legal theorizing in the twentieth century. The following chapters tell the story of the movement and widening of these two streams. Rather than interweaving discussions of these movements in strict chronological order, the chapters below trace developments in each stream separately and in sequence beginning with Holmes legatees, the realists. In some respects this is regrettable, but it is warranted by the fact that, for the most part, the streams did not intersect in significant ways until the last few decades of the twentieth century.

This was due in part to differences in the theoretical spirit and the practical ambitions that drove them. Holmes's path-breaking work attracted thinkers committed to a down-to-earth pragmatism that was skeptical of theory and looked to practice for inspiration. When it sought intellectual partners in the academy, it looked to the emerging social sciences. Hart's revolution, in contrast, arose from solid British empiricism, and, while no less skeptical of Grand Theory and metaphysical speculation, it looked to philosophy as practiced at the time and shunned the social sciences. Differences in the institutional settings in which these theorists worked further explain the lack of extended engagement. The Holmesian strand, initially in its realist phase and later in its critical and even law-and-economics phases, continually sought to challenge legal orthodoxy and especially its mode of teaching of law in American law schools. In consequence, it was always passionately reform-minded. Hart and his legatees, while claiming the radical, orthodoxy-challenging Bentham as their intellectual ancestor, sought largely to stand above the fray of academic politics. For these reasons and perhaps others, the two camps only rarely engaged each other, despite sharing the same language and heritage. It is possible then to tell a coherent story of Anglophone jurisprudence over the past century by following two largely distinct plot lines seriatim, noting points of intersection when they are significant. This is the story that unfolds in the ensuing chapters.

Four further features of the story herein told call for attention. First, this exploration is meant to be what might be called a "critical history" of twentieth century jurisprudence in the common-law world. The aim is not only to trace the movement of *ideas*, but also and even more importantly to trace the movement of *arguments*. Thus, while a great deal of attention will be given to careful and sympathetic exposition of the views of the writers herein discussed, we will not rest content with a grasp of these views, but rather will assess their internal workings and plausibility by looking equally carefully at the arguments offered for them, and the assessments of those arguments offered by critics. Tracing the dialectic of arguments will be as important as tracing the influence of ideas. This will take time and this, in turn, has necessitated a certain narrowing of the scope of this critical history.

This is the second significant feature of this study. It will focus only on what are regarded throughout this *Treatise* as central issues of *general jurisprudence*. General jurisprudence here is to be distinguished from both particular and special jurisprudence. It is concerned with issues, problems, concepts, and practices of law considered in general, and so not limited to any particular jurisdiction or legal system, nor any specific domain of law. Thus, although we will herein explore the work of theorists working in the common-law world who inevitably have in view the institutions and practices most familiar to them, nevertheless, it is their reflections on universal or at least generic features of law and the problems it generates that will occupy our attention, and not id-

iosyncratic features of common-law legal institutions. Likewise, features of law in general, and not features or principles of contract law, tort law, criminal law, or any other domain of law, will be the focus of our attention. Furthermore, we will not consider here developments in legal philosophy and normative political theory bearing on, for example, the nature, foundations, and scope of rights, the principles of punishment, the limits of justified legal intrusion in individual liberty, the fundamental principles of justice, or the host of other important topics that are frequently and legitimately considered part of contemporary legal philosophy. This is regrettable, because, especially since the early 1970s, there has been an explosion of interest in and high-quality writing on these topics. However, any attempt to do justice to these developments at the level of detail proposed for discussion of issues of general jurisprudence would have required a very different work. So, with regret, a critical history of discussions of these issues will not be attempted here.

Third, it will soon be obvious to readers that the respective legacies of Holmes and Hart have very different characters. Theorists following Hart were on the whole relatively well-behaved, proceeding in a disciplined way through a common philosophical agenda and sharing broadly a common philosophical approach. It is possible to see the developments over time in that stream as the more or less logical or dialectical unfolding of ideas and arguments found in Hart's own work. However, Holmes's legatees look far less homogeneous and disciplined. They were inclined, even from the beginning, to take very different paths. Even Holmes's relationship to the legal realists emerging in the early decades of the twentieth century, as we shall see, was complex, and the extent to which partisans of economic jurisprudence and the critical legal studies movement can be considered off-spring of the realists (or Holmes), is much contested, often among the partisans themselves. In sharp contrast with Hart's legacy, there is in the Holmes's legacy no common agenda and no agreement on method or approach. Thus, use of the term "legacy" in this context may be misleading, as John Finnis (2008, 17–8) reminded us. Certainly the term as typically understood by lawyers—as that which the testator chooses to pass on to others—is inapplicable. The term is used here in an extended sense to include subsequent generations who look to the ancestor for inspiration, some becoming members of this very loosely affiliated family by a kind of extended adoption, where descendents adopt the ancestor or observers associate descendents with ancestors, perhaps against the wishes of the parties, because of illuminating similarities or shared grasp of certain problems of jurisprudence. It is in this loose and tortured sense of "legacy" that we can speak of Dworkin and Waldron, as well as the feuding exclusive and inclusive positivists, as part of Hart's legacy, and of the realists, Fuller, economic jurisprudence and feminist jurisprudence as part of Holmes's legacy.

Finally, we must acknowledge that the story told here did not begin with the two lectures in Boston. Indeed, most of the problems faced by the legal

theorists we will consider below were identified and debated in earlier centuries. Common-law jurisprudence was given its classical expression in the work of Sir Edward Coke and Sir Matthew Hale in the seventeenth century and was restated by Blackstone in the eighteenth. The seventeenth century version was vigorously challenged by Hobbes and Blackstone's version was the focus of most of Bentham's most devastating critique and the opposition stimulated his most creative thinking about the nature of law. But these developments, and their culmination in the work of Austin, have been amply discussed in Michael Lobban's contribution to this *Treatise* and will not be surveyed here. However, to tell the story adequately, other work in the late nineteenth and early twentieth centuries must be considered. This includes the most important theoretical work Holmes did in the 1870s and 1880s and the work of British and Commonwealth writers in the early decades of the twentieth century who established the main outlines of analytic jurisprudence in response to dominant Austinian positivism that took root in the 1870s. Thus, our story begins with a prologue set in the 1870s first in England then in the United States.

ACKNOWLEDGEMENTS

This book was ten years in the making. Over this period, the landscape of Anglophone jurisprudence changed, as did my thoughts about its successes, failures, and future prospects. I often found it difficult to hold this moving target sufficiently in focus to construct a coherent narrative. The project often seemed daunting and it would have been impossible had it not been for the encouragement and generous assistance of a vast number of colleagues, students, and friends. Because ten years takes its toll on even the best of memories, my gratitude for their support can, in many cases, only be expressed generically. Others, however, can be named.

Many eager and expert hands aided me in the preparation of the manuscript, including Timothy Vavricek, Yaacov Ben-Shemesh, Piers Turner, Cathay Liu, Daniel Layman, John Lawless and Seth Bordner, all of the Philosophy Department of the University of North Carolina at Chapel Hill, and Allegra Sinclair, Shelly Biggs and Chris McEachran of the UNC Law School. Karen Carroll at the National Humanities Center also cast a very careful copy-editor's eye over much of the manuscript. I am grateful to my graduate and law students for their patience with, and helpful suggestions on, early drafts of several of the chapters presented in lectures and seminars on topics in the philosophy of law. A fellowship at the National Humanities Center, Research Triangle Park, North Carolina, in the middle of the decade, did much to secure the eventual if not speedy conclusion of this project. I am grateful also to the European University Institute in Florence, Italy, and the head of the law department, Wojciech Sadurski, for a memorable eight week-long retreat during which one chapter was written. I must add a special word of gratitude to the law faculty of the University of Athens, and my dear friend Konstantinos Papageorgiou, for their generosity during my stay in Athens in the autumn of 2009. There I presented the substance of nearly one-half of this work in a series of seminars, which provided me with the opportunity to stitch together into a single narrative what had hitherto been isolated patches of philosophical discussion. Throughout this whole process the editorial staff of this *Treatise*—in particular, Enrico Pattaro Antonino Rotolo, and Corrado Roversi—has been unsparing in their help and indiscriminate in their encouragement. A special debt of gratitude is owed to Enrico Pattaro for introducing me to Modesto and his culinary artistry.

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Part I

Prologue

Chapter 1

ANALYTIC JURISPRUDENCE ESTABLISHED

In 1957, during his extended visit at the Harvard Law School, H.L.A. Hart delivered his Holmes lecture, later published under the title *Positivism and the Separation of Law and Morals*, in which he sketched a profile of his landmark theory of law. As a listener might have expected, Hart opened his lecture with praise for the jurist and justice after whom the lectureship was named (Hart 1983, 49–50). Holmes will always be regarded in English legal circles as "a heroic figure in jurisprudence," Hart acknowledged, because he "magically combined" two qualities: clarity and imaginative power. English jurisprudence always prided itself on the former, he maintained, but imaginative power it surely lacked. Like Bentham, who sought "to pluck the mask of Mystery from the face of Jurisprudence" (Bentham 1977, 410), Holmes looked to careful analysis of law and the language used in it to expose fallacies of thought and practice. In particular, Holmes shared with Bentham, Austin, and much of English "positivist" jurisprudence that followed them the conviction that clarity and precision required that what law is must not be confused with what it ought to be. Hart went on in the remainder of the lecture to articulate the positivist doctrine of the separation of law and morals and defend it against a variety of what Hart thought to be misdirected criticisms.

From a historical point of view, it is remarkable that the only representatives of English jurisprudence who warranted serious discussion in *The Concept of Law* are Bentham and Austin,[1] as if jurisprudence had gone on holiday since the publication of Austin's *Lectures* in 1863. This was no accident. Most observers of the history of English-speaking jurisprudence since the late nineteenth century generally agree that, while legal theory in the United States in the period before the late 1950s was a bold, bustling, and rambunctious frontier town, jurisprudence in the common-law world outside of North America in that same period was a sleepy, contented, complacent village, dominated by Austinian jurisprudence,[2] and showing no significant movement beyond Austinian orthodoxy or even any desire to challenge it.

There is a good deal of truth in this characterization, but it obscures from view significant, if subtle, movement and challenges that did occur over these years. To approximate more closely the truth about jurisprudence in the period between Austin and Hart, the above characterization must be qualified in two respects. First, it was not Austin's work itself that exercised this remarkable

[1] John Salmond is mentioned, but only in passing (Hart 1983, 61).

[2] Jurisprudence in the years between Austin and Hart was, according to Duxbury, "a one-house town" (Duxbury 2005, 29).

G.J. Postema, *A Treatise of Legal Philosophy and General Jurisprudence*,
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control, but rather the work of those writing in the generation following the publication of his *Lectures on Jurisprudence* in 1863, most notably T.E. Holland's *Elements of Jurisprudence* (1924; first published 1880). It is doubtful that Austin's ponderous work was much read, but Holland's book, an accessible statement of core Austinian themes, and others like it, secured the dominance of Austinian thought in English jurisprudence, and through the influential work of Dicey, Austinian ideas came likewise to dominate constitutional theory of the English Commonwealth.

Second, Austin's was not the only jurisprudential voice heard in this period and it did not escape serious criticism. As Michael Lobban has shown,[3] Maine challenged the Austinian command model of law, arguing that it failed utterly to fit working law in Indian and other non-Western legal systems. This attack was carried forward by representatives of the historical jurisprudence, like Vinogradoff (1920). In like fashion, Scottish legal theorists at the turn of the century, especially Miller (1884, 1903) and Bryce (1901), challenged the methodological abstemiousness of Austinian jurisprudence. While Maine and Vinogradoff urged a wider role for comparative and historical research in jurisprudence, the Scots urged a more serious engagement with systematic philosophy of law. However, these criticisms were summarily dismissed by mainstream English jurisprudence because its constituency, practicing lawyers and students preparing for practice, had little patience with the scholarly or philosophical study of law.

A more successful challenge to the orthodox Austinian doctrine of law, although not to its characteristic methodology, came from New Zealand's John Salmond, whose textbook on jurisprudence (1924, first published 1902) was widely studied. With the kind of reserve appreciated by English lawyers with their noses close to the doctrinal grindstone, he engineered a significant if subtle shift in English legal positivism, but the full impact of this shift was not felt until half a century later when H.L.A. Hart systematically articulated and defended the view (with only the barest acknowledgement of Salmond) in *The Concept of Law*. Yet even Salmond saw little reason to challenge the basic methodological assumptions of Austinian orthodoxy. Dissenting voices did raise questions about these assumptions, some more radical than others, but these voices rarely received a serious hearing. Philosophy was driven from the province of jurisprudence before the turn of the twentieth century; it returned at mid-century, but even then not because of changes in prevailing jurisprudential attitudes but rather because of changes in the prevailing methods and aims of philosophy.

This chapter traces the subtle transformations of analytic jurisprudence, both its substantive theory of law and its understanding of the methodology of jurisprudence, that occurred over the first half of the twentieth century. At

[3] Lobban, Volume 8 of this Treatise, secs. 7.2– 7.3.

the end of this chapter we will find ourselves on the eve of the publication of Hart's *Concept of Law* with most of its central themes in view, albeit in sketchy and unelaborated form.

1.1. Austinian Orthodoxy

Our story begins with the establishment of Austinian orthodoxy at the end of the nineteenth century and criticism of it in the years immediately following.

1.1.1. Holland's Opus

Holland's *Elements* (thirteen editions from 1880 to 1924) established jurisprudence in the curriculum of English legal education in the late nineteenth century. It articulated in a breezy style an uncluttered, unqualified, and unapologetic version of Austin's main jurisprudential doctrines, including an elementary presentation of its methodological aims. *Elements* soon became, in Twining's assessment, "the main vehicle of Austinian analytical jurisprudence" (Twining 2000, 26 n.10) and it remained so for over fifty years.

Holland understood the law as an aggregate of laws; hence, the primary object of analysis is a law (Holland 1924, 15). A law is a rule of action (ibid., 21, 23), which because it is a normative rather than a descriptive proposition, must be understood as a proposition addressed to the will of a rational being by another such will (ibid., 22). Since law does not merely counsel compliance, we must understand these propositions as commands and hence as necessarily accompanied by threats of sanctions. Moreover, they are addressed to classes of people concerning classes of actions (ibid., 22–3). Thus, in first approximation, laws are "propositions commanding the doing or abstaining from, certain classes of actions [by certain classes of agents]; disobedience to which is followed, or is likely to be followed, by some sort of penalty or inconvenience" (23). Such commands presuppose a "determinate authority" empowered to impose them. Human laws are set by that authority "which is paramount in a political society" (ibid., 41–2). The sovereign is paramount in the sense that it is free of all control and controls all action within the state (ibid., 50).

The sovereign is not only the source, but also the ultimate enforcer of law. *Pace* Maine, rules which do not depend on coercive force for compliance, do not qualify as laws (ibid-, 53–4): We should "recognise as laws only such rules as can reckon on the support of a sovereign political authority" (ibid., 54). Holland did not shy away from the statist implication of this definition of law.

> Until the State is constituted there can be no law, in the strict sense of the term. There may be, and doubtless always have been, morality and customary rules of conduct. After the formation of the State, such rules as receive its sanction and support, whether promulgated for the first time by the governing body, or already in operations among the people, become, in the proper sense of the term, "laws." (Ibid., 56)

Joseph Raz once argued that Holland shifted theoretical attention away from commands imposing laws to an exclusive focus on coercive enforcement, thus from Austin's focus on law-making institutions as definitive of legal sovereignty to law-enforcing (and law-applying) institutions (Raz 1980, 190). Although Holland (1924, 79) allowed that coercion is "the most obvious characteristic of Law," he also believed that other elements were equally essential to law. His notion of a general rule relies heavily on the concept of command (ibid., 21) and he insisted that positive laws are "authoritatively imposed" by the will of the sovereign (ibid., 43 and n. 1): "[E]very law is a proposition announcing the will of the State" (ibid., 88–9).

Holland acknowledged that custom plays a role in (English) law, but, like Austin he insisted that it does so only insofar as customs are recognized by the courts, which insist that they meet conditions of reasonableness (ibid., 60–1). But he rejected Austin's view that customary norms have status as valid laws just in case they are individually recognized by a court. He thought this was a mistake because in fact courts typically regard the rules of custom as already having legal validity. It is more accurate, he argued, to think of the court as legislating in a wholesale fashion, by setting conditions which customs must meet. Thus, when courts encounter customary norms that meet these conditions, they recognize the rules as already valid legal rules, as they would the validity of a statute properly legislated by Parliament. "The judges acting as delegates of the State, have long ago legislated upon this point as upon many others [...] [and] established as a fundamental principle of law [...] that, in the absence of a specific rule of written law, regard is to be had [...] to custom" (ibid., 61). Although he departed from Austin's specific account of custom, Holland did not abandon the fundamental Austinian model. Customary norms still depend for their legal validity on legislative activity of the courts, activity that also results in "many other" such rules, although in this case it operates in a wholesale fashion. It was a further step, and not a small one, to focus not on the court's legislative activity as a demi-sovereign but on its practice of *recognition* of legal principles as the foundation of law. That step, we shall see, was for Salmond to take, but first we must consider the main outlines of criticisms of Austinian jurisprudence.

1.1.2. Austinian Orthodoxy Challenged

Despite its dominance, orthodox Austinian positivism was challenged on each of its key doctrines by critics outside and within the Austinian camp. The main critical themes emerging already in the 1890s and before, sounded over the following six decades with only subtle variation and little development. Critics found the defects of the command model and doctrine of sovereignty too obvious to need elaboration, while defenders dismissed objections as minor complications, to be dealt with at some other time by someone else. Nowhere evi-

dent in this period is the kind of philosophical seriousness that kept Bentham from publishing his *Introduction to the Principles of Morals and Legislation* for a decade while he worked out systematic answers to problems he found in his version of the classical doctrines (Bentham 1996, 301–11). Such philosophically serious treatment of the doctrines and their defects was not to appear until the second half of the century.

1.1.2.1. Commands and Complications

Critics argued that the command model of laws distorts our understanding of law and blinds us to their variety. Objections came from two quarters. Bryce clearly summed up the first line of criticism, which arose from within the ranks of analytic jurisprudence, when he wrote:

> In mature States where there exist public authorities regularly exercising legislative functions, most laws do not belong in their form or their meaning to the category of commands. In order to make them seem commands a forced and unnatural sense must be put upon them, by representing the State as directly ordering everything to which it is prepared to give effect. (Bryce 1901, 500)

Law adopts a variety of modalities which cannot be reduced to personal directives imposing duties, critics argued (Bryce 1901, 500–1; Salmond 1893, 98–106; Salmond 1924, 54; Buckland 1945, 49–51). Permissive laws, for example, declare certain conduct not to be wrongful and thereby define certain liberties rather than impose obligations. Likewise, laws defining remedies for wrongs done, rules of evidence and procedure, and rules for interpretation of law or of acts in law are modeled on commands only at the cost of serious distortion of their nature and function. To shift the focus of the command from subjects to officials does not fit the facts, Salmond argued, for often officials are not punishable for failure to comply with many such rules. He added that "these rules are rules of law because they are as a matter of fact acted on, not because the judges are bound by legal sanctions to act upon them" (Salmond 1893, 100–1). It is equally distortive to view the "nullity" that often accompanies failure to comply with such laws as itself a sanction.

> This is a most perverse and unnatural method of regarding them. . […] A plaintiff is non-suited, not as a punishment for his failure to adduce legal evidence, but simply because in the eye of the law his case has not been proved. The injury sustained by a litigant who adopts a mistaken procedure is in no other sense the sanction of a rule of procedure, than that in which the broken leg that results from a fall is a sanction of the law of gravity. (Salmond 1893, 103–4)

"A *sine qua non* is not an imperative," Buckland (1945, 91) quipped half a century later. Bryce agreed that such laws take the form of "an authorization which makes action legal which might otherwise have been illegal" (Bryce 1901, 500). He came close to recognizing a fundamental conceptual difference between mandatory laws and laws that create and confer legal powers, but the

concept of a legal power still eluded him. He tended to see powers in terms of liberties, or "declarations of the doctrines which the Courts have applied and will apply" (Bryce 1901, 500). Although he approximated the Hohfeldian understanding of legal powers (see chap. 3, sec. 3.1.3) when he likened them to "assurances given by the State that it will, with physical force at its disposal, take a certain course in certain events, and thus they become instructions helpful to the citizens, showing them how they may get the law, and physical force, on their side in civil disputes" (ibid.). Salmond, on the other hand, clearly distinguished legal powers from rights ("in the strict sense") and liberties (Salmond 1924, 237–52) and on that basis was able to distinguish between legal duties and legal disabilities (lack of legal power).[4]

The second line of criticism originated in the work of external critics, but was later embraced by some within the analytic camp.[5] Critics sympathetic with historical jurisprudence argued that the signal failure of the command model was its blindness to customary forms of law. Customary rules are not imposed on a community by a determinate political authority, as the command model insists, but rather develop spontaneously within it. Holland, as we have seen, modified Austin's view, according to which customs became law when recognized by courts exercising a delegated law-making power (Austin 1954, 31, 163), and held that courts tend to exercise this law-making power in wholesale fashion, legislating conditions which customary rules must satisfy in order to earn status as valid laws.

Critics thought the modified Austinian account, even if it explained the role of custom in English law, was still blind to the operation of customary law in the wider world. They argued that Holland's explanation presupposes the centralized political authority characteristic of the modern state and fails to explain the nature and role of law in political communities temporally and culturally distant from England (Pollock 1872, 191–2). Austinians, for their part, tended merely to dismiss this objection on the ground that it took them beyond the boundaries of the province of jurisprudence as they understood them. But they found it more difficult to dismiss criticism of their treatment of international law and constitutional law. Critics not only challenged the Austinian doctrine of sovereignty, which we will consider presently, but also the assumption that law must be seen as the product of institutions of the state, especially institutions of coercive enforcement. Some in the analytic jurisprudence camp (e.g., Salmond) were willing to accept that coercive en-

[4] The distinction appears already in the first (1902) edition of *Jurisprudence*. For further discussion of the analysis of rights and powers in analytic jurisprudence at the turn of the century, see chap. 3, sec. 3.1.3.

[5] Notably, Frederick Pollock (1872). Because of its importance for understanding the Austinian starting point of Holmes's jurisprudence, I will reserve discussion of Pollock's essay for Chapter 2, Section 2.2.2

forcement is a necessary condition of the existence of a *legal system*, but rejected the Austinian assumption that coercion is a necessary feature of each law. Other critics, notably William Galbraith Miller, pressed a more fundamental criticism.

Against those who put state enforcement institutions at the foundations of law, Miller argued that this focus distorts our understanding of law's fundamental mode of operation. "The error of supposing that law is only involved in cases of contentions between men," he wrote, "is as great as if we supposed that nobody but a dyspeptic had a stomach or a liver" (Miller 1884, 22). He complained that Austinians practically define all laws as legislation, which implies that "law begins with the State" (Miller 1903, 264) and that is mistaken in two respects. First, law cannot be equated with legislation, since "legislation, like the social contract, implies a common law behind it" (ibid.). Invoking Hume's familiar critique of the idea of an original contract as the foundation of political authority (Hume 1985), Miller argued that legislation cannot be the source of all law, because law-making, like contract- and promise-making, presupposes a rule or practice of recognizing certain acts as giving rise to binding obligations, a practice that also sets the terms and conditions of such rule-making. Thus, law-making presupposes laws that empower authorities to make law and provide the "ideas of justice whereby we may interpret the statutes of the legislator" (Miller 1903, 264) and so legislation cannot model all law. More fundamentally, the Austinian model reverses the order of dependency between law and the state. "Law, like language," he argues, "springs from the society itself, and one of its first works is the creation of the State […] for the enforcement of rights and duties in accordance with law. The State makes laws but does not create law, just as it may manufacture gun-powder, but does not create chemical reactions" (ibid., 265). Miller's criticism goes beyond the historical school's objection that Austinian jurisprudence is limited to legal systems of modern states. His claim is that the state is a legal entity, the existence and nature of which depend on law. Its ability to make law is constituted by law that it does not and cannot make. Similarly, Bryce objected that the notion of sovereignty is a *de jure* legal notion: sovereignty "exists in the sphere of Law: It belongs to him who can demand obedience as of Right" (Bryce 1901, 520). Austinians avoid this criticism, he argued, by confusing legal sovereignty with practical mastery, that is, with effective coercive control (Bryce 1901, 537, 540). To assess this last charge we need to look more closely at the Austinian doctrine of sovereignty.

1.1.2.2. Limits of the Sovereignty Doctrine

As understood at the turn of the century, the Austinian doctrine of sovereignty held that, necessarily, at the foundation of every legal system was a determinate person or body of persons which holds ultimate power of command, such that

the bulk of members of the political society are habitually disposed to obey it while it is not likewise disposed to obey any determinate superior; and this sovereignty, necessarily, is undivided and legally illimitable. Although the command model of laws and the doctrine of sovereignty are closely linked in Austinian jurisprudence, they are conceptually distinct. As John Dewey pointed out, it was common at the time for critics to confuse the power to command with the power to coerce (Dewey 1894, 33–37). For example, T.H. Green, echoing Maine, maintained that the essence of Austinian sovereignty lay in the power "to put compulsion without limit on subjects, to make them do exactly as it pleases" (Dewey 1894, 31 quoting Green 1889–1890, vol. 2, 401 and Maine 1880, 349).[6] Against this typical misreading, Dewey argued that according to the Austinian doctrine the capacity to command rests not on the power to compel but rather on the wide-spread disposition to obey, a disposition that may have many different causes. It follows that sovereign coercive power is not necessarily unlimited. Dewey argued further that Austin accepted that the habit of obedience might be limited in various ways with respect to both the objects and the occasions of obedience, but that they could not count as divisions of or limits on sovereignty because no *determinate* person or body (habitually obeyed by all others) imposed them (Dewey 1894, 35–7).

This important clarification of the Austinian doctrine left untouched the question of the necessity of the unity and illimitability of sovereignty. The Hobbesian pedigree of the doctrine is unmistakable, but, for Hobbes, this necessity lay in his normative argument for political authority (Hobbes 1991, e.g., chap. 29, par. 9). We look to law defined by the great leviathan to provide the public standards absent in the state of nature, so to introduce alleged legal limits on the sovereign introduces uncertainty which, in turn, risks plunging us back into the state of nature. Bryce (1901, 536) observed that Hobbes looked to unified and illimitable sovereign authority as "pointing a way out of civil war." Bentham also had practical reasons for his, more modest, endorsement of the doctrine of sovereignty, ultimately relying also on a concern about securing the publicity of legal norms. However, Austinian orthodoxy at the turn of the twentieth century treated such general philosophical arguments with great suspicion, especially when they rested on practical or normative principles. The ultimate, undivided, and legally illimitable nature of sovereignty was simply stipulated; sovereignty so conceived was regarded as a universal and necessary feature of all legal systems.

Critics attacked this doctrine at two points. First, they argued that it simply failed to fit the facts. It was not necessary to look to primitive or ancient societies for counter-examples, for even among familiar, mature legal systems—once we look beyond simple monarchies—it is difficult to locate an Austinian sov-

[6] According to Maine, Austin's sovereign necessarily possesses "irresistible force" (Maine 1880, 350).

ereign. Anticipating Hart's familiar challenge (Hart 1994, 71–8), Bryce asked where, for example, the sovereign resides in the dual state of the Austro-Hungarian monarchy (Bryce 1901, 538–9). Even more pointedly, he asked who is to be deemed sovereign in the United States (Bryce 1901, 539–40; compare Salmond 1924, 530). All the governing bodies are said to be subordinate to the Constitution, but the Constitution is not a determinate person or body of persons, and the only eligible such body of persons is the people of the states, but they do not act regularly. Moreover, "the majorities by which the Constitution can legally be amended are very rarely attainable; and when they are not attainable, there would therefore seem to be no Sovereign at all" (Bryce 1901, 540). And surely, Dewey (1894, 38–42) argued, "the people" do not meet the conditions of determinacy that Austin stipulated for sovereignty.

A more fundamental line of criticism was also pressed in the early years of the new century. It focused on the coherence of the Austinian concept of sovereignty. If sovereignty is a matter of fundamental law, then, it was argued, whether in any given legal system sovereignty is legally limited, or divided in some fashion, must be settled not by *a priori* stipulation, but only by looking to the fundamental law of that system (Bryce 1901, 506–7). The root mistake of the Austinian account was to treat the determination of the dimensions of sovereignty, and so features of the foundations of a legal system, as a strictly conceptual or theoretical matter.[7]

Salmond (1893, 140–1) pressed this line of criticism especially against the illimitability doctrine. This doctrine, he maintained, comprises two claims: (i) Necessarily, every legal system recognizes legislation as a source of law and (ii) necessarily, legislative power is unlimited. That is, *quod principi placuit legis habet vigorum* is a necessary truth of jurisprudence. However, Salmond insisted that this is simply false—it is not essential to any system of law that the governing authority be regarded as having *any* legislative power, let alone that the power be unlimited ("infinite"). The illimitability of legislative power "stands on exactly the same level as any other principle of law" (ibid., 140); for "a principle is a principle of law, not because it is true or has any rational foundation, but because it is recognised and acted on by the State" (ibid., 143).[8] Thus, to determine whether supreme legislative power in a system is legally unlimited one must look neither to normative arguments nor to *a priori* conceptual considerations, but only to the activities of that system's tribunals. In England, the

[7] Later, a similar question will arise regarding the determinants of the content of the rule of recognition (the concept that plays a role in Hart's positivism parallel to that of sovereignty in Austinian positivism). See the debate between inclusive and exclusive positivism in chap. 10, below.

[8] Similarly, Salmond wrote in *Jurisprudence*, "the extent of legislative power depends on and is measured by the recognition accorded to it by the tribunals of the state. Any enactment which the law-courts decline to recognise and apply is by that very fact *not law* and lies beyond the legal competence of the body whose enactment it is" (Salmond 1924, 529, author's emphasis).

legislative power of Parliament is sovereign, he admitted, but this is not theoretically necessary; indeed, it was not always so.

But does it not follow that it is in the courts rather than legislatures that unlimited sovereignty is located, for, on this view, courts have unlimited power to make (or at least to recognize) law? Definitely not, Salmond (1893, 138–9) replied, for "the administration of justice is, in respect of the recognition of new rules of law, habitually regulated by legal principle, in exactly the same sense and manner in which it is so regulated in other respects. […] The causes or occasions of the recognition of new principles of law by the judicature are themselves defined and determined by law" (ibid., 139).

Are not such alleged limits of legal principle ineffectual and hence not real limits at all? After all, states (or their courts) comply with such principles if they wish but not otherwise. Salmond replied that, although this is true, it does not make them any less real legal limits, for the same is true for all legal rules, not merely of limits on judicial recognition. A sovereign can ignore any laws (ibid., 148), but that does not make them any less laws or violation of them any less violations. Salmond's argument seems to be that from the fact that any organ of the state can get away with non-compliance it does not follow that it can do so *legally*. Law is a matter of norms, which define duties, powers, and limits on powers. Law can never eliminate the possibility of non-compliance or revolution, but that inability does not make these actions any less contra-legal. The inability implies nothing about the possibility of legal limits on sovereign power.

Defenders of the Austinian doctrine pressed a different argument at this point. Austin once wrote that "supreme power limited by positive law, is a flat contradiction in terms" (Austin 1954, 254). Salmond argued, in response, that this conceptual thesis rests on a confusion of legal *limitation* with legal *subordination* and, more fundamentally, it confuses subjection of the exercise of legal powers to conditions and limits with the subjection of the exerciser of those powers to legal duties (Salmond 1893, 137–8; 1924, 527). All legislative power, even that of an "omni-competent" parliament is subject to conditions regarding the *manner* of enactment of legislation which do not impose any legal duties on the part of law-makers. The same is true, he argued, with respect to limits on the *matter* of legislation (Salmond 1924, 530). The Austinian tradition failed to recognize the fundamental difference between legal limits and legal duties, because it is saddled with the command model of laws. On this view, to be subject to any law is to be subject to a command, hence a sanction, and thus a subject to legal duty. So, subjection to any law entails subjection to the power of a determinate superior. There can be no legal limits on sovereign legislative power, because, on the command model legal limits entail that the law-maker is subject to some other power, hence not supreme, or is subject to its own commands, which is no subjection at all. But, as we have seen, Salmond argued that it is a major defect of the command model that it has no

room for legal norms that perform functions other than imposing duties. And among the norms we might find in a legal system are those which impose substantive conditions on the exercise of legislative power.[9]

It is perhaps already apparent that Salmond's views represented a significant revision of Austinian orthodoxy and a bridge to developments in legal positivism in the second half of the century. These views warrant a closer look, which we will undertake in section 3. But first we will explore the influence of Austinian jurisprudence on English constitutional theory through the work of Albert Venn Dicey.

1.2. Dicey: The Sovereignty of Parliament and the Supremacy of Law

Although Dicey's work mainly addressed basic issues of English constitutional law, it had an impact on English jurisprudence in the first half of the twentieth century well beyond constitutional theory. This was due in part to the rather narrow focus of English and Commonwealth legal theory in the period on local law and its structural doctrines, but it was also due to the way Dicey subtly wove themes of constitutional theory and the rule of law into a perspective on the nature of law that was especially congenial to contemporary common-law lawyers and legal scholars. Dicey's debt to the Austinian tradition is evident in *The Law of the Constitution*; yet his thinking was even more deeply rooted in common-law patterns of thought.

The Law of the Constitution (Dicey 1982)[10] articulated and elaborated three main theses: the sharp separation of constitutional laws from constitutional conventions, the legislative sovereignty of Parliament, and the supremacy of law. The first provided the structure for Dicey's enquiry. Constitutional law proper, according to Dicey (1982, cxl–cxli, 227, 313), includes all and only those rules and doctrines—whether written or unwritten, derived from statute or rooted in judicial precedent—that are consistently enforced by the courts; constitutional conventions comprise all the rules governing the distribution or exercise of the sovereign power of the state that rest on the understandings, practices, and habits of government officials (ibid., cxl, 280f, 292). Echoing Austin, Dicey insisted that although constitutional conventions are binding on officials and in practice are no less sacred than constitutional laws, they are binding only as a matter of "constitutional morality," not as a matter of law, because they would never be enforced by courts of law (ibid., cxli, 278, 280).

[9] To the objection that these limits could not be *enforced* against the sovereign power, Salmond argued that enforceability was not necessary, and that justiciability—regular recognition and use by the courts of the principles imposing such conditions—is sufficient for their legal status. See below section 1.3.2.

[10] First published in 1885. Eight editions were published between 1885 and 1915 all under Dicey's supervision.

Indeed, courts would simply refuse to hear disputes invoking them. "They are none of them 'laws' in the true sense of the word," Dicey wrote, "for if any or all of them were broken, no court would take notice of their violation" (ibid., cxliii). Conventions are not only unenforceable; they are not justiciable.

Dicey simply helped himself to this staple of Austinian jurisprudence. Nowhere did he attempt to defend the view of law on which it relies. However, even here, when he is at his most Austinian, Dicey introduced a note that sounds more in a common-law mode. He argued that, although constitutional conventions are not laws, strictly speaking, they are legally relevant and "nearly as binding" as proper laws (ibid., 293). Their binding force rests not (or not wholly) on popular opinion,[11] as Bentham and Austin held, but rather on the fact that they have behind them "the force of law" (ibid., 295–7) in the sense that officials who defied them would quickly find that they are unable to carry out their ordinary legal responsibilities, because actions needing authorization of law would stand legally naked, unauthorized, and often in violation of the law (ibid., 297). Although constitutional conventions cannot themselves be enforced or adjudicated, they are so thickly woven into the fabric of ordinary law that violators are inevitably put at odds with the law and liable to the ordinary administration of the law. Thus, constitutional conventions, like other fundamental doctrines of constitutional law, are rooted in the ordinary law of the land and in the common usage of the courts that administer and maintain that law. Dicey offers no clear examples of this phenomenon, but the idea is familiar enough to classical common-law jurisprudence, although integration of the conventions into the body of law would have been regarded as sufficient to secure for them status as proper laws. Dicey's Austinian sympathies prevented him from drawing the same conclusion.[12]

With the distinction between constitutional laws and constitutional conventions in place, Dicey identified two fundamental doctrines of English constitutional law. The first is the doctrine of the (unlimited) legislative sovereignty of Parliament: Parliament "has the right to make or unmake any law whatever [...] no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament" (ibid., 3–4). Thus, judges, "as exponents of morality," have no power to override acts of Parliament (ibid., 19). "A modern judge would never listen to a barrister who argued that

[11] As he argued in *Law and Public Opinion* (Dicey 1905); see Michener's foreword (Dicey 1982, xx).

[12] Yet, if he were consistent, Dicey would have had to deny proper legal status to his two pillars of English constitutional law. Latham (1949, 525) pointed out that "Dicey was unable to cite a single decided case as authority for his classic exposition of the sovereignty of Parliament." The same is true for the companion doctrine of the supremacy of law. Such fundamental legal principles, Latham argued, owe their status and validity, especially in a common-law system, to tacit integration into the body of law. But if this is true, Dicey had little basis, other than Austinian prejudices, to deny constitutional conventions status as proper laws.

an Act of Parliament was invalid because it was immoral, or because it went beyond the limits of Parliamentary authority" (ibid., 20).

This is a classic statement of the English doctrine of Parliamentary sovereignty; yet, what Dicey took away with one hand he gave back in good part with the other. To counter the mistaken impression sometimes given by the language of the courts, he wrote that "judges, when attempting to ascertain what is the meaning to be affixed to an Act of Parliament, will presume that Parliament did not intend to violate the ordinary rules of morality, or the principles of international law, and will therefore, whenever possible, give such an interpretation to a statutory enactment as may be consistent with the doctrines both of private and of international morality" (ibid., 20). This strategy of judicial interpretation is not only typical of classical common-law adjudication, but it was also endorsed by Hobbes (1991, 194), who argued that judges must appeal to "equity" (law of nature) where the intention of the sovereign legislator must be discerned. "The Intention of the Legislator is alwayes supposed to be Equity: For it were a great contumely for a Judge to think otherwise of the Soveraigne." This strategy, like the companion common-law strategy of presuming that Parliament intended their statutory language to cohere with the existing body of common-law principles, invites a degree of judicial review of legislation that a baldly-stated doctrine of legislative sovereignty would seem to rule out.

Dicey (1982, 27, 285), unlike other Austinians, was clear that he regarded this doctrine as a legal, not a political or *de facto*, principle. Thus, he recognized that the principle was compatible with political limitations involving both "external" limits on the people's disposition to obey and "internal" limits due to shared commitments of government officials to shared political values and principles (ibid., 30–2). Although he toyed with the Austinian thought that the idea of a legally limited sovereign is self-contradictory (see above sec. 1.1.2.2), he concluded that it must be seen more narrowly as a doctrine of English constitutional law, rooted like all English law in the common practice of its governing institutions, rather than a general jurisprudential principle. This English doctrine is not derived from the Austinian doctrine; rather, the Austinian doctrine is a generalization of the English principle (ibid., 26–7).

The second pillar of English constitutional law, according to Dicey, is the doctrine of the supremacy of law. Despite its narrower focus, Dicey's discussion greatly influenced thought about the rule of law in the Anglo-American tradition since the publication of *The Law of the Constitution*. Because of this influence, and because the notion plays a major role in the thought of Lon Fuller, Frederick Hayek, and others (see chap. 4 below), it is important to look carefully at Dicey's distinctive and in some ways idiosyncratic doctrine.

Dicey's supremacy of law doctrine comprises three "kindred conceptions" (ibid., 110). The first holds that "no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the

ordinary legal manner before the ordinary Courts of the land" (ibid.).[13] This principle, as Dicey elaborated it, is rich in meaning. It embraces the principle *nulla crimen sine lege* and extends to every activity of government, opposing every exercise of "wide, arbitrary, or discretionary" governmental power (i.e., power not accountable to general public rules of law and ordinary courts). This principle funded Dicey's vigorous opposition to the development of administrative law in England (Jowell 2000, 7–10).

The second component of the supremacy of law invokes the idea of equality before the law. It insists on one law for all, "the universal subjection of all classes to one law administered by the ordinary Courts" (ibid., 114). According to this principle, no one is above the law. Moreover, just like every citizen, every official, from Prime Minister to constable, is subject to the same law and the same system of enforcement. Dicey's notion of the rule of law focuses on the exercise of arbitrary power by those in positions of authority and leaves unclear the role of equality, understood as "equal protection of the law" for all citizens, in the ideal of the rule of law.

The third component of Dicey's notion is the most idiosyncratic. He insisted that protections of personal and civil liberties are "the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts" rather than deriving from broad statements of rights or principles in a written document of fundamental law (ibid., 115–6). These important rights are the product of, and continually protected by, vigilant contestation in the regular and public courts of law which are focused on concrete matters, rather than grand abstract principles, and these rights are inseparably tied to effective remedies: *ubi jus ibi forum et remedium* (ibid., 117–8). The principles, which are announced with fanfare in the Constitutional Codes and Basic Laws of other countries are the consequence rather than the source of individual rights in English constitutional law, according to Dicey (ibid., 121).

Dicey's understanding of the rule of law—especially its clear preference for ordinary courts over special tribunals, private over public law, and its prejudice against abstract principle and written constitutions—clearly speaks in an English, common-law jurisprudential dialect. But we should not overlook a more general message embedded in this idiosyncratic medium. First, Dicey made clear that the rule *of* law is not served by governments that merely rule *with* law, using law as a convenient instrument of governing; rather, it calls for law's supremacy, law's shaping and constraining the exercise of governmental power (Postema 2010b, 276). Second, he was less focused than later theorists of the rule of law, like Lon Fuller, on formal features of legal instruments, like

[13] Dicey here echoes Clause 39 of the Magna Carta (1215): "No freemen shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land" (Howard 1998).

generality, prospectivity, and the like. Rather, Dicey encouraged us to think of devices for holding the exercise of power accountable. Hence, the concern of his second principle was not to serve an egalitarian ideal of subjection to a common set of laws, important as this might be, but rather with ways in which formalities of law can be used to shield political power from accountability. Subjecting public power to the same law and the same tribunals was meant to keep the exercise of this power always open to public scrutiny. This same concern also underlay the third component of his conception. Dicey thought that abstract principle, however amiable and public, leaves power insufficiently accountable, if it is not disciplined by adjudication tied to a body of concrete cases and the necessity of providing concrete remedies. Dicey's bias in favor of ordinary common-law courts may have been unwarranted, but the features that, in his view, characterized the operation of these courts at their best—publicity, openness, accessibility, independence, and competence to call all exercises of executive power to account—are surely important components of any adequate understanding of the rule of law.

But this leads us to wonder about the relationship between the two pillars of Dicey's constitutional theory. The doctrine of the supremacy of law seems inconsistent with his doctrine of Parliamentary sovereignty, for a sovereign legislature is competent to enact restrictions of individual liberty and to delegate vast powers of the executive branch without challenge let alone reversal by the courts. However, Dicey insisted that the two doctrines, far from being inconsistent, were "mutually supportive" (Dicey 1982, 268–73). Parliament is sovereign, he argued, only with respect to its general legislative activities. Hence, it cannot exercise direct executive power, and the doctrine of the supremacy of law at its most fundamental means that courts have the right to control the exercise of governmental power (ibid., 315). Moreover, sovereign power can be exercised only through formal, deliberate legislation. "Parliament speaks only through an Act of Parliament" and execution of the will expressed in such Acts is put exclusively in the hands of the courts, thereby "greatly increas[ing] the authority of the judges" (ibid., 269). Likewise, he argued, the supremacy of law "necessitates" parliamentary sovereignty because the only escape from the limits on official governmental action imposed by law is to seek further legal authorization from Parliament. In times of "tumult," when government must exercise discretion, it can do so only with a grant of such discretion by Parliament which, in effect, "legalizes illegality" (ibid., 271–2).

It is hard to find this argument entirely persuasive. T.R.S. Allan maintains that the two doctrines can be reconciled if we attribute to Dicey a divided sovereignty doctrine according to which Parliament is accorded full legislative sovereignty, but the ordinary courts are accorded full adjudicative sovereignty (Allan 2001, 13–4). Thus, while courts are not empowered to overturn legislation, the application and interpretation of general legislation are put under the sovereign supervision of the publicly accessible courts. The courts are bound

to interpret the explicit language of legislation on the assumption we noted earlier, namely that it was intended to be strictly consistent with deep principles of the constitution, including the values of the rule of law and individual liberty. So, any attempt to compromise these deep principles will be possible only through legislative acts which make their liberty-limiting or rule-of-law-compromising intent explicit and subject to popular scrutiny. If this reading of Dicey's intent is sound, then it appears that Dicey puts his faith for the achievement of the aims of the rule of law not in judicial institutions, but rather in the power of publicity to mobilize political and popular resistance.[14] Whatever we conclude about this attempt to reconcile two pillars of Dicey's constitutional theory, it is clear that he held that these principles are valid doctrines of English law strictly in virtue of their integration into the body of English law recognized and accepted by courts charged with maintenance of this law. This links his constitutional doctrine to the line of thought in general jurisprudence emerging in the work of John Salmond. Because of the importance of this general thesis for jurisprudence in the Hartian tradition, we pause here to consider its development in the thought of Salmond.

1.3. Salmond: Positivism Recast

John Salmond was born in Northumberland, England, in 1862, but he was raised and went to university in New Zealand. After earning his law degree at University College London, he returned to New Zealand to practice law. His first contribution to jurisprudence, *First Principles of Jurisprudence* (1893), was written while practicing law, but the first edition of his textbook, *Jurisprudence* (1902), was published while he taught law at the University of Adelaide.[15] He entered government legal service in 1907, eventually serving as Solicitor General then sat on the Bench of the Supreme Court from 1920 until his death in 1924.

1.3.1. Jurisprudentia Universalis—*The Science of Civil Law*

Salmond began *Jurisprudence* in a fashion typical of analytic jurisprudence at the beginning of the century. "Law," he wrote, broadly refers to any rule,

[14] One can also find an argument of this kind in Lon Fuller's account of the rule of law; see chap. 4, sec. 4.3.3, below.

[15] *Jurisprudence* appeared in seven editions during his life time, the last in 1924, but, because it had become a standard pedagogical tool in Britain and the Commonwealth, five more editions were published by a succession of editors, some of whom (especially, Parker in the ninth edition and Fitzgerald in the twelfth) very substantially revised Salmond's original text. Glanville William's tenth and eleventh editions (1947, 1963), however, preserved (with some deletions, additions, and revision) most of the original material of interest to general jurisprudence. Hart was probably familiar with the tenth edition of Salmond's *Jurisprudence*.

standard, or pattern to which actions do or ought to conform. Although he distinguished eight kinds of law—including "imperative law," "physical law," and "natural or moral law"—he stipulated that law *simpliciter*, law in its strictest sense, is *civil law*, that is, law of the state, the product of civil government, "the law of lawyers and courts." All other uses of "law", he claimed (following the Austinians), are derived by analogy or extension from this "original" sense (Salmond 1924, 33; 1893, 1–2).

The science of jurisprudence takes civil law as its sole object: Jurisprudence is "the science of the first principles of civil law" (ibid., 2, 33). The aim of this universal science is not to inquire about "what is the law" but rather "what the law is" (1893, 1); that is, it inquires not about the laws of a given jurisdiction regarding some practical issue, even less about the nature and kinds of *laws* that exist, but rather about the general features of law itself. This science has three branches: *analytical*: "the philosophical part of systematic legal exposition"; *historical*: "the general or philosophical part of legal history"; and *ethical*: "the general or philosophical part of the science of legislation" (ibid., 4–8). He limited his text to the first branch, which in 1893 he called "formal jurisprudence," echoing Holland. However, his understanding of this form of enquiry has less in common with orthodox Austinian methodology than this suggests.

Salmond (1893, 9) rejected the view of "the English [i.e., Austinian] school of jurisprudence" that jurisprudence must be sharply separated from ethics and philosophical reflection on the nature of right and wrong and the meaning of obligation. This separation, he insisted, is impossible, because "legal right and moral right, legal justice and natural justice, are closely related in fact and in theory." It is a "defect of English jurists that they have attempted to deprive the idea of law of that ethical significance which is one of its most essential elements" (ibid., 10). Yet, he hastened to add that the proper work of jurists is not to participate in and contribute to discussion of "the science of right," but rather to draw from this body of thought conclusions needed for their analytical task. General jurisprudence, in Salmond's eyes, was a matter of applied moral or practical philosophy, theoretically linked to the moral philosophy, but separated for pragmatic reasons.

1.3.2. The Nature of Civil Law

Salmond's rejection of orthodox Austinian methodology is evident in his choice of starting points. It is a mistake, he argued, to assume with that tradition that law is simply an aggregate of laws (enactments, directives, and other exercises of law-making authority), a view which made the command model of law attractive. The law, he wrote, "does not consist of the total number of laws in force." The "law and laws—the law and a law—are not identical in nature or scope." "The constituent elements of which the law is made up are not laws, but rules of law or legal principles" (Salmond 1924, 36).These rules and

principles, the systematic arrangement of which constitutes the law of a society, arise from or are implicit in the products of the various sources of law, which include legislative enactment, judicial decisions, custom and the like. The task of jurisprudence is to account for the existence and validity of these legal rules and principles.

Although Salmond accepted the Austinian view that law is the product of state activity, he refused to identify law with the products of the exercise of state coercive power—a view that confuses law properly understood with "imperative law" (ibid., 49–54). Like Austinians, he held that "where there is no state which governs a community by the use of physical force, there can be no such thing as civil law" (ibid., 50). Thus, if rules exist prior to and independent of state action, as the historical school maintained, they "may greatly resemble" and may even be "primeval substitutes for law," but "they are not themselves law" (ibid., 51).[16] However, he insisted, a legal theory that stops at this point without giving full recognition to "the essential ethical element" of the concept of law is incomplete and distorts our understanding of legal reality. "Law is not right alone, or might alone, but the perfect union of the two. It is justice speaking to men by the voice of the state" (ibid., 52, see also 514).

This hybrid approach and his first-hand experience of common-law practice led Salmond to set his definition of law in the institutional context of "the administration of justice." The law just is the body of rules and principles recognized, applied, and acted upon by courts acting as agents of the state, fulfilling its primary task, the administration of justice (Salmond 1924, 39–40, 53; 1893, 77, 83). For fundamental features of law we look not to law-making institutions (like Austin), nor institutions of law-enforcement (like Holland), but rather to institutions of law-application: "[I]t is to courts of justice, and to them alone, that we must have recourse if we wish to find out what rules are rules of law and what are not" (Salmond 1924, 57). Every rule or principle of law is "embodied in a judicial practice" (Salmond 1893, 88); its fundamental principles constitute "the creed of the courts" (Salmond 1924, 40). Thus, the law comprises all the rules and principles *recognized* (seen and accepted as authoritative—ibid.) by the courts and this recognition is manifested in the courts' *use* of them in concrete cases. They are law just insofar as they are "received and operative" in the courts (ibid., 528) and "observed in accordance with the established practice of the courts" (ibid., 57).

Salmond drew two conclusions of a distinctively positivist cast from this definition of law. First, he held that, while principles of law are meant to maintain right and justice in a political community (ibid., 40) and thus represent "the wisdom and justice of the organised commonwealth," their status as law depends strictly on their recognition by the courts. "The validity of a legal principle is entirely independent of its truth. It is a principle of law, not be-

[16] Hart later adopted a similar view (see below Chapter 4, sec. 4.1).

cause it is true, but because it is accepted and acted upon by the State as true [...] for the purposes of action" (Salmond 1893, 83). Thus, what might be right and reasonable in the eyes of the law may not be so in truth. But, then, wherein lies the authority of law; what binds courts to recognize these principles? According to Salmond, they have a moral obligation to do so in virtue of their oath of office, which is enforced by public opinion and by professional opinion of the bench and bar; however, there is no legal obligation to do so, because there is no tribunal empowered to declare, apply, and enforce this obligation (Salmond 1924, 56).[17] Moreover, and this is the second positivist implication he draws from his definition, no such legal obligation can be part of the definition of law for the simple reason that "law is law, not because the courts are under any legal obligation to observe it, but because they do in fact observe it" (ibid., 57). For Salmond, the validity of law is strictly a function of judicial recognition, and this recognition is strictly a matter of social fact about the ordinary practice of institutions devoted to the administration of justice.

With this definition of law, Salmond broke with Austinian orthodoxy and set English-speaking general jurisprudence on a very different trajectory. This break is evident in the shift in Salmond's view on the issue of whether the state can be subject to legal duties to its citizens. In his early work, he agreed with Austinians that the state could not be subject to legal duties, and hence citizens could not have rights against the state, because the state could not be forced to comply with adjudged duties (Salmond 1893, 133–5). However, nine years later, in the first edition of *Jurisprudence*, Salmond argued that, when duties are implied by judicially recognized principles of law, the state has proper legal duties to citizens and citizens have corresponding legal rights against the state, even though they will not or cannot be coercively enforceable. The legal status of such duties, in his view, depended not on enforceability, but rather on justiciability, that is, on subjection to the determination and adjudication of claims of law by the courts (Salmond 1924, 255–7; 529 n1). Legal rights are all those rights "legally recognised in the administration of justice […] [those] which can be sued for in courts of justice, and the existence and limits of which will be judicially determined in accordance with fixed principles of law" (ibid., 256). Although Salmond did not abandon the view that state coercion is a defining feature of law in general, he rejected the view that it is a condition of the legal status of any particular principle or proposition of law.

1.3.3. Ultimate Legal Principles and Judicial Recognition

Early readers of Salmond's work, including Americans, saw his definition of law as close kin to that of the proto-realist John Chipman Gray (see chap. 3,

[17] It is not clear how Salmond reconciled this position with his view that legal obligations do not depend on enforcement.

sec. 3.1.2.1), and vulnerable to the same criticism that it reduced law to an aggregate of court decisions.[18] However, those who offer this criticism misunderstand Salmond's view. First, as we have seen, Salmond held that law must not be identified with *either* legislative enactment or judicial decisions, but rather consists in the rules and principles accepted and used in the ordinary activities of deciding concrete cases. The state might undertake to administer justice *without law*, by setting up tribunals and giving them wide discretion to do justice by their best lights, but they would not be *courts of law*,[19] because they would not be held to making their determinations by "fixed principles of law" (Salmond 1924, 40). In Salmond's view this would be true even if the decisions of such tribunals fell into observable regularities, for, although to every rule of law there is a corresponding uniformity of judicial action, the converse is not true. "The law is not the aggregate of the uniformities observable in the administration of justice, but is the aggregate of the underlying principles of which such uniformities are the manifestation" (Salmond 1893, 88). Thus, while Salmond and Holmes agreed that we must look to the practice of the courts to understand the foundations of law, Salmond could not agree that law is just a matter of "prophecies of what the courts will do in fact," surely not as the realists understood this slogan in the 1930s.[20] Rather, on his view, law comprises the rules and principles recognized by courts of law. It is the regular use of rules and principles in their deliberation and decision-making, not the decisions they make, that gives legal status to rules and principles of law. Moreover, the courts' recognitional practice itself is rule-governed, in his view. "A rule of law does not mean a judicial practice, but that *reason* to the consistent acceptance and application of which, such a judicial practice is due" (ibid., 88, author's emphasis). Viewed from within the practice, judges do not just happen to recognize some rules and reject others; they do so for reasons that are rooted in some further rule or principle. Courts of law are constrained by "an authoritative creed which they must accept and act on without demur. This creed of the courts of justice constitutes the law" (Salmond 1924, 40).

Thus, there is, in Salmond's view, a fundamental difference between judge-made law—judicial decisions which, in virtue of a doctrine of *stare decisis*, have legislative effect—and the judicial practice of recognition that underlies the law in each legal system. On his view, precedents, no less than Acts of Parlia-

[18] J.L. Parker, editor of the 9th edition of Salmond's *Jurisprudence*, points out that Roscoe Pound criticized both Salmond and Gray on this ground (1937 49f, 202–3). P.J. Fitzgerald, editor of the 12th edition of *Salmond on Jurisprudence*, explicitly states that Salmond held a version of (legal) realism (1966, 36).

[19] Joseph Raz (1990b, 137–41) called them institutions of "absolute discretion," see chap. 8, sec. 8.1.1.1, below.

[20] On Holmes's orientation of jurisprudence toward the practice of courts, see below chap. 2, sec. 2.3.2. Holmes offered his slogan in "The Path of Law" (Holmes 1995, vol. 3: 393), but his understanding of the slogan differed from that adopted later by the realists (chap. 3).

ment, give rise to law just in case there is a concordant practice that recognizes judicial decisions as having precedential effect and that thereby recognizes rules and principles rooted in such decisions as legally valid. The thesis that equates law with the sum of judicial decisions fails to honor this distinction, which Salmond took to be fundamental to our understanding of the nature of law. Likewise, it does not do justice to Salmond's break from Austinian orthodoxy simply to highlight the shift in theoretical attention, which he shared with the Holmes and J.C. Gray, from explicitly law-making institutions to law-applying institutions. For the more fundamental break was to replace the Austinian doctrine of sovereignty with his grounding of law in the courts' practice of recognition of sources of law.

Thus, Salmond insisted that the administration of justice according to law is "habitually regulated by legal principle," not only with respect to the particular decisions it makes, but also with respect to the rules and principles it recognizes as proper bases for those decisions. "The causes or occasions which determine the recognition of new principles of law by the judicature are themselves defined and determined by law" (Salmond 1893, 139). These legal principles determine the "sources" of law (Salmond 1893, 139; 1924, 164–70). The judicial "creed" concerns authoritative sources of legal rules and principles.[21] A source of law is "any fact which in accord with the law determines the judicial recognition and acceptance of any new rule as having the force of law." Source facts accord legal force to rules in virtue of some rule that calls for recognition of the legal validity of rules bearing the right kind of relationship to those facts. These source-constituting rules may themselves rest in some prior or more fundamental source and rules constituting them: "The rule that a man may not ride a bicycle on the footpath may have its source in the by-laws of a municipal council; the rule that these by-laws have the force of law has its source in an Act of Parliament" (ibid., 169). The recognitional practice, according to Salmond, has what Kelsen (1945) would later characterize as a "dynamic" structure, and Salmond understood that, because such chains of validity cannot run to infinity, they come to rest in one or more ultimate legal principles whose authority is not derived from any other principle (ibid., 169). Thus, for example, to the question concerning the example above, Whence comes the rule that Acts of Parliament to have the force of law? Salmond answered that it is legally ultimate and self-existent: "There must be found in every legal system certain ultimate principles, from which all others are derived,

[21] It is surprising, then, that the most recent editor of *Salmond on Jurisprudence* repeats the criticism that Salmond's definition of law is does not fit statute law because "a statute is law as soon as it is passed; it does not have to wait for recognition by the courts before becoming entitled to the name 'law'" (Fitzgerald 1966, 36). For, on Salmond's view, individual statutes do not wait for recognition any more than individual judicial precedents or common customs do. Their legal relevance depends on the overall (rule-governed) practice of recognition.

but which are themselves self-existent" (ibid., 169). But they exist as historical facts, not as a presupposition or transcendental postulate of the legal system, as Kelsen would later maintain (see Volume 12 of this Treatise). The source of the rule validating Acts of Parliament, like that validating judicial precedent, "is historical only" (Salmond 1924, 169–70); it lies in the facts of the unified recognitional practice of courts of justice. The facts of this practice are the ultimate facts concerning the validity of rules of law. "No rule that is not thus in fact observed in accordance with the established practice of the courts is a rule of law, and, conversely, every rule that is thus in fact observed amounts to a rule of law" (ibid., 57).[22]

Two vital questions about this practice of recognizing sources of law are nowhere addressed by Salmond, but they will occupy much jurisprudential writing in the last three decades of the twentieth century. First, what kind of things can figure as sources of law? In particular, if something is a source of law just in virtue of the fact of its regular recognition by courts, can there be any limits set on what can count as a source of law? Salmond assumed, but never argued, that the sources would include formal enactments of legislative bodies, judicial precedent and perhaps custom. Could justice or morality more generally also function as a source? John Chipman Gray made a special point of including morality as a source of law (Gray 1921, 124, 302–3; see chap. 3, sec. 3.1.2.1, below), but it appears that Salmond never considered the matter. Hart, elaborating Salmond's understanding of judicial recognition at the foundations of law, also seemed to be uncertain about the matter in the first edition of *The Concept of Law* (see chap. 7, sec. 7.5.1, below) leading to a major split amongst *fin de siècle* Hartian positivists, as we shall see in Chapter 10.

Second, Salmond did not tell us how the facts of this practice constitute a rule or norm or how the practice can simultaneously be a fact and a norm, but that is clearly the view he wished to embrace. This further question was not faced squarely in English-speaking jurisprudence until the 1960s when Hart put the concept of a social rule at the center of his account of law. But, Salmond, like Hart, maintained that, if we are to ask further after the authority of this historical recognitional practice, we can only point to the *moral* (i.e., extra-legal) obligation undertaken by judges when they took the oath of office (Salmond 1924, 57).

1.3.4. Salmond and Analytic Jurisprudence

To readers familiar with *The Concept of Law* (1994), Hart's debt to Salmond is obvious. Most of the key themes of Hart's theory of law, from his critique of Austin's command theory and doctrine of sovereignty to his doctrine of the

[22] See also his discussion of the contingency of the English doctrine of parliamentary sovereignty at 529.

rule of recognition (see Chapter 7, sec. 7.1.3), can be found announced and elaborated in Salmond's jurisprudence. Hart did not acknowledge this debt, except in one brief footnote. The central theme of *The Concept of Law*, he wrote, is that at the foundation of a legal system lies not the habit of obedience to a legally unlimited sovereign, but rather an ultimate rule providing criteria for identifying valid rules of the legal system. Although this idea resembles Kelsen's notion of the *Grundnorm*, he admitted, it more closely resembles Salmond's notion of ultimate legal principles. Yet, Hart (1994, 292) dismissed it as "insufficiently elaborated."

Hart rescued from obscurity an idea first announced by Salmond and made it the pivot of his theory of law, but he did not rescue Salmond's work itself. There may be several reasons for Salmond's relative obscurity. First, although Salmond announced his ideas with clarity, he never developed them fully. Appearing initially in works intended as student texts, they were never given systematic philosophical treatment, no doubt because he was not and did not regard himself as competent to do so. Second, although his views, when taken together, fundamentally challenged Austinian orthodoxy, Salmond seemed to do everything he could to play down the challenge, with the result that his work was widely viewed in the United Kingdom and abroad as a pedestrian restatement of Austinian commonplaces. Third, English legal theory in the early 20th century was not inclined to pursue questions of philosophical jurisprudence energetically in the shallow intellectual environment of the time. Austin's formulas (especially Holland's restatement of them) were considered good enough for practical purposes and Salmond's measured and nuanced views about the nature of law simply could not compete with the brash and undisciplined jurisprudential thinking that was exploding in the United States at the time. Finally, after 1924, although Salmond's textbook remained one of the most widely used texts for introducing students to jurisprudence, the book was turned over to editors who felt free to revise and rewrite much of it to their own taste. This practice, if it had been undertaken by competent and philosophically engaged editors, might have encouraged attempts to elaborate and defend key doctrines insufficiently developed by Salmond. Regrettably, it led rather to shallower presentations of his key ideas and criticisms that reveal little understanding of them.[23]

1.4. Matters of Method

In his report on *Calvin's Case* (1608), Sir Edward Coke boasted that "*Jurisprudentia legis communis Angliae est scientia socialis et copiosa*: sociable, in that it agreeth with the principles and rules of other excellent Sciences, divine and

[23] Fitzgerald's 12th edition deletes entirely the second on ultimate legal principles and claims that Salmond was committed to a strong form of legal realism. Parker's 9th edition shows an even shallower understanding of Salmond's ideas.

human" (Coke 2003, 231–2). Three centuries later, a perceptive English lawyer lamented that modern common law, "has ceased to be 'sociable'. It is impatient of other kinds and systems of law, and does not eagerly claim kinship with moral science or natural reason" (Latham 1949, 511). In the thought of Bentham, more than a century earlier, English jurisprudence had taken a decidedly empirical and analytical turn, but it retained an equally resolute critical and reformist outlook. After the publications of Austin's *Lectures* in 1863, however, and until the publication of Hart's *Concept of Law* a century later, the dominant mode of jurisprudence in England and the Commonwealth was narrowly analytical, increasingly resistant to reform, and dismissive of systematic philosophical reflection. The regeneration of philosophically sophisticated jurisprudence in the middle of the twentieth century was due less to changes in the jurisprudential temperament of the time than to changes in philosophical method and attitude in mid-century England. In this section I will sketch a profile of this temperament and its preoccupations and prejudices, remnants of which, we shall see, have persisted through the second half of the twentieth century.

1.4.1. Analytic Jurisprudence: General vs. Particular

T.E. Holland opened his textbook with an authoritative tour of the boundaries separating jurisprudence from "the other practical sciences" (Holland 1924, 25). This enabled him "to narrow and deepen the popular conception of 'a law' […] as to fit [the jurist's] purposes" (ibid., 21), which were strictly pedagogical: "to set forth and explain those comparatively few and simple ideas which underlie the infinite variety of legal rules" (ibid., 1). The task, he insisted, is expository without practical or normative dimensions. He took formal grammar rather than philosophy as his model (ibid., 6–7, 11–2). Since jurisprudence is a science, its methods must be formal and analytical (ibid., 5–6). It focuses not on rules of law, but on the relations regulated by these rules, that is to say, the basic, structural concepts of law, abstracted from the rules or principles that give them substance (ibid., 6). Holland's analysis of rights and other legal concepts launched a tradition of painstaking, but on the whole mediocre, work in English jurisprudence that lasted well into mid-century.

Holland insisted that jurisprudence focus solely on concepts that are basic in legal practice and hence common to all legal systems (ibid., 7–8). Although the only tool of analysis was logic, he regarded the enterprise as strictly an *a posteriori* exercise, seeking to generalize concrete legal experience.[24] Because jurisprudence is a science, it is *necessarily* "general" albeit *a posteriori*, and

[24] Holland seemed to think it unnecessary to explain how an *a posteriori*, empirical, "inductive" analysis could nevertheless be strictly formal and logical. Much attention was paid to this question in analytic jurisprudence later in the twentieth century.

hence so-called "particular jurisprudence" was thought to be impossible, for either it is particular, descriptive of local notions, and therefore not a science, or the "relations" it analyzes "hold good everywhere" despite the local provenance of its data, and hence it is not particular but universal (ibid., 10–1). On this view, historical or comparative study of law might bring data to jurisprudence, but it was not the task of jurisprudence to undertake such study; indeed, jurisprudence has no interest in these facts unless they "fall into an order other than historical and arrange themselves into groups which have no relation to the varieties of the human race" (ibid., 12). History and archeology (by which Holland meant empirical social science), like ethics and metaphysics, are alien to the jurisprudential enterprise (ibid., 11).

This understanding of the jurisprudential enterprise did not die with Holland. Fifty years after the publication of the first edition of *Elements*, C.K. Allen (1931, 1–27) presented the same conception for a new generation of law students. Jurisprudence, he wrote, is "the scientific synthesis of the essential principles of law" (ibid., 19). Its object of study is positive law—*positive*, because law cannot be anything but positive, i.e., "made by men for men"; positive *law*, not *laws*, because jurisprudence is concerned with "the basic elements on which law *qua* law is built," not with "a body of fortuitous phenomena in a particular setting" (ibid., 20). Its aims are scientific rather than philosophical (16–18). It seeks systematic knowledge of "a human institution"; its method is *a posteriori* and inductive in the sense that it begins with observation and the collection of data—"separate things, events, phenomena"—and brings "them into a rational concatenation" uncovering "the animating principle within" (ibid., 2–3). Because it "induces a principle of is from what is observed and correlated," its method is sharply distinct from critical moral enquiry (ibid., 3, 18). The results of this enquiry are universal and uniform, Allen wrote. "There is no such thing as a science which is local" (ibid., 3). Allen departed from Holland's conception only to accept that historical and comparative inquiries are proper parts ("methods") of general jurisprudence; indeed, his most well-known work, *Law in the Making* (1964), is an extended comparative study of "sources of law," although he offered no systematic theory of sources, conceived as basic elements of law.

This methodological manifesto of analytic jurisprudence faced some difficulties. From the beginning the formal/logical and the empirical/inductive dimensions of the method were in tension. It was also unclear whether the alleged common elements were only conceptual, rather than normative. Moreover, critics pointed out that Holland offered no evidence to support his assertion that there are common elements of law across all legal systems or that the elements he selected were in fact universal (Buckland 1890, 445; 1945, 68–69; Twining 2000, 28). They complained that the actual evidential base of the analyses offered was parochial, limited to the familiar practice of English private law (Bryce 1901, 536–41, 614, 624; Brown 1906, 367). Most English

jurisprudence, Buckland observed, is particular jurisprudence; Allen's *Law in the Making*, for example, "is not a general treatise on Jurisprudence, still less a treatise of General Jurisprudence" (Buckland 1945, 71). The same was true of the work of A.L. Goodhart (1931).

Other critics found fault in pursuit of universality (see generally Twining 2000, 30–2). Jethro Brown (1906, 364–6; see Allen 1931, 7–13), for example, argued that any genuinely universal jurisprudence would require a point of view on existing legal systems that simply is not available to us. What we take to be fundamental notions of law are not everywhere the same—or at least we have very good reason to suspect that they are not—since law is "in a great degree the product of the milieu in which it has developed" (Buckland 1945, 69). The only epistemologically creditable jurisprudence, they argued, is particular jurisprudence: "Jurisprudence has no independent existence. Its formulae are meaningless except in relation to concrete legal rules" (Buckland 1980, 438; quoted in Twining 2000, 32). Salmond countered, however, that this amounts to no serious limit on the enterprise of analytic jurisprudence; on the contrary, it offers a more secure and proper understanding of *jurisprudentia generalis*:

> It is not because of universal reception that any principles pertain to the theory or philosophy of law. For this purpose such reception is neither sufficient nor necessary. Even if no system in the world save that of England recognised the legislative efficacy of judicial precedents, [e.g.,] the theory of case-law would none the less be a fit and proper subject of general jurisprudence. Jurisprudentia generalis is not the study of legal systems in general, but the study of the general or fundamental elements of a particular legal system. (Salmond 1924, 4 n(a))

Despite the vigor of this debate over jurisprudential method, it involved no fundamental challenge to the actual practice of analytic jurisprudence during this period. It was largely an internecine dispute among writers who were committed to the basic methods of analytic jurisprudence. Competing versions of these methods were offered, but no effort was made to explore the epistemological assumptions on which they rested and they were not subjected to analysis or criticism from a more general philosophical perspective. In the shared understanding of jurisprudence, philosophy had no place. Philosophical jurisprudence as practiced throughout the history of philosophy was regarded as meta-jurisprudential—Allen called it "philosophy of jurisprudence." The business of jurisprudence was thought to be to arrive inductively at essential principles of law," while the business of the philosophy of jurisprudence was "to take the results of jurisprudence […] and relate them to general philosophical principles" (Allen 1931, 15–7). On this view, the owl of Minerva spreads its wings only at the end of the day when the labors of the formal science of jurisprudence are ended. The philosophy of jurisprudence may be inescapable for the philosopher, but the lawyer and jurist can resist and rest content with the deliverances of the more modest endeavors of jurisprudence.

1.4.2. The Province of Analytic Jurisprudence

Austinian jurisprudence established hegemony in English and Commonwealth legal theory in the last few decades of the nineteenth century. Maine and the historical school briefly challenged it, but the challenge was largely unsuccessful, due in part, perhaps, to the fact that its historical scholarship was insecure (Duxbury 2005, 27–8) and in part to the fact that it was seen to offer only a methodological supplement, rather than a distinct alternative, to analytic jurisprudence (see, e.g., Bryce 1901, Essay XII and Keeton 1930, 13). We can attribute the dominance of analytic jurisprudence in the first half of the century to two complementary factors: British philosophy's loss of interest in jurisprudence and common-law lawyers' historic lack of interest in philosophy.[25] From Plato to Mill, philosophers have regarded law as a major subject of systematic study, but for nearly a century after Mill British philosophy[26] had almost nothing to say about fundamental jurisprudential issues, leaving the study of law entirely to lawyers who left their distinctive stamp on the enterprise.

The common-law mind at the turn of the twentieth century was empirical, pragmatic, and conservative. Insofar as the common-law mind could be said to have had a philosophical orientation it was naively empiricist. (Bentham's thought offers a good example of the orientation.) Reflection on any jurisprudential subject was tightly tethered to what were agreed to be concrete, observable facts of ordinary experience. Concepts and principles were seen as abstractions or generalizations from concrete experience and regarded as legitimate just insofar as a path back to concrete experience was ready to hand.[27] This philosophical orientation paralleled a juridical empiricism. From early in the history of the common law (Postema 2002a, 2003), jurists have thought of law in terms of generalizations drawn from judicial decisions or determinations of concrete disputes. *Ex facto ius oritur*. Rules or principles "induced" from such cases were indulged only to the extent that they were immediately needed and were always thought to be answerable to the concrete cases from which they arose. The value of theoretical reflection in achieving a degree of coherence across a range of cases was recognized, but only as an aid to sound decisions in concrete cases. In this respect, also, the common-law mind was practical or pragmatic, aiming at the workability of a solution in daily life rather than large-scale theoretical coherence.

[25] In his introduction to the English edition of Del Vecchio's *Justice*, A.H. Campbell wrote that "systematic philosophy of law has not flourished in the English-speaking world. Few of our lawyers have been philosophers and few of our philosophers have been lawyers" (Del Vecchio 1952, ix). Nearly all professors of jurisprudence in England between 1900 and 1950 were lawyers without serious claim to status as philosophers (Twining 1979, 559).

[26] This was also largely true of philosophers on the North American continent during this period, with the exception of John Dewey and Morris and Felix Cohen who did address important issues of jurisprudence (see chap. 3, below).

[27] English jurists "have always been afraid of abstract ideas in the air," Goodhart wrote; "they hesitate to accept generalities which are unrelated to concrete facts" (Goodhart 1949, 12).

These attitudes were reinforced by a characteristic British contempt for philosophy (if Bertrand Russell is to be believed[28]) which resulted in a strong disinclination among common-law jurists to think philosophically about law and legal practice. Philosophy of law, Bryce (1901, 623) complained, is not just abstract, it is "vague and viewy," offering very little practical payoff for a lifetime of strenuous effort of study (1901, 611). Before him, Dicey (1880, 382) observed that "jurisprudence is a word that stinks in the nostrils of a practising barrister." At the mid-century, Glanville Williams (1945–6, vol. 61: 179) detected the source of this odor in "the flatulencies that may gather around the unacknowledged puns of language," which can be avoided only by the most careful and disciplined adherence to an empirically defined verification principle. Earlier writers in this tradition traced the defects of a philosophically inclined jurisprudence to its preference for speculative metaphysics (Bryce 1901, 609–12), in particular its alleged ambition to derive ideal systems of law from *a priori* concepts by strictly deductive means (Allen 1931, 15), indifferent to actual systems of law and their ordinary modes of operation. This "is not our jurisprudence," Buckland (1945, 32) declared. Even at mid-century Hart (1953b, 356) confessed that "the expression 'philosophy of law' has never become domesticated in England. The words have a foreign ring." The philosophy of law, associated with wild and dangerous speculations of natural-law theorists or with the equally dangerous, myth-busting jurisprudence of Bentham, was not welcomed by the conservative mind of the era's common-law jurist.

Also contributing to the dominance of analytic jurisprudence in this period was the fact that from the late nineteenth century until the 1960s the primary focus of jurisprudential writing was pedagogical and the main medium was the textbook (Twining 2000, 25–6, 32–3; Duxbury 2005, 78–88). Its primary aim was to provide a framework for the study of law, especially English law, by undergraduates. For this purpose, an elementary sketch of basic issues of jurisprudence seemed sufficient. In these works, it was customary to offer a "definition" of law, without elaboration or defense. Basic concepts were laid down, the governing rules of the enterprise announced, and then attention was directed to the immediate task of exploring English law in its general part—the concepts that gave structure to the local legal system, with little sustained interest in more general application.[29] Thus, I think the dominance of analytic jurisprudence was not due, as Duxbury (2005, 15) maintained, to the fact that

[28] "The British are distinguished among the nations of Europe on the one hand by the excellence of their philosophers, and on the other hand by their contempt for philosophy." Quoted with approval by Goodhart (1949, 12).

[29] One measure of the magnitude of Hart's achievement in *The Concept of Law* is his transformation of this jurisprudential textbook tradition. Despite its philosophical sophistication, *Concept* was intended as a student text.

"the shadow cast by Austin's work had a paralyzing effect on many of his successors," since the pedestrian nature of Austin's work did not escape theorists at the time,[30] but rather that Austin's approach simply fit the specific temperament of the legal mind of the period.

Seen in this light, the most influential feature of Austin's work was not his account of the nature of law, but his determination of the province of jurisprudence. He determined this province both negatively and positively. He determined it *negatively* by excluding from it all but a very narrow range of issues and subject matter. Austin is often credited with the first formulation of what some take to be the core doctrine of classical legal positivism—the separation thesis, according to which the existence and validity of any law is not necessarily (or, in some formulations, necessarily is not) dependent on the justice or reasonableness of its content. "Law is one thing; its merit and demerit is another," wrote Austin (1954, 184). Understood in this way, the separation thesis is a very general but nevertheless substantive claim about the nature of law. However, Austin's determination of the province of *jurisprudence* took on the character of a methodological thesis: The province of jurisprudence, i.e., the proper study of law, is the study of law apart from matters of justice, morality, or practical reasonableness. Yet, Austin, or rather analytic jurisprudence following Austin, excluded more than morality and practical reasonableness from jurisprudence; it also excluded systematic reflection on the social conditions of law. The focus of jurisprudence was to be trained exclusively on the core concepts of law, without regard to the social structure on which they might depend or which might give them meaning. Likewise, the enterprise to which philosophers from Plato to Mill had contributed was treated as outside the boundaries of jurisprudence. Austin's work in *The Province of Jurisprudence Determined* analyzing the concepts of law, command, sanction, sovereignty and the like, which readers now take to be the core of his jurisprudential theory, was regarded not as jurisprudence proper, but rather as *prolegomena* to jurisprudence, fixing its presuppositions and defining its subject matter (Buckland 1945, 3; Campbell 1949, 119). In a chapter entitled "Jurisprudence [is] not a Philosophy," Buckland summed up the view that had prevailed in analytic jurisprudence circles for over fifty years. "A philosophy would have in view the whole scheme of thought expressing the relation of the immediate subject to other concepts of the mind. [However,] 'General Jurisprudence' [as understood by analytic jurisprudence] analyses a group of phenomena carefully isolated from everything else. […] It defines the phenomenon [positive law], as a preliminary to getting to work upon it" (Buckland 1945, 42).

Thus, in this spirit, the proper subject matter of jurisprudence, its province determined *positively*, was limited to analyzing the basic concepts of legal dis-

[30] Compared to Bentham "fertile and inventive" if "cranky" work, to read Austin, according to Bryce, was "to traverse a stony and waterless desert" (Bryce 1901, 615).

course—concepts of legal right and duty, possession, ownership, liability, fault, person, thing, status, intention, will, motive, legal sources, legislation, precedent, custom and the like. The task of jurisprudence was to offer an analysis of these concepts, in their ordinary, professional use, identifying the core elements, excluding the immaterial or accidental ones, capturing what lawyers implicitly have always in mind when they use them (Goodhart 1947, 283–84). Thus, jurisprudence on this view may offer definitions of concepts of law, state, sovereignty, right, and duty, but only as prolegomenon, not as a proper part of jurisprudence and not part of a serious, systematic philosophical activity. Extended defense of these definitions was thought to be someone else's (endless and inevitably inconclusive) task, a task that jurists need not undertake. Jurisprudence could safely proceed on the assumption that preliminaries were firmly in place. Its proper activity was limited to "policing action," aimed at "arrest[ing] suspicious phrases and propositions, and subject[ing] them to a rigorous examination" (Bryce 1901, 503). The vision and ambitions of writers of jurisprudence in this period were characteristically narrow. The hope, in C.K. Allen's paraphrase of Sir Isaac Newton, was "to pick up a pebble or two on the shore of truth" (1931, 8). From Newton's mouth,[31] the modesty of the phrase is charming, not least because it was clearly false, but Allen's use epitomizes the singular lack of vision, philosophical engagement, and intellectual seriousness of analytic jurisprudence of the period.

1.4.3. Dissenting Voices

Analytic jurisprudence had its challengers in the first half of the twentieth century, of course. Realists in America and in Scandinavia and the powerful work of Hans Kelsen offered serious criticism and sophisticated alternatives. There were also neo-Thomist, neo-Kantian, neo-Hegelian and Marxist challengers (see Volume 12 of this Treatise in regard, e.g., to Jhering, Krabbe, Stammler, Jellinek, Schmidt, and Ehrlich). Writers in the analytic tradition were not entirely unaware of these authors and some regarded them with genuine, if somewhat bemused, curiosity. Yet, as Duxbury (2005, 38) observed, "curiosity really was the sum of it." It is very difficult to find even a hint of influence of this work on analytic jurisprudence of the period.

Potentially more serious challenges arose closer to home; yet, they too failed to shake the hegemony of analytic tradition. The weakness of these challenges laid not in the inferiority of their proposals, for they were never seriously entertained, let alone shown to be deficient, but rather in their inability to break

[31] Not long before his death, Newton wrote, "I do not know what I may appear to the world; but to myself I seem to have been only like a boy, playing on the sea-shore, and diverting myself, in now and then finding a smoother pebble or prettier shell than ordinary, whilst the great ocean of truth lay all undiscovered before me." Quoted in More 1934, 664.

the intellectual complacency into which English jurisprudence had fallen. Nevertheless, a brief look at a few representative dissenting voices will shed further light on the dominant mode of legal theorizing in the period and mark paths that Anglo-American jurisprudence might have taken in a different cultural and intellectual climate.

1.4.3.1. Miller: Jurisprudence in the Scottish Tradition

At the turn of the twentieth century, William Galbraith Miller[32] launched a full-scale attack on the Austinian orthodoxy that was taking hold in English jurisprudence at the time. Writing out of the long philosophical tradition of Scottish jurisprudence—represented by the work of Stair, Kames, Hume, Reid, and Smith—Miller criticized the narrow intellectual vision and methods of analytic jurisprudence. He rejected the naïve natural-law idealism of his teacher, James Lorimer, who had argued that the law is social order given by *a priori* reason. Positive law, in Lorimer's view, was not to be confused with actual behavior in the physical world, but rather is (ideal) natural law, "relativized to a given time and place" (MacComick 1997, 15). Miller inverted this point of view. He agreed with English writers that reflection on law must start with the concrete behavior of people governed by actual positive law. Against Lorimer, he insisted that there are no natural-law norms existing apart from the actually articulated norms of positive law (Miller 1884, 29, 44); natural-law norms are merely generalizations drawn from positive law (ibid., 381–3). He also rejected norm-skeptical empiricism, which later took the form of behaviorism or psychologism. Embedded in legal relations at their most concrete is the idea of right, he argued, without which the behavioral facts of those relations would be meaningless (ibid., 44–5).

The fundamental mistake of analytic jurisprudence, as Miller saw it, lay not in its chosen starting point, but in its severely myopic view of that starting point and its abstemious methodology. Miller (1903, 2) observed that law is a sociological phenomenon embedded in and continuous with human social life, and he concluded that the aim of jurisprudence must be to understand law in its habitat. The methods of jurisprudence must be as various as the tools we have developed to advance this understanding. For this son of the Scottish tradition of jurisprudence, the province of jurisprudence was all of human social life (Attwool 1997, 231). It starts with the recognition that law is a fundamental normative ordering (ordering according to "the idea of right") of so-

[32] Miller was a lawyer and lecturer on public law, jurisprudence and international law at the University of Glasgow. He wrote jurisprudence with a distinctively Scottish accent. This is nowhere more evident than in his elaboration of Aristotelian doctrine. Yes, man is a social animal, he conceded, but "man's inventive powers have made him a cooking animal [and most importantly!] a *brewing and distilling* animal" (Miller 1903, 8, emphasis added).

cial life. "Law and the idea of legal right are […] the foundation on which the superstructure of social relations must be built" (Miller 1903, 465). Surely, to view the precincts of this province through Lorimer's idealization is to theorize about an abstraction, Miller (1884, 22) argued, but it is equally abstract and distorting to have regard only for the coercive activities of the state, or institutional responses to disputes. The role of coercion in the law is not to be denied any more than the legislative and adjudicative institutions on which it relies, but to attend to them exclusively is to consider only an abstraction, to focus on the most immediately visible feature of a social phenomenon that is far deeper and more complex. "Law is a result of social life and has no meaning apart therefrom" (Miller 1903, 28). To attempt to understand law through analysis of these immediately visible features alone, torn from the reality that gives them meaning, is the product of "professional bias […] which sees law only in precedents of conveyancing and forms of process" (ibid.). Miller likened those who in this spirit define jurisprudence as merely formal science to the "naturalist who throws away the oyster and studies the shell which was made by the oyster and has a meaning only for it" (ibid., 465). "Since jurisprudence is a science of human activities, and touches humanity both on its social and its individual side," he argued, "it has relations to all human sciences" (ibid., 16), including logic, to be sure, but also history, sociology, ethics and even metaphysics, that is, philosophy in general (ibid., vii–viii, 3–4, 15–6).

Although he conceded that the practical skills and arts of law precede the science of law and science precedes philosophy, he argued that the scientific arrangement of the rules and concepts of law is incomplete and potentially distorting, because it fails to take up the further, inevitable, and more fundamental questions regarding the reasons for its doctrines and the foundations of its concepts. "No hard and fast line can be drawn" between jurisprudence as a formal science—with its ambition of cataloging and arranging legal phenomena—and philosophy; rather, "they shade into one another […] [and] the human mind refuses to stop arbitrarily at this point [viz., the outskirts of the province of Austinian jurisprudence] and ask no more questions" (Miller 1884, 3; 1903, 465–6). We cannot form a notion of the ideal of right or justice except through reflection on concrete positive law, but equally we cannot begin to understand law and legal relations without a firm grasp of the idea of right. The "problem [of] how to reconcile […] rigidly formal law with the aspirations of justice and equity" is a problem of "pure metaphysics" (Miller 1903, 465). Because the "phenomena of jurisprudence are continuous […] [w]e cannot, for scientific purposes, draw an arbitrary line between law and [ethics and metaphysics] and confine the province of jurisprudence to legislation, as Austin virtually did, or to judicial decrees and precedents, as has been proposed more recently [e.g., by Salmond]" (ibid., 465–6). However, Miller hastened to add, the aim of philosophical jurisprudence is not to make us better lawyers or statesmen, or even better citizens, any more than the aim of the philosophy

of religion is to make us more pious. Rather, we study philosophical jurisprudence to deepen our understanding of law and our social world, that is, "to comprehend the world, not try to make it better" (Miller 1884, 5–6; 1903, 3).

Miller's spirited challenge to analytic jurisprudence at the turn of the century went unanswered. Scottish legal philosophy, to the extent it was recognized outside of Scotland itself, was identified with the work of Lorimer rather than Miller (see Kermack 1936, 442). Except for rare references in the work of Roscoe Pound and Julius Stone (Attwool 1997, 219), Miller's work was ignored in subsequent jurisprudence. Having secured the borders of the province of jurisprudence, English and Commonwealth writers had no inclination to consider challenges from quarters as far afield intellectually as that from which Miller launched his critique. On the contrary, soon after Miller wrote, English jurisprudence secured a foothold in Scottish legal education and by 1930 (perhaps earlier) Scottish jurisprudence had assimilated to the English analytic model (Kermack 1936, 444). Indeed, by the late 1940s, Scotland's most important legal philosopher, A.H. Campbell, could speak with ease and without irony of "our English analytic writers" (Campbell 1949, 116).

1.4.3.2. Moderate Dissent at Mid-Century

However, A.H. Campbell, Professor of Public law and the Law of Nature and Nations in Edinburgh, did offer an important, if limited, challenge to the prevailing English jurisprudence. In an essay that may have influenced Hart's thinking on the place of international law in his theory of law (see Hart 1953b, 362; 1994, chap. 10), he charged that, although analytical jurists correctly rejected all attempts to deduce the nature of law from general principles of philosophy and looked rather to law as "it actually is and works," they "imposed an arbitrary limitation on their field of observation" (Campbell 1949, 114). They considered "only municipal law of the contemporary Western State" to be the proper object of jurisprudential enquiry. This *a priori* restriction, another product of Austinian determination of the province of jurisprudence (ibid., 119), was not only arbitrary and undefended, he argued, but also inconsistent with the professed empiricism of the analytical method. Campbell challenged analytic jurisprudence to return to the empiricist principles from which it strayed; its motto should be Molière's "*Je prend mon bien là où je le trouve*" (ibid., 120f). Broadening the field of jurisprudential observation might have revolutionary results, he conceded. Conceptual schemes may be stretched to the breaking point and we may find that concepts originally framed on the narrower base may turn out to be too limited, or even entirely mistaken. We may be forced to revise or even "abandon them and start afresh" (ibid., 121). But, in fact, Campbell's proposal, salutary as it might have been, was not all that revolutionary (and his own work was far less revolutionary than these remarks suggest). It was simply a version of the challenge often made by partisans of

the historical school to analytic jurisprudence to broaden the scope of its attention and to look with an unprejudiced eye on other relevant legal phenomena.

Julius Stone (1946, vii), writing in Australia in the mid-1940s, portrayed his own work in his massive *The Province and Function of Law* as a revolutionary challenge to the methodological positivism of analytic jurisprudence. Jurisprudence, he insisted, must not be limited to the "logic of the law," the traditional domain of analytic jurisprudence, but must include as equal partners in the enterprise "law as justice" and "law as social control"—that is, what had been conventionally associated with natural-law theory or "the science of legislation," on the one hand, and the newly emerging sociological jurisprudence, on the other (in the work, for example, of Roscoe Pound).[33] To some practitioners of analytic jurisprudence Stone posed a genuine challenge, since he treated normative political philosophy and systematic empirical sociology as legitimate inquiries for students of law and jurisprudence. However, Stone's challenge, like Campbell's, was less radical than he fancied. He accepted the orthodox understanding of the aims, methods, and subject matter of analytic jurisprudence and its understanding of the boundaries of its enquiry; he only argued that this enquiry should be set alongside natural-law and sociological inquiries. While jurisprudence, on his view, was conceived more broadly, he made no attempt to integrate these distinct kinds of enquiry, nor did he even express a hope that such integration might be possible. Stone's suggestion, however outlandish it might have sounded to jurisprudential orthodoxy at the time, offered no serious challenge or alternative to analytic jurisprudence as practiced over the fifty years prior to the publication of his book.

1.4.3.3. Oakeshott: Philosophical Jurisprudence Reconceived

Miller's brief for a more integrated and philosophically grounded jurisprudence was spirited, but failed to force analytic jurisprudence outside its comfortable boundaries. At best, philosophy was seen as a meta-jurisprudential enquiry, philosophy of the science of law, which was harmless if pursued strictly as an avocation. This comfortable view was challenged in the late 1930s in a remarkable essay by Michael Oakeshott, entitled "The Concept of a Philosophical Jurisprudence." Unlike the proposals of Campbell and Stone, Oakeshott's case for a truly philosophical jurisprudence posed a fundamental challenge to British jurisprudential orthodoxy.

Jurisprudence seeks a rational explanation of the nature of law, Oakeshott (1938, 203) argued, but British jurisprudence of the time was, in his view, a cacophonous world of competing incomplete explanations (ibid., 214). It was epistemologically incoherent because it lacked an adequate and comprehensive

[33] See Hart's discussion of Stone's proposal in Hart 1953b, 359–60; for Pound's sociological jurisprudence see chap. 3, sec. 3.1.2.2, below.

theory of explanation. In this world of "confusion and ambiguity" philosophy was viewed in an ecumenical spirit, as one method among many equals (although, in truth, it was more often "dismissed as a work of supererogation") (ibid.). Yet, what at the time was politely tolerated or summarily dismissed was only a caricature of philosophical reflection on law; or rather, it was a blurred overlay of a number of different caricatures (ibid., 215–20). In the cartoon sketchbook of British legal thought, Oakeshott observed, philosophical jurisprudence was seen either as *applied philosophy*, using law to illustrate favorite general philosophical doctrines or supplying presuppositions prior to and independent of consideration of legal concepts and experience, (where jurisprudence itself was seen as no proper concern of philosophy); or as *a priori natural law*, seeking to construct an ideal system of law by deduction from pure concepts, a kind of metaphysical theory of legislation; or as *interpreter* of grand stages of human history; or as the *philosophy of jurisprudence*, reflecting on categories and conclusions of the properly scientific study of law, but not of any use or interest to that study.

Each of these views of the nature and tasks of philosophical jurisprudence suffered from two fundamental defects, Oakeshott argued. First, they reflected a profound ignorance of the philosophy of law as practiced over its long history and thus a failure to consider, let alone seriously engage with, the work of Plato, Aristotle, Aquinas, Hobbes, Kant, Hegel, Green, and their like (ibid., 217, 220–1, 347). Second, philosophy in each of these guises was, he thought, incoherent and profoundly unphilosophical (ibid., 221). According to Oakeshott, philosophy does not generate algorithms for use in the practical world; neither does it merely provide convenient illustrations nor spin out fantasies of ideal legal codes. Rather, philosophy is directly engaged in the practical human social world of law, attempting to devise a deep and comprehensive understanding of it, along the way challenging comfortable, but partial and myopic, explanations. Thus, it is not the business of philosophy to accept the data or conclusions of jurisprudence; on the contrary, it shapes them, recasts them, through critical examination of their presuppositions (220). Philosophy is fundamentally critical.

A genuine philosophical jurisprudence, he urged, is in some respects far less pretentious than its detractors assume, although at the same time more subversive. It *seeks*, rather than dogmatically delivers, a framework for explanation that relates and makes epistemically coherent the various otherwise partial conceptions and approaches (ibid., 352–3), by subjecting them to "the revolutionary and dissolving criticism of being related to a universal context" (ibid., 345); and it does so without presupposition, reservation, or limit (ibid., 345–50). "Suspicious of every attempt to limit the enquiry" (ibid., 248), philosophical jurisprudence effaces boundaries, explores connections, demands deeper understanding of superficially disparate phenomena. It is, in Oakeshott's vision, equally critical and potentially revisionary of the deliverances of

science, human and natural, as of those of metaphysics. It starts from ordinary ideas, from what is already commonly known, hoping that, by relating apparently isolated ideas to a broader conceptual and experiential context and by subjecting them to unrestricted criticism, we will be able to know more fully (ibid., 345–6). Like Miller, Oakeshott argued that the key to this philosophical approach to jurisprudence, to explaining the nature of law, is relocating the immediately visible institutional manifestations of modern law in their natural habitat of human social life and experience (ibid., 352–3). A truly philosophical understanding of phenomena, according to Oakeshott, relates rather than distinguishes; it seeks to find the deeper connections that fund and legitimate the distinctions that, on first inspection, seem so important. Philosophy is meant to be concrete at the beginning and at the end: It begins with the manifold of human experience, not some convenient abstraction from it, isolated by myopic professional vision, and it seeks what Hegel called "concrete concepts," i.e., explanations that are not only comprehensive but also unite into a coherent whole both presuppositions and conclusions, abstract ideas and immediate experience (ibid., 346–7).[34]

Oakeshott called for a fresh start on this enterprise of philosophical jurisprudence (ibid., 360), but he recognized that major obstacles stood in its way. The greatest, perhaps, was "the prevailing ignorance about what has already been accomplished in this enquiry, and the prejudice, that springs from this ignorance" (ibid., 357). So, the first item on the agenda for the regeneration of philosophical jurisprudence must be a thorough reconsideration of and reengagement with the work of major figures in the tradition of philosophical jurisprudence (ibid., 357–8). The aim of this study, however, is not, as Burke suggested, to learn "how and what we ought to admire,"[35] and surely not to absorb and internalize any particular philosophical doctrine as credo (ibid., 360). Our approach to this tradition must itself be thoroughly philosophical, Oakeshott insisted. Philosophy "is not a tradition of conclusions or even questions, but of enquiry" (ibid.). We fail to engage this tradition philosophically if we consider only its *obiter dicta* and ignore its *rationes decidendi* (ibid., 359). To engage philosophically involves addressing its doctrines and the arguments advanced in their defense, not only rethinking its answers, but also reformulating its questions. This thoroughly philosophical engagement with the philosophical tradition offers us "a firmer consciousness of what we are trying to do […] [and] the knowledge that we cannot understand our own questions and

[34] Despite the broadly Hegelian language of his proposal (which explains its icy reception in English jurisprudential circles), Oakeshott made no brief in this essay for Hegel's special brand of philosophical jurisprudence. The enterprise he recommended, although foreign to the practice and temperament of his English audience, was "to be found living and active" as much in the work of Socrates, Aquinas, the Scholastics, and Hobbes, as in that of Kant and Hegel (347, 356).

[35] Quoted in Dicey 1982, cxxv.

answers without understanding the questions and answers of others," thereby also bringing to light "questions which have never been fully considered" (ibid., 360).This conception of philosophical jurisprudence is a far cry from the "philosophic spirit" that James Bryce so admired in the Roman lawyers of the classical era (Bryce 1901, 628–38). Their frame of mind, in Bryce's description, was thoroughly pragmatic, unburdened by speculative training and the preoccupations of their Greek predecessors. It was largely their characteristic practical sense and flexibility of mind and their appreciation of the harmony of the law that enabled them to navigate the vast, complex body of Roman law and make it work in the concrete cases that they faced (ibid., 629). This same spirit gave that body of law its reasonableness and consistency over time, in Bryce's view. Always mindful of the value of coherence of doctrines, Roman lawyers never "sacrifice[d] practical convenience to their theories"; neither did "deference to authority prevent them from constantly striving to correct the defects of the law" (ibid.). Bryce, writing at the beginning of the century, highlighted what the English legal community of the day would have recognized as an embodiment of the ideals they most admired in common-law lawyers. It was an idealization exposed and demythologized by Bentham more than a century earlier, but no less powerful in Bryce's day and in the decades to follow. In view of the prevailing demand that jurisprudential writing and thinking be governed by its primary pedagogical task, it is should come as no surprise that Oakeshott's call for a thorough-going *philosophical* jurisprudence fell on deaf ears and his remarkable essay has been ignored ever since.

1.4.4. Glanville Williams: Convergence of Philosophy and Jurisprudence

The visions of jurisprudence offered by Miller and Oakeshott were no less alien to the prevailing philosophical climate, than to the dominant attitudes of jurists of the time. In striking contrast, Glanville Williams brought logical positivism, much in fashion in post-war English philosophy, to bear on central questions of jurisprudence in a long essay serialized in the *Law Quarterly Review* (1945–46, anticipated in Williams 1945). Although his understanding of the doctrines and methods of logical positivism was limited, drawn largely from his reading of Ogden and Richards' *The Meaning of Meaning* (1945), and his attempt to revolutionize the practice of English jurisprudence was soon thrust into the shadows by the more sophisticated and systematic work of Herbert Hart, still, Williams' essays signaled that English legal theorists at mid-century were willing to admit philosophy into the province of jurisprudence as long as it met their terms.

Williams' attitude towards the practice of jurisprudence of the time was anything but irenic. Analytic jurisprudence, which sought to explore the nature of law through the analysis and definition of legal concepts, was, in his view, fundamentally misdirected. Like all jurisprudence and philosophy to date, ana-

lytic jurisprudence rested, he thought, on a naïve understanding of language and complete ignorance of its power to mystify. Language is just an instrument by which we seek to direct or control the thoughts, feelings, and behavior of other people, he argued. Although words do not mean just anything we want them to mean, they have no true, correct, or proper meaning. All language is strictly conventional in the sense that words either have a relatively settled meaning in virtue of the fact that people happen to use them in the same way, or they have special, stipulated, personal meanings to which use others simply acquiesce (Williams 1945–1946, vol. 61: 384). Even words with conventional meanings enjoy general agreement only with respect to a settled core which is encircled by a zone of unsettled usage (ibid., vol. 61: 191).[36] Moreover, many words in ordinary language are chameleon-like, changing in meaning depending on the linguistic company they keep (ibid., vol. 61: 301). 'Freedom' is such a word, Williams claimed, as are 'democracy', 'state', 'property', 'ownership', 'interest', 'agency', and even 'law' (ibid., vol. 61: 301–2). Disputes often arise over the meanings of these terms, of course, and we think we are disputing over the nature of things in the world; indeed, in our most pretentious—that is, philosophical—moments, we launch enquiries into "the nature of this or that, hoping thereby to settle or resolve these disputes." But all such disputes are not really about the world, but only about words, and they are settled not by argument, but only by stipulating definitions (ibid., vol. 61: 301–302, 389). Disputes are not likely to arise where the conventional meaning of words is settled, or the chameleon-word's context is fixed, but only when matters are not settled. The definitions that are offered to capture "proper" use of the terms are nothing more than logomachy, more or less explicit attempts to get people to use the words in a particular way (ibid., vol. 61: 384–6, 389). No definitions can claim to be more rational, proper, or real than any others, according to Williams, because there is no such thing as getting them right or wrong, although, of course, advocacy for a particular use can be more or less effective. When we realize this, he concluded, we can "write off almost the whole of the vast and futile controversy concerning the proper meaning of the word 'law'" (ibid., vol. 61: 386).

Williams aimed his broadside not only at analytic jurisprudence, but also at philosophy generally and especially at philosophers inclined to take metaphysics seriously. He put all talk of "essence" and "real notions" of things, ideas, and concepts (except insofar as they could be reduced to words) were put beyond the pale of intelligibility. No sentence formed in language can be regarded as meaningful, in his view, unless it is verifiable by a straightforward empirical test (ibid., vol. 62: 403). Most of traditional philosophical writing—especially, all of metaphysics and ethics—fail this test, he concluded.

Astutely, Williams observed that this skepticism of metaphysics and all philosophical reflection not securely tethered to observable empirical facts "is

[36] See Hart's discussion of the "settled core" and "penumbra" of legal rules, chap. 7, sec. 7.6.

gratifying to the Anglo-American jurist because it confirms the strong suspicion that he has already felt regarding the value of metaphysical speculation, particularly metaphysical speculation about law" (ibid., vol. 62: 404). But the acid burned more deeply: all enquiries into the nature of law and all attempts to domesticate concepts of law, right, duty, ownership, and the rest of the stock in the analytic jurisprudence stables must be recognized as wastes of time (ibid., vol. 61: 301), or at best well-intentioned logomachy. Over the course of its history, jurisprudence has been riven by disputes, but now, looking through metaphysics-skeptical lenses, Williams confidently asserted that we can see that these disputes were simply about words, not about the world.

From this tale about the misdeeds of philosophers and jurists, Williams drew a moral about law and common-law lawyers' customary way of thinking about law.

> The theory here advanced destroys completely and for ever the illusion that the law can be completely certain. Since the law has to be expressed in words, and words have a penumbra of uncertainty, marginal cases are bound to occur. Certainty in law is thus seen to be a matter of degree. Correlatively, the theory destroys the illusion that the function of a judge is simply to administer the law. If marginal cases must occur, the function of the judge in adjudicating upon them must be legislative. The distinction between the mechanical administration of fixed rules and free judicial discretion is thus a matter of degree, not the sharp distinction that it is sometimes assumed to be. (Ibid., vol. 61: 302–3)

Although he thought this moral followed from his theory, it is not at all clear from exactly what his conclusions are supposed to follow. Neither skepticism about philosophical essentialism, nor observations about the core and penumbral meanings of words, warrant these conclusions; neither do his largely common-sense warnings against word fetishism, or the pitfalls of persuasive definitions.

However, it was not jurists who challenged the drift of Williams' breezy dismissal of jurisprudence and disciplined legal thought, but rather the philosopher John Wisdom (1951, 195–9). He argued that to treat difficult questions of the application of legal rules and concepts, as well as questions of the analysis of key legal concepts, simply as disputes over words inviting more or less arbitrary decisions to stipulate definitions is "to distort and denigrate legal discussion" (Wisdom 1953, 250). Matters in dispute are neither to be settled by appeal to obvious linguistic facts, nor determined by linguistic fiat, but rather are to be *argued* further by setting out the whole case or issue in as rich a context of relevantly like and different cases as possible (Wisdom 1953, 250). The subtle, but disciplined movement of thought by analogy, and similar techniques common to legal practice, must be given their due, Wisdom argued. Enamored with the power and elegance of the tools of logical positivism, Williams had not revolutionized jurisprudence (or metaphysics), in Wisdom's view, but only rendered it mute. Philosophy in Williams' hands bludgeoned jurisprudence into silence, leaving it without the resources to understand law, incapable even

of intelligently listening to the ordinary practice of law so as better to understand it.

A philosophical method capable of reviving English jurisprudence must not only join it in its empiricist and anti-metaphysical prejudices, but also be capable of listening to the regular rhythms of legal practice, Wisdom seemed to be arguing. Oxford ordinary language philosophy, having displaced the bravado of logical positivism at mid-century, offered just such a method, and Herbert Hart, a skilled practitioner of that art, was able finally to return philosophy to English and Commonwealth jurisprudence. At the close of his 1931 essay on jurisprudence, C.K. Allen wrote wistfully, "Will there some day arise a greater Austin, no less patient in method, no less meritorious in intention, but perhaps more ingratiating in manner? He may be *in posse*: one does not yet, it is to be feared, see him *in esse*" (Allen 1931, 27). Such a one appeared *in esse* at mid-century. Hart succeeded in rejoining philosophy and jurisprudence, in part due to his patient and sophisticated method and ingratiating manner of writing. Miller and Oakeshott failed because they made no concessions to the intellectual temperament of common-law lawyers and jurists; Hart's success was due, at least at the outset, to the fact that the emerging philosophical temperament, especially at Oxford, had much in common with the prevailing common-law temperament.

Ordinary language methodology, in effect, made philosophy safe for common-law jurisprudence at mid-century. Indeed, ordinary language philosophy came to sup at the table of the everyday practice of law. It was the other Austin—the philosopher, J.L. Austin, who shaped philosophical thinking in the 1950s—who insisted that philosophers had much to learn about the biology and behavior of ordinary concepts from the law, especially case law (Austin 1956–57, 13–4). There may be no better example of the wisdom of latter-day Austin's injunction, or of the accommodation of philosophical jurisprudence to the common-law mind, than Hart and Honoré's classic 1959 *Causation in the Law*.

We will pick up this historical thread in Chapter 7 and succeeding chapters, where we will follow the story of how Hart succeeded in rekindling the fires of the English and English-speaking philosophy of law that had nearly gone cold since the days of Bentham. First, however, we must take up a different story. It, too, begins in the late nineteenth century, but in a very different part of the common-law world. After we have traced the trajectory of legal theory first launched by Justice Oliver Wendell Holmes, Jr., who also started from Austinian premises, we will return to the story begun in this chapter.

Chapter 2

JUSTICE HOLMES: A NEW PATH FOR AMERICAN JURISPRUDENCE

In 1897 a prominent Boston lawyer and judge of the Massachusetts Supreme Judicial Court—soon to begin a brilliant career as Justice of the United States Supreme Court—addressed Boston University law students. In this address, he stated his themes in such fresh and provocative language that later readers of the published text took it to mark a revolutionary break from nineteenth century thinking about the nature of law and legal reasoning. This language would decisively shape and direct American legal theory in the twentieth century. "The Path of Law" quickly acquired the status of a classic, one of the most influential pieces of jurisprudential writing in English in the twentieth century; yet its rhetoric and reputation do not match its reality.

As it is commonly read, "The Path of Law" urged legal theorists to approach questions of the nature of law not from the point of view of a detached scientific observer or that of the sovereign law-maker, but rather from the point of view of the practicing lawyer's client. The relevant client, moreover, was not the good citizen, "who finds his reasons for conduct […] in the vaguer sanctions of conscience," but the *bad man*, "who cares only for the material consequences" of his actions and wishes above all "to avoid an encounter with the public force." (Holmes 1995[1], vol. 3: 392). From this point of view, Holmes provocatively asserted, law is nothing more than a matter of "prediction[s] of the incidence of the public force through the instrumentality of the courts" (CW 3: 391). "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law" (CW 3: 393). Judges, of course, pretend otherwise. Committed to the mythology of formalism, they pretend that their decisions are strictly rule-governed, driven by the internal and ineluctable logic of the law. Mystification, Holmes declared. Behind the logical form of every judicial decision is an implicit—often unacknowledged and inarticulate, sometimes fully conscious but carefully hidden—choice among competing considerations of public policy.

A more decisive break from nineteenth century jurisprudence could hardly be imagined. The aim of constructing a rational and objective science of law was rejected, it seems, as was the dominant Austinian positivist understanding of law. Similarly, classical common-law thinking, tarred with the brush of "formalism," also seems to have been scuttled. Yet, for all their rhetorical power and undeniable influence on twentieth century legal thought, Holmes's words actually expressed an outlook on law that was deeply and ineradicably rooted

[1] Hereafter abbreviated as "CW."

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in the very intellectual sources it seemed most radically to reject. The rhetorical Holmes, and the "realist" or "pragmatist" Holmes of later reputation, sounded revolutionary, but the real Holmes was practically, and in many respects theoretically, rather conservative. Behind talk of the bad man's point of view, the fallacy of logical form, and law as nothing but predictions lay a complex mix of late nineteenth century thought about science, revisionist Austinian positivism, and not just a little classical common-law jurisprudential thinking.

Holmes as jurist stood on the verge of the twentieth century. Although he never crossed over (see sec. 2.1.1), the troops he inspired marched boldly in. The sire of a brood of wildly conflicting interpretations (progressive liberal, legal realist, conservative champion of economic jurisprudence, founding father of critical legal studies, proto-pragmatist, etc.), each claiming him as originator, champion, and legitimator of their favored jurisprudential theory,[2] Holmes is an enigma in the history of modern Anglophone jurisprudence. His intellectual weaknesses—his preference for the *bon mot*, provocative, slightly naughty and unencumbered with qualifications, over carefully crafted articulation and his paradoxical impatience with argument and consequent unwillingness rigorously to work out and defend his brilliant insights—make consistent reconstruction of his thought especially difficult. These weaknesses also account in good part for the gap between the reality of his views and their diverse reception, although we cannot discount the intellectual and political ambitions of later readers to claim this icon of American jurisprudence as ancestor and inspiration. Holmes's legacy, and the legacy of "The Path of Law" in particular, has been rich, strong, and diverse, although what his followers took from him was more rhetoric and attitude than doctrine and argument.

This chapter sketches the main outlines of Holmes's jurisprudence.[3] Subsequent chapters will trace the diverse influence of this boldly radical, conservative, enigmatic, not-entirely-consistent understanding of law. Because for Holmes, more than any other writer we will consider, biography is essential to understanding doctrine, we will begin with a brief sketch of his life.[4]

[2] For a compact list of the "kaleidoscope" of Holmes interpretations with references to representative work pressing those interpretations, see Reimann 1992, 243–5 nn. 4–6.

[3] Michael Lobban, in Volume 8 of this Treatise, chap. 7.4–7.7, offers an excellent and largely complementary account of Holmes's legal theory. Following recent scholarship (especially, Horwitz 1992b and White 1993), Lobban divides Holmes's work into early and later stages, the latter being markedly more skeptical about law and judicial reasoning. The account developed here, however, tends to see continuity where Lobban sees discontinuity and sees a marked skepticism emerging at the end of Holmes's scholarly career. It also puts greater emphasis on the common-law elements in Holmes's theory than any recent commentator.

[4] G. Edward White's *Oliver Wendell Holmes, Jr.*, (2006) is a short, accessible biography. For full-length biographies see Sheldon Novick (1989) and White (1993). White's is especially useful for its comprehensive and detailed discussion of all of Holmes's major writings. For a slightly broader biographical perspective, see Menand's *The Metaphysical Club* (2001), although I believe Holmes's links to this famous, proto-pragmatist group are more tenuous than Menand claimed.

2.1. Holmes: The Man and the Mind

2.1.1. Jurist, Judge, Justice

Oliver Wendell Holmes, Jr. was born on March 8, 1841 to a family at the center of Boston's elite legal and literary society. His father, an uncomfortably dominant figure in Wendell's life, was a medical doctor, poet, man of letters, and co-founder of the *Atlantic Monthly*. Wendell was a head-strong and irreverent son—he was officially censured for "repeated and gross indecorum" in Francis Bowen's moral philosophy class at Harvard College (White 2006, 10)—but an aristocrat's overwhelming sense of duty was woven deep in his character. Moved by his mother's abolitionist sympathies and hoping to fight with forces opposing slavery, he left Harvard just before graduation and enlisted in the Massachusetts Volunteers. When he was assigned to duty protecting the Boston harbor, he resigned, completed his college studies, and in July of 1861 joined a regiment of the Volunteers that was guaranteed to see action. In his first battle, just three months later, he was shot through the chest but survived and returned to action in the spring of 1862. Later that year at the battle of Antietam Creek he was again severely wounded and a third time in May, 1863.

Deeply disillusioned about the war, he chose not to re-enlist. He enrolled in Harvard Law School in September 1864 and later apprenticed with the Boston firm of George Shattuck, which he joined after he was called to the Bar in 1867. For the next fifteen years he practiced law and pursued an increasingly intense program of reading and writing in jurisprudence and legal history. During this time he read voraciously, including much work in German legal philosophy and legal history, especially Kant, Hegel, Savigny, and Puchta (Reimann 1992; White 1993, 129–30). At the end of this period he delivered the Lowell Institute Lectures, which he published shortly thereafter (March, 1881) as *The Common Law*. He began teaching in the Harvard Law School in September, 1882, only to resign in December of that year to take up a post on the Supreme Judicial Court of Massachusetts. He served on the court for twenty years, the last three as Chief Justice. In 1902, at the age of sixty, he was appointed to the United States Supreme Court, where he served for thirty years, retiring in January, 1932. He died three years later.

Holmes was a legal theorist of the nineteenth century. Although he was active as a judge until the early 1930s, and wrote thousands of judicial opinions while sitting on the U.S. Supreme Court, his last piece of serious jurisprudential scholarship ("Law in Science and Science in Law," CW 3: 406–20) was published in 1899. His most sustained period of scholarship was the dozen years leading up to and including his publication of *The Common Law* (1881). His labors on the Massachusetts court after that period permitted him only intermittent scholarly work. Three essays—one of them a public speech ("The Path of Law")—appeared in the second half of the 1890s. They advanced

some themes announced in earlier work, but little systematic work appeared after 1882. So, while Holmes the legendary justice was a man of the twentieth century, Holmes the jurist thought, wrote, and spoke at the end of the nineteenth century. His reputation as a judge in the new century brought his previous scholarly writings from relative obscurity into a light that influenced subsequent understanding and appreciation to the very end of that century. Slogans from his pen have launched at least half a dozen movements in American legal theory in the twentieth century, but to understand what Holmes might have had in mind when he penned them, we must recognize that his feet were firmly planted in the previous century.

2.1.2. Orientation

Holmes's Civil War experience had a profound effect on his intellectual orientation and his personal attitude toward life and work. The casual brutality of war and the high-minded sacrifice of hundreds of thousands of lives in the name of irreconcilable values drove all idealism out of the young Holmes as well as any sense of the possibility of a benign, rationally ordered world. It left him with obedience to blindly-accepted duty, to which he remained fanatically committed throughout his life, as his only ideal, with a visceral and irresistible fascination with brute power, and with the root conviction that disagreements on moral or political matters run headlong and immediately into the wall of our "can't helps"—arbitrary, irreconcilable, and unshakeable preferences and prejudices. He was convinced that we reach the limits of rational public deliberation almost as soon as we express our disagreements, leaving us with just one alternative: to fight without rules or limits to the death. Power, not the discipline of reason, was sovereign in Holmes's universe. "The *ultima ratio*, not only *regum*, but of private persons, is force" (Holmes 1963, 38),[5] he insisted, and power, dressed in robes of duty, commands absolute allegiance.

This savagely skeptical orientation is evident in Holmes's writings throughout his life, in published essays, public speeches, and private correspondence.[6] Many commentators dress these comments out as philosophical convictions which, they claim, underwrite and offer justification for jurisprudential themes

[5] Holmes wrote to Frederick Pollock (Feb 1, 1920), "I believe that force, mitigated so far as may be by good manners, is the *ultima ratio*, and between two groups that want to make inconsistent kinds of world I see no remedy except force […]. [e]very society rests on the death of men" (Holmes 1942, 2: 36).

[6] See his "Gas Stokers Strike" (1873) (CW 1:323–5); *The Common Law* (1881) (1963, 37–8); "The Soldier's Faith" (1985) (CW 3: 486–91); "Ideals and Doubts" (1915) (CW 442–4); "Natural Law" (1918) (CW 3: 445–8). To Harold Laski he wrote, "when men differ in taste as to the kind of world they want the only thing to do is to go to work killing" (Holmes 1953, vol. 1: 116). See also his letter to Alice Green Aug. 20, 1909, (Novick 1995, 28).

and theses they find in his work. Some think that it is possible to tease out of such views an articulate metaphysics or epistemology (Cohen 1937, 300–3; Novick 1995, 24–8; Leiter 2000),[7] or at least a coherent social and political philosophy (Pohlman 1984).[8] However, to view them in this way gives his attitudes both less and more weight than they deserve: less weight, because they are not merely theoretical postulates, but rather components of a deeply engrained manner of relating to life and the world around him; more weight, because they do not take the shape of an articulated and defended philosophical foundation. These views tell us a great deal about Holmes the man, his character, and his personal approach to life, but much less about the content of his jurisprudential doctrines and modes of analysis. There is no philosophy here (except in the vulgar sense of a person's life attitude)—that is, no carefully thought-out analysis resulting in philosophical doctrines based on considered reasons. Not only is it nearly impossible to make any coherent sense of these attitudes as philosophical convictions, but it is hard to avoid the conclusion that Holmes embraced them and celebrated them in all their brutal unloveliness precisely to mask his own unwillingness to think deep or hard about the issues. These attitudes, no doubt, influenced the direction in which his jurisprudential thought ran—we will note some instances of this presently—but they do not give anything like a unified rational grounding for his views such

[7] Especially popular in recent years is the attempt to read Holmes as a pragmatist (Grey 1989; Menand 2001; Haack 2005), although the inclination to link Holmes to the pragmatists can be traced to mid-century (Wiener 1949) and perhaps earlier to John Dewey who quoted with apparent approval long portions of Holmes's "Ideals and Doubts" and "Natural Law" in his book *Experience and Nature* (Dewey 1929, 417– 8). As a matter of historical fact, Holmes separated himself from the newly established proto-pragmatist "Metaphysical Club" in Boston very shortly after it was founded. His motives for doing so are not clear, but I am inclined to think that, in the presence of powerful philosophical minds like those of Chauncey Wright and C.S. Peirce, Holmes's cavalier "philosophical" attitudes and his unwillingness to engage in serious philosophical argument could not survive. White reports that Holmes seemed intimidated at times by William James (White 1993, 92) and he may have sensed even more reason to feel intimidated by Peirce. He wrote to Felix Frankfurter in 1927, long after the Club was disbanded, that he suspected Peirce "regarded outsiders like […] me with contempt or at least indifference" (Novick 1989, 427).

[8] *Pace* Pohlman (1984) and Kelley (1985), Holmes's fundamental convictions are at most a caricature of Utilitarian moral-political doctrine. With Utilitarianism at its crudest, Holmes shared a willingness to sacrifice the goods, liberties, and even lives of individuals to larger social purposes (1963, 37–38; CW 3: 443). But what appealed to him in this thought was not service of overriding community good or general welfare in which each member had some part. The "majority" (or "greatest number") has claim on our attention, he felt, only if it holds power: "If the welfare of the living majority is paramount, it can only be on the ground that the majority have the power in their hands" (CW 1:325; CW 1: 268). Moreover, he had only a vague quasi-consequentialist idea in mind when he wrote of the claims of "social advantage" and "public policy." Due to his deep-rooted skepticism of all moral or political values, "social ends" claimed his allegiance as judge as well as jurist only because they were ends of the community to which he was blindly duty-bound. "I am so skeptical as to our knowledge about the goodness or badness of laws," Holmes wrote to Pollock, "that I have no practical criticism except what the crowd wants" (Holmes 1942, 1: 163).

that one could look to them to resolve conflicts or confusions at a less cosmic level of thought. Often Holmes is said to be "tough-minded," but "tough-nosed" might be a more accurate description, since he seems to have reverted to these shocking "can't helps" just when what was most needed was tough-minded, persistent, hard philosophical thought.

Holmes's philosophical views are not to be found in his cosmically skeptical rhetoric, I think, but rather in his thoughts on subjects closer to his experience and expertise. Even here, his impatience with careful argument and his unwillingness to do the hard work of elaborating what he sensed were brilliant insights[9] makes interpreting his grand assertions difficult; still, we have enough of argument and analysis to justify seeking coherence of his scheme of jurisprudential ideas. And what emerges is a view of law and the methodology of jurisprudence that, while neither revolutionary nor radically skeptical, represents a distinctive and original reworking of familiar jurisprudential ideas.

2.2. Common Law, Science, and Positivism

Already in Holmes's earliest theoretical writings we see an attempt, sustained and refined throughout his career, to combine themes from three sources: classical common-law jurisprudence, Austinian positivism, and late nineteenth century ideas of science and system. The result was a framing conception of law with two complementary parts: a *static* conception of law that anchored his studies in an understanding of law's general structure, and a *dynamic* conception, that enabled him to explain the growth and development of basic substantive principles of law. This complex conception of law, and the understanding of the process of judicial reasoning based on it, are of considerable historical and philosophical interest, but Holmes's project—combining elements of common-law, positivist, and scientific thinking—was not unique to late nineteenth century Anglo-American legal theory. Brief consideration of two other influential jurists writing in the early 1870s and well known to Holmes, Christopher Columbus Langdell and Sir Frederick Pollock, will help us better understand his distinctive theory of law.[10]

[9] Hart's judgment at the opening of his discussion of Holmes's *Common Law*, is not unjust. This work, he wrote, "resembles a necklace of splendid diamonds surprisingly held together at certain points by nothing better than string. The diamonds are the marvellous [sic] insights into the genius of the common law and the [...] dynamic of its growth […]. The string is the sometimes obscure and hasty argument, the contemptuous dismissal of rival views, and the exaggerations" that run through the work (Hart 1983, 278). Edward White, a very sympathetic reader of Holmes, adds that Holmes "was arguably more interested in letting his language, as distinguished from his evidence or his logic, carry his arguments" (White 1993, 480).

[10] Langell was Dean of Harvard Law School (1870–1895) and legendary creator of the case-study approach to legal education dominant in American law schools to this day. Pollock was a long-time friend of Holmes with whom he corresponded from 1874 until Holmes's death in 1832.

2.2.1. "Formalism" and Langdell's Science of Law

Exposing the evils of "formalism" was an obsession of twentieth century American jurisprudence (Stone 2002a, 166) and it was long thought that Holmes launched this "revolt against formalism" (White 1947). There is no doubt that, at least by the time he wrote *The Common Law* (1881), he was highly critical of certain formalist tendencies in legal theory and judicial practice, and his scathing review of the second edition of Langdell's *Cases on the Law of Contracts* (CW 3: 102–4; see below section 2.4.1) in 1880 put Langdell's jurisprudence at the center of this criticism.[11] Despite this criticism, the portrait of Holmes as the arch anti-formalist and Langdell as the arch formalist are caricatures of their views; indeed, as we shall see presently, Holmes and Langdell shared many views about the nature of law and the proper approach to its study.

"Formalism" has served for well over a century of American legal theory as a convenient term of abuse.[12] It refers to a connected set of views about law and adjudication that take shape largely in the eyes of its critics (Stone 2002a, 167). These views are sometimes attributed to legal theorists, most notably Langdell, but more often to working judges, to characterize either their explicitly expressed approach to judicial reasoning or their implicit practice. In sum, this critic-constructed doctrine holds, first, that law is regarded as (a) a rationally ordered system of principles, (b) structured as an axiomatic system with a small number of abstract concepts (or universal principles) at the apex, (c) where other principles and rules, extending to the most concrete ones, are derivable strictly by deductive logic, (d) the whole system being constructed *a priori* from strictly legal materials and hence without appeal to moral considerations or the political or social context in which the law operates. This view of law is then thought, second, to underwrite a descriptive (but also, by implication, prescriptive) view of legal reasoning according to which the body of law available for judicial reasoning is (a) complete and comprehensive (hence, "gapless"), and thus (b) sufficient to yield univocal, determinate results for every case brought to the court, which results (c) are determined solely by exercise of formal, deductive, or at least demonstrative and rationally compelling, reasoning, (d) without appeal to moral or other contextual considerations, and (e) are overridingly binding on judges in the face of any conflicting demands of justice or other considerations of morality.

Legal historians debate whether such views, taken together, were wide-spread in the late nineteenth and early twentieth centuries (said to be the Formalist Era

[11] Expressing a near century-long orthodoxy in the American legal academy, Thomas Grey (1983) represents Langdell as the primary spokesman for formalist orthodoxy in the nineteenth century.

[12] Only late in the twentieth century has it been explicitly embraced by some legal theorists, e.g., Schauer (1988) and Weinrib (1988). See below chap. 8, sec. 8.7.

in America). This debate is not our concern, except that it has uncovered a tendency amongst critics to attribute the whole package of views to their targets, when they detect hints of just one or a few of them. At the same time, critics themselves often accept one or more of the components while strenuously resisting others. This double-standard practice of formalism's critics may have been initiated and surely is exemplified by Holmes's criticism of Langdell.

Langdell's views,[13] outlined in the preface to his casebook (Langdell 1879, vii–ix), hardly add up to an articulated theory of law. His aim, rather, was to articulate a framework for *study* of law, which, especially in university-based law schools, must aspire to be a *science*.[14] By "science" he had in mind a rationally ordered, and systematically arranged, set of general principles or doctrines. His model was not an axiomatic system like geometry, as was often charged—"Law has not the demonstrative certainty of mathematics," he wrote (LaPiana 1994, 56). Rather, law could claim to be a science in his view because its doctrines formed a coherent, internally related body of basic principles with a kind of rational "integrity," which informs and grounds more concrete rules and decisions. Like a good common-law lawyer, Langdell thought that law's basic principles were not to be derived from universal first principles of natural law, but rather inferred "inductively" from decided cases, that is, from critical assessment of the reasoning in those cases. Since "each of these doctrines has arrived at its present state by slow degrees," determination and mastery of the principles is achieved through tracing their growth over time (Langdell 1879, viii). This is done with a keen eye to the facts of the case, and others analogous to it, informed by moral good sense (Kimball 2007, 376–82). Yet, the principles are answerable to the decided cases; the lawyer's task is to extract principles embedded in the cases—law as it is—not to construct some ideal set of laws to replace them.

This understanding of the task of a science of law led Holmes to blast Langdell as "perhaps, the greatest living legal theologian" (CW 3:103), by which he meant that Langdell was an uncritical apologist for the existing law.[15] This, of course, suggests that Langdell was sympathetic with one prominent theme of Austinian positivism—the alleged separation of law and morals—while at the same time embracing the common-law focus on principles embedded in case-law rather than the explicit dictates of the legislative sovereign.

Langdell's view of how law is best learned suggests a view of the nature of legal reasoning. In typical common-law fashion, he insisted that the way to master the general principles of some department of law is not to learn some abstract formulation, but rather to trace its development over time, working

[13] For a helpful summary of Langdell's view of law, see Lobban, vol. 8 of this *Treatise*, 205–7.

[14] In an address to the Harvard Law School Association in 1886, Langdell declared, "If law be not a science, a university will best consult its own dignity in declining to teach it" (quoted in White 1978, 220).

[15] A.V. Dicey turned this very charge back on Holmes's *Common Law*. See sec. 2.4.1 below.

closely with the cases to get a direct feel for how the principles do their work at the concrete level. The mode of reasoning of the legal mind involves concretely engaged judgment, not manipulation of or deductions from abstract concepts. With classical common-law lawyers, Langdell held that legal judgment, adequately trained and having full mastery of law's principles, would be able to locate a reasonable, legally-grounded, determinate solution for any legal problem brought to it. In that sense, he assumed (or perhaps rather he regarded as the working regulative principle of legal reasoning) that the law is complete and sufficient without need for supplement. However, he did not shy from the conclusion, shared with positivists, that the determinate outcome favored by trained and disciplined legal judgment might not square with what justice, independently considered, might call for. What the judge should do in such cases, he thought, was a question separate from the question of what the law calls for; it is question for justice rather than law. And his view on the latter question was that justice more broadly considered calls for decisions consistent with the conclusions drawn by trained legal judgment even in the face of contrary demands of more particular justice (Kimball 2004, 279).

From this sketch, Langdell emerges as a half-hearted formalist at most. He wove together common-law and positivist ideas with a familiar conception of science into his theoretical framework for the study of law. In general, this view was not widely distant from Holmes's own.

2.2.2. Pollock's Predictions

On the eve of a life-long correspondence with Holmes, Frederick Pollock, legal historian and jurist,[16] wrote two remarkable essays, "Law and Command" (1872) and "The Science of Case-Law" (1882, first published 1874). Holmes was probably familiar with the latter (Pollock refers to it in a letter to Holmes dated July 26, 1877 [Holmes 1942, 7]), and he wrote an extended notice of the former essay for the *American Law Review* (of which he was editor at the time) shortly after it was published (CW 1: 294–7). Holmes opened his notice with the observation that Pollock's views "more or less coincide with" opinions he had laid out in a course of lectures at Harvard before Pollock's piece appeared (CW 1: 294), and then, in characteristic fashion, he proceeded to set out his own views rather than Pollock's. The views overlap at several points, but they also differ in tone and substance.[17] Pollock's essays have long since fallen from view, but they offer valuable insights into Holmes's developing jurisprudential

[16] Pollock (1845–1937) wrote with Maitland the classic early history of the law of England (Pollock and Maitland 1898) and textbooks on contracts, torts, partnership, and jurisprudence. He taught jurisprudence at Oxford from 1883 to1903.

[17] Commenting on Holmes's notice, Pollock notes one point of agreement without commenting on what are some obvious points of difference (Holmes 1942, 3).

views and help us locate them in the domain of Anglo-American legal theory in the last third of the nineteenth century.

Among English lawyers in the late nineteenth century, it was perhaps a self-deprecating commonplace to admit that common law was "a chaos with a full index" (Holland 1870, 171; Pollock 1882, 238). But Pollock was keen to show in these two essays from the early 1870s that a genuine science of (common) law was possible. He understood "science" to refer to two complementary rational activities or methods: first, the activity of systematically arranging the concepts, doctrines, and principles of some body of knowledge (Pollock 1872, 189–90) and second, the process of reasoning (rational method) by which the body of knowledge developed. These complementary activities presented the body of knowledge in different lights, the former static and orderly and the latter dynamic, growing, and harboring tensions that spur growth. These two understandings of science informed Pollock's early articulation of the notion of law.

In "Law and Command," Pollock acknowledged the importance of systematic analysis and arrangement of central concepts of law as advocated by Austin (see chap. 1, secs. 1.4.1 and 1.4.2). For this project to succeed, a broad view of the field of law must be taken, he argued, but Austin and his followers had taken a decidedly narrow view. Austin's definition reflected the perspective of a member of an advanced political community who, "having acquired a sense of independent power, comes to set the State over against himself as an extraneous agency." Such a person, when informed of his duty under law, asks " 'Who bids me do this? In what capacity? and what will happen if I do otherwise?'" (Pollock 1872, 191). On Pollock's view, Austin's definition presupposed a centralized sovereign law-giving and law-enforcing agency and takes the perspective of subjects who view the actions and directives of that agency merely as exercises of "other people's power," subjects later epitomized in Holmes's image of the "bad man."[18] This perspective may be useful for understanding certain features of modern legal systems, Pollock conceded, but it mistakes the familiar for the fundamental. "The leading ideas of a science ought to be expounded not only according to the form they have now assumed, or are tending to assume," he insisted, "but in correspondence with their reason and inner development" (Pollock 1872, 190). To do so we must look beyond the near and familiar to forms of law more remote in time and political culture. When we do, we soon realize that Austin's identification of law with enforced commands of a supreme governing power distorts rather than illuminates the nature of law.

Following Maine,[19] Pollock (1872, 192–9) argued that Austin's definition induced blindness to customary law. On Austin's account, custom acquires the status of law just when its violations are enforced by courts of the sovereign. As

[18] Holmes's "bad man" is "an enduring symbol of a positivist view of law seen as other people's power" (Twining 2000, 111).

[19] See Lobban, Volume 8 of this Treatise, secs. 7.1–7.3.

an account of the place of custom in English law this proposal fails, he argued, because it gets the logical order reversed: it is not that custom is law because courts enforce it, but rather courts enforce custom because they acknowledge its prior status as law. Moreover, we know of actual examples of societies which lack the centralized (adjudicative and coercive) agencies of the modern state, but which are ordered effectively by custom; and it is sheer prejudice to deny customary orders the status of legal systems. To this familiar criticism of Austin (see chap. 1, sec. 1.1.2.1), Pollock added that Austin's definition entails an absurd paradox. Since custom exists as law on Austin's account only if enforced by sovereign courts, it follows that customary arrangements, which are so clear and effectively engrained in the minds and behavior of those governed that violations by them are rare, fail to qualify as law precisely because of their success (ibid., 194–5). This points up the fact, he concluded, that Austin's view of law is essentially negative, recognizing something as law only when it is broken and an external power must be enlisted to repair it. Law is represented "as an abnormal restraint [rather] than as part of the normal development" and functioning of society (ibid., 203); and thus "our attention is fixed on what seems the arbitrary determination of the lawgiver instead of being directed beyond it to the causes which make the action of the lawgiver a necessary constituent in the life of the nation" (ibid.).

This problem is fundamental, for not only does the Austinian definition misdirect our attention and distort our grasp of the depth of law's penetration into social life, but it also makes scientific understanding of law impossible: "Every act of legislation assumes the shape of an isolated exercise of sovereign will, and the systematic unity which is the real and informing spirit of the body of law finds no recognition" (ibid.). Without resources for representing law as a systematic unity, we are encouraged to view the aggregate of laws as just one thing after another—arbitrarily, not rationally, connected.

Pollock did not offer a positive conception of law in "Law and Command," but he offered something approximating it in "The Science of Case-Law" (1874) and in the opening chapter of his *First Book of Jurisprudence* (1896). In the latter work, Pollock (1896, 7–8) first introduced an "abstract" notion of law, according to which law is the regime of rules and standards that are in force in a community and that are regarded as binding on its members qua members. Building on rather than supplanting the abstract notion is law "in a concrete sense" (ibid., 14)—that is, *laws*, especially as viewed by modern (English) lawyers.[20] Law in

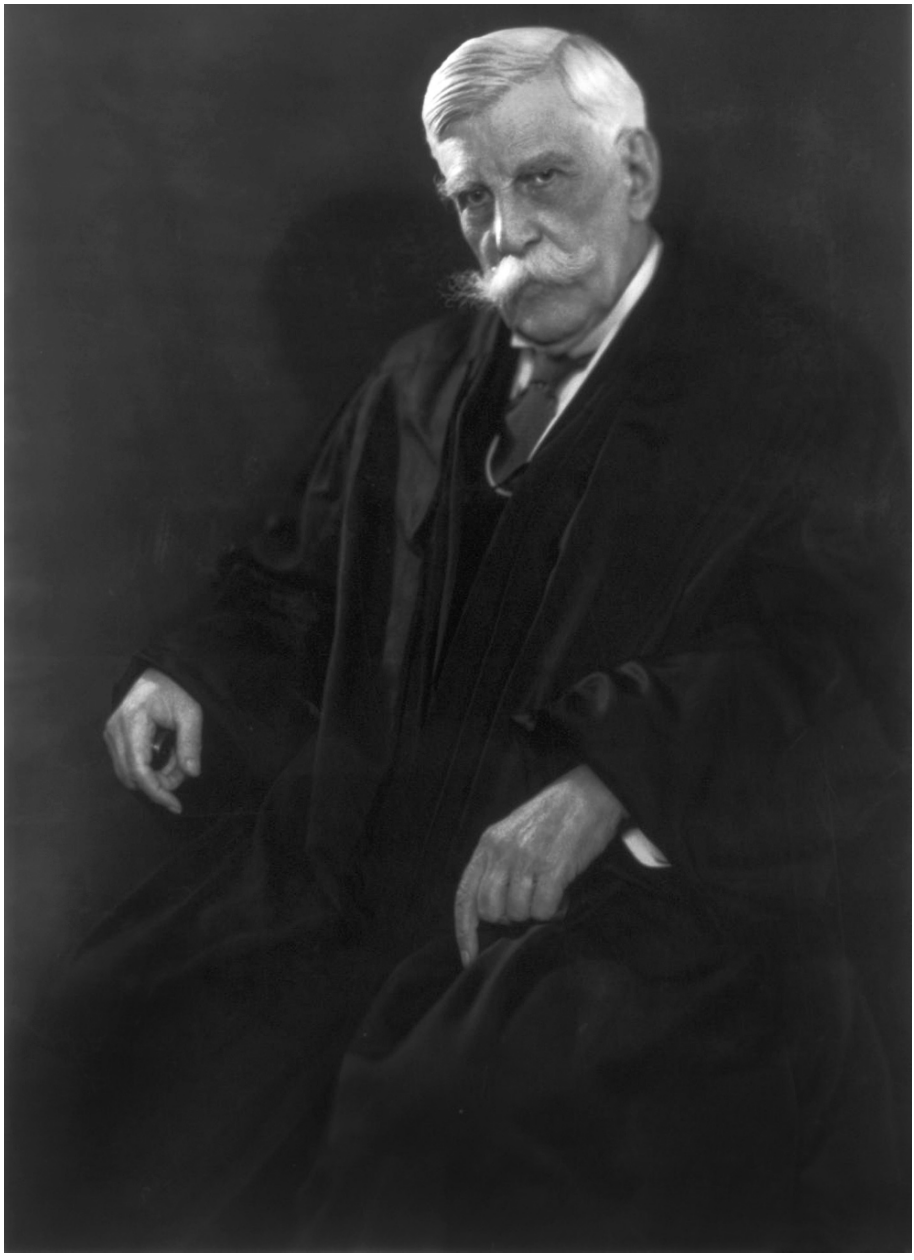
[20] Pollock's usage here is somewhat unusual for an English legal writer at this time, but I think he has in mind a two-fold distinction: (a) between *law* (*ius*) and *laws* (*leges*) and (b) between a general notion of law and one specific to the perspective of the professional (English) lawyer. His use of the qualifiers "abstract" and "concrete" suggest the former and his explicit endorsement of Holmes's account of the professional lawyer's notion of law (CW 1: 295) in a letter of 1874 (Holmes 1942, 3) supports the latter.

the concrete sense includes any rule "having the nature of law in the abstract sense" which is expressly posited by the supreme power in the state, exercising its "creative or at least formative authority and discretion" (ibid.). Intentionally left out of both notions is explicit reference to formal sanctions, for, according to Pollock, they are not essential to law (ibid., 23–5). Of course, a rule or prescription is law only if it is, and is regarded as, binding by those subject to it, but in Pollock's view the sanctions can range all the way from "acts of violence" to "general and open reprobation" to "obscure monitions of conscience" (ibid., 25). Thus, Pollock concluded, the Austinian positivist definition of law even fails to capture the narrower, professional lawyer's notion of law (and contrasts sharply with Holmes's account of it, see sec. 2.3.2). Law in the concrete sense is not simply what the state commands and enforces, for "law is enforced by the State because it is law; it is not law merely because the State enforces it" (ibid., 27).

A genuine science of law is possible, in Pollock's view, because the principal means by which it grows and develops is a method of reasoning with the strongest credentials as scientific. The mark of a modern science, Pollock argued, is its ability to generate predictions the credibility of which is determined by the strength of the evidence on which they rest. The ultimate object of natural science is to predict events; likewise, the object of legal science—the science of lawyers—is to predict decisions of courts (Pollock 1882, 238). Scientifically credible law seen from the perspective of the lawyer is a matter of making predictions of what the courts will do. Readers in the twentieth century who encountered this thought in Holmes's "Path of Law," (written two decades after Pollock's essay) found it original and shockingly radical, but the idea, it appears, was in the air and not all that radical.[21] Indeed, in Pollock's hands, the thought was part of a brilliant *apologia* for the fundamental rationality (the "scientific character"—ibid., 237) of the common-law method. We can gain insight into Holmes's use of this idea by looking at Pollock's.

Predictions in natural and in legal science are possible only on the assumption of uniformity—uniformity of nature in the one case and uniformity of law in the other. The nature of these "fundamental axioms" is different, for the former is an assumed truth of nature, whereas the latter is "conventional," based ultimately on considerations of general policy (ibid., 254). Moreover, the latter is a *norm* binding on judges, an "ideal standard" that makes possible predictions of behavior because it is internalized by judges (ibid., 251). Pollock made clear that his argument for the scientific credentials of the common-law

[21] Pollock uses the term quite unselfconsciously in a contemporaneous work that did not seek to exploit the alleged analogy between the natural and legal sciences: "Case-law gives particular instances and concrete analogies, from which general rules may be inferred with more or less exactness, and their application to new instances predicted with more or less certainty" (Pollock 1877, iv).



Oliver Wendell Holmes, Jr. (1841–1935)

method depends on the *analogy*, but not the *identity*, between the two methods. The "axiom" of uniformity for law is the "understanding that the court *shall* follow the authority of decisions formerly given on similar facts" (ibid., 240, emphasis added).

Thus, lawyers trying to work out for their clients the legal consequences of their actions, relationships, or current legal conditions, predict what courts are likely to hold in view of what has been decided in similar cases and for this purpose they go to reports of decided cases (ibid., 243). Pollock implicitly assumed (what would be obvious to any reader, he believed) that courts are expected to make their decisions based on reasons drawn from law embedded in past decisions, so it makes sense to look for the reasons of the decisions by considering the cases they would consider in seeking legal grounding for the decisions. Thus, what makes decisions predictable, what funds the legal scientific enterprise of making predictions, is the fact that courts are bound to decide on the basis of reasons or rules drawn from past cases. The predictions, then, are predictions about what courts will do (decide), but the grounds of the predictions are rules; they are *normatively grounded predictions*. Moreover, the predictions are not themselves law, but rather they are based on law, namely, the rules inferred from past decisions that ground the predictions.

Of course, lawyers and courts often face novel cases, but, Pollock argued, the common-law method in such cases is just a natural extension of the process in straightforward cases (ibid., 247–9). First, the consulting lawyer gets a full and clear view of all facts that are likely to be material to the case and then provisionally selects a comparison class of cases; with respect to this comparison class the lawyer seeks out a general rule that arranges and explains the cases, highlighting the truly similar ones and distinguishing them from the materially dissimilar. Doing so, the lawyer will treat express formulations of such rules in the opinions with great circumspection, focusing not on the rules thus formulated but rather on the cases from which they are inferred. After formulating, testing, and reformulating such rules the lawyer finally will select the one in which he or she has greatest confidence (although this may fall well short of certainty). (Even the most strongly supported rule may not square with all the decided cases, however, so the lawyer must entertain the possibility that the recalcitrant cases were wrongly decided and thus treat them as "not law.") On the basis of this general proposition, the lawyer makes a prediction regarding the probable legal consequences in the case in view.

Judges follow the same method, although they are in a position to *determine* rather than merely predict the consequences (ibid., 250–1). They make predictions just as lawyers do. This is neither naïve, nor confused, nor paradoxical, but precisely what he must say at this point, for the rationality of the process assumes that there is no fundamental difference between the perspective of the lawyer and the judge; on the contrary, it is precisely because lawyers and judges analyze the same cases from the same point of view that lawyers can

make their predictions with confidence appropriate to the strength of the arguments and grounds of the rules on which they are based. The "predictions" at the heart of legal science, in Pollock's view of it, are anticipated normative conclusions based on general reasons (normative predictions), not descriptive behavioral predictions. Both lawyers and judges are in the business of making them; judges, however, take the process one step further and make a decision on the basis of these predictions (or, rather, on the basis of the rules or principles on which the predictions likewise are based).

These features of common-law method—that its fundamental axiom holds courts to making decisions on the basis of reasons drawn from cases decided in the past, and that lawyers and judges are engaged jointly in the activity of discerning those general considerations as bases of predictions or decisions—make possible the systematic arrangement of legal doctrines in an intelligible order, in Pollock's view. "The generalities which make it possible to state the law in a connected form are supplied by a process of discussion, inference, and comment carried on partly by judges themselves in dealing with the cases, partly by private text-writers" (Pollock 1877, v). Thus, the two kinds of "scientific" activity characteristic of common law are complementary.

However, despite the common law's "scientific" credentials, Pollock recognized that lawyers and judges remain justly wary of general theory. They are more comfortable, in general, reasoning "from particulars to particulars" (*a similia ad similibus*) and avoid hasty generalizations (Pollock 1882, 256). Also, although they understand that general principles of law have their uses, they regard them as either empty or highly misleading at the point of decision. They are "hopelessly misapplied" by those who "make them a starting point of deduction for purposes quite foreign to their true scope" (ibid.). It is a kind of fallacy to regard such general principles as providing all the support one needs to ground a particular decision. To rely on deduction from such general propositions is to misrepresent the kind of reasoning, rational and scientific though it may be, that is characteristic of sound common-law method. Competent judges and counsel, even when they profess to deduce conclusions from general propositions, "think not so much of the general proposition as of the decided cases by which they suppose it to be justified"; thus, "the rightness of the actual results does not depend on the form in which the general proposition is expressed" or on the formal inferences drawn from it (Pollock 1882, 257). Those who understand the truly scientific nature of common-law method need not rely on this fallacious appeal to form, Pollock concludes.

Pollock, Holmes's life-long friend and correspondent, articulated classical common-law jurisprudential themes in an idiom shaped by Austinian positivism, Maine's historicism, and popular, if naïve, notions of science. Langdell, an associate if not a friend of Holmes, articulated similar themes in much the same idiom. Their work, written in the early 1870s, brings to light the framework of ideas within which a common-law trained and philosophically inclined jurist

would begin thinking systematically about law as he knows it. Each of them made a separate peace with positivism and historicism, the contending jurisprudential paradigms of the time. Holmes, writing at the same time, did the same.

2.3. Holmes's Static Conception of Law

In the early 1870s, Holmes sketched a conception of law which framed and anchored his jurisprudential thinking thereafter. Within the frame of this static conception of law—or rather, conception of law viewed synchronically—Holmes developed a complex, dynamic understanding of law. At the root of these complementary notions were two primitive and largely unexamined thoughts: that law is fundamentally a matter of the activity of courts and that law is fundamentally a matter of power. Power, we have already noticed, was for Holmes the starting point of all explanations of social phenomena. "The *ultima ratio* [...] is force" (Holmes 1963, 38), he maintained, and he regarded the law as the locus of force or power, both as instrument of the dominant force in society and as the result of the struggle for dominance among competing centers of power (CW 1: 325). So, Holmes associated law with power, but the basic common-law orientation of his mind directed his attention to the exercise of power by courts of law. This orientation, rarely acknowledged by readers of Holmes, colors all of this legal thought. To understand his complex two-fold conception of law we need first to sketch a profile of this orientation.

2.3.1. Common-Law Orientation

Holmes opened his first publication with a classic characterization of common-law method familiar from our discussions of Langdell and Pollock. Courts decide "the case first and determine the principle afterwards," he asserted. Their decisions emerge from intuitive ("obscurely felt") judgments immersed in the particular facts of the cases in front of them and disciplined by understanding of a vast body of previously decided cases. Lawyers and judges "frequently see well enough how they ought to decide on a given state of facts without being very clear as to the *ratio decidendi*" (CW 1: 212–3). Indeed, they are wary of premature articulation of the general rule they intuitively grasp and confidently apply: "just in proportion as a case is new and therefore valuable, no one, not even the judges, can be trusted to state the *ratio decidendi*" (CW 1: 242).

Although Holmes did not hesitate to call judges "law-makers" (CW 1: 223), he accepted the familiar common-law view that general rules of law emerge from decisions over time through a process in which many judges participate. "It is only after a series of determinations on the same subject-matter, that it becomes necessary to 'reconcile the cases,' […] that is, by a true induction to state the principle […] A well settled legal doctrine embodies the work of many minds and has been tested in form as well as substance by trained critics

whose practical interest it is to resist it at every step" (CW 1: 213). Moreover, general principles are never greater than the cases they summarize. "A generalization is empty so far as it is general. Its value depends on the particulars which it calls up to the speaker and hearer" (CW 3: 419). Thus, "to make a general principle worth anything you must give it a body" and the way to do that is to grasp "how it gradually emerged as the felt reconciliation of concrete instances no one of which established it in terms" (CW 3: 477). This is precisely what Langdell's case-book method sought to teach law students and Holmes praised his approach for this reason (CW 1: 213, CW 3: 477–8). Law, seen through this lens, is essentially dynamic and always changing, portions of it becoming more or less settled after "a series of successive approximations" (CW 1: 213), other portions still maturing. Nothing is absolutely fixed. Decisions of the court provide the authoritative materials from which an understanding of law begins and to which it is always answerable, but that understanding is the product of a keen grasp of the facts of particular cases, an ability to uncover the general legal significance in decisions made on those facts, and an appreciation of the moving, dynamic character of this system of general propositions.

Systematically arranged general propositions have a role to play in this approach to law, as Holmes understood it. In "Path" he maintained that we needed at that time more theory, not less (CW 3: 404) and his early essays were addressed to the problem of finding a suitable basis for a systematic arrangement of law (CW 1: 212–21, 326–34). Throughout his scholarly career he sought to articulate a sufficiently complex, nuanced, and practically usable general theory of law. However, his common-law orientation made him constantly wary of theory in two crucial respects.

First, he insisted that a theory of law is a theory of a constantly changing, fundamentally practical affair, rather than a set of well-behaved abstract concepts. "Law is not a [abstract and formal] science, but is essentially empirical," so, "although the general arrangement should be philosophical, even at the expense of disturbing prejudices, compromises with practical convenience are highly proper" (CW 1: 214). That is, any general scheme of concepts or doctrines must accommodate adjustments made at the concrete level to pragmatic demands on particular decisions. Theoretical consistency and internal coherence of doctrine can only be approximated because law is always growing, adapting to changing social conditions and changing understandings of social needs and values. "[B]y the necessity of its being [law] is always approaching and never reaching consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other which have not yet been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow" (CW 3: 75–6; 1963, 32).

Second, general propositions, however useful they may be at the theoretical level, must be treated circumspectly at the point of decision. "General propositions do not decide concrete cases," Holmes famously wrote (Holmes 1905, 76).

He added, in a letter to Laski, that you can "admit any general proposition you like" and you can still "decide the case either way" (Holmes 1953, 1: 243). These sentiments, which we already saw in Pollock's essay, do not express any deep-going skepticism about the possibility of rules guiding judicial deliberations, but only a typical common-law wariness about the role of general principles, and appreciation for the crucial role of trained judgment, at the point of decision.

The basic common-law orientation of Holmes's mind inclined him to focus his attention on the activities of courts and their deliberative practice; his obsession with the nexus between law and power inclined him to Austinian positivism. The result was a complex theory of law with static and dynamic components. The static component grew from an explicit critique and implicit appropriation (or crude reformulation) of elements of Austin's positivist understanding of law.

2.3.2. Enforcement Positivism

Holmes began his scholarly career with a critique of Austin that recalls (although differs importantly from) Pollock's critique in "Law and Command" (CW 1: 215, 294–5). Austin's definition of law as the command of a political superior to a political inferior enforced by threat of sanction focuses attention at the wrong point, Holmes maintained, for there can be law without political sovereignty and without explicit commands. For something to be law it is not important from whom or what it issued (origin), but only the "the definiteness of its expression and the Certainty of its being enforced" (CW 1: 215). The only sovereignty that matters, in his view, is the power to compel obedience; so, "the will of the sovereign is law, because he has the power to compel obedience or to punish disobedience, and for no other reason" (CW 1: 294).[22] Holmes insisted that law in a wide sense is found wherever clear and definite rules are effectively enforced; thus, ordinary social customs, law merchant, and international law are properly considered law as much as statutes. "Why should not a rule, which is more compulsory than many statutes in practice, be recognized as binding in law?" (CW 1: 330; see also CW 1: 215, 295). (Note Holmes reached Pollock's conclusion regarding the "abstract" notion of law, but despite his insistence, contra Pollock, that coercive enforcement is essential to law.)

[22] Unlike other readers of Austin, Holmes did not confuse Austin's notion of sovereignty with the power to compel obedience (see chap. 1, sec. 1.1.2.2); he simply insisted that Austin was mistaken to think that law-relevant sovereignty involved anything other than the power to compel obedience. Sovereignty, he insisted, is simply a matter of fact about who or what has supreme power, which always bottoms out in naked coercion (CW 1: 268, 294, 325). Holmes also thought of sovereignty as ultimate, final, and supreme authority and thought that that notion had a clear normative dimension. However, he instinctively believed, but never bothered to argue, that such authority is just a matter of force and the ability to coerce.

However, Holmes hastened to add that law, in the lawyers' more limited meaning, focuses strictly on rules enforced *by courts*. "Rules not enforced by [courts], although equally imperative, are the study of no profession" and in particular not the concern of lawyers; from this he concluded that the province of jurisprudence is restricted to "lawyers' law" (CW 1: 215). Law, in neither sense, is in Holmes's famous phrase "a brooding omnipresence in the sky"—a set of authoritative or binding norms neither attached to nor enforced by some controlling authority—and law in this narrower sense is always law of some sovereign state (Holmes 1917, 222). Law "does not exist without some definite authority behind it […] the authority and the only authority is the State" (Holmes 1928, 533, 535).

Thus, law, for the purposes of jurisprudence, is what courts in sovereign states enforce and "the only question for the lawyer is, how will the judges act?" (CW 1: 295). Anticipating by twenty-five years his famous declaration in "Path" (CW 3: 391, 393), Holmes here located the business of lawyers in predicting how the courts will act, adding that they do so by exploring "motives" for judicial decisions. We have learned from our reading of Pollock's essay that we must deal carefully with talk of "predictions" and a like caution applies to our reading of "motives." Holmes made clear that the predictions lawyers make are not based on "singular motives" of a given judge, like "his gout, or the blandishments of the emperor's wife,"[23] but rather on constitutions, statutes, customs, and precedents (CW 1: 295). "Motives" of this kind are grounds for lawyers' predictions because they are grounds for judicial decisions. Holmes wrote,

> It is clear that in many cases custom and mercantile usage have had as much compulsory power as law could have, in spite of prohibitory statutes; and as to their being only motives for decision [and not law proper] until adopted [as Austinians insist], what more is the decision which adopts them as to any future decision [i.e., precedent]? What more indeed is a statute; and in what other sense law, than that we believe that the motive which we think that it offers to the judges will prevail, and will induce them to decide a certain case in a certain way, and so shape our conduct on that anticipation? (CW 1: 295)

Thus, that which is law in the broad sense becomes lawyers' law when it provides a sound basis for predictions about how courts will decide because courts take them as grounds for their decisions.

Moreover, these "motives" are themselves rooted in matters of fact about rules that effectively govern people's lives. He defended this thesis in "A Theory of Torts" (CW 1: 326–34), in the course of an attempt to ground judgments of negligence in community standards of due care. In negligence cases, he pointed out, the question of whether the defendant's behavior was negligent is often left to the jury. In common-law parlance it is regarded as a matter of

[23] Here Holmes anticipated and rejected the extreme version of the legal realist's prediction theory associated with Jerome Frank. (See, below, chap. 3, section 3.3.2.1).

fact rather than of law. But this characterization is misleading, he argued, for it is simultaneously a determination of fact and of law. What the jury is asked to do is to find and apply the community's standard of due care in the relevant circumstances and that just is to find and apply the standard of law for such cases, although its being the standard is a matter of fact, namely, the fact of the standard's being regularly followed and held to be binding on members of the community. This inquiry of fact is an inquiry about the fact of the existence and meaning of a rule of law. Law directs and influences the conduct of ordinary people by providing them rules and motives for compliance, he argued, but it can do so only if the existence and the content of the rules have been established, and establishing the existence and meaning of a rule calls for a determination of fact (CW 1: 328). So, for example, enacted law rests on facts about its enactment and the words of the statute; and for a rule of precedent, the fact of the decision by some prior court, and the fact that the present case is not distinguishable from it, must be established. The same is true when a rule of foreign law is material for deciding a case. The law does not consist in these facts, Holmes maintained, but rather in the rules that these facts "suggest." (I take him to mean that the rules arise from these facts or are somehow grounded in or perhaps validated by them.) Once we recognize this, we can see that not only are statutes, precedents, and rules of foreign law rooted in such facts and figure in legal reasoning in this way, but so too are other standards. It is not necessary to restrict attention to acts of governmental agencies; moreover, the rules "may not even owe their compulsory power to their recognition by the courts." This is the case for customs in the public at large, as well as the customs of a special class or group, like the custom of merchants, (CW 1: 329, CW 2: 197). In each of these instances, the rules directing the behavior of individuals and providing "motives" for decisions of the court are rooted in matters of fact.

This is a peculiar argument and much about it is obscure, but what is clear is that Holmes assumes that the "motives" which direct court (and jury) decisions are standards of various kinds which themselves are grounded in or "proved" by appeal to matters of social fact of various kinds, facts that establish the existence and meaning of the standards. Law functions "as an agent," that is, as something that directs the actions of others, but it does so just insofar as it consists of rules that are demonstrably in force in a community and effectively enforced. Such rules provide the grounds for predictions of how the courts (or juries) will decide in particular cases.

We can now draw together the various strands of Holmes's enforcement positivist conception of law. On this view, law, generally (or "philosophically") speaking, is a matter of rules or standards that direct behavior and promise unwanted consequences for violations and provide motives for behavior of law-subjects and for decisions of those charged with enforcing them. The key and absolutely fundamental fact about them *qua law*, is that they are effectively enforced by coercive means if necessary. A rule is not law if obedience to it

cannot or will not be compelled. These rules arise from, and so are rooted in, two kinds of facts: facts that establish the rules—facts of enactment, previous official decision, or widespread practice—and facts of the effective enforcement of the rules. Law in the lawyers' sense consists of rules of this kind, but only those which (1) are enforced by courts backed by the full coercive power of the state and (2) figure as "motives" (i.e., reasons) for the courts' decisions. Lawyers from their distinctive point of view seek to predict for their clients the decisions of courts, which exercise the coercive power of the state by looking to the rules drawn from the sources courts are most likely to rely on.

Thus, if we are not trying to be careful or precise, we can say that law, from the lawyers' point of view, is a matter of predictions of what the court will do in fact, as it exercises public force. But we should also understand that such predictions are in Holmes's understanding (as in Pollock's) normatively based predictions, that is, predictions based on attributing to the judges reasons for their decisions provided by rules drawn from sources like constitutions, statutes, precedents, and customs. These are the sources lawyers look to because they know that they are the sources to which the courts look for rules of decision.

This conception of law, like Pollock's, shows marks of the common-law mind from which it sprang, but unlike Pollock's it is much more deeply influenced by the root notion that law is fundamentally a matter of the exercise of power. In this respect, Holmes's conception of law looks like a crude version of positivism. All the nuances of Austin's and Bentham's notions of sovereignty are washed out and attention is focused exclusively on the power to compel obedience. But in other respects, Holmes's static conception anticipates some elements of the positivist jurisprudence of Holland and even Salmond (see chap. 1, secs. 1.1.1 and 1.3.2). He shifted the center of the conception from sovereign legislative activity, as in Austin's definition, to activities of the court and maintained that rules of "lawyers' law" are rooted in matters of social fact, the legal significance of which is determined by the fact that courts tend systematically to rely on them. This is not yet the positivist doctrine of sources grounded in the courts' practice of recognition and use, suggested by Salmond and later developed by Hart, but it is kin to it, although the kinship is that of an unselfconscious and somewhat naïve ancestor.

2.3.3. Law, Morality, and the Bad Man

Seen in light of this conception of law, certain notorious or puzzling features of Holmes's provocative discussion in "The Path of Law" can be explained. For example, we can explain why Holmes thought that the place for law students to look for the soundest bases for predictions is the set of books of case reports, treatises, statutes, and the like extending back for over 600 years (CW 3: 391). This is a reasonable suggestion, on the enforcement positivist conception, because the task is predicting decisions of courts based on rules or standards on

which those decisions rely, and the courts will go to these sources for those rules and standards (when there are rules for such decisions to be found). The predictions are not behaviorist, but normative, law-based. Lawyers can look to those sources for rules that can be extracted from them for predictions because they can reliably (but, of course, not with certainty) assume that courts will also look to those sources and extract rules from them by the same methods.

We can also explain why Holmes limited his attention to predictions of the decisions of courts, which seems arbitrary if the concern is, as he says in "Path," "the incidence of the public force" (CW 3: 391). The reason is that his positivism still moved within a basically common-law jurisprudential framework and the focal point within that framework is the courts; the jurisprudential perspective was that of lawyers and judges working within the practice of law, not social scientists standing outside it.

Finally, Holmes's notorious "bad man," who makes his first and only appearance in the Holmesian *corpus* in "The Path of Law," can be seen as a natural, if provocative, extension of the enforcement positivist conception of law sketched in these early essays. In "Path," Holmes urged law students to take up the perspective of the man "who cares only for the material consequences which [...] knowledge [of the law] enables him to predict" (CW 3: 392) to help them avoid making common mistakes as they seek to identify the law which will determine legal consequences of their clients. The bad man's perspective is a heuristic device for a practical, client-focused study of law. It is not a rule for the brotherhood of lawyers; neither is it a guide for the judge. Viewing the court from the bad man's perspective, Holmes believed, would lead the student-lawyer to probe the actual thinking of the judges, not the thinking they would hope the judges would engage in. It would lead them away from considerations external to the practice and focus them on the sources that courts actually consult and the rules they are likely to extract from them by means familiar to judges and lawyers alike.

It is important to see that the bad man perspective does not provide a framework from which enforcement positivism can reasonably be inferred. On the contrary, the usefulness of the bad man *presupposes* the truth or at least the practical reliability of that conception. This is due to the fact that if law cannot be reliably extracted from sources without attention to considerations other than merely the material consequences of the imposition of force, then the bad man's perspective is ill-adapted to the project of uncovering the law precisely because critically important considerations will not be in his line of vision. The bad man's perspective, then, is a practically useful heuristic device for lawyers only if Holmes's enforcement-positivist conception of law succeeds in drawing the distinction between law and morality is drawn in the right place.

This perspective may not even be adequate to the task of predicting court decisions once we enrich Holmes's static conception of law with his equally important dynamic conception, for, as we shall see, the principles of growth at

work in law viewed diachronically involve a complex interaction in judicial reasoning between strictly formal legal materials and methods, on the one hand, and appeals to considerations of "policy," on the other. Because the bad man is focused solely on the material consequences of his actions *for himself*, his perspective systematically excludes both "morality" in the narrow sense Holmes usually had in mind and most other matters of public policy.

2.4. Holmes's Dynamic Conception of Law

According to Holmes's static conception, law is the set of rules and standards that judges draw from sources, viz., precedent, statutes, constitutions, customs, and the like. However, he believed that no static, momentary perspective on law can yield an adequate understanding of law, because law only reveals its nature through its development over time. "In order to know what [law] is," Holmes wrote, "we must know what it has been, and what it tends to become" (Holmes 1963, 5). Thus, Holmes completed his framing conception of law with an account of the dynamic forces that shape law's growth and development. The drive for internal consistency or "integrity" (CW 3: 103) of the set of standards drawn from sources plays a vital role in this process, but it was not the only determining factor. Indeed, Holmes famously announced in the opening pages of *Common Law* that the *life* of the law is "experience."

2.4.1. The Life of the Law

Holmes opened his magnum opus with a passage which, to readers fifty years later, sounded a manifesto for a radical new jurisprudence.

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. (Holmes 1963, 5)

The direct target of the criticism in this passage was German legal science of the 1870s which Holmes regarded as excessively formalistic (see sec. 2.2.1), but his indirect target was what he took to be Langdell's jurisprudence (Reimann 1992). Holmes wrote a more radical-sounding version of this passage in his review of the second edition of Langdell's contracts casebook, published in 1880, the year *Common Law* was published. Holmes complained that Langdell was interested only in "the formal connections of things, or logic, as distinguished from the feelings" which in fact "have actually shaped the substance of law." However,

> The life of the law has not been logic: it has been experience. The seed of every new growth [of the law] within its sphere has been a felt necessity. The form of continuity has been kept up by

reasonings purporting to reduce every thing to a logical sequence; but that form is nothing but the evening dress which the new-comer puts on to make itself presentable according to conventional requirements. The important phenomenon is the man underneath it, not the coat; the justice and reasonableness of a decision, not its consistency with previously held views. No one will ever have a truly philosophic mastery over the law who does not habitually consider the forces outside of it which have made it what it is. […] The law finds its philosophy not in self-consistency, which it must always fail in so long as it continues to grow, but in history and the nature of human needs. (CW 3: 103)

Similarly, in "Path," Holmes claimed that, while the public language of judicial decision-making is the language of "logical form," behind this form always lies a more or less articulate judgment regarding competing considerations of "policy" (CW 3: 396–8).

Like so many of Holmes's riveting passages, the above passages are more inspiring than enlightening, and their imprecision fostered in the twentieth century jurisprudential movements with sharply different platforms. A more sober and more enlightening view emerges, however, from Holmes's subsequent discussion and argument in *The Common Law*. In the second passage above, Holmes seems to announce a project of looking to "forces outside [the law]" like social and political history, sociology, and anthropology, studies that put doctrinal development aside and look to alleged deep structures and forces in society to explain the development of law's substance. However, Holmes never even attempted such a project;[24] and, as many close readers of *Common Law* have attested, the work taken as a whole is remarkably Langdellian in its analysis and argument.[25] An explanation of law, in Holmes's view, could never proceed very far without serious attention to the internal, doctrinal elements of law. Although he sometimes hinted broadly that law could be seen as the resultant of conflicting social forces (CW 1: 325) battling over control of "ideas" or "policy" (CW 3: 397, 436, 506), he clearly believed that these forces had their impact on the law through their influence on the internal dynamics of law (CW 3: 341, 364, 439–40, 536). His analysis focused entirely on these internal dynamics.

Despite the image of the coat merely providing cover for the man, Holmes's criticism in these passages was directed against those who thought "logic"

[24] White maintains that the more measured tone of the opening to *Common Law* signaled that Holmes would not pursue the project of explaining law in terms of such "outside forces" (White 1993, 151).

[25] Indeed, A.V. Dicey, one of its earliest reviewers, turned Holmes's criticism of Langdell (Langdell is "the greatest living legal theologian"—CW 3: 103) back on its author, charging that in this work Holmes was arguing like "orthodox theologians," who offer *apologiae* for existing practice, driven by a need to maintain the integrity of the practice (Dicey 1882, 714). The methodology Dicey highlighted was clearly embraced by Holmes when he wrote that questions of the relation of legal duties to antecedent moral rights are "for the philosopher," not the jurist. "The business of the jurist is to make known the content of the law; that is, to work upon it from within, or logically, arranging and distributing it, in order, from its *summum genus* to its *infima species*, so far as practicable" (Holmes 1963, 173).

alone was sufficient for understanding law and explaining its development.[26] In "Path" he called it a fallacy—the "fallacy of logical form"—to think that logic is the *only* force at work in the development of law (CW 3: 396). In the overlooked sentence preceding the first passage quoted above, he wrote, "It is *something* to show that the consistency of a system requires a particular result, but it is *not all*" (Holmes 1963, 5, emphasis added). His considered view was that "logic" (which includes all the techniques of doctrinal analysis and argument in the lawyers' usual armamentarium) and "experience" (which includes articulate and inarticulate considerations of justice, reasonableness, public policy, felt necessities, and shared—but never merely idiosyncratic—prejudices) *work together in partnership*. The pattern of their interaction explains the growth of law.

2.4.2. The Dynamic Interaction of Form and Substance

Holmes uncovered two such patterns of interaction. The primary pattern takes the form of what he called "the paradox of form and substance." The structure of movement is paradoxical in the (non-technical) sense that law grows by striving to stay the same and publicly appearing for all intents and purposes to do so. In form, the growth of law is logical, but in substance it is "legislative" (Holmes 1963, 31). This explanatory structure is complemented by another pattern which I will call the *penumbra pattern*. Because the *paradox pattern* is, to an extent built upon the *penumbra pattern*, we should consider the latter first.

Holmes's project, as we might expect, focused exclusively on activities of courts deciding particular cases. The growth of law proceeds by stages, he argued. First, courts decide cases of first instance as they judge best given their understanding of the circumstances and the parameters set by existing (statutory, constitutional, and case-based) law. Courts are reluctant to articulate rules, even though they may be confident about the correctness of their decisions, and when they do articulate rules, the rules are not commonly regarded as binding by other courts; only the decisions are held to be binding. After series of decisions, "successive approximations," courts may venture to state a rule or principle for the legal issue, thereby "reconciling the cases" (CW 1: 213; CW 3: 477). This rule (or leading cases exemplifying this rule) takes its place in the body of the law, often contrasting with widely differing cases. At the second stage, these rules or leading cases take shape as opposite poles around which future cases tend to cluster (CW 1: 327; 1963, 101–3; CW 3: 415–6). As time goes on, new cases that arguably fall into the penumbra of the rules come to the court, and

[26] Scholars of this period of American legal history now largely agree that few judges at the time and even fewer theorists of law (including Langdell—Kimball 2004, 2007) held such a view. A contemporary reviewer of "Path" denied that the fallacy of logical form "has taken a deep hold on the [legal] profession. Nor can it be admitted for a moment that the judges have failed hitherto to decide cases according to their ideas of the general good" (Fox 1897, 6).

lawyers and judges work them into the sphere of the existing rules, extending or contracting the rules by appeal to compelling analogies or disanalogies. Considerations of both "logic" (i.e., consistency and local coherence) and "good sense" suffice to decide such cases, although in most cases the determinations are more a matter of intuitive judgment than articulated argument (CW 3: 341, 364). In this way, Holmes held, cases clustering around opposing poles tend over time to fill the penumbral space between them until a case comes to the court that on analogical or internal "logical" grounds alone could be decided either way, or a case for which the original reasons that seemed to underlie the rule lose their force. At this point, Holmes observed, judges are called on to establish a rule, because "it is better to have a line drawn somewhere in the penumbra, between darkness and light, than to remain in uncertainty" (CW 1: 327). In these cases, considerations of "policy," which had been only implicit, come to the fore and the judges set a (relatively "arbitrary") rule on the basis of their assessment of the relative merits of the competing "legislative grounds."

On this view, law grows because judicial decisions are subject to two different kinds of influences, reasons of form and reasons of substance. Demands of consistency and local coherence with past decisions and other legal doctrines are the source of one kind of pressure, while considerations of "good sense," behind which, immediately or mediately, are unarticulated intimations of public policy, supply the complementary source of pressure. These two kinds of influences derive their force from different kinds of practical reasons or principles. Demands of "logic," in Holmes's view, flow from requirements of certainty and treating like cases alike; pressure from good sense and policy flow from requirements of situated reasonableness as manifested in custom and values rooted in interests and social advantage.

Judicial decisions are, according to Holmes, resultants of these two rational forces working in tandem; neither is dispensable. It would be a mistake ("fallacy") to deny the role of either in the process, although in any particular case one or the other may be more prominent. Note that on this account of the dynamics of common-law growth, the point of explicit "law-making," where the courts lay down a determinate rule, is defined by the established rules and their penumbras. It would not make sense to say of judicial decision-making as Holmes portrays it here that in every case the judge is forced to make an essentially arbitrary, policy-determined choice. Moreover, the decisions made in these interstitial cases are "arbitrary" *not* in the sense that they are idiosyncratic or without rational grounds, but only in the more limited sense that the general and largely uncontested reasons only set parameters within which judges must rely on considerations that may still be reasonably contested (CW 3: 396). They may also be arbitrary in the sense that (1) they are (as we might put it) "path-dependent," since how the cases cluster around the poles is partly a function of the order in which they come to the court, and (2) they tend to draw sharp lines on matters which are fundamentally scalar, i.e., matters of

degree (Holmes 1963, 101; CW 3: 415–6). However, it is important to keep in mind that even in these cases rules emerge and new rules replace them due to the pressure of demands of reasonableness on judges.

With this penumbra pattern in mind we can turn to the paradox pattern ("the paradox of form and substance"—Holmes 1963, 31–3; CW 3: 75f), which has the following structure. First, legal rules, concepts, or doctrines emerge (as the penumbra pattern describes) in the courts in response to perceived social needs and "more or less definitely understood views of public policy" (Holmes 1963, 8, 32). Second, over time, circumstances or social values change and the reasons on which the doctrines rested seem no longer compelling, but the doctrines tend to survive by inertia due, at least in part, to the virtues of form. Third, this presses "ingenious [judicial] minds" to look for new grounds for the persisting doctrines. Since "the law is administered by able and experienced men, who know too much to sacrifice good sense to a syllogism, it will be found that, when ancient rules maintain themselves […] new reasons more fitted to the time have been found for them" (ibid., 32). In this way, the old doctrine is reconciled with demands of new circumstances and values. So, the old form acquires new content and over time the form is adjusted to fit the contours of the new rationale (ibid., 8, 32). Thus, law gradually adapts to changing circumstances, again in response to competing rational pressures of form and substance.[27] The process is not always successful. Thus, finally, some doctrines survive by inertia alone. These "mere survivals" (CW 3: 412), upon investigation, appear to be anomalies, like the feline clavicle (Holmes 1963, 31, 32; CW 3: 412–5). Because they impose costs on those who are subject to them, they are often not merely anomalous; they may strike us as serious mistakes, cancers in the body of law.

Holmes's paradox pattern rests on the same assumptions as his penumbra pattern. Both form and substance ("logic" and "policy") are normative demands on judicial reasoning, representing different kinds of reasonableness. Law's dynamic, on his view, is due to the fact that judges demand that the rules and doctrines of law serve reasons of form and reasons of substance. Form and logic, the associated lawyerly techniques of analogy and discrimination (CW 3: 397), shape perception, thought, and imagination and so tend to define options available to decision makers (CW 3; 406). But they also represent a normative demand.[28] Form is the result of the demand for consistency with past decisions

[27] This description of the growth of law recalls Blackstone's classic characterization of the process by which the ancient common law is gradually adapted to modern circumstances (Blackstone 1979, vol. 1: 69–71, 3: 267–8; Postema 1989a, 8–13).

[28] Holmes twice wrote that "continuity with the past is only a necessity and not a duty" (CW 3: 406, 492), which seems to deny the normative dimension of form, but this is just one of those cases in which Holmes cannot resist the *bon mot* even when it does not fit his own explanatory practice. It is not possible to make sense of his deployment of the paradox pattern in explaining the growth of law without recognizing the normative force of the formal dimension of law.

and principled integrity of the body of law as a whole, or some department of law. Substance reflects considerations of policy, public good and social ends or values, whether articulated or merely intuited, which have roots in ideas and values dominant in the community. Both form and substance contribute to the dynamic of growth of law. The law's development and its anomalies are due to the subtle and constant interaction between these two factors. Working in tandem, sometimes they push the law in the same direction, refining and tailoring it to shifting social conditions; sometimes they push in different directions. At any point in time, Holmes argued, the law is the resultant of these complementary and competing normative pressures.

Holmes used his paradox pattern frequently in his jurisprudential writings, sometimes to explain, sometimes to expose. With this basic principle of explanation he accounted for the evolution of core doctrines of the common law (CW 3: 4–16, 21–35, 60–76, 76–100, and especially CW 3: 340–80) and explained the survival of doctrinal anomalies in the law. He also used it to expose the irrationality of some anomalies and the lengths to which judges and partisans of the law had gone to disguise them with the cloak of form. With the paradox pattern he also highlighted the fact that judicial decision making always depends in part at least on implicit or explicit appeals to considerations of public policy (CW 3: 341, 399, 412, 421).

The latter purpose is especially clear in his discussion of the "fallacy of logical form" in "Path" (CW 3: 396–8), which had an enormous influence on subsequent American jurisprudence. However, although he rarely missed an opportunity to expose what he saw as attempts of the judiciary of the time (and theorists like Langdell who, he thought, encouraged them) to conceal their reliance on policy, he did not wield this "paradox" like a skeptic's hammer to smash all pretense of rationality and reasonableness of law. Neither did he understand it to liberate judges to wholesale reform of the law from the bench. Rather, even in "Path," he thought exposure was liberating: when we come to see that legal doctrines are responses to demands of circumstances and policy considerations, revised and refined as those circumstances and considerations change, and that some survivals have nothing to rest on but their appeals to consistency with long usage, "we are at liberty to consider the question of policy with a freedom that was not possible before" (CW 3: 75; 1963, 33). "History sets us free and enables us to make up our minds dispassionately whether the survival which we are enforcing answers any new purpose when it has ceased to answer the old" (CW 3: 412). In this reassessment, Holmes acknowledged, consistency with the past and coherence with other doctrines of law are always some reason for present decisions in line with them (CW 3: 418, 436–7, 536), although not always overriding reasons (CW 3: 398). That is, in reassessment, the more explicit balancing of formal and substantive factors may sometimes favor retaining the anomalous doctrine, despite its anomaly; at other times it counsels replacement of the doctrine. The account of law's evolution as de-

scribed by the paradox pattern enables us to view the law systematically and to consider explicitly the purposes served by existing legal doctrine and the nature and extent of reasonable reforms of it.

But who are comprised in this liberated "we"? Does it include judges and consulting lawyers? legal theorists? legal reformers? What roles do "the black-letter man," the "man of statistics and the master of economics" (CW 3: 399), the historian, the political scientist, and the political philosopher play in this explicit and systematic reconsideration of law? To answer these questions we need to look at Holmes's view of the role of theory in law and in adjudication.

2.5. Law, Theory, and Adjudication

The dynamic dimension of law complements its static dimension. Law is a matter of "other people's power"—court enforcement of imposed norms, but it is not simply the aggregate of exercises of judicial power or predictions about them. Judicial decisions are the resultants of multiple normative pressures: rules and doctrines that emerge from sources (past decisions, statutes, custom, etc.) by a collective process of formal and informal reasoning ("logic"), driven by trained good sense and an intuitive (and increasingly more explicit) awareness of underlying social goals and goods dominant in the community. It is in virtue of this dimension of law that it is possible to think of law as more than an unconnected series of arbitrary acts of power and as actually forming a set of internally related principles or doctrines that can be organized into something that approximates a theory. Of course, because law is always in flux, always growing, and because it will always contain anomalous doctrines that persist due to inertia and the demand for consistency with the past, any theory of the law will be incomplete (Holmes 1963, 32).

2.5.1. Holmes's General Jurisprudence

In 1920, near the end of his life, Holmes wrote in a letter to the philosopher, Morris R. Cohen, "My chief interest in the law has been in the effort to show the universal in the particular" (Rosenfeld 1962, 328). Indeed, Holmes began his career with two essays that sought, in the style of English analytic jurisprudence, to uncover principles by which a rational arrangement of the law could be laid out,[29] and he ended his scholarly career thirty years later with two essays that sketched an ambitious, multi-part program of what we might call general jurisprudence.[30] Recent scholarship has maintained that, while Holmes be-

[29] "Codes and the Arrangement of Law" (CW 1: 212–21) and "The Theory of Torts" (CW 1: 326–34), published in 1870 and 1873 respectively.

[30] "The Path of Law" (CW 3: 391–406) and "Law in Science and Science in Law" (CW 3: 406–20), published in 1897 and 1899 respectively.

gan his career committed to a program of "scientific" ordering of law, repeated failures and an ever deepening general skepticism regarding the rationality of law forced him to abandon any hopes of a general theory of law.[31] However, the record of Holmes's scholarly work and his own commentary on it supports a different interpretation. His theoretical ambitions, although sometimes stated in grand gestures, were also, from the start, qualified to the point of modesty (CW 1: 214; 1963, 32). He never abandoned his view of the feasibility or the potential value of a general jurisprudential theory, although his views of the nature and scope of this enterprise developed over time and his unsuccessful efforts led him to abandon or scale back certain projects within his larger enterprise. At the end of his scholarly career he still insisted, "We have too little theory in law rather than too much" (CW 3: 404).

In "Law in Science," Holmes distinguished between pure ("abstractly scientific") and engaged ("practical") studies of law (CW 3: 406–20). These different theoretical approaches in his view had contrasting interests, aims and directions and to some extent different objects. The former is disinterested, and seeks understanding without an eye to its practical use, whereas the latter is engaged and looks to theory for guidance (but not necessarily justification); but also the former views law and ideas from the outside, as events with causes and objects subject to social forces, while the latter considers their internal, logical and normative relationships (CW 3: 413, 439, 469). In "Law in Science," as in "Path," Holmes made clear that the primary focus of his general jurisprudential theory was practical (CW 3: 412, 420).

A few months before delivering "The Path of Law" to Boston University law students, Holmes wrote to his friend Lady Castletown that he was at work on his "discourse on the theory of legal study" (Novick 1995, 54). The second half of his lecture was devoted to sketching his ideal of the study of law (the "practise [of] law in a large way"–CW 3: 440). We can fairly treat this as his view of general jurisprudence. Jurisprudence is *practical* and *particular*: it looks at law from the inside and with an eye to its practical use and, although it may have implications for law more widely viewed, its focus is on the structuring concepts, principles and driving forces of the common law. While recognizing the value of mastering Hobbes, Bentham, and their "worthy successors," he criticized some English writers (including Austin) for "striving for a useless quintessence of all systems, instead of an accurate anatomy of one" (CW 3: 403).

On his ideal model, the study of law brings together three complementary theoretical activities: jurisprudence, history, and policy science (CW 3: 404). *Jurisprudence*, "law in its most generalized part" (CW 3: 403), seeks a comprehensive, systematic theory of the substantive doctrines of law. It involves extracting general principles from particular cases (ibid., 403, 439), "analyzing and generalizing the rules of law and the grounds on which they stand" and

[31] See, e.g., Horwitz 1992a , White 1982 and White 1993, chaps. 4–6.

their historic relations to other principles (CW 3: 477), and organizing them in light of analyses of law's most fundamental and general notions (CW 1: 303), e.g. notions of a right, a duty, malice, intent, negligence, ownership, possession, etc. (CW 3: 403, 404).[32] Presumably, jurisprudence so understood includes his hybrid (static-cum-dynamic) conception of law.

History traces the development of legal doctrines over time (CW 3: 404, 536), according to the penumbra and paradox patterns described above. It is a necessary part of the rational study of law (CW 3: 399, 402), and will always play an important role in determining the scope or limits of general principles (CW 3: 399, 412, 477), but Holmes thought there would be a time when it would play only a small role in the explanation of law, because it would be replaced by policy science (CW 3: 403, 492).

The science of policy, according to Holmes, involves theoretical articulation of the social ends and goals that have exerted their influence on the development of law over its history through intuitive, blindly-felt intuitions of judges (CW 3: 377, 399, 413, 415, 420, 492). Its task is three-fold: (a) to identify the ends and goals to which the law has been, and might reasonably be, directed and the reasons or ideals on which they depend; (b) to assess their worth relative to other ends and goals and determine measures by which costs of pursuing them can accurately be assessed (ibid., 404, 420); and (c) to work out the best means (via legal rules and institutions) for implementing these ends and goals (ibid., 399, 403, 404, 412, 413, 420, 536). Ideally, according to Holmes, a mature science would be quantitative, but he recognized that this ideal is rarely achieved because it is difficult to reduce social goals and their relative worth to numbers (ibid., 415); nevertheless, he thought that in future statistics and economics would have an important supporting role to play in this part of the general theory of law (ibid., 399, 403).

These three components were thought to be complementary. Jurisprudence largely works with principles delivered to it by history, although the doctrinal historians' (including judges' and lawyers') determinations of the principles and doctrines that emerge over time might also be influenced by viewing law from the more general theoretical perspective of jurisprudence. The science of policy might also play a role insofar as its explicit articulation of eligible social ends and values might provide candidates for revised rationales of long-standing doctrines and, conceivably, might be consulted in constructing the general theory of law (although Holmes does not mention this). Moreover, Holmes believed that a competent, modern bench and bar would do its ordinary law-find-

[32] Holmes clearly had in mind not only the activities of English analytic jurisprudence discussed in chapter 1, but also his own efforts at systematic arrangement of the law around the concept of duty—"Codes and the Arrangement of the Law" (CW 1: 212–21) and "The Theory of Torts" (CW 1: 326–34)—which were not entirely abandoned, but rather folded into a more complex and integrated theoretical enterprise.

ing and law-applying better if it were clearly aware of and had an explicit and articulate grasp of the ends to which the law is directed (ibid., 377, 399, 418).

These are activities directed to determine the law as it is, of course, and Holmes understood that they are distinct from activities of determining law as it ought to be. In the latter activities the science of policy plays a dominant role at three possible points, in his view. First, in adjudication, in cases of real doubt, where the resources of existing law and the exercise of standard techniques of lawyers' "logic" run out and judges are forced to "exercise the sovereign prerogative of choice" (ibid., 418–9), we might hope that policy science could offer rationally grounded principles on which judges can rely. Second, where we face anomalies or "survivals," and questions of small-scale reform of the law arise, policy science can help us determine whether we must leave the anomalous doctrine in place (in deference to considerations of certainty) or replace it with some better rule. Third, it will also play a major role in any efforts at large-scale systematic reform of the law.

2.5.2. Theory, Skepticism, and Adjudication

Holmes never filled out this sketch of his general jurisprudence and, except for his not-entirely-successful efforts at the historical component, he contributed little to any of its branches. Rather than outlining a concrete research program, "Path" issued a manifesto; because of the vagueness of its pronouncements it was developed in a wide variety of ways in the next century. His discussion of the third branch is especially problematic. He never made clear whether he regarded the theory as fundamentally a normative enterprise or a strictly descriptive one, that is, whether it is concerned with the ends and goals, instrumental means, and associated costs in their own right, or rather with the way in which these ends, etc., are the battlegrounds on which groups and classes struggle for power. He was aware of the difference. At one point he insisted that the "most important question in the law" is that of the worth of social ends: "I mean their worth in a more far-reaching sense than that of expressing the *de facto* will of the community for the time" (436). Yet, he was always so attracted to the dynamics of power and to the popular Darwinian language of struggle for life (CW 1: 325; CW 3: 407, 421, 439), that his intentions in any give passage are rarely clear. It might be possible to work out a consistent view relating these two dimensions—integrating theoretical observations from the external, causal point of view[33]—but Holmes never bothered to do so. Something like the following seems to have been his view. A mature science of policy is a normative theory—understood either in the mode of a utilitarian theory of legislation or

[33] At one point, Holmes suggested that sociology and economics, like history, are necessary tools in the "practise [of] law in a large way" (CW 3: 440), but he never attempted to explain how they (and "anthropology"—CW 3: 413, 420) might contribute to general jurisprudence.

a positive theory, like those drawn from economics that start from axioms of rational choice. However, his ambitions for such a theory were modest, in part because he was mindful of the complexity and recalcitrance of the subject matter itself, but also because he believed that any theory of law must take into account the fact that law is the resultant of forces at work in the society it serves. He realized that a strictly ideal normative theory will be forced to make large compromises which jeopardize not only its completeness but even its rational integrity. Thus, he counseled, we should seek a general science of policy, "so far as possible" (CW 3: 404, 420).

Holmes was always scornful of "absolutes" (CW 3: 443, 446–7, 536), but although his skepticism was philosophically shallow—the product of impatience with philosophical foundations—he never doubted the value of attempting to develop a general theory or of working to make our implicit assumptions and intuitive judgments more explicit and articulate, even if our efforts fall short of his naïve and impossible ideal of achieving "the sanction of the universe" (ibid., 536). Of course, this ideal will only be approximated and never be achieved, he admitted, but that's what ideals are for (ibid., 420). However, he was more skeptical, or perhaps we should say wary, about the value of general jurisprudence, especially the science of policy, at the point of decision in adjudication. In discussing his views at this point we must tread carefully, because he was not always as careful as he should have been and throughout the twentieth century his readers were even less careful in attributing views to him.

To begin, recall that the static, "court-enforcement positivist" component of his conception of law was complemented by a dynamic component that explained the development of law over time in terms of the interaction between elements of form and substance. The two elements typically work together because of the governing judicial assumption that law is responsive to demands of formal and substantive reasonableness. Even in cases where the original rationale ("legislative ground") of a prevailing legal doctrine becomes obsolete, new grounds are found to rationalize the doctrine. Holmes assumed that this is true for most of the cases decided by the courts and this makes it possible to predict courts' decisions based on a common reading of the sources and the rules that standard lawyers' techniques ("logic") uncover. However, Holmes argued, our study of law's doctrinal history reveals that this is not true for "survivals" and in penumbral cases. Consider survivals first.

Tracing law's development, guided by the paradox pattern, we are often led to doctrines that seem to survive through formal inertia alone when their rationales prove obsolete. The positive value in tracing the history of legal doctrines is that one thereby acquires mastery of legal principles and the practical capacity to apply them intelligently to concrete circumstances (CW 3: 412, 477–8), Holmes insisted, but he recognized a "negative and skeptical" aspect of this activity (ibid., 399, 412, 421, 436). It brings to light doctrines that strike us as groundless and thus raises the question of whether the anomalous doc-

trines should be replaced with other rules which better answer to contemporary needs and values. The exact shape of this question, however, depends on the party asking it. Holmes distinguished (for a slightly different purpose) the "social question" (the reformer's question) and the "judicial question" (ibid., 418). In both cases, the options are to keep the rule, despite its lack of any clear substantive rationale, or replace it with some other rule, but Holmes thought that the issues at stake are materially different, and his wariness about jurisprudential theory has somewhat different consequences for the different decision makers. Holmes was keenly aware that any policy science he could envision was likely to leave decision makers with only the most general guidance. Aware of the deficiencies of our understanding of the relative merits of competing social goals and of our ability to engineer rules to serve them well (ibid., 436, 536), he still thought that in some cases reforming the rule might be worth the gamble, if we attempt the reform by explicit legislation. However, similar reform from the bench faces additional problems, he thought, and brings with it much more serious costs.

At the point of decision in adjudication, judges must sometimes make "policy choices." Even the best general theory will not speak unequivocally to specific cases. But it is critical for the standing and authority of the courts that they proceed on rational grounds that can apply equally to other like cases, in Holmes's view. A court can effect change only through doing justice in particular cases in such a way that the reform is taken up by other courts. This requires the court to be especially attentive to considerations of "certainty"—that is, predictability and especially impartiality. On the other hand, the law as it stands (even when "anomalous") has the singular virtue "that it exists" and so, even if not easily rationalized, it is possible for people to "know what it is" (CW 3: 536). Moreover, appeals to considerations of policy always involve balancing competing social goals and their associated costs and thus face two problems. First, balancing judgments are inconclusive, involving matters of judgment, and hence are contestable. Second, because the social goals that are balanced are inevitably tied to real social interests, to decide on policy grounds is in effect, and especially from the point of view of the parties, to pick winners and losers (ibid., 375). Thus, a reasonable modesty about their ability to get the decision right, plus the serious demand for maintaining the impartiality of the court, together urge judges to adopt an "unconvinced [i.e., nondogmatic] conservatism" (ibid., 436) and a serious reluctance to reform. Thus, despite the skepticism generated by a historical investigation of the law, limitations of the science of policy and the important requirements of certainty and impartiality of the courts, in Holmes's view, argue for a largely passive, precedent-following style of adjudication. He put the point in his characteristically vivid way towards the end of this life. He wrote that the law is inevitably behind the times and that is as it should be; after all, law "embodies beliefs that have triumphed in the battle of ideas and then have translated themselves into action." So,

"while there is still doubt, while opposite convictions still keep a battle front against each other, the time for law has not come" (ibid., 507).

Consider now the problem of gaps in the law. Recall, Holmes thought that, in the penumbra of rules, standard lawyers' techniques of reasoning by analogy will often yield reasonable, logic-determined solutions even if the decisions are not entirely incontestable; however, at some point the analogies line up against each other, representing conflicting social goals or values, and from the legal point of view there is little agreement and much dispute about where the weight of the considerations of logic and analogy lies. In cases like these, where "the simple tool of logic does not suffice," the ample resources of the law run out and the judge must "exercise the sovereign prerogative of choice," Holmes conceded (CW 3: 418f). The judge chooses on policy grounds to set a rule which may seem "arbitrary." In these cases, the judge must act as a legislator, making rules in the interstices of the law. Early in his career, Holmes thought that the courts could still protect themselves and their integrity by passing the decision in cases like these to the jury or by appealing to what all involved could recognize as already established social conventions or customs (CW 1: 329–31). But he soon recognized that even these diversionary tactics were not always available and that judges had been and were increasingly faced with penumbral problems that could be solved only by the exercise of the sovereign prerogative of choice. Of course, in such cases, appeal to formal features of law cannot help, although, Holmes sometimes suggested, "formalist" judges are inclined to pretend that their choices are nevertheless dictated by law's logical demands. The "paradox of form and substance" reveals that sometimes this subterfuge actually works on the public and it may even convince insufficiently self-aware judges.

It is this last episode, that of judges making forced policy choices in the penumbra of law, which readers in the twentieth century took to epitomize Holmes's theory of law and adjudication. Focusing on it alone, they were inclined to attribute to him a deep skepticism about the ability of legal rules and principles to guide and direct judicial decision making, seeing it rather as driven only by idiosyncratic policy preferences. This view of adjudication, combined with what they took to be Holmes's skepticism about general theories of law, led others to attribute to him skepticism about the rationality of law itself. However, these readings cannot be sustained.

We have seen that Holmes did make scathing criticisms of so-called formalists, but he attacked formalism in its most extreme form (see above sec. 2.2.1) and rejecting extreme formalism leaves open a wide spectrum of views from radically antinomianism to modest formalism. Similarly, although Holmes held that all law rests on policy and that competent judges must keep policy grounds in mind as they work through the law and apply it to particular cases, it was clearly not his view that judges always do, let alone that they should, decide only on such policy grounds. It was essential to his view, even when

he was intent on exposing irrationalities in the law, that form and substance always work in tandem, and hence that formal elements of law (rules, principles, considerations of consistency, coherence, and the like) exert substantial normative pressure on judicial decision making. Most cases are decided in accordance with prevailing law, because formal and substantive considerations work ultimately to the same outcome; even in cases where the law is anomalous, its rules and doctrine do not merely offer cover for arbitrary judicial decisions, but actually provide reasonable although possibly inconclusive grounds for those decisions. Finally, even in penumbral cases the presence and pressure of the formal demands of law can be seen at work, in his view. Such cases are *penumbral*. Hence, they are relatively rare; moreover, they are possible only if existing legal doctrines cast an umbra.

Thus, seen against the background of his elaborated theory of law and understanding of general jurisprudence, Holmes's jurisprudence shares more with modest, eighteen- and nineteenth century common-law views of law and adjudication than with the bold jurisprudential theories it inspired in the twentieth century. However, its tone and especially its overtones were anything but orthodox. It was his rhetoric, rather than the reality of his jurisprudential views, that opened a bold new path for American jurisprudence in the dawning century. Social and political developments in the United States, especially in American legal education, pushed his work into the *avant garde*. His iconic status in the opening decades of the 1900s made it attractive to trace newly fashioned ideas and arguments to his jurisprudential writings, which lent themselves to this treatment because of their flamboyant and studied imprecision. Holmes might have been surprised by the directions in which his thought was taken, but it is unlikely he would have protested, even when, if he could have been honest with himself, he would have had to admit that the views derived from his work bore only distant kinship with his own.

Part II

The Holmesian Legacy

Chapter 3

REALISM AND REACTION

3.1. Roots of Realism

At the end of World War I, life in America returned to normal, but the mood, at least in some law schools, was not entirely pacific. A small group of upstart law professors at Columbia Law School (among them Walter Wheeler Cook, Underhill Moore, Herman Oliphant, Hessel Yntema, William O. Douglas, and a little later Karl Llewellyn) began to challenge the intellectual rigidity and political conservatism of orthodox legal education that had spread in the early years of the twentieth century from Langdell's Harvard across America.[1] If we are to enable our students to understand law and practice it effectively, they argued, we must teach them to look at what courts *do*, not what the courts *say*—especially not what Langdell-inspired collections of leading cases say. Taking a cue from Holmes's "Path of Law," they declared that law is best seen as a matter of *predicting* what courts will do. This "realistic" perspective, they insisted, not only is more directly practical for ordinary lawyers advising clients, but also provides a basis for a critical look at how law works and how to make it work better.

As the 1920s advanced, the *Streit der Facultäten* became intense. After losing a key battle for the Columbia Law School deanship, the dissident legal scholars scattered—some to Yale Law School, some to the fledgling Institute of Law at Johns Hopkins University, while a few remained at Columbia. The scattering reflected not only differences between these scholars and their more tradition-minded colleagues, but also growing differences of substance among themselves. Ironically, it was two years after this dispersion that the movement was publicly christened "realism" by Llewellyn (1930), who was left behind at Columbia and to a degree marginalized (Schlegel 1995, 6). This radical diaspora continued to write and fight academic battles, but several members of the circle also moved into important governmental positions; some joined Franklin Delano Roosevelt's New Deal administration and others took influential judgeships, including the United States Supreme Court. By mid-century they had made a major impact on legal thought and practice in the United States, and especially on the teaching of law in American law schools. They set in large part the legal theory agenda for the world of American legal scholarship for the remainder of the century, inspiring in each new generation both new critical movements and new attempts to recover ele-

[1] For a history of the development and demise of the realist movement in the United States, see Schlegel 1995, Kalman 1986, and Twining 1985a, 10–83.

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ments of an older jurisprudential tradition which, it was argued, still shaped the practice of American lawyers. Yet, despite their apparently radical politics, and fears of critics that they threatened the very foundations of common-law jurisprudence, the realists were engaged mainly in an attempt to recover key elements of the common-law tradition that in the late nineteenth century had grown sclerotic and deaf to its own creative muses and had entrenched in judicial practice and legal scholarship a conception of the science of law that, in their view, was as antithetical to good (modern) science as it was foreign to the good sense and "Anglo-Saxon opportunism" of the common-law tradition (Oliphant 1928, 76).[2]

3.1.1. Movement or Mood, Metaphysics or Method?

In the words of Justice Cardozo, realists were given their name "because fidelity to the realities of the judicial process, unclouded by myth or preconception [was] […] the end and aim of their endeavour" (Cardozo 1947, 10). Realists surely shared this intellectual stance, but beyond this it is hard to pin down shared doctrines or arguments.[3] Great disparateness, rather than any commonality, of doctrine characterized the movement. Indeed, one observer suggests it would be more accurate to call it a mood rather than a movement (Duxbury 1995, 69). Realists were united not by any positive thesis, but by "solidarity of opposition" (Kronman 1993, 186), especially opposition to (what they took to be) Langdellian "formalism" in courtrooms, classrooms, and scholarly writing on law.[4] In view of this great diversity, generalizations about realist jurisprudence should be rare and carefully circumscribed. (Even the claims made in the introductory paragraphs of this chapter must be qualified: For example, not all early realists were politically radical or concerned with law reform.) A safer course is to avoid generalizations and focus on lines of thought or argument that have proved influential and are often identified with realist jurisprudence, keeping in mind that as often as not many realists would have distanced themselves from them.

One generalization we can advance with confidence is that none of the realists, except Felix Cohen (1933, 1935, 1950) were credentialed philosophers, although some of their intellectual models (e.g., John Dewey 1924) and some of their most vocal critics (e.g., Morris R. Cohen 1933, 1950) were. Another safe generalization is that realists, following the dubious example of Holmes, were

[2] Two examples of this radicalism in recovery are Oliphant's "A Return to Stare Decisis" (Oliphant 1928) and Llewellyn's *Bramble Bush* (Llewellyn 1951).

[3] Ironically, two of the best known realists, Karl Llewellyn and Jerome Frank, were viewed as marginal by partisans of the so-called "social science" wing of the movement. For different perspectives on this point see Schlegel 1995, Twining 1985a.

[4] On the alleged formalism of Langdell and the "Age of Formalism" in American law, see chap. 1, sec. 1.2.1.

seldom given to precise, carefully qualified statements or precisely formulated arguments, whether their own or their opponents'. Readers, then, must take special care not to confuse rhetorical bravado with fundamental intellectual or philosophical commitment. As we have seen, realism sprang rather from struggles over the direction of legal education and understanding of the judicial decision making process. Despite language to the contrary, they did not embrace any recognizable metaphysical or epistemological doctrine. Surely, their realism had nothing in common with any variety of philosophical realism, but by the same token it was not antirealist in the contemporary philosophical sense. The philosophical pragmatism of Peirce and Dewey had some impact on realist thinking, but realism, Llewellyn once said, was not a philosophy but a method, a technology, with a simple motivating imperative: "see it fresh […] see it as it works" (Llewellyn 1960, 508–10). The realists' pragmatism had little more philosophical substance than this.[5] The intellectual pragmatism in the air at the time infected them with a marked impatience with metaphysics[6] and a bias toward inquiries starting from and returning constantly to concrete problems of human life, action and interaction, and ways intelligent ordinary people go about trying to solve them. Their intellectual focus was on tools, tasks, and technique, not theories of truth; on method, not meaning.

This impatience is especially evident in their attitude toward familiar preoccupations of legal philosophers like puzzling over the metaphysics of law and inquiries into the concept of law.[7] The most famous and scandalous definitions of law were no sooner offered than their framers disowned or radically qualified them.[8] At the outset of his classic statement of the realist project, Llewellyn announced that realists were not interested in *defining* law, but in refocusing the study of law, because defining seeks to restrict and exclude, while his project sought to expand and include, with the hope that in doing so our understanding of the law and its characteristic modes of operation would be en-

[5] This is not the orthodox reading of the realists. For a contrary opinion see Rumble 1968 and Summers 1982.

[6] Here too Holmes offered inspiration, although the source of his impatience was different (see chap. 1, sec. 1.1.2).

[7] Morris Cohen (1937, 304) wrote, justly, that the realists had "not shown much interest in the philosophical foundations of their point of view." Some realists seemed to have been actively hostile towards philosophy, at least in the province of jurisprudence. Llewellyn, for example, told his students that "[j]urisprudence ought to be for lawyers and not for philosophers." In *The Common Law Tradition—Deciding Appeals* (Llewellyn 1960, 509), he wrote, "I regard the vocabulary of professional philosophy as curiously inept to our purposes" (both quoted in Hull 1997, 15, 16).

[8] Llewellyn boldly stated in *The Bramble Bush* that law is "what officials do about disputes" and that legal rules "are important so far as they help you see or predict what judges will do" (Llewellyn 1951, 9, 12), yet at his first opportunity he withdrew the definition (foreword to 2nd edition). Jerome Frank's famous definition of "actual law" as simply the decisions of the court, and "probable law" as "guesses" about what the court will do in future, met a similar fate in his hands (Frank 1963, 50–51, and preface to sixth printing at viii).

hanced (Llewellyn 1930, 431–3). Of course, if students of jurisprudence know anything about American legal realism, they know that it championed "predictionism." This view was inspired by Holmes's bold declaration in "The Path of the Law" that "prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law" (Holmes 1995, vol. 3: 393). But Llewellyn properly counseled readers to be reluctant to treat the invocations of "predictionism" that are everywhere in realist writings as commitments to a particular analysis of the concept of law, competing on philosophical grounds with various versions of positivist or natural-law definitions (Twining 1985b, 343–7). Predictionism, as a theory of the nature of law, may have been dead on arrival, but the realists' contributions and challenges to jurisprudence are not so easily assessed and dismissed. These challenges and contributions, such as they are, arise from their skeptical exploration of the process of judicial decision making.

3.1.2. Fabricators of the Tools of the Realist Trade

Three important figures writing in the early years of the new century set the agenda and provided convenient conceptual tools for realist jurisprudence. Holmes, of course, was the dominant influence on American jurisprudential thought as the century opened, but, as we have seen, his views about law and legal reasoning were still deeply rooted in the nineteenth century, and only later, when seen through the lens of the realists' concerns and projects, did they take on a "realist" cast. Three other influential figures—Gray, Pound, and Dewey—adopted a more decisively twentieth-century perspective. They are often regarded as realists, but it would be more accurate to say that they were not entirely witting progenitors of a movement from which they kept a wary distance.

3.1.2.1. Gray: Law vs. Sources and the Importance of Finality

John Chipman Gray (1839–1915) was a friend and colleague of the younger Holmes. A fellow Bostonian from a very successful legal family (his half brother was a Justice of the U.S. Supreme Court), Gray founded the *American Law Review* in 1866. His invitation to Holmes to edit the journal in 1870 launched the latter's scholarly career. Gray taught at the Harvard Law School from 1869 until 1913, where he served under Langdell's deanship. Unlike Holmes, he declined several offers to take seats on the Massachusetts courts.

In 1909 Gray wrote *The Nature and Sources of the Law* (Gray 1921), in which he developed and extended Holmes's "enforcement positivism" (see chap. 2, sec. 2.3.2). Gray admired Austin's impatience with jurisprudential metaphysics and his attempt to present an account of law as it really is, not as we would like it to be. Yet, he argued, Austin did not go far enough. Austin held that law was a matter of explicitly articulated rules or commands of the

legislative sovereign in a state, but like Holmes (1995, vol. 1: 215, 294–5) Gray argued that this sovereign behind the courts is a shadowy figure of uncertain existence. Sovereign legislatures might enact "laws," but they touch the lives of real people only when the courts choose to apply them. The palpable power of law was the power of the courts.

Gray pushed Holmes's thought further, saying unequivocally what Holmes had put more guardedly in his essays in the 1870s. Courts, Gray maintained, always and everywhere make law. All law is judge-made law; the court is the sole legislative organ in the state. The law just is "the rules for decision which courts lay down;" "all such rules are Law […] [and] rules for conduct which courts do not apply are not Law." It is "the fact that the courts apply rules [...] [that] makes them Law" (Gray 1921, 121; also 1, 84). Law is no ideal thing, Gray insisted, but rather a complex fact (94), a fact about what courts do in their legislative (rather than enforcement) capacity. Gray's simple argument for this thesis had a great impact on jurisprudential thinking in the decade to come. We will consider this argument presently, but first we need to take account of refinements he made to this bold definition of law, which in some respects echo Salmond's more cautious proposals.

First, in Gray's view, law is just a matter of what *courts do*; however, not everything they do, not every rule they enforce, counts as law (here Gray departs from the early Holmes). Law is what courts do when they act in legislative, that is, rule-making, mode; law comprises the rules *laid down* by the courts. Thus, some rules the court enforces are not part of the law—for example, the rules made privately by individuals entering a contractual relationship, or the rules or commands of a master or *paterfamilias* in a domestic context, or the by-laws of corporations (Gray 1921, 107–9). So, it is not merely the recognitional practice of courts that determines the rules of law.

Second, Gray countered the anticipated objection that his account leaves courts unconstrained by law to decide as they please. Not so, he argued, for they are bound to make rules derived from sources of law (ibid., 84, 121). And, importantly, these sources are *prescribed*; courts are "directed" to these sources "by the organized body to which they belong" (ibid., 85, 121). Those who rule in the state exercise control over the courts in two ways: they establish the courts and they lay down limits for their action by "indicating sources from which they are to derive the rules which make up the Law" (ibid., 123; see 302). This important point needs to be unpacked.

Gray insisted that the law must be sharply distinguished from this or that law—e.g., statute or precedent—for the latter are not *law* proper but rather only *sources* of law. The typical sources of law include enactments, judicial precedents, treatises or the opinions of experts, and principles of morality (ibid., 124; 1892, 28–31). Second, while the rules to be drawn from the sources are always to be determined solely *by* the courts, the sources themselves are fixed *for* the courts; it is not up to judges to determine the sources of law in

the community. Thus, for example, although what rules are to be drawn from the enactments of a political community's legislative organ is solely the province of the courts of that community, it is not up to the courts whether or not to look to the enactments of the legislature as a source of the community's law. Gray never made clear who or what fixes the sources in a political community, except to say that it is those who rule in the state. One is inclined to plug in Austin's political sovereign at this point, but Gray did not explicitly do so. In any case, Gray's view contrasts with Salmond's (and Hart's later) in locating the source-determining rule somewhere other than in the ordinary practice of the courts. Thus, if Salmond's account marked a clear break with Austinian positivism, Gray's view seems to involve only a partial departure.

Remarkably, Gray insisted that morality figures among the sources. In contrast with Holmes, Gray used "morality" broadly to include public policy and matters of social justice as well as considerations tied to the internal integrity ("harmony") of doctrine (ibid., 303) and he had in mind morality proper, what Hart and others later call "critical morality" or "morality of conviction," rather than conventional morality or customs of a community. Courts often decide in accord with community custom, he held, but they do so because the community thinks the customary ways are morally right and the courts agree (1892, 31).

Like Salmond, Gray was unclear about whether it was merely a contingent matter that morality figures among the sources of law of some legal system, or whether something about law demanded it. He singled out legislative enactments as necessary to law, or rather, to the concept of an organized political community (Gray 1921, 124); yet, he asserted that in all civilized societies courts "are impliedly directed to decide in accord with the precepts of morality" (ibid., 303), presumably because courts everywhere are called upon to decide disputes and it is inevitable that other sources of law will run out and the only remaining potentially legitimate source for grounds of judicial decision would be morality (Gray 1892, 30). Moreover, he thought it was hardly possible to prevent morality from influencing judicial decision making. Inevitably, it will be involved in interpreting enactments and determining the meaning and force of precedents. At least "in a large number of cases, the sources of the Law [including prominently, morality] are indistinguishably joined" (Gray 1921, 303).

Thus, it appears that Gray's account of law resembles a relatively radical version of Holmes's account without the nuance and conflicting features of the latter. Simply put, law just is what courts say it is, as long as the rules they lay down are drawn from the sources. The sources impose no serious constraints on judicial reasoning since construing the sources is inevitably shot through with the judges' convictions regarding matters of public policy. Moreover, and this is the position that most influenced the next generation of American legal theorists, since the courts have the last word on what the sources say, the law just is what they courts say it is.

Gray's core argument rests on two observations. First, when courts make decisions they not only decide matters for the parties appearing before them, they also materially affect the legal rights and duties of others. That is, the actions of the courts alter the law; whether they acknowledge it or not, courts exercise law-making power. The mistake of the so-called discovery model of legal reasoning—the view that judges simply discover preexisting law and apply it to the cases brought to them—is that it treats judges like scientific experts, who offer opinions about the law. But, Gray argued, this view fails to recognize the key difference between judicial judgments and the judgments of experts: judicial judgments change *the law* not merely our *views about it*. Paraphrasing the familiar Euthyphro conundrum, Gray maintained that rules of law do not make the courts decide cases as they do; rather "the fact that the courts apply rules is what makes them Law" (Gray 1921, 121).

Second, equally important is Gray's observation that courts, like officials on a football field, have the final say. What struck him and a generation of American legal theorists after him was the fact that, even if a court's decision is mistaken (as judged by our understanding of the law at the time), the decision is no less authoritative. It binds the parties and others through its precedent-setting power. This led Gray to conclude that what the courts say is law is law just by virtue of their saying so. Bishop Hoadly famously observed: "Whoever hath an *absolute authority* to *interpret* any written or spoken laws, it is *he* who is truly the *Law-giver* to all intents and purposes, and not the person who first wrote or spoke them." To this Gray added, "a fortiori, whoever hath an absolute authority not only to interpret the Law, but to say what the Law is, is truly the Law-giver. *Entia non multiplicanda*" [9] (Gray 1921, 102). To have the final word on the meaning of any law was, in Gray's view, to have the only word; adjudicative finality is tantamount to exclusive law-making authority.

It is now widely believed that Gray's argument rests on a mistaken notion of final authority. The defects of this notion are clear from the above allusion to the football official. H.L.A. Hart argued, for example, that the above argument confuses finality of a decision with infallibility (Hart 1994, 141–7), but that is not quite right. Gray would not claim that the official *got it right* and could not *get it wrong*, simply in virtue of having decided in the way he did; rather, he argued that finality *makes it right*. The problem is not that Gray confused finality with infallibility, but rather, that the finality of a decision for certain purposes in law does not entail that it is authoritative for all legal purposes. We can accept that courts are empowered to make decisions that establish precedent and thereby alter the law in significant ways, while still recognizing that it is a great exaggeration to say that whatever they decide has that effect not only on the parties in the case and perhaps in a local corner of the law, but

[9] Gray 1921, 102; Gray quotes this passage from Hoadly's famous sermon, "The Nature of the Kingdom of Christ," delivered before George I, March 31, 1717 (Hoadly 1742).

throughout the legal system. Bishop Hoadly misled Gray about the concept of finality, according to which a decision is authoritative for certain legal purposes *even if mistaken*. This implies that finality itself depends on standards or rules existing apart from the decisions. This is clearly true in the case of the football official's decision. Players and fans may accept that, for purposes of allowing the game to go on, they must accept the decisions of the official as final, but still hold the officials to making their *final* decisions according to the rules of football, rules that players, fans, and officials must grasp and understand that the others grasp. Without this grasp of common rules by all the parties to this extended interaction, the game could not be played. If, on the other hand, all parties were to regard football official decisions as final in the way Gray understood finality, they could no longer assume that the game being played was football. It would be, as Hart argued, a different game—"scorer's discretion" (Hart 1994, 142).

Gray's account is vulnerable to criticism from a second quarter. Gray was keen to assure readers that his account of law did not confer absolute power on the courts. After all, courts, he insisted, are *held to* deciding according to sources, because, as an organ of state power, the courts are subject to "the real rulers of the State" (Gray 1921, 121). But we must ask, then, who are these "real rulers"? To this question jurisprudence has no answer, he admitted (ibid., 121–3). However, this result restores the shadowy sovereign behind the sovereign that both Holmes and Gray most opposed in Austin's theory, and so discomfited them and the generation of legal theorists to follow.

Another problem appeared to be far more serious to the emerging realist camp. The distinction between law and its sources seemed useful, but including precedents among the sources caused new problems. What were the *rules laid down* by the courts, if not precedents? According to the above argument, precedents can only be sources, since each court must determine for itself what the rule drawn from the precedential decision is. But, if law can only be that which is settled finally, not open to further change, and if "rules" made by today's court can be set aside by tomorrow's court, then courts cannot be in the business of making rules of law. If, as Jerome Frank, the maverick realist of the 1930s, later put it, since "it is only words that the legislature utters when it enacts a statute" and "these words can get into action only through the rules laid down by the courts," the same could be said for the words of today's court applied by tomorrow's (Frank 1963, 132, 135). How, then, are we to understand the claim that courts lay down rules of law? Gray had no answer to satisfy the realist. His mistake was the same as that of the ridiculed "discovery model": he focused on what the courts *say* rather than what they *do*.

It is important to recognize that when some realists made this argument, they did not wish to deny any role for rules in judicial decision making, or even to deny that judicial decision making must be understood to give rise to rules. Rather, Gray's critics argued that he had not broken from the classical

positivist understanding of law but merely altered its form. Both Austin and Gray saw law as a matter of explicit rules expressed in some canonical form of words that are laid down ("posited," as Austin liked to say) by a sovereign; they disagreed merely about who was understood to be the sovereign laying down the rules. Oliphant argued that this confuses *stare decisis*—"let the decision stand"—with *stare dictis*—"let the words stand." The focus of legal theory should be on the judgments of the courts, not on the opinions they wrote to rationalize them—that is, on the law they put into place through their decisions regarded as examples, not on their words (Oliphant 1928, 75–6; see also Frank 1963, 135).[10] Thus, Gray, for all the realism of his focus on courts and the impact of the power of the state on the daily activities of ordinary citizens, was not realistic enough for an increasingly vocal new generation of legal theorists.

3.1.2.2. Pound: Two Forms of Jurisprudential Empiricism

Roscoe Pound (1870–1964), Dean of Harvard Law School from 1916 to 1937, was dean of American jurisprudence for more than a generation at the beginning of the century. He began his law studies at Langdell-led Harvard Law School in 1888, and was impressed with and to a degree influenced by John Chipman Gray. He returned to Harvard as professor in 1910, with the support of Holmes and Brandeis (Hull 1997, 76). Impressed with the early work of Wesley N. Hohfeld, Pound did much to promote the brilliant young Stanford law professor's career (Hull 1997, 99–102). He clashed with the upstart legal theorist and student of Hohfeld, Karl Llewellyn, over the directions of the emerging movement of legal realism (Llewellyn 1930; Pound 1931; Llewellyn 1931). In the late 1930s, he was instrumental in bringing to Harvard Lon L. Fuller, an outspoken critic of realist jurisprudence. Pound was a tireless promoter of a progressive reform of legal education and of the central role of very broadly defined jurisprudence in it. He was also (as Pollock once put it to Holmes) "monstrously learned" (Hull 1997, 78); having command of most European languages, he read Continental legal theory voraciously and did a great deal to bring this work to the attention of his American colleagues. He did much to promote publication in English translation of the work of Stammler, Ihering, Del Vecchio, Kohler, and many others. His own attempt to refashion American jurisprudence with a strong "sociological" dimension drew heavily on the work of Ihering and Ehrlich. So, not only did Pound bridge eras of American jurisprudence, he also did much to bridge the wide gap between

[10] This criticism, advanced in the spirit of the newly emerging realism in the twentieth century, could just as well have been addressed to Bentham by Blackstone in the late eighteenth. It rests on a classic common-law idea of how lawyers and judges should regard the decisions of prior, precedent-setting courts (Postema 2003, 11–7). This suggests that the apparent radicalism of (at least some of) the realists may have roots in a longer Anglo-American jurisprudential tradition.

fledgling American jurisprudence and the more established tradition of legal theory on the European Continent.

Looking back on the period of the birth of realist jurisprudence, Llewellyn wrote that Pound's voluminous writings "provided half the commonplace equipment" with which they reshaped American legal theory (Llewellyn 1962, 496; Twining 1985a, 23). Yet Pound was an early vocal critic of the fledgling movement.[11] In his view, realists only half-learned the lessons he sought to teach; if they had learned them better, their realism might have been more securely tethered to the realities of the modern legal system as it developed out of its more traditional forms. Yet, Pound was no Burkean conservative; on the contrary, he was a card-carrying member of the American Progressive movement (1890–1920), at least in the first part of his very long career, and his jurisprudence clearly reflected its spirit of reformist optimism (Summers 1982, 29, 49).

In this spirit, he renewed the attack initiated by Holmes on the "formalist" conceptions of law and the science of law. As constructed by its critics, formalism, we may recall from chapter 2 (sec. 2.2.1), held that law must be regarded as a framework of practical reasoning rather than as a social institution and, thus, it was subject to constraints of rationality. The science of law so conceived focused on the logical, rational structure and content of this framework and its use in judicial decision making. The formalist framework was said to consist in a small number of very general, logically ordered principles or "abstract concepts," which were either constructed *a prior* through logical means only or discovered *a posteriori* through the use of standard legal techniques of generalization ("induction") from leading cases. In either case, the set of principles was determined without appeal to moral considerations or the political or social context in which the law operates. The body of law thus determined was said to be complete and comprehensive ("gapless") and thus capable of providing judges and lawyers determinate, univocal guidance in every case through "deductive" or "mechanical" processes of reasoning.[12] Because the discovery of the principles, their canonical formulation, rational organization, and deductive application were all thought to be governed by strictly formal, logical norms, the framework could correctly be regarded as *autonomous*—independent of the moral or evaluative judgments of individual judges, independent of the moral principles or prejudices of the community in which the framework is deployed, and independent of any other social condi-

[11] See Pound 1931 and Llewellyn 1931. On "The Realist Controversy, 1930–1," see Twining 1985a, 70–83, and Fisher et al. 1993, 49–52.

[12] As we noted in Chapter 2, the terms "logic" and "deductive" are used in a looser sense than philosophers are inclined to use them; they include any technique of reasoning or inference which is self-contained and directs deliberation from premises to conclusions without appeal to what are taken to be external considerations. Of course, this presupposes some, usually unarticulated, criterion of what considerations are external to the process, and so makes it very difficult to mark the limits of this "logical" or "deductive" (or "mechanical") reasoning.

tions or circumstances. This is the "formalism" that Pound and the realists after him (constructed and then) attacked. For our purposes, it is less important to ask whether anyone adopted this combination of views, than it is to keep it in mind as the foil against which its opponents defined their own views, for seen as foil it imposes constraints on the way we interpret arguments deployed against it.

Pound attacked this view, not because it insisted that law meet standards of "science," but rather because the "scientific" criteria that the formalist advocated—uniformity, certainty, and conformity to reason—were only means to the proper ends of law and the administration of justice (Pound 1908, 605–9). It is a common tendency in human nature, amplified in professionally minded lawyers, to be fascinated with technicality for its own sake, Pound insisted, but we must not lose sight of the fact that the technicality of the law, and its demand for consistency and internal coherence, are not ends in themselves. Law "must be valued by the extent to which it meets its end, not by the beauty of its logical processes or the strictness with which its rules proceed from the dogmas it takes for its foundation" (Pound, 1908, 605). Moreover, Pound argued, formalist or "mechanical" jurisprudence rests on an obsolete conception of science as a deductive system based on abstract conceptions. The science appropriate to law, in his view, was pragmatic, empirical, and especially *sociological* (Pound 1908, 609). These remarks suggest Pound's orientation to law and its systematic study.

According to Pound, law was first of all a particular kind of human endeavor, a special kind of social institution, albeit one such institution among others. Understanding of this social institution must proceed "scientifically," but, for Pound, that meant keeping clearly in view its social dimension as well as its rational, practical deliberation-shaping dimension, and neither of these can be understood, he insisted, unless we understand what law is for. Since law is a social institution, it cannot be viewed as autonomous; rather, by design it typically works upon human social interaction in all its complexity. At the same time, it is subject to social forces at work in the community in which law is found. Thus, to understand law, we must put it in its social context. The aim of the study of law, he argued, must be the "scientific apprehension of the relations of law to society and of the needs and interests and opinions of society of today" (Pound 1907, 610–1). Only when we understand law in its social context can we understand what forms it takes and why, and how it can be constructed effectively to achieve its aims. The study of law is indeed scientific, he argued, and the most important science is *sociology* (or the social sciences more generally, including economics). Hence, Pound liked to refer to the kind of jurisprudence he championed as *sociological jurisprudence*, a key, although by no means the sole,[13] component of which is empirical social science, broadly construed.

[13] It also included an instrumental conception of law, a program of "social engineering"

> The modern teacher of law should be a student of sociology, economics, and politics as well. He should know not only what the courts decide and the principles by which they decide, but quite as much the circumstances and conditions, social and economic, to which these principles are to be applied. […] The most logical and skillfully reasoned rules may defeat the end of the law in their practical administration because not adapted to the environment in which they are to be enforced. (Pound 1907, 611–2)

While Pound's own conception of this enterprise was notoriously vague and never pursued systematically, realists and legal theorists building on their initial efforts transformed his critique of formalist legal science into vital empirical research programs and disciplines.

By arguing for a shift of attention from doctrine to the empirical study of law—from a study of "law on the books" to "law in action" (Pound 1910)—Pound sought to reorient the study of law. But to forestall misunderstanding two features of this reorientation must be stressed. First, on his view, the new empirical study was to *supplement* and *enhance*, but not to replace, more traditional attempts to understand law from a more abstract, philosophical perspective. Second, study of "law in action," in his view, included not only study of external behavior and forces at work on it as conditions and effects of law, but also study of the way law shapes the practical reasoning of judges, lawyers, and citizens at a concrete level. That is, he did not conceive of the study of "law in action" on a narrowly behaviorist model. He called for attention to the way the law actually does its work on and for rational human agents engaged in complex social interaction. Pound argued that law on the books—legal doctrine articulated in treatises or even the headnotes of reported cases—is not the proper target of our study because, if those propositions are not brought into contact with the concrete daily activities of citizens, they will not play any role in their practical reasoning, and thus they will not affect their conduct. Proper study of law takes the law on the books as a useful first approximation, but the proof of the pudding lies in the daily eating by ordinary citizens and officials.

Also at the center of Pound's conception of law and his program of sociological jurisprudence was his conviction that *law is an instrument* for promoting social ends. This instrumentalist conception of law set him directly against his formalist opponent, because it followed from this conception, he thought, that one could only begin to understand the law if one abandoned formalism's commitment to the *autonomy* of law. To understand law we need to know what

directed to transforming the law into an effective means of promoting social welfare, and a flexible, justice-oriented yet rationally disciplined process of adjudication. This program is grandly stated in the following passage: "The sociological movement in jurisprudence is a movement for pragmatism as a philosophy of law; for the adjustment of principles and doctrines to the human conditions they are to govern rather than to assumed first principles; for putting the human factor in the central place and relegating logic to its true position as an instrument" (Pound 1908, 609–10; see also Pound 1909, 464).

its ends are and the ends to which it ought to be directed; and how it interacts with other social institutions and is affected by prevailing social forces. Without a grasp of the ends to which a law is directed, we will not be able to understand what the law requires of those subject to it, he maintained. Laws have meaning only insofar as they are taken as means to certain ends, and so the content of any legal norm is influenced, if not entirely determined, by its purpose.

Thus, Pound's instrumentalism committed him to a "purposive" theory of legal interpretation (the view that laws are to be interpreted in terms of their purposes). It committed him, further, to an ambitious program of "social engineering." This inclined him to include under the umbrella of sociological jurisprudence both the empirical social sciences and normative political theory (Pound 1923, 954–6). For the latter, he was sympathetic to a broadly utilitarian approach, although he took his inspiration not from Bentham (who was too closely associated in his mind with Austin's analytic jurisprudence, and hence a type of formalism or "conceptualism," and the codification movement) but from von Ihering's *Wirklichkeitsjurisprudenz* (Pound 1908, 610, citing Ihering 1903). He argued that the ultimate end of law is to maximize the satisfaction of wants (and minimize their sacrifice) and that this involved "elimination of friction and waste, economizing of social effort, conservation of social assets, and adjustment of the struggle of individual human beings to satisfy their overlapping individual claims in life in civilized society" (Pound 1923, 954). One important point on which Pound and the new generation of realists disagreed most strongly is whether the normative and the descriptive can be sharply distinguished, even if only for theoretical purposes. Most of the realists insisted on such a break—although Llewellyn insisted it was only "temporary" (Llewellyn 1931, 1236)—but Pound thought that this was a profound mistake. He insisted that jurisprudential theory could not proceed, that a sound understanding could not be achieved, if we put to one side normative issues and ignored fundamental normative principles. Yet, he failed to work out how the empirical/descriptive and normative/engineering components of his conception of the jurisprudential enterprise were to be combined. This problem has continued to bedevil American legal theory in the twentieth century, even among those descendants of Pound who took seriously his reorientation of jurisprudence to the social sciences, like the law and economics movement (see chap. 5).

Pound's institutional and instrumental conception of law had a profound impact on legal theory at the opening of the century, but by far the most influential feature of his work was Pound's attack on "mechanical jurisprudence." The characterization of judicial decision making as a matter of deriving unique, authoritative conclusions from very general precepts by means of logical or technical devices alone fails both descriptively and prescriptively, Pound argued. He distinguished four broad tasks of judicial decision making: finding the facts, finding the law, interpreting the law, and finally applying the law found

and interpreted to the facts as found (Pound 1923, 945ff.). Successful performance of each task often involves relatively straightforward, almost "mechanical" reasoning, and the results will be largely uncontroversial, but sometimes one or more of the tasks will prove to be much harder.[14] Conflicts can arise between legal rules or precepts, for example, and the judge may be forced to choose between them or to interpret them so that the conflict is resolved; or a legal precept, interpreted naturally, may yield an outcome substantially in conflict with the judge's sense of what is fair under the circumstances. In such cases, judges must rely on judgment to bring about clear and fair decisions. No formal ("mechanical") account of the reasoning involved is available. Intuition or judgment is inevitably involved, although this judgment must be informed by "the common sense of the common man as to common things and the trained common sense of the expert as to uncommon things" (Pound 1923, 952).

Thus, as a general characterization of the way judges actually go about deciding cases, formalism surely fails, in Pound's view. He admitted, however, that it does capture the way judges are inclined to *represent* how they reach a conclusion on disputed matters of law. It is a familiar American ritual, Pound observed, for courts to write opinions actually "adjusting the letter of the law to the demands of administration in concrete cases, while apparently preserving the law unaltered." This ritual disguises the "equitable application of law, and leaves many a soft spot in what is superficially a hard and fast rule, by means of which concrete causes are decided in practice as the good sense or feelings of fair play of the tribunal may dictate" (Pound 1910, 19–20; Fisher et al. 1993, 40–1). Pound did not mean to cast a cynical eye on this practice, as if it were designed to circumvent public controls on judicial decision making, but rather he saw it as the inevitable and welcome result of judges trying to exercise responsible judgment within a system grown rigid and inflexible. In that system, "the judge's heart and conscience are eliminated" (Pound 1910, 20; Fisher et al. 1993, 41); yet, "in practice, flesh and blood will not bow to such a theory" (Pound 1910, 20; Fisher et al. 1993, 41). Rigid, autonomous judicial decision making is undesirable. Legal rules and precepts should be seen not as rigid determiners of decisions, but as general guides leading the judge in his pursuit of a just decision in the case before him. "Within wide limits [the judge] should be free to deal with the individual case, so as to meet the demands of justice between the parties and accord with the general reason of ordinary men" (Pound 1912, 515). There is no room for such "equitable application of the law" in the formalist's juridical heaven and that represents, in Pound's view, a failure both on the descriptive and the normative side if its theory of adjudication.

[14] Pound did not seem to think that the task of fact-finding is as problematic as the other three tasks; however, Frank's "fact-skepticism" called attention to similar problems in that area (see below, sec. 3.2.2.5).

But it would be misleading to leave the exposition of Pound's theory of adjudication at this point. We must acknowledge that Pound, like Holmes, did not deny the importance of legal rules and norms in judicial reasoning. He did not even give priority to the judge's sense of fairness or intuitions of justice in adjudication. He argued for a much more nuanced, although unsystematic, view of the process of judicial reasoning (in common-law jurisdictions). The judge's responsibility, he argued, is threefold: to do justice between the parties in the particular case before him, to attain justice in accord with, i.e., on grounds and in a manner prescribed by, law, and to do so in a way that provides a sound basis for deciding future cases like it or at least arguably analogous to it (Pound 1923, 940–1). These three elements impose pressure independently and reciprocally on the judge's reasoning. And it is out of the *rational* assessment of these *normative* pressures that the judge comes to a conclusion. The authority of the court's decision for the case before it is settled, but its authority for future cases depends on how it and argument articulating its grounds are taken up. "Out of the struggle to decide the particular cause justly and yet according to law, while at the same time furnishing, or contributing to furnish, a guide for judicial decision hereafter, in time there comes a logically sound and practically workable principle derived from judicial experience of many causes" (Pound 1923, 943).

Thus, judicial decision making, on Pound's view, is not simply a matter of appealing to preexisting rules, nor of judicial intuition of justice in the particular case, nor again of writing in the reported opinion a new rule for cases like the one appearing before the court, but rather a complex reasoning process in which each of these responsibilities and the norms and logic governing them are given their due by the judge. That process is represented not as the activity of a single judge in a particular case, but rather as the constantly iterated and interactive activity of many such judges and lawyers (and even, to a degree, citizens) taking place over time. Pound's characterization is sketchy and incomplete, but its reliance on a long tradition of thinking about the process of adjudication in classical common-law terms is unmistakable. His criticism of the mechanical jurisprudence was not skeptical in its upshot, but rather in effect recovered an older tradition of thinking about law threatened (as he thought) by the misguided scientific pretensions of the formalists.

3.1.2.3. Dewey: The Logic of Inquiry

John Dewey (1859–1952) was the most important philosopher with links to the realist group. His influence on members of the movement is difficult to deny, but there is less reason to treat him as a member. Even the influence of his general philosophical views on the main concerns of the realists is open to some question. But there is no doubt about the importance for realist analyses of the judicial process of one key idea of Dewey's: his pragmatist account of the logic

of inquiry. One of the texts frequently quoted (albeit less frequently understood) by realists was Dewey's essay, "Logical Method and Law" (Dewey 1924).

Dewey opened his essay by distinguishing broadly two kinds of human conduct: Some conduct is unselfconscious or merely intuitive, while other conduct is more considered or deliberate. The former stems from routine, instinct, or hunch. It is not irrational and in fact it may be quite reasonable, but it is not *reasoned*; neither is it *rational* like the latter kind of conduct which follows upon a decision after some form of inquiry and some amount of deliberation. Only with respect to the second category, Dewey argued, can we speak of a "logic" of the mental activity involved (Dewey 1924, 17). But even here, we are not speaking of logic in the sense of the formal relations of entailment between abstract propositions, like those explored by a mathematician, but rather a method of reasoning, deliberation, and inquiry leading to decisions, where the decisions may be of many different kinds. The logic of legal reasoning and judicial decision is of the latter kind, and, like other forms of it, it is "ultimately an empirical and concrete discipline" (Dewey 1924, 19). With respect to this "discipline" again it is useful to distinguish two forms, Dewey argued, the "logic of exposition" or "justification" and the "logic of search and discovery" or "inquiry" (Dewey 1924, 21, 26). The former sometimes masquerades as "a logic of rigid demonstration" promising certainty, but the masquerade is unnecessary. The two processes do not differ with respect to certainty, but rather with respect to the relationship of starting and ending points. The logic of justification works from general, established premises and leads one to more concrete conclusions, thereby showing the conclusion or judgment to be rationally supported and, to that extent, rationally justified. The logic of inquiry works the other way around. Dewey described the process as follows:

> We begin with some complicated and confused case, apparently admitting of alternative modes of treatment and solution. Premises only gradually emerge from analysis of the total situation. The problem is not to draw a conclusion from given premises […] [but rather] to *find* statements, of general principle and of particular fact, which are worthy to serve as premises. […] Thinking actually sets out from a more or less confused situation, which is vague and ambiguous with respect to the conclusion it indicates, and […] the formulation of both major premise and minor proceed tentatively and correlatively in the course of analysis of this situation and of prior rules. (Dewey 1924, 23, author's emphasis)

We start with a vague sense of the right conclusion and search for principles and facts to substantiate that sense, or to help us choose intelligently between rival solutions. Strictly speaking, "the conclusion does not follow from the premises; the conclusions and the premises are two ways of stating the same thing" (Dewey 1924, 23). This mode of reasoning, Dewey maintained, is typical of judges and lawyers, although it is also very common in practical and theoretical endeavors.

In addition to this logic of inquiry courts rely on the logic of exposition (Dewey 1924, 24). Courts not only make decisions, but they also "expound

them," that is, they seek to offer reasons in justification of those decisions to others. The purpose of this exercise "is to set forth grounds for the decision reached so that it will not appear as an arbitrary dictum, and so that it will indicate a rule for dealing with similar cases in future" (Dewey 1924, 24). Dewey acknowledged that this process can become "mechanical," and for good reason—there are good reasons for securing the "certainty," that is, reliability for the future, of inferences drawn from the particular decisions courts are inclined to make—nevertheless, he did not think this mechanical character is inevitable or that the process of justification is dispensable. Indeed, it is clear that Dewey believed that the logic of inquiry and the logic of exposition are complementary, especially in law. The logic of exposition is important because it is important to require that officials holding significant power over others account publicly for their decisions to others who demand a reason or exculpation and are not satisfied until they get it. "The only alternative to arbitrary dicta, accepted by the parties to a controversy only because of the authority or prestige of the judge, is a rational statement which formulates grounds and exposes connecting or logical links" (Dewey 1924, 24). The logic of inquiry captures the processes by which the decision maker actually arrives at the decision, and in virtue of that "logic" it is not entirely arbitrary; nevertheless, for purposes of law, the logic of exposition, the public articulation and justification of the decision, is also required. The two disciplines work hand in hand.

A moment's thought will suggest a further interdependency between these two disciplines that Dewey did not explicitly acknowledge. Dewey described a process of tentatively testing conclusions, searching for more general principles to warrant them, and reconsidering both of them if the most appealing general principle does not yield the intuitively most attractive conclusion. This process presumably is carried on until some more or less rational equilibrium is established. We can extend this search for equilibrium to include the process of public justification as well. For, as Dewey correctly observed, if we rightly demand that officials give an adequate public accounting of their decisions in terms of the available law, then if they are unable credibly to do so, they are forced to reconsider the result of their "inquiry" and to search for some other conclusion. Of course, it may turn out that they can credibly argue publicly that the existing law is inadequate and so the fact that a justifiable decision formulated in its terms is not available counts against the law and not the decision. That is, the process of exposition is not immune to adjustment in the larger search for equilibrium. But if this is so, then the line between the logic of inquiry and the logic of exposition begins to blur. The public justification process and the private discovery process are not two different activities undertaken for different reasons, and, as it were, with different audiences in mind, as a cynical reader of the "two logics" model might be tempted to suggest; but rather, the two are different parts of the same more complex reasoning process. Moreover, it should be obvious that, although we have long ago left behind

(or rather built upon) the narrow logic of tracing entailments among abstract propositions, we have not left behind *reasoning* in any substantial sense. The process is still one of reasoning, albeit a complex form of reasoning, not easily reduced to canonical rules. It is neither merely deductive argument nor merely a matter of being caused to come to one conclusion rather than another, but something in that possibly large territory between them.

3.1.3. Hohfeld: Analytic Jurisprudence in Realism's Province

Careful conceptual analysis was never the hallmark of the work of the realists in their heyday, nor of their predecessors or descendants; indeed, the analytic jurisprudence practiced in the opening decades of the twentieth century was in spirit and method the antithesis of the brash iconoclasm of the new realist movement. Yet, one of the most important influences on the development of American legal realism was the abstract analytical work of Wesley Newcomb Hohfeld (1879–1918). Two essays written in the mid-1910s (Hohfeld 2001)—not entirely original[15] but brilliantly conceived and executed—developed analytical tools which, even after nearly a century of assessment and criticism, have remained sharp, supple, and essential for general jurisprudence. Paradoxically, despite the obvious formalism of Hohfeld's method and approach, his tools became weapons in the early realists' pitched battles with the forces of formalism, which they thought dominated the courts and legal scholarship.

Hohfeld studied law at Harvard from 1901–1904 and was influenced by John Chipman Gray. After a very short period in legal practice in San Francisco, he joined the law faculty of Stanford University in 1905. Visiting the University of Chicago law school in the summer of 1910, he struck up a friendship with Walter Wheeler Cook, one of the original realists, and with Roscoe Pound, who was also visiting at the time. Subsequently, Pound did much to promote Hohfeld's career. In 1913, Hohfeld published the first of his essays on fundamental legal conceptions in the *Yale Law Journal* and immediately attracted the attention of legal scholars in America. He accepted Yale Law School's offer of a professorship in 1914. At Yale he was a brilliant but difficult teacher, frustrating many students but attracting the devotion of some of the brightest, including Walter Corbin and Karl Llewellyn, who brought Hohfeld's analytical tools to the attention of the emerging group of realist scholars. Hohfeld died suddenly in 1918, not long after the publication of the second of his seminal essays. To best understand the effect of Hohfeld's work on the development of realism we must first describe the analytical tools he forged in "Fundamental Legal Conceptions" and set them in their theoretical context, before we explore the reasons for his paradoxically enthusiastic reception among realists.

[15] In Anglo-American jurisprudence many of the core ideas in Hohfeld's essays were developed by Terry (1884, secs. 108–28) and Salmond (1902, secs. 72–8).

3.1.3.1. Jural Correlatives and Opposites

Like a typical practitioner of analytic jurisprudence, Hohfeld approached the understanding of law through a meticulous examination of the language of lawyers and judges. Like a chemist, he sought to break down complex notions to their more basic components. He focused on the language of legal rights. Ordinary judicial reasoning, he observed, was often muddled, using talk of rights in many different ways (Hohfeld 2001, 11). Careful attention to this usage reveals not one but several distinct and basic concepts in play. Because these concepts are *sui generis*, not reducible to any other notions (ibid., 1213), no explicit definition was possible; however, explication of them was possible by putting each concept into precisely articulated relationships with the others. For this purpose, he regimented his analysis in two ways. First, each notion-pair captured one basic legal relation between just two parties regarding just one activity (action or omission) (Finnis 1972, 379–80). Second, the notions all function within some particular normative (specifically legal) system and concern (legal) persons governed by the norms of that system. These two regimenting conditions are essential to understanding Hohfeld's analyses, although they are often ignored.

Hohfeld (2001, 12–13) identified eight basic concepts and arranged them in structured pairs in two ways: as jural correlatives and jural opposites. We can begin with the idea of a right (in a narrow sense) or *claim*. For an individual A to have a claim with respect to some activity Z (possibly regarding some object, O) is for another individual, B, to have a duty with respect to Z (and O); indeed, for A to have this claim just is to have a claim with respect to Z/O *against B* and for B to have a duty *to A* with respect to Z/O. A's claim and B's duty are *correlative* and they characterize one and the same normative relationship from the different perspectives of the two individuals in that relationship. A different kind of "right" is a *privilege* or liberty (ibid., 14–21). For A to have a privilege relative to some action (and object) just is for B to have *no-right* to A's performing that action. Of course, if B *had* a right (i.e., a claim) to A's performing the action, then A would not have a privilege/liberty, but rather a duty to perform it. Thus, the same concepts in play are related also by negation, as "jural opposites." (We will return to this conceptual relationship presently.)

We have here, in Hohfeld's view, four fundamental rights-related conceptions, structured into two pairs of correlative conceptions. They all are concerned with *doing*, or refraining from doing, certain actions (although sometimes the actions are characterized in terms of their outcomes as, for example, A's claim to bodily security is correlative to B's duty to refrain from actions that cause A bodily harm). These relations stand in fundamental contrast with a different set of pairs that concern not doing, but rather *bringing about* certain normative (legal) consequences. The core idea is that of one's ability to change the normative (legal) position (the duties, claims, liberties, powers, and the

like) of some individual. Just as physical power is the ability to change something in the physical world (to move a rock or turn on a light), so a normative power is the ability to change something in a normative world. We encountered this notion in chapter 1 several times, especially in Salmond's critique of the Austinian orthodoxy (chap. 1, secs. 1.1.2.1 and 1.1.2.2). The fundamental difference between legal claims, duties, and liberties, on the one hand, and legal powers, on the other, had been recognized in the nineteenth century by Windscheid (1875, sec. 37), Bierling (1883, 49–73) and others and found its way into Anglo-American jurisprudence in the work of Terry (1884, 100–1) and Salmond (1902, 233–6). However, Hohfeld, through his analysis of the correlatives of the concept of normative power, shaped it into a supple tool of legal analysis (Hohfeld 2001, 21–31).

Correlative to A's power to change B's legal position is B's liability to A's exercise of that power. "Liability," as Hohfeld used it, does not imply any "duty" or "burden to pay" as in tort law, but merely susceptibility of a legal person to having some part of its legal position changed. Hence, Hohfeld himself suggested that another term for B's correlative to A's power is "subjection" (Hohfeld 2001, 27; see Sartor, Volume 5 of this Treatise, 580). If B is *not* subject to A's changing some right, duty, or power of his, then in that respect B has an *immunity* to A's doing so and A has a correlative *disability*. Thus, in the general legal power, or "bringing about," category we have again two pairs of correlative concepts: power correlative to subjection and immunity correlative to disability. Hohfeld (2001, 12) set out these eight conceptions in the following patterns.

Jural correlatives (arranged vertically)

Doing

A's claim	A's privilege/liberty
B's duty	B's no-right/claim

Bringing about

A's power	A's immunity
B's liability/subjection	B's disability

A's *claim* with respect to activity Z (and object O) is correlative to B's *duty* (*re* Z/O). These two terms look at one and the same legal relation. Similarly, liberty and no-right, power and subjection, and immunity and disability are correlatives. But also, for A to have a liberty with respect to Z just is for A *not* to have a duty with respect to Z, and similarly for the claim/no-claim, power/disability, immunity/liability pairs. They are "jural opposites."

Jural opposites (arranged vertically)

Doing

A's claim	A's privilege/liberty
A's no-claim	A's duty

Bringing about

A's power	A's immunity
A's disability	A's liability

Hohfeld thought that these eight conceptions, while interdefinable, are not reducible to anything else or to each other, but a kind of conceptual reduction is possible. A's liberty with respect to Z, for example, just is the absence of a duty on A with respect to Z. Similarly, A's disability just is the negation of A's power, and A's immunity is the negation of A's disability. So it appears that, with the addition of the operation of negation, we can reduce the eight conceptions to four and the four pairs of correlatives to two: right/duty and power/subjection. Moreover, if we understand duty as duty *owed to* someone, and power as normative power *relative to* someone's position, it is possible to see the entire Hohfeldian scheme as built around these two fundamentally irreducible concepts. Nevertheless, it is true that (giving him some other assumptions we will consider presently) Hohfeld identified four irreducible *legal relations*, for a liberty/no-right relation between A and B is a different relation from a claim/duty relation between them, even if it can be described as a "no-duty"/no-claim relation. And the same can be said for the other set of relations. The relations are not analyzable into smaller components.

Another word about the role of negation in Hohfeld's scheme is needed. His notions of privilege, no-right, disability, and duty are defined relative to a normative background (specifically, some particular legal system). Thus, while a privilege or liberty is the absence of a duty, the negation must not be understood as a bare privative. In a Hobbesian "state of nature," of course, an individual may enjoy liberty of a sort, since by definition there are no civil laws or common norms in a state of nature, and hence no laws imposing duties. But Hohfeldian liberties, although they are just the absence of a duty, are not identical to Hobbesian liberties in a state of nature, because they are liberties (we might say permissions) *within* a presupposed normative system. The same is true for immunities, disabilities, and no-rights. This is a consequence of Hohfeld's orienting thought that the concept pairs capture *legal* relations, relations between persons in a given legal system, and hence are very different from the absence of all legal relations. At the same time, we must understand that Hohfeldian liberties are very different from liberty-rights as these are often understood, namely, as freedoms to engage in certain activities unobstructed by others—freedoms others have a duty not to interfere with. On Hohfeld's analysis, liberty-rights of this kind are a complex combination of a number of different legal relations (among many different individuals), amongst which are Hohfeldian liberties. Hohfeldian liberties are not necessarily protected by duties on the part of others, although they may be combined with such duties, in which case a person would have not only a liberty to engage in some activity but also a claim on someone else not to interfere with that activity.

It is sometimes said that Hohfeld's scheme ignores remedies (Finnis 1972, 380), but this is a mistake. Similarly, it is a mistake to say, as some early realists did, that on Hohfeld's analysis, for A to have a claim against B is for the state to hold B to a duty against A (Corbin 1920, 230; Llewellyn 1951, 85).

The truth rather is that, on Hohfeld's analysis, if someone's claim or liberty is protected by a legal remedy of some sort, then that is true by virtue of a distinct legal relation combined with the claim or liberty. Hohfeld's analysis is not committed to the familiar doctrine that there is no right without a remedy, but it can explain the doctrine. It is the thesis that every legally recognized right includes in the bundle of legal relations that it comprises a power/subjection relation on the part of the right-bearer to call on the state to act in a certain way. It is an open question, of course, whether the doctrine, or slogan, is true for any given legal system. Hohfeld's analysis makes clear what has to be true for the slogan to be true of that legal system. However, it should be mentioned that the question of the role of remedies in Hohfeld's analysis does create one important challenge to his analysis. Since there would often be three essential parties to a remedy relation, namely A, B, and some legal agency, it may be difficult to analyze many legal remedies in terms of strictly bi-partite relations.

Reflection on Hohfeld's treatment of liberty-rights and legal remedies brings clearly into view the core analytical claim of his work: the rights that lawyers, judges, jurists, and lay people typically have in view are always complex bundles of many different basic legal relations, viewed from the perspective of the party presumably benefited by the bundle.[16] Familiar rights have what we might call an "exercise-respect" (E-R) structure, an integrated combination of a number of different components (Postema 1989c, 112–5). So, with respect to any alleged right, we can use Hohfeld's conceptual tool to identify the components of its E-R structure. But this raises the question of what brings these components together, what combinatorial principle(s) determine the E-R structure of the rights recognized in a given legal system or, for that matter, of the rights we wish to see recognized by law?

Remarkably, Hohfeld is completely silent about the combinatorial principles. What we know from his analysis is that from the existence of any one of the legal relations no other relation can be inferred directly. But that is just to say that Hohfeld isolated the atomic elements of legal relations and that we now need to identify the principles according to which they are united into legal molecules and compounds. It does not follow from this that there are no logical or conceptual relations among components of a given molecular right, but only that whatever determines their combination it is not the logical structure of the legal atoms themselves. These combinatorial principles may be of many different kinds. There may be concerns of justice or other moral values that call for regular combinations of certain atoms; there may be concerns of a very general nature tied to fundamental aims or tasks of law that yield combinatorial principles, or general principles in particular departments of law or

[16] Official "duties" or "responsibilities" can also be analyzed in terms of bundles of Hohfeldian powers, disabilities, liberties, duties, and perhaps claims, although we would not think of these as benefits or advantages of officials.

of the law of certain legal systems that do so. ("No right without a remedy" might be one of these principles for example.) Moreover, it is not necessary that these combinatorial principles focus on securing advantages to individuals, even if the primary relata of the component legal relations are individuals. Any number of collective social or political goals may be served by arranging the E-R structures of rights in certain ways. The correlativity of the pairs of fundamental conceptions is a matter of their internal logic; nothing follows one way or the other about the priority of the related individuals in the *justification* of the E-R structure. The important point to recognize here is that, although Hohfeld's analysis puts the question of the combinatorial principles clearly in view, he offered nothing towards answering it. His view favors no approach to answering it, not even the view that the combinatorial principles must be normative as opposed to logical or metaphysical.

3.1.3.2. A General Framework for Analysis of Law

We have considered the core of Hohfeld's analytical structure. It is this structure that has become established as a major tool of analysis of (legal and moral) rights throughout the world.[17] Hohfeld, however, had an even larger vision of the theoretical scope of his analytic framework. He maintained that he had uncovered not merely basic constituents of legal rights, but rather fundamental conceptions of law in general. He thought his framework was comprehensive, sufficient, and fundamental for analysis of all legal positions—that is, all legal positions and all legal effects could be adequately expressed in its terms alone (Halpin 1997, 28–9). Its terms offered a lowest common denominator for expressing all legal positions (Hohfeld 2001, 30). All legal positions could be expressed as (combinations of) bi-partite relations among legal persons.

Hohfeld did not explicitly commit himself to the nature of these legal persons in his two essays, but Corbin maintained that he had only natural persons in mind (Hohfeld 1920, 227). This makes some sense, for it is likely that Hohfeld would have analyzed corporate legal persons into complex relations among natural persons. Although the related parties were concrete natural persons, the jural relations, in his view, were abstract in a three-fold sense. First, jural relations are abstracted from physical and mental phenomena (Hohfeld 2001, 5–6). He sharply distinguished jural relations from physical or mental phenomena. They are *normative* relations, matters of legal standing, a function

[17] See, for example, Kocourek (1928), Ross (1968), Lindahl (1977), Hart (1982, 162–219), Wellman (1985), Halpin (1997) and Sartor in Volume 5 of this Treatise, chaps. 19 and 22. Hohfeld's analysis also had a great influence on the development of American law. Its influence is evident, for example, in academic codifications of major departments of American law (Restatement of Contracts, Restatement of Property, the Uniform Commercial Code, and Uniform Sales Act).

of the legal norms in force in a legal system, not physical properties or relations, or probabilities regarding them (ibid., 5–9). Second, jural relations are not positions as implied, characterized, or constituted by any particular legal instrument (statute, code chapter, constitutional provision, precedent, or the like), but rather resultant effects of all such instruments or sources (Halpin 1997, 31). Third, jural relations are abstracted from any concrete individual interests. They may be related to, designed to serve, or designed to protect such interests, but they are logically distinct from them.

Thus, Hohfeld held that legal reality is a complex of fundamentally abstract, normative facts about relations among individual natural persons. Moreover, he maintained that viewing law in this way provides the key to analyzing, arranging, and explicating all of law. With this analytic tool, he concluded, we can uncover the "fundamental unity and harmony in the law" (Hohfeld 2001, 31). Hohfeld saw himself working on a project similar to that of Holmes, Langdell and many others at the turn of the century, namely, systematic, rational ordering of legal material according to certain fundamental principles or concepts in terms of which all other legal positions can be analyzed and legal norms expressed. His was a project in what Holmes called (philosophical or analytic) jurisprudence (Holmes 1995, vol. 1: 212–21, 326–35 and 3: 403; see above chap. 2, sec. 2.5.1), but whereas Holmes thought the concept of *duty* could do the job, and others thought the concept of *rights* would suffice, Hohfeld argued that his more complex, but also logically refined analytical framework, would provide the necessary basis for a comprehensive rational reconstruction of any given system of law.

This is an extraordinarily bold claim. It is remarkable in two respects. First, it was entirely undefended. It is a strong philosophical thesis for which no philosophical argument was ever given. Linguistic analysis of talk of rights is not up to this task and in any case his analysis was based on assumptions that were themselves undefended, even if very fruitful. Is Hohfeld's ontology of law (atomized relations among natural persons) adequate? Is the correlativity assumption plausible—that is, are all legal positions *relational*? Are there no "absolute" (non-relational) duties? Could there be? Are all legal relations bipartite? What combinatorial principles account for familiar legal compounds? These and hosts of other questions which Hohfeld never considered easily suggest themselves. As it stands, his framework is analytically brilliant, but philosophically shallow (or rather, in view of the fact Hohfeld died before he could work out his views, we should say incomplete).

3.1.3.3. Reception of Hohfeld's Analytic Jurisprudence

The second remarkable feature of Hohfeld's account is that, despite its very obvious similarities to formalist projects at the turn of the century, its relentlessly logical-analytical method, and its commitment to fundamental legal re-

lations as abstract, normative entities, it was embraced by realists for a long time[18] as a major contribution to the effort to break the shackles of formalist thinking on judicial reasoning and legal thought. How could that have been?

The simple answer is that realists appropriated Hohfeld's analytic framework, ignoring its obvious formalist elements and in many cases ignoring crucial components of that framework. In its early gestation period in the 1920s and early 1930s, most realists were greatly concerned to promote progressive legal reform and to support efforts at protecting workers and communities from the predatory practices of capitalist enterprises. They saw formalist approaches to law and legal thinking as major obstacles to such reform. Anything that might aid their criticism of formalism was embraced and put to use. With Hohfeld's analytical tools they attacked the idea of absolute, natural property rights. Rights, they argued, were merely legal constructions, bundles of relations bearing no logical relationships to each other, easily prised apart, and thrown together for merely political or policy reasons. From the fact that a factory owner had a liberty, nothing followed about duties of others to respect that liberty, they argued, and since rights and duties were nothing more than logical correlatives, it followed that rights do not deserve any privileged position in legal analysis or argument. Moreover, the claims of formalist judges that certain components of property rights fit together into tight conceptual packages were shown to be entirely unfounded, they thought. Arguments that pretended to be logically deductive and closed to considerations of justice or policy where shown, they thought, to be full of gaps which could only be filled by appeals to policy. Hohfeld's analysis of the language of rights in the realists' hands became a potent weapon of progressive criticism.[19]

But this use of Hohfeld's tools was hardly warranted by his presentation of them. (Hohfeld may have had progressive sympathies, but his analysis was entirely neutral with respect to ideological matters.) The assertions about rights that allegedly figured in the formalists' arguments and the realists' criticism of those arguments concerned rights-compounds, certain E-R structures that were alleged to be embedded in and protected by existing law. Nothing in Hohfeld's analysis provided reason to think that rights are not natural (or non-institutional or moral); that is a matter of their justification, not the logic of their atomic components. He, along with positivists since Bentham, may have assumed they are only artificial constructs, but his analysis did not show this. That analysis can be used to articulate the structure of natural rights as well as legal rights. Legal rights may be socially constructed rather than natural, but

[18] Hull reports that Karl Llewellyn, the most ardent early promoter of Hohfeld's work, admitted in 1955 that, if Hohfeld had lived another twenty years, "he and I would have been at war" (Hull 1997, 107).

[19] For the realists' reception of Hohfeld's analysis see Horwitz (1997, 151–6) and Simmonds (2001, xii, xviii–xx).

this is in virtue of their arising within an institutionalized normative system, not in virtue of the conceptual properties Hohfeld's analysis exposed. Likewise, although Hohfeld's tools enable us to analyze complex rights-compounds, like property rights, into their atomic components, nothing follows from that about what binds them together. Hohfeld was silent about combinatorial principles, but from silence it is not possible to infer that there are no such principles or that they are drawn from entirely extra-legal (merely political) considerations of policy. Similarly, from the fact that the atomic components do not by themselves generate logical connections among them, it does not follow that they are not and cannot be connected in some other way, by virtue, say, of some features of law in general or structures and principles of certain departments of law, or other considerations. Hohfeld's analytical tools cannot even show that there are logical gaps in arguments that infer one component of a right from the existence of some other component. It only shows that if there is some such connection it must be in virtue of the E-R structure of the rights-compound in question and the combinatorial principle that generated it.

It appears, then, that Hohfeld's analysis put on the theoretical agenda questions which may have been obscured by the legal or political rhetoric in the early decades of the new century. But Hohfeld did not begin to answer them, neither was there anything in his analysis (as opposed to his own political convictions) that favored one kind of answer over another. The fact that this analysis was not only used by progressive realists but taken by them to be truly liberating says far more about the realists than about Hohfeld's analytical scheme. Hohfeld's scheme was brilliantly conceived and executed, but all of its elements were available to lawyers and legal scholars in other parts of the common-law world (in Salmond's work and elsewhere) and they did not generate or support the kind of criticism of existing law or efforts towards progressive legal reform that characterized the work of the early realists in America. Analytic jurisprudence was alive and well both in England and America in the opening decades of the twentieth century, but its impact on law, on the practice of law, and on legal scholarship was dramatically different in the two domains. The difference between them lay not in the instruments of legal analysis, but rather in the political climate of the respective legal professions and legal academic communities at the time.

3.2. Realism: Skepticisms and Remedies

Taking their cues from Pound and Holmes, realists argued for a radical reorientation of the study and teaching of law. The point of orientation, they insisted, was the practical interest and needs of practicing lawyers advising their clients. This, they argued, directed the attention of legal scholars away from law on the books to law in action, from the dictates of sovereign legislatures to the decisions of courts, and from what courts *say* to what they *do*. It also

forced a new conception of the science of law—its aims, methods, and primary data. Early realists were not shy about expressing their contempt for doctrinally oriented study and teaching of law and took pleasure in trashing their formalist opponents. This led inevitably to rhetorical (and sometimes substantive) excesses. Soon the realists were widely believed to be committed to various forms of radical skepticism about the rationality and rule-guided nature of judicial decision making, advocating, as one recent critic put it, "a mordant suspicion of all so-called legal 'rules'," thereby distorting and radicalizing Holmes's jurisprudence (Kaplan 1983, 11). It is not easy to separate the serious hypotheses from the strategic hype, the real commitments from the rhetorical excesses of the realists and their critics, but it is important to do so, for despite the extremism of some of the realists, they raised issues of general importance for legal philosophy. Without denying that it is possible to find more extreme versions of their views in the literature, I will try to identify those themes and arguments that remain of interest to legal theory.

3.2.1. Rules: Paper and Proper

We can begin with Karl Llewellyn's classic statement of the realist program in his essay "A Realistic Jurisprudence—the Next Step" (Llewellyn 1930). This paper is often thought to have sparked the radical "rule skepticism" that dominated realist thinking well into mid-century, but this reading ignores the context and target of its criticisms. Llewellyn's criticism rested on a distinction between prescriptive and descriptive rules. Since the distinction he had in mind, and his use of it, is easily misunderstood, we must proceed carefully.

"Descriptive rules," according to Llewellyn, are rules *of* conduct, that is, observable regularities of behavior. We might say that they describe that which people do "as a rule," but no normative significance is attached to this fact. (It is not part of the descriptive rule to suggest that people *ought* to act in this way.) These rules can sometimes serve as bases for predictions of similar behavior in future. Sometimes Llewellyn called them "real rules" (without intending any prejudice against prescriptive rules), but he preferred to call them "practices" rather than "rules" (Llewellyn 1930, 439 n. 9, 448). In contrast, "prescriptive rules," or proper rules, are rules *for* conduct. They are not to be equated with either predictions or commands, but rather are norms prescribing conduct (or legal consequences) in certain specified circumstances. They may be articulated normative propositions, but often they are just implicit in behavior (Twining 1985a, 488–9). Prescriptive rules perform several important tasks in law. They guide, control, or limit the behavior of citizens and officials, and they play a role in justifying official decisions and supporting judgments of advocates. They can also aid in describing and predicting the practices of courts and other agencies (Twining 1985a, 492–3). They can perform the latter task because, in Llewellyn's view, prescriptive rules—at least articulated ones—

always include both a prescriptive and a descriptive part: they prescribe a certain form of conduct, but also tacitly (and necessarily, he thought) assert that behavior of the relevant norm-agents actually conforms to it (Llewellyn 1930, 450). This is a surprising claim, and it is unclear what led Llewellyn to think it was true. He may have meant nothing more than that, when prescriptive rules are officially articulated, at least those who utter them like to think that the rules are regularly followed.

Whatever led him to it, this view underwrites the further distinction, important for his realist analysis of law, between "working rules" and "paper rules." The latter—for example, formulated rules found in law books or headnotes of reported cases—implicitly *claim* that behavior conforms to their prescriptions, but this claim is frequently false. "Working rules," in contrast, are prescriptive rules to which there corresponds a true descriptive rule—the rule is actually *in force* or *practiced* (Llewellyn 1930, 439 n. 9). The aim of Llewellyn's classic 1930 paper was to argue that we must not take "paper rules"—accepted doctrinal formulations of legal norms—at face value. Realists adopt a skeptical posture, he argued, not with regard to rules in general, but with regard to *paper rules*. They seek not to eliminate (prescriptive) rules from legal thinking and reasoning, but rather to counsel a more careful and realistic look at the rules that find their way into our thinking. The realist "seeks to determine how far the paper rule is real, how far merely paper" (ibid., 450). We are inclined to assume that the norms are actually in force, but he demanded "Don't assume, check it out!" (ibid., 440, 443–4). And when we check it out, he argued, we find the formalist is mistaken to think "that traditional prescriptive *rule-formulations* are *the* heavily operative factor in producing court decisions" (Llewellyn 1931, 1237, first emphasis added). This is a form of "rule-skepticism," but a relatively modest one.

It is tempting to think that what Llewellyn had vaguely in mind was the distinction between *valid* law and *effective* law. Hart and others later argued that, although it is possible for a particular law to be valid and binding even if not generally followed, effectiveness is a necessary condition of the existence of the legal system as a whole (see below, chap. 7, sec. 7.1.3). However, this is not what Llewellyn had in mind. His point is not about the conditions of existence of rules, but about conditions determining their content or meaning. It is not just that paper rules might be mistaken for actual working rules, but that viewed merely as paper rules, without attention to their use and application in ordinary circumstances of daily life, the meaning and content of legal rules can never be adequately understood. Llewellyn here advocated a modest contextualism addressed to the issue of the interpretation of prescriptive legal rules.

Llewellyn's contextualism had three dimensions. First, following Pound, Llewellyn insisted that legal norms can only be understood in terms of their *purposes*: rules of law, he argued, "are measures […] to be judged against their purposes" (Twining 1985a, 490). To determine the prescriptive content of any

paper rule we must put it in the context of its purposes; we must seek to make some intelligible sense of it as a prescription for action and this requires at a minimum that we grasp the aim or principle it was meant to serve. Second, Llewellyn argued that we cannot grasp the meaning of a legal norm until we set it in the context of its ordinary application. The "practice" of courts and especially citizens, in his view, does not merely confirm or falsify the descriptive part of a prescriptive rule, but it also decisively shapes the content of that rule. Practice affects the meaning and not just the existence of rules. Thus, the proper focus of legal inquiry, he insisted, should be the area of contact between judicial behavior and the behavior of citizens, for only there can talk of rules, rights, and interests take on concrete content (Llewellyn 1930, 442–3). Finally, elsewhere (especially in *The Common Law Tradition*) Llewellyn called attention to the problem of the characterization of facts to which rules are supposed to apply. "The problem of guidance by rules," he maintained, "is the problem of guiding, by rules of law, the classification of emergent raw states of fact" (Twining 1985a, 490). As we shall see, this problem will seem nearly insurmountable to Jerome Frank and drive him to a strong form of "fact-skepticism." For Llewellyn this problem was not unsolvable, but it was difficult and must not be ignored by legal theorists.

Llewellyn's distinction between paper rules and working rules became a staple of realist analysis, although other terms were used to mark the distinction. For example, Herman Oliphant decried the dominant tendency in scholarly and judicial thinking to pay attention only to what the courts *say* and ignore what they *decide*, and so fail to see how the decisions diverge from favored general principles. Generalized abstractions were endowed with a reality of their own. "Absolutes and universals […] replace mere generalizations. Broad principles […] spring from few cases […] This search becomes partly one for mere word patterns" (Oliphant 1928, 75). The results for legal education, he argued in his typically colorful way, was that "most of our students […] remain intellectual infants with toothless gums too soft except for munching elastic generalities with sophomoric serenity" (Oliphant 1928, 76). That is, they are unable to approach real-life legal problems with the skills of perception, judgment, and careful attention to implications for future cases that are taught by the traditional practice of precedent. Oliphant's target, like Llewellyn's, was not judicial use of rules or norms, but a certain style of judicial thinking, judicial opinion writing, and legal scholarship that focused on "supergeneralized and outworn abstractions" without attention to the contexts from which rules and principles get their vitality. (Recall Pollock's and Holmes's view of general principles, chap. 2, sec. 2.2.2, 2.3.1.)

It would be misleading to leave the matter here, however, for the realists marshaled a set of arguments to bring home in a powerful fashion the theoretical, as well as descriptive, inadequacies of formalism and the corresponding importance of contextualism. To appreciate the impact that realism had on

subsequent legal theory in the United States, and to assess its contributions to the philosophical understanding of law, let us consider the most important of their allegedly rule-skeptical and fact-skeptical arguments.

3.2.2. Rules and Reasoning in Judicial Decision Making

Realists argued that if we just take a good look at law, if we "see it fresh" as Llewellyn (1960, 510) urged, it will be obvious that the guidance offered by rules and norms cannot alone adequately explain the decision a judge makes.[20] To support this conclusion, they offered a number of arguments. Some of them relied on relatively superficial observations of judicial behavior; others penetrated more deeply into the structure of practical reasoning.

3.2.2.1. Conflicting Rules

The first argument begins with the simple observation that in many cases judges find that several, conflicting rules press for consideration, and thus, judicial *choice* as well as rules must figure in the explanation of a judge's decision (Kronman 1993, 189–90). As William O. Douglas, who later became a Justice of the U.S. Supreme Court, put it, "there are usually plenty of precedents to go around; and with the accumulation of decisions, it is no great problem for the lawyer to find legal authority for most propositions" (Douglas 1963, 19; Rumble 1968, 55–6). In modest form, this argument merely points out the obvious, namely, that the law in play in the courtroom is not reducible to a small set of general and internally consistent rules, but rather that often the judge is faced with conflicting legal authorities. Following Douglas's lead, flamboyant realists asserted, further, that the legal materials are so various and conflicting that almost any proposition can be legally supported. For example, Leon Green maintained that "out of the numerous competing theories, doctrines, formulas, and rules at hand in every case […] [the judge] can always find those that fully justify the policies which to him seem dominant" (quoted in Rumble 1968, 56). A modest objector might accept that almost any legal proposition might be able to find *some*, at least minimal, support in the legal materials, if they are not analyzed carefully and thoughtfully, but refuse to accept that *any* proposition could find persuasive, let alone legally sufficient, support therein (to "fully justify" it). The more radical conclusion, it would seem, cannot rest on observation alone, but must be defended with detailed substantive legal argument. Realists should have been the first to acknowledge that not every invocation of

[20] The realists never acknowledged the ambiguity of talk of "explanation" between *causal* and *rational* determination. They rarely made clear whether they had in mind the role rules play in the actual motivations (or other causes) of a judge's decision as opposed to the rational support the rules give to the decision.

rule or doctrine, even if given canonical syllogistic form, counts as an adequate argument in justification of a legal conclusion. Realists often embraced the extreme claim, but for their purposes they did not have to do so. It was enough for them to show that the legal materials on which a judge must rely are far more varied and less obviously consistent, and so requiring far more investment of the judge's own resources, than their formalist opponent would allow.

This problem of too much law, as it were, might not be very serious if judges had relatively precise interpretive metarules to guide their attempts to resolve conflicts among first-order rules. However, Llewellyn and others argued, the interpretative metarules themselves conflict, urging either narrow or broad interpretations of the rule or precedent as the judge chooses. The doctrine of precedent, Llewellyn argued, is "not one doctrine, nor one line of doctrine, but two, and two which, applied at the same time to the same precedent, are contradictory of each other" (Llewellyn 1951, 66–8). Rules alone, then, cannot fully explain judicial decision making. Jerome Frank even went so far as to conclude that the conflicting rules or precedents were "not authoritative" because the judge was forced to *choose between* the rules, and for that reason *neither rule* could be said authoritatively to determine the judge's decision (Frank 1963, 287). Frank was inclined to attribute to his formalist opponents a notion of a rule's authority that recalls John Chipman Gray's arguments (this chapter, section 3.1.2.1). This notion will play an even larger role in other realist arguments framed by Frank.

3.2.2.2. Finding the *Ratio Decidendi* and the Problem of Generalization

In common-law domains, the problem of finding the law can be difficult even when the judge does not face multiple, conflicting authorities. A major problem arises from the fact that, being bound by *stare decisis*, a judge must follow the rule of the precedent case, the *ratio decidendi*, but finding the *ratio* is complicated by the classic logical problem of generalization. Put simply, on the one hand, the decision in the prior case, if limited to its particular facts, *cannot* be followed, because those facts are logically particular. So, if the precedent decision is to be followed, it must be regarded as establishing and exemplifying some *relatively* general normative proposition. But, logically speaking, there are indefinitely many generalizations and levels of generalization from the particular facts of the prior case, and *logic alone* cannot determine for the judge which generalization is the correct one to use in the present case. Felix Cohen offered a typical version of the argument.

> Elementary logic teaches us that every legal decision and every finite set of decisions can be subsumed under an infinite number of different general rules, just as an infinite number of different curves may be traced through any point or finite collection of points. Every decision is a choice between different rules which logically fit all past decisions but logically dictate conflicting results in the instant case. Logic provides the springboard, but it does not guarantee the success of

any particular dive[...]. No one of these rules has any logical priority; courts and lawyers choose among competing propositions on extra-logical grounds. (Cohen 1933, 35)

Since *logic* cannot settle the question of what level (or direction) of generalization is correct, the judge must depend on *extralogical* grounds. Since no other legal rule is likely to give any more than limited guidance on this matter, realists conclude that, again, rules are unable alone to determine what the rule of the prior case is. (Here, clearly, it is *rational* determination that is at issue.) Oliphant made the same point in more colorful language.

There stretches up and away from every single case in the books, not one possible gradation of widening generalizations, but many. Multitudes of radii shoot out from it, each pair enclosing one of an indefinite number of these gradations of broader and broader generalizations [...]. A student is told to seek the 'doctrine' or 'principle' of a case, but which of its welter of stairs shall he ascend and how high up shall he go? Is there some one step on some one stair which is *the* decision of the case within the meaning of the mandate *stare decisis*? (Oliphant 1928, 73)

Faced with this indeterminacy, the judge cannot "escape the fact that he can and must choose. To realize how wide the possibilities and significant the consequences of that choice are is elementary to an understanding of *stare decisis*" (ibid.). Critics of the realists typically see this as an argument for the conclusion that the "choice" of the *ratio decidendi* is subject to *no* rational constraints (Rumble 1968, 62–3; Golding 1986, 456). If this was the intended conclusion, the argument is an obvious failure, for from the fact that logic alone does not constrain the intelligent identification of an appropriate or the correct level of generalization, it does not follow that *nothing* having anything to do with *reason* does. However, Oliphant did not intend to draw this radical conclusion from his argument. He used the argument to pose a problem to which, in his view, the traditional practice of stare decisis was a solution. The question this argument raises, Oliphant argued, "is real and insistent […] [and] should be asked explicitly and faced squarely" (Oliphant 1928, 75), but it is not a question to which there have been no plausible and practicable answers. Over the long history of the common law, courts solved the problem through a "method" embedded in long practice, "by an intuition born of their [the courts'] experience" (Oliphant 1928, 73). These "fabrics which Anglo-Saxon opportunism has woven" imposed a rigorous discipline of thought and judgment on common-law courts of the past (Oliphant 1928, 76). The problem, he argued, was that this long-standing practice, handed down through generations of practically engaged, experienced lawyers and judges, has been undermined by developments in the modern world, both within the legal community and in the political society at large. He argued not for the radical indeterminacy of law, nor for its merely causal determinacy,[21] but for the need for an alternative

[21] Some commentators (e.g., Rumble 1968, 63) suggest that Oliphant was committed to a rather simple-minded behaviorism by his claim that courts "solve" the problem of generalization by simply "respond[ing] to the stimulus of the facts in the concrete cases before them rather than

solution that can hope to do the work that the traditions of common-law practice were able to do in a simpler political society. We will consider presently the shape this alternative must take in Oliphant's view.

3.2.2.3. The Problem of Determination: Authority and the Judgment Gap

The problem of generalization has its roots in an important *logical* point: particular decisions are logically particular and hence entail no generalization; yet, legal decisions are thought to have normative significance beyond their logically particular boundaries. They establish a rule, or at least an example for future cases. One might think that this problem is limited to common-law domains that treat judicial decisions as precedents and conclude that it does not threaten authoritative general rules that are explicitly legislated and neither contested nor in conflict with other equally authoritative legal norms. At least here, the defender of formalist jurisprudence might hope to stand on solid ground. However, several realists argued that this too is sinking sand.

Holmes famously said, "General propositions do not decide concrete cases" (Holmes 1905, 76). We saw that, from Holmes's pen, this is the relatively innocent and altogether unremarkable common-law thought that sensitivity to context and experience-shaped judgment are essential to judicial decision making. Although he charged that legal theorists who ignored this otherwise homely common-law thought commit "the fallacy of logical form," he did not think it committed him to skepticism about the possibility of judicial reasoning. However, Jerome Frank took this thought in a different and much more radical direction.

Frank's argument (1963, 134–8, 296–7) is similar in some respects to an argument Bentham developed over a century and a half earlier to undermine Blackstone's common-law jurisprudence (Bentham 1970, 153–4; Postema 1989a, 286–9). Frank proceeded from two key premises: (1) necessarily, rules are *general* propositions that purport to guide action; and (2) necessarily, propositions of law are *authoritative and final*. To these he added an observation (which Bentham would have rejected): (3) only decisions of the court are authoritative and final. From these premises he concluded: (4) no rules (or any other general proposition), but only particular decisions of the court, are law.[22] That is to say, the *law*, strictly speaking, just is the particular decisions of the court and nothing more (Frank 1963, 50).

to the stimulus of over-general and outworn abstractions in opinions and treatises" (Oliphant 1928, 75). However, his view was more complex. The vocabulary of his extended description of common-law practice, now largely obsolete, is not limited to behavioristic terms. He treated the practice as self-conscious, intelligent, and reasoned, if not formally rational.

[22] Note that in the place of (1) Bentham had asserted: necessarily, legal propositions are general guides to action. From this he concluded that the common-law theory was incoherent, in that it claimed that only judicial decisions were authoritative and yet that such decisions gave guidance as general propositions of law. Bentham would have regarded Frank's conclusion as incoherent.

To understand this argument it will be necessary to unpack its three premises. First, however, it is important to notice that Frank's conclusion is not that rules do not exist, nor even that rules play no significant role in judicial decision making (Frank 1963, 141–2, 290), but rather that there are no *authoritative* legal rules. This argument was first of all directed against Gray's proto-realist definition of law (see above 3.1.2.1); indeed, it turns Gray's own argument against its conclusion. But Frank thought that the argument equally undermined the formalist thesis that law consists of a small set of very general principles that are canonically formulated and systematically ordered by "scientific" reason. (He used this argument against John Dickinson (1931), who advanced a modest defense of what Frank took to be a formalist thesis (Frank 1963, 286–9).) However, it appears that, if the argument is sound, it equally undermines efforts of fellow realists, and perhaps Frank himself, to identify law with predictions regarding the behavior of courts. For *any* general proposition that might be thought to guide action lacks the requisite *authority*. This applies not only to prescriptive propositions that purport to guide action directly, but also to predictions. Frank indirectly admitted as much. "Anyone can make a legal rule," he wrote. "That is, anyone can study the precedents and, as a result, can venture predictions of the legal consequences of particular conduct, and can put these predictions into the form of generalizations" (Frank 1963, 297). But he thought the validity of any such rule lies in its trustworthiness or accuracy, and "does not depend on who created it" (Frank 1963, 297–8). Such predictions are not themselves law but are merely "about law" (Frank 1963, 297); they, like other rules and opinions in textbooks, are, in Gray's terms, "sources of law" (Frank 1963, 137). As such, they may *influence* judicial decisions, but they do not do so as *authoritative law*. Let us look first at Frank's notion of authority and then return to the first premise and its role in the argument.

Frank's notion of law's authority, taken uncritically from Gray, is complex and decidedly positivist in character. First, law's authority is content-independent, as philosophers would later put it (see chap. 7, sec. 7.3.2.2), that is, the authority of a legal proposition depends not on the truth, accuracy, or reasonableness of its content, but rather on someone's laying it down. This is evident from the contrast implicit in Frank's refusal to recognize the authority of predictions (Frank 1963, 297). Second, on this view, authoritative propositions are *final*; that is, they settle matters that are previously unsettled, and thus put them beyond any further (legitimate) question or challenge.[23] Third, authoritative propositions *conclusively bind* the agents to whom they are addressed.

[23] This is the moral of his discussion of the hypothetical case of the Blue & Gray Taxi Co. vs. Purple Taxi Co. (Frank 1963, 46–51). Of course, the thesis was also central to J. C. Gray's argument. Like Gray, Frank quotes Bishop Hoadly's maxim that legal authority rests ultimately in the hands of the one who gives final interpretation to the words of law (Frank 1963, 132).

They "authoritatively compel" decisions or actions and hence leave no further room for the agent's judgment or choice.[24]

With this elaboration of Frank's notion of law's authority we can fill out the rest of his argument. It began with the innocuous premise that rules are by nature *general guides for action*, but, quoting (without understanding) Holmes,[25] Frank concluded that rules are not capable of guiding action, because "rules are merely words and those words can get into action only through decisions" (Frank 1963, 135). Frank's point may have been the banal thought that words need to be acted on, but he may have had something deeper and more general in mind. We might put the argument for his lemma as follows. Rules guide action just insofar as the agents to whom they are addressed are able to grasp them and apply them to the logically particular circumstances in which they find themselves. Since the rule is always and necessarily general (that is, universal) in nature, the rule alone can never direct any action, for action is always particular and concrete. Hence, an exercise of judgment is required to bring the general rule to bear on the particular circumstances of any concrete action. One, perhaps misleading, way of putting this is to say that rules give determinate guidance only with the help of something other than the rule, namely, the exercise of a kind of practical judgment.

Note two features of the argument at this point. First, it is entirely general. It applies to all rules—indeed, Kant (1929, 177–79) held that it applies to all thinking that involves concepts—not merely to rules of law or to explicitly formulated norms. As legal philosophers since St. Thomas (and probably long before) have understood, guidance by rules presupposes that those to whom the rules are addressed are rational, self-directing agents—beings who are capable of grasping a general rule as a guide for their actions and of understanding how to leap the logical gap from its general terms to its application in particular cases. Legal philosophers have long regarded this feature—providing guidance to rational, self-directing agents—as a defining feature of law, marking its distinctive mode of social control (see below chap. 4, secs. 4.2 and 4.3, for Fuller's use of this idea). What sets Frank off from this very large group is the fact that he used the same feature to conclude that only *particular decisions* of courts can be law. Second, the argument turns on a logical point, not an epistemological or causal one. The alleged gap between rules and their determinate applications remains even if it is obvious to the agent, or to anyone

[24] Frank never makes clear whether this "compulsion" is thought to be rational or causal (or both), but it is clear that, in Frank's view, for a proposition to have authority it must determine the judgment or action fully, leaving nothing to additional elements (whatever they may be thought to be).

[25] Frank (1963, 134) quotes the slogan from *Lochner* mentioned on page 113 above and the following from Holmes's essay, "Law in Science and Science in Law": "A generalization is empty so far as it is general. Its value depends on the number of particulars which it calls up to the speaker and the hearer" (Holmes 1995, vol. 3: 419).

who considers it, what the right application is, and even if it is always the case that all agents considering it would apply the rule in the same way. That is to say, Frank's argument does not depend in any way on any (epistemological or causal) indeterminacy of the rules. It is a logically necessary feature of *all* rules, however determinate, that there is this alleged gap between rule and action. But if this is true for all rules, everywhere, and just in virtue of their necessary generality, and does not depend on any controversy or perceived indeterminacy, then we must ask why Frank would think that this raises any problems for treating rules as candidates for proper legal propositions?

Frank's answer lies in the second premise of his argument: the requirement of authority for legal propositions. And, according to Frank, only court decisions actually enjoy the requisite authority. Rules "can get into action only through decisions; it is for the courts in deciding any case to say what the rules mean. […] The fact that courts render these decisions makes them law" (Frank 1963, 135, 134). Court decisions alone are authoritative because they alone are final and binding solely in virtue of the fact of their having been made. Consider the agents to whom the rules are addressed. They do not have any such authority, for their applications of the rules to the particular circumstances are subject to reversal by the courts. If those agents come to a wrong result, the court can reverse them. This is not the case for the courts, at least the highest courts in the jurisdiction: "If the judges in any case come to a 'wrong' result and give forth a decision which is discordant with their own or anyone else's rules, their decision is none the less law" (Frank 1963, 134). Decisions of the courts, and their decisions alone, are final. This is even true of the "rules" laid down by some previous court, since if any subsequent court decides in a way that appears inconsistent with this alleged rule, "their decision is none the less law." No rule requiring courts to follow past decisions, or other rules, or *anything* can change this, since even with respect to that rule, what is final and binding is not the rule, but the decision of the court, whether or not it is consistent with it. Therefore, decisions of the court and they alone may properly be regarded as propositions of law.

This is Frank's argument. Clearly it rests heavily on a strongly positivist notion of law's authority, and he seems to be entirely focused on the brute fact of the court's putting an end to the dispute. He appealed, almost ritualistically, to Holmes's "bad man" to support his case that the proper focus is court decisions, not rules.

> Your bad man doesn't care what the rules may be if the decisions are in his favor. He is not concerned with any mysterious entity such as the Law of Massachusetts which consists of the rules usually applied by the courts; he regards only what a very definite court decides in the very definite case in which he is involved; what is the "usual rule" is a matter of indifference to him. (Frank 1963, 135)

But this argument is problematic for two related reasons. First, if we take quite seriously the "bad man" that Frank invoked, it is clear that he would care far

less about the finality of the court's decision than Frank thought. After all, it is far too late in the day for the bad man to care about the court's particular decision in his case, for he will have had to make his business or personal arrangements long before that court acts. For him to wait for the *authoritative* and hence legally *final* determination of the issues affecting those arrangements is very likely to be far too costly. He needs to know what the court is *likely* to decide, and that is a matter about which, Frank recognized, there can be no authoritative determination. For the bad man, court decisions come too late. Moreover, the court decision *settles* only the *legal* matter; there still remains the *empirical* matter of just how likely it is that the court decision, final though it is, will be visited upon the "bad man." Would he not say about court decisions what he said about the law of Massachusetts, "I care little about whether it is final; I care whether it will actually be executed!"

Second, not only does the court's decision come too late, it also comes in the wrong form. Finality is a normative, not an empirical, matter. It is surely false that when courts decide an issue that issue is settled, at least for the parties involved, as a matter of empirical fact. Not only must we consider whether the parties will accept and act on the court's decision, but also it is possible that agencies charged with executing the court's orders will not comply with them; indeed, once we begin thinking about it, it is clear that any number of events and actions can stand in the way of the actual execution of a court's orders. Frank might respond that, regardless of these matters, it still is the case that in the eyes of the law, the court's decision lends finality to the matter in dispute. Then and only then is it final, *res judicata*. Thus, courts *settle* disputes as Frank thought of settling, not in the way the thug settles whether the mob boss is paid "protection" money, but by settling how, according to law, matters in future *shall* (that is, *will* according to law) be regarded. However, this is an entirely normative matter, and it necessarily concerns *general* matters; it concerns the way the parties, other citizens, and officials of all sorts are *bound* in future cases to regard the matter litigated. On the other hand, if we focus on normative matters, then it is not clear how the bad man's concerns are relevant and we need to rethink Frank's claims concerning authority and finality.

Perhaps Frank could abandon his appeal to finality and focus rather on *determinacy*, arguing that it is really *determinacy* and not *finality* that is most important for law's guidance. However, this will not improve the cogency of his argument. As far as guidance of behavior is concerned, the court's decision comes too late in the game. The court decides matters *ex post* not *ex ante*, but *guidance* is always sought *ex ante*: we need to know how to act in future, not how we are treated now for the way we acted in the past. While it is true that there is always a logical gap between rule and application, courts are not in a position (that is, they are not authorized and only in very rare cases able) to give determinate guidance *ex ante* so as to fill this gap. Thus, it is finality, not determinacy of guidance, that courts are specially authorized to confer on legal propositions.

But this, of course, is just to say that it is a feature of familiar legal systems (and arguably necessarily true of all legal systems) that court decisions are accorded this legal power to make authoritative, final decisions, a power that can only be understood in terms of norms granting such powers to the courts. However, this admission is devastating for Frank's argument, for the very thing it denies—the existence of general legal norms—is a presupposition of the argument. Authority-granting, court-authorizing norms must be explained, and they cannot be explained with the resources Frank allowed himself to work with.

These are familiar problems with Frank's argument. More serious for understanding Frank's realist program is the fact that it is not very clear how the three components of Frank's notion of authority (content-independence, finality and bindingness) were supposed to be related. All three seem to be essential to what we might call full-fledged Frankian authority, but are they internally linked? Or is it possible to have one without another? This is especially important because it is tempting to extract from Frank's larger and very problematic argument the crucial bit regarding the logical gap between the rule and its application. However, that narrower argument by itself does not get the realist very far. It merely says that rules (logically) must be combined with a faculty of judgment if they are to guide the action of intelligent beings. But Frank and other realists wanted to say more; they wanted to conclude that rules are not able to determine particular judgments or decisions, suggesting not only that there is this logical gap, but that the existence of this gap threatens any claim one can make to the rule's genuinely *binding* the decision of judges. Is this idea of bindingness essentially tied to the special and strong legal sense of authority Frank relied on? Or is it separable from it?

This question is important because, although other realists did not seem to embrace Frank's notion of authority, they did recognize the problem of judgment, in one form or another. Indeed, the task of characterizing and controlling this element of judgment attracted the greatest effort of the realists and drove them into three very different camps committed to three very different programs. We can get a better sense of the nature of this task, and the problem of judgment as they conceived of it, if we look briefly at two further lines of argument realists often deployed against their formalist opponents.

3.2.2.4. Argument *from* the Conclusion: Judicial Window Dressing

All of the arguments considered thus far, while designed to undermine the formalist account of judicial decision making, share with it a basic model of that process. According to this model, judges arrive at their decisions by applying the law to facts and the process of finding the law and that of finding the facts are mutually independent. The process of decision was thought to have roughly the structure of an Aristotelian syllogism; conclusions were thought to follow from premises not only according to their *ratio essendi*, but also according to

their *ratio cognoscendi*. However, the realists—Frank most prominent among them—maintained that this model fundamentally misrepresents the judicial decision making process in two respects. It fails to recognize that the finding of fact is inextricably linked to and dependent on the process of applying law to the facts; moreover, it treats the determination of the conclusion of the argument as the end result rather than the *beginning* of the process. In one form or another this argument can be found in many of the writings of realists, sometimes only suggested (see references in Kalman 1986, 6–7), at other times fully developed (Radin 1925, 357–9, Frank 1963, 108–12, and notoriously Hutcheson 1929).

Reversing the accepted model of judicial deliberation, some realists described "how judges think" as follows. A case—a miscellaneous batch of facts—is brought to the attention of a judge. The judge sets that batch into the context of his or her experience and struggles to make some sense of it in familiar terms. It is possible that the facts of the case will fall neatly into a familiar pattern and more or less automatically suggest a fair and proper decision with respect to it. More likely, however, several, conflicting patterns will suggest themselves to the attentive judge and he or she must put them all together and then wait for the "intuitive flash of understanding" that makes one pattern and associated conclusion stand out (Hutcheson 1929, 278). This intuitive process is not entirely passive; rather, the judge works from a conclusion, vaguely formed, to premises that might substantiate it (Frank 1963, 108). This is a matter of judges "working their judgment backward, from a desirable conclusion to one or another of a stock of logical premises" (Radin 1925, 359)—that is, reasoning *from* the conclusion *to* premises. Typically, also, judges will then construct an argument in the reverse direction from premises back to the already determined conclusion. But, since "the vital, motivating impulse for the decision is an intuitive sense of what is right or wrong for that cause," when the judge turns to the task of writing his opinion, the aim is, perhaps, partly to justify the intuition to himself, but more importantly just "to make it pass muster with his critics" (Hutcheson 1929, 285).

There seem to be three elements of this process as the realists characterize it: (1) grasping and making sense of the facts and arriving at a hunch concerning the right way to deal with it (the right conclusion); (2) working back from this conclusion to plausible premises to support it; (3) working in reverse down from premises back to the conclusion, usually in the public form of a written judicial opinion. The similarity to, and perhaps influence of, Dewey's account of the logic of inquiry and the logic of exposition is undeniable (see above 3.1.2.3; Frank 1963, 108). The model was understood in two different ways. For some, notably Hutcheson and possibly Frank, the first element was seen as dominant, while the others were thought to be separable and only of marginal importance for the process as a whole. According to Hutcheson, the judicial process is essentially passive, reactive and merely intuitive. "The judge really decides by feeling, and not by judgment; by 'hunching' and not by ratiocination, […] the

ratiocination appears only in the opinion" (Frank 1929, 285). Frank likewise seemed to regard the process as largely passive and responsive. He took pains to allow that rules may exert some influence on the judge: the rules, like other features, are "hunch-producers" (Frank 1963, 113). On this view, the second element, the search for satisfying premises, is pursued for peace of mind only, and the third element is merely for public consumption, an "apologia for that decision," "logomachy," mere "rationalization" (Hutcheson 1929, 279).

In contrast, other realists, at least from time to time, portrayed the process as more active, ratiocinative, and interdependent. Frank admitted that the search for persuasive premises to support the intuitively attractive conclusion may feed back on the formation of the hunch. "If he cannot, to his satisfaction, find proper arguments to link up his conclusion with premises which he finds acceptable, [the judge] will, unless he is arbitrary or mad, reject the conclusion and seek another" (Frank 1963, 108). But Frank still thought that the process is limited to individual judges finding premises that are satisfying to them. The third stage still appears to be a matter of "rationalization" and plays no key role in the conclusion-forming process. Max Radin took a more plausible view of this aspect of the process. He held that the search for premises is intertwined with the attempt to properly characterize the facts of the case (Radin 1925, 357–9). These premises provide the judge with the categories in which to capture and make sense of the facts as they present themselves. This process might conceivably involve the kind of reasoning that seeks to incorporate new information into a body of beliefs, making adjustments where necessary to achieve a kind of reflective equilibrium or coherence. Radin's extended discussion of examples is compatible with such a construal, although it also does not clearly require it. Frank also argued that the process of finding the facts (or determining which are the relevant facts) and determining the rules to be applied to them are bound together, but he still treated the process as largely passive and reactive, rather than involving the rational deliberative activity of the judge. "The decision is frequently an undifferentiated composite which precedes any analysis or breakdown into facts and rules" (Frank 1963, xiv; see also 144–5).

Llewellyn took a rather different tack. He argued that the third element is an integral component of the process (not just a final, unimportant stage). The judge is bound to build "a logical ladder" from the conclusion *to* exiting legal precedent or principle *and back*.

> This, as a judge, he wishes to do. This, as a judge, he would have to do even if he did not wish. This is the public's check upon his work. This is his own check upon his work. For while it is possible to build a number of divergent logical ladders up out of the same cases and down again to the same dispute, *there are not so many that can be built defensibly*. (Llewellyn 1951, 73 emphasis in the original)

As we noted when we considered the relationship between Dewey's logic of inquiry and logic of exposition, to take seriously the need to provide a public

justification of any intuitive conclusion—such that failure to find a justification that has some hope of being widely if not universally regarded as persuasive is enough to drive the judge back to the drawing board—turns the passive, merely responsive, intuitive process into an active process of *reasoning*, held to public standards of performance by other informed members of a public. This seems to have been Llewellyn's view of the process, despite the undeniable role of "argument *from* the conclusion" in it.

3.2.2.5. The Problem of Relevance: Fact-Skepticism

While realists were sometimes drawn to the latter dynamic interpretation of the model of reasoning from conclusions, it appears that many realists easily lost their grip on it. Typically, they viewed the judicial process as a matter of passive hunch-formation followed by public rationalizations. This led Jerome Frank to a deeper form of skepticism. Other realists, he argued, embrace some form of "rule-skepticism," but they fail to see that skepticism about the rationality of judicial decision making extends far beneath the problems that we canvassed above to fundamental problems about the rationality of judicial finding of facts. Other realists fail to appreciate the depth of this problem because they tend to think of the judicial process in terms of the process of decision making in appellate courts, which, in American jurisdictions, are usually required to take the facts as already established and are faced only with issues of law. At the trial court level, however, the relevant facts must first be determined (Frank 1963, x–xii). The problem at that point is not the strictly epistemological problem of establishing rational principles of evidence by which to judge from the evidence what the facts of a given case were (i.e., what was true), but the conceptual and normative question about the *relevance* of facts thus found. Again, although the form in which he presented his argument lacks precision, Frank did identify an important issue for legal philosophy. We might call it the *problem of relevance*.

What are the relevant facts in any case? Frank asked. One judge might be convinced that facts *a*, *b*, and *c* are the relevant ones, and if others could agree on that, there may be no further question about the fair and legally right decision to make with respect to the case characterized in this way. But another judge may well feel that a different set of facts is relevant and it may be true that on that characterization of the facts a quite different decision is indisputably correct. The difficulty may lie in agreeing on the set of relevant facts (Frank 1963, 145). It is tempting to say that the problem is that the judges are using different criteria of relevance, and that choice of criteria of relevance rests on extralegal "considerations of social or economic policy" (Cook 1927, 308). But that is not actually the way Frank thought of it, nor does it get to the bottom of the problem. Frank thought the problem was solved only by the individual judge's exercise of intuition, not by appeal to a favored, if contested, set of cri-

teria (rules) of relevance with extralegal roots. "The peculiar circumstances of any particular case cause the judge to favor one conclusion or another. […] The judge then often—more or less consciously—'interprets' those circumstances so that the conclusion can be stated in terms of some well-established rule of law" (Frank 1963, 288 n. 7; see also 162).

Frank did not fully appreciate, however, that the problem of relevance arises within a legal system richly structured by concepts, rules, examples, and the like. This is clear from Radin's (1925, 357–60) discussion of the matter. The problem of relevance is similar to the problem of generalization and the problem of determination, and the way it is typically solved is not by appeal to some more general rule, but by the exercise of something like the faculty of judgment that we saw at work with respect to the other problems the realists raised. That is to say, decisions are made, conclusions drawn, and actions taken on them, despite the fact that no rule or algorithm determines them. In many cases, and in a variety of ways, no rule or well-established authority precludes the unruly exercise of judicial choice (Frank 1963, xii). Of course, it is precisely the unruly character—the apparent impossibility of reducing it to an algorithm—that impressed Frank, and made him think that no formalist account of judicial decision making can possibly succeed. Judgment, or intuition, or hunch, or something like it is pervasive and impossible to eliminate from the process. This fact radically undermines the claim of the judicial process to regularity and rationality; it can only appear irregular and largely arbitrary.

3.3. If Not Rules, What?

All that being said, realists (except Frank, see below sec. 3.3.2.1) recognized that judicial decisions are not utterly random. Thus, the realists asked: If rules conceived on the formalist model do not determine judicial decisions, what does? How are we to explain the ordinary functioning of law and the regularities it manifests? Because their critical attention was focused exclusively on the defects of formalism, it is not surprising that the realists turned to the social sciences for their answer. They argued that formalism failed because it rested on an obsolete and defective model of the science of law. The answer to their question, they thought, lay in a thoroughly modern model of the science of law. On this they agreed, but what this science was to involve and how it was to be conceived were matters of intense disagreement. Pound's "sociological jurisprudence" suggested a vague direction for their thinking but nothing more. As a result, three quite different and apparently incompatible approaches emerged. Realists were united in their opposition to formalism, and largely agreed on its defects, but they were divided on the positive programs they pursued and the understandings of law that drove them. (I hesitate to speak of "theories" here because rarely did these programs mature into recognizable jurisprudential theories.) Personality differences, preferred styles of scholarship,

academic politics, and even to an extent national politics, help to some extent to explain the emergence of these different realist camps, but the differences also had a source in a fundamental ambiguity in the upshot of the realists' critique of formalism. To identify this ambiguity we must first clarify the nature of the problems with formalism uncovered by the arguments we surveyed above.

3.3.1. Failures of Formalism

From the perspective of the twenty-first century, someone familiar with the work of the realists' descendants, most notably critical legal scholars (see chap. 6, sec. 6.3), might be tempted to see the realists as engaged in exposing the radical indeterminacy and inevitable disputability of law. Even Brian Leiter, one of realism's most careful recent interpreters, claims that the realists held that *law* is both rationally and causally indeterminate (Leiter 1996, 265ff.)—that is, authoritative legal sources are insufficient to justify unique decisions in any case and insufficient to bring a judge to a determinate decision. Leiter is correct to call attention to the distinction between rational and causal determination of judicial decisions, but I believe he has misunderstood the upshot of the realists' main arguments. It is very clear that the concern of most of the realists, except for the always problematic Jerome Frank, was not the indeterminacy or uncertainty of judicial decision making. In this respect, their concerns were different from late twentieth-century critical legal scholars (see chap. 6, sec. 6.3 below), but it is also true that they did not typically hold, and, more importantly, their arguments did not support, the view that the law is indeterminate either rationally or causally. The problem, in their view, lay not in the law or the judicial process, but in the account of it dominating legal education and scholarship, i.e., formalism. In their view, formalist theory failed to explain the operation of the judicial process and the determinacy, such as there was, that characterized it. Rules of law do not determine judicial decisions, the realists argued; but that claim was directed specifically with respect to *rules* and *determination* as they were conceived by the formalists. The failure *of formalism*, both in fact and in theory, did not entail a failure *of law*. Only Frank was inclined to express out loud his despair about the uncertainty of the law, or rather of the judicial process, and even he complained that Leon Green "grossly exaggerated the extent of legal uncertainty (i.e., the unpredictability of decisions)" (Frank 1963, xii). Other realists, the so-called "rule skeptics," he said, were merely "left wing adherents of a tradition" that insisted on the fundamental regularity and certainty of judicial decision making (Frank 1963, xii).

If this is correct, then it would seem to follow that we must not be quick to attribute to the realists a substantive, albeit embryonic, theory of law or legal validity on the basis of their primary arguments against formalism. If their arguments were designed to show that *law* is either rationally or causally inde-

terminate, then it would be reasonable to conclude that the arguments presuppose a criterion by which authoritative legal materials are distinguished from those that are not, a criterion that is distinctively positivist (Leiter 1996, 269; Leiter 2007, 69–73). But if the arguments targeted *formalism*, then they need only accept *arguendo* formalism's characterization of the legal materials. Only one of the arguments relies on a clearly positivist premise, namely Frank's argument from authority against rules as law (see section 2.2.2.3), and this is not surprising, since it started out as an *ad hominem* against Gray's theory challenging its coherence. To the extent that his argument has wider significance, the problem of determination that it identifies does not depend on any positivist-inspired criterion of validity, but only on the assumption, shared by legal theories of many stripes, that law seeks to guide rationally the behavior of intelligent self-directing beings. There is good reason to think that most of the realists were committed to some version of the positivist doctrine of the separation of law and morality, but the arguments we canvassed above (Frank's authority argument excepted) do not seem to presuppose any more substantial commitment to positivism.

3.3.2. Realist Science of Law

It appears, then, that the upshot of the realists' main arguments was not that law or the judicial process needed radical reforming, but rather that our understanding of that process needed a fresh start. The arguments, they thought, uncovered phenomena that called for explanation and existing theory, the formalist's "science," was radically inadequate for that task. At this point a crucial ambiguity in the realists' arguments moves to the foreground. The terms in which the arguments were set out—formalist rules were said to be insufficient for "determining" or "producing" judicial decisions—*are* ambiguous between rational determination and causal determination. The former concerns the sufficiency of the reasons, arguments, or modes of reasoning judges are expected to use; the latter with the actual causal factors (whether conscious motives or other factors not available to the decision maker's consciousness) that move them to take decisions. The formalists, as realists represented them, had a very narrow view of rational determination, allowing only deductive or "mechanical" inferences to qualify. It is possible, of course, to demonstrate the defects of this narrow conception of judicial reasoning while maintaining one's focus on the issue of rational determination. The call for an alternative explanation of the (relative) rational determinacy of adjudication would then take the form of discussion of the role in a judge's practical reasoning of factors other than explicitly formulated rules and legal materials as conceived by formalist theory. This, in fact, was the route taken by one realist faction, represented primarily in the later work of Llewellyn (1960), stressed the element of judicial craft and a practice-embedded discipline of judicial reasoning. Kronman (1993, 209–25)

called this "prudentialist realism" because it resurrects a quasi-Aristotelian notion of judicial *phronesis* or prudence. This, however, was definitely a minority position within the realist movement.

Most realists, including apparently Llewellyn in some of his early writings (e.g., Llewellyn 1930, Llewellyn 1931), thought that a proper science of law was strictly *empirical*, modeled on the physical sciences, and focused on explaining judicial (and lay) *behavior*. In the writings of these realists, the rational indeterminacy of formalist law might have drawn their attention, but they sought to explain law's regularity with a causal, narrowly behaviorist theory. They did not clearly mark or even fully recognize the shift in their theoretical focus. Thus, when they articulated, for example, what we called the problem of determination, or the problem of relevance, and then posed the question, "If not rules, then what?" they responded not with a more nuanced account of the faculty of judgment in the domain of reasons and reasoning, but rather a theory of *causes*. Herman Oliphant's classic realist paper, "A Return to Stare Decisis" (1928), illustrates the pattern of thought common in this large group of realists.

Oliphant first gave a classic statement of the problem of generalization along the lines we explored above, but it is clear he regarded the argument not as a demonstration of the indeterminacy of law or of judicial decision making in general, but only as setting a task for the engineering of adjudicative institutions. English Common Law, matured in the seventeenth and eighteenth centuries, solved the problem, he thought, through the "method" or discipline (not the doctrine or principle) of *stare decisis*. What was characteristic of this method, in his view, was that the judgment of individual judges was disciplined by a historically refined, collective practice of judging, which provided each judge with a rich body of experience dealing with concrete practical problems of social life, required the judge to focus narrowly on the specific facts of each case, and trusted the continual exercise of such judgment over time to refine the rules and doctrines made by the courts. In his description of this method, which is remarkably accurate, classical common-law practice is eminently pragmatic, opportunist, and "empirical" (meaning, in this context, focusing narrowly on concrete cases and allowing more general propositions to emerge only over time through a process of trial and error) (Oliphant 1928, 73–6). However, Oliphant argued, this practice was lost to modern American law, partly due to the rise of a style of thinking about law he called *stare dictis* and associated with Langdellian formalism, but also partly due to the increasing complexity of modern social life. The common-law practice of *stare decisis* is a lost Atlantis, no longer available to us, he argued. The "return" to *stare decisis* that he recommends is a return only in broad function. Surprisingly, in the place of the fabric of common-law "empiricism" woven, he says, by "Anglo-Saxon opportunism" (Oliphant 1928, 76), he proposed an applied science that takes as its focus the empirical (in the philosophical sense) study of behavior

(Oliphant 1928, 76, 159; Oliphant 1932). This is, of course, a proposal for a radical shift in focus papered over by equivocation on the term "empiricism." It is very hard to imagine how the empirical study of judicial and citizen behavior could possibly play the role that the "prudential practice" of the classical common-law experience sought to play.[26]

Oliphant's proposal became the project of one very substantial group of realists. Yet, even this wing, while it advocated with evangelical fervor the shift of jurisprudential attention to empirical science, was not univocal. It split again into two unequal camps, one represented by those who joined Oliphant, Radin, Cook and Moore (many of them located at Johns Hopkins' Law Institute or the Yale Law School), the other represented in rather lonely fashion by Jerome Frank. Like the others, Frank was inclined to think that any explanation of determinacy of judicial decision making had to be causal, but he was convinced that the social sciences offered no hope, since the causes of judicial decisions, ultimately, were idiosyncratic, a function of the peculiar personal bent of each individual judge. In his view, regularity in the decision-making process was not to be found, it was to be imposed through personal discipline. In order to gain a sense of the impact realism had (and did not have) on subsequent legal theory, it would be useful to look briefly at each of these different realist programs.

3.3.2.1. Impartial Idiosyncrasy

Consider again the problem of relevance. The judge or lawyer encounters a complex and motley collection of facts with alleged but uncertain legal relevance. The judge or lawyer sifts through this collection and sooner or later finds that they fall into a pattern (or possibly a number of competing patterns), that also typically carries with it a pointer toward some proper or fair decision concerning the disposition of the case. We noted earlier that many realists tended to represent this as a largely passive process; in Oliphant's off-quoted phrase, it was a matter of responding "to the stimulus of the facts in the concrete cases before them" (Oliphant 1928, 75). At various points, realist arguments detailing the role and extent of choice or judgment in adjudication seem to bottom out in this claim. It crops up so frequently in realist writings and seems to play such a key role in their arguments that Leiter has dubbed it "the Core Claim" of American legal realism (Leiter 1996, 270; 2007, 21–5). Frank, Llewellyn, and the sociological wing of the realist party all gave this claim some

[26] Radin made a similar shift, but his move is a little more plausible. He focused not on judicial behavior but on the conceptualizations available to experienced judges thinking their way to a decision (in the backwards way described above, sec. 3.2.2.4) in recognizable *types* of citizen conduct (Radin 1925, 359). While suggesting a shift to empirical study of behavior, this retains its focus on the practical reasoning of judges—that is, on "how judges *think*."

play in their arguments and positive programs, but, as we have seen, they also gave it very different interpretations.

The way the judge gets his hunches is the key to the judicial process, Frank proposed, so we need to identify these "hunch-producers" (Frank 1963, 112–3). Rules of law figure prominently among them, he conceded (ibid., 113, 141–2); they can "powerfully influence the making of law" (1963, 290). But he added quickly that a whole host of other factors do so as well, including the judge's political and economic views and moral convictions. Yet even this list is too short. Indeed, *no list* of general considerations or factors will suffice, for uniquely individual factors, the "peculiar traits, disposition, biases, and habits of the particular judge," are often more important causes than legal rules, political affiliations, or moral convictions (ibid., 114–20). To know the hunch-producers of any particular judge we need to know intimately his or her personality (ibid., 120, 143). The particularity of the personalities of individual judges is then multiplied by the radical uniqueness of fact situations they are asked to assess (ibid., xii–xiii, 160), and the product is an overwhelming case for the unpredictability on external, behavioral grounds of any judge's decision. There simply are no *discoverable* general and useful regularities.

Yet, uniformity of decisions, or at least a substantial degree of reliability of the judicial process, is important, Frank (1963, 35–41) admitted, even though legal theorists and lawyers have been obsessive about it. But this regularity is achieved, not discovered, in Frank's view. It is product of a program of judicial self-discipline, not one of empirical science: "we can achieve greater uniformity if judges are able to detect and check their prejudices, are aware the rules are not their masters, but merely agencies to be utilized in the interest of doing justice" (ibid., 144). Self-scrutiny, not science (either formalist-style, or empiricist-style), is our only hope (Frank 1943, 652–3). The project, as Frank described it, is lonely and individual, private and personal rather than theoretical.

3.3.2.2. Jurisprudence as Social Science

It was precisely Frank's unqualified individualism, and his refusal to acknowledge the fact that judges are members of social groups in socially structured situations, that so turned his fellow, sociologically-oriented colleagues against him. Felix Cohen argued that "the 'hunch' theory of law" failed to appreciate "the relevance of significant, predictable, social determinants" of judicial decisions that yield "a significant body of predictable uniformity in the behavior of courts." Judges, he continued, are

> selected to a type and held to service under a potent system of government controls. Their acts are 'judicial' only within a system which provides for appeals, rehearings, impeachments, and legislation. […] A judicial decision is a social event. […] Only by probing behind the decision to the

forces which it reflects, or projecting beyond the decision the lines of its force upon the future, do we come to an understanding of the meaning of the decision itself [...]. This is a question not of pure logic but of human psychology, economics and politics. (Cohen 1935, 843–4)

Two themes emerge from this passage. One is that judicial decision making is a social phenomenon and cannot be understood if it is treated as the action of an isolated individual. Decisions are "social events" that take on their character and meaning only in the context of the institutions and practices of which they are a part. One can no more understand a judge's decision apart from this context than one can understand the decision of a football official apart from the rules, institutions, and practices of the game (and business and worldwide culture) of football. The second theme is that such an understanding is properly expressed in terms of "social forces" and "social determinants" of the behavior in question—the language of social psychology, economics, and politics. Jurisprudence, Cohen argued, must be conceived as social science.

The inclination to look to the social sciences for illumination of the nature and functioning of legal institutions, of course, came straight from Roscoe Pound. Pound had already convinced a generation of young legal scholars that the study of legal institutions and their interaction with other social forces was an important and neglected field. Even without the impetus of the various arguments against formalism that we canvassed above, there was strong motivation among this generation of legal scholars to study the "stimulus" that law was thought to give to citizens and the way in which it influenced their behavior.[27] But it was the need to explain judicial decisions in the face of the evident failure of formalism that brought empirical social science into the theory of law, or at least the theory of adjudication, in a way that Pound never anticipated or sanctioned.

The particular direction Cohen seems to chart for such a broadly sociological theory of adjudication was not the inevitable outcome of the attempts of the first realists to explore in a socially sensitive way how judges think. Max Radin and Herman Oliphant accepted what Leiter called the Core Claim of realism, that judges respond to the stimuli of the facts of the cases before them, but they did not draw Frank's radically individualist conclusion. On the contrary, Radin (1925, 359) argued that it is possible (at least in principle) for citizens to "think the way judges do" because judges respond to situation or action *types*.

Most of the things we do are pattern things, groups of acts rather than wholly separate acts, and many of these groups have at some time or other been considered by courts. The shifting character of human experience rearranges groups, rather than creates wholly new ones. (Radin 1925, 359)

[27] The most notorious example of this kind of enterprise was Underhill Moore's study of the influence of municipal traffic laws on the parking behavior of the residents of New Haven, Connecticut (see Schlegel 1980; Duxbury 1995, 91). For a comprehensive study of this part of the realist program see Schlegel 1995 and Summers 1982, chap. 3.

Judges are often in a special position to grasp these patterns because they are familiar due to their experiences as lawyers, citizens, and active participants in the social practices from which they arise (Radin 1925, 357–8). Likewise, Oliphant argued that a properly "empirical" science of law would study and build on "the response of [judges'] intuition of experience to the stimulus of human situations"—their "situation-sense," Llewellyn (1960, 122) called it. Only this kind of study, rather than a study of "vague and shifting rationalizations" of judges or treatise writers, can hope to give us the "constancy and objectivity" we demand of law and of the scientific study of law (Oliphant 1928, 159). The judges' "situation-sense" that these realists had in view, was not Hutcheson's "hunch" or natural intuition; rather, it was the intuition of the long-experienced participant in the activities and practices of law—not the bare hunch of a social atom, but tutored and disciplined judgment. If we study the patterns of judicial decisions, they argued, we will find that what judges decide is largely in accord with implicit social norms or customs (Leiter 1996, 281). Judges do so, not because they explicitly and deliberately appeal to these extralegal norms to supplement indeterminate legal materials, but rather because these implicit social norms, like the rules, norms, and prior decisions of the law, shape the judges' perception, deliberation, and judgment as they try to uncover the pattern of significance in the welter of facts alleged to constitute a legally relevant case.

This sounds remarkably like the old-fashioned common-law practice that Oliphant argued had become obsolete. What does this have to do with social science? The answer is that with the tools of social science we systematically study the social influences that shape deliberation and judgment. Social science was thought to replace the kind of information supplied by experience in a simpler age (Oliphant 1928, 159–60). Hence, on this view, there is a role for social sciences not only in predicting decisions of the court, but also in the court's own deliberations. This, however, is still a far cry from Cohen's picture of jurisprudence as a social science; indeed, it seems much closer to Llewellyn's craft-oriented alternative to the sociological approach. These elements in Radin's and Oliphant's initial conception of the sociological approach were soon silenced by the more narrowly behaviorist elements of Cohen's approach. Jurisprudence came to be seen as the study of "social forces" operating on and determining the behavior of judges.

> Behind the decision are social forces that play upon it to give it a resultant momentum and direction; beyond the decision are human activities affected by it. The decision is without significant social dimensions when it is viewed simply at the moment in which it is rendered. Only by probing behind the decision to the forces which it reflects, or projecting beyond the decision the lines of its force upon the future, do we come to an understanding of the meaning of the decision itself. (Cohen 1935, 843)

Oliphant (1928, 75–6) argued that we should pay attention to what courts do, not what they say; so he advocated that we not pay a great deal of attention to

how judges articulate the practical judgment they exercise. Cohen's approach takes this suggestion one very large step further. On Cohen's picture, the aim of jurisprudence is to construct a theory that can explain fully judicial decisions entirely in terms of the social forces to which they respond. This kind of explanation takes not only the public explanations, but also the conscious deliberations of the judges, as entirely expendable. Explanations are, as Cohen put it, "functional," expressed in terms that eclipse the thoughts and deliberations of any of the actors playing according to the functional script. This group of realists (see especially Moore and Callahan 1943) tended to use the language of behaviorism, although it is not entirely clear how deeply they were committed to behaviorism. Their enthusiasm extended to vigorous advocacy for this new direction in legal scholarship, but, curiously, not to efforts to carry out the program. There was remarkably little empirical work done by realists in the 1930s and 1940s.

It is not easy to fix clearly the relationship between the realists' new jurisprudence-as-social-science and the long tradition of philosophical jurisprudence stretching from Aristotle and Cicero through Aquinas, Coke, Hobbes, Bentham, and Kant to Kelsen and Hart. It is clear that the realists advocated with evangelical fervor a shift of scholarly attention to the new endeavor, but it is much less clear whether they thought their new approach offered a useful supplement to traditional theorizing or rather thought it entirely supplanted the philosophical enterprise. Brian Leiter has suggested that this group of realists was engaged in creating a "naturalized jurisprudence," on the model of (and anticipating by several decades) recent efforts inspired by the work of philosopher, W.V.O. Quine, to develop a naturalized epistemology (Leiter 1998; 2007). The new jurisprudence, on this view, was meant as a rival and preferred *alternative to* traditional philosophical theorizing about law, wresting the baton of legal theory from the conceptual (and normative) analysis of traditional philosophers and passing it to empirically based theorizing of social scientists. This new jurisprudence, and in particular its focus on predictions of court behavior, Leiter has argued, was not intended as an alternative analysis of the concept of law, rivaling Austin's sovereign command model or Hart's union of primary and secondary rules. It proposed a rival form of *theorizing* not a rival *theory*. Hence, criticisms of the prediction theory, conceived on the standard model of philosophical accounts of law (e.g., Hart 1994, chap. 7.2; Summers 1982, chap. 5; and Benditt 1978, 25–41), fall wide of their mark; they defeat a weak team in a contest that realists never entered.

This suggestion is intriguing, but we have some reason to resist it. For one thing, it does not square with the realists' everyday pragmatism and constitutional impatience with metaphysics. Contemporary philosophical naturalists propose their nonconceptual-analytical theories as more rational and attractive alternatives to or replacements of traditional philosophical doctrines. Realists, even the more "scientific" of them, sought only to supplement tra-

ditional philosophical doctrines. Their impatience with metaphysical debates extended to debating and defending the antimetaphysical position. To be sure, they proposed scientific study of law modeled after the natural sciences, as a more fruitful use of intellectual energy; but this, like its attitude to all philosophy, was practically, not philosophically, motivated. Moreover, Leiter's thesis is not easily demonstrated because members of this group, like realists generally, were simply incapable of toeing a party line. While Cohen might serve as a good example of the naturalizing tendency, others, like Oliphant, refuse to conform to the model. Oliphant (1932, 137–9) clearly regarded jurisprudence as social science as a supplement and aid to "rational" science (more traditional analytic theories of law) and to "the art of government" (normative and practical approaches to the study of law). The ambiguity and unclarity about the relation between new social science-inspired jurisprudence and more traditionally conceived philosophy of law evident in the various wings of the realist party lingers in its descendants, especially in the more sustained and sophisticated realistic and pragmatic work of the law and economics movement (see chap. 5 below).

3.3.2.3. Law Jobs: Llewellyn's Conception of Legal Science

Karl Llewellyn was perhaps the most articulate spokesman for the "new jurisprudence," but he was never intellectually comfortable with his early associates, Cook, Oliphant, and Moore, and their strong emphasis on empirical study of law (Twining 1985a, 188). His natural focus was always on the craft of the lawyer rather than the behavior of the judge or citizen. Arguably, this is the dominant theme in his widely popular *Bramble Bush* (written and published for his students in 1930). Despite its rash and radical declarations (Llewellyn 1951, 9, 12, 14–5), Llewellyn's aim was not to introduce any form of skepticism (whether of rules or of facts), but only to focus attention sharply and memorably on the techniques of lawyering and to lead his student audience to an appreciation of their distinctive merits (ibid. foreword to 2nd edition). As the decade of the 1930s waned, and through the 1940s, Llewellyn looked on with interest, but increasingly at a distance, as the realists pursued their empirical researches. He concluded that such work could be at best a small part of the jurisprudential enterprise. He rejected entirely the idea that the traditional jurisprudential enterprise could be scrapped and replaced with an empirical science of law (Twining 1985a, 188–96). He especially rejected the idea of subjecting legal practice to the rigors of systematic science. Indeed, Llewellyn's approach became decidedly nonsystematic in two respects. It offered no principle or schema for organizing substantive legal doctrines into a systematic and intellectually satisfying whole. It focused on practice and process, not on doctrinal substance, but even its account of the practice and process was non-systematic. Moreover, the practice itself, as Llewellyn portrayed it,

was nonsystematic, more interested in pragmatic results than satisfying theoretical completeness or even (within bounds) consistency. He proposed what he called in unpublished course materials a "horse-sense theory" of law (notes for which can be found in Twining 1985a, appendix C). For effective lawyering, it is important to uncover facts, but the inquiry is "pre-scientific" and the whole approach is "non-science in method" (Twining 1985a, 502, 503).[28] Because it seeks to take account of values as well as behavior, it is not open to strictly empirical validation by social scientific measures.

Llewellyn turned his attention increasingly to two theoretical tasks: (1) articulating a general approach to legal institutions on the model of interpretative social science, which he called his "law-jobs theory" (Llewellyn 1940, 1949), and (2) within that, characterizing in detail the distinctive features of "juristic method" (Llewellyn 1960). Concerning the first, his view was that we understand the law only when we understand the kind of needs to which law and the practice of lawyering respond, the "jobs" we ask law and lawyers to do. Among these jobs he included preventing or minimizing conflicts, adjudicating disputes, channeling conduct and expectations and rechanneling them in response to change, allocating authority and procedures for decision making, and providing incentives for behavior (Llewellyn 1940, 1375ff.; Twining 1985a, 175). These needs must be met, at the "bare-bones" level, in order to keep society together and alive, but also to secure the efficiency of social interaction, and beyond that to facilitate realization of human aspirations (Llewellyn 1941, 187–8). Practices, "the bony structure of a legal system," form around these needs and tasks and give rise to the crafts of law. "The fresh study of these crafts and of the manner of their best doing," he maintained, "is one of the major needs of jurisprudence" (ibid.). Unfortunately, this general theory of law jobs and the practices and crafts associated with them was never developed in any detail.[29] Llewellyn applied his energies primarily on one part of this project, an account of common-law decision making.

3.3.3. Recovery of Craft and Principle

Llewellyn's most important contribution to jurisprudence, *The Common Law Tradition—Deciding Appeals* (Llewellyn 1960), although eclectic and rambling, directed the attention of legal scholars away from the exclusive study of official behavior and focused it again on the norms and practices, on the *craft*,

[28] Notice that the connotation of "science" has shifted dramatically from the late nineteenth century usage of Langdell, Pollock and Holmes (see above chap. 2, secs. 2.2 and 2.5.1).

[29] Lon Fuller's much more fully developed theory, which he called "eunomics"—the "study of good order and workable social arrangements" (Fuller 2001, 28, 188–205)—bears a striking resemblance in motivation and broad aim to Llewellyn's theory of law jobs (see below, chap. 4, sec. 4.2.1). I know of no evidence that Fuller was directly influenced by Llewellyn's work, although he would have known of it.

of judicial reasoning. A decade earlier, Edward Levi, legal scholar and U.S. Attorney General (1975–1977), had published his classic description of common-law method, *An Introduction to Legal Reasoning* (Levi 1949). In some respects these two works represented a return to a style of reflection on law that had been moved to the background, but never ushered from the jurisprudential scene, by the realists' criticism of formalism. In the early decades of the century, Roscoe Pound had sought to keep alive jurisprudential interest in the rational discipline of common-law reasoning. Joining him in this endeavor was Benjamin Cardozo, who in the view of many ranks among the greatest American judges of the twentieth century.

3.3.3.1. Pound, Cardozo, and Reasoned Elaboration

Pound argued that the realists, in their rush to expose formalist rigidities, plunged jurisprudence into skepticism because they ignored "the traditional technique of application [of law] […] which tends to stability and uniformity of judicial action in spite of the disturbing factors" on which they exclusively focused attention (Pound 1931, 706). In attending only to what judges *do*, they failed to take into account what they *ought to do*. Pound was not calling for a normative theory of adjudication, in addition to a descriptive one, but rather insisting that any adequate descriptive theory of law and adjudication must fully recognize its normative dimension, that the law purports to guide action of officials and citizens alike by means of addressing to them norms for their conduct. Realists tended to dismiss or ignore this normative dimension because they discovered that the rules and principles of law did not uniquely determine judicial decisions or official behavior. The result of this dismissal and exclusive focus on behavioral facts, Pound argued, was that the law itself was lost from view, and the very features of legal practice that could hope to provide a significant element of stability and rational uniformity in social life (Pound 1931, 707–8). In a little book written in 1921, Pound tried to capture the "spirit of the common law" (Pound 1963). The distinctive feature of common-law method, which, he argued, is characteristic of Anglo-American legal systems but in fact necessarily plays a role in every legal system, is its "judicial empiricism"—its development of principles of law "inductively," that is, case by case. This process, while ultimately one of "law-making," proceeds by means of "the disciplined reason of the judges" rather than "arbitrary will" or choice. This "artificial reason and judgment of the law," as Sir Edward Coke's in the seventeenth century characterized it (Postema 2003), proceeds by analogy to existing rules and doctrines, proposing and testing the limits of principles gradually over time, disciplined by the structure and practice of bench and bar (Pound 1963, 182–3). Beyond this, however, Pound said little about the nature and structure of this discipline, so it is no surprise that realists found little in his discussion but pious generalities.

Cardozo filled out these pious generalities a little. He, too, began with celebration of what he called common law's "pragmatism": the use of an essentially "experimental" method, proposing principles as "working hypotheses" rather than fixed truths, and continually testing and reworking them in an attempt to give articulate expression to the deep sense of justice in society. Courts, he liked to say, are "great laboratories of the law" (Cardozo 1921, 23). The reason-guided process of generating and refining these justice-oriented principles, in Cardozo's view, is structured by four usually complementary methods: the method of analogy, the method of evolution, the method of tradition, and the method of sociology. The methods of evolution and analogy seek to develop and refine principles by tracing out the "logical progression" of established rules, the former through projection from their historical development (evolution), and the latter through testing out hypothetical cases (analogy). They seek thereby to maintain the law's principled consistency. Appeals to social custom typical of the method of tradition add substance and direction to the struggle to bring legal principle to maturity (Cardozo 1921, 30–97). These three methods work within bounds set by the method of sociology at the core of which are not the realists' techniques of empirical social science, but rather the normative standards of justice and social well-being. The method of sociology does not secure determinate content for the principles—for that can only be worked out from materials internal to law—but orients law and adjudication to justice and charts the general path to realizing it (Cardozo 1921, 66).

Cardozo's work speaks with the authority of a practicing legal mind, but it still cries out for theoretical articulation and defense. The case for the role of principle and reason in the adjudicative project was taken up with vigor in the 1950s. In constitutional theory, several critics of the U.S. Supreme Court argued that its focus on politically attractive decisions ("right results") led justices to ignore the distinctive and essential responsibility of the court to articulate reasoned and principled defenses of their decisions. In their view, the court was a unique "forum of principle" whose legitimacy rests solely on ability of judges to offer publicly "reasoned elaboration" of their decisions in terms of "neutral principles."[30] Henry Hart (1959, 123) argued that legal reasoning is a process of "maturing of collective thought," to which both majority and dissenting opinions contribute, but only if the court undertakes to produce carefully reasoned opinions. Such opinions, in the words of Herbert Wechsler, "must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcend-

[30] The most widely discussed defense of this "reasoned elaboration" approach was made in Herbert Wechsler's essay, "Towards Neutral Principles of Constitutional Law" (Wechsler 1959). Other key contributions were given by Bickel and Wellington 1957 and Henry Hart 1959. For general discussions of this development in American constitutional theory, see Sebok 1998, chaps. 4 and 5 and Duxbury 1995, chap. 4.

ing the immediate result that is achieved" (1959, 15). Wechsler was aware that the principles themselves could not be neutral, but he insisted on neutrality in their application. That meant decisions must be rooted in existing law, transcending the politics of the immediate result, and committed to applying to other like cases in the same way. Beyond that, however, it was not clear what "neutrality" and "reasoned elaboration" were supposed to involve.

3.3.3.2. Llewellyn: The Discipline of Craft

The "reasoned elaboration" theme developed explicitly in criticism of realist tendencies evident in constitutional thinking and adjudication, but two theorists often associated with the realist movement, Karl Llewellyn and Edward Levi, were arguing similarly for a renewed appreciation of the role of reasoned deliberation and judgment in adjudication generally. In this spirit, Llewellyn wrote *The Common Law Tradition—Deciding Appeals*, a detailed study of appellate decision making. Llewellyn never lost his sense of the "leeways" allowed by the doctrine of precedent and other familiar principles and practices of jurists, but he undertook to remedy the crisis of confidence in appellate decision making produced by the "myth of uncertainty" propagated by the realists' relentless attacks on formalist accounts of that process. Realists were not wrong to call attention to the limits of formal logic to determine deliberative outcomes, Llewellyn argued, but their mistake was to conclude from this that there was nothing to bridge the logical gaps opened by their analyses. Basic to the misconceptions of the realist analysis of appellate decision making, he insisted, is "an absence everywhere of the concept of craft, of craft-tradition, of craft-responsibility […] [that] significant body of working know-how, centered on the doing of some perceptible kind of job" (Llewellyn 1960, 214). *Certainty* is not attainable, of course, but certainty is fool's gold anyway, he argued; the appropriate and attainable goal is "reasonable reckonability" of decisions.

> For the fact is that the work of our appellate courts all over the country is reckonable. It is reckonable first, and on a relative scale, far beyond what any sane man has any business expecting from a machinery devoted to settling disputes self-selected for their toughness. It is reckonable second, and on an absolute scale, quite sufficiently for skilled craftsmen to make usable and valuable judgments about likelihoods, and quite sufficiently to render the handling of an appeal a fitting subject for effective and satisfying craftsmanship. (Llewellyn 1960, 208)

Llewellyn charted the operation of fourteen "steadying factors" that underwrite our expectation of this reasonable reckonability. These include broad methods and principles of interpretation and decision, institutional and procedural structures (for example, independence and security of judicial office, adversarial argument by counsel, "frozen" record for courts below the appellate level), and certain customs that are rarely codified (for example, the tradition—or fiction—of a single right answer and the sense of responsibility to achieve a just result).

In addition to these, Llewellyn stressed the way the experience of the judge over time shapes deep-set habits of thought, perception, and decision.

> One of the more obvious and obstinate facts about human beings is that they operate in and respond to traditions[...] . Tradition grips them, shapes them, limits them, guides them; not for nothing do we speak of *ingrained* ways of work or thought, of men *experienced* or case-hardened, of *habits* of mind. Tradition, moreover, wreaks these things upon human beings notwithstanding that in a very real degree men also make use of the tradition, reshape it in the very use, sometimes manipulate it to the point of artifice or actual evasion. (Llewellyn 1960, 53; emphasis in original)

These habits are not merely individual or private; they are shared, communal. From this perspective, Jerome Frank's antinomian personalism was far wide of its mark. Traditions are never merely idiosyncrasies of individual behavior, but always the patterns of know-how, habits of mind and action handed down and extended across the profession. The practice constitutes a common public world in which participants interact, negotiate differences, chart individual paths, and seek out trajectories of agreement. Nowhere is this dimension of common practice-shaped habit more evident, Llewellyn argued, than in the "situation sense" by which experienced lawyers and judges recognize the limits of legal relevance and irrelevance in particular cases. The "problem of relevance," which in Frank's view plunged the process of legal reasoning into radical and irremediable uncertainty (see section 3.2.2.5, above), is solved, according to Llewellyn, not by logic, but by this practice-disciplined, law-habituated "situation sense" (Llewellyn 1960, 59–61, 121–57, 206–8). Anthony Kronman (1993, 216) nicely captured Llewellyn's view when he wrote, "widely shared professional habits incline judges not merely to think alike, but to see alike, and thus to concur in their perceptual judgments." These habits of mind enable and facilitate, rather than inhibit, responsible judicial deliberation and decision making. Herein lies the hope for a reasonable reckonability of decision making, in Llewellyn's view.

Llewellyn and his realist colleagues raised the challenge: if rules do not determine judgments, then what does? Llewellyn, the critic of realism, answered the challenge. To be sure, logic and general rules alone cannot guarantee determinacy in judicial decision making; moreover, he admitted, a residue of choice inevitably remains. But the common, practice-embedded sense of relevance and rightness lends the process a reckonability of serviceable value to members of the profession and to citizens whose lives intersect with this professional practice. Nevertheless, this reckonability is not accessible to the external observer, the empirical legal scientist who focuses only on patterns of behavior. The patterns that make decisions reckonable are learned *in the practice*; no amount of learning *about* the practice from the outside will be sufficient.[31]

[31] This argument anticipates an extended debate initiated by Hart about whether and in what respects the "internal point of view" is essential to jurisprudence (see below chap. 7, secs. 7.3.1 and 7.3.2).

3.3.3.3. Levi: The Forum of Principle

Like Llewellyn, Edward Levi accepted the realists' demonstration of the "leeways" of judicial decision making, but he insisted that it is "the recognition of the present and future leeway, as much as of the prior restrictions, which compels thoughtful judicial decision and makes of judicial reasoning something more than arrangements to be projected on a computer or predicted from the bias of a judge" (Levi 1965, 409). Legal reasoning, he argued, has a distinctive logic, structure, and discipline. In his classic *Introduction to Legal Reasoning* (Levi 1949), he outlined and richly illustrated this "logic" as it functions in (private) case-law, statutory, and constitutional contexts. He, too, stressed the shared, professional nature of this mode of thought. What he added to Llewellyn's craft model was a keen sense of its *institutionalization* and the opportunity it provides for meaningful community participation in the process. For Levi, the discipline of legal reasoning claims legitimacy and something akin to objectivity and essential to this claim is the opportunity for participation of ordinary citizens in its ordinary practice.

Fundamental to legal reasoning in all its forms, but most prominent in case-law contexts is the process of reasoning by example, analogical reasoning (Levi 1949, 1–6). The judge is set the task of finding a rule or general proposition appropriate for application to a cluster of facts. The rule may already exist in statute or precedent form or it may not. In either case, the judge must grasp the legal significance of the factual situation presented to the court and identify a rule appropriate to that factual situation. To do so the judge sets the present case in the context of other cases, notices similarities and differences, extracts from this comparison an appropriate generalization, and justifies disposition of the present case in terms of that generalization. Three features of the decision making process constrain and rationalize this determination.

First, the orienting practical principle is equality, which, for Levi includes both consistency and a sense of justice: the decision must fit prior like cases (Levi 1965, 400), but also the judge must ask herself when it is just to treat two cases the same or differently (Levi 1949, 3). Consistency of principle also requires that the judge be able "to project a pattern to guide later cases" (Levi 1965, 400, 404). Second, no judicial formulation of the rule or principle in a given case fixes it rigidly for the future. On Levi's view, judges in subsequent cases must construe the decision in the prior case on its facts and determine its underlying *ratio decidendi*.[32] This, contrary to appearances, he argued, further constrains judicial decision making, for the judge must not only project

[32] English readers of Levi's book argued that this may be the practice in (undisciplined) American courts, but it is not true of English courts. See, for example, Cross 1961, 207. Levi (1949—Preface to 2nd edition, vi–vii; Levi 1965, 400) replied that these critics do not do justice to their own judiciary and that his description fits the practice of common-law jurisdictions generally.

a pattern she finds intuitively attractive, but she must find one that is likely to be equally compelling to other judges facing similar cases in future. In this respect, Levi acknowledged the deep significance and influence of the interdependency of judges and their engagement in a common enterprise.

The third, and for Levi the most important, constraint is institutional. This process of exploring the similarities and dissimilarities of competing examples, in the context of the existing body of law, and projecting patterns for guidance of future behavior that can be recognized as reasonable and at least minimally just, occurs in a public forum (Levi 1949, 1, 5, 104; Levi 1965, 408). This imposes a further discipline on the process by which the problems of generalization and relevance (sections 3.2.2.2 and 3.2.2.5) are solved. Llewellyn had argued, against Frank, that the perception and judgment of judges were not radically idiosyncratic, but were trained and disciplined by the common practice of judging. Levi adds that this is not merely an elite, professional activity; it happens in public, according to a structured procedure that forces detailed exploration of competing versions of the fact situation presented to the court, tested against arrays of competing examples drawn mainly from past cases and hypothetical situations (Levi 1965, 398–9). This provides a distinctive and meaningful form of participation for the parties to litigation, and by extension for the community at large, in the process of focusing issues, exploring and delimiting ambiguities, and coming to partial resolutions of conflicts. "In this sense, the parties as well as the court participate in the law-making. In this sense, also, lawyers represent more than the litigants" (Levi 1949, 5). Only in this way, is the "moving classification system" of law, responding to the demands of new situations while maintaining some consistency with past decisions, able to claim legitimacy for itself (Levi 1949, 5, 104).

3.4. Conclusion

Legal realism as it developed through the first half of the twentieth century articulated no coherent general account of the nature of law or legal reasoning. It was best at challenging existing theoretical approaches and throwing out richly suggestive ideas and projects for further exploration, but its most devoted partisans lacked the intellectual stamina and philosophical sophistication to work out in detail a distinctive realist theory of law. In the end, Llewellyn was probably right: realism was not a philosophy. But it is not helpful, either, to see it as a "technology" or a "method" (Llewellyn 1960, 509–10). It was a deep challenge to serious philosophical thinking about law. With uncanny skill realists identified problems and issues that jurisprudential theory had to address, and with boundless creativity realism created new banners under which critical and constructive, positive and normative, theories alike could march. The legacy of realism in the second half of the twentieth century, which remains for us to consider, is testimony to its suggestive creativity. This legacy includes the

law and economics movement and the law and society movement, on the one hand, and the various critical approaches and methodologies that sprang up later in the century, among them (critical legal studies, certain strains of feminist jurisprudence, and critical race theory) on the other.

At the mid-point of the century, serious professional legal philosophy tended to dismiss realism as philosophically naïve and undisciplined. Internal critics like Llewellyn and Levi took it very seriously and tried to answer its challenges by giving more detailed and respectful descriptions of the craft and institutionalization of legal reasoning. But these responses left jurisprudence in an unsatisfactory state in two important respects. First, they followed the realists in focusing attention exclusively on the process of adjudication and had little or nothing to say about law in general. Second, their accounts of adjudication remained at the level of suggestive thick descriptions. They lacked the depth that comes from integrating the lessons taught by study of these thick descriptions into a general theory that engages and tries to answer the broad questions about the nature of law that have been part of the tradition of jurisprudential reflection for centuries.

One important jurisprudential writer in mid-century who did undertake these larger tasks was Lon L. Fuller. Although influenced by realism, he became one of its most important critics. His criticism was important in part because he sought to carry out the larger theoretical tasks the realists seemed unable or unwilling to undertake. We shall return in later chapters to trace out the positive and critical legacy of realism, but first we turn to a consideration of Fuller's contribution to legal philosophy in mid-century.

Chapter 4

IMPLICIT LAW AND PRINCIPLES OF LEGALITY

In 1940, Lon Fuller (1940, 2) wrote that the fundamental task of legal philosophy is to give effective and meaningful direction to the application of human energies in the law. However, he added ruefully, judged by this standard, the preceding quarter century had not been a fruitful one. Despite his sympathy with the realists' practitioner-focused approach to law, he argued that their theoretical lens distorted our perception of the reality of law and that positivism, in both its classical Austinian form and its latter-day reinventions, fared no better. Against the prevailing jurisprudential winds, Fuller proposed a form of jurisprudence that looked to many readers like a natural-law theory, albeit in a subtly qualified, secular form. In philosophical circles, Fuller's work is remembered largely for the thesis that there is an "internal morality of law," the principles of which correspond to familiar principles of the rule of law (a close cousin to the notion of *Rechtsstaat*). When the thesis appeared in *The Morality of Law* (Fuller 1969) in the mid-1960s, it was subjected to withering philosophical fire.[1] However, recent readers of this literature argue that much of this criticism fell wide of its target because it failed to appreciate Fuller's distinctive theoretical objectives and his conception of law as one form of social ordering among many.[2] Others have argued that what is of lasting value in his jurisprudence is his insistence, pressed from many different directions, on the deep dependence of explicit, formal law on informal and implicit social rules and practices.

At about the same time but working roughly independently,[3] Friedrich Hayek developed a conception of law that also sought to link modern law to implicit social rules and practices and to an ideal of the rule of law with features similar in several respects to Fuller's. Hayek's arguments for his conception of law in certain respects deepen Fuller's interactional theory of law, but also turn it in a direction that Fuller might not have found congenial. His notion of the rule of law, and his defense of it, bear a remarkable resemblance to Dicey's work at the beginning of the century (chap. 1, sec. 1.2) including its parochial celebration of alleged special merits of common law institutions.

[1] See Cohen 1965, Dworkin 1965b, Hart 1965, Lyons 1993, 1–12.

[2] See, for example, Brudney 1993, Dyzenhaus 1999, Luban 1999, 2001, Winston 2001.

[3] Despite the similarity of their jurisprudential views, there was virtually no contact, either personal or through their writings, between Fuller and Hayek. In essays written in the late 1950s, Fuller (2001, 116, 318) criticized Hayek's early views on freedom (Hayek 1944) and the rule of law (Hayek 1955), but his major jurisprudential work had been published before Hayek's *Rules and Order* in which the convergence of views of the two theorists is most evident. The fact that Hayek made no reference to Fuller's work in *The Constitution of Liberty* and only one reference entirely in passing in *Rules and Order* is harder to explain.

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In this chapter we will explore these two attempts at mid-century to focus jurisprudential reflection on law's implicit social foundations and its internal normative principles.

4.1. Charting a New Path

4.1.1. Legal Realism vs. Legal Reality

Lon Fuller (1902–78) studied law at Stanford University in the mid-1920s. He trained initially as an economist and retained a broad, social scientist's perspective on law throughout his career. Robert Summers (1984, 31) characterized his orientation to law and legal theory as "physiological" as opposed to the "anatomical" approach of analytic jurisprudence and philosophy of his day. After short stays on the faculties of law at the University of Oregon and the University of Illinois, he taught for eight years at the Duke Law School, before moving to Harvard Law School in 1940 where spent the rest of his career.[4]

In his earliest work (Fuller 1934; 1936–37), the influence of realist thought is detectable. He shared their broadly instrumentalist understanding of law. Although he criticized what he called the "left-wing" realists both for their "rule-phobia" and their reduction of legal theory to behaviorist empirical science (1934, 443–4, 455–61), he shared their interest in "law in action" rather than "law on the books." As David Luban (1999, 194) acutely observed, Fuller's "philosophy emerges seamlessly from the practice of law." He thought realists were right to take their theoretical orientation from the points of view of legal practitioners and their clients, but felt that they seriously misrepresented both (Fuller 1934; 1940). Realist theory represented lawyers simply as expert predictors and manipulators of state power, Fuller (2001, 272–4) complained. And it represented their clients as utterly disengaged from the life of the law, seeing law as an alien and hostile force, to be dealt with as one deals with the weather, but never something that might invite participation (Fuller 1940, 93–4). Far from being "realistic," he charged, this approach distorted the ordinary work of most lawyers and the concerns of their clients. In Fuller's view, the primary locus of law work is the office, not the courtroom; and the primary task of lawyers is not predicting when the sword of state power will fall on the client's neck, but creating working relationships among citizens that enable them to pursue their individual and common goals. Typically, he maintained, lawyers are "architects of social structures." Law viewed from the office is not some alien thing imposed from above, but something that arises from within the ordinary activities, commerce, and interactions of citizens, and aims to facilitate these interactions. The lawyer's chief competence, then, is not battening down the hatches against possible litigation (although a good lawyer will keep an

[4] For a short sketch of Fuller's life and academic career, see Summers 1984, 3–13.

eye on that prospect), but rather devising frameworks for lasting and mutually beneficial relationships among parties.

Savoring the irony, Fuller charged that although realists liked to think of themselves as radical critics of the formalism and conceptualism of judges and lawyers, they failed to appreciate the realities of ordinary legal practice due to the conceptual prejudices they inherited from classical positivism. Their preoccupation with state power blinded them to the realities of ordinary life under law and to the conditions that made law possible. Fuller cast his argument in terms of a *reductio*, but it had an important constructive point. He argued that the realist definition of law in terms of predictions of official behavior actually presupposes a definition of law in terms of lay behavior (Fuller 1940, 53–5). Realists claimed that law just is what judges do. Fuller countered that, while directing the coercion of other people is something *judges* do, they can do this only if certain norms authorize them to do so. If we try to define these legal norms in terms of the behavior of judges, however, we fall into a vicious circle. In fact, these norms exist only to the extent that they are accepted and practiced in the community at large. We must conclude, then, that law reduces not to the behavior of judges, but rather to the behavior of everyone in the community. Law just is *what everyone does*. It would seem to follow that the realists' concept of law is vacuous, but Fuller drew a different conclusion. He argued that it forces us to shift our attention away from relatively superficial facts about the behavior of state functionaries to deeper facts about the social behavior and patterns of social interactions that give official behavior its meaning and force.

4.1.2. Sovereignty and the Foundations of Legal Order

To positivists of his day it would appear that Fuller rather seriously overstated his point. He seems to have confused law with its social preconditions and blurred the distinction between law properly so-called and other informal norms or arrangements that might arise from regular social interaction. To understand law, positivists and analytic jurists might argue, we must first clearly identify the boundaries of the province of jurisprudence, that is, distinguish between valid laws and imposters and between law properly so-called and other phenomena that may superficially resemble it. For that purpose we need criteria by which the validity of a legal norm and its membership in a legal system can be authentically determined. The doctrine of sovereignty of classical positivism performs precisely this task. A legal system, on the classical positivist view, consists in all and only those norms enacted directly or tacitly by the sovereign, and the sovereign enjoys law-making power just in virtue of a general habit of obedience in the society.

However, Fuller thought that the positivist doctrine of sovereignty failed in much the same way as realism did.[5] It correctly located the foundations of

[5] Fuller (1940, 55–8) believed that realism silently drew on classical positivism for its basic

law, especially explicitly enacted law, in the ordinary behavior of law subjects, Fuller thought, but it completely misunderstood the nature of this legal substratum. First, Fuller argued that if the sovereign is to enjoy *law-making* power, and if the legal system is to be understood as a valid normative order, the "habit" of obedience must be understood not simply as a matter of brute regularity of social behavior, but as a custom of obedience (Fuller 1940, 31). Developing this point, Fuller wrote, "the 'force' back of political authority derives from the general acceptance of the rules by which the law-making process is conducted. Physical force cannot lift itself by its bootstraps into legitimacy, and where its use is accepted as a proper part of the administration of law it is only because the force employed is regarded as sanctioned by accepted rules" (Fuller 1954, 462; compare Hart 1994, chap. 4.). Later he would argue that the social facts that constitute this custom are facts about reciprocal expectations, convention, and practice, matters that have both a normative and an empirical dimension (Fuller 2001, 231–66; see below sec. 4.2.2).

Second, Fuller argued that this custom is not limited to the formal matter of authorizing the sovereign law-making power, but extends to the content of the law. The mistake of the classical positivists was to think that, like an inverted pyramid, the full weight of the legal order could be balanced on the narrow point of recognition and authorization of a sovereign's law-making power. This mistake cannot simply be corrected by conceding that certain content-regarding criteria may also be included in the foundational custom, for it is "custom rather than the sovereign power which furnishes the basic stability of a society" and its legal order (Fuller 1940, 32). The problem Fuller identified was not limited to the classical doctrine of sovereignty. He recognized that it infects any account of the nature of law that ignores the essential role that the vast network of informal, implicit, and society-wide practices plays in securing the identity, integrity, and coherence, as well as the effectiveness, of the legal system.[6]

This modest-sounding argument has radical implications for jurisprudence. It shifts theoretical focus away from the exercise of state power and gives prominence to the actions and interactions of ordinary citizens. Although state power is not ignored, neither is it any longer at the center of this understanding of law. Fuller acknowledged that decentering legal theory in this way was disorienting for Austinian positivists and analytic jurists (see above chap. 1, sec. 1.4.2) and he expected them to resist it because it threatens to blur sharp

conceptual structure. When he made that charge, he mainly had Holmes and J. C. Gray in mind (see above chap. 2, secs. 2.3.2 and 2.3.3 and chap. 3, sec. 3.1.2.1), although he thought it was equally true for the movement they inspired.

[6] This marks a point of sharp difference between Fuller's view of the foundations of law and that of Salmond and Hart, for while the latter locate law's foundations in custom or convention, it is the custom of courts or law-applying officials (see above chap. 1, sec. 1.3.3 and below chap. 7, sec. 7.5.1), whereas Fuller insists on a community-wide custom of law recognition.

boundaries. Not sharing their theoretical scruples, he welcomed the consequences of this approach: for example, the consequence that whether a social arrangement counts as a legal system may turn out to be a matter of degree, that we may have to allow into the province of jurisprudence social phenomena that are more or less law-like, and even that there is no sharp distinction between descriptive and evaluative claims. Of course, this litany of horrors was sufficient to send analytic jurists scurrying for the cover of the logic of the concept of law, but Fuller sought to calm these theoretical fears. Faced with phenomena that do not conform to our familiar paradigms of law, Fuller suggested that our first inclination should not be to ask how are they to be *distinguished* from these paradigm cases, and thereby *excluded* from jurisprudence, but rather to ask how are they *related* to them, and how can we deepen our understanding of law through a careful study of them? Likewise, he believed that since "law is not a datum, but an achievement that needs ever to be renewed" (Fuller 1954, 467), we can learn as much from exploration of law's pathologies and preconditions as from familiar paradigm cases.

Furthermore, when it comes to understanding important social practices, Fuller held that it is impossible to separate entirely questions of what is from questions of what is good or what ought to be. Giving an illuminating account of a social practice, he argued, is like retelling a story one has heard before. One tries to tell it as one heard it (as it *is*), but to do this one must grasp its point (the story as it *ought to be*) and shape one's retelling in light of that point (Fuller 1940, 8–11).[7] Law is a social fact, but it is a special kind of social fact that is at once a guide and a product or expression of purposive human activity, and as such it has both empirical and normative dimensions (Fuller 1954, 469–70). "In the field of purposive activity [...] value and being are not two different things, but two aspects of an integral reality" (Fuller 1940, 11). Thus, according to Fuller, any attempt to offer a theoretical account or interpretation of this reality must draw on empirical and normative resources.

So, Fuller welcomed the very implications that positivists were most inclined to resist, but he charged that this resistance, attempting to limit jurisprudential inquiry, was in fact disingenuous. Despite the protestations of analytic positivists to the contrary, the aim to preserve sharp boundaries between law and that which is not law (but might superficially look like it), and between law as it is and law as it ought to be, for classical positivists was rooted neither in empirical facts nor in value-neutral analysis of the concept of law, but rather in an article of faith. In giving shape to our concept of law, he wrote, "we are confronted with a problem not of choosing between what we already have and striving after the unattainable, but of choosing between two kinds of striving" (Fuller 1940, 12). It was for ethical or political reasons, he insisted, that posi-

[7] Luban (1999, 196–7) notes the striking similarity between Fuller's example and Dworkin's understanding of interpretation on the model of the "chain novel" (Dworkin 1986, 228–34).

tivists like Hobbes insisted on a sharp separation between law and morality and sought to provide value-free criteria for determining the content and validity of laws. They sought to establish legal obligations, even when subjects were convinced of the injustice of law's demands, in order to maintain peace and order (ibid., 84–90; Fuller 1954, 462–3). In Fuller's view this strategy rests on a mistake, not because it runs together normative and analytical tasks, but because peace and stability of the legal order depend crucially on the layman's willingness to accept those rules as being roughly right. A law that is "good" for the purpose of establishing order will have to be, or at least to seem to be, "good" in other respects as well. With this argument, Fuller challenged analytic jurists' belief in the fruitfulness (perhaps even the possibility) of strictly descriptive jurisprudence and drove the point home by emphasizing that positivism's fundamental orientation was normative rather than descriptive. As we shall see, this became a very hotly disputed issue in the closing decades of the twentieth century among analytic legal philosophers.

From this brief survey it is clear that in his early writings Fuller rejected the two approaches to general legal theory dominant in America at the time; however, he only hinted at the direction his own thought would take. On the basis of his arguments in *Law in Quest of Itself*, it is tempting to plot a trajectory of his thought that lands him in the middle of the natural-law camp. But to see him just as a modern natural-law theorist would not do justice to the novel and most interesting features of his mature jurisprudence. It is worth keeping in mind that Fuller thought that the defects of realist and positivist doctrines lead us to a more careful exploration of the social practices on which legal order depends, rather than to general moral or political theories, and that his objections to positivism were primarily concerned with matters of jurisprudential method. Fuller developed a kind of natural-law jurisprudence, but only as part of a larger theory of social institutions and a broader jurisprudential theory that draws as much from classical common-law jurisprudence as from the natural-law tradition.

4.2. Human Interaction and the Law

According to Fuller, neither realism nor positivism offered a methodology for legal theory adequate to the task of giving "effective and meaningful direction to the work of lawyers, judges, legislators, and law teachers" (Fuller 2001, 269–70). The positivists' pretense of value-neutral, conceptual analysis was disingenuous, and the realists' pretense of value-neutral, empirical, behavioral science was too narrow and abstemious to yield any deep insight into law and its proper functioning (ibid., 274–6). In the place of these two bankrupt methodologies, Fuller proposed a new kind of interpretive social science he called "eunomics." Although he wrote several valuable essays developing this approach (many included in Fuller 2001), it attracted little attention. Its inter-

est for our purposes lies in the fact that it set the explanatory frame for his interactional theory of law.

4.2.1. Eunomics: The Science of Good Social Order

Fuller (1954, 477; 2001, 62) defined eunomics as the "study of good order and workable social arrangements." Not surprisingly, this "science," as Fuller sometimes called it, ignored disciplinary boundaries and combined elements of functionalist and interpretivist social theory, normative political philosophy, and jurisprudence. It identified a range of different social-ordering tasks essential to social life and kinds of institutions or practices that typically perform these tasks. Fuller (2001, 188–205) identified six primary types of social arrangements or mechanisms of social order: custom or practice, contract, adjudication, mediation, legislation, and administration or "managerial direction" (sometimes he also included property, voting, and lotteries in the list). These "focal points of human striving" represent reasoned responses to different kinds of situations and problems common to almost all human societies (Winston 2001, 8–9). Each arrangement has (1) a distinctive purpose or task, (2) a kind or range of problems or issues it is best suited to address, (3) an intended kind of outcome, (4) a distinctive structure for decision making, (5) a distinctive mode of participation for individuals in that decision making, (6) a set of background conditions that enable it to function well, and (7) an "internal morality" or set of governing principles or ideals appropriate to it (see Winston 2001, 38–43).

On this view, legal order is not a mode of social ordering distinct from the other types, but rather a balanced combination of several of them. Legal theory, on Fuller's model, explores combinations of these models, the conditions of their proper functioning, the relations of interdependency that exist among them, and the principles by which rational, self-directing participants are governed. Custom or social practice, understood broadly as the patterns of reciprocal expectations and actions that arise tacitly out of human interaction (Fuller 2001, 188, 194), is accorded a special place in Fuller's account of the legal order: it constitutes the informal and implicit foundation of the formal and explicit institutions, constitutions, and processes of the legal order. The formal institutions and processes constitute modes and patterns of meaningful social interaction and social order; they rest, in turn, on deeper and wider forms of interaction for their meaning, legitimacy, and effectiveness.

4.2.2. Interactional Foundations of Law

Fuller argued that the bright light that theorists of modern law, especially positivists, have trained on explicitly enacted law and regulations has thrown into the shadows the quiet but essential implicit dimension of legal order. This di-

mension is more apparent in societies structured entirely by customary rules, but it is equally essential to modern, formally institutionalized legal systems that appear to have left their customary past far behind them. In a pivotal essay, "Human Interaction and the Law," Fuller argued that "we cannot understand ordinary law (that is, officially declared or enacted law) unless we first obtain an understanding of what is called customary law" (Fuller 2001, 250). We must appreciate the social depth of the legal order if we are to understand the nature, limits, and characteristic modes of functioning of its more immediately apparent surface phenomena.

4.2.2.1. Interaction and Informal Social Rules

It is a mistake to think of the norms and practices of this implicit dimension as blindly habitual, Fuller (1968a, 44; 2001, 193–4, 233–44) argued, for they arise from and are sustained in the rational and purposive social interactions of people. To achieve their purposes, people must anticipate the actions of others seeking at the same time to anticipate their own actions. Implicit norms arise "out of situations of human interaction where each participant guides himself by an anticipation of what the other will do and will expect him to do" (Fuller 1968a, 73). "To engage in effective social behavior men need the support of intermeshing anticipations that will let them know what their opposite numbers will do, or that will at least enable them to gauge the general scope of the repertory from which responses to their actions will be drawn" (Fuller 2001, 233). Customs and informal social rules are the product of individuals solving problems of coordination arising from nested expectations. People involved in such interactions depend on identifying salient patterns around which they can form reliable expectations of the behavior of others and thereby coordinate their interactions. Over time, implicit norms emerge, not designed by anyone in particular or by the community as a whole, from the mutual accommodation and adjustment of expectations and actions of interacting agents.[8] These norms provide relatively stable points in the network of interaction and thus enable the agents to coordinate their interaction in pursuit of individual or collective goals.

A relatively homely example of what Fuller has in mind can be found in the interaction of jay-walking pedestrians and motorists. For this purpose it is useful to contrast customs in New York City with those in play in San Francisco (Hetcher 2004, 186). In New York, it is said, pedestrians often cross streets in

[8] Fuller, like Hayek (see below sec. 4.4), thought the fundamental problems of social cooperation are coordination problems, rather than problems of deep conflicts of interest or principle. Hayek, in his early essay, "Economics and Knowledge" (1937), treats problems of social interaction as problems of knowledge and communication. Similarly, Fuller treats informal social rules as "a language of interaction" (Fuller 2001, 233–4, 237–8).

the middle of the block and so do not have the protection of traffic signals; and when they do so, they first go to the center of the street and then complete their crossing when a gap in traffic opens. Cars do not stop for jay-walking pedestrians. Responsibility for crossing safely is entirely in the hands of the pedestrians. In contrast, in San Francisco, it is said, when pedestrians cross to the middle of the street, motorists are expected to stop and allow them to complete their crossing to the other side of the street. Different cities, different customs; when in New York, do as the New Yorkers do. Indeed, a moment's thought should make it clear that for visitors to follow San Francisco custom in New York could have disastrous consequences. For motorists to stop for crossing pedestrians could well cause an auto accident and for pedestrians to expect motorists to stop in New York would be suicidal. The opposite may be true for New Yorkers visiting San Francisco. These customs, mundane bits of social ordering, function in contexts of social interaction in which the expectations and actions of pedestrians and motorists have just the character of interdependence of actions and intermeshing of expectations that Fuller describes.

Moreover, it is clear that the conventional norms arising from such interactions may be largely implicit and unarticulated (Fuller 2001, 240) and take their content and practical force from this context of mutual accommodation. Explicit formulation of the rules is possible, but any such formulation will only be provisional and will be adequate only to the extent that it works in standard cases, while the import of the implicit conventions extends beyond such limits because they remain rooted in the larger context of mutual accommodation from which they arise. Thus, implicit norms arise, and derive their content and practical force, from this ordinary negotiation of interdependent actions and meshing expectations and aims. They succeed (to the extent that they do) because they are shared, in the sense of mutually understood, having arisen from common experiences and the joint enterprise of forming a stable equilibrium of expectations. But they are also dynamic precisely because they have their roots in access to common resources of experience on which individual members of society can draw in novel cases or instances where the prevailing understanding is not entirely settled. The existing settled rules furnish a point of orientation for ongoing interactive responses (Fuller 2001, 214).

4.2.2.2. Interactional Dimensions of Contract, Case Law, and Statute

Fuller used this dynamic, interactional model of implicit social norms, first of all, to explain informal customs and customary law. He extended the analysis to modern legal systems in all their explicitly enacted, formally institutionalized complexity. Reciprocal dependence and practices of mutual accommodation permeate the whole legal order (Fuller 1969, 91). "No edifice of made law can rest entirely on itself," he argued; "any such system must find its anchorage in supports that are not themselves brought into existence by enactment, but

derive instead from a perceived implicit need" and reciprocal anticipation and accommodation of expectations (Fuller 1968a, 69). Fuller explored at length the ways in which interaction-rooted implicit norms or practices silently shape explicit law in several areas (Fuller 1968a, 71–84, 2001, 244–50). Formal contracts, for example, appear to be a kind of explicitly made law. The parties are the law-makers, making the legally binding norm that governs their contractual relationship, and courts are called upon to interpret and apply this law. The words of the contract and the rules they enact for the parties must be read against a complex interactional background. This background includes both the regularities of "standard practice" in which the parties participate and the evolving patterns of interaction of the parties after entering the contractual relationship (Fuller 2001, 194, 245–6). "The written contract often furnishes a kind of framework for an ongoing relationship, rather than a precise definition of that relationship. For that definition we may have to look to a kind of two-party customary law implicit in the parties' actions, rather than to the verbal formulations of the contract [...] The meaning thus attributed to the contract is, obviously, generated through processes that are essentially those that give rise to customary law" (ibid., 246, 194).

Likewise, Fuller (2001, 256) argued that "adjudicative law," exemplified by common-law adjudication, "projects its roots [...] deeply and intimately into human interaction." Austin distorted this relationship by treating customary practice as law only when, and in virtue of its being, explicitly adopted and sanctioned by courts (Fuller 1968a, 45–6). This doctrine not only failed to represent the actual role of implicit social norms in ordinary common-law judicial reasoning, but it misrepresented the dynamics of the law that often changed when the underlying custom changed. This doctrine of legal "second birth" became, in effect, "a doctrine of continuous rebirth, with all the embarrassments such a view entails for any notion that custom is in some way wholly transmuted into a radically different thing on the date when it was first used by a court to decide a litigated issue" (ibid., 46).

Austin's mistake, in Fuller's view, was just a symptom of a more serious blindness to the deep dependency of adjudicative law on interaction among ordinary law-subjects and between them and the courts. He argued for the following contrasting view. Lacking the means formally to enact general rules, the courts were forced to "make" law through deciding particular cases in such a way that their decisions were taken up by the community as examples of more general rules or norms. Through sensitivity to the community's underlying practices and understandings and through articulation of principled justifications for their decisions, courts sought to anticipate the ways in which ordinary citizens would take up their decisions, while the citizens were forced to understand the general import of the decisions in such a way as to anticipate how the courts would decide future cases that may affect their lives. This process of reciprocal anticipation was aided by the procedural structure of adjudicative law, which

provided extensive opportunity for parties to participate in offering reasons and arguments to the court, thereby giving the court insight into the underlying norms and practices that gave structure and meaning to the ordinary intercourse and interactions of the parties in their communities (Fuller 1968a, 84–110).

Customary law, contract law, and adjudicative law are, in a way, easy cases for Fuller's interactional thesis. More difficult, one might think, is to argue that explicitly enacted statutory and constitutional law rest on an essential interactional foundation, but Fuller was keen to defend that thesis as well. Interpretation and application of statute law, he insisted, also occurs in a dynamic, interactional setting. He discussed two such settings. First, he considered the interaction between law-making, law-interpreting, and law-applying bodies. Since the task of drafting statutes and constitutions is usually assigned to one governmental body and officially interpreting it to another, intelligible and effective law-making is possible only if these two activities are coordinated (ibid., 57–9, 63–8). Although this coordination may be structured to some extent by explicit rules, much of it depends on the reciprocal expectations of the agencies and their intermeshing anticipations. "The effective functioning of the total law-making and law-applying process depends, then, upon a kind of customary law that lies behind enacted law and enables it to achieve its goals effectively" (Fuller 2001, 195). A similar, intra-institutional coordination problem arises within the judiciary and various conventions and practices, including those captured in the doctrine of precedent, arise to make that problem manageable (Fuller 1968a, 46–7).

4.2.2.3. Vertical Interaction and Congruence

In addition to this horizontal dimension of official interaction, Fuller called attention to an important vertical dimension of interaction between officials of government and ordinary citizens. Law, he argued, depends for its content, its effectiveness, indeed for its very existence, "upon the establishment of stable interactional expectancies between lawgiver and subject" (Fuller 2001, 254; Postema 1994, 368–73).

His argument for this thesis rests on the assumption that law by its nature seeks to achieve its substantive aims, whatever they may be, in a distinctive way, namely, by providing guidance to rational, self-directing agents (Fuller 1969, 210; 2001, 254). To govern in this law-like way, laws must be such that rational, self-directing agents can grasp for themselves (within a wide range of their application) their meaning and appreciate their practical force. He acknowledged that there are other ways to govern and to control behavior. "Managerial direction," for example, leaves relatively little to the understanding and determination of its subjects and gives specific directives to perform actions serving the ends of the manager (Fuller 1968a, 254; 1969, 207–9). But it is part of our idea of legal ordering that it undertakes to address *reasons* and *norms* to agents who

are capable of grasping them, interpreting their import for the particular occasions they face, and appreciating their rational force. Thus, Fuller argued, in the very process of making law there is an implicit social dimension, a complex interactive relationship between lawmaker and subject. They are caught in a web of "reciprocal interactive expectancies." The subjects' understanding of the law enacted depends on their expectations with respect to the way in which other subjects and officials are likely to understand it and the practical force they are likely to accord it; likewise, officials will draft laws and others will interpret them in ways that they anticipate that subjects are likely to understand them, which depends in part, of course, on how subjects expect other subjects to understand them (Fuller 1969, 228–30). Fuller inferred from this that undertaking to govern and be governed by law generates a kind of relationship with a distinctive normative (and, he thought, moral) dynamic. This is fertile soil for implicit understandings, norms, and conventions to take root. Law can govern effectively in its distinctive way—that is, there can be governing in law-like ways (and so we can say "law exists")—only when the unwritten, customary commitments giving structure and stability to this collaborative enterprise are honored, by and large.

There are two key implications of this argument. First, Fuller's thesis is not merely about conditions of the effectiveness of a system of governing. For it may be possible to get people to comply more successfully and efficiently in other ways. To the extent it is about effectiveness, it is limited to effectiveness *given* a commitment to govern *in a law-like way*. So we might say that it is intended as an argument about the extent to which *law exists* (allowing, as Fuller always does, that this is always a matter of degree). Moreover, the thesis first of all concerns conditions under which the *meaning* or *content* of the laws (that is, of directives regarded as laws) is practically determinate.

Second, this thesis about the "vertical" dimension of interaction presupposes the "horizontal" dimension, for what officials must anticipate is not how each individual subject, considered separately, will understand the enacted rules, but how they will understand them in light of how other subjects will understand them. Statutes are, as it were, "projected" into the ongoing life of the society they are intended to govern; no "statute can be cut loose from the developing life into which it is projected" (Fuller 1968a, 66). For this reason, it is necessary that there be a substantial *congruence* between the everyday practices and understandings of citizens and the formal dictates of law (see Postema 1994, 373–9).

> [A]n important part of the statute in question is not made by the legislator, but grows and develops as an implication of complex practices and attitudes which may themselves be in a state of development and change [...]. The interpretation of statutes is, then, not simply a process of drawing out of the statute what its maker put into it but is also in part, and in varying degrees, a process of adjusting the statute to the implicit demands and values of the society to which it is to be applied. (Fuller 1968a, 59)

A legal order could not survive, Fuller argued, and its enacted norms could not be fully intelligible to law subjects, if those norms were systematically at odds or "cut loose" from their informal social practices, conventions, and understandings.

Fuller's interactional conception of law, then, consists in the following claims. (1) Legal order has an explicit—formally institutionalized, explicitly articulated and enacted—dimension and an informal, implicit dimension. (2) These dimensions are highly interdependent. (3) The implicit dimension must be understood in interactional terms. That is, (a) social behavior is the product of the intermeshing of anticipations of rational self-directing agents with respect to the reasoning and actions of others with whom they are locked in networks of interdependence; (b) as the result of more or less explicit mutual accommodations, these intermeshing anticipations congeal into regularities of behavior and stable points of expectation in the network of conventions or practices; and (c) the content and practical (reason-giving, action-guiding) force of these conventions depends fully on the network of intermeshing expectations out of which they arose. (4) These implicit, interactional, relations pervade the law and can be found at several different levels: (a) in citizen-to-citizen relations, (b) in relations among departments of government and individual officials in formal governmental roles, and (c) in relations between officials and departments of government, on the one hand, and individual citizens and non-governmental groups and institutions, on the other. (5) The content of laws and the effectiveness and legitimacy of the legal order depend on the cooperation that can be achieved at the each of these levels, especially the third. And, more specifically, (6) they depend on a broad congruence between the explicit directives of the legal order and the implicit conventions and practices that give structure to the social lives of law subjects.

4.3. The Internal Morality of Law

Fuller is best known for his claim that there is an internal morality of law. A careful reading of *The Morality of Law* reveals that this claim is rooted in his interactional conception of law. The facilitation of social interaction among self-directing rational citizens, he argued, depends on "a relatively stable reciprocity of expectations between law-giver [and other legal officials] and subject"; law is "the product of an interplay of purposive orientations between the citizen and his government" (Fuller 1969, 209, 204). This interdependency and reciprocity generate a moral relationship between these parties in virtue of which they have conditional responsibilities and obligations to each other. Citizen obligations to comply with the law are conditional upon legal officials creating and administering law in a way that respects the citizens' part in the relationship and their nature as self-directing rational agents. With these materials Fuller built an argument for familiar components of the notion of the rule of law. Since he argued that this constitutes the internal morality of law (or

rather, of governing by law[9]), he is said to embrace a form of natural-law jurisprudence. This is correct but potentially misleading, and so, before we look more closely at Fuller's argument for the internal morality of law, it would be helpful to relate his thought to familiar natural-law themes.

4.3.1. Immanent Reason

As we have seen, Fuller argued strenuously in his early work against the forms of positivist jurisprudence then current (in which he included American legal realism). His objection rested in part on what he took to be the untenability of the distinction between what is and what ought to be, for purposes of the analysis of law and its foundations. At the same time, however, he sought in other work to separate himself from what he took to be the dogmas of natural law jurisprudence (Fuller 1946, 381, 385; 1968a, 115–6).[10] He rejected the notion that there is an ideal system of law, the same for all legal systems, grounded in some transcendent source (whether God or Nature), and discoverable by reason. He also rejected the idea often associated with natural-law theory that legal rules or norms must pass a more or less strenuous moral test in order to qualify as law. That is, he rejected a natural-law test of validity of legal rules that includes criteria of justice or other moral principles, rooted in something independent of the specific practice of law and the social substratum in which it is embedded (Winston 2001, 6). He was convinced that legal validity did not work like this.[11] In his view, whether the moral defects of specific legal norms affect the status of the norms in the legal order depends on whether they are part of its core, or are somewhere out on its periphery, and on how pervasive or systematic the defects are. He thought that the standards by which legality is determined admit of degrees of compliance or deviation. So the greater, more serious, or more systematic the departure, the more difficult it is to maintain the legality of the system. Finally, the standards by which legality is determined are, he argued, largely formal, not directly matters of substantive justice.

Fuller applauded the efforts of natural-law theory "to keep alive faith in the capacity of human reason," but he thought it tended to overstate the role

[9] Fuller typically wrote of the internal morality of "law-making," but clearly he had in mind not merely legislative drafting, but all the activities involved in making, interpreting, applying and administering the law. Hence, "the internal morality of governing by law" more accurately conveys the scope of his claim.

[10] Fuller worked with a conventional, not altogether sympathetic or well-informed, understanding of natural-law theory. This view was decisively challenged by Finnis (1980, 1998). For recent developments in natural-law theory in the late twentieth century, see below chap. 12, secs. 12.1–12.3.

[11] In this respect Fuller departs from so-called "inclusive positivists" like Hart (1994, 247–51), Waluchow (1994) and Coleman (2001a) who allow for the possibility of substantive moral criteria included in a legal system's master rule of validity. The debate between "exclusive" and "inclusive" positivists is explored below in chap. 12, secs. 12.1–12.3.

of rationality in human affairs (Fuller 1968a, 116; 1946, 385). Abstract reason cannot determine every detail of the law, he maintained, for "fiat" plays an equally important role. Arguably, Thomist natural law theory could accept this thought as well, since, according to that view, reason-derived natural-law fixes the parameters of a legal order, like the architect who draws the blueprint for a building, but within these parameters it is reasonable choice that "determines" the details of the concrete legal structure (Finnis, 1980, 284–9; 1998, 267–71; see below chap. 12, sec. 12.3). Fuller's view, however, took a slightly different and somewhat Burkean line.[12]

In his early essay, "Reason and Fiat in Case Law" (Fuller 1946), Fuller argued that reason works concretely and immanently within a given environment's social practices. Working with the resources of human nature, environment, and existing social patterns and practice, immanent reason fashions concrete practical solutions to immediate problems of social interaction. What he called in this essay "natural law thinking" is just a matter of judges or other officials reasoning through the realities facing them to a satisfactory arrangement for people living together (Fuller 1946, 379–80; Luban 1999, 208–9). Prominent among these "realities" are established facts about the existing practices and precedents in the community. The task of a judge engaging in this kind of thinking is to discover criteria "found in the conditions required for successful group living, that furnish some standard against which the rightness of his decisions should be measured" (Fuller 1946, 379). The attitude with which such a judge approaches the task is not "that of one doing obeisance before an altar, but more like that of a cook trying to find the secret of a flaky pie crust" (ibid.). The principles by which social practices are judged are derived not from external sources, but from the practices themselves, their underlying purposes or point, and the human needs and projects they serve (Winston 2001, 5). As Luban points out, this is not so much an expression of commitment to the philosophical doctrine of moral realism or robust natural-law theory as it is the more specific thesis that "legal institutions, although they are entirely human creations, have moral properties of their own—properties that their designers may never have intended or even thought about" (Luban 2001, 194). The task of identifying the morality of these institutions is a matter of discovery rather than invention, even though, of course, the institution is itself a human invention.

4.3.2. Law's Internal Morality

In *The Morality of Law*, Fuller identifies eight principles or canons of legality at the core of the notion of the rule of law. They require that laws be general

[12] Fuller admitted this Burkean strain in his thought in a letter to Thomas Reed Powell (Fuller 2001, 335–6); however, a deeper source is the classical common-law understanding of the "artificial reason" of law. See Postema 2002a, 176–80; 2003.

(rather than case-by-case directives), public, non-retroactive, clear and intelligible, consistent, and relatively constant over time; they must also require only actions within the powers of those bound by them, and there must be congruence between the rules announced and their actual administration (Fuller 1969, 39). These eight canons of legality admit of degrees and at times officials may have strong reasons, perhaps deriving from the ideal of legality itself, for compromising one or another of these standards.[13] In the literature on the rule of law there is only marginal disagreement about the details of these principles;[14] however, what drew heavy fire was Fuller's claim that these canons of legality constitute *moral* standards *internal* to the very idea of law or legal order. Philosophical critics of Fuller's *Morality of Law* found this claim, and Fuller's defense of it, untenable.

Fuller offered two reasons for regarding the eight canons as law's "internal morality": (1) the *direct reason*: the canons are essential to our very idea of legal order and constitute moral principles in their own right; and (2) the *indirect reason*: legal systems that largely conform to the canons will tend to be substantively just—that the rule of law is inconsistent with brutal injustice. Arguments for both claims have been challenged. Consider first the direct argument.

Fuller (1940, 8–12) began from the observation, which he thought to be incontestable, that the law is by nature a purposive activity, and proceeded to argue that conformity to the eight canons is necessary if the basic purposes of the legal order are to be served. Just as it is difficult to determine whether something is a steam engine without having an idea of what a steam engine is for (and, hence, what a good steam engine might look like), he argued, so too we need an idea of what law is for and what would count as good law in order to be able to judge whether we have in view a functioning legal order. At this point critics raised three objections. They agued, first, that although law may be a purposive activity, in the sense that it is used for a wide variety of purposes, there is no single purpose that can plausibly be said to be included in the concept of law. They conceded that controlling behavior or guiding action might be such a purpose, but argued that this purpose could not generate the eight principles of legality, which are supposed to impose significant constraints on the exercise of power. They argued, second, that what Fuller articulated in his eight canons were not conditions for the *existence* of a legal order, but rather conditions of its *effectiveness* or *efficiency*. Third, they argued that even if it could be shown that general conformity to the eight principles is

[13] See, for example, Fuller's sensitive discussion of the issue of retroactivity in his story "The Problem of the Grudge Informer" (1969, 245–53) and his debate over this problem with H.L.A. Hart (Hart 1958, 616–21; Fuller 1958, 648–57).

[14] Joseph Raz (1979, 214–8), although he adopted a sharply differing view of the point and value of the rule of law, basically accepted Fuller's list (somewhat expanded), as does Finnis (1980, 270–3) from a natural-law perspective.

necessary to achieve certain purposes internal to the nature of law, nothing follows about these being principles *of morality*, any more than the principles of pipe-fitting, auto-mechanics, or for that matter assassination are principles of morality. H.L.A. Hart put this, perhaps the most vigorously pressed, objection in its classic form as follows:

> Poisoning is no doubt a purposive activity, and reflections on its purpose may show that it has internal principles. ("Avoid poisons however lethal if they cause the victim to vomit," or "Avoid poisons however lethal if their shape, color, or size is likely to attract notice.") But to call these principles of the poisoner's art "the morality of poisoning" would simply blur the distinction between the notion of efficiency for a purpose and those final judgments about activities and purposes with which morality in its various forms is concerned. (Hart 1965, 1286) [15]

Fuller (1969, 201) wrote in response, "this line of argument struck me at first as being so bizarre, and even perverse, as not to deserve an answer." It seemed perverse to him not because it attributed to him a view—the purposiveness of law and the principles of legality as principles of legal efficacy—that he did not hold, but because it failed to acknowledge the moral significance of the interactional background that his argument presupposed.[16] A more complete case for the moral status of the canons of legality must link them to this interactional background; this case may promise also to meet the other two objections raised by early critics of Fuller's internal morality thesis.

The principles of legality are principles of governing by law, Fuller argued. Legal order is not merely the systematic exercise of a monopoly of power to control and manage social behavior. It is an activity of governing subjects conceived as rational, self-directing agents, engaged in a complex network of interactions to achieve individual and common aims, and of providing guidance that such self-directing individuals can grasp for themselves and incorporate into their own practical deliberations and apply to their own situations without the case-by-case direction of a manager. This form of governing, he argued, presupposes a rich context of interaction, an intermeshing of expectations, and a network of practice-rooted accommodations or conventions, which, in turn, constitutes a partnership of sorts, a kind of moral relationship among the parties. It is not a morally thick relationship like that of family or friendship, but it has recognizable moral dimensions. Each of the parties involved has a recognizable, albeit implicitly defined, role, with legitimate expectations of the other parties, including established expectations of a kind of reciprocity and a degree of trust. Moreover, within this relationship citizens are, in a minimal but not entirely negligible way, recognized and respected as autonomous mor-

[15] For similar arguments see Dworkin 1965b, 675; Cohen 1965, 651; Schauer 1994, 302–4.

[16] In defense of his critics it should be said that Fuller did not fully develop the interactional element of his theory until after he published the first edition of *The Morality of Law* in 1964, although most of the elements of his view are available in that work.

al persons. All this, Fuller insisted, is enough to give recognizable moral content to the principles that are internal to this human enterprise. It is perverse, Fuller thought, to persist in thinking that they have no more claim to moral status than the principles of pipe-fitting or assassination. The dimensions of reciprocity, mutual trust, and the expectation of treatment as autonomous beings are recognizably moral, even if they leave aside the question of the nature of the more specific ends or purposes to which law may be directed. Fuller was inclined to add in his later work that these principles of legality provide the foundations for a recognizable and valuable form of civil *liberty*, an important value of political morality (Fuller 1968b; 2001, 316–27; Winston 2001, 17–23).

Thus, he argued, while governing by law may adopt a wide range of specific aims, they are all subordinated to the one that defines the enterprise of legality: offering guidance to self-directing rational agents for their social interaction. Given the nature of human beings and their need for guidance in the context of interaction in which they are in complex ways interdependent, this enterprise will inevitably take the shape of a kind of interactive partnership. For law-makers to achieve their more specific aims within this partnership, Fuller argued, they must strive to meet standards of legality as much as the circumstances permit. These are not merely conditions of a power-wielding agent achieving his particular aims; rather, they articulate minimal conditions of respecting the trust and autonomy of the parties to this relationship. Essential to "managerial direction" is a "one-way projection of authority, emanating from an authorized source and imposing itself on the citizen" (Fuller 1969, 192), while, in contrast, governing by law presupposes a reciprocity between governor and governed, and that generates mutual obligations.

This provides a stronger case for the moral status of his principles of legality, but recent critics have not been entirely satisfied. They argue that it is not clear that we need to conceive of law in the (apparently morally laden) terms of interactional partnership. Two major objections have been advanced against this view. First, Edward Rubin (1989, 398–408) has argued that law in the modern administrative state does not have the character that Fuller attributes to it. Fuller conceives of legislation as "transitive," according to Rubin, that is, it seeks to direct the actions of law-subjects; however, he argues, most legislation in the modern state is "intransitive," giving officials or agencies authority to develop substantive rules, largely for their own operation, to enable them to carry out the social aims and projects of those in power. Intransitive legislation fails many of Fuller's eight principles, but this does not seem to count against them, since the premise on which the principles are based—the complex interaction between officials and citizens—does not apply to it.

Rubin's argument poses a serious challenge to Fuller's interactional conception of law, not just to the conception of law's internal morality based on it. But two points can be made in Fuller's favor. First, Fuller recognized that there are many different ways of ordering social life. Law is only one of them; another is

"managerial direction." Although Rubin's intransitive legislation does not fit Fuller's characterization of managerial direction, he might recognize it as a substantial variation on it. Rubin also admits that Fuller's characterization of law reflects the basic understanding of it in the Western legal tradition. So, Fuller might agree that the modern administrative state has moved away from a mode of social ordering characterized by law to a rather different one. The question at this point, then, is not whether the principles of legality have been honored, but why we should think it is important that these principles should be honored, that is, why we might prefer social ordering by law in Fuller's sense to social ordering in some other way. This is ultimately a question about the reasons we have for preferring that political power be constrained by commitments to the rule of law. Rubin's objection does not answer this questions, but puts it clearly on the table. Second, as Peter Strauss (1989, 445) has argued, what makes an intransitive legislation regime tolerable is precisely that it is contained within and constrained by a larger system of law—of political ordering governed by principles of legality. Fuller himself recognized that modern political systems tend to be complex mixtures of legal and other modes of ordering. The question, again a question of the importance of the rule of law, is whether such mixtures are consistent with our best judgment regarding good social order.

Fuller's analysis of law has also been challenged from a different quarter. His analysis quite intentionally begins from a point of view internal to the practice of law.[17] Realists and certain positivists (for example, Schauer 1994) object that this is not the perspective from which an illuminating theory of law should be constructed. (Holmes's "bad man" was, of course, the quintessential "outsider" (see chap. 2, secs. 2.2.2 and 2.3.3).) It may be true that if we take up the insider's point of view we are led to Fuller's conclusions, but we can ask *from the outside* what a legal system is like, and hope for an answer that does not make appeal to moral standards, whether richly substantive or more minimalist and formal like Fuller's principles of legality. A moralized notion of law, like the one employed by Fuller, is not the notion such an outsider would be inclined to use, and certainly would not be forced to use, critics maintain.[18]

The issues raised by this objection are complex and will be addressed several times in the chapters to follow. Only a word or two can be said here. To begin, we should recall that Fuller was not at all concerned with conceptual

[17] Recall, Fuller opened *Law in Quest of Itself* with the claim that "the function of legal philosophy [...] [is] to give a profitable and satisfying direction to the application of human energies in the law" and so asked how the legal theories available then characterized the activities and modes of thought of the practicing lawyer (Fuller 1940, 2–4). Luban's sensitive reconstruction of Fuller's case for the internal morality of law interprets the theory as "natural law as professional ethics" (Luban 2001). Hart refined this notion of the internal point of view on law. See below chap. 7, sec. 7.3.2.

[18] For a version of this criticism, see Hart's arguments for a "narrow" concept of law, below chap. 7, sec. 7.7.2.

analysis or sketching the logic of our concepts, but with giving an account of the familiar legal order that is deep and illuminating. It would not concern him in the least if the claims that he thinks can be demonstrated are, while extremely important, nevertheless logically contingent. What concerned him, rather, was whether the claims that can be demonstrated, or at least persuasively defended, and yield answers to deep and serious general questions we are inclined to raise about the nature of law. But looking at matters from this vantage point, we have to recognize that the question whether or not the outsider *must* take up the insider's perspective on the phenomena may not have a single answer; answers will vary widely with the kind of questions one wishes to raise. If the outsider's interest in a given legal order, or in legal orders wherever they are found, are like the physicist's interest in football or baseball, then it will not be necessary to take seriously any internal, participant perspective. On the other hand, if the outsider's interest is distinctly practical, as was the interest Holmes's "bad man" took in the law, it is arguable that, even if he cares not a fig for morality or civic responsibility, he will do best by pursuing his questions with a good grasp of how law is viewed from the inside, not only by officials but also by his fellow citizens (for whom he also, presumably, cares not a fig).

Fuller assumed that there is a range of questions at the core of "legal philosophy" and that for these questions a strictly outsider perspective could not possibly suffice. Fuller never explicitly articulated the questions falling in this range, but we can gather something about their general nature from his discussion of the interactional nature of law. They are questions persons might raise, persons who are not necessarily committed to the institution or practice of law, but who recognize the practical fact that it is an established part of their practical environment and as such defines a certain common social world. In order to make one's way in and through this social world, they understand, one must find out what law means to others, knowing that, inevitably, what they take it to mean will depend (at least in some cases and to some degree) on what one takes it to mean. Continuous with these are questions of a more general, philosophical sort that are, nevertheless, still practical rather than theoretical. Fuller does not assume wholesale moral commitment to the justice and practical wisdom of the practices in question, but he does assume at least the recognition that these practices play an important role in the lives of participants, that they constitute a meaningful social reality that has at least some minimal normative significance for those caught in its web. Undertaking to grasp its meaning and practical force, at least under ordinary circumstances, does not preclude raising larger and deeply probing questions about the moral status of this practice, but, at the same time, it does not depend entirely on it. Fuller understood jurisprudence as a branch of practical philosophy, at least in the sense that it proceeds with analysis of legal phenomena within the framework of concepts of practical reasons, human purposes, ideas of what is good or worth pursuing, and the like.

4.3.3. Legality and Substantive Justice

Fuller in some places maintained that there is a second, albeit less direct, link between morality or justice and the principles of legality. He claimed that there is a positive connection between legality and moral goodness or justice, and that, more specifically, no tyrant bent on brutal injustice against his subjects could carry out his unjust schemes while adhering to the principles of legality. At one point, Fuller (1958, 636) even owned that "coherence and goodness have more affinity than coherence and evil." Many critics found this claim to be naïve at best. Doubtless, there is a certain air of naïve optimism in this idea, but some recent defenders have argued that it must also be credited with a certain degree of political realism.

Fuller (1969, 153) was very clear, of course, that the principles of legality themselves are entirely neutral with respect to substantive ends: "the internal morality of law may support and give efficacy to a wide variety of substantive aims," he acknowledged, and it would seem that among the aims the law might adopt are those that systematically and consistently impose brutally unjust burdens on some portion of a nation's population. It is instructive at this point to call to attention an important argument that Fuller's rival, H.L.A. Hart, made in defense of a kind of natural-law implication of his own positivist theory (see below chap. 7, sec. 7.7.3). Hart (1994, 193–200) argued that, while there is no conceptual connection between law and morality, there is a logically contingent but strong "natural" connection yielding a "minimal content natural law thesis." Hart argued that, given basic features of human nature and human social and material environments, it follows that human life in close social contact is not feasible without certain fundamental constraints on human behavior, which constraints include prohibitions on use of force and fraud, keeping of promises, respecting basic property rights, and the like. Moreover, since law presupposes and must protect the foundations of social life, law to be effective must also incorporate this "minimum content of natural law" into its body of norms. However, Hart hastened to add, this is not to say that the law thereby is required by some "natural necessity" to incorporate *moral* principles into its set of norms. Although the minimal rules seem to cover some of the same territory (use of force, honesty, keeping faith, etc.), there is no guarantee that the protections the law offers will be extended to all members of the community as morality requires. That is to say, law may extend its protections just as far as it is necessary to secure its efficacious operation and no farther, thereby mobilizing the full coercive resources of the state to oppress a portion (minority or even majority) of the population whose lives it controls. One might ask, why could not the same be true of a regime that meets Fuller's principles of legality?

It is clear that there is no logical barrier to this outcome. Nor is it likely that we will find any metaphysical ground for a contrary hope. Even some of Fuller's most sympathetic critics (e.g., Luban 2001) concede that his theory is simply

overly optimistic at this point. However, a few things can be said in its favor, even if, perhaps, in the end they do not warrant quite the faith Fuller was inclined to embrace. The first thing to notice, as Brudney (1993, 284) pointed out, is that Fuller's claim is best interpreted as an empirical claim rather than a conceptual or metaphysical one. The claim is that, if governing is done largely according to the precepts of legality, then it will actually be difficult in many cases for authorities to pursue the most egregious forms of brutal injustice, the reason for this is that legality requires publicity and broad consistency of behavior and it is often difficult (and inefficient) for truly brutal political regimes to work in full sunlight. One might argue that public, fully acknowledged violations of human rights, enslavement of peoples and the like, are in the modern era rare. This is not to say that brutal and systematic violations and enslavement are rare, but that rarely are such activities capable of being effectively prosecuted in the full light of day. Finnis (1980, 273) adds a further important point in Fuller's behalf: "A tyranny devoted to pernicious ends has no self-sufficient *reason* to submit itself to the discipline of operating consistently through the demanding processes of law." Meeting the demands of legality, from the point of view of such a regime, introduces serious inefficiencies into the equation, costs that any tyranny (as opposed to a regime that is prepared to regard its subjects as self-directing rational agents) would have little reason to pay. The only reason, of course, is to gain the public, political benefit (natural and international) from being *regarded* as a legality-respecting regime. This, in the modern world, is a benefit of some significance, but it comes at the relatively high price of shining the light of publicity on governing activities. A regime that is forced to announce and execute its brutal repression in the light of day could face powerful political pressure from within its borders and beyond them. Of course, this is no guarantee that adherence to the rule of law will bring in its trail substantive justice, even in the long run, but Fuller's faith was built ultimately on the leverage that legality provides to people of good will for moving the rock of brutal injustice off the back of oppressed people.

4.4. Spontaneous Order and the Foundations of Law

Friedrich Hayek (1899–1992) was born and educated in Vienna and while working in the Austrian civil service came under the influence of the Austrian economist, Ludwig van Mises. In 1931, he accepted a chair at the London School of Economics and in 1950 moved to the University of Chicago, at the height of the "Chicago School's" activity. He moved to Freiburg in 1962 and retired there in 1969. Although trained as an economist with a distinctively "Austrian" point of view, and although he began and ended his career in Europe, the center of his career and arguably of his jurisprudential thought was Anglo-American. His legal theory was deeply influenced by his conviction that seventeenth century English common-law (on a somewhat romanticized understanding) had forged the basic institutions of individual liberty. His deep

and rather uncritical devotion to the common-law tradition became increasingly important to his view of the fundamental structuring principles of law and the rule of law.

In his jurisprudential work, Hayek defended a model conception of law he calls "*nomos*," a spontaneous, "grown" order of largely implicit laws, exemplified in the practice of English common-law jurists of the seventeenth and eighteenth centuries. Committed to the project of "constructive rationalism," Hobbes, Bentham, and Austin led the way in replacing *nomos* with the model of "*thesis*"—explicitly formulated directives of a sovereign law-maker imposed on law-subjects (Hayek 1973, 124–8), aimed at reconstructing the social order as directed by rationality unburdened by all conditions but reason itself (Hayek 1967, 84–95; 1973, 5, 8–34, 95). According to Hayek, what we might call the "thesist"[19] project was simultaneously theoretical and practical. *Thesis* provides a framework for understanding (modern) law and a blueprint for making it more rational (where "rationality" could be defined in terms of efficiency, social welfare, social justice, democratic responsiveness or any number of other social goals). In Hayek's view, the model is basically the same whether the law-maker is an individual sovereign, a legislative assembly, or a judge who makes law in the course of adjudication. So, the thesist camp, in Hayek's eyes, includes not only classical positivists and their decedents, but also realists and defenders of economic jurisprudence (see chap. 5).

Hayek never disguised his deep disapproval of the thesist project or his idealization of *nomos*, its polar opposite.[20] Because the ideological fervor of Hayek's writing, his work has had little traction in Anglo-American legal philosophy, but his conception of law has much in common with Fuller's interactional conception of law and his arguments are different and in some respects more sophisticated than Fuller's. He offered two different kinds of arguments for his *nomos* conception. The more familiar argument grounds this conception in the rule of law as normative ideal, in service of a distinctive conception of liberty. In addition to this normative argument for *nomos*, he argued that the thesist model fail to recognize fundamental conditions essential for the existence of law, and thus cannot provide an adequate understanding of law as it exists in modern societies. Both arguments draw heavily on his core explanatory notion of a spontaneous order and his related notion of abstract rules. We will turn to these root notions first before looking at his arguments for his conception of law-as-*nomos*.

[19] Hayek rarely referred to his opponents as "positivists," preferring to attack the *thesis* model and the constructive rationalists who championed it. Since the "positivist" label has been applied to so many different jurisprudential positions in recent years, a neologism with a precise reference seems preferable.

[20] From very early in his career, Hayek's *bete noir* was socialist planning, and his favorite model of a "grown order" was the market, so most readers, friend and foe alike, have tended to regard him as a (perhaps moderate) libertarian. But his libertarian sympathies may not have been philosophically fundamental (see below sec. 5.3).

4.4.1. Spontaneous Order and Social Rules

Hayek based his explanation of the emergence and alteration of social rules on his idea of spontaneous order.[21] On this model, new rules emerge and are altered in response to changing environmental conditions or in response to changes in rules that result from the irregular behavior of some individual members. The balance of forces within the order brings about these changes, without the intervention of any designers who have a view of the whole system of rules and the order it tends to produce.

4.4.1.1. The Idea of Spontaneous Order

Although we naturally regard manifestations of order in the world around us as products of design, many are self-generating and spontaneous, Hayek observed. This is especially true of social order. Observable patterns in social life emerge spontaneously, Hayek argued, from the interaction of many individuals responding to their environment, which includes the actions of other individuals; all of them act on local knowledge of that environment from a potentially wide variety of motives and within the limits defined by the system of rules in force in the group (Hayek 1973, 40). This order is "spontaneous," because it is the result of individuals arranging themselves according to "forces" (i.e., motives within the framework defined by rules) in a specific environment. The order is the resultant of of these forces. Like Fuller, Hayek (1973, 36) held that social order manifests itself in a kind of equilibrium of expectations.

To understand the explanatory power of the idea of spontaneous order, we must distinguish between rules of conduct and the social order they indirectly generate (Hayek 1967, 66–9). The relationship between them is indirect and complex, because the order emerges from the combined influence of the rules and the environment on the choices and consequent interactions of the agents. The environments in which individuals interact, and the way (and the extent to which) the rules influence the actions of individuals, greatly affect the relationship between rules and the resulting social order or disorder. Thus, for example, it is possible for the same pattern of social interaction to be produced by different sets of rules and for the same set of rules to yield different social orders (Hayek 1967, 67–8; 1973, 43–4). Moreover, it is not the case that every set of rules will produce a corresponding order; indeed, some rules may prevent any order from forming or may produce an order that is highly dysfunctional (Hayek 1973, 43).

We can identify several salient features of spontaneous orders as Hayek conceived of them. First, they are path-dependent in the sense that the properties of the order at any point in time depend on its history (Sugden 1998c, 488).

[21] For a general discussion of Hayek on the nature and evolution of social rules see Postema 2011.

Second, they approximate but never strictly achieve equilibrium (Gaus 2006, 234). Nevertheless, third, spontaneous orders are, within limits, self-maintaining; that is, they can survive exogenous and endogenous shocks, restoring their (approximation to) equilibrium (ibid.). Finally, the spontaneity of a social order is a matter of degree (Hayek 1973, 41–2).[22] Spontaneity is in part a function of the dispersion of power, that is, the extent to which an individual can influence the properties of the social order (Sugden 1998c, 487). The more widely power is dispersed over a population, the less power each individual will have; thus, the greater the dispersion, the greater will be the spontaneity of the order. Since dispersion of power admits of degrees, so will the spontaneity of an order.[23]

Consider now the dynamic movement within a spontaneous order. First, changes in the environment in which members interact (exogenous shocks) can cause members to adjust their behavior within the parameters defined by the existing rules, with the result that the order is re-established. This is a case of simple self-maintenance of the order. Exogenous shocks (or endogenous challenges to the rules) may result in a change of the rules. If this does not produce an overall change in the order, we have a more complex form of self-maintenance. But the change of the rules may be substantial and influence the integrity of the social order. Changes of some rules may bring about shifts in other rules of the system and these adjustments may restore the (near) equilibrium of the order. Other changes in the environment or changes of the rules may require substantial adjustments in the behavior of members of the group, thereby altering the nature of their interactions. In that case, the emergent social order will also change, resulting over time either in disorder or in the emergence of a new order with different properties.

In each of these cases, individual members may be affected, as may the felicity and fortunes of the group as a whole. Hayek (1967, 67; 1973, 43–44) was aware that the fact that an order emerges spontaneously from the interactions of a group does not guarantee that the order is beneficial, let alone optimal, either to individual members or to the group as a whole. Indeed, it is possible that a set of rules may even prevent order from emerging, or bring about damaging and socially dysfunctional disorder. Hayek's notion of spontaneous order is value neutral and the fact that an order has arisen spontaneously, taken alone, implies no special value and offers no guarantee of its being beneficial.[24]

[22] Hayek's penchant for sharp dichotomies, especially between made/imposed order (*taxis*) and grown/self-generating order (*kosmos*), often obscures this fact.

[23] The important conclusion we must draw, although Hayek obscures it, is that we may have to ask what degree of spontaneity of a social order is desirable, and what reasons ought to guide that choice.

[24] In his jurisprudential writing, Hayek linked spontaneous order with individual freedom, but that is not part of his initial construction of the idea of spontaneous order as an explanatory device, and his extension of the concept depends on evaluative premises that are not at the core of the notion itself.

4.4.1.2. Social Rules: Implicit and Abstract

According to Hayek, the vast bulk of our knowledge of our physical and social world is only implicit, especially our grasp of informal social rules operative in spontaneous orders. They are matters of only tacit understanding, "known by none, and understood by all" (Hayek 1967, 46), grasped in the practice, rather than in any articulated appreciation, of them. Echoing the English philosopher Gilbert Ryle, Hayek claimed they involve "knowing how" rather than "knowing that" (Ryle 1949, chap. 2). "The habit of following rules," he wrote, is "a skill to fit oneself into, or align oneself with a pattern of whose very existence one may be barely aware and of whose ramifications one has scarcely any knowledge" (Hayek 1988, 78; also 1973, 43).

Not only are such rules unarticulated, but most of them *cannot* be articulated or brought to our awareness, due to the fact that they are highly localized: restricted to certain times, places, and circumstances of individuals and embedded in the particular activities and skills of their ordinary practical lives. The rules are so deeply embedded in practice, Hayek claimed, that they cannot be brought to consciousness without abstracting from most of their content. The problem lies in part in the fact that something can be made explicit to consciousness only if it is articulated linguistically, according to Hayek, and that we lack the resources to articulate the content linguistically. But it is due even more to the fact that we could not capture the rule even if our linguistic resources were far more sophisticated, because it is so vastly interconnected with other aspects of inarticulate practice. Thus, inevitably, a very large part of that which gives determinate meaning to any given rule in particular circumstances remains tacit, accessible to action as "know how" but inaccessible to the consciousness of the agent who learns how to follow it. Moreover, since we are unable to make this knowledge explicit, Hayek concluded, it cannot be shared; it is widely dispersed and in very large measure private.[25]

Informal social rules, the product of and operative in spontaneous social orders, are abstract in the sense that they concern impersonal relations among individuals (i.e., not dependent essentially on any particular individuals) and that they serve no specific purpose, because they are not designed by anyone (Hayek 1973, 39, 50). Unlike specific commands, which direct those addressed

[25] Despite many similarities, Fuller's understanding of implicit social rules (above sec. 4.2.2.2) differs from Hayek's in one crucial respect. In Fuller's view, shared rules have their roots in common resources of experience on which individuals can draw when they face novel cases. For Hayek, unlike Fuller, the uniformity of behavior ("the order of action") that results from individuals in a community following (what turn out to be) similar rules can only be explained as a happy convergence, not the result of the intelligent, and to an extent joint, activity of parties engaged in the interaction, and thus Hayek found it necessary to call on external authorities (the "chief" or judges) to help individuals adjust their behavior (and the rules governing it) to meet novel circumstances and resolve differences in understandings of the existing customs.

to perform actions in order to achieve a particular purpose, informal social rules tend to set parameters of choice and action rather than mandate specific actions directed to concrete purposes. Abstract rules are generic with respect to circumstances to which they apply, to purposes achieved in following them, and to the subjects directed by them.

The market was the exemplar of a spontaneous order, for Hayek, and when he spoke of abstract and implicit rules he had in mind rules like those protecting against force and fraud that structure informal market-like social orders. The market also provided Hayek with his basic understanding of the way social rules function in a spontaneous social order: social rules play the same role in other spontaneous orders that prices play in the market (Zywicki and Sanders 2008, 569–73). Prices solve the problem of the wide dispersion of knowledge. Producers throughout the economy need to know how much to produce, and so how much they should purchase of the materials and labor they need to produce it; likewise, consumers need to know how to distribute their budget of resources over items they wish to buy. Although there are elements of conflict in these complex relationships, the more fundamental problem, in Hayek's (1973, 14) view, is a problem of knowledge. Each must know an enormous amount about the production and consumption decisions of a vast number of fellow participants in the market, decisions determined by their preferences, needs, available resources, and local conditions. The price system organizes and coordinates this information, not by collecting and publishing it, but rather by offering publicly recognizable markers around which players in the market can orient their decisions and actions. The price-system represents, as it were, all the knowledge needed to make such decisions, knowledge that is and strictly speaking remains radically dispersed. Prices merely focus expectations of buyers and sellers, producers and consumers, in a way that allows each of them to make rational decisions about their economic activities.

Similarly, abstract social rules provide the stability of expectations about the behavior of others that enables people to make rational decisions about how they will navigate the complex network of social interactions in which they live. Guiding their actions by rules, Hayek (1973, 49) wrote, "it is possible [for agents] to make use of knowledge which nobody possesses as a whole." The rules coordinate the choices and actions of individuals, not primarily directing them to specific kinds of actions, but rather by organizing and coordinating information available to the agents. In Hayek's view, social rules primarily are solutions to information problems. Facing a complex and potentially difficult problem of social interaction, individuals relying on social rules do not need to know anything about the specific interests or motives of other parties to the interaction, or anything about their particular understanding of their circumstances; all they need to know is that there are certain governing social rules and that the other parties are likely to shape their decisions and actions within the parameters defined by those rules.

4.4.2. The Informational Conditions of Thetic Law

With this understanding of the model of spontaneous orders and of the role of abstract rules in them, we can set out Hayek's critique of the *thesis* conception of law. Thesists, as Hayek understood them, offer a distinctive explanatory account of law that supports their practical program of reconstruction of the social order. According to Hayek's thesists, the social order is seen as exclusively the product of thetic law, detached from, or replacing, informal social rules (custom). The coordinated activity of individuals in society is the product of rules designed by political authorities, imposed on law-subjects, directing them to ends or goals conceived and articulated by those authorities. Earlier law may have been dominated by custom, but only authoritative directives enacted by publicly recognized political authorities can meet the demands of modern society. Modern social order is the product of legislation and the task of jurisprudence is to rationalize law to achieve its ends more effectively.

Hayek charged that the thesist model fails to recognize the radical dependence of modern law on a substructure of informal social rules both for its authority and its content. Hayek (1973, 91–2) argued that law-makers are capable of making explicit law only if empowered and authorized to do so and the authorizing norms must bottom out in such informal social rules. Authority derives from law, not law from authority, and the rules that empower legislating also limit that power (Hayek 1973, 95). (See chap. 1, sec. 1.1.2.2.) Also, he argued, informal social rules are necessary if made law is to have the intelligible content it needs to direct social behavior. He wrote, "the whole process of development, change and interpretation of law would become wholly unintelligible if we closed our eyes to the existence of a framework of such unarticulated rules from which the articulated law receives its meaning" (Hayek 1967, 102).

Both of these points are familiar from Fuller's critique of positivism, but Hayek offered a unique argument in support of this familiar critique. This argument focuses on epistemic conditions of thetic law, that is, on the information needed for imposed authoritative directives to do their work of guiding and coordinating the actions of individuals in a way that achieves the goals of those who issued them. In order to direct behavior to such goals, law-makers must be able to predict with some degree of confidence the effects of their directives on the behavior of individuals in society. This can be done, Hayek argued, only if the directives are set in the whole system of legal rules that purport to govern the behavior of those individuals, for legal rules direct behavior only as a more or less systematic whole, and not merely as discrete commands. Further, this system of rules can hope to guide behavior only if it is meaningful to each of the individuals addressed, and it can be meaningful only if legal rules fit into the structure of social behavior defined by the informal individual and social rules practiced by law-subjects. Thus, authoritative directives of law

must be integrated into two systems simultaneously, the system of legal norms and the system of behavioral determinants already in place in the society. This, Hayek argued, puts enormous informational demands on law-makers. The information needed to predict the effect of the introduction of a new directive on the behavior of individuals subject to it is not available to the law-makers and, in most cases, is strictly inaccessible. The information is so widely dispersed in the community and so closely held (indeed, in Hayek's view it is unavailable in an articulate form even to those who grasp it implicitly) that it can never be gathered. This obstacle cannot be overcome by improved methods of information collection, analysis, and storage. The required information is in principle unavailable to law-makers (Hayek 1973, 12–5, 48–51).

Of course, the thesist project is not to enlist informal networks of social rules, but rather to displace them, to focus attention of law-subjects on the directives themselves, detached from the vast fund of implicit, inarticulate "know how" on which their practical deliberation and decision-making depends (ibid., 124–5). But this project is self-defeating, in Hayek's view, for in cutting off their directives from this informal substructure, law-makers detach their directives from the conditions of their intelligibility to those they are meant to guide. And if law-makers actually succeed in undermining confidence in the informal social rules that do the lion's share of coordinating social interaction, they eat the seed corn of their project. From this argument Hayek concluded that law conceived on the *thesis* model cannot explain modern social order and law's role in it, because the very conditions for its playing the role thesists assign it do not and cannot exist.[26]

This argument shares with Fuller's the assumption that law's distinctive mode of operation is to offer normative guidance to law-subjects and that law-makers can achieve their goals only through coordinating the complex, highly interdependent interaction among those law-subjects. Hayek added to this picture the assumption of the radically dispersed knowledge on which individual subjects must draw in order to make decisions guided by law. Hayek underscored Fuller's conclusion that the superstructure of made-law is dependent on

[26] As we shall see below in chap. 5, Richard Posner, a major exponent of economic jurisprudence, maintained that common-law judges seek to promote *efficiency* (understood as "wealth maximization") by "mimicking the market"—that is, they anticipate systemic failures of the market and mimic the results of market transactions not distorted by real-time conditions facing ordinary law-subjects (Posner 2005; see chap. 5, sec. 5.2.2). Hayek's argument challenges this version of thesist jurisprudence, as well as the more familiar positivist versions. This understanding of law makes informational demands on judges that are impossible to meet. If something like the market is to determine outcomes, the only way to know what the market determines is to run the market. Thus, according to Hayek, the positive thesis of economic jurisprudence must be rejected because it rests on a false assumption and the associated normative project must be rejected because what it proposes is practically impossible (Zywicki and Sanders 2008, 563–9). Posner (2005) acknowledged Hayek's challenge but simply denied the premise that the relevant knowledge is not available, but he never addressed Hayek's extended argument for this premise.

a sub-structure of implicit rules, by emphasizing the dispersed, local character of those rules.

4.4.3. Modern Law as a Mixed Order

Although Hayek portrayed *nomos* and *thesis* as polar opposites, his conception of law in fact combines them. Building on the above argument, Hayek maintained that modern social order is fundamentally a spontaneous order, emerging from behavior of vast numbers of individuals who make decisions in concrete circumstances in pursuit of their individual goals, decisions that are structured and in certain respects constrained by implicit, often largely invisible, social rules. At its foundations, law (i.e., *nomos*) is implicit. However, in modern conditions, Hayek conceded, the spontaneous order resulting from the operation of custom cannot entirely sustain itself. He recognized that adjustments of social rules in response to exogenous shocks or endogenous challenges to the rules are not guaranteed to re-establish the (near) equilibrium of the existing social order or to replace it with another, well-functioning social order. At times the forces of spontaneous adjustment fail: either they fail to produce new rules that take hold in the community (with the result that there is uncertainty about the rules that govern or new rules are needed for novel conditions), or they produce rules which threaten to produce disorder. The forces of informal, spontaneous order can lead to dysfunctional equilibria, from which a society cannot extricate itself, or cannot do so quickly enough to avoid serious breakdown at critical points in the social order. Thus, there is a role, in Hayek's (1973, 43, 88–89, 100) view, for intervention of a more intentional sort and thus for a more visible form of *nomos*. This visible law is the product of political authorities publicly articulating existing social rules and even, when necessary, adding new rules to meet novel or rapidly changing conditions.

The primary form that this visible dimension of *nomos* takes will be akin to a system of common-law norms which emerge from the ordinary activities of individual judges seeking to adjudicate particular cases brought to them in ways that are consistent with their and, more importantly, the parties' sense of justice (Hayek 1967, 45), i.e., their sense of the appropriateness of actions and the distribution of duties and rights rooted in common, implicit rules. This body of somewhat more visible rules of law is not detached from, but rather deeply rooted in and emerging from, the implicit rules of the spontaneous order, through the efforts of individual judges to articulate, adjust, focus, refine, and to an extent renovate the inherited informal system of social rules in which the interactions and practices of ordinary members of the society are entangled.[27]

[27] *Pace* Hasnas (2005), Hayek did not confuse informal customary rules with the rules generated by common-law adjudication, or collapse the former into the latter, but rather he believed that the two bodies of norms are intricately linked.

This, Hayek argued, is not a *deus ex machina* imposed on the practices of individuals, but rather is a natural development of an evolving spontaneous order (Gray 1998, 71). It emerges from specific needs of individuals for clarification and support of the rules of the informal order already in place. As the order evolves, new rules may be introduced inadvertently, or if they are introduced to some degree intentionally, this happens only as individuals seek to discover the order implicit in the relations that exist among them (Hayek 1973, 76–8).

Not only are these rules organically linked to the underlying informal, implicit structure, but they are also the product of a second-level spontaneous order: the order of custom *in foro*, which emerges from the accumulation of large numbers of decisions among judges whose power individually to determine the law is widely dispersed. Judges, working with a tutored intuitive sense of the inchoate rules followed by the parties, give articulate expression to these rules in the course of deciding particular cases (ibid., 60, 119), not with an eye to some larger social goal, but rather considering only how to fit their decisions into a given framework of rules (ibid., 65–6). On this view, no single decision on its own "makes" a new law (the doctrine of strict *stare decisis*, on this model, is a product of thesist thinking); it only contributes to the evolution of doctrines which may more or less radically redirect the law. The judge is "an unwitting tool, a link in the chain of events that he does not see as a whole" (ibid., 66). Thus, visible *nomos*, taking shape as a body of evolving principles of common law, not only is underwritten by and serves to refine the existing spontaneous order, but it does so through a the operation of a second-level spontaneous order.[28]

But Hayek did not leave the articulation of visible law exclusively in the hands of common-law-like judges. Legislation is needed, he conceded, because the process of spontaneous adjustment of rules to exogenous changes in the environment of social interaction—whether at the informal level of custom *in pays*, or the more formal level of custom *in foro*—can be too slow, and it may be impossible for judges to make necessary changes in the rules to meet the demands of changing circumstances, since they lack resources for announcing publicly new rules which can in a short time refocus expectations (ibid., 88–89). Thus, legislation has a valuable role to play. Every functioning modern legal system involves some mixture of common-law and legislative institutions, but, he hastened to stress, legislation, the thetic element of law, is domesticated and constrained within an effective nomic structure. For enacted laws exist only as islands in a sea

[28] It is this part of Hayek's exposition of common-law reasoning that led Posner to declare that Hayek is "a thoroughgoing formalist" (Posner 2003, 278). But Hayek clearly rejects the usual "formalist" constraints on judicial reasoning. Judges will be forced in many cases not only to articulate rules which have been previously unarticulated, but even to introduce new rules and substantially reshape legislation in order to integrate it into the body of law (Hayek 1973, 66, 99–100). Thus, "whether a new norm fits into an existing system of norms will not be a problem solely of logic, but will usually be a problem of whether, in the existing factual circumstances, the new norm will lead to an order of compatible actions" (ibid., 105).

of common law and the implicit law that underwrites it; thus, judicial interpretation of legislation will also strive to construe it in a way that integrates it into and makes it coherent with the body of law of which it is a part (1973, 66).

4.5. *Nomos*, Liberty, and the Rule of Law

Thus, *nomos* must be foundational in modern law, underwriting and limiting its necessary thetic elements. Law construed (or constructed) in this way is, in Hayek's view, a bulwark of individual liberty. Indeed, his case for law-as-*nomos* rests ultimately on this normative basis. He first set out this argument in his monumental work, *The Constitution of Liberty* (1960), but he refined and extended it in *Rules and Orders* (1973), where he sought to show that *nomos* is "the law of liberty."

4.5.1. The Rule of Law in The Constitution of Liberty

The root idea of the rule of law, according to Hayek, is that of the law's ruling, being master, over those wielding power. Its principles of legality are, fundamentally, principles of constitutional order, principles that constitute and constrain political power and thereby define "the constitution of liberty." In his early work, Hayek, like Fuller, sought to limit political power through fixed, explicit constitutional structures and formal principles of legality (Hayek 1960, 177–82). Hayek grouped these principles of the rule of law under four heads.

First, the rules enacted and enforced by the governing authorities must be general, i.e., addressed to classes of agents and actions in generic circumstances. General rules, Hayek thought, are impersonal, long-term measures, addressed to yet unknown future situations without reference to specifics of persons, places or things. Second, laws must be fixed in advance and so must be prospective and certain (Hayek 1960, 179, 207–8). Likewise, judicial decisions must be predictable, in the sense that they be in accord with pre-existing rules (ibid., 208–9). As we shall see below (sec. 5.2), rules guiding judicial decisions need not be explicitly formulated, if they are in some sense congruent with citizens' sense of justice. Third, all those subject to governmental power must be equal before the law (ibid., 85–7, 153–4, 209–10). This equality, which must be a property of legal norms and of all the processes by which law is administered, adjudicated, and enforced, is not a matter of substantive or material equality, but rather a matter of the law applying in the same way to all (ibid., 87, 210). Law must be no respecter either of persons or of status; thus, law must apply to the governors just as to the governed. Fourth, if law is to rule, then there must be a sharp institutional separation of law-making from law-applying functions and strict limits on the discretion accorded to administrative agencies (ibid., 212–3).[29]

[29] Hayek's concern was similar to Dicey's (see chap. 1, sec. 1.2) and, like Dicey, he vigorously attacked the emerging institutions of the administrative state (Hayek 1960, Part III).

Liberty lies at the heart of the ideal of the rule of law, according to Hayek; however, this liberty is not freedom from obstacles in the way of satisfying our wants, but rather freedom from subjection to the arbitrary will of another person. In society, we are often compelled to make choices we would rather not make and act in ways we would rather not act, but where circumstances and the world around us compel such choices and actions, we are not coerced, in Hayek's view. "Coercion occurs when one man's actions are made to serve another man's will, not for his own but for the other's purpose" (ibid., 133). The evil of coercion lies precisely in the fact that "it thus eliminates an individual as a thinking and valuing person and makes him a bare tool in the achievement of the ends of another" (ibid., 21). In Hayek's view, the principles of legality protect individual liberty in its most fundamental form: freedom from subjection to the arbitrary will of another (ibid., 11). This freedom is at risk when those who wield political power direct particular individuals to specific ends of the wielder of power. The rule of law, conceived formally, seeks to make the government's use of power predictable and impersonal (ibid., 142–3). Hence, law must meet requirements of generality, prospectivity, and certainty. Similarly, to minimize that risk, law-making and law-applying functions must be sharply separated. When they are separated, law-makers are forced to view all matters in terms of classes of agents, actions, and circumstances and will be forced to lay down rules in ignorance of particular persons and circumstances, and judges, who consider particular circumstances and persons, will be bound by general rules (ibid., 153).

Freedom from subjection to the arbitrary will of another also underlies Hayek's notion of equality before the law. The law, of course, is in the business of making distinctions, and so, treats people differently all the time. This does not violate the equality of all before the law, according to Hayek, if the distinctions are not arbitrary in the sense of subjecting one group to the will of another group. The test for such subjection that Hayek proposed is whether the distinctions included in the law are "equally recognized as justified by those inside and outside the group" benefited or disadvantaged by it, or at least by a majority of the members of these groups. If only those inside the group approve, "it is clearly a privilege"; if only those outside the group favor it, "it is clearly discrimination" (ibid., 154).

The Constitution of Liberty articulated a formal notion of legality similar in many respects to Fuller's "inner morality of law," but the connection to his conception of law-as-*nomos* is not clear; indeed, Hayek's understanding of the rule of law in this work seems unpromising as a basis for his defense of *nomos*, since his conception of *nomos* was modeled on classical common-law practice, which typically tends to run together the law-making and law-applying functions.[30] When, more than a decade after publishing *Constitution*,

[30] Fuller (2001, 116) pointed out that, Hayek, in early lectures on the rule of law, argued that common-law adjudication was inconsistent with the ideal of the rule of law (Hayek 1955, 19).

he turned again to the question of the institutionalization of the rule of law, Hayek looked beyond formal constitutionalism to a view similar to Dicey's, although he never explicitly mentioned Dicey among those who nudged him in this direction. Ironically, perhaps, it was more likely the work of Italian, Bruno Leoni (1961), that convinced Hayek that it was in the institutionalized practice of common-law reasoning, rather than in formal constitutionalism, that individual liberty was most securely protected.

4.5.2. Nomos*, the Law of Liberty*

The rule of law, conceived formally, in Hayek's view, sought not to eliminate constraints on choices and actions by those wielding law, but to make them predictable and impersonal (Hayek 1960, 142–3). But critics of *The Constitution of Liberty* convinced Hayek that constitutional and formal legality limits, while necessary, were not sufficient to protect individuals from the use of law to subject individuals to the will of others (Hayek 1973, 101 and n. 10 at 170). He came to see that the very notion of law as an instrument to direct individuals to goals of those in power (whether or not done so in the name of the community as a whole) was one of the most serious threats to individual liberty. As a result, he launched his extended critique of the thesist conception of law and defense of *nomos*.

Nomos, as articulated in *Law, Liberty, and Legislation* (Hayek 1973, 1976, 1979), sought to honor the spirit of the conditions of the rule of law defended in *Constitution*. The rules of *nomos*-law arise from a spontaneous process; they are abstract, general, non-purposive, and apply to whole classes of individuals equally, governing their actions in only an adverbial fashion (Hayek 1973, 85–6). They are also predictable, not because judges are restricted to conclusions mechanically derived from already articulated rules, but rather because, in seeking to reach decisions that coordinate and stabilize expectations, judges seek to make decisions that accord with the general sense in the community of what is just (ibid., 115–8). *Nomos* meets the conditions of respect for individual liberty, because the vast body of legal norms is rooted in informal, implicit rules that emerge from the spontaneous actions of individuals and these norms are interpreted and extended again in a spontaneous order of individual judicial decisions. The rules emerge—no one designed them—and they do not direct action to specific goals of those in power (whether government power or power in the community). Thus, since they are not imposed by, and do not serve the specific purposes of, any individual, the constraints of law on individual choices and actions cannot be regarded as coercion in Hayek's special sense: law-subjects are often compelled, but no one is subjected to the arbitrary will of another. Just as commodity prices limit our choices in very substantial ways, but those limitations are not intrusions on our liberty, precisely because they are established by impersonal forces of the market (Zywicki and Sanders

2008, 590), Hayek argued, so too common-law rules are products of impersonal forces and thus coerce no one. *Nomos* does not so much promote freedom of individual members of society as constitute their freedom, in Hayek's view (Zywicki and Sanders 2008, 589). Action taken within a framework of *nomos*, he thought, just is free action, not because individuals consent to the rules, but because the rules are the product of impersonal forces in a spontaneous order and thus do not subject any individual to the arbitrary will of another.

Of course, Hayek recognized that legislation plays a necessary role even in a properly functioning *nomos* system, and legislation carries the potential for coercion of just the sort Hayek decried. But, he thought, legislation in this system is domesticated by the formal conditions of legality (generality, prospectivity, equality, and the like) and by its necessary dependence on and subordination to the dual-level spontaneous order of implicit and common-law norms. Coercion can never be eliminated from the political domain, Hayek conceded, but the most serious intrusions of legislation on individual liberty can be cabined, confined, and thus minimized.

4.5.3. The Value of Liberty

The key premise of this argument relies on the principle of liberty as non-domination. This notion has deep roots in the history of political philosophy and it has attracted contemporary political theorists, especially in its neo-republican guise. However, Hayek's interpretation of it is very narrow: one is not subject to the arbitrary will of another as long as the rules by which one is governed are not the product of the explicit willing of some other particular individuals. It would seem that this ignores at least two possible sources of subjection that are no less objectionable. First, as a result of the aggregated actions of individuals groups can unintentionally back into structures of norm-governed power that effectively subordinate the lives and choices of some to the wills of others Second, it is possible for rules emerging from impersonal processes to create opportunities for individuals to subject others to their own arbitrary wills. The fact that the rules which permit or facilitate this exploitation or domination were not created by the dominators or by any identifiable individuals whom we can hold responsible, does not eliminate the subjection or make it any less a violation of the victims' liberty.

These worries should have been obvious to someone who deeply values liberty as non-domination. One wonders how deep Hayek's commitment to individual liberty was. In fact, on the rare occasions when he addressed the question of why liberty as non-domination is important, his argument took on a surprisingly utilitarian color. Coercion makes someone the tool of the purposes of another person (Hayek 1960, 21). This is evil, Hayek wrote, "because it prevents a person from using his mental powers to the full and consequently from making the greatest contribution that he is capable of to the community"

(ibid., 134). That is, the value of liberty lies in its promise of benefit to the community as a whole that comes from the fullest exploitation of individual capacities, including each individual's command over a vast body of unarticulated local know how. Perhaps, then, Hayek's concern was not, fundamentally, about subjection of individuals to the wills of others, but rather about limitations on the most efficient use of human resources for community advantage. This might explain his apparent blindness to forms of intrusion on individual liberty, but, it seems, his argument suffers as a result.

4.6. Common-Law Adjudication and Hayek's Arguments for Law-as-*Nomos*

Hayek's epistemic argument and his normative argument for law-as-*nomos* both rest on a distinctive view of common-law adjudication. To assess the plausibility of these arguments we need to look more closely at this key premise. Adjudication, as Hayek conceived it, is a process in which judges, who have power only to decide particular cases, focus their attention on local circumstances and understandings, rather than broad, system-wide goals, to identify and articulate the rules applying to those cases. The informational demands on judges are limited because they are expected to confine their attention to local circumstances and understandings. General rules emerge from this process, but they are not imposed, on this view, because the process is impersonal, spontaneous, and not goal-driven. The system of rules that emerges from and is sustained by this process, so Hayek argued, yields a spontaneous social order without making excessive demands on the vision and knowledge of participants or subjecting individuals to the arbitrary wills of others.

This is the premise on which Hayek's arguments rest, but his understanding of adjudication is simplified and idealized. At times Hayek realized this and sought to draw a more complex and realistic picture of the process. However, arguably, this picture threatens to undermine his arguments.

On Hayek's favored picture, judges, focusing solely on the features of the particular cases before them, are "unwitting tools" of an impersonal, spontaneous process by which general rules evolve. However, Hayek recognized that, in addition to deciding particular cases, judges have responsibility for the maintaining the system of rules. They aim "to make the whole system consistent" (Hayek 1973, 66), which involves not merely logical consistency but also practical coherence. This, he observed, calls for shaping or bending rules that are not in accord with the body of law as a whole to make them better conform to the order, even to the point of nullifying the intention of the legislator. "Legal technique" leads lawyers and judges "to fit an alien element into [the body of law as a whole] […] by so transforming it as to make it harmonize with the whole" (ibid.). It may also call for introducing new rules to meet demands of conditions not fully anticipated in existing law, or to articulate implications not fully understood before (Hayek 1973, 97–105).

The rules of law are related to the "order of actions" it spontaneously generates (sec. 4.2.1). Thus, law generates this order as an interconnected whole and the influence of a given rule on the order of actions depends on its relation to other rules of the system (Hayek 1973, 60, 103–5). The acceptance of some rules in the system oblige us to accept other rules, Hayek maintained, not just because the ends of the accepted rules could not be served unless other rules are also in force, but more importantly because it is the system of rules taken as a whole that ultimately shapes the order of action. Thus, when a judge seeks to articulate a rule in a novel case, she seeks a rule "which serves the same function as the unquestioningly accepted rules of law [do]—namely to assist the constant re-formation of a factually existing spontaneous order" (Hayek 1976, 60; see 1973, 78). Maintenance of that order of action, the structure of cooperation, is the judges' ultimate measure of practical coherence and the fundamental ordering principle (Hayek 1973, 105–6). "The chief concern of the common law judge must be the expectations which the parties in a transaction would have reasonably formed on the basis of the general practices that the ongoing order of action rests on" (ibid., 86).

The ultimate test of systemic consistency, according to Hayek, is whether the legitimate expectations of the parties are served.[31] Thus, when a judge is presented with a dispute that cannot be resolved by appeal to existing rules and must introduce a novel rule, the primary task of this judge is to insure that the new rule coheres with existing legitimate expectations (ibid., 116, 119). And, although judges and lawyers need not look to any other goals or aims of the resulting order, they are committed to keep in view the singular aim of assisting individuals in forming reliable expectations about the behavior of others. Thus, although immanent criticism—fitting rules together into a logically and practically coherent system—is a basic technique of legal reasoning and the primary instrument of the evolution of legal thought (ibid., 118–9), judges must look ultimately to the functioning of the entire system of law as a creator and maintainer of secure expectations of individual law-subjects. The proper measure of securing such expectations takes into account the fact that it is not possible to satisfy all expectations, even all legitimate expectations; so the aim must be "to maximize the fulfillment of expectations as a whole" (ibid., 103).

Thus, on this elaborated picture of common-law decision making, judges must always work with an eye trained on the effects of their decisions on the system of law as a whole and its likely effects in turn on the order of actions as a whole. And the measure by which the practical coherence of that system is judged is the maximization of the fulfillment of expectations. That is, Hayek

[31] Hayek's understanding of what qualify as legitimate expectations is very broad. "Legitimate" or "reasonable" expectations are those based on practices that could in fact determine expectations and on such facts as can be presumed to be known to the parties in question (Hayek 1973, 86).

seems to endorse a kind of "utilitarianism of expectations" as the fundamental principle of common-law decision making. It is tempting to attribute to Hayek a kind of "indirect" utilitarianism of expectations, according to which the satisfaction of expectations is maximized over the long run by judges paying attention only to particular situations and given rules and the internal logical coherence of these rules. However, this does not seem to be what Hayek had in mind. In *Rules and Order*, Chapter 5, he described a relatively active judiciary, working within a given and evolving body of legal norms, but also taking a comprehensive view of the system of law as a whole and the "order of actions"—the structure of coordination—that it is meant to serve (Hayek 1973, 119). For this purpose, the judges' fundamental *working principle* is the maximization of the satisfaction of individual expectations he maintained.

Although this elaborated picture of judicial decision making introduces a degree of realism into his account, it creates problems for both of his core arguments for law-as-*nomos*. Consider, first, its implications for his normative argument. The problem here is that the spontaneity of the order, and hence the impersonal and undesigned character of the rules, are compromised. Some implicit and inchoate rules that have proved uncertain in practice are authoritatively articulated—that is, one understanding among several is privileged—and new rules are introduced, all with the smooth functioning of the system (and hence maximal fulfillment of expectations) in mind. The spontaneity of the original system of rules is compromised for the very good reason that spontaneity is no guarantee of successful coordination, but the rules would seem to be no less "imposed" for serving this end. These efforts at rule-articulation and rule-making may not be the result of the decision of a single judge—they may depend on up-take in the broader judicial or legal community—but as the aggregate effect of official action they still appear *officially imposed*, and, thus, his case for the liberty-constituting character of common-law *nomos* is in jeopardy.

Hayek would resist this conclusion on the ground that the ultimate aim of judicial decision making is *abstract*; that is, it is not a social goal that is opposed to the ends and aims of individual members of society, but rather seeks to provide a secure social context in which individuals can most successfully pursue whatever ends and aims they wish to pursue. "In the ordinary sense of purpose law is therefore not a means to any purpose, but merely a condition for the successful pursuit of most purposes" (Hayek 1973, 113). It is a "multi-purpose instrument." But one might object that the fact that the goal is abstract in this sense does not make it any less of a social goal, and an aggregate social goal at that, since its focus is not maximal fulfillment of each individual's expectations—or the security for pursuit of individual goals—but rather maximal fulfillment of the aggregate of individual expectations. On this view, individual liberty—at least equal individual liberty—is not thereby promoted, but only some aggregate of expectation fulfillment. It is hard to see why this project is fundamentally different from the kind of project Hayek condemned in his cri-

tique of thesist jurisprudence. Thus, once Hayek introduced a degree of realism into his account of common-law decision-making, the difference between it and the thesist model which at one time seemed very sharp is now greatly blurred. And it is blurred even further as the thesist model is revised likewise to take into account elements of law that do not easily fit its simplified limits. One is left with the worry that the force of Hayek's normative argument for his conception of law rests on a sharply defined dichotomy between *thesis* and *nomos* which he cannot sustain and that his opponents need not concede.

Problems also arise for Hayek's epistemic argument for his conception of law. Again, the sharp contrast between the *thesis* model and Hayek's *nomos* model is blurred. Judges, on Hayek's model, must always deliberate with an eye to the operation of the system of law and with the larger order of actions in mind. They must seek to work out not only how individual rules fit into the larger body of rules, but they must test that "fit" by the effect that adjustment of those rules would have on the overall order of actions. In particular, they must predict how changes in the rules will, in combination with the existing rules of law and the informal rules and customs implicit in the activities and practices of the people governed by the rules, affect the structure of expectations of those people. Judges must, in effect, mimic the spontaneous order. But it is not clear that this idea makes any more sense, or makes any less extravagant informational demands, than economic jurisprudence's "mimicking the market."

First, if we take seriously Hayek's insistence on the near absolute privacy of information on which individual rule-following depends, then judges will be in no better position than legislators in working out how the system of expectations will be affected by rule changes. The information needed to make such determinations, according to Hayek, is inaccessible. Even if judges are skilled followers of the rules in the circumstances in which parties appearing before them have interacted, this will not provide the needed information, for, by hypothesis, local "know how" was insufficient to yield coordination of their interaction, and the judge's private know how will merely add a third, entirely individual, perspective on the problem. Of course, the judge can articulate and enforce his understanding, but then it can no longer be treated as the articulation and enforcement of a common, if imperfectly grasped, understanding. Thus, if we take Hayek's privacy of rule-following information as seriously as his arguments require, judicial rule-making, even if limited to rules directed to fulfilling expectations, is in no better epistemic position than its thetic counterparts.

Suppose, however, we weaken Hayek's assumption of the privacy of rule-following information. Then we can ask whether the informational demands of maximizing the fulfillment of expectations are any less formidable than those of other possible legislative aims. While they may be different in kind perhaps, they are not obviously weaker than those of the pure thesist model, and the contrast is even less clear once we permit modifications of the thesist model to

take into account epistemic conditions of effective law-making in certain contexts. Neither the *thesis* model nor the *nomos* model, taken in its pure form, represent plausible descriptive accounts of modern law, but once we abandon the pure models, Hayek's argument offers little basis for choosing between them (or holding out for some alternative model).

4.7. Conclusion

Hayek alerted legal theorists to an important condition of the effectiveness of law that has largely been ignored. However, beyond putting an important question on the agenda of legal theory, his epistemic concerns did not much advance our understanding of law. In general, his writings did not much influence developments in jurisprudence in the second half of the century. Fuller's interactional account (more than his disputed doctrine of the internal morality of law) has proved more fertile to later legal theory, although it took several decades before its usefulness was recognized. His theory offered a counter weight to both the waning influence of legal realism and to the rising tide of neo-positivism stimulated by Hart's *Concept of Law*. However, after the famous but largely unsatisfying *Harvard Law Review* exchange in 1958 between Hart and Fuller, Hart's work eclipsed Fuller's contribution to jurisprudence. Fuller's work lay largely in the shadows (except, perhaps, for an unacknowledged influence on Dworkin's early anti-positivism) until the last decade or two of the century, when philosophical interest in the foundations of the idea of the rule of law, and especially in the conventional foundations of law, increased. We will pick up this story in Chapter 12.

Influenced by the realists, but, like Pound, appalled by their extravagances, Fuller in effect carried forward the program of the moderate realist camp, while challenging both the extremists and those who sought to replace jurisprudence with social science. Hayek, in contrast, mounted a challenge to contemporary positivism as he conceived of it with resources drawn from his understanding of economics and the forces driving markets. While Hayek's analysis did not take hold in American jurisprudence, neo-classical economics suddenly burst on the jurisprudential stage in the early 1970s. It is time for us to tell that story.

Chapter 5

ECONOMIC JURISPRUDENCE

5.1. Roots, Ambitions, and Projects

5.1.1. Realism and Neo-Classical Economic Theory

Reflection on the relationship between law and economics has been a staple of English-speaking jurisprudential thought since the middle of the eighteenth century. Scottish enlightenment philosophers established that a nation's economy and its legal system are intimately related. Adam Smith conceived of his theory of political economy as an essential part of his broader jurisprudential theory. Nineteenth century utilitarians refined the economic theory and the jurisprudence and explored the connections between them. By the end of the nineteenth century, economics had emerged as the progressive social science. Holmes spoke prophetically when he said that the lawyer "of the future [will be] [...] the master of economics" (Holmes 1995, 3: 399; see above chap. 2, sec. 2.5.1). In the early decades of the twentieth century, progressive economists and legal scholars like Roscoe Pound roundly criticized the naïve assumptions of the United States courts that struck down legislation protecting workers as violations of a constitutional standard of substantive due process. Institutionalist economists argued further that law and the economy were profoundly interdependent, that economic forces determine the direction and content of the law, and that fundamental economic institutions like the market, and notions of efficiency, presuppose legal rights and institutions that enforce basic norms of fair-dealing (Duxbury 1998; Mercuro and Medema 1997, chap. 4). These ideas influenced the political views and policies of certain realist thinkers, especially when they moved into positions in the U. S. government during the Depression. Yet, the ideas remained on the margin of realist jurisprudential thought.[1] In the 1950s, realist jurisprudence was challenged by approaches, like those of Fuller and the "reasoned elaboration" school, that sought to recover resources for deeper understanding of the law from within law and its traditional practice themselves. For a time, economic theory was largely ignored by jurisprudence.

It was not until the early 1970s that the law and economics approach became a significant jurisprudential movement. The signal event establishing the

[1] Karl Llewellyn is both exception to and confirmation of this point (see Schwartz 1998). As principal drafter of the U.S. Uniform Commercial Code (1952) he relied heavily on economics. But his attention was limited to problems of contract and commercial law, and, unlike the institutionalists, he assumed efficiency as his basic organizing and rationalizing norm. He also lacked command of the basic tools of emerging neo-classical economics.

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new movement was the publication of Richard Posner's *Economic Analysis of Law* (Posner 1973).[2] Within a decade the movement had become a powerful influence in American law schools and had made very significant inroads into English-speaking legal thought around the globe. Economics returned to legal theory in the 1970s in a new guise and with a very different mission. In the intervening years, classical micro-economic theory had been revived. Its tools and concepts were refined into a sophisticated, elegant, and powerful method of analysis of human social behavior. This encouraged in a new generation of legal scholars a larger aim: not merely to explore the effects of law on the nation's economy and the economy on the law, but to use the tools and models of neo-classical economics to provide a comprehensive and deep explanation of the nature of law itself.

This new aim was heir to two powerful intellectual ambitions. The first was the ambition of one major wing of the realist movement to ground the study of law in the rational sciences of human behavior.[3] Recall that, to these scholars and their heirs, traditional methods of legal analysis and reasoning left the law a fragmented chaos. Judges were confident of their judgments when they sought to refine the law at the margins, but they rarely ventured beyond doctrinally segmented corners of a structure, which from a larger perspective looked increasingly chaotic and arbitrary. Students, likewise, might learn the basics of tort theory, but when they moved to contracts, or property, or criminal law, they were forced to master different sets of basic principles. Like their late nineteenth century counterparts, academic lawyers in the United States who were inclined to realism increasingly believed that law lacked even the elementary formal features of a rational science. What was needed, it was thought, was a general frame, a unified set of elementary rational principles to which all the disparate parts of the legal system could be related as to their rational foundation. This ambition was not new with the realists, of course; it was a dominant drive behind late nineteenth century jurisprudence and Langdell's formalism. But the realists' ambition took a different form from that embraced by Langdell. They viewed law as an *instrument*, the point or rationale of which

[2] There is no doubt that Posner's work galvanized the movement, but it was already under way in the 1950s at the University of Chicago law school (Kitch 1998, Rowley 1998, 478). The economics department had become the center of a vigorous revival of classical economic theory (lead by luminaries like Milton Friedman and Frank Knight), and since 1939 the law school had employed neo-classical economists to teach law. Most important among them was Aaron Director, who founded the highly influential *Journal of Law and Economics* in 1958. In 1974, the editorship of the journal was assumed by Ronald Coase, a British economist, who had arrived at the University of Chicago in 1964, not long after the publication of his seminal paper, "The Problem of Social Cost" (Coase 1960). Notably, Hayek did not seem to participate in this development, despite the fact that he was a member of the economics department of the University of Chicago from 1950–1962.

[3] However, Posner (1995a, 3), arguably the most influential economic legal theorist, disavowed any link to the realist tradition (except to Holmes).

is entirely external to it. So, the science of law was forced to look beyond resources internal to law for its elemental principles. This gave a distinctive shape to the realists' ambition to fashion a unified, rational science of law.

The realists looked primarily to behaviorist social sciences for their analytical tools, but the new legal scientists of the 1970s looked to economics. In this they were heirs to a second great ambition. Neo-classical economics increasingly extended the reach of its analyses beyond market behavior and labor-management relations to all areas of human social life, from crime to voting to sexual relations, and all social institutions from markets to marriage. Economics presented itself as the foundational social science, providing the basic concepts and analytical tools for all social scientific inquiry. Law could not escape this expansionist drive. Moreover, economics seemed to many legal scholars to provide precisely the resources they needed to organize the chaos and unify the fragments of legal doctrine, by a small set of elementary rational and universal principles, and to do so in a way that respected the fundamental insight (often absent from behaviorist models) that participants in legal institutions are rational, self-directing agents responding to other such agents in a complex environment of interaction and scarcity.

According to Posner (1990, 252), "Holmes believed in policy analysis but lacked the patience to do it." The new generation of legal scholars not only had the patience, but, unlike the realists, they were also armed with a set of tools that appeared to be so powerful and simple in their basic features that literally no aspect of law, and no aspect of human behavior that could conceivably be touched by law, was beyond their reach. The scope of the new methodological approach to understanding law is evident from the contents of the movement's founding text. In the words of one reviewer, Posner's *Economic Analysis of Law* undertook a "relentless item by item march through all of law—property, contracts, crimes and torts, labor law, corporations, taxation, racial discrimination, civil procedure [...] all the way to a final 'Note on Jurisprudence'" (Leff 1974**,** 451). Some practitioners of these methods (I will call them "law-economists") accepted a more modest view of the scope of the theory's application, but Posner, surely, pushed the ambitions of law and economics to its outer limits.

5.1.2. Theoretical Ambitions of Law and Economics

Viewed from the vantage point of the history of philosophical reflection on the nature of law, the scope of the ambitions of modern law and economics is in one respect breathtakingly broad, perhaps even "a bit preposterous on its face" (Coleman and Murphy 1990, 181). However, its scope seems, in another respect, to be especially narrow. It has little to say directly about issues that have long been at the center of legal philosophy. On the nature of law's normativity or authority, on the essential features of the concepts of rights and

obligations, on the relation between coercion and law, and on a host of other such questions, law and economics offered little to jurisprudence. (On the nature of legal rules and norms, also, it had been silent, but recently this has changed.[4]) This is not to say that it remained neutral on such matters, but only that it tended to assume answers to such questions rather than articulating and defending them.

On the whole, law-economists, like realists, were generally indifferent to larger conceptual and philosophical issues and tended to focus their attention on a different set of questions that lend themselves to precise and determinate (economic) analysis and resolution. For some law-economists, the indifference may have been rooted in the conviction that once the economic analysis of law is convincingly presented, the other issues will simply lose their intellectual grip on us. Others were simply keen to get down to the business their methodology could handle and let others spend time on what they regarded as irresolvable issues. A garden-variety pragmatic attitude partly explains this indifference, but also it must be said that law and economics, for all the sophistication of its analytic techniques, is an applied discipline—applied economics and applied jurisprudence. We might call it "legal engineering." This leaves somewhat unclear the relevance of economic analysis for those who approach issues of general jurisprudence with patience, especially with patience for philosophical reflection. We shall return to this question at the end of the chapter, but here we need to explore briefly the kind of intellectual projects that law-economists were most inclined to undertake.

5.1.2.1. Basic Theoretical Assumptions

First, however, we must say a word about the assumptions that structured the law-economists' approach to law. The most obvious assumption is that law is properly regarded strictly as an instrument. So, to understand law, we must identify a goal, the essential features of which can be defined apart from the operation of the law, and on this basis we account for salient features of law by assessing their contribution to the achievement of this goal. Moreover, the goal is seen as a public good: social well-being, or, more specifically, *efficiency*. To give content to this broad concept and to connect it to behavior of individual agents, the approach assumes (1) that social efficiency is a function of the good of individual members of the group, and (2) that those members are fully rational in the sense that they have a coherent (rationally ordered) set of prefer-

[4] In the mid-1990s, economic jurisprudence "discovered" social norms, in the words of one of its practitioners (Ellickson 1998; see also Kahan and Lessig 1998). For a helpful overview, see McAdams and Rasmussen 2007. Ellickson's early work (1991) was groundbreaking; see also Posner 2000 and Drobak 2006. The influence of game-theoretic and rational choice models on the analysis of social rules and conventions in recent jurisprudence will be explored in Chapter 11 below.

ences over a very wide range of states of affairs and always act to maximize their satisfaction of these preferences, taking into account the relevant probabilities. In any given social interaction, we assume that rational agents will choose their best response to the expected choices of the other rational agents with whom they interact, i.e., the response that maximizes their expected individual utility or preference satisfaction, and so will seek to minimize their costs and maximize their benefits.

Often the context of social interaction is structured not only by the material environment, the scarcity of material goods in it, and the claims that other rational agents are likely to make on those resources, but also by existing laws and legal institutions. Law-economists assumed that law is a set of rules or norms that in some way structure the environment of social interaction. Law-economists gave very little attention to how this is done or to what must be true about the attitudes of the interacting parties to the law to make this possible.[5] Typically, they assumed that whatever the conditions for the existence of viable, deliberation-influencing rules are, each individual party for his or her own part regards the rules merely as part of the external decision environment, on a par with various features of nature that he or she must also take into account in deciding what to do. That is, the rules do not provide them with any reasons to act in particular ways, except insofar as incentives or sanctions are attached to the rules or they can expect the behavior of other people to conform to the rules. We might say that law-economists assumed that rational agents regard the law in the manner of Holmes's famed "bad man" (see above chap. 2, sec. 2.3.3).

Finally, the law-economists' goal of efficiency was a *social* goal, comprising each individual member's "best response" to a situation calling for decision. With this goal in mind, law-economists regarded society as a whole as if it were making a decision as a unit and asked what its "best response" is (understanding "best" in this case as a maximizing function of expected benefits minus costs). (In section 2.1, we will explore ways to make this notion more precise.) This standard, then, defines the goal at which the instrument of law is directed, according to law and economics.

5.1.2.2. Projects and Theses: Analytic, Explanatory, and Normative

Holmes, we have seen, cast his conception of the nature of law in terms of the dominant attitudes and organizing ideas of practicing lawyers. For Holmes, the model practicing lawyer is a litigator, or at least a keen court-watcher, who seeks to steer his or her client (conceived as a "bad man") clear of the

[5] A somewhat more nuanced view has begun to emerge lately as law-economists have turned their attention to "social norms" (see the previous note). But the above was true of the bulk of economic analysis of law.

costly interferences of the court. Fuller found this model of the lawyer narrow and distorting. He favored the "transactional lawyer" who seeks to structure for his or her client long-term working relationships with other citizens. The law-economist combined something of each of these approaches. In contrast with Fuller's lawyers as "architects of social structure," the economic model of the lawyer, Luban (1999, 208–13) suggests, is that of the "transaction-cost engineer," whose task is to reduce the transaction costs due to imperfect information or inconsistent time horizons and thereby add value to the deals they help to bring home to their clients. But, unlike Holmes and Fuller, the law-economist saw the lawyer as an essential aid not only to private clients, but also to law-makers and judges. The range of projects that find their way to the law-economist's in-box is wide. It was Bentham, perhaps, rather than Holmes or Fuller, with whom they most shared theoretical and practical ambitions.

We can identify at least three different kinds of projects that law-economists undertook. The first, and least theoretically ambitious, kind of project we can call *analytic*. Law-economists pursuing such projects used the resources of neo-classical economic theory, and increasingly those of game theory, to work out the effects of actual or hypothetical legal rules, or changes in the rules, on the behavior of people. Theory provides *models* of behavior in situations of social interaction, and these models generate predictions about how people will adjust their behavior in light of the rules and their expectations of how other people will act (on the assumption that they too will adjust their choices to the rules and their expectations of the behavior of others) (see Baird et al. 1994; Kornhauser 1998, 683.) Sometimes, these predictions can be verified before or after the rules are put in place and the models can be refined accordingly. Despite the artificiality of their assumptions about social behavior, law-economists maintained that their models do a good job of predicting such behavior, at least better than any other available theoretical approach.

If these claims about the predictive reliability of the models are true, analytic law and economics has much to offer law-makers and legal scholars. Although it may tell us little about the content of the law, or about the ends to which law should be directed, it promises to tell us a great deal about whether the laws proposed or established can reasonably be expected to serve those ends (at a cost we deem appropriate). It can also bring to the attention of policy makers and legislators problems or merits of legal rules that are masked by traditional legal reasoning (Ogus 1998, 487). It can do so because its predictions, unlike those Holmes seemed to have in mind (chap. 2, sec. 2.3.2), are not based on the substantive legal doctrines themselves, but on the norms of "best response" and efficiency, which abstract from legal doctrine.[6] On the

[6] Law-economists, however, tended to ignore the equally important fact that their predictions *presuppose* a great deal about how the utility-maximizing parties understand and interpret the rules and what force they give them, or at least how they expect *other* parties to interpret them

other hand, this analytic project does not undertake to contribute to our understanding of the nature of the law. Indeed, it clearly works from a number of key *assumptions* about the nature of law and the role it plays in the practical reasoning of those to whom it is addressed.

Despite the fact that analytic law and economics rests on fundamentally normative concepts (e.g., concepts of rational choice, "best response," and efficiency), law-economists liked to think of it as a strictly "positive" social science. Because it seeks to model the rational behavior of agents subject to law, it must rely on plausible norms of rationality, but, they insist, these norms are not meant to ground evaluations of behavior or of the rules that shape it. Of course, analytic law and economics can be enlisted in the service of normative assessments and critiques of law, in the same way that techniques for measuring the effects of proposed laws on the habitats of wetland birds can aid in the assessment and critique of environmental laws.

However, another project of allegedly "positive" economic jurisprudence has a more ambitious program. Its *explanatory* project can be pursued for its own sake. Law-economists who undertook such explanatory projects tended to make a two-fold claim with respect to some stretch of legal doctrine or subset of legal rules and norms: (1) that this corner of the law can best be described as aimed at achieving efficiency, and (2) this fact *explains* why the law has the content it has. For example, law-economists sometimes argued that the main features of tort law, its combination of negligence and strict liability rules, and the structure of tort litigation, are efficient means of allocating the costs of accidents, and the fact that they are efficient offers a deep and illuminating explanation of why tort law has these features. Posner offered the stronger thesis that all private case law is best explained in terms of its overall efficiency.

> The common law exhibits a deep unity that is economic in character. The differences among the law of property, the law of contracts, and the law of torts are primarily differences in vocabulary, detail, and specific subject matter rather than in method or policy. The common law method is to allocate responsibilities between people engaged in interacting activities in such a way as to maximize the joint value, or, what amounts to the same thing, minimize the joint cost, of the activities. (Posner 1973, 98)

Let us pause for a moment to identify certain features of this thesis, which I will call Posner's *case-law thesis*. First, Posner claims efficiency only for judge-made law, not for statutory law. The pressures on judges incline them to decide in accord with the requirements of efficiency, but he does not think this is likely to be true for legislators. Second, Posner's general claim concerns the content of law, not its general nature; it concerns what unifies and explains

and accord force to them. Game theoretic and welfare-economics concepts abstract from such discursive considerations. In order for economic analysis to proceed, the content of the rules must be settled, for purposes of the particular problem analyzed. This leaves a large part of what ordinary general jurisprudence attends to unaddressed by economic jurisprudence.

the substantive rules and doctrines of the case-law of property, contracts, torts, and the like. In terms of nineteenth century jurisprudential categories, it is analogous not to the positivist claim that law is the command of the sovereign, but rather to the utilitarian claim that all of law fundamentally serves to maximize the well-being of the community as a whole. Third, the claim is that behind the chaotic, confused, even apparently contradictory surface of private case law, there are important regularities, a latent order. In the fourth edition of *Economic Analysis of Law*, Posner qualified the above statement of his case-law thesis. The claim, he wrote, is not that every case-law doctrine or rule or decision is efficient, but rather that private case law as a whole is *best explained* as a system for achieving efficiency (Posner 1992, 23).

Fourth, it is important to Posner's thesis that this legal order is not captured in the concepts, modes of reasoning, and working vocabulary of lawyers and judges, but rather only in the more elemental concepts of maximizing value and minimizing costs provided by economic theory (Kronman 1993, 226). Finally, the deeper unity of law described in these terms was said to provide the best explanation for the apparently disparate legal doctrines that make up existing private case law. This was said to be a deeper, and hence better, explanation than any appeal to surface doctrines because it brings all the doctrines together under a single principle that is fundamental to the decision-making of rational individuals and the societies that comprise them.

Strictly speaking, such an explanation is neutral with respect to whether it is good for law to aim at efficiency. Of course, law-economists do not deny that their claim to offer a deep and illuminating explanation of law depends on our agreeing that it is at least not a bad thing that law is efficient. Still, many law-economists want to argue that their explanatory project does not imply endorsement of existing private case law. However, some law-economists go further and advance a *normative* or *prescriptive* thesis, namely, that law (or some portion of it) *ought* to be directed toward efficiency. Indeed, some law-economists feel more comfortable advancing this normative thesis than the explanatory thesis, because it does not commit them to the potentially dubious claim that existing law already is efficient, generally speaking. At the same time, it commits them to the view that efficiency is not merely a norm that enables us to model the choices and behavior of rational agents, but it is also a fundamental norm of political morality.

Normative law and economics projects tend to focus either on adjudication or on legislation. A *normative economic theory of adjudication* maintains, roughly, that judges discharge their responsibility as judges best when they seek through their decisions to promote efficiency. Efficiency ought to supply the guiding principle of judicial decision making. A *normative economic theory of legislation* holds that all laws should, so far as possible, be directed to efficiency. In the strongest form of this view, efficiency is said to be the sole or overriding principle of political morality. Moderate versions recognize efficiency as

one, important principle of political morality, but may regard it as subordinate in some instances to other principles (justice, or equity, for example). A variety of moderate versions is possible, depending on just how important efficiency is taken to be relative to other competing principles of political morality. At its weakest, the normative thesis maintains that, other things being equal, we should prefer legal rules that are efficient over those that are not. Analytic law and economics projects presuppose at least the weakest version of the normative thesis. If efficiency of rules was not something we cared about even when nothing else of importance conflicted with it, then there would be no point in carrying out analyses that explored the relative efficiency of competing rules or policies. Of course, the analytic methods of economic jurisprudence would also be enlisted in service of any stronger version of the normative thesis.

5.1.2.3. Law and Economics and General Jurisprudence

Analytic law and economics is of considerable interest to scholars, policy analysts, government officials, and legislators who seek to make, remake, and reform the law. But the methods and assumptions of law and economics stand at the frontiers of the historical province of jurisprudence when they are put in service of the more ambitious versions of explanatory and normative theses described above. Law-economists who held such views in the closing decades of the twentieth century (Richard Posner being, perhaps, the most prominent among them) have been inclined to think that economic jurisprudence offers a mode of analysis of law that is more systematic, rational, and determinate than traditional philosophical approaches. In their view, this mode of analysis offers a rational, scientific account of laws that fulfills aims that traditional philosophical theories have not and perhaps cannot satisfy. Although the analytic approach and less ambitious versions of the explanatory and normative theses of economic jurisprudence can coexist comfortably alongside many of the historically important theories of the nature of law and legal reasoning, the more robust explanatory and normative theses set out fundamentally to challenge philosophical jurisprudence as it has been historically practiced.

It is more difficult to locate strong explanatory economic theories on the jurisprudential map. Since they are focused largely on the content of law, rather than its form, general nature, or preconditions, they would not seem to challenge much of general jurisprudential theorizing, although they may challenge substantive doctrinal theories, like retributive theories of criminal law or corrective justice theories of tort law. The most ambitious explanatory economic theories, such as Posner's case-law thesis, claim to offer a deeper and more universally applicable framework for positive analysis and understanding of the law. At times, economic jurisprudence was put forward as a theory of law in the tradition of positivism, construed very broadly to include everything from Bentham's classical positivism to realism of the scientific variety. But at other

times it appears that law-economists were more inclined to propose economic analysis as an alternative (more rational, scientific, etc.) *form of theorizing* about law, one that is more rational, scientific, and the like, rather than as a rival *philosophical theory of law*.[7] Because law-economists were not inclined to address foundational issues systematically, they did little to dispel this ambiguity in their broader theoretical ambitions.

5.2. Analytical Tools

Economic analysis of law fashioned its tools and models out of fundamental concepts of welfare economics. Although detailed exposition of these concepts is not necessary for our purposes, a brief statement of the basic ideas will be helpful. We have already seen that the law-economists' core concept is that of efficiency. In fact, several related concepts of efficiency were put in play and we will consider them first. It was not clear how to bring these concepts to bear on legal rules and institutions until legal scholars in the 1960s began to reflect on the implications of Ronald Coase's seminal essay, "The Problem of Social Cost" (Coase 1960), for legal analysis. The bridge from welfare economics to law was completed, in skeletal form at least, by Calabresi and Melamed's (1972) introduction of the distinction between property, liability, and inalienability rules and their discussion of the efficiency of these different kinds of rules in various legal contexts. Brief consideration of these contributions will help us focus our discussion of explanatory and normative claims of law-economists. In recent years, law-economists have increasingly become interested in the interactional and strategic dimensions of individual behavior in the shadow of the law and have looked to the techniques of game theory to model this behavior and the role of law in shaping it. We will look briefly at some broad features of these analytical models.

5.2.1. Concepts of Efficiency[8]

5.2.1.1. Utility and the Pareto Criteria

One natural way of thinking of efficiency as a social goal is in terms of policies or institutions that produce human welfare, utility, or satisfaction of preferences at the lowest cost. The utilitarian principle, which calls for maximizing net aggregate expected utility of members of the society in question, would seem to be a natural formalization of this intuitive idea. However, economists have long been uncomfortable with it because it relies so heavily on interpersonal

[7] Compare this with Leiter's construal of realism as "naturalized jurisprudence" (Leiter 2007), see above chap. 3, sec. 3.3.2.2.

[8] I summarize here Coleman's useful introduction (Coleman and Murphy 1990, 182–98) to the basic concepts and models of efficiency at the heart of economic jurisprudence.

comparisons of utility or welfare. They found Vilfredo Pareto's (1848–1923) criteria more congenial.

Economists using Pareto criteria invite us to consider alternative "states of society"—imagine these as consequences of alternative policies, legal rules, or institutions—and how all the individuals involved are affected by moves from one to another of them. One such state of society S^1 is said to be *Pareto superior* to another S^2 just in case no one is worse off in S^1 than in S^2 and at least one person is better off in S^1 than in S^2 (or, just in case no one prefers S^2 to $S^1$and at least one person prefers S^1 to S^2). Using this notion, we can define optimality as follows: S is *Pareto optimal* just in case there is no other state of society S^n such that S^n is Pareto superior to S. Thus, a Pareto optimal state is one that cannot be improved upon from the point of view of any affected member without some other member suffering some loss. Market exchanges are thought to be good examples of Pareto superior "moves" because rational bargainers would give up some of what they own for something another party owns only if each would regard the resulting distribution of goods preferable to the pre-exchange distribution; and a bargain would not be struck if there were no transfer of some portion of goods of each to the other that each would regard as preferable to the existing (and hence Pareto optimal) distribution.

These principles are relatively uncontroversial as long as they identify one desirable feature of a social state among others. The price of being uncontroversial, however, is that they are also weak, since it is likely that many different conditions of society at a given time will be Pareto optimal relative to other alternatives, and the principle does not rank them, since any move from one to the other would involve loss to at least one of the members and so will not be a Pareto superior move. Economists have strengthened the criteria a little by considering the possibility of compensating losers after a change from one state of society to another. They call this *ex post* compensation. A social state S^1 may be *Pareto superior* to S^2, even if the move from S^1 to S^2 involves losses for some of the members, as long as no one is worse off in S^1 relative to S^2 once the losses are compensated.

5.2.1.2. Kaldor-Hicks and Wealth Maximization

For most purposes of legal analysis the Pareto notions are of limited use, because in most cases the compensating transfers cannot be made (or would be too costly), and yet one social state may seem much preferable to another even if some parties stand to lose. In such cases, some economists invoke the Kaldor-Hicks principle. It is sometimes called the "potential Pareto superiority" test because it considers not only *actual* compensation to losers, but also *hypothetical* compensation. Thus, social state S^1 is *Kaldor-Hicks efficient* relative to S^2 just in case the winners in the move from S^1 to S^2 *could* compensate the losers such that no one would be worse off and at least one person would be

better off. Note that on this criterion, all that needs to be taken into account is whether there the winners gain enough to compensate the losers (ignoring all costs associated with actually making the compensating transfer) and there is enough left over to make the move worthwhile to the winners. No compensation is actually required for a move from one policy to another to meet the conditions of Kaldor-Hicks efficiency.

It is harder to tell whether a move from one social state to another is Kaldor-Hicks efficient than to tell whether it is Pareto superior (with or without compensation), because we need some way of telling whether the gains to the winners are large enough to fund hypothetical compensation to the losers. Unless we make interpersonal comparisons of gains and losses, this may be impossible to do. Law-economists typically finesse this issue by proposing as a useful approximation that all gains and losses be measured in some monetary unit, for example euros. We can measure how much a person "values" some good or service by asking him how much money he would be willing to pay to acquire it or how much he would demand in exchange for it. If we could set a monetary value on all the goods and services the allocation of which are affected by moves from one social state to another, we could use a version of the Kaldor-Hicks efficiency principle to assess the moves. A social state S^1 would be what we might call "wealth superior" to S^2 just in case losses in the move from S^1 to S^2 are less than the gains as measured in wealth value. A social state is "wealth optimal" or "wealth efficient" just in case there is no alternative allocation of the goods and services involved that would be wealth superior to it, that is, just in case "all goods and services are, so far as feasible, allocated to their most valuable uses" as measured by the standard of willingness to pay (Posner 1995b, 99). This notion of efficiency as *wealth maximization* is the notion most widely used in economic analyses of law.

5.2.2. Virtual Markets, Transaction Costs, and Legal Rules

In a very important paper, Ronald Coase (1960) established a theorem that built a bridge between economists' notions of efficiency and legal theorists' notions of law. Under usual assumptions made by economists, market exchanges are wealth maximizing (they are also Pareto optimal). Coase demonstrated that when market transactions are costless and individuals act rationally, any assignment of entitlements to goods or resources will be efficient. His idea is intuitively simple. With respect to any good, and two parties who are able to bargain costlessly, it will not matter in terms of efficiency whether one party owns it or the other, for if the owner values it more than the other party, then the allocation is already efficient, and if the owner values it less, then there is some amount of money the non-owner is willing to offer and the owner is willing to accept that will enable the transfer to the non-owner, in which case it will be in the hands of the party who values it most.

This simple idea provided a powerful tool for legal analysis when combined with a key idea introduced by Calabresi and Melamed (1972). They argued that legal rules can be viewed as devices for allocating entitlements to parties—entitlements to goods and services and to various kinds of activities of others respecting these entitlements, including requiring them to get prior permission to use the goods (so-called property rules) or to compensate for use or damage after the fact (so-called liability rules).[9] One can then ask how such entitlements should be allocated. The Coase theorem says that, from an efficiency point of view, it does not matter how they are allocated when transactions are costless. But transactions are rarely costless; in fact, in most cases it makes a lot of difference from the point of view of efficiency how entitlements are allocated, and we cannot expect markets by themselves to achieve an efficient allocation. Posner's breakthrough was to propose that officials charged with determining what rules to adopt, i.e., how to allocate entitlements, should "mimic the market." When the market proves ineffective (and inefficient), the suggestion went, the law should step in and assign rights so as to produce the outcome the market would have produced.

Thus, on this view, laws are seen as devices for achieving efficient, wealth-maximizing social states. Laws encourage efficient use of resources by individual members of society by giving them incentives to adopt those courses of action that maximize wealth overall. Typical Coasian efficiency analyses tend to regard individual members of society as individual (expected) value or wealth maximizers, who treat decisions by other agents, whether officials or other citizens, as given. But often official as well as non-official parties find themselves in situations of strategic interaction, where the decision of any one party depends on the decisions of other parties who at the same time are trying to decide how the first will decide. Game-theoretic models have been introduced to analyze such strategic situations, and to predict what the rational, "best responses" of each party in such situations might be (Ayers 1990; Baird et al. 1994). Laws frequently structure such situations, enhancing or inhibiting rational and ultimately efficient decision making. Laws are efficient in such circumstances when they so structure the decision-making situations that each party, seeking to maximize his or her own net benefit, is likely to decide in ways that maximize social wealth. With these basic concepts in mind we can explore the central theoretical claims of the economic approach to law.

[9] These rules combine a number of Hohfeldian relations (see above chap. 3, sec. 3.1.3), but law-economists did not pay attention to this more fine-grained analysis.

5.3. Positive Economics: Case Law, Torts, and Deep Explanation

5.3.1. Efficiency Explains the Law

Positive economic jurisprudence sought to explain the existing law in terms of the general goal of efficiency and more specifically in terms of wealth maximization (see Wagner 1998; Coleman and Murphy 1990, 198–213). The case-law thesis focuses on judge-made law, which, Posner maintained, exhibits "a remarkable (although not total) substantive consistency" when viewed from the perspective of efficiency. "It is as if the judges *wanted* to adopt rules, procedures, and case outcomes that would maximize society's wealth" (Posner 1990, 356).

On this view, the various rules of contract and property law facilitate efficient exchanges, doing a reasonably good job of getting resources into the hands of those who value them most (are willing to pay the most for them). For example, the rule that a property owner has no duty of care to trespassers appears to be efficient because the trespasser is on the whole able to avoid the costs of injury at a lower cost than the owner. Similarly, the rule of contract law that ordinarily awards only expectation damages for breach of contract is easily seen to be efficient relative to rules that award damages relative to reliance or require specific performance of the contract. For under the expectation damages rule, a seller has incentive to breach his contract and sell his goods to another buyer only when that buyer values the goods more than the originally contracting buyer. (Since the seller must compensate the original buyer for the full expected value of the contract to him, the seller would lose if he were to sell to anyone who values the goods less than the original buyer.) However, other remedies sometimes induce a seller to breach a contract even when the new buyer actually values the goods less.[10]

But the law-economists went further. They claimed that the fact that the law of contract, for example, displays this remarkable efficiency *explains why* we have the particular rules that make up the law of contract. A given legal system has its particular combination of rules of offer and acceptance, consideration, breach, and damages in contract law *because* that combination yields efficient outcomes in the long run. Moreover, when rules of law change, they do so *because* a more efficient rule has emerged to do the legal work. Accordingly, if over time a rule becomes inefficient, we can expect that it will soon be replaced by a more efficient one.[11] This is the core of the explanatory use of principles of economic jurisprudence. To get a better idea of the nature of the

[10] For an argument to this effect, see Coleman and Murphy 1990, 210.

[11] Posner argued that the doctrine of precedent can likewise be explained in terms of efficiency. "The existence of abundant, highly informative (in part because recent) precedents will enable the parties to legal disputes to form more convergent estimates of the likely outcome of a trial, and [...] if both parties agree on the outcome of a trial they will settle beforehand because a trial is more costly than a settlement" (Posner 1990, 358–9).

explanatory claim involved, let us look more closely at the case-law thesis as it applies to tort law.

5.3.2. The Case-Law Thesis Illustrated: An Economic Theory of Tort Law

As a matter of substantive legal doctrine, tort law[12] consists of a network of liability rules (combinations of negligence, contributory or comparative negligence, and strict liability) and defenses, including standards of what is to count as negligence, rules for assessing causation, and the like. Tort law also typically has a distinctive structure. As a matter of procedure, tort litigation is initiated by a private party who asserts a claim against the defendant for redress on the ground that the defendant breached a duty owed to her and caused her injury. Tort law at its core is characterized by *correlativity* between the parties. The victim's right to recover is held against the defendant, not against society as a whole, and the defendant owes a duty to the victim to redress her losses, not to contribute to a general compensation fund or to pay a fine. Law-economists undertook to explain both the substance and the structure of tort law.

Tort law, they argued, is concerned with the losses people suffer in the course of their interactions with other people. Accidents are costly and unwelcome and it is often possible for people to prevent them, or at least reduce significantly the likelihood of their occurring if they take precautions. Of course, some precautions may be very effective in preventing certain kinds of accidental losses, but the price of such precautions may be very high. (For example, bodily injury from automobile accidents could be reduced to near zero if autos were built like army tanks and could only move at very low speeds.) It would be unreasonable as well as infeasible from a social point of view—indeed from the point of view of any individual member of the society—to try to prevent accidents entirely. A more reasonable goal would be to achieve an optimal level of accident costs, one that takes into account the value of engaging more or less freely activities that are to some degree risky (Calabresi 1970; Landes and Posner 1987). It is natural to think of tort law as a device by which optimal levels of risky activities and precautions might be achieved through deterring behavior that falls short of this public standard and indemnifying those who suffer the resulting losses. Of course, once we do that, we have to consider what might be the most effective means of prosecuting excessive risk takers and the administrative costs of running the system.

Plugging in wealth maximization as the ultimate measure of cost assessment, law-economists offered this as the preferred framework for explaining all the basic features of tort law. They proposed to explain the combination of liability rules, measures of negligence, and standards of proximate causation in terms of the incentives they offer individual parties to choose the most efficient levels of

[12] I will limit attention here to accident law.

risky activity and precautions against injury or loss. On this view, the fault system consists of rules of liability which when followed yield efficient levels of accidents and safety. Legal standards are needed because transaction costs are too high for parties to negotiate wealth-maximizing precautions and activity levels *ex ante*. The courts, then, take on the responsibility of bringing the parties to the point they would have achieved had transaction costs not made their free negotiations infeasible. Thus, on this view, courts hold defendants liable for losses suffered by plaintiffs, but only if the defendant could have prevented the injury at a cost that is less than the expected cost of the losses due to the injury (that is, the cost to the victim multiplied by its probability). Moreover, according to the law-economist, public norms governing participation in risk-creating activities are enforced privately by giving victims incentive to bring norm-violators to court by promising redress for the losses they suffered. Thus, both typical substantive liability rules and typical structural features of tort litigation—private initiation and prosecution and correlativity—are accounted for in terms of efficiency.

Let us consider some important features of this strategy of explanation (see Stone 2002b). First, the arguments depend on a showing that the rules in place actually do maximize wealth when all costs and benefits are taken into account. This requires more than the construction of a convincing abstract model; it requires a careful and comprehensive exploration of all the wealth-related effects of establishing the rule and of all feasible alternative rules. This is very demanding. On the other hand, the range of relevant considerations is restricted to entirely forward-looking considerations; no space is given to backward-looking matters, like the fact that the defendant wronged the plaintiff or breached a duty owed to the plaintiff. On this explanation, what entitles the victim of the defendant's injurious conduct to press a claim against the defendant is that she is the most efficient tort-prosecutor. Likewise, what brings the victim's injurer to the attention of the court is simply that imposing costs on him is likely to be the best deterrent against risky behavior in the future, or he is best able to bear the costs of compensating the victim's losses. Also, the reason the defendant is required to compensate the victim is to encourage the victim to "prosecute" the case. Nothing intrinsic to the relationship between the parties requires the defendant to pay compensation to the victim he injured (or to any victim, for that matter, whether injured by him or someone else); likewise nothing intrinsic to that relationship requires that the victim proceed against her injurer for redress. The only reason there is, on this view, for putting the parties together in the way classical tort-law structure does is that (allegedly) it *works*—that is, it achieves efficient allocation of accident costs. And, law-economists would add, that is all the reason we need. On the other hand, they must also admit that there is nothing in the efficiency framework that engenders any loyalty to the classical tort-law structure. On the contrary, proper application of the framework requires us constantly to cast our analytical eyes across the whole field of possible suitors to consider more promising alternatives.

Some critics of the economic analysis of tort law concluded that, since this explanation offers no deep reason for the classical structure of tort law, it fails as an explanation (Stone 2002b, 139–52; Coleman 2001b, 185–9). They argued that it does not capture the way lawyers and judges (and possibly also ordinary citizen participants) in the practice of tort law think about that practice, what they take to be its essential features, and the concepts and categories they use in their practical reasoning about liability for harms done. But this objection merely points out the obvious: economic explanations were designed *not* to rely on the concepts and modes of reasoning of participants in the practice, but rather they sought to explain that practice in terms that are independent of the practice. That is a good thing, Posner argued, because

> The true grounds of legal decision are often concealed rather than illuminated by the characteristic rhetoric of judicial opinions [...] Indeed, legal education consists primarily of learning to dig beneath the rhetorical surface to find those grounds. It is an advantage of economic analysis as a tool of legal study rather than a drawback that it does not analyze cases in the conceptual modes employed in the opinions themselves. (Posner 1977, 18)

In this respect, again, economic jurisprudence can be seen as carrying out the realist project of focusing exclusively on what judges *do* rather than on what they *say* (see above chap. 3).

This is a plausible response to the criticism, as far as it goes, but it forces the law-economist to face directly the question: in what sense does the alleged efficiency of the existing tort practice provide a deep and satisfying *explanation* of the practice?

5.3.3. Evidence and Explanation

5.3.3.1. The Empirical Case for the Case-Law Thesis

At a minimum, an economic explanation of some part of the law must show that it is efficient, at least roughly; however, many critics of law and economics, and even some law-economists (Friedman 2000, 302–6), were unconvinced by the efforts by Posner and others (Posner 1973; Landes and Posner 1987). The critics' challenges were not limited to the details of the specific arguments. One of the major defenders of the method admitted, "the chief problem with the empirical case for [the case-law thesis] is not error but ambiguity. In many, perhaps most cases, an ingenious economist can make good arguments for the efficiency of either of two alternative rules" (Friedman 1998, 58). Part of the problem lies in the fact that the precision and credibility of the results of the formal techniques of economic analysis are strictly a function of the accuracy and precision of the empirical data fed into the process. This yields no deep objection to the use of the techniques; indeed, as analytical, modeling devices they can be very useful. But arguments for much of the existing law often depend on stipula-

tions, assumptions, or approximations. Some critics argued that the information requirements for any serious efficiency calculations are so enormous that use of the norm is utterly impractical (Rizzo 1980, 642; recall also Hayek's criticism, above chap. 4, sec. 4.4.2). If this is so, it is not surprising that a cloud of vagueness ("ambiguity") seems to blanket explanations using these techniques.

The epistemological problems may be deeper. According to the economic theory of law, law has a role to play precisely when transaction costs make free market exchange infeasible. Thus, economic arguments must appeal to assessments of offering prices and demand prices entirely in the absence of any real markets to confirm their estimates. But prices presuppose markets and it does not make sense to talk about wealth maximization in the absence of prices and hence markets (Coleman 1988, 108). Posner dismissed this concern with the argument that we can "assume that (in many cases anyway) a court can make a reasonably accurate guess as to the allocation of resources that would maximize wealth" (Posner 1979, 120). However, this reply is cavalier; it fails to appreciate the seriousness of the concern. The problem is not that, in the absence of markets, it is just more difficult to measure some independent quantity like how much people want something, because in the absence of markets there *simply is nothing to measure*. So-called "shadow prices" are unknowable, not because our information is insufficient, but because, strictly speaking, it does not exist. Of course, analysts might estimate how much people *want* some good or resource, but Posner resolutely distinguished wealth maximization from preference satisfaction and any other ordinary notion of individual welfare or utility. If this objection is legitimate, then alleged explanations of existing rules necessarily depend on largely arbitrary stipulations of prices.

5.3.3.2. Functional-Causal Explanation

For philosophical purposes, however, the positive economic theory of law raises more interesting questions about the nature of explanation it can offer. To provide an illuminating explanation of any part of the existing law law-economists must do more than show that it is efficient, for this fact can be dismissed as nothing more than a curious side effect of some other deeper feature of law (Altman 2001, 186–7). What more is needed? That depends on the kind of explanation law-economists propose to offer. Two kinds of explanation seem to be available to economic theory: *functional-causal* accounts and *interpretive* accounts (Coleman 2001b, 189–94).

Theorists committed to strong explanatory versions of law and economics would seem naturally to be attracted to functionalist explanations. If the case-law thesis is true, then law appears to be *designed* so as to achieve efficiency, or at least to be *directed* in that way. Of course, economically-minded legal scholars would never entertain the idea that some collective agency is responsible for the designing. So, they must offer some *causal mechanism*, involving the

actions of ordinary individual agents, that produces results that look *as if* they were intentionally so designed. This task is made more difficult by the fact noted earlier that economic explanations are indifferent to ordinary concepts and modes of reasoning of officials and citizens deliberating, deciding, and acting in the shadow of the law. Two different functional-causal arguments have been offered.

Posner repeatedly argued that, despite appearances to the contrary, judges in fact make their decisions guided more or less by considerations of efficiency (Posner 1973, 99–100, 1990, 359).[13] Prosperity and avoidance of wasteful use of resources (of which wealth maximization is a good measure) are recognized and uncontroversial social goods, he maintained. They are also intuitively obvious and accessible to common sense, and there are no other principles or goals that are as widely shared and uncontroversial. Moreover, judges who seek to follow other principles with the hope of achieving some redistribution of resources are simply bound to fail, because economic forces are such that a new equilibrium will be established that usually will undermine any attempted redistribution. So judges, wishing to achieve some social good and realizing that the only uncontroversial good they can achieve is efficiency, will on the whole seek to make the rules they establish at least approximate the goal of efficiency.

Few readers have found this argument persuasive; even law-economists largely dismissed it (see, e.g., Friedman 1998, 56–7). In view of the epistemological problems we just noted, it is highly unlikely that judges, working with nothing more sophisticated than common-sense intuitions, could get the efficiency calculations right so often. Indeed, some have thought that this simply replaces one mystery (how is it that ordinary rules of law so often seem to approximate efficiency?) with another (how is it that ordinary judges can get the economic calculations right so often when trained economists are often in disagreement about the issues?). Moreover, in view of the fact that judges do not publicly use the language of efficiency, and do not articulate their official arguments for their decisions in terms of efficiency, Posner must attribute to judges a large dose of cynicism. They would appear to use the traditional legal categories and forms of reasoning for public consumption, all the while actually basing their decisions on intuitive judgments of efficiency. In view of the allegedly uncontroversial nature of the goal of efficiency and the unavailability of any other rational principle or ground of decision, it is hard to explain why judges do not own up to what they are doing. Moreover, if Dworkin is correct that wealth maximization is not an intelligible social goal, then we must agree that it is "bizarre to assign judges the motive either of maximizing social wealth for its own sake or pursuing social wealth as a false target for some other value" (Dworkin 1985, 264).

[13] Posner cannot consistently offer this argument while also claiming that he is only explaining law in terms of what courts do and not what they say.

An alternative explanation accepts that judges in fact do not actually appeal, explicitly or secretly, to efficiency considerations as they deliberate, but rather maintains that the pattern of outcomes of cases can be explained by appeal to wealth maximization. "Judges are at least tacit economic calculators, regardless of the content of their actual thought processes" (Wagner 1998, 314). This raises the obvious question about the causal mechanism involved. Without specification of this mechanism, the explanatory claim is empty. Rubin (1977) and Priest (1977) argued that we should not look to the behavior of judges at all, but rather to larger evolutionary forces that make it likely that judicial decisions will, over time, approximate efficiency. Their evolutionary model focused on the behavior of litigants rather than of judges. They argued that efficient rules encourage settlement of disputes, but inefficient rules give at least one of the parties an incentive to litigate over the terms of the rules. So, rules will be litigated until an efficient rule is established and parties will settle, until the circumstances change and the established rule becomes inefficient. Thus, on this view, efficiency is the unintended consequence of self-interested decisions of litigants trying to win cases.

This explanation is the right kind for the job, but critics soon also found it wanting. Law-economists noted that parties will behave strategically in making decisions about whether to bring a case to court just as they would in any other aspect of their interaction. But, then, it is likely that in seeking strategic advantage they will bring suit even when settlement might minimize costs for the parties; thus, not only inefficient rules will be litigated (Coleman and Lange 1992, xxiii n. 3).[14] Moreover, a careful application of standard mathematical models for evolutionary processes led Cooter and Kornhauser (1980) to conclude that we cannot expect evolutionary forces to drive the legal system towards efficiency, and Kornhauser (1996, 177) showed that the selection mechanisms that Rubin and Priest discussed are likely to produce efficient rules only under implausible conditions. Other critics added that this evolutionary account fails to *explain* the structural features of tort law, because it presupposes that the structure is already in place. At best, the evolutionary account explains why parties choose to settle or litigate *given* that the law has this structure; it fails to explain why it has it (Coleman 2001b, 191).

5.3.3.3. Interpretive Explanation

In *Problems of Jurisprudence*, Posner suggested a very different view of the explanation provided by the case-law thesis. He wrote,

[14] Coleman argued that strategic behavior poses a general threat to the Coase theorem (Coleman and Murphy 1990, 217). Paradoxically, once we take strategic behavior in bargaining into account, the lower the transactions costs (i.e., the time, effort, and money it takes to complete a bargain), the less likely the parties will come to agreement and the more likely they will fritter away in negotiation the "bargaining surplus" that initially existed between them.

> Besides generating both predictions and prescriptions, the economic approach enables the common law to be reconceived in simple, coherent terms and to be applied more objectively than traditional lawyers would think possible. From the premise that the common law does and should seek to maximize society's wealth, the economic analyst can deduce in logical—if you will, formalist—fashion [...] the set of legal doctrines that will express and perfect the inner nature of the common law [...]. [These will approximate the legal rules actually in force.] Where there are discrepancies, the path to reform is clear—yet the judge who takes the path cannot be accused of making rather than finding law, for he is merely contributing to the program of realizing the essential nature of the common law. (Posner 1990, 361)

Posner's claim here is not causal. If it is "functional," the "function" in question is the law's deep point or aim that gives law its rational shape and content, in terms of which alone it makes normative sense to us. This explanation, he maintains, uncovers "the inner nature" of this part of the law. It is an interpretive explanation of the kind championed at about the same time by Ronald Dworkin (1986) (see below chap. 9, sec. 9.3.2).

Explanations of this kind depend on two key demonstrations. It must be shown, first, that the various and disparate elements of the law fit together plausibly when organized relative to the alleged function or aim (the *fit* dimension), and, second, that the function or aim is normatively attractive, and so the fact that law can be seen to serve this function shows it in its best light (the *appeal* dimension). We will discuss in chapter 9 the merits of this form of explanation, but two comments about understanding the explanatory project of economic jurisprudence in this way are in order. First, although explanations in terms of hidden causal forces can ignore deeply rooted concepts and patterns of reasoning of officials, lawyers, and citizens who participate in the various practices that make up a legal system, interpretive explanations cannot. An explanation must be found that accounts for them, or at least justifies treating them as window-dressing. But this is just what economic arguments systematically fail to do; indeed, they render the structural and fundamental substantive concepts of tort law, for example, entirely mysterious (Coleman 2001b, 188). Second, the plausibility of interpretive accounts rests on the plausibility of the normative principle that guarantees the "appeal dimension" of the explanation. Law-economists' interpretive accounts rest explanation on the case for efficiency as a normative principle. Likewise, some law-economists, wary of robust descriptive or explanatory claims made about legal arrangements actually in force, made a somewhat more modest claim about the nature and value of economic analysis as applied to law, a claim that also forces us to explore the normative merits of the efficiency principle, which we will do in section 4 below.

5.3.3.4. Economics as the Logic of Law

David Friedman, in an accessible and useful introduction to the methods of economic analysis, considered the evidence for the case-law thesis and con-

cluded that "the jury is still out," but hastens to add that what is really valuable in the law-economist's methods is something quite different.

> In trying to demonstrate that law is efficient, [Posner] (along with many others) has demonstrated the essential unity, not necessarily of the law as it exists, but of the problems the law exists to solve. We do not know whether the law is efficient. We do know that the question "What is the efficient legal rule?" converts the study of law from a body of disparate doctrines into a single unified problem, where the same arguments—moral hazard, holdouts, public good problems, adverse selection, *ex ante* vs *ex post* rules, and many others—help make sense of a wide variety of legal issues. (Friedman 2000, 307; see also Kitch 1998, 231–2)

Economic analysis, Friedman maintained, lays bare the logic of legal problems, and enables a unified, truly systematic, and rational approach to analysis of the issues that law must face whenever or wherever they arise, whether in the guise of problems of contract or constitution, property or procedure, tort or taxation. On this view, efficiency is the core concept of *Recht*, if not of *Gesetz*.

But this raises the fundamental question: What normative weight does the principle of efficiency have? Efficiency must be a political-moral concern of considerable significance; otherwise, the fact that it is possible to cast all, or even many, legal problems in terms of efficiency will be nothing more than a curiosity, like the shapes that cloud formations or constellations suggest to the imagination.

5.4. Efficiency as a Political Norm

Thus, interpretive accounts and economics-as-law's-logic rest on the normative appeal of the law-economists' core principles. Moreover, law-economists, who agreed with critics that the descriptive and explanatory claims made in the name of economic jurisprudence are dubious, found the concept of wealth maximization (or some other articulation of the notion of efficiency) compelling not as an explanatory principle, but as a norm or goal, defining a framework for developing recommendations for the refinement or reform of the law. We need to look at the reasons that were given for this conviction. It is obvious that the plausibility of the normative economic project depends on the credibility of these reasons, but this is equally, if less obviously, true for most positive claims that law-economists have put forward. For even modest explanatory claims, made in the functionalist mode at the heart of economic analysis of law, must be able to defend the working assumption that enhancing efficiency is a rationally attractive goal.

5.4.1. Is Social Wealth a Value?

At least some explanatory claims, and all prescriptive claims, made by the economic approach to law presuppose that wealth maximization is an important

political good, if not the only one. And even when some law-economists admit that there may be other important political values, they insist that at least some political institutions and officials that administer them (adjudication and judges, for example) should treat wealth maximization as the sole or most fundamental operative decision principle. Posner thought that the value of wealth maximization was intuitively obvious. In 1979, he wrote,

> While nowadays relatively few of the people in our society who think about these things consider wealth maximization or some other version of efficiency the paramount social value, few judge it a trivial one. And [...] sometimes it is the only value at stake in a question [...] But I am unwilling to let the matter rest there, for it seems to me that economic analysis has some claim to being regarded as a coherent and attractive basis for ethical judgments. (Posner 1979, 110)

Arguments of several different kinds have been advanced for this normative thesis. Most of these arguments were offered at one time or another by Posner, who attended to the defense of the normative dimension of economic analysis of law more closely than any other law-economist. It is easy, of course, to think of wealth either in terms of tangible objects (money, goods, or real estate), or measures of productivity or prosperity (like the Gross Domestic Product), but these things are only tangentially related to "wealth," the maximand of Posner's basic normative principle. Thus, we should not confuse efficiency understood in terms of wealth maximization with *productive efficiency*—in the sense of achieving a greater output of widgets (Altman 2001, 188). Wealth, in the sense law-economists have in mind, is enhanced when a resource moves from a person who values it less to a person who values it more, where "valuing" is understood strictly in terms of what they are willing to pay for it (or to demand in return for it), *even though nothing is thereby produced*. This should lead us to be wary of the common argument that the concern for efficiency is simply a concern for increasing the size of the pie, leaving to another day or another forum the concern about how that pie is to be distributed (often called "equity" to distinguish it from the economist's concern with "efficiency"). There is a sense in which increasing the productivity and hence efficiency of some process produces the same or a larger amount of a good or commodity at a lower cost. This would increase the size of the resource pie. But wealth maximization does not necessarily achieve that kind of outcome. To assess claims made about the intrinsic value of social wealth, and so the desirability for its own sake of increasing social wealth, it is important to distinguish it from other things that may be related to it only contingently or instrumentally.

Wherein lies the value of social wealth, then? It is tempting to say that talk of social wealth is just another way of talking about *utility*, that it is a kind or measure of human welfare, satisfaction, or happiness. However, many law-economists are keen to distinguish wealth from any such utilitarian measure of value (Posner 1979). In a way, they are wise to do so, since there are strong arguments to show that, although Pareto Superiority may plausibly be linked to

improvements in utility as conventionally understood, Pareto Optimality does not guarantee utility optimality and the case is even stronger against any link between the Kaldor-Hicks criterion and utility (see Coleman 1988, 97–105; Coleman and Murphy 1990, 219–22). Wealth maximization, as a monetized version of Kaldor-Hicks, would seem to stand at an even greater distance from any plausible understanding of utility or human welfare. This is easy to see. Following Dworkin's famous example (Dworkin 1985, 242–5), consider two parties, Derek who has a book and Amartya who wants it. Suppose Derek is willing to sell it for as little as $2 and Amartya is willing to buy it for as much as $3. It would appear then that if the book were to find its way into Amartya's hands, a wealth-improving transfer would have occurred. This is true even if Derek is willing to sell it for lifesaving medicine, although rereading it is a constant source of solace and pleasure, while Amartya, who is rich and content, merely would like it for a momentary diversion as he waits for his plane to depart.

However, once we clearly distinguish social wealth from things easily confused with it, and especially once we set it apart from utility, satisfaction, or other recognizable dimensions of human welfare, it is difficult to sustain the sense that wealth has any claim on its own to value. Divorced from all such considerations, it is very hard to see why the situation after the transfer of the book from Derek to Amartya (the situation that registers a manifest wealth-improvement) is in any way morally better than the original situation, Dworkin (1985, 242) argued. The case for the normative merits of wealth maximization must be made on other grounds, as Posner later admitted (Posner 1995b, 101).

5.4.2. The Proxy Principle and Ex Ante Consent

Posner offered two other arguments for wealth maximization as a fundamental normative principle, neither of which depends on recognizing improvements of social wealth as morally desirable in themselves. First, he argued that wealth maximization is the fundamental goal of our legal institutions, especially adjudication, not because wealth is itself desirable, but rather because if our law and legal officials are single-mindedly oriented toward wealth maximization, the result will be the best overall mix of protections for individual rights, liberties, promotion of human welfare, concern for truth-telling and promise-keeping, and the like (Posner 1979). Wealth maximization, on this view, serves as a proxy for other principles that have more immediate moral appeal (at least to some portions of the public), but are more difficult to apply case by case, or are controversial in their applications. We do better by justice, he argued, by aiming at (and directing the aim of our legal institutions at) wealth maximization instead.

This is a happy thought, at least for the economically inclined who secretly harbor moral concerns, but it calls for a degree of harmony of the moral and the economic domains that appears highly unrealistic (Dworkin 1985, 251–6).

To answer the skeptical critic, detailed argument is needed, but seldom offered. Instead, Posner offered a different argument that seems more promising (Posner 1980). The argument rests on the principle of autonomy and the moral magic of consent. So-called *ex ante* compensation, it is argued, constitutes an appropriate form of consent and hence shows respect for autonomy. To begin, it is easy to see that a Pareto Superior move—for example, when parties actually trade goods in a market—is wealth maximizing and involves actual consent. The same moral effect can be achieved, Posner argued, if the party who seems to have lost in the transaction is actually compensated after the fact; *ex post* compensation signals actual consent. Now, the wealth maximization principle, which is deployed when transaction costs block free exchange in accord with the Pareto principle and hence "mimics" the effects of such an exchange, is a version of the Kaldor-Hicks principle. On that principle a transfer is warranted if the loser *could* be compensated by the winner. The Kaldor-Hicks principle introduces the notion of *ex ante* compensation. An institution that utilizes Kaldor-Hicks (wealth maximization) will realize certain gains that all who participate in the institution will enjoy.[15] Thus, if some also come out losers from time to time, they have been compensated *ex ante* and this compensation also constitutes consent, just as the person who buys a lottery ticket and loses consents to the loss. Wealth maximization, then, while it is not in itself a moral goal, nevertheless stands as a kind of proxy for respect for autonomy, something that enjoys status as an intrinsic moral good.

The idea that *ex ante* compensation justifies *ex post* losses is very attractive to people who like to think in economic terms, but this is usually because it indicates a rational calculation, that is, a choice made on the basis of a calculation of expected utility. This may also be what attracted Posner and other law-economists who have been persuaded by it. But we have already seen that there is no sound basis for linking wealth maximization to utility, and, in any case, the moral basis of this argument is explicitly laid in the principle of respect for autonomy as it is expressed in freely given consent. Critics have pointed out, however, that consent cannot be inferred from *ex ante* compensation, or even, for that matter, from *ex post* compensation (Coleman and Murphy 1990, 225–7; Shapiro and McClennen 1998, 462–3; Kornhauser 1998, 682). Counterfactual consent is *counter* to fact, that is, it is no consent at all.

[15] Coleman offered the following illustration (Coleman and Murphy 1990, 224). Suppose in accident law we could adopt either a negligence rule or a strict liability rule. Under the latter, victims would be compensated more often than they would under the negligence rule, since an injurer who took all reasonable precautions would still have to compensate his victim. The negligence system, however, would be less costly to run and so people would have to pay less to keep it going. On the other hand, those who would have been compensated under a strict liability rule would not be compensated. They would be Kaldor-Hicks losers; nevertheless, so the argument goes, they would be compensated *ex ante* by participating in the benefits of a lower-cost accident-law system.

Whatever else may be involved here, whether appeals to fairness or to self-interest or something else, Dworkin argued, autonomy is simply not in play (Dworkin 1985, 275–80).

Although challenges like these have shaken the commitment of many to wealth maximization considered as a fundamental normative principle of adjudication or legislation, they have dampened enthusiasm for economic jurisprudence only slightly. This suggests that the appeal of the methodology must lie elsewhere. Much recent literature in law and economics starts from the modest normative premise that, whatever ends its serves, law should be designed to serve them efficiently, not self-defeatingly, and the like. As a technique for predicting with some degree of reliability the ways in which enacted legal norms will function in contexts of complex social interaction, it has proved especially useful. This makes it especially appealing to legal theorists of a distinctively pragmatic bent. Indeed, the return of a form of legal pragmatism, explicitly harking back to realist forebears and even, in the view of some, to Holmes, has sustained economic jurisprudence in more modest dress in the courts of legal theory, despite major challenges to its jurisprudential credentials. Pragmatism has provided the warrant and the jurisprudential framework for its continued influence.

5.5. Pragmatism and Politics

In recent years Posner, the chief defender of normative economic jurisprudence, abandoned the attempt to provide a philosophical foundation for wealth maximization (Posner 1995b, 101–3), but he is no less committed to the principle as the organizing principle of his view of law and adjudication. Having grown skeptical (or just weary) of efforts to construct coherent moral systems, he proposed to take a more "pragmatic" view of it. Wealth maximization is an appealing guide for judicial decision making, he argued, because it represents a kind of common denominator among most of the important, currently contending approaches to political morality (Posner 1995a, 405).

Posner was more inclined to assert this claim than defend it and the argument that he seems to have offered for it is not entirely persuasive. He maintained that if judges were generally to follow the dictates of the wealth-maximization principle (at least in standard private-law contexts), their decisions would largely coincide with decisions that would be made if judges followed other attractive broad principles of adjudication, whether they be utilitarian, liberal (of a Millian, or Kantian, or Dworkinian stripe), or the like. So, he suggested, we can think of wealth maximization on the model of a Rawlsian "overlapping consensus" (Rawls 1993, 133–72)—as a middle-level decision principle which people holding very different and potentially conflicting comprehensive political theories might nevertheless agree upon as the common principle of public justification, because it captures reasonably well just that set of decisions and results on which the competing theories agree. This argument is persuasive,

however, only if it can be shown, first, that wealth maximization captures in extension the area of agreement in results among competing comprehensive theories, and second, that it is independently attractive as a workable decision principle. It is fair to say that this case has been made in only the roughest terms.

Still, rough terms were good enough for Posner, since he saw the economic approach to law as just one component of a general "pragmatic" approach to understanding law. Of course, in late twentieth-century legal theory there were many pragmatisms and Posner has by no means established hegemony in this contested land. But his version is of interest in the context of our current discussion because it promised to bridge economic theory of law and more traditional jurisprudential theories. Posner's pragmatism is only distantly related to the philosophical pragmatism of Peirce, James, Dewey, Quine, and others. In fact, his "everyday pragmatism" is not so much a philosophical doctrine as a set of loosely related attitudes, a kind of sensibility (Posner 1990, 28; 1995a, 4–10). In this respect, Posner's is one more version of realism in late twentieth century robes. His favored pragmatic sensibility is a general orientation of thinking closely tied to everyday activities. Keenly aware of work to be done, it is only willing to engage in thinking, inquiring, and theorizing—especially in rigorous philosophical mode—to the extent needed to get immediate jobs done. (It's not made clear what is on pragmatism's to do list, or who or what composes the list.) Posner's pragmatism was activist and forward-looking, concerned with the past just to the extent that it affects our future, and inclined to treat merely as instruments for shaping the future what many would take to have intrinsic significance. It is empirically-minded in the sense that it is focused on concrete contextual matters and on the conceptual and scientific tools that enable us to gather and understand the facts.

This particular pragmatic sensibility finds especially attractive the kind of irreverent, no-nonsense, stripped-down view of law that Posner thought was championed by Holmes; indeed, Posner declared Holmes to be "law's greatest pragmatist" (Posner 1995a, 13; see also 1990, 15–21). Posner's "legal pragmatism" incorporates a briefly sketched view of the general nature of law and a more developed (largely normative) theory of adjudication. The former simply invokes a "prediction theory" of law and perspective of the "bad man" that occurred to Posner upon reading Holmes (Posner 1990, 26, 221–7, 456–7).[16] Legal pragmatism, Posner maintained, rejects the view that law is composed of rules, norms or standards and that it is built on fundamental concepts. We must understand law, he insisted, in behaviorist terms. Law is not a thing, but rather "the activity of licensed professionals we call judges, the scope of their license being limited only by the diffuse outer bounds of professional propriety

[16] I characterize Posner's approach in this tendentious way because it does not appear to be rooted in a careful and extensive reading of Holmes's writings; at least it lacks all the nuance and conflicts of the Holmes we encountered in Chapter 2.

and moral consensus" (ibid., 457). Law's *ultima ratio* is *force* (ibid., 83), and the judge's task is to determine when that force is to be applied (ibid., 223). Thus, law is best captured in *predictions* about what judges will decide about the use of state coercive force in particular cases. There are no a priori bounds on what can count as valid legal arguments, since that simply depends on what the court (that is the jurisdiction's highest court) does (ibid., 459).

When uttered before the assembled Boston University law students in 1897, these ideas surely seemed fresh, exciting, and radical. After a century of critical consideration and reconsideration, they seem a little worse for wear and Posner seemed uninterested in sprucing them up for present purposes. That is surprising, since, as we noted early in this chapter, the economic theory of law ignores key questions about the nature of legal rules and norms and their role in the practical reasoning of citizens and officials that economic theory explicitly put on its agenda. Other, more severely behaviorist theories can ignore these questions without incurring any theoretical cost, but economic theory cannot. Its predictions are based on assessments of the likely practical reasoning of rational agents; it needs to explain how laws function in practical reasoning. Arguably, they must function *as norms* of some kind or another. It would be surprising if we *could* do without normative constructions entirely and rely solely on representations understood as predictions. The surprising may turn out to be true, of course, but it needs to be argued. The theoretical infrastructure needed by economic theory is not yet provided by Posner's unelaborated invocation of Holmes's prediction theory, and its core ideas seem to be open to most of the ambiguities and problems that we noticed above when we tried to understand the kind of explanations and accounts of law that economic jurisprudence seeks to offer.

But Posner was a self-declared pragmatist, and pragmatists of his stripe are by temperament impatient with such abstract theoretical problems. His attention, like that of Holmes and the realists after him, was focused on adjudication. The economic theory of law that Posner still defends is perhaps best understood as the core of his normative theory of adjudication. Like the realists, Posner first cleared the field of various "formalists" and "legalists" (including ancient foes like Coke, Blackstone, and Langdell, and more recent ones like Fuller, post-realist prudentialists, and Dworkin) (Posner 1990). He insisted that, as a descriptive matter, we are inclined to take far too seriously the role of rules, norms, and traditional devices of legal reasoning (like analogy and precedent) in judicial decision making (ibid., chaps. 1–2). Those who do not make this mistake (like critical scholars—see below chap. 6) make the opposite mistake of thinking they play no role at all. There is no special logic of legal reasoning, he maintained, and logic has no constructive role to play in judicial reasoning, although it does play an important critical role (ibid., 26, 455, 459). Legal pragmatism is not nihilist, but rather occupies the plausible middle ground; its founding concept, and ultimate norm of decision,

is "reasonableness" (ibid., 26, 30). Of course, reasonableness is understood pragmatically, that is, as contextual, concrete, non-theoretical, and consequentialist. But, he cautioned, we must not assume that the pragmatist judge is antinomian, eyes glued to the page laying out the narrow consequences of the specific case; indeed, Posner was inclined to say that the pragmatist judge is no consequentialist at all, but that surely overstates the case. It is more accurate to say that pragmatist judges, as Posner portrayed them, are global consequentialists. They take precedent and continuity with the past seriously, along with the established texts of contracts, statutes and constitutions; and more generally they fully appreciate the importance of systemic considerations that weigh so heavily in the minds of formalists and legalists, considerations often gathered under the rubric of the "rule of law" (or rule-of-law values). Indeed, a pragmatist judge might seriously entertain the idea that "the pragmatic thing to do is to be a formalist" (Posner 1995a, 401). The "pragmatic thing to do" would, of course, be articulated in terms of the long-run consequences of such a personal, adjudicative policy. "The game can be justified in pragmatic and economic terms, but it cannot be played in a purely pragmatic or economic spirit" (ibid., 21).

But, pragmatist judges will take all these matters into account because, and just insofar as, they obviously affect the consequences of their decisions. As forward-looking deliberators, they are aware that what was done in the past has consequences for the future, that texts of contracts or statutes are read, interpreted, and thus shape the expectations and behavior of people, that consistency, generality, and predictability have payoffs. Thus, for example, they take seriously continuity with the past, not for its own sake, of course, but because it shapes expectations about the future. The past, he claimed, usually operates as a *reason*, but it does not operate as a duty for the pragmatist judge; it is something to take into account but in no way binding (Posner 1995a, 11). Thus, pragmatist judges, on this view, will give weight to the past, to existing rules, to the textual language of contracts, to other systemic considerations, but they will not treat them as exclusive or trumping or preemptive. Moreover, they will recognize that the weight of these considerations varies with the context of the legal decision. Thus, more straightforward "balancing" is appropriate in certain kinds of tort cases than it would be in criminal cases. Pragmatist judges give due and appropriate weight to all of these considerations, along with more concrete or case-specific consequences, and then determine which of the alternatives available is *reasonable*, all these things considered. In many cases, established rules, recognized precedent, or plain meaning of a statute will be sufficient to settle what is reasonable. But, Posner hastened to add, pragmatism is not a counsel of reasonableness in the gaps; it is not a proposal for how judges should decide when the law runs out. It is a comprehensive normative theory of adjudication: reasonableness is the norm for all cases, easy and hard. Thus, it is possible and not all that unlikely that a rule may be clear

and clearly established and yet, in the circumstances, following it would be unreasonable. In the province of pragmatism, reasonableness is sovereign.

Is this reasonableness guided by any general principle? Posner still thinks that the wealth-maximizing principle has something to offer here. So at this point, finally, we have found the link between Posner's economic theory of law and his more general, "pragmatist" jurisprudential views. Wealth maximization is a *useful* principle for pragmatist judges to deploy in deciding what the *reasonable* thing to do in a specific case is. (Unless, of course, the pragmatic thing to do is to be a formalist and forswear all such principles!)[17] It "epitomizes the operation in law of scientific inquiry pragmatically understood" (Posner 1995a, 15). It can also plausibly claim a certain degree of objectivity, generating reasonable if not entirely compelling answers to difficult legal questions (ibid., 18). It is not a principle for all legal seasons, however. For one thing, it works best in private law adjudication where, by the nature of the options available to the judge, few other principles are likely to be effective. But outside this context, and especially where redistributive values are likely to command political or moral attention, the principle loses much of its charm for a pragmatist judge (ibid., 404).

It is not at all clear that the above collection of thoughts, suggestions, common sense, and bold conjectures is internally consistent, let alone that it adds up to a coherent jurisprudential theory. Suppose, for example, that "the pragmatic thing to do is to be a formalist"; what would it be *to be* a formalist but to *abandon* pragmatism? There might be good reasons to do so, but they could not be reasons of pragmatism, because pragmatism could never consider such a systematic, principled commitment.

Short of that, legal pragmatism, even when filled out with a sophisticated economic theory for use in select places, looks a great deal like early, unreconstructed, and theoretically unarticulated legal realism. On this view, the technology of law and economics is very promising for understanding behavior within a legal system, once we have a grasp of its basic features. The basic terms of its understanding of law and adjudication, however, are those of realism, or perhaps Holmes's enforcement positivism. Posner's legal pragmatism backs away from the political commitments of many of the early realists and it adds little to our theoretical understanding of the nature of law.

Of course, Posner in his pragmatist mood would not find this assessment entirely unwelcome. Although it is not radically anti-theoretical (as, for example, is Fish's (1999) pragmatism), it is more interested in the critique of theorizing, and especially philosophy, than doing the work of philosophical theory itself. Like the realists (Llewellyn 1960, 508–10), its main method, and the which

[17] Posner's muddle here about the relative roles of the wealth-maximization principle and traditional common-law legal ("formalist") techniques and principles recalls a very similar muddle Hayek got into relating his principle of expectations-maximization to common-law techniques and principles (see above chap. 4, sec. 4.6).

it recommends to judges and legislators, is the method of "muddling through" (Posner 1995a, 405). But that's not a theory of law, or even something that approaches such a theory, and it offers nothing constructive that might be of use to jurisprudential theory. At its best, giving it a lot of lee-way, it is a collection of common-places. For all its technical sophistication, the (pragmatic) jurisprudence of economics has not advanced much beyond jurisprudence of the early realists.

Chapter 6

CRITICAL JURISPRUDENCE AND THE RULE OF LAW

6.1. Progressive Politics and Critical Theories

The 1960s and 1970s in the United States and in Europe were decades of political activism in which liberal, progressive, and radical movements formed loose coalitions to challenge racism, sexism, and increasing state militarism. In the U.S., the civil rights movement was perhaps the catalyst, but an increasingly visible and vocal feminist movement soon added its strength. Opposition to the Vietnam War mobilized large numbers of people and radicalized many of them. It also sowed seeds of disillusionment. Liberal and progressive activists, lawyers and legal scholars among them, looked to the law and the courts for social change. However, in the late 1970s, the slow pace, the apparently superficial nature of the changes, and the support for a disastrous war of a liberal political establishment, led many in the legal academy to turn their critical energies on the law itself.

These energies were focused into a movement of sorts when in 1977 the first conference of Critical Legal Studies (CLS) convened in Madison, Wisconsin. Never disciplined or homogeneous in theoretical convictions or political program, the group drew inspiration from late Marxist theory; egalitarian, liberal, and communitarian political theories; varieties of feminist social criticism; and, later, deconstructionist and post-modernist literary theory. The movement focused on law and jurisprudence through an appropriation and radicalization of American realism which had, by this time, been domesticated and brought into the service of liberal orthodoxy. Initially, the CLS movement attracted legal scholars of many progressive creeds. Soon, however, feminists, critical race theorists, and scholars speaking in the name of other excluded and marginalized groups, especially gays and lesbians, found their own distinctive voices, and were often as sharply critical of the CLS movement as they were of existing law. As the twentieth century closed, momentum seemed to shift from the original CLS movement to the more sharply focused if more diverse forms of what has come to be called "outsider jurisprudence" (Matsuda, 1989, 2323–6).[1]

While the critical movement of the late twentieth century was born in a few elite American law schools, it soon caught on abroad in other English-speak-

[1] In this chapter, "critical theorists" will be used to refer generally to writers contributing to any of the critical movements mentioned in this paragraph. Scholars identified specifically with the Critical Legal Studies movement will be referred to as "CLS writers/theorists," or "Crits" for short.

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ing countries and in Europe, especially where there was already established a stronger leftist political tradition than that in the United States. Yet, for all of its focus on contradictions and injustices in political society generally, and its ability to attract sophisticated contributors outside the U.S., the critical movement (and CLS in particular)—like the American realist movement half a century before it and the more recent law and economics movement, its rival sibling in the extended realist family—was at bottom a struggle for the soul of American legal education (Kennedy 1982, 1983). Yet, unlike realism and economic jurisprudence, critical jurisprudence has had only a limited impact on the American academy, except for feminist jurisprudence which by the turn of the new century was firmly entrenched.

Despite wide differences in intellectual roots, analytical and critical methodologies, and political programs, CLS and outsider approaches to legal theory shared some common concerns. They sought to identify and focus public attention on systematic discrimination, exclusion, subordination and oppression in modern Western societies and the complicity of law in these evils. They argued that law makes systematic oppression possible and often enhances it. Features intrinsic to legal ordering blind those who exercise political power to the needs, interests, and experiences of large portions of the populace and this systematic blindness in turn perpetuates the oppression and undermines the law's claim to neutrality, equality, and adherence to the rule of law, on which its legitimacy ultimately rests.

Following Réaume (1996), we can distinguish three levels at which this kind of criticism was pursued. *First level* criticism exposed and sought reform of *explicit* bias, exclusion, or oppression in substantive legal doctrines and their application. Critical theory rarely lingered here; it sought, rather, to uncover deeper forms and sources of exclusion and oppression masked by familiar and valued forms of law and ways of thinking in and about law. *Second level* criticism sought to identify *implicit* class, gender, sexual orientation, or racial bias in the law. Laws, legal doctrines, and institutions may appear neutral but still work systematically to reinforce, reproduce, and mask deeper oppression, it was argued. Many critics, especially those working in outsider jurisprudence, have produced valuable work of this sort. However, some critical theorists pressed the criticism to a *third level*. They sought to uncover sources of oppression, or at least support for it, in very general features of law itself—its basic structuring concepts and characteristic methods of reasoning. Some found roots also in the theoretical frameworks with which we try to understand, explain, and legitimate legal institutions and practice. This *foundational* criticism argued that the law itself is deeply implicated in injustice and oppression. Some radical criticism at the foundational level challenged not just the law's claim to neutrality or objectivity, but the very notions of neutrality and objectivity; not just the claims of methods of legal analysis and judicial reasoning to reasonableness and objectivity, but the idea of legal rationality. Other critics,

while they did not press the critical project to this length, still mounted vigorous challenges to mainstream understandings of law and its claim to legitimacy.

This chapter will focus exclusively on critical work at the foundational level, because that work raises the questions of general jurisprudential significance that are the focus of this volume and *Treatise* as a whole. Also, rather than offering a broad survey of critical work at the foundational level, this chapter will concentrate on just a small number of lines of analysis and criticism which emerged in the most widely discussed critical work at this level. These criticisms can be found in their most articulate forms in CLS and feminist jurisprudence, so we will focus attention on this work.[2]

6.2. Law as Ideology and the Ideology of Law

"Law shews itself in a mask," wrote Bentham (1977, 124) almost exactly two hundred years before the first CLS conference. Bentham's pioneering work on general jurisprudence was motivated by a drive to strip jurisprudence of this mask (ibid., 410). This "demystification" project, as Hart called it, sprang from Bentham's conviction that "human society and its legal structure which had worked so much human misery, had been protected from criticism by myths, mysteries, and illusions, not all of them intentionally generated, yet all of them profitable to interested parties" (Hart 1982, 25–6). Critical legal theories two centuries later might have drawn inspiration and direction from Bentham's work, had they been aware of it, but, like twentieth century legal theorists of nearly all stripes, they knew little of the history of their own tradition. They looked rather to Marx, or rather to contemporary readings of Marx, and this gave distinctive, albeit more ambitious and problematic, shape to a major theme in their work. Central to CLS and at least the radical wing of feminist jurisprudence is the view of *law as ideology* (Gordon 1982, 1984; Hutchinson 1989, 3; Kelman 1987, chap. 8; MacKinnon 1982, 1989).

6.2.1. Law as Ideology

Sometimes when it is said that law is fundamentally ideological all that is meant is that law is inescapably *political*. "Ideology" here is used in a broad and not necessarily critical sense to refer simply to values, principles, and judgments about matters of public good and the basic rules of political society that vie for recognition and influence in the political arena. But in its classical form, "ideology" was typically tied closely to what Bentham called "sinister interests,"

[2] Other forms of outsider jurisprudence have tended to focus on first level and second level criticism, which is outside our frame of attention here. To the extent that they have advanced foundational criticism, it has much in common with the feminist criticism of oppression we will consider below and so will be included in spirit in our discussion.

narrow class- or other group-based interests that systematically conflict with broader public interests and especially with the interests of oppressed groups. Law is ideological in this narrower sense if it is a pervasive fact about law that it serves narrow interests of a dominant class.

To fix ideas at this point I propose to describe a robust version of the law-as-ideology thesis. We can then use it as a foil to compare and clarify versions of the theses proposed by key critical theorists. According to this robust version, to regard law as ideology involves a complex claim with at least three components.

1. The *service thesis*: law protects and promotes social and political relations that are coercive, hierarchical, and harmful or contrary to the interests of ordinary subjects of law. More specifically, it serves the interests of the socially dominant class at the expense all others.

2. The *mystification thesis*: law masks its own basic operations and the relations its supports and serves, persuasively portraying them as natural and necessary. In this way, those who are in subordinate or powerless positions are encouraged to reconcile themselves to their condition and regard it and the law as legitimate.

3. The *jurisprudential thesis*: the service and mystification theses are true of law in general and tell us something about the fundamental nature of law. That is,

a) they are true of the legal system as a whole, not merely of specific laws or domains of law—service and mystification are pervasive;

b) they are true in virtue of structural, rather than merely accidental, features of law; and

c) they are not mere side effects of these features of law, but are deeply implicated in the nature of law: law has these structural features because it enables law to serve dominant class interests while appearing legitimate in the eyes of those subject to it.

"Ideology" as used in this complex claim is evaluative as well as descriptive, and the evaluation is strongly negative: ideology induces false belief about social relations in order to mask the harmful systematic exercise of illegitimate power. To say law is ideology is to say something about the nature of law as a historical social form, one which, in view of its service and mystification theses, is deeply and ineradicably flawed.

Each of these components, in some form, is necessary if the law-as-ideology thesis is to fulfill its promise as a distinctive and powerful analytical and critical tool. For example, the critical bite of the mystification thesis depends heavily on the assumption that the legitimation achieved by law is based on the false picture it offers subjects of law. Without the service thesis, and the condemnation implicit in it, we might speak of legitimation but not *mystification*, and we might not regard the law's legitimation function, as critics suggest, as itself illegitimate. Similarly, few ordinary people, and no sophisticated jurisprudential theory (not even natural law), would hesitate to accept the truism that positive

laws are the products of political power and often political power is used to serve narrow interests. The distinctive critical bite of the law-as-ideology thesis depends crucially on the role of the mystification that it claims to expose. The especially troubling force of the law-as-ideology thesis, if it is true, lies in its claim that mystification is not only pervasive, but is made possible by deep structural features of law. The rottenness corrupts the foundations of the legal edifice, and it exists there not by accident but, as it were, by design.

Critical theories tended to link law in modern Western societies with what they took to be its dominant legitimating political creed—"liberalism" *very* broadly construed.[3] Indeed, the specific target of critical attacks often was not some existing legal system, but rather the mode of thinking about law that was, in their view, pervasive in the popular mind and amongst mainstream legal scholars. They called this "liberal legalism" (West 1993; MacKinnon 1989, 162; Kennedy 1997). This broad, allegedly popular creed, rather than any sophisticated jurisprudential theory, supplied the list of the deep, structural features of law on which the ideological analysis rests. That is, the *law-as-ideology* thesis depends heavily on a view of what we might call the *ideology of law*, a construction that critical theory located in presuppositions of popular liberalism. This is no accidental feature of the critical use of the law-as-ideology thesis, for *legitimation* plays a key role in the explanation and the critique provided by critical deployment of this thesis, and legitimation, it is said, depends on widely and deeply held assumptions about standards that law must meet to achieve legitimacy. On the robust model of ideological analysis of law, the appeal to the ideology of law does not stand alone, but presupposes and is constrained by a background functionalist social theory and a set of implicit principles of political morality.

6.2.2. Ideology Analysis in Critical Jurisprudence

The robust model of a law-as-ideology theory offers resources for understanding the distinctive appeals to the notion of ideology in recent critical jurisprudential theories. I will focus on two such appeals: the "law as patriarchy" notion found in some feminist jurisprudence and the "law as politics" notion found in the work of CLS theorists.

6.2.2.1. Law as Patriarchy

"Law is male." Much of late twentieth-century feminist jurisprudence marched under this banner, but the slogan has as many meanings as there are forms and

[3] Mark Kelman admits that for most CLS writers "'liberalism' is little more than the very loose term for the dominant post-feudal beliefs held across all but the left and right fringes of the political spectrum" (Kelman 1987, 2).

versions of feminist thinking. At its weakest, the claim is that under modern conditions law regularly and systematically serves male interests and maintains male dominance over women. "Law is a system of binding norms or rules created by, reflecting, and perpetuating patriarchy," wrote Patricia Smith (1993, 484). This is a gender-based version of what we called above the service thesis of the law-as-ideology model. Yet, once we accept the historical and sociological observation that all societies with which we are familiar are organized on predominantly patriarchal principles, this claim about the law is not very surprising, and, as it stands, it says nothing very substantial about the nature of law, except that law tends to support existing social and political arrangements. Of course, one might add that it is no accident that it does so, since law is by its nature conservative and so it will always support the *status quo* (Smith 1996, 309). But, again, that tells us something true and important, but not very illuminating, about law or patriarchy.

Most feminist legal scholars go farther, of course. They argue, in Catherine MacKinnon's (1983, 645) words, that law "not only reflects a society in which men rule women; it rules in a male way."[4] Law rules "in a male way," on this view, when and precisely because seeks to be rational, objective, neutral, and principled (Olsen 1995). However, in conditions of patriarchy and pervasive male dominance, this pretense masks the systematic exclusion of women from participation in the benefits of law's protection and in the processes by which the law is shaped (Réaume 1996). This important challenge comes in three different forms, each more radical than the one before it. Patricia Smith (1993, 489) is right to say that very few feminists hold that law is patriarchal as a matter of *conceptual necessity*, but each challenge sees the law's complicity in social patterns of patriarchy as more than accidental or occasional.

Law as Patriarchy I. Many feminists argue that, while the ideals of law (or, more broadly, the ideology of law) are sound, no attempts to satisfy them in conditions of pervasive social dominance of women by men can hope to succeed. The attempts to treat men and women equally, or to devise legal arrangements that are neutral on their face, only serve to mask deeper inequalities. The problem is that even arrangements that are neutral on their face tend to rely on common-sense notions of normal situations that are inevitably determined by male interests, experience, needs, and values.[5] Where men are, and always have been, the measure of all things (MacKinnon 1987, 36), almost nothing is neutral even when it most appears to be so. Through the long history of gender inequality, male power and interests have been able to shape all of social reality.

[4] According to MacKinnon (1989, 162), law is male in that it "authoritatively constitutes the social order in the interests of men as a gender."

[5] See, for example, Minow 1987; Bartlett 1991, 371–7; Réaume 1996, 278–86. Kymlicka (2002, 378–86) articulates this line of criticism clearly.

Legal arrangements that fail to acknowledge this fact cannot hope to meet the standards of neutrality and equality allegedly implicit in the law.

This challenge holds law to the values it publicly professes. It is keenly aware of the potential for officials to mask the complicity of law in patriarchy, but this complicity is not fundamental to law. So, this challenge, while clearly important, stops short of the fundamental challenge structured by the robust law-as-ideology analysis. But some feminist theorists push this challenge deeper. They accept the close association of law with rationality, objectivity, neutrality, and the like, and do not deny that it does a pretty good job of meeting these ideals, but nevertheless reject the ideals themselves, and with them the legal institutions and methods of reasoning designed to meet them, as complicit in gender dominance. MacKinnon (1983, 645) put the challenge this way: "Law will most reinforce existing distributions of power when it most closely adheres to its own highest ideal of fairness." This challenge is meant to go more fundamentally to the heart of law and systematic thinking about law. This deep challenge itself has taken two very different forms.

Law as Patriarchy II. One form has roots in a branch of feminist theory that maintains that there are distinctively female modes of thinking, reasoning, and experience which are systematically excluded from male-dominated society and its most important institutions like the law. Law is most explicitly male, on this view, in the modes of reasoning and analysis that it deploys (Bartlett 1991, 377–81; Minow 1991; Finley 1993). This challenge shares some features of robust law-as-ideology analysis, since the complicity of law in gender inequalities and male dominance is alleged to be a function of defining features of law and the distinctive mode of reasoning it deploys, and this complicity is not merely an unfortunate side effect of its use but part of its essential and proper functioning. Still, this challenge stops short of the full-scale functionalism to which robust ideology analysis is committed, and it holds out hope that law might be (perhaps radically) reformed to incorporate the distinctive kind of reasoning and experience of women (Minow 1987, 1991; Bartlett 1991; Finley 1993). We will explore this challenge more fully below in section 6.4.2.2.

Law as Patriarchy III. The most radical version of patriarchy challenge can be found in MacKinnon's very influential work. This challenge also comes closest to the robust law-as-ideology model. While rejecting some of its most distinctive substantive doctrines, MacKinnon (1989) retained the basic structure of standard Marxist analysis of law and the state: her theory is fundamentally a theory of power and the way power is structured, distributed, exercised, and masked in society (1989, 4). For Marxists, these structures are relations of production; for MacKinnon, they are sexual relations. In MacKinnon's account, these relations are essentially hierarchical, unequal, and coercive. Male sexual dominance explains not only a variety of social relations, but also the basic fea-

tures of legal institutions and the fundamental norms by which they are governed and assessed. In her view, law is essentially rational and objective, but rationality and objectivity are male, not merely in the weak sense that when legal institutions or legal officials act in accord with them male dominance is supported as a side effect, but in the deeper sense that the norms themselves are at bottom norms of good performance in the social role of "sexual objectifier"—the role specific to male sexual dominance (Haslanger 1993). In section 6.4.2.3 we will discuss MacKinnon's fundamental challenge to mainstream general jurisprudence.

6.2.2.2. Law as Politics

The ideological function of law was a dominant theme in CLS literature. Much of its critical analysis seeks to show how law serves the interests of entrenched centers of social and political power and works against interests of the disempowered, while masking this operation by appeals to the rule of law to legitimate it. However, this challenge relied more on the radical rhetoric of ideology analysis than on its substance. Crits embraced a version of the *service thesis*—that is, they held that law systematically serves interests of those in power—but they rarely claimed any direct or immediate instrumental relationship. They frequently argued that, despite the radical indeterminacy of legal doctrine, judges and legal officials produce predictable results that can be traced to patterns of power and privilege in society (Kennedy 1997; Tushnet 1998), but they were reluctant to claim that elites dominate all such decisions (Kelman 1987, 248). The law may be a tool of power, in their view, but they believed that that tool is typically used subtly and allowed to work a good bit on its own. Similarly, they were reluctant to make any systematic claims about the nature of the classes or groups wielding power. Despite their roots in Marxist critical theory, they did not seek to ground all political and social relations in relations of production, or material class interests; similarly, they shied away from explanations of relations of social and political power in terms of deeper relations of sexual or gender domination, or the like. On the contrary, they tended to believe that "the conditions of social life and the course of historical development are radically underdetermined, or at least not determined by any uniform evolutionary path[...]. The causal relations between changes in legal and social forms are likewise radically underdetermined" (Gordon 1984, 100–1).

It is not surprising, then, that CLS writers were generally skeptical of the kind of functionalist mode of explanation that forms the core of robust ideology analysis (Gordon 1984; Kelman 1987, chap. 8). They were skeptical of the social theory used to identify dominant social groups, and they rejected the assumption implicit in a functionalist analysis that legal institutions and practices have no content or existence apart from their functional role. Following other neo-Marxist legal theorists and historians (Thompson 1976, 259–69), they rec-

ognized the relative autonomy of law. "Although they are the product of political conflict," Gordon wrote, "legal forms and practices don't shift with every realignment of the balance of political forces. They tend to become embedded in 'relatively autonomous' structures that transcend and, to some extent, help to shape the content of the immediate self-interest of social groups" (Gordon 1984, 101). No reduction of legal "superstructure" to an instrument of a material "base" is possible, they argued, because it is "impossible to describe any set of 'basic' social practices without describing the legal relations amongst the people involved" (Gordon 1984, 103).

This skepticism of grand, reductionist social theory and functionalist explanation is evident even in the "fundamental contradiction thesis" that played a major role in the early, quasi-structuralist phase of the Crits' indeterminacy critique. As we will see in sec. 6.3.3.2 below, Kennedy argued that a radical form of indeterminacy of ordinary legal doctrines is due to "contradictions" that run through the law, which are rooted in two fundamentally irreconcilable ways of thinking about ourselves and our social relations and the role of law with respect to them. This analysis had very little in common with robust ideology analysis. Moreover, since Kennedy himself was pessimistic about the prospects of resolving the underlying contradiction, at least within legal theory, he was left wondering what the point of criticism might be. "Demystifying" our legal thought brings us face to face with the fact that it is "no more immortal than is the society that created and sustains it," but he gave us no reason to think that we need to pay the price of the intellectual endeavor needed to win this realization or that it is worth the price. Of course, it is possible to argue, as other CLS writers did, that the deep contradictions in law make it possible for those in power to use law for their purposes while masking those purposes. However, despite its rhetorical similarity, this claim is different from that at the heart of robust ideology analysis, for all the basic theoretical work needed to ground such a claim had been decisively rejected by the Crits.

Thus, it appears that ideology analysis as practiced by CLS scholars took a different form. It used a much broader notion of "ideology" than is in play in the robust model. This is manifest in Kennedy's later work. "Ideology" in Kennedy's usage refers to "a universalization project of an ideological intelligentsia that sees itself as acting 'for' a group with interests in conflict with those of other groups," liberalism and conservatism being "two primary examples of American ideology" (Kennedy 1997, 39). At the core of this broad notion of ideology are two ideas. (1) The driving political forces in competition are not (merely) group preferences or interests, but competing visions of life in the polity and matters of public good, articulated in principled, "universal" language, and (2) the groups' basic political commitments are articulated in these visions by its intellectual elite. We might say then that an ideology in Kennedy's usage is a socially articulated normative political theory (if we understand "theory" in a relatively undemanding sense)—a more or less struc-

tured and articulate set of political values and principles that are embodied in the practices and political lives of a socially significant group. The reference to group interests recalls standard ideology analysis, but this similarity is superficial in two respects: the "interests" in question are "universalized," so they are understood in terms that transcend narrow group self-interest and may include concerns and values that are, at least in the short term, detrimental to the group's self-interest, and there is no deeper theory of group interests lying beneath and giving any more definite sociological shape to the interests referred to in the definition.

This definition of ideology pulls the critical sting from the Crits' rhetoric (Lucy 2000). To talk of ideological conflict, so understood, is just a rhetorically charged way of talking about ordinary political conflict in which groups compete for power in the name of values, principles, conceptions of justice or the common good to which they are committed. In this respect, however, Kennedy's usage is no different from, but only more transparent than, much of the ideology rhetoric of CLS writers from the beginning (see, e.g., Unger 1983; Tushnet 1988 and 1998). For example, Bauman (1996, 34) maintained that "in all its manifestations, law remains the contingent result of ideological struggles among competing factions in which different visions of justice jostle for privileged recognition." Thus, "law as ideology" in CLS rhetoric reduces to "law as politics." Moreover, since "ideology" no longer offers any critical sting, the critical force of the charge of "law as politics" must be found elsewhere.

Much of this critical sting was supposed to derive from the associated charge of "mystification." "Whether actually being used by the powerful or the powerless," Gordon wrote, "legal discourses are saturated with categories and images that for the most part rationalize and justify in myriad subtle ways the existing social order as natural, necessary, and just" (Gordon 1988, 16). This, of course, is not surprising or distinctively radical. Indeed, legal theorists of all stripes (although perhaps not all legal theorists) have argued that legal discourse by its nature *claims* legitimacy or authority. The radical, ideology-related thought, is that law by its nature gets people to *believe falsely* and *contrary to their interests* that this is so, and it does so by effectively portraying its dictates and categories as legitimate. A great deal of CLS ink was spilled seeking to demonstrate the many ways in which law makes what is essentially unfair and illegitimate appear entirely fair, natural, and worthy of allegiance. Charges of "abstraction" and "reification" are articulated and defended (e.g., Kelman 1987, chap. 9). It is argued, for example, that the tendency in legal discourse to characterize claims in terms of rights or relatively fixed rules radically abstracts from the deeper conflicts of value and interest and the roles they play in the daily lives of people and legitimates the status quo. This argument depends on two important assumptions. First, it assumes that there are no good general reasons for such abstraction or "rule-based" reasoning, and hence the only plausible account of their existence must be ideological (in the legimat-

ing-by-mystification sense). There is, however, an important line of argument, vigorously articulated by Bentham already in the eighteenth century (Postema 1989b) and re-stated by neo-formalists (see chap. 8, sec. 8.7.1.2 below) in the twentieth century, to the effect that legal institutions that meet conditions of the rule of law make social coordination possible where conflicts of interest and of principle threaten to undo social interaction. It is argued that abstracting from the matters that divide us and focusing on middle-level practical guides—general rules, appeals to rights, or the like—enables heterogeneous, pluralistic societies to function and even secure a degree of individual liberty (see, e.g., Raz 2001a). This argument is articulated in many different forms, but the point here is that the "mystification" charge takes hold only if arguments defending relatively abstract, "right-based" or "rule-based" practical reasoning are answered. The charge legitimately appears only at the conclusion of an argument showing that the alleged benefits are nonexistent or not worth their cost. That is, the mystification argument must engage in argument about the nature and merits of the ideal of the rule of law.

Second, mystification arguments assume that the law's regular use of abstract terms and categories, giving definition and stability to concerns and claims that in daily life are vague and fluid, will by themselves suffice to mystify ordinary folks. However, as Thompson pointed out, "people are not as stupid as some [critical legal theorists] [...] suppose them to be. They will not be mystified by the first man who puts on a wig" (Thompson 1976, 262); indeed, they are just as likely to grab the legal rhetoric and turn it to their own purposes, if only they could muster the resources and engage a lawyer to assist them. And when they are no longer able to continue the fight at law, they can still articulate a sense of legal wrong, convinced that "the propertied had obtained their power by illegitimate means" (ibid., 261). Charges of "reification" and "mystification" ring empty unless supported by both normative and social theories that fund the judgments of systematic, mystifying injustice that such charges presuppose.

Feminist jurisprudence offered such theories and so gave content to such charges (see sec. 6.4 below). However, CLS writers, wary of general theories, were forced to a different kind of argument. They relied heavily on the view that law-as-politics violates deeply held popular standards of legitimacy captured in the so-called "ideology of law," which they associated with the ideal of the rule of law rooted in liberalism broadly construed. The core of CLS ideology critique lay in the view that law's legitimacy rests on the popular view that there is a sharp difference between the kind of activity and argument characteristic of politics and that of law. Hence, law must be embodied in clearly formulated, publicly accessible rules that can be applied in a predictable fashion to particular cases by ordinary citizens, which application is confirmed by impartial judges looking only to those same rules when adjudicating particular cases brought before them. (See Kairys 1982, 1–2, for a typical formulation

of this ubiquitous thought.) If law is to be legitimate, legal reasoning must be sharply distinct from the "open-ended disputes about the basic terms of social life, disputes that people call ideological, philosophical, or visionary" (Unger 1983, 1), for, according to this conception of the rule of law, only in this way can political power be tethered to law. The personal and political elements must be *entirely and manifestly* eliminated from the process of legal reasoning.

This provides the background for typical CLS charges of "mystification" and the critical bite in their charge of law-as-politics. They argued that law does not and cannot meet this ideal, and its failure is pervasive and systemic; yet, through its rhetoric, its abstraction and reification, its constantly repeated claims of neutrality and objectivity, and its denial of the pervasive role of choice in judicial reasoning, law masks its own failures, and in doing so opens the door for manipulation in the interests of power. We will explore the details of this argument in section 3, but the important point to note here is that this argument is very different from critical arguments that utilize robust ideology analysis. Because it has refused to develop any theoretical account of the nature of law or of underlying social relations, its account of essential features or structures of law depends entirely on the assumed ideology of law, which is a popular, rather than philosophical, view (Tushnet 1998). And the critique is not so much directed against actual legal institutions, but against a certain popular (mis?) understanding of them. Rather than a radical critique of law, it would appear to be an internal critique of a popular mode of consciousness.

This leaves somewhat obscure the upshot of this critique for general jurisprudence. For its critical bite depends on whether there are independent reasons to think that the ideology of law, the particular conception of the rule of law attributed to popular opinion, has any merit. If so, we may be forced by the critique to think harder about how to reconcile the ideal with reality; alternatively, we may be encouraged to rethink the ideal. In any case, the implications of the ideology critique for the philosophy of law are unclear.

6.3. The Indeterminacy Critique

Central to the Crits' attacks on the ideal of the rule of law is a line of argument first suggested by American realists at the beginning of the century, or rather by those who understood them to advocate a radical "rule-skepticism" (for a more nuanced interpretation of the realists' arguments see above chap. 2, sec. 2.5, chap. 3, sec. 3.3).

> The starting point of critical theory is that legal reasoning does not provide concrete, real answers to particular legal or social problems. Legal reasoning is not a method or process that leads reasonable, competent, and fair-minded people to particular results in particular cases [...]. The ultimate basis for a decision is a social and political judgment incorporating a variety of factors, including the context of the case, the parties, and the substance of the issues. The decision is not based on, or determined by, legal reasoning. (Kairys 1984, 244, 247)

According to this argument, legal materials and methods of reasoning cannot live up to the requirements of the rule of law because they are radically indeterminate. Versions of this argument appear from time to time in other critical writings, but it can be found most frequently and in its most developed forms in the writings of the CLS theorists. And they, like the realists, tended to focus their critique narrowly on adjudication and judicial reasoning.

6.3.1. Structure of the Argument

James Boyle gave vivid articulation to the basic indeterminacy argument:

> Nothing internal to language compels a particular result. In every case the judge *could* produce a wide range of decisions which were formally correct under the canons of legal reasoning. Of course, shared meanings, community expectations, professional customs and so on may make a particular decision seem inevitable (though that happens less than many people think). But even in those cases, it is not the words of the rule that produce the decision, but instead a bevy of factors whose most marked feature is that they are anything but universal, rational or objective. Legal rules are supposed not only to be determinate (after all, decisions based on race prejudice are perfectly determinate), but to produce determinacy through a particular method of [analysis, reasoning and] interpretation. That method…alone, however, produces indeterminate results and it cannot be supplemented sufficiently to produce definite results without subverting its supposed qualities of objectivity and political and moral neutrality. (Boyle 1992, xx)

All the key elements of the Crits' indeterminacy critique are included in this passage, although two of them are not entirely explicit. To understand the argument, these implicit elements must be brought into the light. First, the indeterminacy charge and the implications drawn from it are set in the context of a problem of legitimacy of law—"indeterminacy matters because legitimacy matters," as Ken Kress (1989, 285) put it. The legitimacy of law, it is said, depends critically on its rules, doctrines, and norms ("legal materials") and mode of reasoning from them ("legal method") meeting strict standards of the rule of law, but indeterminacy makes it impossible for law to meet these standards and thereby undermines legitimacy.

The second distinctive feature of this indeterminacy critique is that, contrary to what might have been expected, it does not rest on the view that law's indeterminacy makes judicial decision making unpredictable. Rather, the argument is that, despite the radical indeterminacy of law, judicial decision-making *is predictable* to a large extent, but this predictability *is not due to law* and its characteristic modes of analysis and reasoning, and therein lies the threat to its legitimacy. It is not law's uncertainty (or, rather, uncertainty of the outcomes of judicial decision making), but its very certainty, that stands as a fundamental rebuke to its claim to legitimacy.

To understand this indeterminacy argument we answer two important questions. First, what is the nature of the alleged indeterminacy of law and legal reasoning? Second, what accounts for its alleged indeterminacy? Once we

have answers to these questions we may have a better idea why the indeterminacy but predictability of judicial decision-making was thought to pose a serious threat to the legitimacy of adjudication and hence to law.

6.3.2. Dimensions of Indeterminacy

CLS writers tended to define indeterminacy in terms of its opposite, determinacy: the law is *determinate* with respect to a given legal issue, if the accepted materials of law and accepted modes of reasoning with those materials are sufficient to yield a unique and dispositive solution for that issue. Accordingly, the law on the issue is said to be *indeterminate* just in case it is *not determinate*; and presumably, it would be less indeterminate as it approaches the determinacy end of an imaginary spectrum of indeterminacy—that is, as the choice among open options is narrowed.

It will be useful for our understanding of this indeterminacy argument to distinguish, first, between narrow and counter-factual indeterminacy and, second, between limited (local) and unlimited (global) indeterminacy. The first distinction concerns the indeterminacy of law relative to certain background conditions. (It will be important, of course, for critics to specify which conditions count for this purpose.) Law is *narrowly* indeterminate on a given issue when, *under (relevant) existing conditions*, legal materials and methods are insufficient to yield a unique and conclusive solution to the issue. Sometimes CLS writers were inclined to say the law is indeterminate on an issue, even when it is determinate under existing conditions, if it would *become* indeterminate, if certain (relevant) conditions, supposed to be external to the law itself, were to change (Tushnet 1998, 227–8). I will refer to this as *counter-factual* indeterminacy. The second distinction concerns the scope of law's alleged indeterminacy. It is *limited* or *local* if only some portion or domain of law is characterized by indeterminacy, but it is *unlimited* or *global* if the indeterminacy infects all or nearly all of law.[6]

The above distinctions concern the background conditions or scope of the law's alleged indeterminacy; we can also distinguish three different claims regarding the nature of this indeterminacy. For this purpose we can stipulate the following as common ground among the Crits and their critics. Law is a forensic argumentative practice: it is *forensic* in that activities characteristic of the practice take much of their shape from practice in courts and activities pursued in the shadow of courts; it is *argumentative* in that disagreement among credentialed participants in the normal activity of the practice is par for the

[6] Boyle's quotation above—"In every case […]"—expressed a global thesis (see Kelman 1987, 4: "there are [...] no easy cases.") A more modest thesis might claim that law is indeterminate in interesting, important, or difficult cases (Tushnet 1988, 52) or "across an analytically interesting range of cases" (Tushnet 1998, 225).

course. Indeed, the characteristic activity is, at least in good part, a matter of offering claims and counter-claims, arguments and counter-arguments (iterated many times), and critically assessing them. An observer might report on this activity by saying that everything in law is disputed. If this were all that the Crits were saying, it would not be at all remarkable; nor would it in any way challenge our ordinary understanding of law or of the constraints of the rule of law. The Crits' indeterminacy thesis must have involved something more robust. We can distinguish at least three versions of the thesis.

First, the law on some issue may be said to be *rationally* determinate if the best arguments from the available legal materials justify a unique and dispositive judgment or decision regarding that issue, and, thus, it is rationally indeterminate if the best arguments do not themselves direct and justify a unique judgment but rather allow two or more such judgments (Coleman and Leiter 1993, 559–64). Notice that rational determinacy is a property of the rational or normative relationship between legal materials and a judgment or decision or the proposition implicit in them.[7] It says nothing about those who take the judgment, make the decision, or entertain the proposition. Disputes may arise regarding which judgment or decision is best supported by the legal materials and they may arise whether or not the matter is rationally determinate. Disagreement does not entail—it is not even very good evidence for—the claim that the matter is rationally indeterminate.

Second, the law on some issue may be said to be *epistemically* determinate if competent practitioners are confident to a relatively high degree that the judgment or decision they reached through reasoning from the legal materials is the one best supported by arguments from those materials (Kress 1989). Where they are less confident they may claim that the matter is, to some degree, "uncertain." Unlike rational determinacy/indeterminacy, this version takes into account the (epistemic) position of the party making the judgment or decision. Where matters are epistemically determinate, there may be *some* disagreement (because individuals may make mistakes in evaluating the strength of the arguments for a judgment or decision), but where there is persistent disagreement, a reasonable participant may feel compelled to reevaluate her assessment and may conclude from it that the matter is uncertain. However, the epistemic determinacy or indeterminacy (i.e., certainty or uncertainty) of a legal matter is logically distinct from its rational determinacy or indeterminacy.

[7] Sometimes legal philosophers prefer to put this point in metaphysical mode saying that law is determinate when there is a fact of the matter about what judgment the legal materials decisively support and there is only one such judgment. The normatively-expressed version above leaves room for, but does not take a stand on, the metaphysics of rational determination. For the debate over whether determinacy and objectivity should be construed in normative-rational or metaphysical terms see Dworkin 1996c, Postema 2001b, and Leiter 2001, 2002. It is not necessary to explore this dispute here, since arguably the metaphysical version plays no role in the Crits' indeterminacy critique (Kennedy 1997, 24, 169–70).

Finally, the law on some matter may be said to be *professionally* determinate if it is a matter which duly credentialed members of the legal profession, viewing the matter non-strategically, would have no doubt but that the legal materials yield a unique and dispositive judgment regarding the matter, so that any argument aimed at undermining the judgment would be laughed out of court. A matter is professionally indeterminate if disputes about it based on arguments drawn from the legal materials are likely and would not be laughed out of court (and so, in that sense are "reasonable" but not necessarily dispositive). This reading of indeterminacy is largely sociological, except that the "no-laughter" condition imposes a weak evaluative constraint. We might say that professionally determinate judgments are publicly or manifestly demonstrable and those that are professionally indeterminate are not manifestly demonstrable, but rather contested or at least contestable.

Crits began their critique of modern law practice with a radical claim of *narrow* (rather than counter-factual) *global* indeterminacy. For example, Robert Gordon wrote, "the same body of law, in the same context, can always lead to contrary results because law is indeterminate at its core, in its inception, not just in its applications" (Gordon 1984, 114; see also Boyle 1992, xx, quoted above). However, because the Crits' never sharply distinguished the three different kinds of indeterminacy, it is not entirely clear which they had in mind when they made this global claim. They focused most of their attention on publicly disputable matters, but if they meant to *infer* solely from observations of professional indeterminacy that law was rationally indeterminate, they would have been guilty of an obvious error; for rational indeterminacy is only one of many possible causes of professional disagreements in which the arguments of all the parties pass the no-laughter test. We might hope to establish which notion of indeterminacy they wished to deploy in their critique by looking closely at what they took to be the primary sources of law's alleged indeterminacy.

6.3.3. Sources of Law's Indeterminacy

6.3.3.1. Impoverished Opulence

Following the realists (see chap. 3, sec. 3.2), CLS theorists sometimes argued that law's indeterminacy is due to the fact that it is simultaneously impoverished and opulent: accepted legal rules, norms, and doctrines provide legal reasoning both too little and too much to work with. Law is *impoverished*, they maintained, because it is frequently vague in language or intent, or its silence on important matters opens serious gaps (Kairys 1982, 13; Singer 1984, 14–5; Kelman 1987, 45–51). It is *opulent* because it offers a rich and dizzying array of conflicting precedents, rules, doctrines, and methods of dealing with them (Singer 1984, 15–6; Tushnet 1988, 191–2; Kairys 1998, 5). Thus, they argued,

law opens the door for wide and unconstrained judicial discretion guided only by resources that any clever judge can manipulate to rationalize any decision she might wish to make.

In *Red, White, and Blue*, Mark Tushnet refined this argument.[8] He observed that although we require that courts maintain "principled consistency" with past decisions, judges and lawyers must determine what consistency with a past decision requires. To do that they must identify the principle (*ratio*) of the past decision, but they lack criteria for distinguishing between cases that depart from and those that conform to the principles of their precedents. Any case can compellingly be placed in either category (Tushnet 1988, 50). He illustrated his point with a discussion of two cases faced by the U.S. Supreme Court and arguments that that might have been given from what might first have appeared to be doctrinally distant precedents. Concluding, he wrote,

> In a legal system with a relatively extensive body of precedent and well-developed techniques of legal reasoning, it will always be possible to show how today's decision is consistent with the relevant past ones, but, conversely, it will also always be possible to show how today's decision is inconsistent with the precedents. This symmetry, of course, drains 'consistency' of any normative content. (Tushnet 1988, 51)

It is hard to know how to take this argument. As an argument for the rational indeterminacy of law (even of U.S. Supreme Court jurisprudence) it is a rather obvious failure. In his text, Tushnet did not even begin to make the case for rational indeterminacy in the cases he mentions. All he did was sketch creative and not entirely frivolous arguments that might have been offered on both sides of a contested issue. He does not demonstrate that the arguments are "compelling," let alone that the competing arguments are "equally compelling"—that would involve assessing the arguments *on their merits* and his sketch did not attempt to do so. At best, his discussion plausibly suggests that lawyers might give them a hearing. Viewed sympathetically, then, his arguments offer some evidence, albeit limited, for the *professional* indeterminacy of law, or at least the portion of U.S. Supreme Court jurisprudence on which he focused. More would be needed to establish any more extended, let alone a global, version of the thesis.

6.3.3.2. Theory-Dependence

Roberto Unger, arguably the CLS movement's leading theoretician (Kronman 1993, 248–9), deepened Tushnet's sketchy argument. Intelligent application of

[8] Tushnet has in mind the U.S Supreme Court, but his argument is put in very general terms that could apply to any legal system with some doctrine of *stare decisis*, and with a little more adjustment it could be generalized to any legal system that requires consistency with existing legal doctrines whether they are rooted in code, statute, administrative regulation, or judicial precedent. I will not pause here to work out this generalized form.

law, he maintained, always requires interpretation of relevant legal norms and doctrine and inevitably this activity brings to bear on ordinary legal decision making visions of individual and common good and of just forms of human association.

> Without such a guiding vision, legal reasoning seems condemned to a game of easy analogies. It will always be possible to find, retrospectively, more or less convincing ways to make a set of distinctions, or failures to distinguish, look credible [...]. Every thoughtful law student or lawyer has had the disquieting sense of being able to argue too well or too easily for too many conflicting solutions. Because everything can be defended, nothing can; the analogy-mongering must be brought to a halt. It must be possible to reject some of the received understandings and decisions as mistaken and to do so by appealing to a background normative theory of the branch of law in question or of the realm of social practice governed by that part of the law. (Unger 1983, 8)

To interpret legal doctrines, the aims or purposes of the law must be consulted, but these are seldom given; rather they must be constructed, attributed to legal doctrines on the basis of judgments of their intelligibility in light of the attributed purposes and the sense they make of the law overall. Judgments of intelligibility and purpose, in turn, are rooted in deeper visions of human good, justice, and community. If a vision were already embodied in the law, if law were an autonomous, intelligible moral order, judges would not have to rely on extra-legal normative conceptions of human good and justice. However, law taken on its own does not contain a single, coherent vision of social life, Unger argued, but rather contains "in confused and undeveloped form" elements of competing visions (Unger 1983, 68). Thus, it is possible to make coherent sense of the law only if we are willing to treat substantial portions of existing doctrine as "mistaken," appealing beyond the law itself to normative political theory to account for the bulk of the legal materials and distinguish its sound parts from its mistakes (ibid., 3). Hence, law can only hope for coherence if judges appeal to background views of political morality.

This argument, it would appear, focuses exclusively on the rational or justificatory connections between legal resources and judicial decisions. But it does not yet entail any version of the rational indeterminacy thesis. Unger was fully aware of this. He did not argue that law is indeterminate, but only that legal resources are radically indeterminate *if and only if* the "guiding visions" that give content to our specific legal rules, norms, and doctrines are ignored. Indeed, his argument against the "formalism" of "modern legal theory" presupposes the possibility of (ultimate) *rational* determinacy of law. We can escape indeterminacy, he argued, if we accept the appropriateness within the practice of legal reasoning of "open-ended disputes about basic terms of social life" (ibid., 1). But he does not claim that open-ended disputing about broad visions is not governed by standards of rationality. The tone throughout *The Critical Legal Studies Movement* is decidedly non-skeptical. His argument, of course, is meant to challenge traditional views of the legitimacy of law, but the challenge

is directed against a certain narrow conception of the grounds of legitimacy, namely, the view that insists on a sharp distinction between legal and political reasoning.[9] Legal argument, when practiced correctly, involves critical, "deviationist" exploration of "alternative schemes of human association" within the context of resources provided by the law (ibid., 16–22). Thus, the threat to this narrow understanding of the rule of law comes not from law's indeterminacy, but from the very thing that offers the possibility of *rational* (if not epistemic or professional) *determinacy*.

However, it takes a resolutely rationalist mind to resist the temptations to skepticism lying around every corner of Unger's argument. Many of his colleagues succumbed. If judicial reasoning is deeply and pervasively theory-dependent, they thought, then we must conclude that the law and methods of legal reasoning are radically indeterminate; for these broad visions are utterly subjective, or at least highly contested, and there are no uncontested meta-principles to settle disputes about them (Kelman 1987, 64–85). They concluded that if Unger is right that ordinary judicial reasoning is necessarily theory-dependent, then in every case it will be possible to make the theoretical issues explicit, exposing them to challenge; every legal rule, norm, or doctrine is thus vulnerable to such challenge, since to apply rules is to interpret them, and to interpret is to appeal to an inevitably contested theory that focuses on a set of political ("ideological") commitments that ultimately are ungrounded. Every legal norm is contestable, so law cannot determine judicial decisions; law is radically indeterminate. Thus, the theory-dependence thesis, *combined* with skepticism about the rationality of fundamental moral and political values, led some Crits to embrace a *global rational indeterminacy* thesis. (Skepticism about the rationality of underlying political commitments rules out any coherent epistemic version of the indeterminacy thesis, although sometimes Crits characterized rational indeterminacy as "uncertainty.")

6.3.3.3. Patchworks, Political Forces, and Fundamental Contradictions

Crits found support for both of the above arguments in the observation that the frequently conflicting rules of blackletter law rest on a patchwork of competing and compromised values and principles that defies regimentation by any single coherent normative theory.[10] They offered two different explanations for this allegedly inevitable and irremediable incoherence.

[9] In this respect his approach is not fundamentally different from Dworkin's "law as integrity," see below chap. 9.

[10] Andrew Altman is responsible for isolating and naming this "patchwork thesis" in the writings of CLS theorists (Altman 1986, 221–7, 1990, 4–5, 105–6, 117–30), but he followed Kennedy who earlier argued that "The outcomes of these conflicts [in contract doctrine] form a patchwork, rather than following straight lines" (Kennedy 1983, 15).

First, they argued that the law at any point in time is "the contingent result of ideological struggles among competing factions in which different visions of justice jostle for privileged recognition" (Bauman 1996, 34). In view of "the many conflicts of interest and vision that lawmaking involves, fought out by countless minds and wills working at cross-purposes," it would be strange, indeed "miraculous," if "a coherent, richly developed normative theory were to coincide with a major portion of any extended branch of law" (Unger 1983, 9). This patchwork thesis does not directly imply any version of the indeterminacy thesis, but it could be seen to lend support to both rational and professional global indeterminacy theses. If it is correct, one might conclude that there is little hope of achieving substantial public consensus around any single normative theory of law. Professional indeterminacy seems inevitable. Also, although it does not explicitly make the substantive case for incoherence (Kress 1989, 303; Altman 1990, 121–2), the argument might nevertheless incline one to skepticism about the possibility of constructing a coherent normative theory of the law (Edmundson 1993, 575), or at least radical uncertainty about having a clear grasp of the theory that might do the job. "It would be a miracle" would give anyone second thoughts about a proposed theory that claims to do the job. Thus, either rational or epistemic indeterminacy might be supported, if not entailed by, these considerations.

A second explanation of the patchwork looks deeper within law and the culture to which it gives institutional expression. "Legal rules," it was argued "derive from structures of thought [...] that are fundamentally contradictory," (Gordon 1984, 114) and incommensurable (Kennedy 1976, 1979). We are deeply divided, Duncan Kennedy argued, not only "among ourselves [but] also within ourselves, between irreconcilable visions of humanity and society, and between radically different aspirations for our common future" (Kennedy 1976, 1685). From this "fundamental contradiction" flow the contradictions that rend law and create opportunities for judges in any case to find resources sufficient to argue compellingly for any legal proposition or its negation (Kennedy 1976, 1979). Beneath the apparent madness of law there is a deep structure, if not a rational method—an explanatory orderliness, if not a coherent normative order (Kennedy 1976, 1724).

This quasi-structuralist argument in broad outline proceeds as follows. Detailed analysis of several areas of law[11] reveals a recurring pattern of pairs of competing principles, neither member of which can be eliminated without radical distortion of the law but also neither of which can be consistently followed. Rather, they are cramped and constrained, asserted boldly at one point only to be undermined by exceptions and limitations elsewhere. This pattern occurs not only in substantive legal doctrines but also in the formal aspects

[11] Kennedy (1976, 1979) focused initially on private law, but others following his lead explored constitutional law, criminal law, family law, and the like.

of law (Kennedy 1976). This persisting pattern of formal and substantive conflicts is explained by the systematic correspondence between these recurring pairs of conflicting legal norms or doctrines and two broad models or visions of social life, which Kennedy labeled "individualism" and "altruism," structured around values of independence, self-reliance, and freedom, on the one hand, and caring, sharing, solidarity and interdependence, on the other. The values embraced by the models hang together coherently within each model, but the models are incompatible and their values incommensurable. The contradictions between these models, Kennedy argued, are intense and pervasive in law and in our culture; moreover, each of us, by virtue of our participation in modern Western culture, is divided by the contradictory attitudes captured by the models. We feel that "relations with others are both necessary to and incompatible with our freedom"—others are necessary if we are to become persons and yet we fear annihilation at their hands. This is "an aspect of our experience of every form of social life." On this view, law is merely a formal reflection of this deep cultural and personal contradiction: this is "the very *essence* of every problem" within the law (Kennedy 1979, 213).

These conflicts are not rationally resolvable. All appeals to rational "balancing" of competing values or conflict-resolving meta-principles are groundless; they are merely exercises of wishful thinking. Of course, we soldier on; we accommodate, compromise, and act. "We make commitments, and pursue them [...] [but] the moment of abandonment is no more rational that that of beginning, and equally a moment of terror" (Kennedy 1976, 1775). Law offers no escape from this predicament, although it tries to provide cover. Standard techniques of legal reasoning, if truth be told, are nothing more than "mechanisms for denying contradictions" rather than facing them honestly (Kennedy 1979, 214). All attempts to contain the contradictions and domesticate them distort our experience systematically. They mystify (ibid., 215). Recognition of these deep contradictions must shatter any illusions we may have of the determinacy of law; for in every case, to rationalize her decision the judge will appeal to legal resources that draw their life's blood from one of these deep sources, but there will always be available another source that could support the opposite conclusion with equally compelling force.

This bold argument derives most of its force from three key claims: (1) that the basic formal and substantive doctrines of law fall into a pattern of conflicting norms that can be mapped one-to-one onto the "models" of individualism and altruism; (2) that this offers a deep and illuminating explanation of legal doctrine; and (3) that the values congealed in these two models are rationally incommensurable. The argument has drawn heavy critical fire. The first claim is very strong and some critics have argued that the mapping simply fails (Altman 1990, 127). Legal doctrines, it was argued, often do not fall neatly into opposing pairs; sometimes both members of the pair can be traced to one model (or both), and often the link between legal doctrine and the alleged deep structure

is vague or implausible. Other critics, some within the CLS camp itself, were highly skeptical of any attempt to reduce the complex and conflicted body of legal materials to a single pattern (even if one of irresolvable conflict). Indeed, it appears that the main author of the fundamental contradiction thesis later abandoned it.[12]

Several critics focused on the third claim, arguing that to point out conflict or competition between values or principles, even if it can plausibly be said to be all-embracing, does not yet demonstrate that the conflicts are rationally irreconcilable or that the values in question are strictly incommensurable (Dworkin 1986, 266–75; Kress 1989, 306–20; Coleman and Leiter 1993, 572–4; but see Altman 1986 and 2001, 303–10). If we assume that the fundamental contradiction argument is meant to support a rational indeterminacy thesis, this criticism is telling, if it is sound. As Kress argued, "insofar as the principles and counter-principles of legal doctrine reflect psychological tension rather than a strict contradiction, it would appear that only competition, not contradiction, in principle should emerge" (Kress 1989, 307).

But this objection raises a further and in some ways more fundamental question focused on the second core claim of the argument: what sort of explanation does the argument offer? One might think that it offers an explanation in the mode of rational, normative analysis; however, the "models" of individualism and altruism only superficially resemble theories of normative moral or political philosophy. They more closely resemble (and indeed in Kennedy's classic statements of the argument were presented as) social or cultural versions of psychoanalytic hypotheses. The explanation offered by such a theory would then not be rational or normative, but socio-psychological, explaining motivation rather than offering a rationale. Viewed in this way, the "contradictions" might turn out to be irresolvable, not in the sense that no coherent *theory* could rationally combine the competing values, but in the sense that they represent dynamic psychological forces that resist long-term resolution at either the personal or social level. Thus, properly understood, this argument supplying the foundations of the CLS indeterminacy critique seems most plausibly to support a global professional indeterminacy thesis.

This way of understanding the argument moves it out of the range of certain powerful criticisms, but it opens it up to new challenges. The problem lies in the fact that CLS writers were inclined to argue that the familiar techniques and methods of legal reasoning mask the "deep" contradictions that undermine law. Judges, no less than the public at large, are victims of this mystification. Despite the surface lack of conflict, Crits often argued, law is deeply rent in two, such that in any case it is in some sense possible for a professionally compelling case to be made for both a legal proposition and its negation. This

[12] It played no role in Kennedy's restatement of his critical theory (Kennedy 1997), which he referred to as "chastened" (ibid., 294, see generally 284–96).

conclusion hovers on the edge of *counter-factual*, rather than narrow, global professional indeterminacy thesis. Indeed, the CLS critique tended to move in this direction in the 1990s, as Kennedy later admitted (1997, chap. 7).

6.3.4. Indeterminacy and the Rule of Law

Unfortunately, the arguments offered in support of the Crits' indeterminacy thesis do not clearly favor one version of that thesis over any other. Some considerations seem to support a rational indeterminacy thesis (or, perhaps, an epistemic reading of the thesis), but others tend to support a professional indeterminacy reading. The rational and epistemic indeterminacy readings, however, are not strongly supported by these arguments and were vulnerable to strong criticism. It is likely that, were they forced to choose, CLS writers would have been content with a reading of the thesis in terms of professional indeterminacy. This reading may also fit best their larger critical purpose, which was to challenge the claim of modern legal system's to legitimacy (see above sec. 6.3.1).

"Determinacy is necessary to the ideology of the rule of law," Joseph Singer wrote. "It is the only way judges can appear to apply the law rather than make it. Determinate rules and arguments are desirable because they restrain arbitrary judicial power" (Singer 1984, 12). Crits thought indeterminacy of law to be a threat to law's legitimacy because it is a threat to the rule of law, that is, a threat to law's ability to rule, govern, and guide those who are in power. The core concern of the rule of law is to constrain (especially official) arbitrary use of power by means of general rules or norms and techniques of publicly reasoning with these rules. Predictability of official decisions is not sufficient for rule-of-law legitimacy, for the arbitrary exercise of power can still be entirely predictable. If law is indeterminate, then, predictability of decisions cannot be attributed to the law. Indeterminate legal norms and modes of reasoning do not (perhaps cannot) constrain arbitrary power; hence, law's claim to legitimacy is unfounded. The law's claim to constrain arbitrary power and hence its claim to legitimacy would seem to be most seriously threatened by manifest, i.e., professional, indeterminacy. In Singer's view, only if law is manifestly determinate is it possible for judges to appear to apply law rather than to make it and so restrain arbitrary power

Early on, Crits advanced the professional indeterminacy thesis in its narrow, radical form. "In every case," Boyle wrote, "the judge *could* produce a wide range of decisions which were formally correct under the canons of legal reasoning" (Boyle 1992, xx). However, this claim is open to serious challenge on strictly empirical grounds. In a very wide range of its operation, law is not professionally indeterminate—there is an indefinite number of "easy cases" in which, were they brought to court, the unique determinate resolution could not be challenged without violating the "no-laughter" condition. This may

not be apparent to those, like American law students, who are fed a steady diet of appellate court decisions for study and debate (Schauer 1985). But, the Crits' critics argued, this impression is due to selection-bias. The only cases that make it to appellate courts are those for which substantial arguments on both (or more) sides of the issue can be made. Law functions in the daily lives of ordinary lawyers and citizens without ever raising issues worth bringing to court, let alone pursuing them all the way to an appellate-level court. Moreover, cases likely to be considered by an appellate court must be ripened, the issues focused, so that contested issues can be understood and legally debated. This process itself requires that a large part of the law is at that point in time and for that purpose *uncontested*. Law contestable at every point could not be intelligibly contested at any point.

Just so, Crits replied, but what offers stability and predictability—apparent "easy cases"—is not *law*, its language and methods of reasoning, but rather the "institutional setting," the "role of the decision-maker," "customs of the community" of those governed by the laws; even "legal culture," "conventions" and "common sense" might yield determinacy to indeterminate legal language and methods of reasoning (Singer 1984, 21, 25). These extra-legal determiners, it was argued, are "anything but universal, rational, or objective" (Boyle 1992, xx); they are simply matters of "politics" and "the ideology of the judge" (Singer 1984, 24–5). This argument presupposes criteria for assigning determining factors to the categories *law* and *non-law*. No criteria were offered or defended, but the suggestion seemed to be that *law* was restricted to propositions whose meaning is settled and the product of formal methods of reasoning from rules with settled meaning. That is, the Crits took on uncritically and without argument a naïve positivist understanding of the domain of the legal (Postema 2010b, 266–71). They also worked with a naïve view of language, rules, and methods of reasoning; for rules and modes of reasoning taken apart from their practical and institutional setting or "legal culture" would not be indeterminate, they would be practically unintelligible. Ironically, Roberto Unger pronounced perhaps the most damning criticism of what he calls "the radicalization of indeterminacy." It is simply a mistake, he wrote,

> not merely a mistake about law and language but also a mistake about the relation between what the radical indeterminists mean and what they say [...]. The thesis of radical indeterminacy turns out to be in large part a metaphor for something else: a planned campaign of social and cultural criticism. The trouble is that it does nothing to equip us for this campaign or to illuminate its aims. It is a dead-end. It tempts the radical indeterminist into an intellectual and political desert, and abandons him there alone, disoriented, disarmed, and, at last, corrupted—by powerlessness. (Unger 1996, 121)

Perhaps in response to this stinging criticism within its own camp, some CLS writers shifted ground to a *counter-factual* understanding of the professional

indeterminacy thesis. The claim, they argued, is not that law is always contested—that claim is manifestly false and none of the arguments (vagueness and incompleteness of law, theory-dependence, patchwork, and its explanations) were meant to imply otherwise—rather, the claim is that in any case a challenge *could* be raised, perhaps not under current circumstances but if those circumstances changed (while leaving the existing legal resources unchanged). Thus, no proposition of law is entirely secure from challenge, every such proposition *could* be challenged credibly (without being summarily dismissed by competent professionals), although this is true for some propositions only if circumstances change; *and* what determines the change of circumstances is something other than law, something, from the perspective of the rule of law, that is *opposed to* law, namely, the "ideology" or politics of influential segments of the legal profession.

This is the way two central figures in the CLS movement and frequent users of the indeterminacy critique presented the critique at the end of the century (Kennedy 1997, chap. 7; Tushnet 1998). Both maintained that the actual, manifest determinacy of law offers no fundamental challenge to the indeterminacy thesis as they understood it, for the determinacy or indeterminacy of a legal proposition is ultimately a function of factors entirely other than the law and recognized legal method. For Tushnet, determinacy was strictly a function of the social power of significant social groups to assert and defend arguments and to have them taken seriously.

> The indeterminacy thesis claims [...] that legal propositions will be indeterminate when some socially significant group finds it useful to raise legal claims that theretofore seemed frivolous; their arguments will become first professionally respectable and then reasonably powerful as their social or political power increases. (Tushnet 1998, 228)

Kennedy took a somewhat different approach, maintaining that indeterminacy is a function of the extent to which the judge engages in "ideologically-oriented legal work"—where work is "ideological" when it is rooted in a general normative political theory or set of principles shared in some portion of the judge's community (Kennedy 1997, 4, 60, 152–6, 311). The basic thesis of *A Critique of Adjudication* is that law and adjudication are inescapably and pervasively *ideological*, but Kennedy took great pains to distinguish this, and the view that judges characteristically engage in *law-making*, from the view associated with realists and critical theorists (and many positivists) that judicial activity is ideologically-oriented *legislation* (ibid., 1–2, 30–7). Judicial law-making activity is not *legislative*, he argued, because it works within and seeks to be faithful to law. Law is the *medium* of all judicial activity (ibid., 159). The activity is *ideological* because the language, form, and substance of law is infused with the discourse of normative political principles and theories (ibid., 133 and chap. 6 generally), and because every judge's work in the medium of law is influenced by his or her ideology (ibid., chap. 7). Still, Kennedy insisted that in a

straightforward and meaningful sense law constrains judicial decision making (ibid., 160–1), although, strictly speaking, the judge is not so much constrained *by* law, as constrained *to* law by her personal oath and her desire to be seen publicly as faithful to law (ibid., 159f). The law effectively constrains or guides, not only in those "easy" cases where rules obviously and without controversy apply to specific situations, but also in the "hard" cases when, after serious and conscientious "legal work," the judge concludes that broad principles or policies in the law, suggested and constrained by considerations of "fit" with the rest of the body of law, yield powerful arguments for a specific conclusion, arguments that the judge finds compelling and expects other competent professionals will or at least ought to find compelling as well (ibid., 33–8, 160–1).[13] Thus, he rejected the view that law cannot in any meaningful sense constrain judicial decision-making (that all judicial activity is ideological *legislative* work) and the view he associated with Hart that, when it comes to hard cases, law falls silent and the judge is forced to engage in legislative activity (ibid., 30–3, 177–8; for Hart's view, see below chap. 7, sec. 7.6).

At the same time, this always-constrained legal work is nevertheless always ideological, in Kennedy's view. This is due to the fact that what the judge conscientiously finds to be compelling—either rules with obvious applications in easy cases or broad principle or policy arguments in hard ones—is always strictly a function of the amount and nature of the legal work the judge invests in, and the orientation of, that work (Kennedy 1997, 162–9). Thus, for example, for a long time a judge may consider rules clear and their application obvious until she has reason to look further into the matter, at which point she may still find the case for the original understanding of a rule to be compelling, but it is also possible that her original understanding will be unsettled and she will come to appreciate reasons to replace it with a different one (ibid., 162–3). Reassessment of settled rules and settled convictions regarding the scope and force of principles or policies can unsettle them. All of this is consistent with the view, from the inside as it were, that the judge is responding at every point to her best assessment of the strength of the reasons and arguments available in the legal medium in which she works. However, the amount of legal effort she puts into reassessing matters, and the direction that these efforts take, Kennedy argued, are determined not by the law but by the judge's intuitive sense of what is right in particular cases and larger political aims and principles (ibid., 163). They are also determined by the "economics" of legal activity—

[13] Kennedy (1997, 37) admitted that at this point his view comes very close to Dworkin's theory of "law as integrity," except that Kennedy insisted that the judge's activity is inescapably and pervasively ideological; however, since "ideological" means little more than what Dworkin would call "political," the difference between them boils down to different assessments of the consequences of the ideological/political character of adjudication. Kennedy thought that recognition of it undermines our faith in law's legitimacy (1997, 311–3), but Dworkin thought it was essential to law's claim to underwrite genuine rights and obligations (see chap. 9, sec. 9.4).

the amount of time, energy, knowledge, and skill the judge has to spend on such matters (ibid., 169), and priorities regarding how these limited resources should be spent. Such considerations inevitably bring ideological strategy into the decision process. Tushnet added that it might also be determined in part by whether a socially significant group can make a case strong enough to move the judge to reconsider.

Kennedy concluded that neither the judge's sense of being constrained to a particular conclusion by the existing law (epistemic determinacy), nor the concurrence of the professional community at the time (narrow professional determinacy), can settle whether a question of law has a determinate answer. All we can say is that for *this* judge under *these* circumstances in *this* professional community a legal proposition is determinate (ibid., 169–72). From these considerations Tushnet concluded that almost any legal proposition *could* be vulnerable to challenge if the circumstances were right (counter-factual professional indeterminacy); however, Kennedy suggested we drop all talk of the determinacy of law and "conceptualize constraint in terms of [ideological legal] work" (ibid., 172). He concluded that it is only in this sense that CLS writers represented "the actual content of [legal] doctrine as the outcome of an argument between intelligible contending projects, or visions, with big stakes in view" (ibid., 179).

This is a far more modest view than the more common narrow global professional indeterminacy thesis which earlier Crits espoused. On Kennedy's view, law is at every point open to challenge, at least *in principle*, but very little of it will in fact ever be contested. Within the frame of the ordinary practice of legal reasoning, legal arguments on contested matters can be assessed by competent practitioners as compelling, reasonably strong, weak, or nonstarters and lawyers can reasonably expect to be in substantial agreement on these assessments with most other practitioners, except, of course, for issues currently in play, about which there is likely to be a great deal of disagreement, which will eventually be resolved into some consensus at least for the time being. Far from directing a radically skeptical challenge against mainstream (liberal) jurisprudential theories, this appears merely to give a slightly skeptical, perhaps wistful, spin on orthodox legal theory.[14] I say "wistful" because Kennedy thought that if we accept his disclosure of the pervasive influence of "ideology" in adjudication we will lose our faith in judicial reasoning.

But his view is far less corrosive than he would like to think. It is not at all clear that the rule of law, or law's legitimacy resting on it, is much threatened by this disclosure. Law across a large swath of its ordinary operation is, on this view, manifestly determinate and official exercise of governance will

[14] We can trace the roots of this "coherence theory," as Kennedy called it, to the return of Llewellyn and later Fuller to the emphasis on craft, practice, and principle in reaction to the excesses of earlier realists (see chap. 3, sec. 3.3.3 and chap. 4, sec. 4.1.1).

not be thrown to the beast of particular passions or partialities, nor even the personal values and idiosyncratic commitments of a specific judge. Of course, we have to accept that law once settled is not forever settled, but that is likely to cheer rather than depress the partisan of the rule of law, for "once settled always settled" is likely to bring with it a more worrisome arbitrariness (Endicott 1999) and force on law an inflexibility that detaches it from the social needs and problems it must address. Moreover, although the unsettling of the law is initially *motivated* by a judge's or lawyer's or significant social group's sense of right and political priorities, it is also structured and constrained by the law's discipline of practical reason, and in virtue of that fact some might find this a a welcome structuring of a process of public political argument in the name of the rule of law. Of course, there is no guarantee that what emerges from this process is just or even particularly admirable from a moral point of view. Nor are we guaranteed that the voices that are heard in and through the law, that move ideological legal work, and that sound in the ear of those conscientiously doing that work are truly representative of the voices in the community (Tushnet 1998, 232–3). This may still worry us, but little in the CLS theorists' indeterminacy critique gives substance to this worry. For this we need to turn to feminist jurisprudence.

6.4. Oppression, Objectivity, and Law

Although it was nurtured in the CLS movement in the 1970s, feminist jurisprudence was born of the broader feminist movement and the social and political theory developed within it. This fact sets feminist jurisprudence apart from CLS in at least two important respects. First, feminist legal theorists rarely found the indeterminacy critique compelling or theoretically useful; perhaps, as Catherine MacKinnon put it, they found law to be altogether too determinate (MacKinnon 1989, 290 n18). The feminist critique of the rule of law, in some versions, was more fundamental than the indeterminacy argument proved to be. Second, they were not reluctant to draw on broader social theory to inform and structure analysis and criticism of law. They deepened critical discussion of almost all areas of law, but especially criminal law regarding rape, sexual abuse, self-defense; labor law regarding workplace standards, pregnancy, family leave, and sexual harassment; family law regarding divorce, surrogate motherhood, and many other matters; constitutional law regarding abortion, sports, and other matters—the list could go on. Moreover, it offered a powerful model for other forms of "outsider jurisprudence" (e.g. critical race theory), although feminist jurisprudence received its fair share of criticism from these quarters for its inability to appreciate similarities between sexual oppression and other prominent forms of oppression.

Feminist jurisprudence took many forms, drawing on a variety of sources for theoretical inspiration and forms of critical analysis. Rather than a unified

doctrine, creed, or method, it offered a vigorous debate over the nature and forms of oppression driven by a commitment to expose and remedy it wherever possible. The basic premise of feminist jurisprudence, which was understood in different ways, was that women are subjected to systematic oppression and subordination as women and that this oppression characteristically takes the form of systematic exclusion from the benefits and protections of law and other social institutions (Réaume 1996). Law, feminist critics argued, is deeply complicit in oppression of women. Social arrangements, defined and underwritten by law, are blind to women's needs, interests, values, experience, and modes of relating to the world; moreover, women are excluded from full participation in social life by the very ideals to which law is held.

This charge is serious and worth the serious attention of philosophers and legal theorists. However, the importance of feminist jurisprudence for purposes of this study lies in the implications of its criticisms for general jurisprudence, and we face at the outset an obstacle to working out such implications. Philosophers in the Anglophone tradition, when focused on matters of general jurisprudence, tend to focus on questions about "the nature of law in general" or "the concept of law," where the implicit contrast is with special jurisprudence (concerning substantive domains of law: criminal law, family law, accident law, etc.) or local jurisprudence (e.g., French law, European law, early German tribal law, etc.), but feminist theorists were very reluctant to think in such terms (Smith 1993, 484). They were inclined, rather, to regard law as taking different historical forms, its "nature" being more or less specific to the distinctive structures and institutions of a particular society at some point in time. They did not much attend to questions about the nature of law more generally, or the criteria by which we might include different institutional forms at different points in social history under the concept of law; they were inclined to regard such speculation as pointless. So, on a first look, it would seem that feminist jurisprudence would have little to contribute to general jurisprudence.

However, this conclusion would be hasty, for feminist jurisprudence was interested not only in the complicity in gender oppression of this or that substantive doctrine of law, but claimed that *law* itself, in general (at least in its distinctive modern form), is implicated in this oppression—that "law is male." They focused on deep, structural features of law—if not of law wherever it is found, then law as we here and now conceive of it, and concerning beliefs rooted deep in our understanding of law. Among these core convictions, they claimed, are standards by which we assess law's performance *as law* and its claim to legitimacy, standards like neutrality, objectivity, and rationality often summed up in the term "rule of law" or "legality" (feminists: "liberal legalism"). Feminist critics rarely articulated or explicitly defended these assumptions about what lies at the core of our understanding of law. They took them as given and proceeded to subject them to their distinctive form of criticism. Because of the importance of these standards for our understanding of mod-

ern law—manifest already at several points in previous chapters—the feminist critique of them directly engages concerns of general jurisprudence.

6.4.1. Oppression

The starting point of feminist jurisprudence was the thesis that gender is a pervasive and systematically oppressive feature of social life. Oppression has been usefully characterized as "an enclosing structure of forces and barriers" that is part of a broad system that unjustly disadvantages one group while benefiting others (Frye 1983, 10–1; Haslanger and Tuana 2003, sec. 2.3). Racial, gender, religious, and ethnic oppression subject people to specific forms of harm and disadvantage because they are black, female, Muslim, Roma, or the like. Feminists maintained that oppression of women is systematic and a direct function of gendered social relations: to be a woman is, in part, to be related to men as oppressed to oppressor. Let us look more closely at the theory of gender underlying this claim.

To begin, according to this theory,[15] gender is understood as a network of social relations. It is not first of all a biological or anatomical matter, nor is it merely a dichotomous classification of people, like speaker and audience, or aggressor and victim; rather, it is a matter of social roles related systematically to other social roles. Roles are defined by a set of norms or expectations and by patterns of behavior characteristic of the role and governed by the norms of the role. Because these roles are in some sense the product of human action and interaction, and of efforts of those involved to make sense of these interactions, they are said to be "socially constructed," and hence we can intelligibly ask whether they serve legitimate human interests or are consistent with basic moral principles.

Gender roles are defined by gender norms and expectations, which select clusters of characteristics and abilities that enable people to function competently in the roles; these properties also provide ready tests by which we can identify individuals as incumbents in the roles. Since gender is very important to most of us, we try to conform to gender norms and develop those features we need competently to function as women or men. It is often tempting to attribute the distinctive characteristics of role incumbents to the nature of the individuals involved, ignoring the fact that typically these characteristics are products of individuals' adjustment to the norms and expectations of the role in which they find themselves. But this is a mistake. We might call it *the fallacy of endogenous differences*. It is a mistake to overlook the fact that, as Haslanger (1993, 91) put it, "even if the generalizations are accurate their accuracy may simply reflect the impact of the norms and the pattern of social relations that underwrites the acceptance of those norms."

[15] This sketch is guided broadly by Haslanger's (1993, 87–91, 98–101) very useful discussion. See also Rapaport 1993, 132–5.

Feminists pointed out that social life is pervasively gendered. Our lives are fundamentally gender-structured and this shapes our social prospects and opportunities, our choices and actions, and the way we think about ourselves, others, and the world. Moreover, one's gender role is (for the most part) not a matter of choice, but rather is determined largely by birth or the anatomical expression of genetics and, because gender categories are bipolar, society views the gender-assigning facts of birth as bipolar as well. "Sex, in nature, is not a bipolarity; it is a continuum. In society it is made into a bipolarity" (MacKinnon 1987, 44). Despite this socially-construed nature, most features of gender roles, or typical characteristics and abilities of individuals filling these roles, cannot be explained by the genetic facts by which individuals are assigned to genders, or any biological function closely related to them. On the contrary, feminists argued, gender roles and relations are defined *by and in the interests of men* and tend to be *hierarchical* (relations of domination and subordination).

MacKinnon radicalized this account of gender oppression, which was widely shared among feminists, in two ways. First, she claimed that gender roles are not merely in fact hierarchical and systematically serve the interests of men, but that this is necessarily so. In her view, what makes the categories gender categories is that they define relations of domination and subordination and in particular domination of women by men for men's benefit. To occupy the role of man just is to play the role of dominator of women, just as to occupy the role of master just is to bend the behavior, life, and will of a slave to one's own will. And, correspondingly, to occupy the role of woman is to be submissive to men, just as to be a slave is to be submissive to the master. Of course, as slaves can defy their masters, women can defy men, but they cannot do so *as women*.[16] Secondly, MacKinnon maintained that gender domination is fundamentally *sexual*: the social roles man and woman "are created through the eroticization of dominance and submission" (MacKinnon 1989, 113).

> Sexuality […] is a form of power. Gender, as socially constructed, embodies it, not the reverse. Women and men are divided by gender, made into the sexes as we know them, by the social requirements of its dominant form, heterosexuality, which institutionalizes male sexual dominance and female sexual submission[...]. [Sexuality is] a social construct of male power: defined by men, forced on women, and constitutive of the meaning of gender. (MacKinnon 1989, 113, 128)

This expresses MacKinnon's distinctive "dominance" thesis, according to which "one is a man by virtue of standing in a position of eroticized dominance over others; one is a woman by virtue of standing in a position of eroticized

[16] Less radical feminists agree that gender roles are oppressive, but they do not think they are necessarily so; they find that gender differences in certain respects are important and valuable. Gender oppression, on their view, lies in part in the devaluing and silencing of valuable distinctive characteristics and abilities of women. If these characteristics and abilities are given adequate recognition and voice, gender differences would be to that extent less oppressive (West 1993, 520–8).

submission to others" (Haslanger 1993, 99). Women are "viewed functionally as objects for the satisfaction of men's desires," desires that are "conditioned to find subordination stimulating" (ibid., 101). Through exercise of their power, men organize society into two interdependent, hierarchically structured roles. Individuals assigned to these groups develop characteristics, abilities, modes of behavior, and even values that are appropriate to these roles, and useful for competent execution of them (MacKinnon 1989, 109–11). This in turn shapes the experience, phenomenology, and attitudes of men and women as they relate to each other. In this way, men enforce women's conformity to the male view of them (Haslanger 1993, 101). In sum: "As the organized expropriation of the work of some for the use of others defines the class, workers, [so] the organized expropriation of the sexuality of some for the use of others defines the sex, woman" (MacKinnon 1987, 49).

MacKinnon at times came close to saying that sexual dominance is the root of all forms of oppression, as when she wrote, "sexuality is a pervasive dimension of social life, one that permeates the whole, [...] a dimension along which other social divisions, like race and class, partly play themselves out"; and later "male power takes the social form of what men as a gender want sexually, which centers on power itself [...]. In capitalist countries, it includes wealth. Masculinity is having it; femininity is not having it" (MacKinnon 1989, 130, 131). Although she may have later qualified her theoretical ambitions, MacKinnon left no doubt that she thought that her dominance thesis offered a unified explanation of sexism and gender oppression, if not all forms of oppression. Whatever their immediate characteristics, all forms of gender oppression, all divisions of labor and modes of discrimination, flow from eroticized male domination, in her view. In contrast, so-called pluralist feminists were skeptical of any "grand theory" that purports to explain all the forms of gender oppression in terms of a single fundamental form (Haslanger and Tuana 2003, sec. 2.3). Sexist oppression, like oppression generally, they maintained, can come in many varieties and the battle against it must be waged on many different fronts (Spelman 1988 52–4; Young 1990, chap. 2). We will not pursue this debate further, but we should keep it in mind as we explore the implications of gender oppression for our understanding of law.

6.4.2. Law's Complicity in Gender Oppression

Feminist legal theorists sought to expose law's complicity in gender oppression. Of course, if feminist claims about pervasive gender oppression in modern societies are true, it would not be surprising to find that law maintains and even promotes male hegemony, but feminist legal theorists have argued that the complicity is deeper and more pervasive.

6.4.2.1. Man is the Measure

Law, even (or especially) when it earnestly strives to meet ideals of impartiality, neutrality, and objectivity, is deeply implicated in the systematic oppression of women. "Law is male" and so cannot credibly claim allegiance or legitimacy. One very important feminist argument in support of this charge attacks directly law's claim to impartiality and gender neutrality. Neutrality, it was argued, is impossible—or, more modestly, law's claim to neutrality is always suspect—in a society that systematically oppresses women. The problem lies not in explicitly gender-biased legal norms, but rather in the fact that legal norms, procedures, or arrangements that appear to those who make and administer them to be scrupulously neutral nevertheless often work systematically to the disadvantage of women and actively support or promote their subordination to men. This is due to what we might call "the problem of the unstated norm" (Minow 1987, 38–45)—a problem with its roots in blindness induced by the fallacy of endogenous differences. What we often take to be natural features of our social world, not themselves implicated in gender-bias or any other artificial or imposed construction, nevertheless often are products of social arrangements created by and for males, created in light of male characteristics, capacities, needs, and interests. The norm or point of reference for the formation of these arrangements is that of males, although this is rarely acknowledged or even evident to those who participate in the formation. MacKinnon put the point most forcefully when she wrote,

> Virtually every quality that distinguishes men from women is already affirmatively compensated in this society. Men's physiology defines most sports, their needs define auto and health insurance coverage, their socially designed biographies define workplace expectations and successful career patterns, their perspectives and concerns define quality in scholarship, their experiences and obsessions define merit, their objectification of life defines art, their military service defines citizenship, their presence defines family, their inability to get along with each other—their wars and rulerships—define history, their image defines god, and their genitals define sex. (MacKinnon 1987, 36)

Man is the measure, the point of reference for what we take to be normal, ordinary, and natural in our social world (Minow 1987, 39–40). Because they have no voice in the formation of social arrangements, it is not at all surprising that women find that their characteristics, capacities, needs, interests, and experiences are systematically excluded. Moreover, we are blind to this fact: the male norm is unstated and taken for what is true, reasonable, and suited for everyone regardless of gender; the male point of reference is unacknowledged and taken for the universal, that is, for *no* point of view. "Because the men of law have had the societal power not to worry too much about the competing terms and understandings of 'others,' they have been insulated from challenges to their language and have thus come to see it as natural, inevitable, complete, objective, and neutral" (Finley 1993, 571). The result is a false universality that

actually works systematically to the disadvantage of women. The norms or procedures look neutral from the male standpoint because the law merely reflects the familiar inequalities of the social world (MacKinnon 1989, 213). Legal norms and processes that are neutral on their face are often and in surprising ways decidedly not neutral in fact.

An example might illuminate the problem. In recent years, domestic violence and spousal abuse have been shown to be alarmingly wide-spread in American society and cases of women who kill their husbands after suffering years of abuse at their hands are increasingly drawing public attention. Charged with murder, defendants in such cases sometimes argue self-defense, but the argument had been difficult to make in American courts, since the defense is available only if the victim posed an immanent threat to the defendant. The immanence of the threat of further abuse is often difficult to prove when, as is often the case, the defendant killed the victim in his sleep. These cases have raised questions about the rationale for the immanence condition of self-defense. The typical, and for a very long time unchallenged, rationale appears to rest on the unarticulated assumption that the typical context of response in self-defense to violence is that of an encounter between two unrelated persons of roughly equal strength. The special features of domestic violence and long years of violent abuse do not seem to be countenanced by this rationale. If this analysis is correct, a superficially gender-neutral norm systematically disadvantages women.

To avoid this problem, feminists argued, we must regularly pose "the woman question" (Bartlett 1991, 371–7; 2000, 37–8). We must identify and expose the systematic gender bias and degradation (devaluation/subordination) of women in arrangements and practices that might appear to be neutral and non-discriminatory, asking whether and how the experiences, points of view, needs, and interests of women have been excluded and how living under these rules and practices actually affects the lives of women. As Will Kymlicka (2002, 381) put it, "before we decide whether gender should be taken into account, we need to know how gender has *already* been taken into account." Unstated norms need to be stated and critically assessed, the partiality of our perspectives must be acknowledged, and voice given to those whose voices, perspectives, and experiences have been excluded (Minow 1987, 16, 70–82).

This is an important argument and it suggests a powerful tool of critical analysis of law in all aspects of its operation. It is even more powerful than its use in the feminist cause suggests, for the critical tool feminist legal theorists have forged—paying careful and critical attention to unacknowledged points of reference that shape our understanding of problems and available solutions to them—need not be restricted to uncovering unacknowledged gender-bias. The experience of the able-bodied, of the heterosexual, of the European, of the Protestant Christian, or of many other socially dominant groups is often taken without thought as the natural point of reference, with harmful results

for people who do not live that experience. This critical tool is equally useful for exposing systematic but implicit bias against such people (Minow 1990).

As powerful as this critical tool is, it does not seem to pose a fundamental challenge to law itself or to ideals fundamental to law's claim to legitimacy. This is so for two reasons. First, feminist language notwithstanding, this line of argument does not pose a threat to the ideals of neutrality or objectivity; on the contrary, it presupposes those ideals. Martha Minow made this clear when she wrote, "Justice can be impartial only if judges acknowledge their own partiality [...]. Only by admitting our partiality can we strive for impartiality" (Minow 1987, 74, 75). Under conditions of pervasive sexual oppression, the demands of neutrality or impartiality cannot be met, according to this argument, but this is an indictment of those conditions, not of the ideals by which they are judged. Those proclaiming law's neutrality, in the face of such failures to meet the standard, may be hypocritical, but the fault properly lies at the door of the specific laws in question and the social arrangements they support.

Second, the above criticism would pose a fundamental threat to law itself if it were literally true that man is the measure of *all things* and there is no reasonable hope of this ever being changed. For then law could never legitimately claim neutrality. The only role for the notion of neutrality, if that were true, would be to mask systematic oppression. This very deep challenge has power, only if it is true that *all* of our social world, all social relations, serve the end of male oppression of women, and that all hope of altering this is hopeless. However, most feminists acknowledged that this claim is too strong to be plausible. If something short of this strong thesis is true, then there seems to be a positive role for law and the ideals of the rule of law even under conditions of great oppression. As E.P. Thompson argued, himself a committed critic of the use of law as an instrument of systematic oppression,

> If law is evidently partial and unjust, then it will mask nothing, legitimize nothing, contribute nothing to any class's hegemony. The essential precondition for the effectiveness of law, in its function as ideology, is that it shall display an independence from gross manipulation and shall seem to be just. It cannot seem to be so without upholding its own logic and criteria of equity. (Thompson 1976, 263)

Although in the context of gross inequalities the neutrality and equity of law will always be a sham, nevertheless, the forms and rhetoric of law, and its pretense of neutrality, impartiality, and objectivity, might still have the ability to constrain power and offer some protection to the powerless (Thompson 1976, 266). They also create the resources and the opportunity for a radical critique of the practice of the society (ibid., 265). We cannot wield these weapons if we remove them from our critical arsenal.

However, feminist legal theorists mounted a more radical critique. The critique we have just considered denies law's claim to be neutral, impartial, objective, and in that sense "rational," whereas this more fundamental critique

accepts the claim and argues that the standards themselves, precisely when they are most scrupulously followed, are inescapably complicit in oppression of women. This charge takes two very different, indeed opposed, forms. According to one, the rationality characteristic of law and legal reasoning is incomplete because they employ only distinctively male modes of analysis and practical reasoning and systematically exclude the female voice. According to the other, law is not incomplete, but rather law and legal reasoning are by their fundamental nature complicit in the oppression of women. Objectivity, the gold standard of judicial deliberation and legal reasoning, is itself a form of objectification, the characteristic activity of male domination. Let us look at each of these arguments in turn.

6.4.2.2. Impoverished Legal Reason

Modern legal practice claims to give structure and focus to practical reasoning, but, some feminist critics charged, this actually "reflects an impoverished view of reason and understanding" (Henderson 1993, 245). Law "has exalted one form of reasoning and called only this form 'reason' " (Finley 1993, 571). In this respect, law merely reflects patriarchal society: "Women are entirely rational, but society cannot accommodate them because the male standard has defined into oblivion any version of rationality but its own" (Scales 1993, 98). This is the "problem of the unstated norm" arising with respect to our practice of legal reasoning itself.

The charge is serious, but the target is difficult to fix. Feminist legal theorists rarely offer systematic descriptive accounts of the ordinary practice of legal reasoning. Rather, they focus on what they take to be widely endorsed standards of good judicial practice ("liberal legalism"), which fall into three groups: (1) formal characteristics or values, including abstraction, objectivity, universalization, neutrality, and detachment from context and concrete circumstances—all of which were typically summed up in the terms "legal formality" and "rule-bound" judicial reasoning (Finley 1993, 574; Henderson 1993, 247–8; Scales 1993, 95–7, 100–101); (2) typical procedural features of modern common law, especially the adversarial and winner-take-all mode of dispute resolution (Menkel-Meadow 1985); and (3) values of predictability, control, and principled justification that rely in some way on appeals to individual autonomy protected by rights (Scales 1993, 98–9; Finley 1993, 573; West 1993, 495–6).

Feminist critics argued that this understanding of the "reason" of law is impoverished, because it excludes the experiences of women. "As the men of law have defined law in their own image, law has excluded or marginalized the voices and meanings" of women (Finley 1993, 571). Underwriting this criticism is the view that there is a distinctive feminine voice shaped not just by its long experience as oppressed and excluded, but also by a distinctively female

nature, mode of moral and practical reasoning, and set of values.[17] On this view, women's sense of self is grounded in connection rather than separation, in relationships with others rather than hard-won independence from them (West 1993, 494, 499–505). As a result, it was argued, women approach moral reasoning and practical problem solving in a distinctive way and they tend to work to solutions from a distinctive set of values. They tend to see moral problems as the results of failures to connect, of broken relationships, and so look for ways to accommodate the needs and interests of all parties in the concrete circumstances. Care and responding to needs and maintaining relationships, rather than rights and autonomy, are the values giving shape to female moral reasoning, it is argued (Réaume 1996, 287; Scales 1993, 98–9; West 1993, 503). Contextualization and empathy are the key techniques of the female mode of reasoning (Bartlett 1991, 377–81; Henderson 1993; Scales 1993, 100–101).

So, these feminist critics argued, the practice of legal reasoning must be enlarged and enriched by integrating these values and modes of reasoning into it. Alternatives to winner-take-all adjudication, like mediation and reconciliation processes, must be made readily available (Menkel-Meadow 1985). Actively taking the point of view of others (empathy) and paying careful attention to the unique features of each case (contextualization) must be given a more central role in legal reasoning and analysis (Bartlett 1991, 377–81; Henderson 1993; Minow 1987, 71–82).

But feminist theory did not offer a systematic account of how this can be done, or even what it means to integrate these concerns and values in legal theory. And some who voiced this criticism were inclined to admit that such integration already occurs to some extent in "good" judicial practice.

> Far from being unmanageable, this approach describes what happens already in the best practices of justice [that is, judicial reasoning]. Justice, in this view, is not abstract, universal or neutral. Instead, justice is the quality of human engagement with multiple perspectives framed by, but not limited to, the relationships of power in which they are formed [...]. [Courts have] 'engendered' justice in many cases. (Minow 1987, 16)

Feminist practical reasoning, Bartlett insisted, "is not the polar opposite of 'male' rationality" (Bartlett 1991, 380). Not only *must* feminist legal methods engage in abstraction, detachment of circumstances to some extent, and the like, but also ordinary practices of judicial reasoning depend heavily on contextualization (Bartlett 1991, 380). "Because legal reasoning can be sensitive to context, we can work to expand the context that it deems relevant. By pulling the contextual threads of legal language, we can work toward making law more comfortable with diversity and complexity, less wedded to the felt need

[17] West 1993; Scales 1993; drawing on the work of Chodorow 1978, Gilligan 1982, Noddings 1984. For a useful discussion of the use of feminist psychology in feminist jurisprudence see Réaume 1996, 286–9.

for universalizing, reductive principles" (Finley 1993, 579). These feminist critics seem to have pulled the sting from the radical critique of law's claim to rationality. They argued, rather, to enlarge, expand, develop seeds already firmly planted in legal practice, and, perhaps, to admit more openly this "open-ended" exploration of practical contexts, relationships, and values.

At this point one might ask why we should do so. Is it really a good idea to encourage and publicly acknowledge development of the practice of legal reasoning in this direction? The case for doing so rests on the view that in this way the distinctively female voice will be added to and complement the dominant male voice in the legal process. Only in this way, it was argued, will the special needs, interests, concerns, and experiences of women be given full respect in the application and development of law, and the unjust dominance of male interests countered. In this way, women's imposed silence will finally be broken.

However, the assumption that there is a distinctively female voice rising from a distinctively female nature and expressed in distinctively female modes of knowing, understanding, and practical reasoning has been challenged both from outside and from within the feminist tradition. Gilligan's thesis that there is a distinctively female mode of moral reasoning is now widely viewed with skepticism by psychological researchers (Flanagan 1991). And feminists themselves challenged the thesis on familiar grounds, arguing that generalizations drawn from human behavior and attitudes that do not pay close attention to the way social relations and arrangements may shape them commit the fallacy of endogenous differences. Gender norms, effectively enforced, are likely to yield behavior and attitudes that conform to observable regularities. Features common to women may well be traceable to their systematic subordination rather than their authentic interest or volition (Rapaport 1993, 133). More pointedly, MacKinnon argued,

> I do not think that the way women reason morally is 'in a different voice.' I think it is morality in a higher register, in the feminine voice. Women value care because men have valued us according to the care we give them[...]. Women think in relational terms because our existence is defined in relation to men. (MacKinnon 1987, 39)

It does not follow from this challenge that there is no case for the enrichment of the practice of legal reasoning in the ways feminist critics have urged. There may be very good reasons for doing so. Minow (1987, 71–82) and Bartlett (1991, 381), for example, argued that doing so would enable us better to address and redress systematic injustices, including oppression and discrimination suffered by women. But, of course, this advantage is not the whole story. There may be countervailing costs, losses, even potential injustices, all of which must be articulated, considered, weighed, assessed in determining whether we should accept this invitation to revise or open up our practice (or expand parts of the practice already in place). This is an important issue for legal philosophers (among others) to consider and feminist criticism has forcefully put this

issue on the theoretical agenda. But, when all is said and done, their proposals stand or fall on their own merits, not on whether they arise from distinctively female concerns (Radcliffe-Richards 1995).

6.4.2.3. Objectivity as Objectification

MacKinnon pressed a more radical claim of law's complicity in male domination of women, focusing on its most fundamental "legitimating norms [and] forms": rationality, neutrality, and the rule of law, all of which she gathered under the term "objectivity" (MacKinnon 1989, 162; see also Scales 1993, 95–7). She argued, not that under circumstances of inequality and oppression, striving for objectivity can reinforce and sustain oppression, but rather that, in meeting fully the demands of objectivity, law is most relentlessly complicit in men's oppression of women; when it is most objective, legal reasoning is most effectively exercising male domination (MacKinnon 1989, 248). "Objectivity," she maintained, "is the methodological stance of which objectification is the social process" (MacKinnon 1989, 124, see also 114, 248). Activities undertaken in the name of objectivity themselves involve or promote male sexual domination over women ("objectification").

The Objectification Thesis

MacKinnon thought of objectivity in law as practical and dynamic, as a norm governing certain activities, especially those of constructing, interpreting, and reasoning with the rules and doctrines of law, and the practices and procedures in which these activities are carried on. She conceived of objectivity as a certain kind of activity and a stance, a way in which people engage in constructing, interpreting and reasoning with rules, a way in which they represent the activities to themselves and others, and the standards by which they guide and monitor their performance in these activities. She held that this very activity and stance is complicit in sexual domination: the objectivity norm itself is a gendered norm and objectivity is a form of objectification. Following Haslanger (1993, 92–8), we can distinguish three different ways in which to understand this *objectification thesis*.

First, a weak version of the objectification thesis holds that the objectivity norm is *weakly* gendered; it is *appropriate to* the male objectifying role in the sense that those functioning in that role have a greater chance of success in the role if they follow the norm. This is much stronger, and politically and morally more serious, than the claim that following the norm happens to have, under some circumstances, the consequence that women are disadvantaged or oppressed. A person who satisfies a weakly gendered norm is in a good position to achieve ends central to the exercise of the role. Thus, just as the ability to focus on the activity at hand and not think beyond the technical demands of

one's activities is useful for torturers and assassins, and the ability to communicate care and understanding is especially useful for certain kinds of medical professionals, so, on this version of the thesis, striving after objectivity makes one especially good at sexually dominating women.

Second, she might have the stronger claim in view that, in certain background social conditions, to strive after objectivity is sufficient in itself for participating in the social role of objectifier. If this is so, we might say that the objective stance is *contextually grounded* in the role of objectifier. To illustrate the idea, Haslanger invites us to consider the ideal of leading a life of pure contemplation, or the ideal of engaging in zealous, independent investigative journalism. Under most (but not necessarily all possible) social circumstances, to pursue the ideal of pure contemplation is sufficient for one to function in the role of social dependent. Similarly, under conditions of dictatorship (but not under conditions of liberal democracy), the zealous investigative journalist will thereby function in the role of criminal. In this version, under conditions of pervasive male dominance, to take the stance of objectivity inevitably enrolls one in objectifying activities. Hence, if objectivity is fundamental to legal practice, the law's complicity in the oppression of women will be very deep, not merely accidental.

According to an even stronger version of the objectification thesis, the stance of objectivity is *constitutively grounded* in the social role of male dominance. Just as the activity of identifying and penalizing violations of the game's rules is constitutive of the role of official in a sporting event, and seeking to impart information and understanding is constitutive of the role of teacher, so, the thesis maintains, acting from the stance of objectivity is internal to the activity of objectification of women. This, of course, is a very strong claim. To determine whether any of these three claims is true and which MacKinnon might have had in mind, we need to understand better what is involved in objectification and in the stance of objectivity as MacKinnon understood them.

Objectification and Objectivity

Consider her notion of objectification, the mode of behavior and attitude in which individuals in the male social role relate to women in particular and interact with the world in general. This characteristic gender activity of men, has three distinctive features (Haslanger, 1993, 100–103). First, women are regarded and treated as submissive and the object of the dominant partner's desire. Second, being submissive and the proper object of the dominant partner's desire is regarded not merely as true of her, but as her nature—that is what she is *for*. Third, this is not merely a male fantasy; women are made to submit through the exercise of the dominant partner's power. Objectification is not mere stereotyping; it essentially involves the exercise, or at least presents the real possibility of the exercise, of power. Thus, the objectifier is one who treats his object as something existing for the satisfaction of his desire, and she has the properties

that answer to his desire (and typically thinks of herself in this way), due to the threat of his power (and that of other objectifiers), although he regards the properties not as the product of his making, but as part of her nature.

MacKinnon's notion of objectivity is harder to explain. It may be useful to recall briefly certain features of the philosophical concept of objectivity, or at least of the concept of objectivity widely in use in contemporary philosophical discourse (see Postema 2001b, 105–13). Objectivity is often thought to be concerned with the relationship between (a) a person judging, (b) some subject matter, and (c) a judgment concerning that subject matter. It is a certain kind of openness to the subject matter on the part of the judging subject that lends the judgment credibility (but no guarantee of truth).

This openness involves at least three features—features that all conceptions or norms of objectivity share, although they fill them out in different ways and often in ways that are specific to particular domains of discourse or deliberation. (1) *Independence*: the judgment transcends features of the judging subject's attitude and experience so as better to reflect the subject matter. Arthur Ripstein alerts us to an important fact any articulation of the notion of objectivity must keep in mind: "some influences make us [...] better judges, while others make us worse, and the total absence of influences would leave us as no judges at all" (Ripstein 1993, 359). Not only must the judgment be free of certain influences regarded by the relevant norm of objectivity as improper, but it must also be the product of what are regarded by that norm as proper influences. An articulate norm of objectivity must identify those influences that are improper, independence from which is critical to the objectivity of judgments in the domain governed by the norm. (2) *Assessment*: the notion of objectivity opens a gap between something's being so and its seeming to be so to a judging subject (her thinking, believing, or taking it to be so). This gap between correctness and conviction makes it possible to assess the judgment, to open the question whether it may be mistaken and it puts the judgment in the framework of reasons. We can ask not only whether it is correct, but also what reasons there might be for its correctness. The judgment is presented as in principle a conclusion that can be reached on the basis of reasons or evidence and so assessable in terms of the adequacy of these grounds. Thus, objective judgments are expressions that are open to assessment and to challenge, as opposed to merely rejection or acceptance. Finally, (3) *invariance across judging subjects*: it must be possible in principle for other suitably situated and competent judging subjects to confirm or disconfirm the judgment. To claim objectivity for a judgment is to claim an authority for it that is short of truth but nevertheless implicates other judging subjects and calls on them to assess, to find it worthy of their endorsement, not because the original judging subject endorses it, but for reasons others can assess on their own.

On this understanding, a judgment is objective if it (or the process of reasoning on which it rests) actually satisfies a norm of objectivity meeting these

three broad conditions. Judging subjects may *claim* objectivity for judgments they make and utter publicly, but claiming does not make it so, even if the claim is made with great conviction (or commotion). To claim objectivity for a judgment in some domain of discourse is not to silence argument, but rather to *invite* it at two points simultaneously: the claim of objectivity of the judgment itself can be assessed against the norm of objectivity relevant to the domain and, if the claim is sound, the judgment itself has been located in the arena of reason, argument, and intersubjective assessment.

This sketch throws light on MacKinnon's proposed articulation of the idea and ideal of objectivity. Her characterization proceeds at two levels. First, at the most general level, the stance of objectivity, in her view, is constituted by three attitudes: (a) distance or disengagement, (b) "aperspectivity" or "point-of-view-lessness," and (c) intersubjectivity (MacKinnon 1989, 97, 121–2, 231). "To perceive reality accurately," she wrote, "one must be distant from what one is looking at and view it from no place and at no time in particular, hence from all places and times [...] [T]he tests of reality are replicability and measurability, the test of true meaning is intersubjective communicability" (ibid., 97). She also associated objectivity with several other concepts, notably abstraction, universality, and impartiality, as opposed to concreteness, particularity, and partiality (116), but she often merged abstration and universality as the defining features of objectivity.

Second, it is important to keep in mind that MacKinnon always thought of objectivity in terms of a self-conscious "stance"—not so much a concept or norm (although it involves both), but a mode ("method") of approaching inquiry, observation, deliberation, and judgment that involves a representation of that activity by the judging subject to himself and his public. It represents, in her view, the outcome of a two-fold quest—of the Western philosophical tradition (ibid., 106–7), of scientific epistemology (1989, 97), and of jurisprudence (ibid., 237)—for *certainty* and *control*. Objectivity is the answer to the search

> for an approach to the real on which to base arguments and conclusions that will make one's point of view unquestionable and unanswerable, immortal and definitive and the last word, regardless of time, place, or person. Its thrust has been to end diversity of viewpoint, so that there can be no valid disagreement over what knowing is right knowing [...]. When [objectivity] speaks and there is silence, it imagines it has found it. (MacKinnon 1989, 107)

Objectivity secures certainty and silence[18] and promises control, i.e., power over reality.

[18] Martha Minow expressed a similar view, although she focused on the companion notion of impartiality rather than objectivity: "The idea of impartiality implies human access to a view beyond human experience, a 'God's eye' point of view. Not only do humans lack this inhuman perspective, but humans who claim it are untruthful, trying to exercise power to cut off conversation and debate" (Minow 1987, 75). I suspect, however, that she did not mean to reject the ideal of impartiality, but only the abuse of the rhetoric of impartiality, for just before this she wrote: "Only by admitting our partiality can we strive for impartiality" (ibid.).

This stance defines the relevant world as that which can be objectively known, as that which can be known in this way. An epistemology decisively controls not only the form of knowing but also its content by defining how to proceed, the process of knowing, and by confining what is worth knowing to that which can be known in this way. (Ibid., 97)

By defining the rules of the knowing game, objectivity also controls the reality said to be known because it defines the limits of reality by the limits of what can be represented and copied according to the rules of this game. "Objectivity," she wrote, "creates the reality it apprehends by defining as knowledge the reality it creates through its way of apprehending it" (ibid., 114).

This, then, is a second characterization of objectivity. It is a specification of the first, very general characterization, determined by pragmatic purposes which objectivity is designed to serve in her view. Offering this characterization, MacKinnon was not interested in articulating a view of the notion which those who embrace it might endorse. "Objectivity is certainty and control" was meant to do the work in MacKinnon's account that "property is theft" played in Proudhon's political theory. But, to do that job persuasively, it must connect to her general characterization, which objectivity partisans presumably do accept. She meant to call attention to an unacknowledged dark side of the notion and norm. When objectivity works its magic, she suggested, judging subjects regard themselves and are regarded as reliably representing a reality which is at the same time their creation and yet presented as entirely independent. Objectivity is a means of effectively exercising control over the world, and especially other people, by effectively denying it. It is a mask of power.

The Case for the Objectification Thesis

To summarize, the stance of objectivity is characterized by "point-of-viewlessness" which enables judging subjects to secure control over the subject matter of their judgments, while strategically denying that it does so, and over other persons because it commands their silent acquiescence in those judgments. The objectification thesis holds that any institution that is committed to the stance of objectivity is deeply and inextricably complicit in the oppression of women. In the following passage she makes the case for the link.

Men create the world from their own point of view, which then becomes the truth to be described [...]. Power to create the world from one's point of view, particularly from the point of view of one's pleasure, is power in its male form. The male epistemological stance, which corresponds to the world it creates, is objectivity: the ostensibly noninvolved stance, the view from a distance and from no particular perspective, apparently transparent to its reality [...]. Woman through male eyes is sex object, that by which man knows himself at once as a man and as subject. What is objectively known corresponds to the world and can be verified by being pointed to (as science does) because the world itself is controlled from the same point of view [...]. Male power extends beneath the representation of reality to its construction: it makes women (as it were) and so verifies (makes true) who women 'are' in its view, simultaneously confirming its way of being and its vision of truth, as it creates the social reality that supports both. (MacKinnon 1989, 121–2)

This passage is obscure, but the outlines of a case for the objectification thesis are available in it. Objectification involves treating a woman simply as the proper object of male desire, while regarding this as appropriate or justified by the fact that it is the nature of women to be submissive to men and serve their pleasure, a "nature" which is forced on women by the exercise of male domination but at the same time denied. In objectifying a woman, a man views her as having a nature that satisfies his desire, a nature he created through his exercise of power over her. To MacKinnon, this is just a special case of the objective stance which amounts to creating a reality according to one's image and then denying authorship by calling attention to publicly recognized absence of personal or any other social involvement in the determination of the brute facts that justify the treatment. Not only does scrupulous adherence to the discipline of objectivity enhance one's ability to perform the male, objectifying, role, the objective stance just is a generalization of the process or activity of objectification. Objectification just is a special case of objective world-making.

Is this case for the objectification thesis persuasive? Although the argument's conclusion supports the claim that objectivity is deeply implicated in objectification, the argument does not seem to support any of the three ways of understanding "implicated in" that we identified above. For in each of those understandings the order of dependency or explanation is the reverse of that claimed in the above argument. On each of those understandings, the objectivity stance is said to advance, promote, or enable objectification, but on the above argument, objectivity makes objectification possible only in the sense that objectification is a special case of (what is alleged to be) the general project of the stance of objectivity. It is said to carry out the objectivity project, not vice versa. So, while objectivity may be in that sense "implicated in" objectification, the argument does not support the thesis that promotes it or is grounded in it. It does not even follow that objectivity is constitutively grounded in objectification. For MacKinnon does not claim that the aim or point of the latter is to realize some objectivity goal. What we can say, perhaps, on the basis of this argument is that objectivity is *of a piece* with objectification and thus that we might expect the two to travel closely together.

That, of course, might be enough to indict and condemn the ideal of objectivity, but only if we accept MacKinnon's pragmatic characterization of that ideal. However, there is good reason to resist it. The root of the problem lies in her failure to see the role of the *assessment* feature of the concept of objectivity. Any specific norm of objectivity she might propose, if it seeks to meet the certainty and control conditions of her pragmatic interpretation of objectivity, will fail to respect the space between conviction and correctness which it is the point of objectivity to open, space which *invites* rather than *silences* challenge and assessment. To *claim* objectivity for one's judgment is to claim that the judgment, or the process by which one did (or could) reason to the endorsement of it, meets the relevant standard of objectivity. However, claiming

doesn't make it so. Moreover, to claim objectivity for the judgment is to place it in that public, dialectical space in which reasons and arguments are legitimately demanded and must be offered. Thus, the first man who offered objectivity as the answer to the need to silence questions and thereby in part control reality sold his brothers a bill of goods (property turned out to be theft). This is not to deny that the *rhetoric* of objectivity, like lots of rhetoric, can be and has been abused for this purpose. But the nature of that very abuse is exposed by keeping clearly in view the structure and point of claims of objectivity. Although rhetoric can often have enormous power, we can hope to exercise reasonable control over it with clear thinking, and for this we need the concept and discipline of objectivity.

Thus, although manipulation of the rhetoric of objectivity, or rather objectivity construed pragmatically and rhetorically, might enhance the ability of an objectifier to dominate women and to present his behavior to himself and the world as justified, this is no indictment of the ideal of objectivity, no reason to think its reputation has been so compromised that we will not allow it into our legal neighborhood. MacKinnon's objectification thesis, even in its weak version, and *a fortiori* its stronger versions, appears to be false.

Because we have strong reason to exercise constant vigilance in exposing hypocrisy in appeals to neutrality and objectivity, and in claims to offer considerations or arguments from a universal or purely impersonal point of view, we have reason to embrace and deploy robust notions of neutrality and objectivity. We eliminate them from our stock of fundamental norms by which we assess the operation of law as law only at the peril of our ability to assess coherently the legitimacy of its exercise of power over us, and especially over those among us who are systematically disadvantaged by historic structures of sexism, racism, and other forms of injustice. Thus, the challenges feminist jurisprudence put to our complacent and unmindful understanding and use of the ideals of neutrality and objectivity were often sound and serious, but they were most powerful when they drew on the practical force of these ideals and weakest when they sought to eliminate them from our critical armamentarium.

6.5. Attack on the Citadel

When it burst on the scene in the last third of the twentieth century, contemporary critical jurisprudence set out to make a direct assault on the citadel of mainstream thinking about law and legal reasoning, attacking law as nothing more than a species of ideology and attacking the very ideology that claimed to accord it legitimacy. The critical jurisprudential movement soon took off in different directions, two of which we explored in detail in this chapter.

Despite its early bravado, the CLS branch of the movement later pulled the sting of its attack, moderating its assault until, by the end of the century, it had domesticated its radical-sounding indeterminacy thesis, which maintained that

law is always and everywhere unsettled, contested and incapable of effective constraint on the arbitrary exercise of power, replacing it with a claim about the *potential* of law to be unsettled should circumstances change. After an early blistering attack on liberal views of judicial reasoning, the movement's most respected leaders (Unger and Kennedy) developed a view of the role of moral-political considerations in judicial reasoning that moved in its substance back in line with mainstream, liberal Anglo-phone jurisprudence, or at least one of its dominant strands, that represented by Dworkin's "law as integrity" (see below chap. 9, sec. 9.4). It still preferred to package the view in the rhetoric of "ideology," but, because of the reluctance of Crits to embrace the stronger philosophical and sociological theses that might have given the charge of "ideology" genuine critical bite, even this rhetoric lost its radical flavor. By century's end, the critical dynamic of the CLS jurisprudential movement had largely been spent.

Feminist jurisprudence, in contrast, where it set out radically to attack the citadel of law and legal theory never moderated its radicalism. Yet, from the beginning it was a far more diverse movement and its critique of law and of legal theory was more varied, taking quite different targets. Much of its criticism of law over time found a relatively secure place in contemporary legal theory. Most of this criticism, however, was not addressed directly to, but rather in many instances presupposed core elements of general jurisprudence. Even MacKinnon's most radical attack on the citadel of contemporary jurisprudence, did not challenge core doctrines of the nature of law, but rather challenged notions at the core of the law's ideology, namely, notions of objectivity and rationality. These challenges may not have won the day, but they, like other feminist assaults on that ideology, have forced serious rethinking of that ideal, rethinking that continues well into the new century.

Part III

Hart and His Legacy

Chapter 7

HART'S CRITICAL POSITIVISM

7.1. Hart and Legal Philosophy at Mid-Century

At the end of chapter 1 we found ourselves on the eve of Hart's inaugural lecture in 1952. In mid-century, British jurisprudence was in a very different state from its counterpart across the Atlantic. For several decades American jurisprudence had struggled with vigorous challenges posed by realist rebels, conceding or domesticating some of them, making adjustments in response to others, and rejecting yet others outright. Always pragmatic and skeptical of grand theory, American jurisprudence made up for its lack of philosophical sophistication with a rough-edged vitality and a determination to locate all theorizing in the rough-and-tumble of ordinary legal practice. In contrast, British jurisprudence at mid-century had settled into a comfortable orthodoxy. Bentham's rich, radical speculations about the nature and logic of law, and his meticulous articulation of systematic principles of legislation, procedure, and constitutional design, lay buried in a pile of unpublished manuscripts and Bowring's (1838–43) inferior and unreadable nineteenth century edition of his works, surviving only in the simpler and more rigid creed taught by latter-day Austinians. Generations of lawyers raised on Holland, Dicey and Salmond lost sight of Bentham's razor sharp criticism of common-law theory and practice. The English jurisprudence Hart encountered, in his view, "had no broad principle, no broad faith [...] And there were no large scale inquiries into the philosophical dimensions of law or legal study" (Lacey 2004, 7, 149).

Hart's *Concept of Law* set the problems, defined the terms, articulated a methodology, and offered a compelling theory of law that awakened English jurisprudence from its comfortable slumbers. Many of the core themes of *Concept*, as we have seen, had appeared in embryonic form in work of Salmond and others, but brought these ideas into a clear and compelling synthesis and defended them with a degree of philosophical sophistication hitherto unknown to English jurisprudence. Hart reintroduced common-law jurisprudence to philosophy, but his success was due in part to the fact that the philosophy to which he introduced it was in tune with the mentality of jurisprudence that had been dominant for the preceding ninety years. In the mid-1950s, philosophy had become safe for English jurisprudence.

7.1.1. Hart's Project

Herbert Lionel Adolphus Hart was born in 1907 to a moderately well-to-do Jewish family with a dressmaking business in Yorkshire, England. He earned

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a first in "Greats" (classics, ancient history, and philosophy) at New College Oxford in 1929. His hopes to further pursue philosophy were dashed, however, when he was denied the prize fellowship at All Souls College Oxford, so he turned to law and was called to the Bar in 1932. In the mid-1930s, he built a successful career as a Chancery Barrister before joining the war effort in 1940, serving in military intelligence (MI5). Through regular conversations with fellow intelligence officers, Gilbert Ryle, Stuart Hampshire, and his lifelong friend Isaiah Berlin, he developed a keen interest in the new "linguistic" philosophy. After the war he returned to Oxford as a Fellow of New College and tutor in philosophy. There he found himself in the middle of a newly emerging circle of influential Oxford philosophers including Ryle, Hampshire, Berlin, Frederick Waismann, and dominated by J.L. Austin. Although he had published little (only one article on a jurisprudential topic), he was appointed to the Chair of Jurisprudence in Oxford's Law Faculty in 1952. Over the next sixteen years he brought the Chair and legal philosophy in general to prominence in England and the wider world. He retired from the Chair in 1968 to focus his scholarly efforts on Bentham. In the 1970s and 1980s, he edited three volumes of Bentham's jurisprudential work and published important critical studies of Bentham's moral, political, and legal philosophy. He died in Oxford on December 19, 1992.[1]

Hart opened his Holmes lecture at Harvard in 1958 (Hart 1983, 49), his first articulation of the view later elaborated in *Concept*, with a tribute to the imaginative power and clarity of the work of Oliver Wendell Holmes. "The English lawyer who turns to read Holmes," he wrote, "is made to see that what he had taken to be settled and stable is really always on the move." He also praised Bentham, lifelong inspiration of Hart's legal philosophy, for his determination to "pluck the mask of Mystery from the face of jurisprudence" (Bentham 1977, 410; see Hart 1982, chap. 1). However, unlike Bentham, Holmes, the early realists and their descendents, Hart led no frontal attack on the citadel of ordinary thinking of the practicing lawyer or legal scholar. On the contrary, he undertook to clarify basic jurisprudential concepts and deepen understanding of the structure of modern forms of legal ordering. He thought that "philosophy could be tutor to law," as Ronald Dworkin observed, but equally that "law could be tutor to philosophy" (Hart 1998, 213). The aim of jurisprudence, he wrote early in his career, was not to increase knowledge but to deepen understanding by paying close attention to how lawyers think and talk (Hart 1957, 972). This was first of all not a critic's project, but that of an observer equipped with the humanist's tools of interpretation and the philosopher's tools of analysis. Yet, his project was driven ultimately by the conviction that success in this analytic project would clear the way for sharp-eyed critical

[1] See Nicola Lacey's (2004) splendid full-length biography for more details on Hart's life. For Hart's life seen through the eyes of his wife, Jennifer, see Hart 1998.

assessment of law, penetrating the web of noble dreams that practitioners and politicians are wont to spin around it (Hart 1994, 200–2, 207–12).

For this project, he insisted, jurisprudence must deploy the techniques and resources of contemporary philosophy, especially philosophy of language and philosophy of mind, as well as moral and political philosophy. By practice rather than precept, Hart taught Anglo-American jurisprudence again to speak the language of philosophy (or rather, one dialect thereof) and thus engendered an increasingly sophisticated philosophical enterprise that remains vital in the early years of the new century. With this sophistication came also an increasing self-consciousness about the methodology of philosophical jurisprudence; indeed, as Michael Moore (2000, 64) correctly observed, due to Hart's example, this methodological self-consciousness has become a hallmark (one might even say obsession) of contemporary Anglo-American legal philosophy. *The Concept of Law* was a product of postwar Oxford philosophy; yet, the compelling quality of Hart's philosophical vision and the persuasive force of many of his core arguments have survived translation into philosophical idioms that have since replaced "ordinary language" conceptual analysis.

Hart's influence on late twentieth century legal philosophy was not limited to topics addressed in his seminal book. On almost every important issue in legal philosophy, contemporary English-speaking philosophers naturally and inevitably start with Hart's views (Gavison 1987a, 2). His impact was felt already early in his career on key topics in special jurisprudence, especially his groundbreaking analysis of causation in law (Hart and Honoré 1959) and his work in the theory of criminal law on the concept of responsibility and the justification of punishment (Hart 1968), and, in a different vein, his vigorous defense, along Millian lines, of a liberal theory of the limits of the criminal law (Hart 1963; 1983, essay 11). Hart did not shun normative political philosophy, like Kelsen and other mid-century legal positivists who were profoundly skeptical of the possibility of rational argument in the domain of political morality. On the contrary, Hart's subtle defense of a natural right to freedom (Hart 1955a), and his discussions of liberty, rights, and the limits of utilitarian political theory (Hart 1983, essays 8–10), contributed greatly to the revitalization of normative political philosophy in the second half of the twentieth century.

Some of Hart's most important work was done late in his life when he took up editing and critically assessing Bentham's legal and political theories (Bentham 1970, 1977, 1996; Hart 1982, 1996). This work reveals a subtler reading, and deeper appreciation, of classical positivism than is apparent in *Concept* and his initial critical discussion of Austin's theory (Hart 1954). Hart's patient and sympathetic reconstruction of Bentham's strikingly original, penetrating, and inventive reflections on the logic and structure of laws, rights, and powers, as well as his theory of sovereignty and method in jurisprudence, give even greater credibility to Hart's criticisms and highlight key features and motivations of his own general theory of law which would otherwise be hard to

identify. Although students of Hart's general theory of law are naturally drawn to his *Concept* (and its posthumous "Postscript"), they overlook his *Essays on Bentham* (Hart 1982) at the serious risk of misunderstanding its aim and misjudging its plausibility.

7.1.2. Hart's Philosophical Resources

7.1.2.1. Bentham, "Greats," and the Two Austins

Without the Austins—John, the nineteenth-century London Austin and J.L., the twentieth-century Oxford Austin—there would have been no *Concept of Law*. The London Austin provided Hart with a convenient foil for the development of his own theory of law, its defects crying out for Hart's ready remedies; but that is not all. Austin's positivism, despite Hart's powerful criticisms of it, supplied the structure for Hart's theory; it was for him an indispensable jurisprudential template.[2] The Oxford Austin supplied Hart with his analytical method, so-called "linguistic" or "ordinary language philosophy." Yet, it would be a mistake to focus exclusively on the impact of the two Austins on Hart's jurisprudential thought. For one thing, Hart was far more deeply influenced by Bentham's work than by John Austin's, and Bentham's influence extended beyond matters of jurisprudential substance to philosophical method and orientation. Likewise, the power of J.L. Austin's philosophical influence was matched at crucial points by that of the later Wittgenstein (through the work of Hart's contemporary at Oxford, Frederick Waismann). It would be more accurate to say that Hart's theory of law is the product of the marriage of classical legal positivism and Oxford linguistic philosophy, with Hart's fertile philosophical intelligence acting as both matchmaker and midwife.

It is no accident, of course, that these complementary approaches to legal theory and philosophical analysis share a common ancestry in the basically empiricist orientation of modern British philosophy, its rejection of speculative metaphysics and its uncompromising focus on the details of everyday experience. But this orientation was refined in Hart's thinking about law due to another, rarely recognized, intellectual influence manifested in the philosophical milieu in which *Concept of Law* was written. Nicola Lacey (2004, 137) points out that almost all of the most important members of the postwar Oxford philosophical circle, including Hart, were trained in the classics. Their degrees were in *Literae Humaniores* ("Greats"), and their minds were disciplined by reading Greek and Latin literature, ancient history, and a large dose of ancient philosophy. Their intellectual orientation was fundamentally humanist rather

[2] This author recalls that Ronald Dworkin's Oxford lectures on Hart in early-1970s included a demonstration of how, through a series of subtle changes, Austin's classical positivism could be transformed into Hart's neopositivism.

than natural- or social-scientific; they were concerned with meaning and interpretation more than explanation and prediction. This intellectual orientation was hostile to any attempt to reduce the categories of human experience, whether aesthetic, moral, or social, to the categories of natural science. Facts of social life were never merely facts of behavior or mental states, or even complex combinations of them. This orientation produced in Hart's thinking a deep distrust of the largely behaviorist, reductionist social sciences of his day. Philosophy, committed to analyzing the concepts we use to make sense of our social experience, is the fundamental tool of legal theorizing, he insisted, not history or the social sciences. In its preface he characterized *Concept* as "an essay in descriptive sociology" (Hart 1994, vi), but far from reaching out to incorporate empirical social theory into legal theory, his aim was to claim an important province of social experience for the kind of interpretive articulation and explanation offered by philosophy.

7.1.2.2. Philosophical Techniques: Alternatives to Definition and Description

Two philosophical tools were fundamental to Hart's analytic technique: one replaced the search for a definition of "law" with a careful, context-sensitive explication of the concept; the other exploited the "performative" dimension of language. First, Hart's approach to philosophical analysis was inspired in part by Bentham's analytic technique. Bentham was keenly aware that much of ordinary language, although indispensable for thought and deliberation, is "fictitious" in the sense that it could not intelligibly be taken to refer simply to natural objects and hence, he thought, was not amenable to definition *per genus et differentiam*. He developed clever, albeit clumsy, analytic techniques ("phraseoplerosis," "paraphrasis," and "archetypation") to elucidate and regiment such language (Bentham 1997, Hart 1982, 128–31; Postema 2002b, 409–18). Hart (1983, 26–35) found Bentham's approach, if not his particular techniques, attractive. The core of good sense, he thought, lay in locating the concept or word in its habitat of ordinary discourse and analyzing its function and meaning in that context (ibid., 34–5). Words must be set in the context of their use in meaningful sentences, and sentences set in larger contexts of use and social practice. Rather than define the word 'law', Hart sought to explicate its underlying concept by looking carefully and systematically at core instances of its use (Hart 1983, 21–47, 89–92; 1994, 213). His ambition, he wrote in his notebook for *The Concept of Law*, was "to characterise the *Concept* of law by identifying the main elements and organisation of elements which constitute a *standard* legal *system*. When this standard case has been established as understood [...] then, first, the doubts and indeterminacies of the non-standard case can be dealt with (international law) and secondly the relations of law with 'morals' as a means of social control can be analysed" (Lacey 2004, 222, emphasis in original). Thus, for example, he argued that the ideas of "primary" and "sec-

ondary" rules (see below, sec. 7.2.2.1) were so important to our understanding of law that "their union might be justly regarded as the 'essence' of law." But he hastened to add that the "justification for assigning to the union of primary and secondary rules this central place is not that they will there do the work of a dictionary, but that they have great explanatory power" (Hart 1994, 155).

To get a good look at these core instances from a number of different angles Hart proposed to work indirectly. He opened *Concept* with the perennial question—What is law?—with which we ask for an account of the nature of law and in that sense explication of our concept of law, but he proposed to answer this question by putting it aside and seeking answers to three other "persistent questions": What is the relationship between law and coercive orders? If legal obligations are not reducible to coercive orders, are they simply a kind of moral obligation? What is it for a rule to exist and what role do rules play in law? Hart suggested in Chapter 1 that answers to these three questions alone might yield an illuminating account of the nature of law, but as he proceeded it soon emerged that other questions were no less critical to his project. For example: How are individual laws related to law, i.e. to a legal system? What accounts for the unity and persistence of a legal system? How are we to understand law's insistent claim to guide and to authorize social behavior? Which institutions are critical to the operation of a legal system? Are there laws that any functioning legal system must include? Are there any tasks every legal system must perform? Must a functioning legal system at least appear to aspire to justice?

Hart's answers to these questions were intertwined, yielding a subtle and supple account of the nature of modern law. His methodology was flexible enough for him to raise questions fruitfully about important or interesting cases that seem to fall outside the paradigm of modern municipal law, e.g., international law (which seems to lack the key feature of a "rule of recognition") (Hart 1994, chap. 10) and "embryonic" or "pathological" legal systems" that lack key institutions (1983, 257–8; 1994 118–23). Austin, anxious to define precisely the boundaries of the province of jurisprudence, was quick to assign forms of social ordering to the category of "law improperly so-called" if they failed to meet conditions of his definition of law. Hart made no such claims for his account, because it was clear to him "that the diverse range of cases of which the word 'law' is used are not linked by any such simple uniformity, but by less direct relations—often of analogy of either form or content—to a central case" (ibid., 81). Hart sought, rather, to explore these analogies and disanalogies of form, content (and perhaps function). While he was in some respects a better professor than practitioner of this method,[3] we must keep these

[3] Some of Fuller's claims about the inner morality of law and the fluid boundaries between law and related forms of social ordering (see chap. 4, sec. 4.2 above) might have appeared more intelligible to Hart had he kept his own methodological principles in mind.

methodological principles in mind as we articulate and assess the main outlines of his theory.

Hart's other key philosophical technique was built on J.L. Austin's speech-act theory (Austin 1962) and the analysis of moral language based on it. Hart thought the Oxford Austin's analytic tools enabled him to integrate evaluative and normative judgments into his positivist theory of law while avoiding skepticism and reductionism. J.L. Austin's notion of the performative aspect of language was useful because it suggested that the context of utterance, specified in terms of certain rules and expectations, might contribute to the meaning of an utterance, and more generally that we can treat certain kinds of utterances as meaningful even if treating them as stating facts or describing states of affairs would turn them into fantasy or nonsense. Hart viewed evaluative or normative judgments when made from an "internal point of view" as an amalgam of a descriptive part and an expressive part, the former pointing to some state of affairs and the other part endorsing it. On this view, an evaluative concept offers a classification of some portion of the natural world and the approval or endorsement element accounts for the evaluative or normative character of this classification (Stavropoulos 2001, 62; Raz 2001b, 5).

Hart believed that this noncognitivist mode of analysis, which he endorsed throughout his career, enabled him to remain agnostic about the existence of evaluative facts or properties allegedly referred to by moral utterances,[4] while acknowledging the meaningfulness of the utterances without reducing them to statements about the mental states of those who utter them or mere predictions of their behavior.[5]

7.1.3. Hart's Theory of Law in Outline

Despite its title, *The Concept of Law* set out not to define the concept of law, but to deepen our understanding of a common feature and structure of modern social experience. Hart's primary technique was the analysis of language, but his focus was on a complex, institutionalized social practice, the historical product of human ingenuity and artifice (Hart 1994, vi–vii). This singular focus on law as a particular kind of social institution (in Hart's words, a "social fact") was part of the legacy of classical legal positivism. Yet, Hart's humanism would not allow him to ignore that this social fact had normative signifi-

[4] It must be kept in mind that Hart's noncognitivism did not underwrite any form of moral skepticism. Some of Hart's most enduring work came in his contributions to normative political theory.

[5] Hart was sharply critical of the tendency of some Scandinavian realists, e.g., Hägerström and Ross (Hart 1955b, 370–2; 1983, 163f.), who too easily consigned large portions of normative and evaluative language to the domain of the "meaningless" or "magical." He thought a performative analysis of language provided a straightforward understanding of such language without commitment to magical powers or mysterious metaphysical entities.

cance for those who participate in it—that it was meaningful to them in ways that shaped the way they deliberated and acted—and that this normative significance was intrinsic to the nature and normal functioning of law. Bentham taught him that this social institution, this social fact, must never be confused with an ideal, but rather recognized as something of which we can reasonably demand that it meet or approximate our most cherished moral and political ideals, realizing that it often falls far short of them. An account of the nature and normal functioning of this central fact of our social experience must not, he insisted, be confused with an account of the ideals and standards by which we judge it (Hart 1983, 8–9). At the same time, no account of law that failed to capture its distinctive form of normative significance, by reducing the social fact to behavioral or psychological regularities or other natural facts, could do justice to its complexity and its central role in our social experience (Hart 1994, 9–11, 55–61, 88–91).

The path between these two mistakes to a satisfactory account of modern law, Hart (1994, 80) argued, was opened by the concept of a *rule*—not just any kind of rule, but rather practiced, social rules (ibid., 56–7), which he later explicitly associated with customs or conventions (ibid., 254–9). Hart did not ground his theory of law in a general exploration of rules or norms and their role in practical reasoning, as other legal philosophers have done;[6] rather, he focused from the start on rules practiced by members of a community. Equally important for his analysis was the thought, inherited from classical positivism, that law was an integrated *system* of rules, and that this system depended on certain key *institutions* (lawmaking, and especially law-applying, institutions being the most important). It is not far from the truth to say that *Concept* is a systematic articulation of the idea of law as an institutionalized system of rules.

For this purpose, Hart needed not only an explication of the nature of social rules, but also a careful exploration of various *kinds* of rules. For this purpose, he introduced a distinction between what he called "primary" and "secondary" rules, terms he used, unfortunately, to mark at least two different distinctions among kinds of rules. A key distinction marked by these terms was that between what we might call "first-order" rules governing (in a variety of ways) ordinary social behavior and "second-order" rules defining the regular activities of agents in institutions charged with the maintenance and proper functioning of other rules, both first-order and second-order. Second-order rules enabled Hart to explain the institutional character of law and the unity and persistence necessary for its rules to constitute a legal *system*. Second-order rules (or sets of them) establish law-applying institutions like courts and lawmaking institutions like legislatures (and institutions that mix both functions, e.g., regulatory agencies).

[6] Aquinas (*Summa theologiae* IaIIae 90 [Dyson 2002, chap. 3]) comes immediately to mind, but Raz (1979, 1990b) also begins his positivist theory in this way (see chap. 8, secs. 8.2.1 and 8.2.3 below).

For Hart's purposes, the most important second-order rule is the rule of recognition, which is a social rule practiced by law-applying officials in a given jurisdiction, and which provides criteria by which all other rules of that jurisdiction count as valid rules of the legal system. The concept of a rule of recognition (resting on the notion of a social rule) is the pivot on which Hart's theory of law turns. With it, he believed, he could explain how law is fundamentally a matter of convention or custom, broadly construed, and yet transcends social custom; how law constitutes a systemic unity and persists through time; how legal rules can be authoritative not in view of their content or merit (justice, wisdom, or reasonableness) but in virtue of their source in an institutionalized form of social recognition; how they can yield obligations which are not necessarily, however, morally binding; how the perspective of a law elite can diverge from that of ordinary citizens without losing its status as authoritative; and thus how law, which purports to control and guide social interaction normatively, can, without entirely losing its claim to status as a legal system, appear to most of those subject to it as an alien coercive machine.

Hart's theory was the product of the careful articulation and development of two key concepts: social rule and rule of recognition. They did not yield a definition of law, but rather provided the template for Hart's explanation of modern legal systems, the core instance of law in our experience. The notion of social rule, he thought, provided all the materials necessary to explain the normative character of law without losing sight of it as strictly a matter of social fact, while the notion of a rule of recognition enabled him to explain the institutional and systematic nature of law, alert us to its potential benefits, and warn us about its potential evils.

Hart summarized his theory by saying that law is "the union of primary and secondary [first-order and second-order] rules" (Hart 1994, 79ff.). We might sketch the main ideas of this theory as follows (refinements will be introduced in later sections).

1. Law is a complex historically evolving social institution, the product over time of human artifice, and as such it is a social fact that is taken by those who participate in it to have normative significance for them—it is meaningful to them in ways that shape how they deliberate and act—and this normative significance is intrinsic to the nature and normal functioning of law.

2. A legal system is made up of rules of different logical kinds, serving different functions; some imposing duties, others conferring powers.

3. These rules operate at different levels; some governing or facilitating ordinary social behavior of citizens (first-order rules), some governing (mainly) officials charged with maintaining the system of rules (second-order rules).

4. Chief among second-order rules are (a) rules of change: instituting, empowering and regulating lawmaking, (b) rules of adjudication: instituting, empowering, and regulating law-applying, and (c) rules of identification: instituting criteria of validity for the system.

5. All these rules exist, are authoritative, and constitute a unified system, by virtue of identification according to criteria defined by the rule of recognition.

6. Authoritative duty-imposing rules are legally binding; they generate obligations by virtue of their institutional recognition as valid rules of the system, and not necessarily by virtue of other merit they may have.

7. The rule of recognition of the system is not itself a valid rule of law, but is the standard of validity for all other legal rules or norms. Thus, a rule of recognition exists and is binding not as a valid rule of the system, but as a social rule, accepted and practiced by law-applying officials as a common public standard.

8. By virtue of accepting the rule of recognition, law-applying officials accept indirectly all the rules identified as valid in the system by their rule of recognition. Law-subjects may accept or endorse some or all of the rules of the system, but only rarely will they accept or even be aware of the rule of recognition.

9. Rules of law have an "open texture." The core of determinate application enables law-subjects and officials to apply them to a wide range of circumstances in predictable ways, but they also typically have a penumbra in which their application is less determinate and open to dispute. Judges deciding cases that fall in the penumbra, are guided by law, but they make law rather than apply pre-existing law.

10. For the legal system to exist it must be effective; it is effective just when (a) its rule of recognition is accepted as a common public standard by law-applying officials, (b) the behavior of law-subjects is generally consistent with the bulk of the first-order legal rules, and (c) the indeterminacies of the penumbra of legal rules are resolved by authoritative interpretation by law-applying institutions.

11. Given certain broad features of human nature, social environments, and the nature and complexity of social interaction, a legal system can be effective (and so can exist as a system of law) only if (a) it includes among its rules and norms protections against interpersonal violence, theft, fraud, and violations of promises and agreements, and (b) it is underwritten by coercive mechanism to enforce its requirements on behavior.

This, in outline, is Hart's critical positivist theory of law. Although it stoutly resists the reduction of law's authority to facts about mere habits of obedience or predictions of sanctions and tries to account for the genuine normative significance of law, it nevertheless insists that the existence of legal rules, and the legal system as a whole, does not depend on its moral merit, but rather on its source. It does not deny that in many ways law and morality are (possibly even conceptually) connected.[7] The theory recognizes that morality and law may share many rules and principles, that they have over time exercised a great deal of reciprocal influence, that law may incorporate moral principles and values and even direct judges to decide certain kinds of cases according

[7] Hart makes this clear in draft remarks in response to Postema 1987b (on file with the author).

to their best moral judgment or their best understanding of some fundamental moral principle. It even allows the possibility that the facts needed to establish the existence of an effective legal system might also endow it with moral value.[8] It denies only that law depends for its existence on its merit.

This limited form of what is sometimes called "the separation thesis" can be captured in two distinct but related claims: (1) that the validity of legal rules is strictly a function of their institutional recognition according to criteria of the rule of recognition of the jurisdiction; and (2) the rule of recognition itself exists and has its authority strictly by virtue of the social fact that it is accepted and practiced by law-applying officials in the jurisdiction. These two theses make up what I will call Hart's *substantive positivism*. From them he concluded that facts about their provenance enable us to identify certain rules as law, leaving open the moral question of what respect if any they are due (Waldron 1999b, 95). Sometimes Hart put this point in even stronger terms, maintaining that although law generates genuine obligations, those who are subject to law's obligations do not necessarily have any (even *prima facie*) *moral* reason to comply with them.[9] As we shall see, as Hart's theory was subjected to criticism, both theses generated intense debate that by the end of the century congealed into sharply divided blocs within the house that Hart built.

Hart was also increasingly attracted to an interpretation of his theory that introduced positivism at a higher theoretical level. In his Holmes lecture and again in *Concept* Hart (1983, 72–8; 1994, 200–02, 207–12) seemed to argue for substantive positivism on what appeared to be moral or at least broadly normative grounds; however, later in his career, especially in his posthumous "Postscript" (1994, 239–44), he rejected this line of argument and embraced unequivocally a *methodological positivism* according to which his theory is portrayed as strictly descriptive or conceptual, depending on no moral or other (practical) evaluative considerations, even when, as he said, what is described is evaluative or normative (Hart 1994, 244). This understanding of jurisprudential method has also been the focus of a great deal of debate in recent years.

7.2. Hart's Critical Frame

7.2.1. The Strategy of The Concept of Law

In Hart's view, legal philosophy begins from the pre-theoretical, commonsense observation that law is a social phenomenon which typically, though perhaps

[8] See draft remarks mentioned in the previous note.

[9] At times, Hart was unclear whether he thought *no* (moral) reason followed from the existence of a valid rule of law, or only no *conclusive* (moral) reason. But at other times (e.g., in the draft notes mentioned in note 7) he made very clear that the former was his view (see also Hart 1982, 144–61; 1983, 9–12, 82).

not always, has normative significance; laws are facts of modern social life that nevertheless function typically as norms imposing obligations, where being under an obligation involves being held to a standard of what one ought to do. However, Hart thought that philosophical theories of the nature of law have been vulnerable to two different fundamental methodological errors: (1) reducing the normative dimension to the social fact dimension and normative concepts to merely empirical ones, or (2) inflating the normative dimension to the point of making law a part of morality. The strategy of Hart's defense of his theory of law is reflected in the structure of *The Concept of Law*. The searching critique of Austin's positivist reductionism, with which he opens the work, cleared space for the "fresh start" of his own theory. He then portrayed natural-law theory as the expected response to his critique of classical positivism which he sought to answer, accommodating it at key points, but resolutely resisting its demand for a more robustly normative account.

This way of viewing the relation between positivism and natural-law theory is historically backwards, of course, but Hart's aim was not historical; it was analytical and rhetorical. He sought to contrast his theory sharply with its rivals by tracing their defects ultimately to one of these two methodological mistakes which his "fresh start" enabled him to avoid. However, the expository clarity that this approach made possible came at a price. First, it masked his considerable debt to classical positivism, encouraging him to appropriate silently key features of the classical positivist theory that he might otherwise have felt the need to articulate and defend explicitly—e.g., the assumption that the unity and systemic character of law is best understood as a formal relationship among component rules, and the cognate assumption that this formal relationship consists in their historical connection to certain institutional sources rather than wider and less formal social practices and forms of social interaction. Second, Hart's strategy also led him to interpret rival theories in ways that sometimes fit his diagnoses better than their texts. It is arguable, for example, that Hart's portrait of Austin's sovereign, as a discrete human individual or set of individuals to whom law-subjects were said to owe strictly personal obedience (Hart 1994, 52–4), was driven more by his attribution of behaviorist reductionism to Austin than by a sympathetic reading of Austin's *Province*.[10] Similarly, it has been argued that a close reading of Bentham's early jurisprudential work reveals a theory of the foundations of law far subtler than the mechanical model of sovereignty laid out in *Concept*, one that in key respects resembles Hart's own theory (Postema 1989a, chap. 7). Critics have raised similar doubts about Hart's characterizations of the American realists (Twining 1973, 32, 255, 408), the Scandinavian realists (Ross 1958; Pattaro, in Volume 1 of this Treatise, 143–4),

[10] Waldron (2006a, 1700–1) correctly pointed out that, *pace* Hart, Austin was just as willing to recognize the internal point of view with regard to rules at the foundations of law as Hart was (see, e.g., Austin 1954, 215–6).

and classical natural-law theory (Finnis 1980, 18–9, 29–36).[11] Hart's criticisms of alternative theories, then, may not usher his rivals out of the jurisprudential game with any finality, but they are valuable nonetheless because they map with admirable clarity a certain portion of theoretical space and locate his theory in it. We can learn much about Hart's theoretical motivations and his hopes for his own theory by looking briefly at his criticism of key features of rival theories.

7.2.2. Against Reduction

Hart's basic criticism of other positivist theories of law can be summed up in the charge of reductionism. This charge was directed primarily and most fully against the classical positivism of Bentham and Austin, but Hart also included contemporary legal theorists in his attack, notably Holmes and the American realists, Ross and the Scandinavian realists and even Kelsen. The reduction strategy, on Hart's analysis, took two forms. According to one, the complex array of different kinds of legal rules and norms was reduced to a single logical category (logical-form reduction); according to the other, the normative, binding character of members of this category was explained in strictly empirical terms (empirical reduction). In its most familiar form, the model of commands backed by sanctions issued by a sovereign person to whom most law-subjects were in a habit of personal obedience provided both the logical form and the requisite empirical concepts for this twofold strategy. Other positivist theories, according to Hart, offered variations on this model, emphasizing one of the strategies or the other.

Hart may have been tempted to think that the motivation for the reduction of the variety of laws to the logical form of mandatory norms lay ultimately in the hope of explaining law's normativity in strictly empirical terms. But considerations independent of empirical reduction could just as well have motivated the attempt to reduce the variety of legal norms to a single (if ultimately complex) logical form. These might include strictly theoretical considerations of providing a unified and elegant rational reconstruction of the legal system, or the view that coercion is a central organizing idea of law. Kelsen, for example, seems to have followed the logical-form reductionist strategy for reasons of this kind, but decisively rejected empirical reduction. It is interesting to ask whether the same might also be true, *pace* Hart, of the classical positivists. In contrast, the Scandinavian realists, as Hart read them, embraced the empirical reduction strategy without feeling the attraction of logical-form reduction. It is important for us to treat the two reduction strategies separately.

[11] For more sympathetic treatments of these theorists see, for Bentham and Austin, Lobban, in Volume 8 of this Treatise, chap. 6, also Postema 1989a; for Holmes and the realists, chaps 2 and 3 above; for the Scandinavian realists, Pattaro, in Volume 1 of this Treatise, chap. 8 and Volume 12; for Aquinas and the natural-law tradition, Finnis 1980 and 1998.

7.2.2.1. Kinds of Laws and their Functions

"If we compare the varieties of different kinds of law to be found in a modern system such as English Law with the simple model of coercive orders," Hart wrote opening the third chapter of *Concept*, "a crowd of objections leap to mind" (Hart 1994, 26). Some laws impose duties on citizens, others enable them to make contracts or wills or to convey property; some set up procedures for settling disputes, others empower officials to authorize transactions or issue licenses or make bylaws; some impose limits on the exercise of rule-making powers to protect rights or important public values, others provide for the allocation of benefits or privileges to citizens; some define rights and responsibilities of certain roles, others create legal entities like corporations. Likewise, Hart (1982, 143–4; 1983, 94; 1994, 44–9) observed, there is a wide variety of modes of public and private law-creating, "acts-in-law" that have the effect of changing the legal position of individuals or whole groups.

Against the Model of Commands

The problem with the model of coercive orders, Hart argued, is twofold. First, it models law after personal relations between commanders and subjects and thereby fails to capture the impersonal and abstract character of norms in modern legal systems (Hart 1994, 42–4). This objection, it would seem, relies on an uncharitably narrow reading of the language of "commands," "imperatives," "sanctions," and the like, in the work of many positivists. Bentham, especially, had no qualms about stretching the concept of command far beyond its ordinary limits to include as part of the "expository" material of penal law, a large part of private or civil law (Bowring 1838–43, vol. 3: 163, Bentham 1970, chaps. 14–19, app. A). The concept of command was attractive because it provided a readily understood model for the logical form of law as Bentham sought to explicate it.

The second objection, the core of Hart's critique, is addressed to this ambition. He argued that the model achieves theoretical uniformity at the price of distorting of our understanding of law and its ordinary modes of functioning. "The natural protest is that the uniformity imposed on the rules by this transformation of them conceals the ways in which the rules operate, and the manner in which the players use them in guiding purposive activities, and so obscures their function" (Hart 1994, 40). The problem is not that some form of logical transformation could not be worked out, but that the result would retard rather than enhance our understanding of the law and its distinctive modes of operating; it "would treat as something merely subordinate, elements which are at least as characteristic of law and as valuable to society as duty" (ibid., 41). The value "to society," in Hart's view, is not merely that it offers another, perhaps subtler, device for social control, but rather that it makes of

individual private citizens little sovereigns, as it were, "private legislator[s] [...] competent to determine the course of the law within the sphere of [their] contracts, trusts, wills and other structures of rights and duties which [they] are enabled to build" (ibid., 41). This second objection is deeper and more serious. Although it was inspired by careful attention to how we use language in law,[12] it also, notably, depends on an appeal to features of law that make it valuable or useful for us. Explanatory depth, Hart assumed, involves appeal to such considerations.

Normative Powers

Although critical of reduction of the variety of laws to a single logical form, Hart also sought to introduce order into this chaos with a pair of related distinctions. The first distinction was introduced to explain the failure of the command model to account for legal rules that enabled the formation of legally valid contracts, trusts, and wills; the transfer of ownership; the issuing of a verdict of guilty in a criminal trial; the marriage and divorce of private citizens; and even the making of laws by majority vote of a legislative body (ibid., 27–42). Rules of law that make these various kinds of actions possible and legally efficacious, Hart argued, cannot be understood on the model of command or its impersonal, abstract counterpart, a mandatory or *duty-imposing* rule; rather, *power-conferring* rules impose no requirements on kinds of action. Indeed, the actions cannot in most cases be defined without reference to the rule. Rather, they confer legal significance on certain actions or events, and thereby enable citizens or officials to influence the legal rights, duties, and powers of subjects of law, including themselves. They confer not causal but *normative* power, the power to alter the legal position of some set of legal subjects, to bring about some range of legal consequences.[13] Typically, Hart observes, these rules define conditions under which natural persons are vested with these powers and routines or protocols that must be followed to bring about the legal changes.

There is a rather large variety of kinds of power-conferring rules, ranging from rules empowering the alienation of property to rules denying legislative bodies the power to enact certain kinds of laws (for example, those in restraint of freedom of speech), but Hart maintained that concepts of duty and (normative) power, and the concepts of rules creating or underwriting them, are dis-

[12] Hart claimed that J.L. Austin's theory of the "performative" use of language gave him insight into this essential dimension of law (Hart 1983, 4, 94). This theory enabled him to recognize that typical utterances involved in these acts-in-law (for example, "I hereby bequeath [...]" or utterances involved in offer and acceptance of a contract) were not statements describing some state of affairs, but rather speech acts that produced certain normative consequences in virtue of "a background of rules or conventions" (Hart 1983, 4).

[13] On the concept of normative powers and the nature of power-conferring rules according to Hart, see MacCormick 1981, 71–87; see also chap. 1, sec. 1.1.2.1, and chap. 3, sec. 3.1.3, above.

tinct and logically irreducible. Attempts to treat power-conferring legal rules as fragments of more complex duty-imposing rules (as Bentham did) or to treat the inability to effect the desired legal change due to failure to follow the prescribed protocol as a sanction, Hart argued, is to ignore the very important differences in the reasons for creating these different kinds of rules and the different social functions they are typically assigned in a modern legal system.[14] Mandatory rules may seek to control behavior by offering negative incentives in the form of sanctions for noncompliance with a prescribed routine, but power-conferring rules are designed *inter alia* to enable citizens to arrange their own affairs. Rather than seeking to control their behavior, those who institute power-conferring rules put facilities for private arranging at the disposal of citizens. Similarly, rules conferring legal powers on officials create the forms in which the business of governing at all its levels is carried out, and, in turn, structure, channel, and control the exercise of political power of all kinds. These differences are obscured when legal rules are regimented to a single logical form.

Hart was correct to highlight the concept of normative power, its logical distinctness, and its role in understanding the law. Of course, he was not the first English-speaking legal philosopher in the century to do so. Hart (1994, 289) was aware of the earlier analysis of the concepts of duty and power by Hohfeld (2001) (see chap. 3, sec. 3.1.3 above), but Hart's analysis lacks Hohfeld's precision. Indeed, it is difficult to identify precisely the distinction Hart sought to mark with the terms "duty-imposing" and "power-conferring" (Tapper 1973; Raz 1973). Hohfeld was able to achieve precision because he focused exclusively on the logical character of concepts relativized to very simple normative relations between legal subjects. Hart's distinction is more robust, but murkier. Critics have distinguished at least three different distinctions that Hart may have had in mind. One is a distinction of *logical form*, that of mandate vs. conferring of power. While these are conceptually distinct, it is an interesting philosophical question whether all the logical work can be done with one of the concepts, along lines suggested by Bentham, for example, eliminating the need for the other concept. Corresponding to this distinction of logical form, Raz (1973, 280–7) suggested, is a distinction of *normative function* or mode. Norms, on his view, guide action by providing reasons for action. They can do so in two ways, (1) *directly*, by specifying some action and attaching undesirable consequences to not performing it, or (2) *indirectly*, by specifying some action and a generally desirable consequence of performing it, with the intention that the action be performed only if the agent wishes to achieve the legal consequences. The direct normative function seems to map onto the class of duty-imposing rules and the indirect to power-conferring rules. However, this explanation of Hart's distinction is not very satisfying. For one thing, the category

[14] For Hart's subtlest and most satisfying discussion of Bentham's complex reductionist theory see Hart 1982, 194–219.

of indirect guidance seems to confuse powers with rewards and government incentives of various kinds. Also, law seems to serve other normative functions that fit into neither category, for example, evaluation and public vindication or justification of behavior (either one's own or that of others). Another important function of law, its expressive or condemnatory function, might also be classified as a normative function. So, if the duty-power distinction was meant to mark a key difference of normative function, it tells only part of that story.

However, Hart's objection to eliminative reduction relied less on considerations of logical or normative function, than on *social function*—on the jobs law is expected to do. Duty-imposing rules, he suggested, are introduced to control behavior, channel it in particular directions, whereas power-conferring rules are designed to provide facilities for private arranging. Power-conferring rules function differently in the lives and practical reasoning of citizens and officials than do rules that impose obligations.[15] "Such power-conferring rules are thought of, spoken of, and used in social life differently from rules which impose duties, and they are valued for different reasons. What other tests for difference in character could there be?" (Hart 1994, 41). This is the root of the distinction in Hart's view, but this explanation has two weaknesses.

First, it does not neatly map onto the distinction between duty-imposing and power-conferring rules, for many of the power-conferring arrangements may be introduced precisely to control and direct behavior. Defining the legal status of marriage and empowering only people who meet certain conditions to enter it has the effect, largely intended, of withholding important benefits from people who do not meet the conditions, thus giving them incentives to meet those conditions. This is especially clear in jurisdictions that deny legal recognition of marriages between same-sex partners. Similarly, many of the rules defining the protocol for making a valid contract are not merely arbitrary formalisms, but are often created to make potential partners pay attention to certain features of their transactions that might otherwise escape their attention. Second, a moment's thought suggests that the list of social functions that Hart constructs is too short. There are many other social functions as well, and they do not mark sharply irreducibly different concepts of legal norms. Additional candidates for the list of fundamental social functions include settling disputes, providing services, and allocating of benefits (Raz 1973), raising revenue for government, defining legal statuses for natural persons and constituting legal persons, expressing a society's commitment to certain standards of behavior and rights. There are also the second-level, institution-maintenance functions

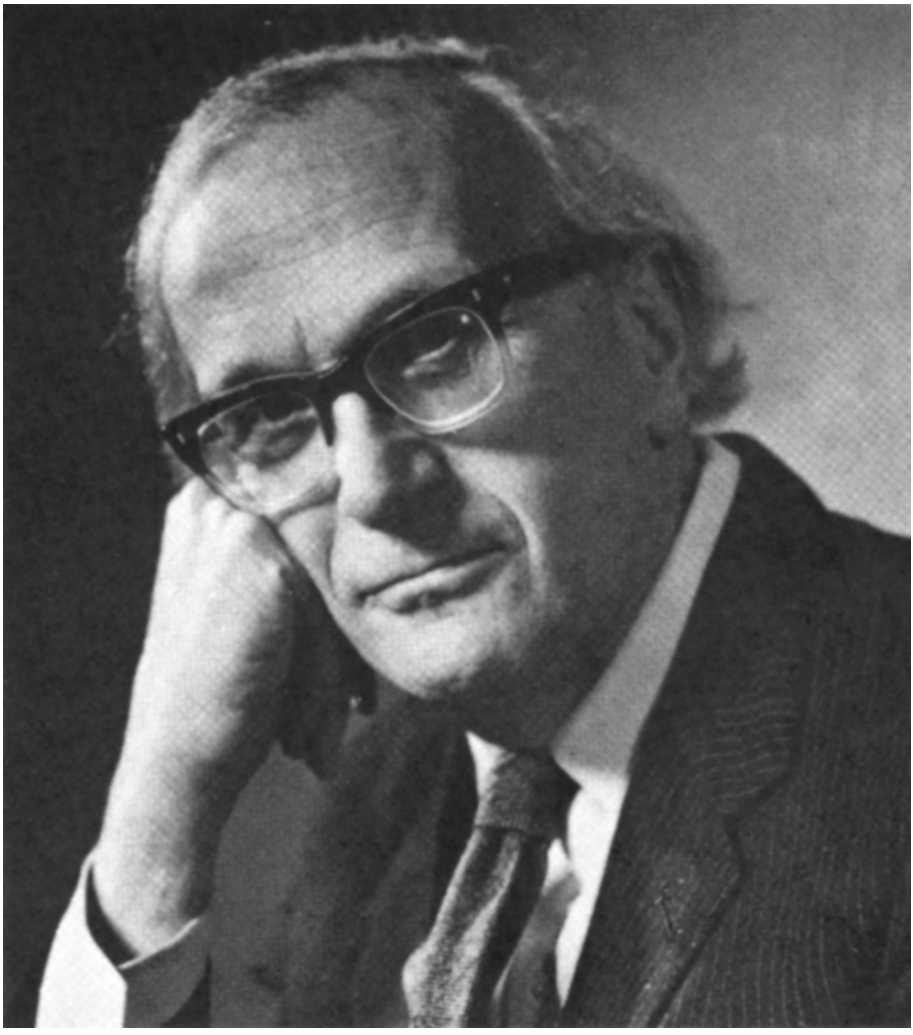
[15] Hart's conviction that these two types of rules are irreducibly distinct, and the difficulty he had in keeping separate logical, normative, and social functions of the rules, can be traced to his heavy reliance on the Oxford Austin's theory of the "performative" use of language. This enabled Hart to see that language can be used for very different purposes, but it did not give him the equipment to distinguish among quite different *logical types* of such functions.

of large scale law-changing, law-enforcement, adjudication and application of the law, and the like. Thus, it appears that Hart's resistance to logical form reductionism put on the jurisprudential agenda a rich array of normative and social functions of law for further exploration. His distinction between duty-imposing and power-conferring rules is not powerful enough, by itself, to enable us to sort and rank them or to explore the relationships between them.

The distinction between the normative functions and social functions of rules enables us to understand another reason why Hart had to resist the reduction of all legal rules to the category of duty-imposing rules. The classical positivists and Kelsen were moved to this kind of reduction by the conviction that law is fundamentally a *coercive* instrument, a tool for the exercise of coercive power. However, equipped with the notion of legal powers, it is possible to grasp how law enables rulers to exercise power, that is *control*, in many subtler and potentially more pervasive ways (Green 1996, 1703–4). Social power is often constrained by law, but it is also enhanced and focused by law. The power of class, race, ethnicity, religion, gender, and the like often expresses itself through different forms of law, not merely through sanction-threatening prohibitions or prescriptions, but also through creating classifications, defining and establishing statuses, allocating resources, and the like. Hart's insistence on a pluralistic account of the kinds of laws and normative functions of them enables us to identify the ways in which power and control are distributed and exercised, and in many cases the exercise of power is disguised.

Primary vs. Secondary Rules

There is a further level of complexity of Hart's discussion that has only been hinted at to this point. As we have seen, Hart argued that there is not just one type of legal rule operative in law but two, and we can hope to do justice the complexity of law only if we acknowledge them and explore the interplay between them (Hart 1994, 80–1). Duty-imposing rules "may well be considered the basic or primary type," but power-conferring rules are no less important for modern legal systems for being "in a sense parasitic upon or secondary to" their counterparts—"secondary" because "they provide that human beings may by doing or saying certain things introduce new rules of the primary type, extinguish or modify old ones, or in various ways determine their incidence or control their operations" (ibid., 81). In this way, Hart summarized his criticism of logical form reductionism and launched his discussion of law "as the union of primary and secondary rules." This union, it would seem, is a union of duty-imposing and power-conferring rules (ibid., 283); however, Hart's language at this point is misleading, for, most critics now agree, Hart did not use the distinction between primary and secondary rules only to mark the same distinction as that between duty-imposing and power-conferring rules, but also to mark a very different distinction.



H. L. A. Hart (1907–1992)

A clue to what Hart (1994, 91–9) had in mind is evident in the contrast he drew in chapter 5 of *Concept* between a prelegal society and a society with a modern legal system. We will consider this part of Hart's discussion in more detail below (sec. 7.7.3), so we need only look here at the kinds of rules involved in these two social orders, as Hart portrayed them. Pre-legal social order lacks important institutions like a legislature and a court, but is still rule-governed, according to Hart; it is a regime of "primary rules." Sometimes he called them "primary rules of obligation" (ibid., 91), but he also believed that in such a society there would be at least primitive forms of property, covenanting, and transferring of property, since among the "primary rules of obligation" he mentioned rules protecting against theft, fraud, violations of agreements, and the like. Clearly, prelegal societies have at least rudimentary forms of power-conferring rules as well as rules of obligation, although they appear to be entirely customary in form, and not in the care of any officials charged with keeping them in good working order or supplementing them when the need arises. Indeed, Hart argued that what law brings to such a society are the institutional means for such rule-maintenance. Defining and empowering legal institutions is a complex network of rules, some of which, of course, will be power-conferring, but some also will be duty-imposing. These rules will define *offices*—clusters of duties, responsibilities, powers, privileges, and liberties—charged with various legal- system maintenance functions. These secondary rules—which he organized under the headings of rules of change, rules of adjudication, and rules of identification or recognition—are importantly different amongst themselves, and different from primary rules, mainly in their social functions. What brings all the secondary rules together are their *institutional* tasks, their focus on structuring and maintaining the system of rules of which they and the primary rules are a part (Raz 1973, 297–8; Hacker 1977, 18–22; MacCormick 1981, 103–8). Secondary rules, then, are *second-order* rules, while primary rules are *first-order* rules; both are composed of duty-imposing and power-conferring rules.

So, what gives Hart's theory of law its distinctive form is a twofold distinction between *kinds* of rules and *levels* of rules. Law, on his model, is a union of duty-imposing and power-conferring rules governing the ordinary behavior of citizens (first-order rules) and structured into institutions charged with the task of maintaining the system (second-order rules). As we have seen, this may not yet provide a conceptual repertoire rich enough to enable us to do justice to the complexity of modern legal systems, but, Hart insisted, no attempts at reduction to a simpler set will allow us to do so.

7.2.2.2. Normativity and Empirical Reductionism

By our commonsense understanding, Hart believed, law holds us to standards, requiring certain behavior of us, imposing obligations on us. Legal philoso-

phers for a very long time have tried to understand this normative dimension of law. Those who were keenly aware of the merely contingent connection between laws and their reasonableness or moral merit or were skeptical of talk of entities other than those available to our senses, tended to look for empirical concepts that could do all the work of more robustly normative concepts and explain this commonsense observation in their terms. Hart recognized the philosophical attraction of this typically positivist quest, but resisted it. His humanist inclinations made him as skeptical of such reductions as he was of the metaphysical and moral inflations of natural lawyers.

While commonsense views law's normative dimension largely in terms of obligations (or permissions), Hart understood that the normative domain is considerably wider, including not only obligations, but also rules and standards that define positions, powers, offices, and capacities, and standards that set out what is to be done, without pretending that doing so is obligatory (rules of etiquette, for example) (Hart 1994, 9). As we shall see, Hart's own analysis of law's normativity proceeds first by considering rules and norms in general and then considering rule-based obligations. However, his criticism of empirical reductionism focused on reductionist accounts of (legal) obligation.

Hart recognized two broad kinds of empirical reductionism, which we can label *subjective*, and *objective* (ibid., 10–12, 82–5). The former seeks to reduce obligation statements to statements about the mental states of individuals. Hart saw the views of Austin, Bentham, and Ross, in part, in this light. The latter reduces obligation statements to statements about the regular patterns of behavior of people in a group including their hostile responses to deviations from those patterns, or to predictions regarding such hostile reactions. Hart attributed variations of predictionist reductionism to Austin, Bentham, Holmes, and Ross.

The subjective strategy reduced normative statements to statements of facts about the psychology of someone imposing obligations—e.g., the wish that certain actions be performed or avoided—or to statements of facts about the psychology of those subject to obligations—e.g., feelings of compulsion. Like Hägerström (see Hart 1955b), Hart objected to the former for several reasons. For example, no person's wish alone is sufficient to put another under obligation; if it is possible to put oneself under obligation, this is due not to any psychological facts but to a rule that makes the expression of that wish normative for the person addressed (Hart 1994, 82–5). To explain the obligation-constituting power of commands we need already in place the notion of a rule or norm that authorizes or confers standing on the commander; so it is not possible to explain the latter in terms of commands or the wishes they tend to express. With similar ease, Hart dismissed the suggestion that obligations can be reduced to feelings of compulsion on the part of one who is subject to a norm (ibid., 82–3). Such feelings (and associated beliefs and motives), Hart argued, are neither necessary nor sufficient for the existence of an obligation (ibid.,

83). The feelings can be experienced in the absence of obligations (so are not sufficient), as when one is *obliged* to act as a gunman directs, and the feeling of compulsion is no less reliable if internally generated. Similarly, one can have an obligation but lack any feelings of compulsion (so they are not necessary). Moreover, (statements about) such feelings do not offer an agent reasons; although the feelings may cause actions, they are not the kind of things that can direct, justify, or vindicate actions, which are among the things normative statements can be used to do. (These points are true not only of feelings, narrowly construed, but of other related mental states as well, including beliefs about obligations, although Hart did not explicitly draw this conclusion.)

Sensitive to the inadequacies of the subjective approach, Austin sought an objective basis of legal obligations, Hart (1994, 83) argued.[16] Rather than making the existence of obligations hostage to individual's feelings or beliefs about their subjection to them, he defined obligations in terms of the likelihood of suffering evil at the hands of officials. A representative statement of this analysis is the following from Bentham: "An obligation [...] is incumbent upon a man [...] in so far as, in the event of his failing to conduct himself in that manner, pain, or the loss of pleasure, is considered as about to be experienced by him" (Bowring 1838–1843, 8: 247).[17] Bentham's suggestion can be refined in various ways, but if these refinements remain honest to the basic thrust of this analysis, they will all be subject to devastating objections, Hart believed (1994, 82–6). First, this analysis proposes to understand obligations on the model of coercive orders, "the gunman writ large." But, although the victim has good reason to comply with the gunman's demands (and, in that sense, is obliged to do so), all would agree that she has no obligation to do so. If she were to ignore the gunman's order, things might not go well for her, but she would not be liable to criticism for doing something wrong. Second, Hart argued, the concepts of obligation and likelihood of suffering evil can diverge in real cases:

[16] I will limit our attention here to Hart's criticism of the classical positivist analysis of legal obligations and return in sec. 7.3.2 to his criticism of Holmes.

[17] In *Essays on Bentham* Hart acknowledged that Bentham had a far more sophisticated analysis of legal obligations than is suggested in this passage (and criticized in *Concept*, 82–6). On that view, to be subject to a legal obligation is to be liable to suffer at the hands of legal officials *as provided for by law*. Thus, not only are officials *likely* to sanction violations of laws addressed to citizens, they are themselves *under obligation to do so*, and the primary laws are supported by a series of subsidiary laws, addressed to officials, each enforcing the obligation on the enforcing official (Hacker 1973, 135–48). This series does not go on indefinitely but, on Bentham's account, bottoms out in official duties supported by what he called "the moral sanction." Hart argued that even this theory, despite it greater complexity and subtlety, succumbs to his fundamental critique of empirical reductionism (Hart 1983, 127–47). But there is some reason to think that Bentham did not regard "the moral sanction" merely as a natural fact, but as a complex moral fact about occasions and grounds for disapproval and criticism (Postema 1989a, 226–30, 395–8). If this interpretation is correct, then Bentham's considered view would not be vulnerable to Hart's charge of empirical reductionism, and in fact would approach in some respects Hart's own view (see sec. 7.3.3, below).

it is possible for people to be under obligations, but unlikely to suffer any evil if they violate them. The idea of systematically getting away with violating one's obligations is entirely intelligible.

However, in Hart's view, these objections point to a more "fundamental objection":

> the predictive interpretation obscures the fact that, where rules exist, deviations from them are not merely grounds for a prediction that hostile reactions will follow or that a court will apply sanctions to those who break them, but are also a reason or justification for such reaction[s] and for applying the sanctions. (Hart 1994, 84)

To say that someone is subject to an obligation is fundamentally different from saying that the person is likely to suffer some consequence, although the latter may stand behind the former in some way. The concept of obligation is a *normative* concept; the concept of *prediction* is an empirical one. They are not only different concepts; they are fundamentally different *kinds* of concepts, operating in different conceptual domains. The latter operates in the domain of empirical facts, states of affairs in the natural world, and certain modal (probability) statements about future states of such affairs. The former operates in the domain of reasons used to guide choices and actions, offered in justification for actions taken or to be taken, and grounds for claims, demands, admissions, criticism, and the like (Hart 1994, 82, 90; 1982, 134–5; 1983, 93–4).[18]

The mode in which Hart typically expresses this criticism is linguistic. He put in view different kinds of utterances or statements that are used for fundamentally different expressive or linguistic purposes—one to describe something about the empirical world including the behavior and psychology of people in it or predict something about some future state of that world, the other to guide, direct, evaluate, justify, or criticize some form of human conduct (Hart 1982, 144)—but, in his view, these linguistic utterances are merely vehicles for expressing distinctive *perspectives* on the world, the "predictive" (and descriptive) point of view and the "normative" point of view (Hart 1983, 93–4)—or, as he puts it in *Concept*, the "external" and "internal" points of view. Many legal theorists have sought to reduce statements made from the normative perspective to ordinary historical or factual propositions which are felt to be less problematic, but the result of all such efforts at reduction fail (Hart 1982, 145), he argued, because ultimately they define this critically important human perspective on life under law out of existence (Hart 1994, 91).

Hart argued that Ross's analysis of statements of legal validity fall victim to this same objection.[19] For Ross, Hart reported, talk of valid rules is meaningless unless it can be subjected to the same logic as that of the empirical scienc-

[18] For a careful discussion of the origins and soundness of Hart's argument for his "anti-reductionist principles," see Baker 1977, 26–43.

[19] However, Hart acknowledged the strong arguments *against* predictionism offered by another Sandinavian realist, Karl Olivecrona (Hart 1994, 10, 278).

es (Ross 1958, 40). Thus, Ross analyzed statements about the validity of laws in terms of statements about the psychology of a society's judges and other officials, about the ideas they are likely to entertain, corresponding feelings they are likely to experience, and predictions of behavior we can expect to issue from these mental events. However, Hart argued, the statement "X is a valid rule of English law" expresses nothing (directly) about any future state of affairs, but rather expresses a recognition that the rule in question satisfies a certain standard, in virtue of which it counts as a member of the English legal system. The judgment is normative, not empirical; it applies a rule rather than makes a prediction. Moreover, even when such statements are used to express predictions about what judges might do, those predictions are based on the view that the judges understand and use the statement of validity in a non-predictive, normative sense. Again, the distinctive normative or internal perspective, within which behavior is held to certain standards and subjected to criticism when and *on the ground that* it failed to meet the demands of those standards, is ignored or defined away. The loss, in Hart's view, is irremediable. Any account of the nature of law that fails to take seriously and account for this normative dimension of law is fatally flawed.

7.2.3. Transcendental Inflation of Normativity

This resolute rejection of empirical reductionism, of course, leaves the legal philosopher, if not the legal practitioner, with a deep question: How, then, are we to explain the authority, the normative character and binding force, of law? "How are the creation, imposition, modification, and extinction of obligations and other operations on legal entities such as rights possible?" Hart asked. "How can such things be done?" (Hart 1958, 86). Like Kelsen, Hart (1983, 18) took explaining the normative force of law to be "a central task of legal philosophy." Hart and Kelsen also shared a view of the problem that generates this task, but they offered very different solutions to the problem.

The problem arises almost immediately if we reflect on the kind of claims law makes for itself (Green 1999, 35–6; Shapiro 2001b, 149–53). Actions of legal officials claim authority, and their authorization is thought to rest on certain legal rules. These rules, in turn, exist and work their normative magic only if they are created in accord with or otherwise arise from other legal rules. Since this "authorization" process cannot recede to infinity, there must be some point at which the process comes to a satisfying end at a source from which its normative authority flows. What could this be? Kelsen's version of this problem is instructive (Kelsen 1967, esp. chap. 5).[20] The normativity of law is, in Kelsen's view, a matter of "dynamic" validity and hierarchical authorization. That is, norms of law are valid not in virtue of their content but in virtue of

[20] For a full discussion of Kelsen's jurisprudence, see Volume 12 of this Treatise.

their creation in accord with higher norms, and in terms of yet higher norms, and so on. The rational coherence of the system of norms requires that this process not proceed to infinity, but the ways to bring this process to an end offered in the history of jurisprudence were all unacceptable to Kelsen. Earlier positivist theories that sought to ground the process in social facts of commands and habits of obedience, or any other empirical facts, fail because they reduce the normative to the empirical, or they violate Hume's law that prohibits deriving an 'ought' from an 'is'. Equally unsatisfactory, in Kelsen's view, is the proposal of natural-law theorists, who ground law's normativity in morality understood either in terms of self-validating rational norms or in terms of self-authorizing divine commands. This strategy must also be rejected because it, too, reduces law to something else, in this case, morality. It also faces the problem, in Kelsen's view, that law's normative claims lose their cognitive content (since he believed that moral and metaphysical statements lack cognitive content and are strictly speaking meaningless).

Kelsen's solution to the problem of law's normativity was to maintain that the legal system as a whole is founded ultimately on a basic norm requiring officials to behave as the first or highest constitution prescribes (Kelsen 1967, 202). This is not a further norm of the legal system (or any other normative system), so it is not in need of any authorization, but neither is it a social norm or other social fact. It is, rather, a necessary *presupposition* of those who "interpret the *subjective* meaning of the acts of human beings by which the norms of an effective coercive order are created, as their *objective* meaning" (Kelsen 1967, 202). The basic norm is, in Kelsen's view, the normative postulate that makes it *possible* to think of the acts and rules that legal officials, practitioners, and scholars take as valid as objectively so without endorsing it as morally good or just. It is the "transcendental-logical presupposition" of an effective legal order.

Kelsen's proposed solution was unsatisfactory in Hart's eyes.[21] Either it begged the very question it sought to answer, or it was superfluous and inflationary. It seemed to beg the question because, rather than offer an *account* of law's normativity, identifying something from which that normativity could be seen to flow, it merely *assumes* it. And, unlike the fundamental Kantian categories of thought, treating claims of a legal system (their "subjective meaning") as objective does not seem to be something on which our framework of thought depends on. Of course, the truth of law's claims to normative authority over us might depend on it, but it is surely possible, Hart thought, that those claims could be false and in any case we do not advance our understanding of law or its normativity simply to *assume* they are true. On the other hand,

[21] Raz (1981) offers an illuminating discussion of the differences between Kelsen's and Hart's views on law's normativity. In a valuable recent discussion, Delacroix (2004) offers a different account of their respective accounts and argues that Raz's reading of Kelsen is better seen as a product of his own theory of practical reasons and norms.

> if a constitution specifying the various sources of law is a living reality in the sense that the courts and officials of the system actually identify the law in accordance with the criteria it provides, then the constitution is accepted and actually exists. It seems a needless reduplication to suggest that there is a further rule to the effect that the constitution (or those who "laid it down") are to be obeyed. (Hart 1994, 293)

There is no need for a *transcendental presupposition*, Hart insisted, when we can account fully for the genuine normativity of law in terms of the actual *social practice* of courts and officials of the system, that of *recognizing as authoritative* the constitution and all that it authorizes. Hart rejected inflation of the normative foundation of law in terms of reason, divine command, morality, or even a transcendental postulate of legal thought. Temperamentally opposed to the Kantian direction of Kelsen's thought, Hart countered in a distinctively Humean vein. Social norms or conventions, rooted in ordinary ongoing practices of human beings and the attitudes that invest them with meaning, are the source of law's normativity, according to Hart. Social practices are not necessarily self-authorizing, but they are capable of generating on their own genuine social norms that bear genuine normative force apart from any moral merit they may earn. This takes the issue of grounding of law's claim to normative authority out of the transcendental clouds and locates it squarely in empirically accessible human social life, *without*, however, reducing it to empirical categories of behavior, feeling, or belief.

In Kelsen's view, of course, Hart's Humean strategy was doomed to failure precisely because it ran afoul of Hume's Law. As Kelsen saw it, there simply was no place to stand on the empiricist side of the line separating norms from empirical facts that avoids reduction of the normative to the merely empirical. This is the argument Kelsen pressed in his face-to-face debate with Hart in Berkeley, California in November, 1961, at the end of which, as Hart tells the story, Kelsen declared "in stentorian terms, 'Norm was Norm' and not something else." This so startled Hart that he fell over backwards in his chair (Hart 1983, 287). This incident illustrates clearly the gulf between Hart and Kelsen (and perhaps a good deal of Continental Europe's jurisprudence), despite the great deal of similarity in their views. Hart was convinced that it was possible to give a fully satisfying, nonreductive account of the genuine normative character of law while still maintaining the basic commitment of his positivist forebears to view law as fundamentally a matter of social fact. The cornerstone of this account was his analysis of social rules or conventions.

7.3. Social Rules

Legal rules are valid, and hence have proper normative status and force, according to Hart, in virtue of their membership in a legal system, as determined by criteria rooted ultimately in the system's rule of recognition. The rule of recognition is neither itself a rule of law nor a transcendental presupposition;

rather, it is a social rule accepted and practiced by judges and other legal officials. Hart's account of the normativity of law, and the clue to Hart's answer to the three questions with which he opened *Concept*, lies in his account of nature and normative character of social rules.

7.3.1. Hart's Hermeneutics

For this account he returned to the starting point of empirically inclined positivists: the ordinary activities and practices of officials and citizens. The root of the positivists' failure adequately to understand these practices, Hart argued, was fundamentally methodological: they viewed such practices entirely from the outside, blind to the fact that social rules have an ineliminable "internal aspect," which participants in the practices typically regard from an "internal point of view" (Hart 1994, 56–7, 88–90). The conduct of participants tends to display certain observable regularities, but what is essential to the practice is the fact that participants look on the behavior as required, as setting a standard for them to follow; they take a "critical reflective attitude" to those patterns of behavior (ibid., 57). No story of the normative significance of the practices is possible without giving a leading role to this internal point of view (ibid., 89–91).

Earlier positivists relied exclusively on methodology and concepts drawn from the natural sciences; however, Hart declared boldly, we need not lie "prostrate before the methods of the [natural] sciences" (1983, 163), but rather, drawing on his humanistic training, he insisted on an alternative method: interpretation. Reductionist theories, he argued, failed

> to mark and explain the crucial distinction that there is between mere regularities of human behaviour and rule-governed behaviour. It thus jettison[ed] something vital to the understanding not only of law but of any form of normative social structure. For the understanding of this the methodology of the empirical sciences is useless; what is needed is a 'hermeneutic' method which involves portraying rule-governed behaviour as it appears to its participants, who see it as conforming or failing to conform to certain shared standards. (Hart 1983, 13)

Practiced social rules, then, have an "outside" and an "inside." Participants regard the "inside" of the rules; they take "the internal point of view" (IPOV) with respect to the rules. Observers view the same rules, but from the outside;[22] they take an "external point of view" (EPOV) (Hart 1994, 88–90). However, it emerges from Hart's discussion that there are at least two different "external" perspectives on social rules. The "extreme" EPOV considers only behavioral

[22] It is doubtful that (extreme) external observers view "the same rule," strictly speaking, for the internal aspect is not merely added to a self-existent pattern of behavior. However, Hart was not sufficiently clear about this and this lack of clarity opened him to attacks from critics (especially Dworkin 1978, chap. 3) which could have been avoided at least in part. (See below chap. 9, sec. 9.2.2.)

regularities, without acknowledging the (normative) significance of the behavior for participants. In contrast, observers deploying Hart's hermeneutic method recognize and seek to give full play to the internal aspect of rules viewed from participants' perspective; they "refer to the internal aspect of rules seen from their internal point of view" (ibid., 90). Because this observer perspective acknowledges but does not take up the IPOV (ibid., 89, 255, 291), Hart regards it as a "moderate" EPOV.

It would seem that the EPOV, whether moderate or extreme, is an *observer's* point of view, the perspective of someone with *theoretical* concerns—sometimes Hart speaks of this as the point of view of the "sociologist" (ibid., 255)—whereas, the IPOV is that of one who regards the rule with *practical* concerns in mind, as providing at least partial answers to the question what is *to be done*? Hart sometimes seemed to suggest as much, but this way of distinguishing the perspectives does not capture accurately what Hart had in mind. For he contrasted the IPOV not only with the view of a practically disengaged observer, but also with the point of view of Holmes's "bad man,"[23] which Hart also characterizes as "external." Moreover, it is not just the "bad man" or "malefactor" (Hart 1983, 93; 1994, 201) who, in Hart's view, take an intensely practical, but nevertheless "external" perspective on the rules of the practice, but also "victims" of oppressive legal regimes who have no reasons voluntarily to obey the law (Hart 1994, 201–2; see 7.7.3, below), as well as those who, due to a variety of causes are distanced or alienated from the practice, but still required by demands of daily life to interact with people who actively participate in it (Hart 1994, 90–1; see sec. 7.4.2, below). Like Holmes's mythical character, agents of all these kinds may take an intense practical interest in the law, but they do not regard it as providing them standards by which to guide or evaluate their behavior, but only as something likely to stand in the way of the pursuit of their projects. They are, we might say, "alienated participants," viewing the law within the frame of their practical reasoning, and in that sense "from the inside," but still external to its operation as a "shared standard." We might call this the "alienated EPOV."

In his criticism of a Holmesian theory of law, Hart (1994, 90) assumed that this perspective could be assimilated to the extreme external perspective which focuses on behavior alone, but this caused confusion about Hart's understanding of IPOV. It was a mistake because this external, but practical, point of view might well take seriously the role that rules of the practice play in the lives and practical reasoning of others (whose actions represent obstacles to the realization of one's aims), and base predictions about their behavior on them. What distinguishes the alienated EPOV from the extreme and moderate ones is that it is practically, rather than merely theoretically, oriented; however, it is distin-

[23] See Hart 1983, 93; 1994, 39, 286, 290. After publication of "The Path of Law," the "bad man" became a *topos* of jurisprudence, separated to varying degrees from Holmes's own use of this heuristic device. For Holmes's notion see chap. 2, sec. 2.3.3, above.

guished from the IPOV in that alienated agents do not take the rules of the practice themselves (as opposed to the fact of other people's following them) as guides for their own decisions and actions.

Hart's lack of clarity concerning the various external points of view led to debates among readers and critics over how to understand Hart's crucial notion of the IPOV and Hart's hermeneutic methodology in general (Perry 1995, 2000, 2007; Shapiro 2000, 2007). To resolve this dispute, Richard Holton (1998) suggested that we distinguish between Hart's *methodological* (hermeneutic) *thesis*, which requires that the "internal aspect" of rules be given a leading role in any account of the normative significance of social rules, and the *substantive thesis* he adopted regarding the nature of the internal point of view on this aspect. The former holds that at the center of the account we must put the perspective of those who act within or at least in the shadow of the practice and in whose practical reasoning its rules figure. The latter claims that the relevant "insiders" are those who *internalize* the rules. Hart's substantive thesis, on this reading, is that those who take the internal point of view on the rules accept them and use them as a guide for their action and evaluate their own conduct and that of others by this common standard. And the observer who adopts the moderate EPOV practices a specific form of the hermeneutic methodology that not only records the regularities of behavior of a group including their tendency to respond with criticism to deviations from the regularities, but also records and gives interpretation of the fact that a significant number of members of the group accept the rules as standards and apply them to their own conduct.

This distinction is useful to capture the dialectic of the debate between some of Hart's commentators and critics (notably Perry and Shapiro mentioned above), but it is misleading, I suspect, because Hart thought that his hermeneutic method itself requires that we take the *insiders'* perspective on the internal aspect of rules. He did not recognize any two-level process, because those who take a practical, but alienated, view of the rules, strictly speaking, are not insiders to—not participants in—the practice. Of course, to consider their approach to the rules is to consider how the rules figure in people's practical reasoning, but it is clear from his discussion that Hart thought that for those who are alienated the rules do not figure in their reasoning of *as rules*, i.e., as standards or guides to action, and so as reasons themselves for the agent evaluating her own conduct and that of others. The practiced rules viewed from the alienated EPOV enter practical reasoning in much the same way that the fact of a fast-approaching train figures in the practical reasoning of someone standing on the tracks. Or if the rules themselves play a role in the alienated agent's practical reasoning, they do so just insofar as they figure in the practical reasoning *of others*; they do not function as standards, guides, or grounds for evaluation of the agent's conduct in their own right. We still need an account of what the insider's or participant's point of view involves, according to Hart (see Zipursky 2007; sec. 7.3.2, below), but it is not enough to say that it is the practical point of view. The practical

perspective is not yet the "normative point of view" (Hart 1983, 93). Moreover, Hart had good reason to privilege the insider's perspective, for any version of the alienated EPOV that takes the rules of the practice seriously (as opposed to considering merely observed behavioral regularities) is parasitic on the operation of rules from the participant-insider's point of view. Predictions of their behavior must be made on the basis of the way such rules figure in *their* behavior, which predictions play a key role in the practical reasoning of the alienated party.

Initially, Hart held that corresponding to the internal and external points of view are distinctive kinds of *statements*: the views expressed from the IPOV use the distinctively normative vocabulary of 'ought', 'obligation', 'right', and the like, whereas EPOV adopts the indirect mode, *reporting that* people take their behavior to be governed by common standards, and the like. Later, Hart came to see that this was not quite correct. For he noted that it is common for theorists to capture the content of laws, for example, using normative vocabulary in *oratio recta*, while nevertheless not endorsing the normative claims they make or expressing commitment to the rules or norms in question.[24] To account for this, Hart borrowed a distinction introduced by Joseph Raz between "committed" and "detached" normative judgments (Hart 1982, 145–6, 153–5, 1983, 14–5; Raz 1979, 153–9; 1990b, 170–7). "Detached" judgments use the vocabulary of "committed" judgments and are made from IPOV on the rules in view, but they do not themselves express the acceptance or endorsement of the rules of those who make them. For example, the atheist who has studied Catholic practical theology may advise a recent convert about her duties to carry her pregnancy to term, and an anarchist lawyer may advise her client about his tax liabilities.[25] Thus, Hart recognized, with respect to social

[24] This is not the only problem with this characterization of the theorist's task. The philosopher's hermeneutic task is not merely to *report* the relevant attitudes, but to articulate, structure, analyze, and critically assess the concepts and broad structuring ideas that these attitudes express (see Raz 1995a, 237).

[25] There are two ways to think about this proposal. On one understanding, normative judgments have the same content in both committed and detached versions, but the latter are made "off-line," as it were, and so do not carry with them the usual expressive commitments. Hart's noncognitivist or expressivist metaethical views incline him to this understanding. An alternative understanding takes the detached judgment as a judgment of "relativized" rationality or normativity, that is, as a judgment of what one 'ought' to do relative to certain rules or norms which in the context are bracketed or treated hypothetically. They might be expressed as follows: "On the assumption (which we will not pursue here) that N is sound and valid, you ought to do A." (John Broome (2000) seeks to capture this phenomenon with his notion of "normative requirements," which do not permit detachment of the "ought" from the hypothetical normative proposition.) Of course, from this nothing follows about what one ought to do. Hart, following Raz, had some hope that this notion of detached normative judgments might bridge the gap between him and Kelsen (Hart 1983, 15; Raz 1981, 452–3). Kelsen, surely, was not inclined to accept the first interpretation of the distinction and there is reason for him to resist the latter interpretation, because there is no need to understand this "hypothetical" condition in transcendental terms. There is nothing assertoric, let alone transcendental, about someone who

rules practiced in a community, one IPOV and a variety of different EPOVs, some strictly theoretical, others practical. Because it is possible to use normative language in a detached way, it is not possible to identify the point of view just from the language used to express judgments from it.

Having regimented Hart's sometimes wayward terminology, we are left with a number of questions. One is how are we to understand this IPOV? A prior question, however, is why exactly must we adopt the hermeneutic method? It is fair to say that Hart's understanding of the jurisprudential enterprise as fundamentally interpretive has dominated Anglo-American legal philosophy almost without challenge since the writing of *Concept*.[26] (Dworkin's "interpretivist" jurisprudence (see chap. 9, sec. 9.3, below) would be unthinkable in the absence of Hart's "hermeneutic turn.") Yet, it is not the methodology that jurisprudence used throughout its history. This is enough to prompt a reasonable demand for argument in its behalf.

We might start with the thought that law is a *social phenomenon*, a *social practice*, so the methodology chosen must be appropriate to its subject. The methodology of the natural sciences, we have seen, forces us to "miss out a whole dimension of the social life of those whom [the observer] is watching" (Hart 1994, 90). That gives us reason to look elsewhere, but it does not yet force us into the hermeneutic game. To be sure, we need to analyze key normative concepts and locate law in that normative domain, but why capitulate to the parties who internalize the rules? Why think the "internal aspect" of rules or law must be captured by taking a participant's perspective on their operations? One might argue that to give proper recognition to the normative perspective on rules and law, we must locate the relevant concepts in the domain of normative concepts generally, and work out the lines of interaction and interdependence in that domain (Postema 1998b, 342). Hart rejected this proposal for two reasons. First, it seems to share with Kelsen the assumption that the normative domain is radically separate from the empirical ("Norm ist Norm!") and Hart refuses to press the distinction between 'ought' and 'is' this far. To understand the distinctive contribution of the normative to our ordinary social lives we need only reflect on, and adequately articulate, human attitudes and modes of practical reasoning deployed as they participate in social practices (MacCormick 1981, 25). Actual practice must anchor reflection on the internal aspect of rules. This is central to Hart's jurisprudential approach. Moreover, any attempt to deal directly with practical normative concepts invites inflation of the normative claims of law and confuses the project of providing "a morally neutral descriptive jurisprudence" with the very different project of seeking to justify law on moral grounds (Hart 1994, 239–44).

finds card games ultimately pointless saying to a friend playing bridge, "You must follow suit." So, this notion may not close the gap between Hart and Kelsen.

[26] Bix 1999; Raz 2001b, 1–2; for a vigorous challenge see Moore, 2000, chaps. 9–11.

These largely negative reasons nudge us towards the hermeneutic option by cutting the ground under some alternatives, but a positive consideration may also have been at work. One might submit that, to put it crudely, law and social rules in general are what they are largely in virtue of what people, when they participate in the practice, take them to be. Hart (1983, 93) suggested this thought when he wrote that attention to features of law highlighted by the normative perspective "is essential for understanding the ways in which law is conceived and operative in social life". Joseph Raz put this point more precisely when he wrote,

> The concept of law is part of our culture and our cultural traditions. It plays a role in the way in which ordinary people as well as the legal profession understand their own and other people's actions. It is part of the way they 'conceptualize' social reality [...]. Various, sometimes conflicting, ideas are displayed in [these traditions]. It falls to legal theory to pick on those which are central and significant to the way the concept plays its role in people's understanding of society, to elaborate and explain them [...]. [U]nlike concepts like 'mass' or 'electron', 'the law' is a concept used by people to understand themselves [...]. It is a major task of legal theory to advance our understanding of society by helping us understand how people understand themselves. (Raz 1995a, 237)

John Finnis also captured Hart's point, with a slightly different emphasis. The object of a social science, including jurisprudence,

> is constituted by human actions, practices, habits, dispositions and by human discourse [...]. [They] can be fully understood only by understanding their point, that is to say their objective, their value, their significance or importance, as conceived by the people who performed them, engaged in them, etc. (Finnis 1980, 3)

These formulations of the rationale for something like Hart's hermeneutic methodology have proved influential in the subsequent extensive debate over the nature and merits of Hart's methodological revolution, but they do not settle exactly what essentially characterizes the IPOV in Hart's view. We must turn to this question now.

7.3.2. The Internal Point of View

Essential to our understanding of the existence and normativity of legal and social rules, Hart argued, is recognition of their "internal aspect" which is manifest in activities of people who take the internal point of view with respect to them. Hart's analysis proceeded in three stages: first he gave an account of social rules in general, then of social obligation, and, finally, on this basis he offered an account of the normativity of legal rules and of legal obligation. We begin with his account of social rules, keeping in mind that he was not interested in giving an account of normativity in general; his focus was exclusively on the normative dimensions of rules practiced in and by social groups.

7.3.2.1. Accept and Use as Guides

Hart's discussion of the IPOV was seminal to his thought and exerted an extraordinary influence on analytic legal philosophy to the end of the century, but, viewed in hind-sight, one must concede that his discussion in *Concept*, the core of which is found in two short passages (Hart 1994, 54–7, 88–91), is imprecise, ambiguous, and in some respects misleading. This has occasioned competing interpretations. We begin by considering Hart's own words and then look at two contrasting interpretations of them.

Recall that Hart introduced the IPOV in contrast with social habits, which simply are regularities of behavior done *en mass* in a group. Social rules are like habits in one respect: there is an observable convergence of behavior on the part of (most) members of the group who practice it; however, unlike habits, this behavior does not exhaust the phenomenon, for social rules have an "internal aspect." One who takes this IPOV on this internal aspect is "concerned with the rules [...] as a member of the group which accepts and uses them as guides to conduct" (ibid., 89). He engages in the behavior as a personal matter but as a member of the group, using it as a guide for action which governs all members of the group. He regards deviations as *deviance* and may treat it as a reason for his criticism of the behavior. This displays "a distinctive normative attitude" (ibid., 255) on his part, a "reflective critical attitude" (ibid., 57), which expressed in his use of distinctive normative language of "ought," "must," "should" and the like (ibid., 85).

It is tempting to think that Hart has isolated three distinct components of genuine social rules: convergent behavior, a distinctive attitude, and the occurrence of these together in the lives of most members of the group, as if we could add the distinctive attitude to convergent behavior to get a *rule*, which, if found in many other people, would be a *social* rule.[27] However, this distorts Hart's proposal. Despite the imprecision of his language, it is clear that he saw these elements not as discrete components of social rules, but as integrally related aspects of them. First, the fact that behavior is convergent in the group is not accidental or something added to the IPOV; it is convergent in part because those who take the IPOV on the rules see themselves *as members of the group*. The behavior is not merely convergent, as it might be if each member followed a rule "for his own part only," or if it was the result of mere conformism. Moreover, people regard the rule not merely as a guide, but as a guide for members of the group in general; it is seen as a common public standard (ibid., 116).

Thus, the social dimension is internal to the distinctive normative attitude; indeed, it is not possible to grasp the behavior in the right way apart from its

[27] This "additive" view is a common understanding of custom in international law, where *opinio juris* (attitude, belief, commitment, or the like) is added to *usus* (convergent behavior) to yield a binding rule of customary law. For discussion and criticism of this analysis of custom in international law see Postema 2007b.

relation to the critical reflective attitude. The relevant phenomenon in view is not a set of discrete, externally observable bits acts of behavior, but rather a *pattern* of convergent behavior. The facts of behavior alone could not even begin to serve as the rule, which is the object of the IPOV. A pattern is a rule in the limited but very important sense that it applies to an indefinite number of particulars and is not limited to the bits of behavior already observed. However, for any given stretch of observable behavior there is an indefinite number of possible patterns. For there to be a rule to be followed, one such pattern must be selected, and, of course, for this the observer's proposals are at best parasitic on the IPOV. Moreover, for the social rule to function as a standard in the group there must be not only be convergence of behavior into a pattern but also convergence among members of the group on that pattern. The pattern of external behavior corresponding to the rule is not available for inspection without an understanding of the pattern (or convergence of patterns) viewed from the IPOV.

Thus, no merely additive conception of Hart's three aspects can do the work he assigned to them, but it also appears that the internal aspect, and especially the IPOV on it, plays a leading role in accounting for the rule-like (i.e., normative) character of social rules on Hart's account. This "distinctive normative attitude" (Hart 1982, 256) is the attitude of acceptance and use of the rule as a standard and guide for action. In his "Postscript," Hart wrote that his view

> treats the social rules of a group as constituted by a form of social practice comprising both patterns of conduct regularly followed by most members of the group and a distinctive normative attitude to such patterns of conduct which I have called 'acceptance'. This consists in the standing disposition of individuals to take such patterns of conduct both as guides to their own future conduct and as standards of criticism which may legitimate demands and various forms of pressure for conformity. (Hart 1994, 255)

Acceptance, however, is not a brute fact about an individual; one can adopt the distinctive normative attitude *for reasons*, but Hart hastened to add that what is important to the IPOV is the normative attitude, not the reasons for which it is adopted; in particular, it is not necessary that one adopt the attitude for distinctively *moral* reasons. All reasons, in Hart's view, are eligible, including reasons of long-term self-interest (Hart 1994, 203, 257; 1982, 155–60, 262–8). This is true with one qualification: the rules must be accepted *as* common public standards and so regarded as binding in part *because* (or perhaps on the condition that) they are generally practiced by others (Hart 1994, 116, 255).

Hart's characterization of the IPOV has generated a great deal of critical discussion and competing interpretations. Two questions especially have attracted attention: (1) how to understand the notion of "acceptance" or the "distinctive normative attitude" at the core of the notion of the IPOV and (2) whether the social rules Hart sought here to analyze are best conceived as conventional rules. We will consider each of these questions in turn.

7.3.2.2. Interior vs. Insider

On one understanding of Hart's notion of the IPOV, it is the *interior* point of view, internal to the mind or psychology of individual members of a group practicing a social rule. Different constituent elements have been suggested: At one end of a spectrum it is characterized rather broadly as "the practical attitude of rule acceptance" (Shapiro 2007, 1157), while at the other it is understood to be "the belief that a certain type of action must be performed" (Pattaro, in Volume 1 of this Treatise, 134–5, 137–9). MacCormick's (1981, 33) proposal—a "wish or preference that the act, or abstention from acting be done"—falls somewhere between these (as does Ross's proposal of "feelings of compulsion"). All candidates along this spectrum have in common that they are mental states of some kind, or possibly dispositions to have and act on such mental states. Some link this attitude of acceptance directly with endorsement of the rule, but add quickly that endorsement need not involve the conviction that the rule has any particular moral merit (Shapiro 2007, 1159, 1161–2).

On this reading, this interior attitude *manifests* itself in conforming behavior, critical assessments of others, etc. (Shapiro 2007, 1162). Thus, those who make *committed* "internal statements" are thought to express (make external or evident) the relevant mental state (the interior state); whereas those using the same statements in a detached way do not express such convictions, because they do not exist. This reading, it is argued, fits with Hart's empiricist metaphysical views and enabled him to give a strictly naturalistic semantics for legal statements, without succumbing to the austere metaphysics of the classical positivists and Scandinavians (Shapiro 2007, 1168–9).

The alternative line of interpretation understands Hartian social rules as social practices (i.e., as networks of interrelated activities with normative significance engaged in by a social group) and understands Hart's "distinctive normative attitude" as internal to the social practice, rather than to any person.[28] The IPOV is the point of view (or rather the characteristic activities and competencies) of *participants* (insiders) in the practice. It is *inside* the social practice in two related respects, both of which are thought to be essential to the IPOV. First, the practice is located in the domain of practical reasoning, of reasons for action; it concerns giving, taking, and deliberating with reasons. Second, this domain is shaped by (the characteristic activities and competencies of) the social practice. As we saw in section 2 above, not all who live in the shadow of a social practice and interact with participants in it are themselves participants; for those who take the IPOV, the "rules *function as rules* in [their] lives" (1994, 90, emphasis added). Participants do not regard the practice (or rather those who participate in the practice) as mere natural facts

[28] This interpretation is suggested, in part, in Perry 2000 and Postema 1998b, but is set out clearly in Zipursky 2006.

(like the train approaching at a certain speed) or as obstacles to be avoided or manipulated; that is, they do not regard the rules as *circumstances in which* they must decide what to do, but rather something *calling for* them to act in a certain way. And this understanding comes from participating with others in the practice; the practice shapes their understanding of the practical force of the rules.

On this view, emphasis is placed on activities rather than attitudes, on competencies rather than convictions. These activities are not thought to give expression to something else (in the mind of the participant), but rather to constitute the point of view. To take the IPOV is to engage competently in those activities that constitute the group's practice of the rule. It is to be able to see how to follow the rule, how to apply it to circumstances even if they are not routine and do so not only to one's own satisfaction but to the satisfaction of others whom one recognizes as competent judges of one's performance; and thus also to acknowledge the legitimacy (if not necessarily to concede the accuracy) of criticisms of that performance. To take the IPOV is to grasp the practical force of the rule, to understand how it structures questions about what to do (Zipursky 2007, 1241). Note that these activities are not merely matters of "external" behavior, because their normative coloring (correctness of application, legitimacy of criticism, standing to make criticism, role in structuring practical reasoning, etc.) is essential to the nature of the activities. Moreover, these activities are not merely personal, but rather social; the competencies are social competencies. The IPOV involves a competency trained to grasp the social or conventional significance of the rules in view (ibid.). Thus, when the moderate EPOV takes seriously the IPOV on certain social rules, it does not report the beliefs, feelings, or attitudes of specific individuals (or large aggregates of them), but rather it gives an account of the social or conventional significance of the rule which it reconstructs ("interprets") from the competent activities of participants.

On this view, competent participation in the practice of the rule is what is distinctive of the IPOV. While it may be necessary that this participation be voluntary (as opposed to coerced), it is not necessary that participants actually endorse the practice, at least in the sense that they regard it favorably or judge it to be good or reasonable.[29] Likewise, although they may decide to participate for some reason, it is not necessary for their competent participation that they do so for any particular (including moral) reason. The insider understanding of IPOV is neutral regarding the reasons for which an individual might choose to participate in the practice of the rule.

[29] It is an interesting question whether, regardless of their actual attitudes, they *are committed* to such endorsement, in the sense that they can be held responsible for participation and others can legitimately take participation *as* endorsement. Hart, it is clear, did not hold this view. The interpretation offered here stands neutral on this further question.

The above represent two different understandings of Hart's core notion of the IPOV, neither of which is decisively favored by Hart's language. The "interior" reading is not an unnatural understanding of Hart's use of "attitude," "disposition," and related terms, but there is reason to think that this reading does not fit Hart's discussion of the IPOV and his use of it throughout *Concept* as well as the "insider" reading does. I will mention just a few considerations that favor the insider reading.[30]

First, Hart vigorously opposed what he took to be the psychological reductionism of Ross and other Scandinavian realists (see sec. 7.2.2.2, above). The specific form of this reductionism he opposed was the view that valid and binding rules are to be equated with certain feelings of compulsion. This, of course, is only one proposal on the spectrum of candidate mental states and his rejection of it does not thereby imply the rejection of all such proposals. However, the arguments he leveled against Ross's proposal have equal force again the other psychologistic proposals. Likewise, although it is clear that Hart's philosophical sympathies lay with empiricism, and he was constitutionally averse to ostentatious metaphysics, it is anachronistic to say that his concern was to find an account of normativity that fits a naturalistic semantics. *Hermeneutics* was his focus, and a non-reductive account of normativity which gives full credit to our ordinary understanding of it was his aim, not metaphysics or semantics. What is more, the process of constructing the internal aspect of rules from the IPOV on the interior view is at best weakly hermeneutic: it focuses on what specific persons mean (i.e., endorse, belief, wish, feel), rather than what the rules viewed from the inside *mean for* its participants.

Second, Hart's language in his discussion of the IPOV clearly highlights activities rather than (interior) attitudes. The IPOV, he says, is that of *accepting and using* a rule as a guide (Hart 1994, 255), of *voluntarily cooperating in the maintenance of the rules* (ibid., 91). Those who take the IPOV *use* the rules in their deliberating, making claims and demands against each other, in evaluating their conduct or the conduct of others, criticizing others, vindicating or justifying themselves to them (ibid., 90). These activities also have a fundamental social dimension, but the interior approach seriously risks effacing this social dimension. The relevant mental states on the interior reading are states of individuals; there can be a social dimension only if there is a concatenation of such individual mental states or dispositions. Thus, social dimension appears at best accidental and contingent; social rules are aggregates of what are essentially individual policies. This distorts Hart's initial insight.

Third, Hart understood the IPOV as fundamentally involving practical reasoning, of the giving, taking, and assessing of reasons for action, but mental states of whatever kind are not the sort of thing that *can* figure in practical rea-

[30] More general philosophical considerations may favor one or the other as an approach to understanding social rules, but I focus here only on their merits as readings of Hart's doctrine.

soning. *Facts about* one's own beliefs or the beliefs of others can do so, but not in the way Hart quite naturally envisioned. This role of rules *as reasons* figures critically in Hart's discussion of the minimum content of natural law (ibid., 193–202) and the point of view of victims of legal regimes that fail to extend the most basic protections of life, body, property, and word (see sec. 7.7.3, below). Hart's attempt to capture this victim point of is entirely in terms of *reasons* they might have for voluntarily complying, not in terms of their mental states.

These considerations taken together favor the insider rather than interior reading of Hart's IPOV, but they may not be conclusive, and it must be conceded that Hart did not explicitly and unequivocally opt for one approach or the other.

7.3.2.3. Social Rules and Conventions

It has also been a matter of debate among readers and critics of Hart's jurisprudence whether social rules on his analysis are conventions. In his "Postscript," Hart (1994, 256) made clear that, at that time, he regarded social rules, and thus the rule of recognition, as conventions, but some believe this was a revision and in some respects a reversal of his previous position in the original part of *Concept*.[31] To settle this issue we must first specify what is meant by "convention" in this context.

At the core of the concept of convention for these purposes is the thought that the regular general compliance of people in society with a social rule is crucial not only to its existence as a *social* rule, but to the reason for action that the rule provides anyone falling within its scope. We must distinguish general observance of conventions from conformism in a group. Conformists seek simply to do what is generally done as a personal policy. A conformist does not, strictly speaking, take the behavior of others as evidence of a rule which she, like the others, seeks to comply with, but rather merely regards the behavior as, for her, what is to be done. She takes the actual fact of (what *she* takes to be) general convergence of behavior in the group as her sole reason for acting. Note that if the group actually practices a rule, it is not that rule but merely the fact of the (perceived) convergence of behavior that supplies the conformist with her reason for acting. (For this reason, conformists are often not very good group rule-followers; they do not grasp the group's rule, but only observed patterns of behavior.) On Hart's view of social rules, conformists might figure among those whose behavior conforms to the rule, but he would not understand conventional social rules as simply the product of conformism.

Moreover, the conventional dimension of social rules in Hart's view does not involve the thought that regular compliance with the rule by others is the

[31] See, for example, Pattaro, this *Treatise*, vol. 1, chap. 8, sec. 3; Dickson 2007.

sole reason for one's own compliance. In fact, this thought hardly makes sense as a description of a social rule, especially on the "insider" understanding of the IPOV. Hart's view is that the social rules he had in mind are those for which the behavior of others is *part* of one's reason for complying. *Which part* and how crucial that part is are questions Hart did not address; however, it is not difficult to understand what he might have had in mind. General compliance with a rule might be part of the reason for complying in the sense that, were it not for (a reasonable degree of assurance regarding the) compliance of others one would have little reason or less compelling reason to comply. Such rules are binding on the condition that one has a reasonable expectation that others typically will comply.

This is a straightforward understanding of "convention" and it is not implausible to think that Hart might have had just such a view in mind in his initial discussion of social rules in *Concept*. We must add, however, that this understanding of "convention" does not presuppose a familiar, more detailed explanation of *why* certain rules are contingent on general compliance, namely, that which regards conventions as solutions to certain kinds of coordination problems (Lewis 1969). This *theory* of conventions in the last thirty years has come to dominate discussion of social rules as conventions to the point that "conventions" are assumed to be "coordination-conventions," or "Lewis-conventions." One might propose this as a further explanation of what makes Hart's notion of conventions plausible, but one need not insist that this is what he must have had in mind when he thought of social rules as conventions.

Thus, if we eliminate as potential understandings of "convention" as mere conformism, or as coordination-conventions, and the idea that general compliance supplies an agent with a complete reason for action, then we are left with the view that conventions comprise that sub-set of social rules for which the general compliance of others is practically relevant to, in the sense of providing part of the reason for, an agent's own compliance. Hart does not *explicitly* embrace this view in the original portions of *Concept*, but he does hold views about the kind of rules he has in mind that naturally could be extended to that view. Recall, he held that one who takes the IPOV regards the rules "as a member of a group that accepts and uses them as guides to conduct" (Hart 1994, 89), that judges accept the rule of recognition, not "for their own part only" but rather "as common public standards" (ibid., 116). The view of social rules as conventions he adopts in the "Postscript" does not follow from these characterizations, but it is not implausibly seen as a clarification of the vague earlier idea, rather than a repudiation of it.

Here again, as with the notion of the IPOV, Hart put on the jurisprudential agenda questions that would occupy analytic legal philosophers for several decades to come. Moreover, the high regard for his work and the imprecision of his own formulations of the questions and answers to them had the effect that many of these debates took the form of debates over interpretation of

Hart's text, rather than debates over the issues and questions themselves. We will consider several such debates in later chapters.

7.3.3. Obligation: Social and Legal

As he was working on *Concept* he identified the notion of obligation as "the *idée maitresse* of the book,"[32] the point at which he could clearly mark his middle way between the command/sanction oriented models of the classical positivists and the overly moralized views of natural lawyers. Yet, he struggled for most of his life to articulate his account of obligation and he may never have been fully satisfied (Lacey 2004, 228–9). We begin with his account of social obligations.

To hold that someone has an obligation to perform some action, according to Hart (1994, 85), presupposes that there is some rule calling for or requiring that action—the "rule" may be social or conventional, or it may be a rule of critical morality, but Hart focuses here on the former. But not all social rules yield or impose obligations on agents subject to them (Hart 1994, 86). Something must be added to the social rule to explain its obligation-imposing character. Later Leslie Green maintained that what is added is the fact that the reasons that the rules provide agents subject to them are of a distinctive, peremptory or exclusionary nature (Green 1985, 337–42) bringing to bear Raz's important notion of "exclusionary reasons" (Raz 1990b, 35–48; see chap. 8, sec. 8.4.2.1, below). Although Hart seemed to embrace the idea of peremptory reasons of this kind (Hart 1982, 253–61), he limited them to explaining features of the normativity of law and did not extend them to explaining social obligations.

Rather, like Mill and Bentham, Hart felt drawn to the notion that there is a close connection between obligations and sanctions ("serious social pressure") (Hart 1994, 86–7); however, the relevant connection was not the *threat* nor the prediction or *likelihood* of sanctions, but rather the *legitimate imposition* of them.[33] In 1987, reflecting on the development of his views, he explained the core of his analysis of obligation as follows.

> Even in the case of a simple regime of custom-type rules what is necessary to constitute them [as] obligation-imposing rules is not merely that they should in fact be supported by [a] general demand for conformity and social pressure but that it should be generally accepted that these are *legitimate* responses to deviations in the sense that they are permitted if not required by the system. So such demands and pressure will not be merely predictable consequences of deviations, but normative consequences because they are legitimate in this sense.[34]

[32] Lacey 2004, 228, quoting from Hart's notebook.

[33] Hart adds two other conditions: (1) that conformity to the social rules is thought to be important for maintaining social life or some prized part of it and (2) conforming involves some degree of personal sacrifice (1994, 87). But these conditions fade quickly into the background and I will ignore them here.

[34] Interview for the Spanish journal *Doxa*, quoted by Lacey (2004, 354) (original emphasis).

Hart saw the idea of serious social pressure seen as a legitimate response to deviations from the social rule as "the central component of [social] obligation" (ibid.). Hart observed that the etymology of 'duty' clearly suggests that statements that someone has a duty "refer to actions which are due from or owed by the subjects having he duty, in the sense that they may be properly demanded or extracted from them" (Hart 1982, 160, 266; 1983, 10).

Hart's account of legal obligations was built on this account of social obligations. Legal obligations presuppose the existence of legal rules calling for certain kinds of action from agents subject to it, rules made valid in virtue of their membership in a legal system resting ultimately on the rule of recognition. These rules are obligation-imposing just in case the actions they call for "may be properly demanded or extracted from [those subject to the rules] according to legal rules or principles regulating such demands for action" (Hart 1982, 160). When a judge makes a committed statement of obligation, he regards the fact that these rules satisfy conditions for identifying laws he must apply and enforce laid down by the rule of recognition as (content-independent and peremptory) reason for conforming to the demands of these rules and for treating them as bases for evaluating the conduct of others and for demanding conformity by imposing sanctions if necessary (ibid., 160, 266).

It is somewhat surprising to realize that this understanding of legal obligation is close to Kelsen's.[35] If we keep in mind Kelsen uses 'ought' to include 'may legitimately' or 'is authorized to', then Hart's view is hardly distinguishable from the following familiar Kelsenian thought: If we say, he who is legally obligated to a certain behavior, "ought"to behave in this way according to law, we only express the idea that a coercive act as a sanction ought to be executed if he does not behave in this way (Kelsen 1967, 119; 1945, 58–63, 143–4). The difference, of course, is that the "ought" Hart has in view is rooted in a practiced social rule, and this allows him to draw a somewhat startling conclusion. From the fact that an individual can correctly be said to have an obligation to perform some action, Hart maintained, *nothing follows* about whether that individual has any reason, fear of incurring the sanction aside, to act as obligated. This is true for social obligations and legal obligations. In both cases, what is necessary and sufficient for the individual to have the obligation is that there is a (social or valid legal) rule requiring the action and related rules authorizing and perhaps justifying others' demands of compliance upon pain of sanction. It is not necessary that the person obligated accept or acknowledge the binding rule or the authority of those demanding compliance *and since*, Hart assumed, one has reason to comply only if one accepts the rule and their authority, it follows that it is not necessarily the case that someone who is under genuine social or legal obligations has any reason and in particular any *moral reason* to comply (fear of sanctions aside). "Judicial state-

[35] Bentham seems to have adopted a similar strategy; see note 17, above.

ments of the subject's legal duties need have nothing directly to do with the subject's reasons for action" (Hart 1982, 267).[36] This, Hart thought, enabled him to maintain a robust sense of the normativity of law, to avoid any empirical reduction of obligations whether social or legal, and to avoid the collapse of the law's normativity into some form of natural-law account of its necessary moral content.

7.3.4. Challenges to Hart's Account of Normativity

Hart sought a non-reductive account of law's normativity, which in the spirit of classical positivism nevertheless maintained an important distinction between law's normativity and morality. His account of law's normativity proceeds in two stages: (1) legal rules and standards, and legal propositions generally (including propositions regarding legal obligations, rights, etc.) have normative standing or validity in virtue of their membership in a legal system grounded ultimately in a rule of recognition, (2) the rule of recognition is a genuine rule, but it is a social rule, existing in virtue of the fact that it is practiced *inter alia* by law-applying officials. So, Hart's account of law's normativity rests ultimately on his account of the normativity of social rules. Social rules have an essential internal aspect on which participants in the practice of those rules take an internal point of view, from which convergent behavior of the practice can be recognized; nevertheless, such social rules ultimately are matters of empirically observable *social fact*, facts about the practice of these rules. It would seem that the distinction between law and morality could be sustained on the basis of this two-fold thesis alone: officials (at least) *claim* that the rules they recognize are binding and observers taking the moderate EPOV represent this claim without endorsing it; they can do so even using the same normative language as that used by participants, although as "detached" rather than "committed" normative statements.

However, as we have seen, Hart insisted that the difference between law's proper normativity and that of morality did not rest solely on the difference between claims made from observer and participant perspectives; he also insisted that only a thin or minimal form of the IPOV is necessary to account of law's normativity. It may be thin in two respects: (1) the existence of a (social or legal) obligation entails nothing about the reasons an agent who is subject to the obligation might have for complying with it; and (2) the reasons for which an individual accepts the rules and participates in their regular practice are ir-

[36] Note that Hart's strategy depends on a relatively crude form of what is sometimes called internalism with respect to reasons (very roughly: the view the reasons an agent has are strictly limited to actual desires, goals, preferences, or commitments of that agent). He embraced this view in Hart 1982, 159. Somewhat oddly, Hart rejected internalism with respect to obligations, but embraced internalism of reasons.

relevant—they need not do so for distinctively moral reasons. These attempts to maintain a separation of law's normativity from more substantial moral commitments have been challenged.

First, consider his account of obligations. Recall, Hart's view was that an individual can be said truly and without qualification to be under obligation to perform a certain action even though that individual has no reason (fear of sanctions aside) to do so. The existence of the obligation depends entirely on the existence of an obligation-imposing rule accepted and practiced by a group which regards as legitimate holding the individual to performance of the action by coercive means if necessary. This is puzzling as an account of the perspective of the obligation-enforcing officials and of the victim of this coercive imposition. It is not puzzling, of course, for the insider-official to regard the individual as bound by the obligation regardless of whether or not he accepts or acknowledges the obligation, but the natural way to express this thought is that the individual has the obligation and thereby *has reason* to comply (and to recognize the legitimacy of the demand for compliance). The official would then regard the individual's failure to acknowledge the obligation and the legitimacy of the demand as a mistake. It is puzzling, however, for the official to think that the individual has an obligation and that the official has a legitimate basis for holding him to it, while acknowledging that neither he nor the individual has any reason to recognize that basis. As Hart understands the official's activity, the official appeals to the rules to justify his imposition of the demand, but doing so would seem to require more than merely pointing to some rule which the official and his associates accept as the ground of legitimacy. It would involve at least the thought that there is something to be said for that rule, something that the subject of the rule should recognize even if he does not; and the mere fact of their acceptance of the rule will not do that job.

By the same token, viewing the situation from the perspective of the victim, it is not puzzling for him to acknowledge that the officials claim that he is under obligation to act as directed and claim legitimacy for their coercive demand that he do so. But it is puzzling to think that he would represent the situation to himself as one in which he *has* the obligation and the officials *legitimately* impose their demands, but that he has no reason to comply or treat the imposition of coercion as legitimate. From the victim's perspective, rather, the claim will be regarded as unfounded and the coercive demand as a *mere exercise of power*, albeit an exercise that others (at least the officials) regard as legitimate and so done with a claim of authority.

It is puzzling, further, that Hart, who wished to give us language and a conceptual scheme with which we can acknowledge clear-sightedly the law's potential for evil (see sec. 7.7.5, below), should insist on an account that, in effect, privileges the perspective of the potential oppressor. Perhaps Hart was right to have second thoughts about his analysis of obligation. Having made what he thought was a clean break from positivist-prediction theories of ob-

ligation, he sought to keep the lions of natural law from his door with this account of obligation, but subsequent critics, Raz most notably (see chap. 8, sec. 8.2.3, below), have argued that it is possible to maintain a robustly positivist theory of law while conceding that there is no fundamental difference in meaning between statements of social and legal obligation and those of moral obligation.

Yet, Hart (1982, 155, 265; 1983, 10) strongly resisted this suggestion, arguing that it rested on an unrealistic view of what is involved in accepting a practice and participating fully and competently in it. In particular, it assumes that those who accept the rules must do so for recognizably moral reasons. However, he argued, some rules "may be accepted simply out of deference to tradition or the wish to identify with others or in the belief that society knows best what is to the advantage of individuals. These attitudes may coexist with a more or less vivid realization that the rules are morally objectionable" (Hart 1994, 257). "There is indeed no reason why those who accept the authority of the system should not examine their conscience and decide that, morally, they ought not to accept it, yet for a variety of reasons continue to do so" (ibid., 203; see also 265).

The question, of course, is not whether it is possible for people to hold inconsistent beliefs, but whether this could represent the internal point of view essential for the existence of social rules and law. There are some reasons for resisting Hart's suggestion.[37] We should note, first, that for this purpose we must not focus on the reasons that might have initially moved individual officials to agree to participate in the practice of the rules, but rather on reasons that sustain that participation, or more precisely, on ways of thinking about the practice to which they are committed by virtue of the nature of that practice and the circumstances in which it typically takes place (MacCormick 1987, 111–2; Holton 1998, 603–5). We have already seen that the fact that the rule of recognition is needed to underwrite "the characteristic unity and continuity of a legal system" imposes constraints on the mode of its acceptance by officials, for to meet this demand acceptance of the rule as a common public standard is "logically a necessary condition of our ability to speak of the existence of a single legal system" (Hart 1994, 116). Further constraints are imposed by the fact that "law has moral pretensions" (Lyons 1987, 115).

Often and by design the law deals with matters that are of moral significance. Law seeks to give structure to relationships among people; it seeks to guide and control behavior and publicly condemns some forms of social conduct, holds up other forms for commendation, and it intervenes in the lives of individuals and communities, imposes significant burdens on them, elevates and privileges some of them, and the like (Lyons 1987, 116). When law oper-

[37] For a defense of Hart, see Schauer 1998; Bix 1999, 195–8; Kramer 1999, 99–101, 162–77 and more general 2004, chaps 5–6; challenged by Simmonds 2007.

ates, the stakes are often very high and of immediate moral concern to members of the community. Moreover, the law functions, and is used by officials and citizens alike, as a framework for justification of actions taken under color of law where the moral stakes are high. Law "claims to provide some measure of justification (in a sense that is not narrowly 'legal') for doing what it does to people" (Lyons 1987, 115). These pretensions impose a constraint on the way in which officials can coherently view their commitment to the law. "While one can accept law as a guide for one's own behaviour for reasons of one's own personal preferences or of self-interest," Joseph Raz has argued, "one cannot adduce one's preferences or one's self-interest by themselves as a justification for holding that other people must, or have a duty to act in a certain way" (Raz 1981, 454–5). Similarly, MacCormick (1987, 112) argued that "the judicial pretension to justification in administering the law as distinct from mere justification by the fact that it is law one is administering amounts to a pretension to having some justifying reason for one's judicial commitment, even though one's actually motivating reason was immoral or amoral or a mere unthinking acceptance of a traditional practice."

Hart was unmoved by this objection because he thought that as a matter of empirical fact officials can, and often do, hold the very views that are said to be unavailable. But this response may have missed the point of the objection, for the objection points not to specific attitudes or beliefs of certain individuals, but rather to what participation in a practice of this kind, in typical circumstances, and in view of the stakes involved, *commits them to*. On an "insider" reading of the IPOV (see sec. 3.2.2, above) Hart's response is clearly inadequate, but it is no less adequate on the "interior" version. Hart's task was to make the practice *intelligible*, which requires that the attitudes or convictions maintain at least a minimal consistency and absence of self-deception; but these would be difficult to sustain without some sense of moral-like warrant for participation.

Questions regarding the normative status of social rules will return later when we look at the key social rule in a legal system, the rule of recognition. Before we consider them, however, we need to look more closely at structural features of the legal system as they figure in Hart's theory.

7.4. Social Rules and Legal Systems

For the existence of social norms and a functioning social system, Hart argued, the kind of validity conferred by a rule of recognition is not necessary; it is, he admits, "a luxury" (Hart 1994, 235). It has distinct advantages, which are intrinsic to the nature of law and which prove nearly irresistible for complex modern societies; yet, the advantages come at a price we too easily overlook. Always suspicious of fulsome praise of law as law, Hart, in his attempt to shine a clear and steady light on distinctive features of law, not only sought to iden-

tify the advantages, but also to give a clear-eyed assessment of these potential costs.

7.4.1. The Luxury of Legal Validity

Hart (1994, chap. 5.3) highlighted the general benefits a legal system offers a community by contrasting a society entirely without a legal system ("pre-legal society"), governed entirely by "primary" or first-order rules, with an institutionalized social system structured and governed by a mature legal system. Imagine a simple society in which first-order rules alone govern the behavior of its inhabitants. These rules exist in the community in virtue of being widely practiced: people not only generally act in accord with them, but they have internalized them. "In the simpler structure, since there are no officials, the rules must be widely accepted as setting critical standards for the behaviour of the group. If, there, the internal point of view is not widely disseminated there could not logically be any rules" (1994, 117). Inhabitants of such a society accept the rules, regard them as common public standards, one by one and on their merits (ibid., 235).

A society thus governed by this "regime of unofficial rules" could surely survive and even be successful for a long period on its own terms, but it could do so, Hart argued, only if it was "a small community closely knit by ties of kinship, common sentiment, and belief, and placed in a stable environment" (ibid., 92). In a larger, more rapidly changing social environment, social relations are often at arm's length, among strangers whose only communal connections are likely to be very abstract. In consequence, individuals cannot draw on shared experience, overlapping in manifold and complex ways, to understand the demands of their common standards.

In such a social environment, the informal regime of social rules will suffer several notable *defects*, Hart (1994, 92–4) maintained. First, it will be *static*: rules can change only gradually with shifting acceptance of a large part of the population to a new rule and over a period of time it will be uncertain what the rule is or might become. Second, enforcement of the rules will be *inefficient*, because a large or at least undifferentiated part of the community must be mobilized to sanction deviations and disputes about enforcement are bound to arise. Related to this, third, there will be increasing *uncertainty* and *indeterminacy* of the rules. Disagreement is likely to arise regarding factual features of novel situations and regarding the application of rules to novel situations. Questions about what a rule calls for and who falls within the scope of its demands are likely to arise, as are questions about the status or authority of the rules themselves, and their answers will be disputed interminably. This will be due in part to the apparent rigidity of the rules which cannot respond flexibly to changing circumstances. As a result, members of the society cannot count on others complying with the existing customary rules either because they can-

not rely on a shared understanding of the rules to generate similar views about what the rules require, or because they cannot count on others to be motivated to follow the rules for their own sake and they cannot rely on informal social pressure effectively to fill motivational the gap.[38]

Remedies for these "defects" are to be found in law conceived as a union of primary (first-order) and secondary (second-order) rules (Hart 1994, 94–7). Indeed, "the introduction of the remedy for each defect might, in itself, be considered a step from the pre-legal into the legal world; since each remedy brings with it many elements that permeate law" (ibid., 94). *Rules of change*, empowering legislative institutions, enable a society to make new social rules and extinguish old ones, and in general to redirect social energies and resources, in response to novel and rapidly changing circumstances. They can also attract *indirect* allegiance to the rules: it is no longer necessary for the rules themselves to be accepted if rules can be accepted in light of their source or origin. This has a further advantage: rules of law can focus on "formalities"—actions or conditions with no intrinsic importance—and thereby increase predictability and facilitate proof or assessment of claims (ibid., 229–30). *Rules of adjudication* institute law-applying institutions, empowered to settle authoritatively disputes about the interpretation and application of the rules and can mobilize institutionalized enforcement of their determinations. Adjudicative institutions underwrite the legislative activities and go some distance toward remedying defects of uncertainty and inefficiency of social pressure. Finally, *rules of recognition* provide criteria by which all the other first- and second-order rules are collected into a single, unified system, each bearing an authoritative mark of validity and membership. This enables people to commit "to the acceptance in advance of general classes of rule, marked out by general criteria of validity" (ibid., 235). The rule of recognition anchors the entire institutionalized system and makes it possible for adjudicative institutions to settle with finality disputes about the authenticity, status, or authority of any putative rules.

It is easy to misunderstand Hart's argument here. His aim was not to provide a literal or conjectured history of the evolution of law out of more "primitive" prelegal social arrangements. Rather, his aim was simply to bring to our attention distinctive features of legal systems by asking what would be missing, and how a society might cope, if legal institutions were not available (MacCormick 1981, 108). "Like many state-of-nature-to-civil-society stories in political theory," Waldron observed, Hart's discussion "is better understood as an account of what we would stand to lose by abandoning the distinctive practices of law than as an account of what we once lacked when we didn't have them"

[38] The similarity in broad outline of Hart's analysis to arguments of familiar social contract theories of law and political authority, most notably Locke's account of the "inconveniences" of the state of nature, is unlikely to be accidental.

(Waldron 1999a, 173). Thus, the "defects" of the prelegal society are not, strictly speaking, flaws or deficiencies of *those* social arrangements, but problems or difficulties we in complex modern societies would experience were we to attempt to organize life along those simpler, institutionally more primitive lines (Green 1996, 1698).

The point may be put more forcefully. The uncertainty for which law is said by Hart to be a remedy is unlikely to arise in Hart's simple customary society. The routines are fixed and bred into the lives of the individual members. As Waldron (1999b, 38, emphasis in the original) observed, "for this mode of existence it is not clear that there is anything to be uncertain *about*." Problematic uncertainty is likely to appear, rather, not just when relations among members are stretched thin, but when in addition the society begins explicitly to alter its rules—when its ways are not seen merely as organic expressions of their way of life, but as capable of being *manipulated* to *achieve* more or less explicitly articulated ends. This distancing, as we shall see below, is a distinguishing feature of law, which suggests that the "defects" for which law is a remedy are features intrinsic to its very mode of operation.

It would also be a mistake to think that Hart meant to offer a "whiggish history" in which law represents the triumph of civilization over "primitive" forms of social ordering, what Leslie Green called "a form of modernist triumphalism" (Green 1996, 1699). But this, too, was not his aim, which is clear if we look more carefully at the typical upshot of "introducing" law into a social order and the costs it threatens to exact from societies rushing to embrace it.

7.4.2. The Sobering Truth about Law

With law comes the institutionalization and centralization of governance or exercise of political power. Consider the upshot. For one thing, certain persons in society are designated as officials and are charged with special responsibility for maintenance of the system of rules—some watch for rules that need to be made or repealed, others will watch for compliance, others will settle disputes that arise with respect to the rules. They will be able to accomplish this in part because their actions and decisions are accorded a special status or authority and they are able, in a way no other members of the society can, to give their resolutions about matters—whether making of rules, interpreting them, or enforcing them—a degree of finality. That is, they have the power of making decisions that in an important respect and to a significant degree hold or bind even if others regard them as mistaken. So, authoritative decisions and the rules put in place through them are able to claim a kind of practical significance apart from their merits. This makes it possible for such officials to create rules and expect them to govern citizens' conduct even before they are widely practiced. Thus, law can create and seek to control social practices, rather than being entirely dependent on them.

This has an important consequence, according to Hart. In a legal system, first-order social rules are not just *supplemented* by a structure of second-order, institution-creating rules, as if it were a formal template laid over an already established network of customs, conventions, and practices; rather, to a large extent legal rules *supplant* those first-order customs and practices, replacing them with legal norms of the legal system's own making. Law cannot gain a foothold in a community unless first-order rules themselves "change their mode of social existence" Waldron reminded us. They must be seen as "intelligible and manipulable apart from their implicit presence in the conduct and attitudes of those whose lives they govern [...] detached from practice in a way that allows them to be contemplated and discussed [...] as objects of *deliberate* change or as possible objects of *explicit* interpretation" (Waldron 1999a, 178; Hart 1994, 229–30). So, distance is put between ordinary people and rules of law in two key respects. First, the internal point of view is shifted from acceptance of each rule piecemeal and largely on its merits, to acceptance of whole classes of rules (or the system as a whole), and acceptance of individual rules just in virtue of their membership in the system. Second, acceptance is largely the business of officials—at least that (plus general compliance with the law in the population) is all that is needed for the existence and effective functioning of a legal system, according to Hart. The rule of recognition is constituted by the practice of law-applying officials and only rarely will ordinary citizens participate in this practice (Hart 1994, 114–7).

Thus, first-order rules of law are likely to lose their connection with prior social practices, and they "come to have a presence in the lives of those subject to them that is quite different from their role in pre-legal society" (Waldron 1999a, 179). They will appear distant and formal, connected to their lives more through the apparatus of institutionalized coercion than through a *sensus communis*. Even when the law requires actions of them that they recognize as morally obligatory, they may be more inclined to see these as demands *in addition to* and perhaps even more fundamental than the law's demands, which appear formal and imposed. It is not unlikely in a legal system that "the [active] acceptance of the rules as common standards for the group [...] is split off from the relatively passive matter of the ordinary individual acquiescing in the rules by obeying them for his part alone" (Hart 1994, 117). The complex composite character of modern legal systems stands in sharp contrast with the simpler decentralized prelegal society. It is possible that the internal point of view on the law is confined to the official world, the remainder of members of society taking a practical but still "external" perspective on the law.[39] Thus, according

[39] Note how sharply Hart's view here differs from those of Fuller and Hayek (see chap. 4, sections 4.2.2 and 4.4.2). Not only is it possible, in Hart's view, for imposed, "thetic" (Hayek) or explicit (Fuller) law to displace "nomic"/"implicit" normative orders, but it is in the very nature of law to do so. In this respect, more than any other, Hart speaks in the voice of classical positivism, and perhaps even more loudly.

to Hart (1994, 91), it was not a mistake for Holmes and Austin to attribute the external point of view to citizens, but only to fail to recognize the importance of *officials* adopting the internal point of view.

In the extreme case, *only* officials take the internal point of view, others will merely submit "sheeplike" to the demands that officials represent to themselves as legitimate and "the sheep might end in the slaughter-house" (Hart 1994, 117). Therein lies the price of indulging in the "luxury" of law, Hart takes pains to point out. The price may be very high. Hart is keen to point out that it is a "sobering truth" that

> the step from the simple form of society, where primary rules of obligation are the only means of social control, into the legal world with its centrally organized legislature, courts, officials, and sanctions brings its solid gains at a certain cost. The gains are those of adaptability to change, certainty, and efficiency, and these are immense; the cost is the risk that the centrally organized power may well be used for the oppression of numbers with whose support it can dispense, in a way that the simpler regime of primary rules could not. (Hart 1994, 202)

The alienation of a large portion of the subject population does not necessarily interfere with effective functioning of the law. The centralization and institutionalization of social control characteristic of law makes coercive oppression of whole populations easier and more efficient. Green sums up this part of Hart's view as follows: "Law is *not* a mark of civility or justice, or anything of the kind; it is just one way in which a complex society copes when the direct, transparent form of social order no longer works very well" (Green 1996, 1699–1700). The existence of law, Hart (1994, 207) concludes, "is compatible with very great iniquity." We will take up below in section 7 the fundamental challenge to natural-law theory implicit in this part of Hart's theory, but first we must consider Hart's notion of the rule of recognition and the implications of Hart's theory of law for adjudication and legal reasoning.

7.5. The Rule of Recognition

It has been said that the idea of the rule of recognition is "one of [Hart's] most distinctive contributions to the intellectual apparatus of legal theory" (MacCormick 1996, 179). It is, surely, the most readily recognizable and perhaps the most influential of Hart's jurisprudential ideas, but its debt to the classical positivist notion of sovereignty and Kelsen's doctrine of the basic norm is also immediately evident. Less evident, but no less important, was its debt to Salmond's seminal idea of "ultimate legal principles" (see chap. 1, sec. 1.3.3 above).[40] Rejecting

[40] Hart (1994, 292) briefly acknowledged Salmond's "insufficiently elaborated conception" in a footnote to his discussion of the doctrine of the rule of recognition. By mid-century, Kelsen's main work was well known in England, due in good part to the work of an Australian, R.T.E. Latham (1949), who studied law in Oxford in the late 1930s and for a while taught and practiced law in

the "top-down" imagery that had dominated legal theory for centuries, Hart brought legal theory into line with the juridical realities of modern democratic societies; by grounding the law in the ordinary practice of law-applying officials, Hart sought to define the systematic unity of law and the core notion of validity in terms that enabled him to treat law as fundamentally a matter of "social fact." In the facts constituting the rule of recognition in a jurisdiction, he thought, we have located the true foundation of a legal system.

7.5.1. The Idea of a Rule of Recognition

To begin, let us briefly review the main features of this pivotal concept.

Tasks. The primary function of the rule of recognition is to provide criteria of validity of other rules and norms. This can be thought of as two tasks: (1) it defines membership in the structured set of norms that make up the legal system that rests on it, and hence defines the boundaries of that legal system; (2) it anchors the normative authority of the rules it deems members of the system. In defining criteria of membership, the rule of recognition seems to do two things at once. (a) It selects some property or authoritative mark as that which makes it the case that a given rule is a member of this or that legal system—its criteria are *constitutive* of membership in the legal system. Also (b) it provides public tests by which members and imposters are distinguished—its criteria enable public *identification* of member rules and norms. The former answers the *ontological* question: what properties make it the case that a norm is a member of this legal system? The latter answers the *epistemological* question: how can we tell that the norm is a member of the system? Since these two questions can have different answers, some critics have argued that Hart thought (or perhaps should have thought) of the criteria as strictly *constitutive*, answering only the ontological question (Coleman 1996, 291–2). However, it is likely that Hart, following Bentham, regarded these two questions as in practice inseparable. It is not an accident that Hart labeled this foundational norm of the legal system the rule of *recognition*. In view of the kind of work Hart expected law to do—*inter alia* reducing uncertainty about whether norms are authentic norms of the community—it would seem that we should not allow epistemic criteria to depart very substantially from ontological criteria.

London, until his death in the war. Latham (1949, 523) articulated an Anglicized version of Kelsen's notion of the *Grundnorm* and argued that the Austinian doctrine of sovereignty was best read as a local particularization of this notion, understanding the *Grundnorm* of English legal system as *quod principi placuit*. Latham's discussion had an impact on English constitutional scholars, like Geoffrey Marshall (1957), but it made no significant theoretical advance over the view already sketched by Salmond that we surveyed in Chapter 1. Indeed, he may have muddied the theoretical waters by treating Kelsen's transcendental norm as if it were a matter of contingent fact (Latham 1949, 521–3) and treating it as a rule of law capable of declaration by judicial precedent (1949, 524–5).

Normative status. Although Hart's language in *Concept* is misleading, it is now widely accepted that the rule of recognition, as Hart conceives of it, is neither a power-conferring rule nor simply a duty-imposing rule; rather, it is, first of all, a *rule of identification*, defining criteria of validity for the legal system in which it operates. Yet, it does not merely *classify* rules as members or non-members of the system, it also plays a role in legal reasoning, providing "tests for identifying what is to count as law in [a judge's] court" and is "part of the *reason* for his decision" (Hart 1994, 105). The recognized status of a norm as a valid rule of law counts among judges' *reasons* for holding those governed by the rule including themselves to its terms. It is not entirely clear, however, how it figures in their reasoning. Following the rule of recognition, judges treat rules meeting its criteria as "authoritative legal reasons" (i.e., binding) for those subject to the rules, according to Hart (1982, 20, 260–1). This much is clear; a little less clear, however, is whether the rule of recognition itself functions as a reason of this kind *for the judges* to apply these rules, insofar as possible, to those subject to them. It is fair to say that Hart believed that they did, but philosophers writing in Hart's wake seem to take different views.[41]

Ultimacy. The rule of recognition is the foundation of the legal system in the sense that it is the *ultimate* rule of the system (Hart 1994, 107). Officials on the street claim legal authority for their actions. These claims are validated by appeal to a rule itself claiming validity as a constituent of the legal system. This claim is grounded by appeal to some yet more fundamental legal norm. This familiar chain of legal reasoning terminates in the ultimate validating norm in the system: the rule of recognition. It is neither valid nor invalid, but rather the *standard* of validity in the system—just as the standard meter bar in Paris is the ultimate test of correctness of measurement in meters (Hart 1994, 109).

Scope of the Practice. This rule is rarely stated or given explicit formulation; rather, it is "shown" in the way courts identify the norms which then figure in legal reasoning. It is implicit in ordinary law-applying practice and reasoning (Hart 1994, 101–2). Conceivably, private persons and their advisors, as well as judges and other law-applying officials might participate in this practice (Hart 1994, 100, 101, 110). However, all that is *necessary* for the existence of an efficacious legal system, and likely under ordinary circumstances, is that the rule of recognition be practiced by law-applying officials (and that the conduct of the bulk of the population conforms to the law) (Hart 1994, 114–7). In the ordinary case most citizens will have little or no conception of the criteria of validity and hence *cannot* participate in the practice constituting the rule of recognition (Hart 1994, 114). In the extreme case, the rule might be confined to a small, power-wielding law elite (Hart 1994, 117, 201–2).

[41] For the view that judges are (ought to be?) bound by the rule of recognition as if it were a strict, peremptory rule see the discussion of Alexander and Schauer in chap. 8, sec. 8.7.1.1.

Unity. Hart held that for every legal system there is exactly one rule of recognition. It may be complex, including several different kinds of criteria of validity, but in that case they will be ranked, with primacy given to one as "supreme" (Hart 1994, 105–6). One might expect this to be an empirical thesis, open to empirical observation, yet Hart never offered any empirical support for it. Raz (1990b, 147) plausibly maintained that Hart's thesis rests, rather, on strictly theoretical grounds: our understanding of the normativity and unity of the legal system requires that there be a rule of recognition and for this purpose it must be univocal or at least establish a clear rank order among multiple criteria. However, it is not clear how to understand this proposal. It might be understood as a rational demand on a legal system, or it might be taken as an explanatory hypothesis. Taken the first way, unity or coherence is necessary condition of the existence of the legal system; taken the second way, the unitary practice of courts is proposed as an explanation of (the degree of) unity achieved in an existing legal system.

MacCormick's attempt to articulate Hart's approach manifests this ambiguity. When a legal system is in reasonably good working order, he suggested,

> there must be an ongoing custom or practice of treating the foundational authorizations [e.g., constitutional documents and practices] as an in-some-way coherent order of validation of legal acts, and hence of practices of recognition of other legal sources treated as binding by duly authorized institutions, especially courts of law [...]. So one must postulate with Hart a customary [...] obligation to respect the constitution by giving full force and effect to its provisions and all acts carried out under them, taking account of the conditions necessary for overall coherence in the system [...]. [This is a] custom that sees the overall unity of authorization and hammers out priority as between rival authorizations. (MacCormick 1996, 181)

If the custom is a postulate, is it, then, the demand for coherence that *calls for* this practice; it is a normative condition of the existence of a legal system? On the other hand, if by "postulate" MacCormick means "explanatory hypothesis," then it is the observed (substantial degree of) unity of a legal system "in good working order" that is explained in terms of the existence of such a custom. Even in the second case, the "postulate" is not itself an observed fact, but something attributed to the activities which, it is supposed, best explains the available unity.

Critics have argued that Hart's thesis does not fit the facts of judicial practice in some legal systems. For example, Kent Greenawalt (1988) argued that it is nearly impossible to gather together and rank criteria of validity in force in the U.S. legal system. As an empirical matter there are no fixed, uncontroversial orderings of the multiple criteria in play. If there is unity and coherence evident in the legal system, it is not due to any observable agreement among courts on the criteria and their rank order.[42] It is not clear whether this criticism engages

[42] Dworkin (1978, chap. 2) makes a similar argument, although it depends on an unsympathetic understanding of Hart's notion of a social rule.

Hart's doctrine or not. For, if it is an explanatory postulate, then it may not be falsified by facts about judges' actual beliefs, for it is the perhaps the underlying structure of their practice—as Hart said elsewhere, a matter of what they *tacitly* accept (Hart 1983,16)—that is postulated. This, of course, would be unintelligible on any psychological or naturalistic interpretation of the IPOV, but it might fit the alternative social practice interpretation. It does, however, risk moving Hart's view of the foundations of law dangerously close to Kelsen's.

It appears, then, that Hart's doctrine of the unitary nature of the rule of recognition faces a dilemma: either it proves to be false as an empirical matter, at least in some legal systems, or it avoids empirical falsification by presenting itself as a fundamental explanatory postulate of legal thought, rendering it vulnerable to the objections Hart addressed against Kelsen.

However, it might be possible to rescue Hart from this particular dilemma by accepting Raz's urging that we abandon the thesis of the unitary rule of recognition. Hart was mistaken to think that the unity of law requires that there be a single (or uncontroversially ranked) rule of recognition, he argued. Rather "the unity of the system depends on the fact that it contains only rules which certain primary organs are bound to apply. The primary organs which are to be regarded as belonging to one system are those which mutually recognize the authoritativeness of their determinations" (Raz 1990b, 147). Note that this approach thrusts the whole weight of the unity of law onto mutual recognition by law-applying institutions. It leaves aside the question of the recognition and status of these very institutions.

Content. It is also a matter of fact, on Hart's view, what the content of the rule of recognition for any given legal system is. The criteria of validity for that system are just the tests implicitly used by committed law-applying officials in that system, *whatever the tests are*. It is tempting, and nearly correct, to say that the criteria of validity are simply what law-applying officials *say* they are, but we must add this caveat: it is not what officials say *about* these criteria that makes them what they are, but rather what they say (and do) *in* consciously deciding matters of identifying the law of the land. Throughout the text of *Concept* Hart strongly suggested that the "authoritative marks" will be some extrinsic property or properties of the rules, properties not necessarily directly connected to their content or merits and typically a matter of "sources"—matters of "pedigree." All the examples he offered are of this nature (Hart 1994, 94–5, 100–1). Moreover, the fact that they must be "taken as a conclusive affirmative indication" that a rule is valid (1994, 94) would seem to rule out criteria that turn on assessments of the justice, wisdom, or reasonableness of the rules in question (in view of the likely controversial nature of such considerations). These passages led many readers to attribute to Hart the strong positivist thesis that criteria of validity must, as a matter of the concept of law, be restricted to matters of pedigree. This has come to be called *exclusive positivism*.

But the text of *Concept* also seems to support a weaker thesis. For one thing, Hart's fundamental empiricism fits uncomfortably with the exclusivist thesis. On Hart's view, the practice of law-applying officials alone determines the existence and the content of the rule of recognition, and that practice is, ultimately, a matter of social fact. Thus, the content of the rule is determined the strictly empirical facts of the convergence of the conduct and internal attitudes of officials. In work written shortly after *Concept*, Hart acknowledged this feature of his thought. In 1965, in his response to Fuller's critique (Fuller 1968a, first published in 1964), he insisted that there is "no logical restriction on the content of the rule of recognition: so far as 'logic' goes it could provide explicitly or implicitly that the criteria determining validity of subordinate laws should cease to be regarded as such if the laws identified in accordance with them proved to be morally objectionable" (Hart 1983, 361). This suggests the view Hart later called "soft positivism" and others now call *inclusive positivism*.

Later, in response to criticism by Dworkin (1978, chaps. 2–4 and 1986, chap. 1; see chap. 9, sec 9.2, below), Hart (1994, 247, 250–1) explicitly embraced the weaker thesis. On this view, so far as the concept of law is concerned, it is *possible* that the rule of recognition in a given legal system will include not only tests of "pedigree" but also moral tests requiring conformity with principles of justice or other substantive moral values conditions of validity. Hart (1994, 204, 247) thought this possibility is actually realized in some modern legal systems, notably that of the United States.[43]

Thus, two different readings of his view of the determination of the content of criteria of validity emerged and this ambiguity and Hart's subsequent endorsement of inclusive positivism touched off one of the most vigorous (if not perhaps the most fruitful) debates in Anglo-American jurisprudence in the last twenty years. We will trace the dialectic of this debate in later chapters (chap. 8, secs. 8.3.4 and 8.4 and chap. 10).

7.5.2. The Unity, Persistence, and Systemic Character of Law

Hart (1994, 61–6, 118–21) maintains that the rule of recognition gives law its systematic character and it underwrites the identity and persistence of the legal system over time, guaranteeing continuity of the law through changes in governments. This thesis has prompted criticism at two levels. First, Finnis (1973, 55, 68) argued that the rule of recognition, as Hart characterized it in *Concept*, is subject to objections similar to those he pressed against Austin's doctrine

[43] A modern natural-law view, which wishes to participate in this debate over validity might hold a stronger view, namely, that, as a requirement of the very nature of law itself, among the criteria of validity for any legal system must be certain conditions of justice or practical reasonableness (see below sec. 7.7.2). This is clearly not Hart's inclusivist view (nor is it clearly the view of classical natural-law theory, but we will explore that matter in chap. 12, sec. 12.1).

of sovereignty. Hart (1994, 61–6) had argued that Austin cannot account for the persistence of law through changes of lawmaking sovereigns, since validity of laws is entirely dependent upon the personal allegiance of citizens to the sovereign maker of the laws. So, when the maker of a law leaves the scene, we should expect the demise of their laws as well, but of course this does not happen. Thus, Austinian sovereignty cannot account for law's persistence over time. A similar objection can be made against the rule of recognition, according to Finnis. For, on Hart's understanding, the rule of recognition consists of the convergent behavior and attitudes of law-applying officials, which is a *present* matter of social fact. Thus, the law in a jurisdiction at any moment is the law that courts *at that moment* are disposed to apply, yet that is only a very small number of the laws actually in force in the jurisdiction. More importantly, Finnis maintained, it is not merely a contingent fact about the attitudes of courts, but essential to the unity and continuity of the legal system over time, that the courts regard laws validly introduced in the past remain valid until repealed or expire according to their own terms. Conceding this point, Hart (1983, 16) responded that, to explain this fundamental feature of law, we must assume that courts "tacitly accept" a general principle roughly along the lines Finnis suggested.

This response is notable because, despite the language of "acceptance," it is clear that, again (as we have seen with the question of the unity of the rule of recognition), Hart postulated a feature of judicial practice to explain a key feature of legal systems in good working order. This postulated feature is not a matter of actual belief or attitude of judges; in fact, it is not itself an observed empirical fact. Rather, it is a view he attributed to the courts, a construal of their practice required to explain a fundamental feature of any legal system. His claim that courts "must tacitly accept" the principle has to be understood as a claim about what courts *are committed to* in virtue of their practice and the tasks they undertake, not merely what they happen to accept, let alone explicitly believe or endorse. We observers attribute this acceptance to them in order to make sense of the ordinary operations of the law.[44] On a "naturalistic" or psychological reductionist interpretation of the IPOV, this would be impossible, but it may be consistent with Hart's understanding on the social practice interpretation.

Hart's thesis that the rule of recognition accounts for the *systemic* character of law has also attracted critical attention. Recall, Hart's view was that the rule of recognition transforms an unconnected set of first-order rules (for example, customs and conventions in a prelegal society) into a structured, unified

[44] It is arguable, although Hart does not make the argument, that this postulate is essential to law because providing normative guidance is essential to law's distinctive mode of governance, and linking what is to be done now and in future to what has been done in the past is essential to this mode of governance. If so, then law's temporal extension is not only a salient fact about it, but is essential to its very nature and to the normative guidance it offers (Postema 2004).

system (Hart 1994, 95, 116, 236). At this point, Hart's doctrine of the rule of recognition is most akin to the Austinian doctrine of sovereignty it was meant to replace. The systemic unity of law, on Austin's account, is due solely to the fact that all rules of a system can be traced to a common origin; thus, "system" is understood simply as shared membership, where membership is determined by an extrinsic property of the rules, that is, a property unrelated to the content of the rules. This is an exceedingly thin notion of "system." Austin did not deny the possibility of thicker, internal relations; he thought they were not essential to law.

Bentham's view, we might note, was more nuanced. In his view, it was essential to law that rules of law meet standards of logical and substantive coherence, not one by one but as they work together *as a system*. It was in part the unruly, indeed chaotic and apparently ad hoc, character of English Common Law of his day that led him to deny it the status of law properly speaking (Bentham 1970, chap. 15). Sovereignty was not, for Bentham, the source of law's systemic character. A large part of his jurisprudential masterpiece, *Of Laws in General*, was devoted to articulating the idea of "a complete law" (ibid., chap. 14) and working out the formal relationships between civil law, criminal law, and procedural law (ibid,, chaps. 16–8). His aim in that work, and in most of his subsequent jurisprudential work, was "to lay the foundation for the plan of a complete body of laws supposing it to be constructed *ab origine*, according to a method of division grounded on natural and universal principles" (ibid., 232). For a proper appreciation of the classical-positivist notion of legal system, one must look beyond the doctrine of sovereignty to this vast body of careful, detailed jurisprudential work.

Hart greatly admired Bentham's work on this aspect of law, but he never tried to incorporate its insights into his own account of the foundations of law. His understanding of law's systematic character is basically Austinian. System for Hart, as for Austin, is an exceedingly thin matter, depending only on each rule in the system bearing "authoritative marks" of membership. According to Hart (1994, 95), in prelegal societies the first-order rules are merely aggregated into "a discrete unconnected set", but the description could also be said with respect to laws gathered together by the rule of recognition. Hart may have favored this thin notion of system because he feared anything more contentful would invite moral standards into the foundations of law which would be inconsistent with his basic positivism. It is not obvious that this is so, however; at least Bentham's impressive body of work suggests that a sense of thicker, internal relations among norms of a legal system may not be entirely inconsistent with a basically positivist approach to law. This issue, both within and outside of positivism, has yet to attract the attention of Anglophone legal philosophy, although it is arguable that it is potentially deeper and philosophically more fertile than many of the issues that have dominated discussion in recent decades.

7.5.3. Ultimacy and the Normative Foundations of Law

The rule of recognition is the *ultimate* validating standard in the legal system. Not itself valid, it underwrites the validity of all legal norms; not itself a legal rule, it is the rule that guarantees the status of all legal rules in a given legal system. The chain of appeals of authorization stops naturally and with finality in the rule of recognition. Thus far, Hart's notion is very close to Kelsen's notion of a Basic Norm, but at this point Hart parts company with Kelsen, for the rule of recognition exists, not as postulated (as Kelsen argued), nor as morally justified (as some contemporary natural-law theorists might argue), but simply as the practice of law-applying officials. Challenges to claims of authorization of legal acts, or norms, come to rest in demonstrations of the institutional facts of this practice. The rule of recognition is the reason for recognizing legislative acts as sources of law, for example, but, Hart argued, there is no appropriate *legal* question regarding the authority or validity of the rule of recognition. If the status of some source is challenged, one can appeal to the rule of recognition; if the existence of the rule of recognition is challenged, the fact of the courts' practice can be cited. But the courts' practice is not the reason for following the rule of recognition; it is merely proof of the claim that "it is the rule in this jurisdiction that such and such" (Raz 1979, 68).

Of course, it is possible to raise further questions about the rule of recognition in a given legal system: whether it is a good rule, whether it might be reasonable to revise or amend it in some way or replace it altogether with a different rule. We can also ask whether there is any *moral* reason for complying with the law thus rooted in the rule of recognition. But all of these questions, Hart argued, are radically different questions from the questions of authorization that moved up the chain ultimately to the rule of recognition. They are questions *about* the rule of recognition; they do not *use* it.

The ultimacy of the rule of recognition and the account of that rule as a *social rule* are the cornerstones of Hart's neo-positivist account of law's normativity that promised a solution to the problem of the circularity of authorization (see above sec. 7.2.3). A social rule grounds the process of authorizing of legal norms and acts, but the rule itself exists as a social fact. However, Hart's solution is vulnerable to an important challenge. Hart's argument from the ultimacy of the rule of recognition appears to rest on an equivocation. When the chain of challenges to the authorization of a legal act or norm is traced back to the rule of recognition, there is a shift from implicit reliance on the rule to identify valid authorizing norms or sources to focusing on the rule itself—from use to mention of the rule, as it were—but Hart also assumes that this involves a shift *from* the internal, practical, reason-demanding and reason-giving point of view from which claims of authorization and challenges to those claims are made, *to* the external, observer's point of view. But we have no reason to think that the shift from use to mention of the rule of recognition entails a shift from

the internal to the observer's point of view with regard to the question of authorization.[45] There is no radical discontinuity in the kind of questions we typically ask at this point. The questions all along have been normative questions, questions of the authority or normative grounds for certain actions, norms, or claims made about them. Those questions do not stop when the rule of recognition is in view. The questions may be different at each link in the chain of authorization—sometimes the differences are subtle, sometimes substantial—but the questions are always of the *same kind*: They are normative questions that can be answered only by offering *reasons*.

To appeal to the rule of recognition in the chain of authorizing is to treat it as a norm. This is true not only when it is used implicitly, but also when its existence is made explicit. It can function in a reason-giving argument only as a norm. But if it is to function as a norm, it must be something other than an externally observed social fact (Zipursky 2001, 237–47). These social facts are not irrelevant to the normative status of the rule of recognition, especially if it is best conceived of as a convention. For the facts of the practice help establish that the norm is a norm *of this particular community*. They locate it, as it were, but they do not account for its status as a norm, and only when its normative force or authority is established can the normative questions about it and its progeny be answered. It is possible, of course, that the facts of the practice—that is, the fact that others regard it as a common standard and use it regularly, etc.—play a key role in accounting for its normative significance. That is to say, if the rule of recognition is a convention, then any account of its normative significance and force must give a major role to facts about the beliefs, attitudes, and behavior of people participating in the practice. This problem led philosophers sympathetic with Hart's general approach to find his account of the normative authority of law incomplete at this point. What is needed, they thought, is an account of how practices can have normative force.

Legal philosophers working in the Hartian tradition in the last part of the twentieth century have taken three different approaches in response to the above problem. One group has insisted that Hart was never interested in giving a full account of law's normativity (Green 1996). He was satisfied in sketching, entirely from the external perspective, certain conditions for the existence of social rules—or rather the fact that the rules are *rules of a given community*. He sought nothing more than an observer's theory of law. He never sought to offer a satisfying account of the normative significance of law, let alone of social rules. This response is of a piece with a more general view, widely debated in recent years, about the proper methodology of jurisprudence. Taking a cue from Hart's "Postscript" (Hart 1994, 239–44), legal philosophers have argued that positivist jurisprudence seeks to offer only a value-neutral, "descriptive"

[45] At this point the "alienated," albeit still practical, EPOV we identified earlier (sec. 7.3.1, above) is clearly not in play.

account of law, leaving to others the task of a "justificatory" or evaluative theory of law. A descriptive theory, it is argued, does not take as part of its charge, the task of giving an account of the normative authority of law.

This response, arguably, does not respond to the above problem. Hart's social facts thesis was meant to do work not only for the external theorist of the law, but also for one who is pursuing a chain of authorization, and for the latter it was meant to *stop* that pursuit. Observations meant to serve the purposes of an external observer will not suffice for the purpose of closing that pursuit. This worry led other legal philosophers to seek a more substantial account of law's normative authority, or at least to explain how it is that law can claim authority (even if that claim proves to be ungrounded). One group of critics, represented best by Ronald Dworkin, has argued that Hart's account of the foundations of law fails precisely because it cannot give an adequate account of the normative significance of law. Moreover, they argue, it was a mistake for Hart to think that law rests on conventional foundations, social rules, at all (see chap. 9).

Taking a different tack, others have sought to supplement Hart's account with an account of the normative force of practices that takes their *conventional* status seriously. They have attempted to explain the normative significance of law by elaborating an account of the normative significance of conventions. One way of doing so, undertaken by Postema (1982, 1998a) and Coleman (1996), was to explain the normative importance of the facts of the convergence of beliefs and behavior in a practice by setting them in the practical framework of nested expectations and rational choice as modeled by game theory. The rule of recognition, they argued, is a rule of coordination. Others, critical of the focus on social coordination, have articulated alternative accounts of social rules that can explain the normative force of the rule of recognition (Marmor 2001b, 1–48; Coleman 2001a, 75–102). We will explore further both the conventionalist and anti-conventionalist alternative to Hart's account of the normativity foundations of law in later Chapter 11.

7.5.4. The Rule of Recognition and the Social Foundations of Law

On Hart's view, the existence of a legal system in any society depends essentially on two broad social facts: (a) the effective operation of law-applying institutions manifesting acceptance of a rule of recognition and (b) broad compliance in the society with the rules and norms of law so recognized.[46] Law-applying institutions (courts), but not legislative institutions, are essential for the exist-

[46] In Chapter 9 of *Concept*, Hart argues for two further ("naturally") necessary conditions of the existence of a legal system: (a) rules protecting law-subjects against violence, theft, fraud, breach of faith, and the like (the "minimum content of natural law") and (b) a coercive mechanism that enforces compliance with the law (Hart 1994, 191–200). See below in sec. 7.7.3.

ence of law, for it is in the practice of law-applying officials that the rule of recognition is constituted, and it is institutionalized decision making guided by the rule of recognition that marks the fundamental difference between a society governed by a system of law and a society without a legal system. Moreover, acceptance of the rule by law-applying officials is sufficient for the existence of a legal system, provided there is general compliance with the law. Acceptance by ordinary people is not needed; indeed, it is rare that ordinary law-subjects will have any idea of what the rule of recognition might be (Hart 1994, 114–7).

This feature of Hart's theory is a bit surprising, perhaps. It accords ordinary law-subjects a strictly passive role in the legal system, not merely in extreme cases (see sec. 7.3, below), but in ordinary cases of mature, healthy legal systems. For all his talk early in *Concept* of the importance of the internal point of view for an adequate account of the nature of law and legal obligation, only in rare cases will the point of view that he took to be definitive of law be the point of view of ordinary law-subjects; relative to that point of view their perspective can only be "external."

Must Hart concede, then, that the crude realist definition of law was not far from accurate, since, *from the point of view of the ordinary law-subject*, the law is (for the most part) nothing more than what the courts say it is—an exercise of "other people's power?" Perhaps not; perhaps they can take an internal perspective of some sort on the rules of law of which they are cognizant, but this perspective must have very different content and focus, since, it will not involve the implicit use of a rule of recognition. How exactly are we to characterize it? Surprisingly, Hart has nothing to say in answer to this question, and neither have any philosophers in the Hartian tradition. Yet it is a question of great importance and interest. For a legal system to exist in a given society it is not enough to observe that, on the whole, behavior of people is not greatly inconsistent with its requirements, for there may be only an accidental correlation between the rules accepted by the legal elite and the behavior of the people allegedly governed by it. Hart's empiricism demands that we recognize that a legal system *exists* only if it *exists in* and is *practiced by* some actual social group; otherwise, it will be merely an epiphenomenal curiosity. If the law is *in force* in a society, it must be *used* by members of that society; but then we need an account of what it is for the law to be used in that society (see Postema 2008a). This is an issue ripe for further investigation.

Fuller might have thought he had something to offer at this point (see chap. 4, sec. 4.2, above). Recall, Fuller argued that any attempt to govern by law—to guide the actions of rational, self-directing agents by means of law—requires a degree of substantive congruence between the legal norms and the ordinary practices, customs, and ways of law-subjects in the community served and governed by the law. If it is to be more than an epiphenomenal curiosity, a legal system must offer some substantial degree of effective normative guidance to those governed by it. But such "epistemic guidance" (Shapiro 2001b, 173) is

possible, Fuller argued, only if the norms can make sense to law-subjects much of the time without a great deal of intervention by officials. If the terms of the law appear largely arbitrary to ordinary law-subjects, then they can only be guided by guesses ("predictions") about what the courts or officials will decide *post hoc*. If this were the case in the context of a game that appeared at first to be a game of football, Hart argued, it would collapse into a game of "scorer's discretion," not football, for the players could not regard themselves as guided by the same rules as the officials were applying (Hart 1994, 142–5). The same seems to be true of law. But then law-interpreting as well as lawmaking officials are dependent on the understandings that law-subjects will naturally attribute to the products of their activities, just as the law-subjects are dependent on the norms made and interpreted by officials. If governing by law is to be possible, legal norms and their interpretations must be intelligible in light of the ordinary practices, ways, and customs of law-subjects. This is possible only if there is a sufficient degree of substantive congruence between law and extralegal social practices.

On this view, Hart's claim that it is an important function of law to facilitate the planning and interactions of ordinary citizens is at best one-sided. While it may be true that *law makes possible* social practices of many kinds, Fuller would argue, it is equally true that implicitly structured social practices *make law possible*. Formal law is broadly dependent on informal practices and sometimes implicit rules in the wider society. From Fuller's perspective, Hart's account of the social foundations of law, focusing as it does on the rule of recognition and the activities of law-applying institutions, is narrow and incomplete.

7.6. Adjudication

On the minimal assumption that law seeks to guide social behavior, it is natural to think that legal norms of a properly functioning legal system will play some role in practical reasoning. The institutionalized nature of law and the prominence of courts in that institutional structure might reasonably lead us to expect that such legal reasoning typically would be exemplified not only in the reasoning of courts, but also in law offices and even (to a lesser extent perhaps) in the society at large. It is natural, then, to hope that a theory of law would seek to offer not only an account of the nature and conditions of existence of a legal system and of the legal norms that it comprises, but also an account of how legal norms, thus identified, figure in ordinary legal reasoning. Moreover, on Hart's view, the rule of recognition selects certain norms for the special attention of judges in their decision making, norms that were normally expected to guide them. They are meant to function as grounds for justification in a larger scheme of ordering of social behavior in which not only the judges' behavior but also their reasoning is meant to shape the expectations and so the interactions of people in their society. So a theory of legal reasoning—or of adjudica-

tion, broadly construed—would seem to be an important component of Hart's theory of law. Yet, Hart paid very little attention to this task and he criticized American jurisprudence for its near obsession with the judicial process (Hart 1983, 123). His discussion of the role of law in legal reasoning did little more than carve out logical space for such a theory. Nevertheless, despite its modest dimensions, his remarks on adjudication attracted critical attention, especially in the work of Ronald Dworkin. We would do well to pause briefly to sketch his approach to problems of adjudication.

An adequate theory of adjudication, he argued (1994, 124–47; 1983, 6–8, 62–72, 103–8, 123–44), must steer between the extremes of radical "rule-skepticism" (which he identified with the "nightmare" excesses of certain American legal realists) and simple-minded "formalism," and its more ambitious cousin, the "noble dream" of common-law "holism."[47] Hart begins his discussion with the observation that legal norms always are beset by some degree of uncertainty. The rule of recognition equips judges with criteria by which to identify valid legal rules and norms, which are by necessity general, but general norms inevitably are open and indeterminate in some concrete cases. We can expect uncertainties in explicitly articulated rules in statutes or codes no less than in implicit rules arising from past judicial decisions (Hart 1994, 124–5): explicit rules may use vague language or open-ended concepts like "reasonable" or "fair," a line of past cases may only suggest the outlines of a general rule, and rules of either kind can conflict with an established metarule to resolve the conflict (Hart 1983, 103). Rules of all kinds and sources face the problem of determination (see chap. 3, sec. 3.2.2.3, above): "Particular fact-situations do not await us already marked off from each other, and labeled as instances of the general rule, the application of which is in question; nor can the rule itself step forward and claim its own instances" (Hart 1994, 126). The difficulties can be mitigated to some degree by canons of interpretation, but they can never be eliminated, since the canons raise again at some point the problem of determination (Hart 1994, 126). These indeterminacies, Hart observed, are due in part to inherent limitations of language but even more to ignorance of fact and indeterminacy of aim (1994, 128).[48] With law, we settle matters in advance, but also *in the dark* (Hart 1994, 130), so a degree of indeterminacy is not only inevitable, but also welcome and reasonable. Absolute certainty is not just unattainable, it is undesirable.

Thus, the "formalist" view, according to which judicial decision making is strictly a matter of deducing particular legal judgments by formal logical

[47] For an analysis of Hart's critique of the realists in his Holmes lecture (Hart 1983, 62–72) see, Postema 2010b, 259–68.

[48] The problem of determination goes even deeper, of course, since it is a logical fact about rules that they cannot claim their own instances. "Logic is silent on how to classify particulars," Hart wrote, and classifying particulars "is the heart of a judicial decision" (Hart 1983, 67).

means from valid legal norms the meanings of which are fixed and determinate is both hopelessly inaccurate as a descriptive account of judicial decision making and radically undesirable as an ideal for the practice. Hart's observations are, of course, familiar and were exploited for all they were worth by the American realists. But Hart was keen to resist the skeptical conclusions that some realists, in their more extravagant moments, were inclined to draw. It was a fundamental mistake, Hart argued, to infer from law's inevitable indeterminacy, that law was everywhere and irremediably indeterminate, providing no guidance for legal reasoning. Such "rule-skepticism" failed to recognize that despite their uncertainties and indeterminacies, legal rules, they were able to function as guides for practical reasoning and behavior precisely because the uncertainty and "open texture" in the penumbra of the rules arises around a *core* of determinate application of the rules, a core that is fixed not by some further rule or norm but by "general agreement in judgments as to the applicability" of the rules to particular cases (Hart 1994, 126).[49]

Due to the open texture of law, there will always be "areas of conduct where much must be left to be developed by courts or officials striking a balance, in the light of circumstances, between competing interests which vary in weight from case to case" (Hart 1994, 135). Here, "at the margin of rules" and in areas that are deliberately left open, courts "perform a rule-producing function," exercising a kind of delegated legislative power, although many courts refuse explicitly to admit they are doing so. However, Hart cautions against drawing the conclusion that realists in their more radical moments made bold to assert. For "the life of the law consists to a very large extent in the guidance both of officials and private individuals by determinate rules which, unlike the applications of variable standards, do *not* require from them fresh judgment from case to case" (ibid.).

The formalists' mistake, Hart argued, was to think that all reasoning with legal norms is a matter of reasoning within the determinate core, which they characterized as essentially a matter of reasoning deductively from fixed meanings of the words or concepts in which the norms are formulated. This ignores the inevitable penumbra of indeterminacy of all general norms, and hence ignores the inevitable element of "choice" or "discretion" that is involved in legal reasoning. The rule-skeptics' mistake was the mirror image of this error: they ignored the core of determinacy made possible by agreement in judgment. But Hart was not content to leave the matter here, with the area of uncontrolled choice or discretion more narrowly circumscribed. He argued further against more moderately inclined skeptics that even the inevitable area of discretion is constrained by reason and law. *Judicial* lawmaking, he urged in his

[49] Although Hart was surely influenced by Wittgenstein and Waismann (Lacey 2004, 140), it should be noted that Glanville Williams anticipated the main lines of Hart's embryonic views on adjudication (Williams 1945–1946, 191, 302–3).

introduction to *Essays in Jurisprudence*, is importantly different from *legislative* lawmaking. The difference lies in the fact that, even when the cases they face are not directly regulated by existing law (that is, existing legal materials do not support a single determinate judgment with regard to legal issues raised in the case), and courts are forced to make a choice based on moral or political values, they (1) are constrained by the "characteristic judicial virtues [...] [of] impartiality and neutrality; consideration for the interest of all who will be affected; and a concern to deploy some acceptable general principle as a reasoned basis for decision" (Hart 1994, 205); and (2) they seek "to proceed by analogy so as to ensure that the new law they make is in accordance with principles or under-pinning reasons which can be recognized as already having a footing in existing law" (Hart 1983, 7). While something like "choice" on the part of the judge is inevitable, this choice is neither irrational nor arbitrary. The judge "chooses to add to a line of cases a new case because of resemblances which can be reasonably defended as legally relevant and sufficiently close," where "the criteria of relevance and closeness of resemblance depend on many complex factors running through the legal system" (Hart 1994, 127).

So, even in the penumbra, judicial discretion is constrained and disciplined by factors internal to legal practice—among them analogical reasoning, a search for deeper legal principles behind surface rules, a general sense of justice and equality under the law, and a demand for as much impartiality as a judge can muster. There is more to say about how this exercise of specifically judicial lawmaking power is disciplined, Hart admitted. "To characterize these [disciplining factors] would be to characterize whatever is specific or peculiar in legal reasoning" (Hart 1994, 127) and that is something he did not undertake. He did, however, seek to block one tempting view of this domain: the "noble dream" of Pound, Llewellyn, and more recently of Dworkin (Hart 1983, 132–44). These theorists celebrated the style of adjudication of "some great English common law judges" who, when faced with legally difficult cases, set the problem in the context of the entire system of the law and drew from it principles to settle the case. Hart did not object to the search for guiding principles implicit in the body of legal materials—since that is what he earlier hailed as part of the regular discipline of proper judicial rule-making—but rather he objected to the confident assertion that this process of deliberation would always yield unique determinate results, a "single right answer." No useful purpose is served, Hart argued, by insisting that there is a unique right answer in such cases; rather, there is typically a range of reasonable and reasonably defensible answers, among which a choice must be made (Hart 1983, 140). For all his criticism of the realists, it appears that Hart's view of adjudication is not much different from or more developed than that of Holmes (see chap. 2, sec. 2.5.2, above).

There is much good sense in Hart's approach to adjudication, as far as it goes. He clearly and decisively refuted both the common charge that positivists

are committed to "formalism" or "mechanical jurisprudence" and the charge that in the area of discretion left by the open texture of legal rules the judge's discretion is entirely unguided by law or reason. Beyond this, Hart offered little. He left for others the task of working out a distinctively positivist theory of adjudication. Most of those who followed most closely in Hart's footsteps, however, have also declined to work out such a theory, maintaining that positivist legal theory has little to offer to this part of jurisprudential theory (Gardner 2001, 211–4; but see chap. 8, sec. 8.6, below). In the years following the publication of *Concept*, it was critics of Hart's positivist theory, most notably Dworkin, and those following his lead, who thought extensively about the distinctive discipline of adjudication and legal reasoning more generally.

7.7. Lead Us not into Temptation: Resisting the Pull of Natural Law

7.7.1. Positivism and the Separation of Law and Morals

Hart's jurisprudence was born with the thought that, despite its shortcomings, "the sane and healthy centre" of legal positivism, its insistence on a sharp separation of law from morality, remained viable and compelling (Hart 1982, 19, 28; 1983, 49–56). He proposed to understand this notoriously slippery "separation thesis" in relatively modest terms (Hart 1983, 8–12, 55). In his rendering, it is the thesis that the existence of law does not necessarily depend on its being just or otherwise morally estimable.[50] It was not meant to deny that law and morality can and often do influence each other (Hart 1994, 185, 204), nor that there might be other close connections between law and morality, for example, that facts establishing the existence of law might also endow law with certain moral merit, or that other contingent facts about legal practices in particular jurisdictions or about human nature in general might bring moral principles into a more intimate relation with law (Hart 1983, 54–5; 1994, 191–200). Primarily, what Hart sought to capture with this thesis was (1) that morality is not central to the task of analyzing the notion of law (Hart 1994, 155); and, more generally, (2) that the mere fact that an action is required of a person by a valid law of an efficacious legal system does not settle what morality requires of that person (Hart 1982, 28), and may not even give that person reason voluntarily to comply with it.

Hart developed his jurisprudential theory first of all in response to defects in the classical positivist conception of law, chief among them, perhaps, being the failure to give an adequate account of law's normativity. However, he viewed his work as a reclamation effort, an attempt to correct the defects of

[50] Note Hart's thesis takes the weak form, *there is no necessary connection*, which is weaker than the way the thesis is sometimes understood, namely, as claiming that, *necessarily, there is no connection*.

positivist theory while remaining faithful to its fundamental insight expressed in the separation thesis. From this perspective, actual historical development is reversed: natural-law ideas appear to be *reactions* to positivism, tempting positivism to bring its account of law closer and closer to morality (Hart 1994, 155). Sensitive to the pull of what he took to be ideas inspired by natural-law thinking pressed on him by critics, he adopted a nuanced strategy to resist the temptation and remain faithful to his positivist convictions. At several points, he conceded the reasonableness of the natural-law intuitions, but resisted their full-blown expression in natural-law jurisprudence. He adopted what we might call a strategy of concede and constrain. At some points his concessions were meager and his constraints were major, but at other points his acknowledgment of the good sense in natural law-like ideas was more substantial. For a full appreciation of Hart's neopositivist jurisprudence we here consider in one telling the full story of his dialectic with natural law.

7.7.2. Natural Law as a Theory of Legal Validity

Hart's concede-and-constrain strategy has been evident at several points in our discussion. In Section 3.3, for example, we considered Hart's nuanced account of legal obligations. Because obligations impose requirements on the actions of rational agents, they cannot be explained in terms of predictions of behavior; nevertheless, he argued, legal obligations are not just a species of moral obligations. Legal obligations depend at bottom on officials accepting ultimate authorizing rules and, indirectly, the legal norms recognized as valid. Thus, from the fact that a citizen has a legal obligation, nothing follows about whether that citizen has *any* reason (coercion aside), let alone a moral obligation, to act as the law directs. Moreover, as we saw in Section 3.4, Hart denied that officials who take the internal point of view with respect to law need to do so for moral reasons and he strongly resisted Raz's view that law claims moral authority.

Natural-law theory, however, not only claims moral authority for law but claims it on the basis of a strong thesis about legal validity, in Hart's view. According to this thesis, it is a universal and necessary truth about law that rules or norms must meet certain conditions of justice or moral reasonableness to qualify as legally valid: *lex iniusta non est lex*. Perhaps because he was preoccupied with the question of the nature of legal validity, Hart (and contemporary positivists after him) tended to take this slogan, and the theory of validity it was thought to express, as the core of natural-law jurisprudence (Hart 1994, 156, 185–6). Arguably this is not a core thesis of historical natural-law theory (Finnis 1980, 351–66), but it was revived in a modern secular form by the German legal philosopher, Gustav Radbruch, after World War II in his attempt to deal with especially troubling postwar legal and political problems in Germany (Radbruch 1946; see Volume 12 of this Treatise). Radbruch's view became one

focus of the famous debate between Hart and Fuller in the late 1950s (Hart 1983, 72–8; Fuller 1958, 648–61).

Radbruch argued for a relatively weak version of the *lex iniusta* principle. He wrote:

> The conflict between justice and legal certainty should be resolved in that the positive law, established by enactment and by power, has primacy even when its content is unjust and improper. It is only when the contradiction between positive law and justice reaches an intolerable level that the law is supposed to give way as a 'false law' [*unrichtiges Recht*] to justice. It is impossible to draw a sharper line between the cases of legalized injustice and laws which remain valid despite their false content. But another boundary can be drawn with the utmost precision. Where justice is not even aimed at, where equality—the core of justice—is deliberately disavowed in the enactment of a positive law, then the law is not simply 'false law', it has no claim at all to legal status. (Radbruch 1946, quoted in Alexy 1999, 15–6)

On Radbruch's view, the injustice of a rule that otherwise meets formal conditions of validation is not normally sufficient in itself to invalidate it. The injustice must be "intolerable," or the violation of fundamental equality must be deliberate and justice disavowed by those who enact the rule. In such an extreme case, we can no longer regard it as law, despite its formal status; it is "unrichtiges Recht."

Hart summarily dismissed this secular version of a natural-law conception of validity as naïve and the result of "an enormous overvaluation of the importance of the bare fact that a rule may be said to be a valid rule of law, as if this, once declared, was conclusive of the final moral question: 'Ought this rule of law to be obeyed?'" (Hart 1983, 74–5). The harsh and intemperate tone of Hart's criticism is puzzling given that his own view is in its essentials not sharply distinct from Radbruch's, for Hart (1983, 73) insisted that "if laws reached a certain degree of iniquity then there would be a plain moral obligation to resist them and to withhold obedience." The only difference seems to be that, when the wickedness sinks to this level Radbruch claimed we must say that the *Recht* is *unrichtiges*, whereas Hart (1983, 77) insisted we should say that "some laws may be laws but too evil to be obeyed." Both insisted that formally validated laws must be assessed by standards that transcend positive norms and that those standards, rather than matters of formal validation, settle the moral question of duty to obey. Is this just a verbal quibble?

Despite his fondness for the method of linguistic analysis, Hart (1983, 5) candidly admitted that in some cases linguistic analysis is powerless to help us. At the same time, he thought this dispute could not be resolved simply by agreeing to regiment our use of the word 'law' one way or the other. This is not, he argued, a matter of language (or language alone) but of how to understand the notions of law, legal validity, and legal obligation. We are faced with two concepts of law—a "narrower" one that excludes the morally offensive rules and a "wider" one that does not—and the choice between them cannot

be settled by "the proprieties of linguistic usage" (since they support both), but only by a reasoned consideration of the relative merits, both theoretical and practical, of each (Hart 1983, 6; 1994, 209–12). On this basis, the case for the wider, positivist concept wins hands down, he argued in his "Postscript," because from a "theoretical or scientific" point of view to restrict attention to rules that pass moral muster has the effect of arbitrarily consigning theoretical study of offensive laws to some other discipline (Hart 1994, 209–10). However, this curiously unfair argument[51] is not at the core of Hart's defense of his wider concept of law which is found rather in his Holmes lecture and the main text of *Concept*. This argument, presented with remarkable passion, is a practical and ultimately moral argument.

The wider concept, he maintained, makes possible a truly critical stance with regard to law, enabling us clear-sightedly to confront official abuses of power, unencumbered with the thought that certification of something as *the law* settles the question of obedience to or respect for it. Despite its aura of majesty, law is always subject to moral criticism and deserves no moral credit just in virtue of being law (Hart 1994, 210). The great merit of the classical positivist definition of law, and his own revised and amended version of it, he thought, is that it laid entirely open to public view the easily obscured fact that law not only protects and facilitates individual freedom, but also restricts it and inevitably causes suffering. It may be and do good, but it is also an evil; its advantages always come at a price. "Law, for Bentham, because it creates suffering, was an evil to be watched and controlled," Hart reminded us, "but it is a necessary evil and one which human beings can, if they are clear-sighted when they watch, control so as to make it contribute to human happiness. [...] We must continually keep our eye upon this balance sheet and weigh benefit against suffering; otherwise we may be taken by surprise when the law, supposed to be our watchdog, turns out to be a hyena" (Hart 1982, 137–8). The wide understanding of law and legal validity that positivism advocates, in Hart's view, underwrites and encourages a demystifying, vigilant, and deeply critical perspective on power. In view of the enormous stakes involved, this feature recommends it hands down over any natural-law rival.

It does so, of course, because on this wider view the legal validity of a candidate norm does not depend on its passing any test of moral merit. Validity, on this view, is one thing, to be determined by morally neutral criteria, while moral appropriateness or justice is something altogether different. If this is Hart's root argument for his critical-positivist conception of law, then it would appear that he must embrace what we earlier called "exclusive positivism"—the view that validity of law always and everywhere must be a matter of morally neutral "sources." For so-called inclusive positivism allows for the possibility that

[51] It is ironic in light of the aim of analytic jurisprudence since Austin to exclude moral theory from the province of jurisprudence (see chap. 1, secs. 1.4.2, 1.4.3.1, and 1.4.3.3).

among the criteria of validity in some legal systems are substantive moral principles. Of course, whether or not legal rules in a given legal system must pass some sort of moral muster is, on this view, a matter of fact about that legal system (that is, about the practice of law-applying officials in that system). But this does not change the fact that, in a system that incorporates moral principles into its fundamental criteria of validity, the kind of moral clarity Hart's critical positivism promised is, on Hart's own passionate argument, compromised.

It is not surprising, then, that readers of *Concept* found it hard to believe Hart (1994, 239–44) when he said in his "Postscript" that he had all along been committed to inclusive positivism. For although at points in the main text of *Concept* Hart suggested something like the inclusivist view (see Hart 1994, 204), nevertheless the view is hard to make compatible with what appeared to be a deep motivation driving his attempt to articulate a positivist theory of law, a motivation I have tried to highlight by calling his theory "critical positivism." Perhaps Hart's theory was conflicted at its methodological roots. I will return at the end of this chapter to consider briefly this question, but first, we must explore further dimensions of Hart's critical positivism.

7.7.3. The Minimal Demands of Natural Necessity

It would be a mistake, Hart argued, to leave the question of the relation between law and morality strictly at the level of the meaning of the words 'law' or 'legal system'. We can elaborate and deepen our understanding of the nature of law by locating it in the context of other broad truths about human nature and the world in which human beings associate (Hart 1994, 199). Classical (Thomist) natural-law theory did so, of course, but it depended on theological, metaphysical, and epistemological assumptions that are no longer viable in the modern world, in Hart's view; however, resources for continuing the inquiry along these lines were available, he thought, in the modern, secular, empiricist natural-law tradition represented by Grotius, Hobbes, and Hume. Indeed, he argued that from a few simple truisms about the common human nature (Hart 1983, 79) it is possible to show that every legal system, by a kind of "natural necessity," must (1) have a minimal core set of rules, akin to core principles of social morality, and (2) have a minimally effective coercive mechanism to enforce compliance with these rules. "Such universally recognized principles of conduct which have a basis in elementary truths concerning human beings, their natural [and social] environment, and aims, may be considered the *minimum content* of Natural Law, in contrast with the more grandiose and more challengeable constructions which have often been proffered under that name" (Hart 1994, 193, original emphasis). Hart's argument is, on the surface, simple and straightforward, but just below the surface it is subtle, nuanced, and profound, and it plants the seeds of constraint on what looks like a significant concession to one important branch of the natural-law tradition.

Hart sketched a simple version of this argument in his Holmes essay (Hart 1983, 78–81). It begins with the observation that human beings universally desire to survive and to live in association with others. This contingent and empirically confirmable truth about human beings captures something deep in human nature and so has a kind of "natural necessity." Other, equally deep features of human nature and their natural and social environment make survival in association with others uncertain and potentially deadly. For example, human beings are vulnerable to physical violence and yet prone to use it to advance their aims, roughly equal in their physical and mental capacities, altruistic but limit their concern to a close circle of family and associates, and possessing limited rational capacities and strength of will. These facts make social life necessary, but competition for scarce material resources makes it potentially deadly. If survival in associations is to be possible, human beings must comply with a certain set of broad principles in their interactions with others. These will include restrictions on the use of violence, protections of possession of material goods, rules to facilitate exchanges and with them rules holding people to their promises and prohibiting fraud. These rules seem analogous to core principles of morality. Thus, human survival in any social organization is premised on broad observance of these core moral principles: "Without such a content laws and morals could not forward the minimum purpose of survival which men have in associating with each other" (Hart 1994, 193). And, he concluded, "if a legal system did not have [rules and protections of this kind] there would be no point in having any other rules at all" (Hart 1983, 80).

The general structure of this argument is familiar to anyone who has read Hobbes or Hume, but as it stands it is a *non sequitur*. For it does not show that *law* must include the minimal rules, but only that any society in which law exists much be such that people generally comply with these rules. Also, this argument does not yet say anything about the necessity of coercion in any legal system. In *Concept*, Hart elaborated this sketch and explicitly tied its general reflections to key claims about the nature of law. Two features of his approach to which Hart explicitly called attention significantly structure his argument. First, the "natural necessity" he had in mind is not causal, but *rational*. "It is important to stress the distinctively rational connection between natural facts and the content of legal and moral rules in this approach" (Hart 1994, 193). The connections are "mediated by *reasons*" relating to "the conscious aims or purpose[s] of those whose rules they are" (ibid., 194). Second, the conditions set out in this argument are not understood as conditions for the validity of individual legal rules (or for their imposing obligations), but rather conditions of the *existence and efficacy* of the *legal system* as a whole (Hart 1983, 78). This second point provides a jurisprudential context for what had appeared before to be just a general argument about patterns of social behavior necessary for human survival, for we know from Hart's earlier arguments that a legal system can be said to exist and thus be efficacious, just in case (1) there is a set of legal

rules that are valid in accord with a rule of recognition accepted and practiced by officials in the system, and (2) people in the society generally comply with these rules. The strategy of Hart's elaborated argument for the minimum content of natural law and the necessity of an effective coercive mechanism is to exploit the conditions of law's efficacy, that is, the conditions under which (2) is true, given the truisms of human nature.

Hart's core argument can be formulated as follows. First, a necessary condition of the existence and efficacy of law is general compliance with the law in the society governed by it. There are two kinds of compliance: voluntary and coerced. Compliance is coerced if people comply solely out of fear of penalties exacted for noncompliance. Compliance is voluntary if people act in a way consistent with the requirements of law from reasons other than from fear of suffering penalties for non-compliance, at a minimum, and perhaps out of at least a minimal sense that cooperation with others is not unreasonable (Hart 1994, 193). Second, general compliance cannot be exclusively coerced compliance, because in order for a coercive regime to operate, at least some members of the community must participate in the coercive enterprise and some larger number must regard cooperation with them, at least to the extent of not interfering and giving some degree of support to the use of coercive force, as not unreasonable under the circumstances. Thus, third, general compliance is possible only if a sufficient number of those governed by the law voluntarily cooperate in its enforcement. "Without their voluntary co-operation, thus creating *authority*, the coercive power of law and government cannot be established" (Hart 1994, 201). Fourth, people will voluntarily comply only if it is *not unreasonable* for them to do so. Fifth, it *is unreasonable* for people voluntarily to comply if they are not accorded at least minimal protections of life, bodily integrity, freedom of movement, security of possession and agreement. Sixth, these protections can be accorded them only if there is in place (a) a set of rules extending to them these protections—the minimum-content rules mentioned above—and (b) a framework of coercive sanctions to assure them that other members of society will in general comply with these rules. Thus, seventh, general compliance with the existing system of valid legal rules is possible (and so a legal system can exist) only if it includes among its rules and provisions rules extending the minimal protections necessary for voluntary compliance and a minimally effective coercive mechanism to enforce those rules.

Before we comment on this argument, a word of clarification about the role of coercion in the argument is needed. Coercion enters the argument at two points, first in the *contrast with* voluntary compliance and again as a *condition* of voluntary compliance. The second appearance is necessary for Hart's argument and is not paradoxical despite appearances. Hart explained the argument this way:

> except in very small closely-knit societies, submission to the system of restraints would be folly if there were no organization for the coercion of those who would then try to obtain the advantages

of the system without submitting to its obligations. 'Sanctions' are therefore required not as the normal motive for obedience, but as a *guarantee* that those who would voluntarily obey shall not be sacrificed to those who would not. (Hart 1994, 198, original emphasis)

Coercion is needed at this point in the argument because the voluntary cooperation of a person so inclined is not unreasonable only if he or she can count on other people generally cooperating as well. This person recognizes, perhaps, "the advantages of mutual forbearance," but they are forthcoming only if the forbearance is mutual. Under the circumstances described by Hart's truisms, people cannot simply assume others will comply with the rules. Large numbers of them may be willing to cooperate, but they will find it not unreasonable to do so only on the condition that others are likely to cooperate as well. This classic assurance problem can be solved if it is publicly known that there are sufficiently credible incentives for compliance. An effective coercive mechanism is a major source of such incentives. Thus, while coercion is the sole or dominant motivation for coerced compliance, but not for voluntary compliance, coercion nevertheless plays a key role in *underwriting* voluntary compliance, for it removes one major condition under which voluntary compliance is *unreasonable*. Thus, under these circumstances, "what reason demands is *voluntary* co-operation in a *coercive* system" (Hart 1994, 198, original emphasis).

Hart concludes that although justice is not a necessary condition of the validity of any legal norm, nor is a credible sanction a necessary condition of a legal obligation, nevertheless, there can be no valid legal norms unless among them are norms affording law-subjects certain minimum protections analogous to core principles of morality and there can be no binding legal obligations in general unless valid legal norms are underwritten by a credible coercive mechanism. Assuming that the argument is at least roughly right, two comments about its upshot are in order.

First, the argument commits Hart to recognizing a kind of "acceptance" or internal point of view within a legal system that is different from that adopted by officials. Law-subjects who "accept" the law, in the sense assumed as necessary for the efficacy of law, simply regard it as not unreasonable for them voluntarily to comply with the law and, thereby, to recognize the at least minimal "authority" governing institutions. This falls far short of the kind of acceptance Hart thought characteristic of (and necessary from) law-applying officials. Law-subjects may not regard law as giving them reasons in themselves (let alone peremptory ones) for complying with its requirements. Their reasons are likely to be broadly prudential (but not necessarily narrowly self-interested), concerning what general strategy would enable them to achieve their individual and collective goals in a social context in which they are constantly faced with the need to coordinate their behavior with lots of other people. This is not the perspective of Holmes's bad man, but neither is it that of one who regards the rules as common public standards. This looks more like the kind of conven-

tional acceptance of government that Hume argued lay at the foundations of government (Hume 1985; 2000, 311–62). But the argument also seems to support the suggestion made above (sec. 7.5.5.2) that Hart must recognize a much broader social (but normatively significant) foundation for law than merely that of the practice of law-applying officials and the purely passive compliance of law-subjects, although he is aware that the scope of this group of voluntarily complying law-subjects may be limited.

Second, Hart was keen to stress that the connection to morality properly understood established by this argument is very minimal. Here again, Hart sought to constrain and minimize his concession to natural law. There are at least two respects in which this natural-law component is minimal. The first is that the conditions necessary for law's efficacy are conditions under which for a sufficient number of law-subjects law it is not unreasonable (given the circumstances) for them voluntarily to comply with the law. These conditions are limited and may not even guarantee that the laws are even minimally just. Law will include among its rules protections against force and fraud and the like, but, since the rules are merely conditions of the law's efficacy, we have no right to assume that the legal protections will overlap substantially with what we take to be even the core moral requirements of respect for the integrity and dignity of others. On the basis of Hart's argument alone, we cannot expect much more than a pale shadow of robust moral requirements.

More fundamentally, nothing in the argument makes it necessary that the legal system extend its protections to all who are subject to it: "though a society to be viable must offer *some* of its members a system of mutual forbearances, it need not, unfortunately, offer them to all" (Hart 1994, 201, original emphasis). The authority and coercive power made possible by the voluntary cooperation of a sufficiently large number can be used against others, without even extending to them the minimal protections of law. Hart recognizes that these are law's *victims* rather than its beneficiaries. The size of the group of such victims may be determined by nothing other than the technology of coercion, the discipline among the cooperators, and the helplessness of the victims; it is not necessarily determined by any considerations of justice or any other humane moral concern. These victims will be alienated from the law, their compliance (or rather, acquiescence) coming at the point of a bayonet. They will have *no* reason voluntarily to comply. "No one denied [minimum protections of the law] would have any reason to obey except fear and would have every moral reason to revolt" (Hart 1983, 82). To such victims only the alienated external point of view is available (Hart 1994, 201–2). Not even Humean "convention consent" is reasonably available to them. The "sobering truth" we noted earlier (sec. 7.4.2) comes back into focus again: the benefits of law may come at the high price of increased efficiency of oppression and indeed the creation of new forms of exploitation and oppression nearly unthinkable without law (Hart 1994, 202; Waldron 1999a,175, 181).

7.7.4. Justice in the Administration of Law and the Rule of Law

At least, this is so as far as *this* argument is concerned, but Hart did not leave the matter here. He also recognized that internal to law—by its nature as the mode of exercising political power via general rules—there are certain standards by which it is governed and evaluated (Hart 1994, 157–61, 204–7). Of course, these standards are not always met by existing legal systems, but they are implicit in the very notion of law as a distinctive method of social control. The standards he had in mind are the familiar principles collected under the rubric of the rule of law.

Such principles, it might be thought, could stiffen law's resistance (or the resistance of those working within the law) to the oppressive abuse of law, thereby offering some hope to counter the "sobering truth" to which Hart called attention. Historian E.P. Thompson made this argument at the end of *Whigs and Hunters* (1976), his detailed history of the enclosure movement in eighteenth century England. Although England's governing elite worked systematically to dispossess country people of their rights to common land, Thompson argued, they were forced to do so by law which was able, "on occasion, to inhibit power and afford some protection to the powerless." Law was not merely "a pliant medium to be twisted this way and that by whichever interests already possess[ed] effective power," but rather, "it was inherent in the very nature of the medium [...] that it could not be reserved for the exclusive use only of their own class. The law, in its forms and traditions, entailed principles of equity and universality which, perforce, had to be extended to all sorts and degrees of men" (Thompson 1976, 266, 262, 264). Thompson's argument is impressive coming from a Marxist historian who was primed to see law as an agent of its own mystification and who was intent on demystifying law. However, Hart, equally intent on demystification, strongly resisted this line of thought. He was willing to concede that there are standards implicit in the notion of law by which its daily exercise must be governed, but he insisted that even these give us no reason to treat law as worthy of fidelity in its own name alone.

Hart's thought at this point was straightforward. Law is a matter of subjecting behavior to the governance of general rules, he argued. To do so effectively, rules must have a core of settled meaning and must be publicly accessible and conscientiously applied. The enterprise of governing by law is itself governed, *inter alia*, by the principle *treat like cases alike*, which is the core of the idea of formal justice (Hart 1983, 81; 1994, 159–60). Concerning law, this principle is articulated in two families of subsidiary principles, Hart maintained. The first has to do with application of law and procedural matters and gives content to the idea of "justice in the administration of law" (or "natural justice"): existing law must be administered without prejudice, interest, or caprice (Hart 1994, 161). When the law is clear, it should be applied according to its terms, and

where it is uncertain (in the "penumbra" of the rules), officials should exercise their discretion objectively and impartially. And adjudicative procedures are constrained by principles of fairness like "no man should be a judge in his own cause" (Hart 1994, 160, 204–5). Second, in like fashion, the form of laws themselves is governed by familiar principles of legality, requiring that they be promulgated, intelligible, prospective, and the like (Hart 1994, 206–7).

Hart did not offer a detailed argument for these rule-of-law principles beyond suggesting that they are implied in the technique of governing social behavior by general rules. "The connection between [justice in the administration of law] [...] and the very notion of proceeding by rule is obviously very close," he wrote (Hart 1994, 161). He accepted Fuller's account of the constituent principles of the rule of law and their interpretation, but, as we have seen, he rejected as extravagant and misleading Fuller's claim that these principles qualify as *moral* principles (see chap. 4, sec. 4.3.2). Hart's view at this point, however, is not entirely clear. At times his writing suggests that governing in accord with the principle of treating like cases alike has *some* moral merit, that doing so is *prima facie* just, or satisfies justice in part (as Lyons [1984, 82–7] suggested). "We have, in the bare notion of a general rule of law, the germ at least of justice" (Hart 1994, 206). Yet, it is more likely, I think, that Hart meant to deny *any moral* significance to achievement of formal or procedural justice. First, he spoke of the principle *treat like cases alike* not as a principle of (formal) justice, but rather as providing *the form* or *frame* of justice (Hart 1994, 159). Any principle must meet this condition, but that is not sufficient for its being a genuine principle of justice. Likewise, applications of even the most arbitrary rules meets the standard of treating like cases alike considered formally, but they are not by that fact alone even minimally just. Second, Hart consistently criticized Fuller's claim that the canons of the rule of law are standards of *morality* on the ground that while as standards they underwrite claims of what ought to be done, nevertheless, they are not *moral* standards and the associated *oughts* are not *moral* oughts. The standards lay down conditions that must be met if the enterprise of governing by rules is to be effective; they mark out efficient *means* to the end of governing by rules. But following them has moral merit only if the enterprise does, and for that there is no guarantee. "Poisoning is no doubt a purposive activity, and reflections on its purpose may show that it has its internal principles. [...] But to call these principles of the poisoner's art 'the morality of poisoning' would simply blur the distinction between the notion of efficiency for a purpose and those final judgments about activities and purposes with which morality in its various forms is concerned" (Hart 1983, 350).[52]

Thus, Hart embraced the rule of law, but regarded it to be morally very thin; either, its standards are of very limited moral force or they are empty of

[52] As we saw in chap. 4, sec. 4.3.2, Fuller replied that this objection overlooks the morally significant context of reciprocity from which the rule-of-law principles arise.

any moral content. In either case, Hart's "sobering truth" returns again. While treating like cases alike may be essential in administering good law, it contributes nothing, in Hart's view, to mitigating the injustice of bad laws. It is still "unfortunately compatible with very great iniquity" (Hart 1994, 207); indeed, insofar as it enables those in power to exercise their power efficiently, it exacerbates oppression. Law can be used for good and for evil: " 'a legal system' is not [...] itself the name of a noble ideal" (MacCormick 1981, 158).

This is Hart's *critical positivism*. It is potentially far more radical than the views of many Critical Legal Scholars in the closing decades of the century, who dismissed Hart's jurisprudence for its uncritical bourgeois liberalism ("liberal legalism") (see chap. 6, sec. 6.5). He had grave reservations about the ideal of the rule of law, or at least about those who tended to praise the virtues of the rule of law without also acknowledging at the same time the price that may be exacted for its promised benefits. Fuller and others might object that while the singularly critical focus of his approach is salutary, it blinded Hart to the critical resources *within* the law and the notion of the rule of law (Fuller in chap. 4, sec. 4.3.3). Fuller, for example, did not deny that, as a conceptual matter, it is always possible for those who wield political power to follow the requirements of the rule of law scrupulously while systematically carrying out brutally unjust and oppressive schemes. But he argued that in the actual world of politics, the aspiration for justice that characterizes law, and the pressure on those who wield it to extend its protections to people without arbitrary distinctions, gives it a kind of moral credibility and force. Law, he maintained, is not a mere fact of power, but is an achievement. And, while it offers no guarantees that justice will be achieved either in the near or the far term, it does offer resources for its own critical transformation. Hart remained skeptical. He insisted on a notion of law that laid bare the wide range of possible, and potentially grave, defects of legal regimes. Moral clarity, he thought, required unflinching and utterly unromantic understanding of the ways in which law can exploit the lives, restrict and invade the liberty, and intensify the suffering and oppression of people, all the while making it appear that it is serving the highest of humanitarian ends. Bentham, the great practitioner of "demystification," was his model and hero (Hart 1982, 21–39), and his aim was to articulate a notion of law that enabled people to respond to the law critically rather than slavishly.

7.7.5. Positivism and Jurisprudential Method

Hart (1994, vi) initially characterized his project in *Concept* as "an essay in descriptive sociology". Yet, this understanding of his project did not prevent him from offering practical/moral (as well as theoretical) arguments for preferring his wider conception of law to the natural lawyers' narrower one (Hart 1994, 207–12). However, the increasing attention paid by legal philosophers in the

1980s to issues of methodology in jurisprudence forced him to rethink and re-characterize his project.

The most powerful influence on Hart's view of his project was Ronald Dworkin's searching criticism of Hart's methodology, as well as his substantive conception of law. We will discuss Dworkin's theory at length in chapter 9. Here we need mention only two key features of it. Dworkin insisted that because law is an "interpretive concept," it can be understood only if its role in the practical reasoning of participants in legal practice is put at the center of legal theory. Indeed, he maintained that "jurisprudence is the general part of adjudication, silent prologue to any decision at law" (Dworkin 1986, 90). The concept of law frames the practical, deliberative problems that judges and ordinary citizens alike face. Law is used to license acts of official coercion and it typically does so by linking past political decisions with present or proposed uses of force. From this perspective, Dworkin (1986, 92–4) argued, the framing question of jurisprudence is how (and whether) appeals to past political decisions can provide this kind of license or justification. This forces legal theorists, whether working at the micro-level (judges or lawyers) or the macro-level (legal philosophers), to ask similar the "interpretive" questions: taking all the relevant legal acts, rules, decisions, and constitutions into account, what set of principles gives the practically most compelling moral case for the law's claim to license official coercion.

About the same time as the publication of Dworkin's *Law's Empire* (1986), other legal philosophers began to notice that classical analytic jurists, notably Hobbes and Bentham, defended their classical positivist account of the nature of law not on strictly conceptual grounds but on explicitly acknowledged normative political grounds.[53] This exploration revealed that it was necessary to distinguish between the account of the nature of law—the "definition", elaboration, or model of law defended in the theory—and the mode of defense of that account. It was argued that while all positivist theories agreed on a morally neutral account of the nature of law—that is, on the view that law is strictly a matter of social fact, for example, commands of a sovereign—they have disagreed about the bases for such an account of law. Some argued for "substantive positivism" on strictly theoretical, morally neutral grounds, as a matter of conceptual analysis, for example. Others, Bentham prominently among them, argued for "substantive positivism" on moral-political grounds. This opened a new level of debate between positivists and anti-positivists over the proper methodology of jurisprudence. "Methodological positivists" insisted on the

[53] Fuller made the argument about Hobbes's legal theory in the early part of the century (Fuller 1940, 19–24). Postema (1989a, 302–36) made the case for Bentham's "utilitarian positivism" in the mid-1980s, when also MacCormick (1985) made "a moralistic case for a-moralistic law." More recent arguments along similar lines can be found in Campbell (1996), Waldron (2001), Murphy (2001), and Perry (2001).

(moral) value-neutrality at the methodological level, while defenders of "normative jurisprudence" argued that substantive moral and political values inevitably and appropriately play an important role in the articulation and defense of an account of the nature of law. This debate, as we shall see in Chapter 10, played out primarily *within* the positivist camp, but the methodological distinction cuts across the entire jurisprudential spectrum, since one can imagine strictly conceptual arguments for a conception of law along natural-law lines as well as a normative argument for a strictly positivist conception of law. In the closing decade of the twentieth century, this controversy, in Waldron's words, "established itself as a major fault-line in modern jurisprudence" (Waldron 2002, 369).

This debate was fueled by the publication of Hart's "Postscript" to *Concept* in 1994. Hart's primary aim in the "Postscript" was to answer Dworkin's critique. Hart sharply distinguished his own methodology from Dworkin's. Dworkin's normative jurisprudence sought *justification* of fidelity to law and took its scope to be strictly local, Hart argued, but his project was *universal* in scope and entirely *descriptive*, and hence morally neutral (Hart 1994, 239–44). The law, of course, has an irreducibly normative aspect, but Hart insisted that his aim was to give a morally neutral account of it. This, he wrote, is a "radically different enterprise from Dworkin's" (1994, 240). Rather than privileging the perspective of participants who seek to work out their moral obligations within the practice, Hart (1994, 242) claimed that his theory takes the (moderate) external observer's perspective. Because its aims are theoretical, rather than practical, descriptive rather than evaluative, it proceeds without appeal to moral values. Dworkin's critique failed to touch his theory, Hart argued, because the two are really not in competition.

Unfortunately, this reply seriously overstates the differences between the two theoretical approaches and mischaracterizes Hart's own theory. It also trades on an ambiguity that runs throughout *Concept*, including the "Postscript." The term "theory," as Hart used it, can refer either to the *process* of jurisprudential theorizing or to its *product*, to the methodology of the enterprise or the model of law it yields. There is no doubt that Hart sought a model of law that was strictly descriptive, but his reasons for doing so were not exclusively theoretical. He was indeed inclined to take an external perspective on the practice, to maintain some distance from it, but his reasons for doing so were practical: to maintain a vigilant critical perspective on the official exercise of coercive power conducted under cover of law.

Actually, Hart began his project thinking that the techniques of linguistic analysis enabled him to approach the fundamental questions of jurisprudence from a strictly morally neutral, observer's perspective. He realized later, however, that these techniques seriously limited for the purpose of answering the perennial questions of legal philosophy. Linguistic usage often seemed to support quite different and competing answers and legal concepts "constituted sources

of perplexity even when their applications to particular cases were uncontroversial, and even for those who had a perfect mastery of those concepts" (Hart 1983, 5). Different points of view depending in part on different moral and political principles generated quite different answers to these questions. For this reason, the neutrality of linguistic philosophy's analytic techniques made them unsuitable for resolving or even clarifying the deep and important controversies on fundamental issues in legal philosophy. "For such cases," Hart wrote in 1983, "what is needed is first, the identification of the latent conflicting points of view [and values] which led to the choice or formation of divergent concepts, and secondly, reasoned argument directed to establishing the merits of conflicting theories, divergent concepts or rules, or to showing how these could be made compatible by some suitable restriction of their scope" (Hart 1983, 6).

This is precisely the method Hart adopted when he turned to the question of assessing the natural-law approach to the key notions of legal validity and legal obligation (see sec. 7.7.2, above). He tested the merits of the "narrower" natural-law conception and his "wider" positivist one by considering their contribution to "our theoretical inquiries" and their ability to "advance and clarify our moral deliberations" about fidelity to law (Hart 1994, 209). He believed that these "reasoned arguments" decisively supported his strictly descriptive conception of law, but it is also clear that the arguments rested on important moral-political values. The point of offering a theory of law is to provide an illuminating account of its nature. It will be illuminating if it brings out salient features of the institution that are of special interest and importance to us in view of general features of human nature and the social environment in which human beings must live together. One of the most important such features, in Hart's view, was the way in which law affects the interests and freedom of individual human beings. A proper theory of law must always keep in mind that law not only protects and facilitates individual freedom, but also constrains it. Because freedom is fundamentally important to us, it is especially important that we are able to plot out the potential impact of law on our freedom, whether the laws are good and just or bad and unjust (Lacey 2004, 257–60, 354). It is especially important that those subject to the law be provided the resources to recognize and respond critically to the potential for official abuse of the law's coercive machinery.

Hart insisted that jurisprudence take the perspective of an outsider, not that of an entirely uninvolved external observer with only theoretical interests in the phenomena, but rather that of one who is potentially affected materially by the movements of the law, one who is an outsider or at least has deep sympathies for those who might find themselves on the outside, as "victims" of the law.[54] Hart rejected *both* the point of view of the committed self-identified

[54] Thus, Twining's (2000, 114) characterization of Hart as a positivist in the Holmesian mode, seeing law in terms of other people's power, is only somewhat exaggerated.

participant *and* Holmes's "bad man." His preferred perspective was that of the victim-sympathetic liberal. He does not attribute a specific function or range of functions to law, but he does identify as fundamental to all law the fact that it seeks to provide normative-guidance underwritten to the extent necessary by coercion. With this feature in mind it is possible to ask, not (as Dworkin was wont to do) how is this use of coercion justified? but rather how is this kind of social control mechanism likely to affect individual liberty? The answer, broadly, is that it can do so both positively, by protecting liberties and facilitating private arranging and political decision making, and negatively, by imposing demands on subjects without providing them with any compensating benefits of a scheme of mutual forbearances.

The resulting account of law is "descriptive" but the dominant aim is practical-critical and the moral-political value driving its critical concern is individual freedom. Thus, Hart's defensive claims in his "Postscript" to the contrary notwithstanding, his jurisprudential theory was at least in part normatively motivated. It is, of course, not the kind of normative jurisprudential theory that Dworkin advocated, but it has some affinity to Bentham's version of this methodology. Hart and Dworkin offer very different theories of law, as Hart's theory differs from Bentham's and from Fuller's, but it is not quite correct to say that these theorists are engaged in fundamentally different jurisprudential enterprises, as Hart maintained. Hart's distinctive neopositivist theory is a *critical* positivism, designed to equip theorists and ordinary citizens with the resources to hold law's demands at a critical distance.

Chapter 8

POSITIVISM EXTENDED: INSTITUTIONS, SOURCES, AUTHORITY, AND LAW

8.1. Hart's Legacy

At mid-century, Hart set out a distinctively positivist general theory of law. Following the lead of Bentham, as he read him, Hart saw himself first of all as an "expositor" of law in general, not its censor. He offered, in the fashion of the time, a philosophical analysis of "the concept of law," which he understood to be an exercise of general, analytical jurisprudence. His theoretical eye surveyed law in general, abstracted from the special features of local, English legal system. Its task was analysis rather than apology, its objective was general understanding, rather than admiration or allegiance. Still, the concept he fashioned was designed to make possible a clear-eyed, critical view of the law. He regarded this as a distinctively positivist project, guided by the root thesis of the fundamental separability of law from morality, which shaped both his methodology and his substantive account of law.

The central themes of Hart's theory set the agenda of analytic legal philosophy for the second half of the twentieth century. His methodology was meant to be *descriptivist*, but took its central task to be the description or articulation of law and legal practice from the "internal point of view." This *hermeneutical* or interpretive approach is necessary, he insisted, if the essentially *normative* character of law is adequately to be captured by our descriptive theory. He summed up his main substantive doctrine simply as the view that law is "the union of primary and secondary rules." By this he meant to emphasize that law is a matter of rules or norms of different kinds having different functions or tasks within a unified system. Secondary rules, on this view, are of critical importance because they define and establish key institutions charged with maintaining the system of norms. These include law-making, law-applying, and law-enforcing institutions. Thus, Hart's theory of law was fundamentally *institutionalist*. On his view law is fundamentally an institutionalized system of norms. What makes a set of rules or norms a *system* of *laws*, and explains its continuity, persistence, and unity, is the special relationship of legal norms to the characteristic activities of key institutions—most importantly, law-applying institutions. These institutions are, themselves, defined by rules, the legal validity of which is rooted ultimately in a foundational rule of recognition. The status of norms—whether first-order rules directing the behavior of citizens or second-order rules defining and directing the law-maintenance activities of officials—as valid legal norms, their existence as laws and their legal authority, according to this *foundationalist* thesis, is determined by the criteria of validity

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defined by the rule of recognition. This foundational rule, in turn, exists and has its characteristic normative force in virtue of the practice of law-applying officials. The social fact of this practice (when accompanied by broad compliance of the population with the set of valid legal norms) explains the existence of the institutionalized system of law. Thus, although law is a system of norms, on this *conventionalist* view, law is fundamentally a matter of social facts, where the relevant social facts are law-recognizing practice of law-applying officials.

These five theses—normativism, institutionalism, foundationalism, and conventionalism of law established by a descriptivist/hermeneutical methodology—attracted the greatest amount of attention in the years after the publication of *The Concept of Law*. These thickly interwoven theses were challenged, defended, revised, rejected, recast and rejuvenated in subsequent jurisprudence. It is impossible to follow the dialectic of subsequent debates in analytic legal philosophy without reference to Hart's initial articulation of them; indeed, many of the debates over novel proposals for understanding elements of law and legal practice were often conducted as debates over the interpretation of Hart's canonical text.

We begin our chronicle of this dialectic with attempts to clarify, defend, and extend the above basic themes of Hart's positivist program. The theoretical approaches here considered, in different ways, put the institutional nature of law at the center, offered robust interpretations of the normativity of law, and argued for a "hard positivist" or exclusive positivist understanding of the criteria of validity. We will leave for a later chapter debates over law's allegedly conventional foundations.

8.2. Institutionalism

The decades immediately following the publication of *The Concept of Law* saw substantial cross-fertilization and collaboration between English-speaking and Continental European legal theory, a rare event in the intellectual history of twentieth-century legal philosophy. Scottish jurisprudence, in the modern era, has always had one eye trained on England and the other on the Continent and it was a Scot, Neil MacCormick, who did the most to link Hartian positivism with developments in post-Kelsenian legal philosophy elsewhere in Europe. Throughout his career he was constantly in conversation with major Continental legal theorists, none more so than Ota Weinberger.[1] Initially working independently, and later together, MacCormick and Weinberger laid the groundwork of contemporary institutional theory of law.

Their theory of law is often called "neo-institutionalism," but this is misleading because the latter-day approach is clearly not a descendent of early

[1] This cross-fertilization continues in recent contributions to institutionalism. See, for example, Weinberger 1991, Ruiter 1993, 1998, MacCormick and de Jong 1998, and Morton 1998.

twentieth-century institutionalism.[2] It shares neither philosophical orientation, nor concrete substantive doctrines, nor ideological objectives with the earlier theory, represented by Romano in Italy, Hauriou in France, and Schmitt in Germany (see Volume 12 of this Treatise). MacCormick and Weinberger explicitly distanced their views from those of Hauriou's Bergsonian vitalism (MacCormick and Weinberger 1986, 24–7). Moreover, the organicist communitarianism of earlier institutionalism finds no foothold in latter-day theory, and there is no hint of the authoritarianism and irrationalism of Schmitt. Certain themes, if characterized very broadly, might be found in both institutionalist theories—for example, an appreciation for the deep social roots of legal norms, a rejection of attempts to reduce legal (and other) norms to purely behavioral or psychological phenomena typical of some twentieth-century positivist and realist theories of law, and an interest in the systematic character of law. However, these very broad themes were articulated, developed, and defended in such sharply different ways that we can only conclude that the two "institutionalisms" are related by homonymy rather than intellectual kinship.

8.2.1. The Idea of an Institutionalized Normative Order

The institutionalism of the contemporary approach is reflected specifically in two focal elements of the theory. Consider again Hart's theory of law. Recall, Hart resisted attempts to explain law's normativity entirely in terms of behavioral or psychological facts; nevertheless, he insisted that law is ultimately a matter of social facts, albeit of a very special kind. Developing this thought, contemporary institutional theorists maintained that we should understand this claim to mean that law is a (kind of) "institutional fact." They took this term to refer to two fundamental features of law. First, the facts of, and pertaining to, law are necessarily part of social reality, which is distinct from (although perhaps supervenes upon) material reality, the study of which is the province of the physical sciences. The "brute facts" of the material world contrast with the "institutional facts" of the social world, on this view. Building on the work of Anscombe (1958) and Searle (1969), institutional legal theorists offered an analysis of institutional facts in general and they argued that legal rules and norms are best understood as species of such institutional facts. This is, in a way, an idiosyncratic use of "institution." Second, they argued that law is institutional in the ordinary sense that it is *institutionalized*.[3] On this view, positive

[2] For a useful discussion see La Torre 1993, 2005.

[3] This was also the focus of Raz's early work in jurisprudence (Raz 1973, 1980, 1990b, ch. 4). However, Bentham was arguably the greatest English-speaking institutional legal theorist. He analyzed key institutional concepts brilliantly in his ground-breaking work in *Of Laws in General* (Bentham 1970) and later in his extensive work on constitutional theory (Bentham 1983; 1989;

law appears among normative orders as a significant form of social organization when agencies are established and authorized to administer, enforce, and maintain norms of social order.

These two concepts are related, according to the institutional theory. Individual institutional facts (for example, *a* promise, *a* contract between two individuals, *a* trust) exist and have their significance in virtue of their incorporation in a larger normative order. One such normative order is the institutionalized system of law. Institutional facts depend for their existence on what Hart called "power-conferring rules" (or some relative of them), rules that enable parties to change obligations or rights that apply to them or others. The rules give normative significance to acts describable in strictly physicalistic terms (they become "acts-in-law," like the formation of a trust, or the delivery of a trial verdict). Especially important for understanding law is the species of power-conferring rules that establish roles and define procedures for agencies charged with the official maintenance of law, for they provide the skeletal structure of a legal system.

Contemporary institutionalists took the normativity of law to be a fundamental and irreducible feature of law. But, in their view, the root concept is not that of a single norm, but rather that of *normative order* (MacCormick 1999, 1–4; 2005, 2–3). "[N]orms belong within normative orders," and can be understood only relative to the normative orders to which they belong (MacCormick 1999, 1). Normative order is "ideal" in the sense that it pertains not to how people regularly act, or how they can be caused to act, but rather to how people *ought* to act. It is an *order for* human agents, not an *ordering of* them. And yet a normative order it is not idealized—it is not merely envisioned, existing only in the pure world of ideas. Rather, it is part of the social reality that individual human beings regularly encounter and must negotiate in their daily lives (MacCormick 2005, 3). It is also practical in the sense that it pertains to the *praxis* of human beings in their social relations, but also in the sense that it is practicable, that is, realizable and realized in their interactions. As normative, these practical concerns engage the will and judgment, and hence the practical reason, of human beings (MacCormick 1999, 4, 6). "Grasping the nature of normativity requires us [...] to grasp the nature of rational action," MacCormick and Weinberger (1986, 106) wrote. Agents subject to norms are subject to the practical, rational judgment and criticism of others (and themselves) if their conduct falls short of the norms' requirements.

This is all familiar ground for careful readers of Hart, except in one respect. Institutionalist theory took a holistic view of normative order. On their view, norms are not discrete entities that constitute a normative order when aggregated; rather, individual norms are understood as propositions we formulate to

1993; 1998). Arguably, his institutionalist work is more sophisticated and of more lasting value than his contributions to British positivism popularized in the work of Austin.

single out and articulate elements of the holistic normative order (MacCormick 1999, 4). The normative order is ontologically and epistemologically prior to its norms. Norms are elements of the normative order lifted out for special attention, but the articulation of them is always responsible to the underlying reality of the normative order. This implies further that individual norms are always linked internally to other norms of the order as a whole—they can be understood only in relation to those other norms. To speak of norms is, necessarily, to speak of an interconnected body of norms.

This holistic element is evident also, MacCormick argued, in simple social practices like that of queuing. Queuing involves a complex interlacing of expectations and entitlements, roles and responses (MacCormick 1998, 304–07). This complex network depends for its existence on how people act and react to each other and especially on how they interpret their own actions and those of others (ibid.; MacCormick 2005, 6). Thus, actual normative orders, embodied in the actions of participants, constitute a shared framework for understanding behavior in a social setting and directing actions and responses (including judgments of them). Where a normative order is well-established in a community, institutional facts become for members of that community "hard realities, facts that constrain us, not merely [abstract] norms that guide our autonomous judgment" (MacCormick 1998, 324).

Contemporary institutionalists did not escape the ambiguity about the nature and ontology of norms (social rules) we noted in Hart's theory (see chap. 7, sec. 7.3.2.2). They argued that norms are not pure "thought objects," but rather "become real only by becoming operative as part of an action-guiding system for some person or group" (MacCormick and Weinberger 1986, 15, 33–41). And this involves in some way both regular behavior and some practical attitude toward the usage manifested in the standing intentions of the members of the group. Weinberger at one point wrote, "Norms exist in the realm of human consciousness: there is something like an experience of obligatoriness, the consciousness that something ought to be the case" (MacCormick and Weinberger 1986, 40). This sounds a decidedly psychologistic note, recalling Alf Ross's analysis of norms (see chap. 7, sec. 7.2.2.2, above), but some pages later MacCormick wrote "the norm's existence is by no means to be understood as a 'being-in-consciousness' or as a 'reality-of-acceptance', which is clearly proved by the fact that such mental contents "can vary considerably without any alteration in the social norm as an object of thought" (MacCormick and Weinberger 1986, 88).

Although in his book on Hart, MacCormick (1981, 33–4) seemed to interpret Hart's internal point of view in psychologistic terms (attitudes as combinations of cognitions and wishes), his own view seems to have moved in a different direction, stressing the social matrix of expectations, actions, interactions, and reactions. From his sensitive analytical characterization of the practice of queuing (MacCormick 1998, 303–6) we learn that the activity of

rational agents in a practiced normative order like queuing is "an intrinsically interpersonal activity" that essentially involves "mutual understanding"—"we seem able to interpret our understanding of each other as in some way actually or potentially common or substantially shared understandings" (ibid., 305–6). A normative order, according to MacCormick, is an observable order or regularity in behavior that is "accounted for by imputing it to result from common action by mutually aware participants acting on the understanding that each is oriented towards more or less the same idea of the right thing to do" (ibid., 306). Following Hume, MacCormick held that a normative order is a system of "common or co-ordinated action under a common sense of the right thing to do" (ibid., 307), although by "common sense" here, he hastens to say, he does not mean to imply that there is full or perfect agreement on the meaning of its requirements. The norms of such normative orders need not be explicitly articulated, and often they are only implicit in the actions and understandings of the participants. These comments suggest that MacCormick might have been sympathetic with recent Hume-inspired theories that have tried to account for law's normativity in terms of conventions (discussed below, chap. 11, sec. 11.3), but he did not explicitly embrace that approach.[4]

8.2.2. Law as an Institutionalized Normative Order

According to institutional theory, law is a special kind of normative order; it is an *institutionalized* normative order. To understand the differentia of this genus we need first to look again at institutional facts, for example, a marriage, a trust, or a contract. Searle (1969, 34–51) introduced the notion of *constitutive rule* to explain such facts. On his view, the normative significance of these acts depends on the prior existence of rules that constitute certain acts *as* normatively significant. Thus, it is in virtue of a constitutive rule of basketball that (exceptions aside) a ball going through the hoop in ordinary play counts as two points. Institutional theorists were inspired by Searle's idea, but found it inadequate in certain respect.[5] MacCormick argued that we need to distinguish three different kinds of rules involved in constituting the normative significance of such acts (MacCormick and Weinberger 1986, 52–3). *Institutive rules* determine when (i.e., under what conditions and through what performances,

[4] Eerik Lagerspetz (1995) explicitly linked institutionalist theory (and the core notion of "institutional facts") to coordination-conventions. Noting that the attempt to explain social rules in terms of institutional facts leads to a regress, since institutional facts presuppose rules and rules in turn are (or are the product of) institutional facts, he argued that what is needed is a notion of non-brute facts that are not themselves rule-dependent. He proposed for this purpose the notion of mutual or shared beliefs: "Institutional facts exist by virtue of the shared beliefs in their existence" (ibid., 1995, 7).

[5] MacCormick and Weinberger 1986, 22–4; MacCormick 1998, 332–6; but see Ruiter 1998, 215–21.

acts, or events) contracts, trusts, mortgages, marriages, and the like come into existence. *Consequential rules* determine the normative consequences of those operative acts. *Terminative rules* define conditions under which the normative conditions or relationships earlier instituted come to an end. These rules fall into two quite different groups. The first and third kinds mark entry and exit into a more or less extensive set of rules constituting the normative order. Consequential rules bring to bear some portion of this normative order, its constituent duties, entitlements, and responsibilities. (For example, rules for acquisition or transfer of property determine entry and exit to the complex network of normative relations constituting ownership.)

Legal entities, such as contracts, trusts, and the like are defined and regulated by sets of rules of these three types, according to institution theorists. They are "institutions of law." Law is also institutional in two further respects. First, the existence of valid legal norms themselves is a matter of institutional fact constituted by sets of the above three kinds of rules. The instituting of rules of law in this manner enables the explicit articulation of norms of the normative order in a way that is publicly available to all those who are subject to the norms (MacCormick 1998, 314–6). Rules of law are institutionally *posited*. In virtue of this "positivity," we have some reason to hope for relatively determinate answers to questions about our responsibilities and rights. On such questions of law there is often a fact of the matter that we can establish by reference to publicly accessible sources (MacCormick 1992, 119; 1999, 13–4).

In MacCormick's view, law is fundamentally and predominantly, if not exclusively, a matter of posited institutional rules. "The existence of 'rules of law' as institutional facts is one of the central features of a legal system," writes MacCormick (MacCormick and Weinberger 1986, 57). This feature, however, is a consequence of the more fundamental fact that law is a formally-organized and officially-maintained, that is, institutionalized, normative order.

Normative order, we have seen, necessarily involves judgment based on practical reasoning. Law institutionalizes such judgment. It does so first of all by establishing and authorizing agencies to act as arbiters to resolve disputes about the existence or application of norms (MacCormick 1999, 7–8; 2005 3–4). To do their work, these agencies must have some basis for determining what count as authoritative norms of the system and rules granting finality of judgment to their decisions about what counts as a binding norm and how they bear on specific cases (MacCormick 1999, 8; 2005, 4). The institutionalization of judgment brings with it the requirement that normative order be conceived of as *systemic*, both substantively and formally (MacCormick 1992, 120–1; 1999, 7; 2005, 47–8). The institutionalists' holist concept of normative order adds a fundamental systematic dimension to law that was missing from Hart's institutional theory. On this view, understanding, interpreting, assessing, and applying legal norms always involves locating them in the legal-normative order, an order underwritten by a principle of internal normative coherence. Law-applying

officials, charged with maintaining the normative order, seek to render it and maintain it as a rationally coherent unity (MacCormick 2005, chap. 10).

These components of the institutionalist theory of law led MacCormick in particular to a complex and subtle view of legal reasoning. He is one of few positivists in the latter half of the twentieth century who have worked seriously to reconcile the argumentative and discursive elements of law with its institutional elements (see MacCormick 2005, chap. 2). He made clear that, while institutional rules are "a singularly important part of it," they "are not the whole of the law." Law "spills over the edges" of valid rules, he wrote. Principles without institutional pedigree play an important role in law, forming the body of institutional rules into a coherent unity (MacCormick and Weinberger 1986, 67–74; MacCormick 1998, 318–22). MacCormick, then, seems to have embraced the incorporation thesis (see below chap. 10, sec. 10.1.3). But at the end of the day, he leaned heavily toward the exclusivist (or rather the neo-formalist) side (see secs. 8.6 and 8.7, below). He wrote,

> the same practical reason which gives us ground to think it desirable to have systems of law, which include relatively clearly statable rules derived from legislation and other sources, also gives us ground to desire that these rules be applied as a relatively distinctive code, and elaborated through legal reasoning which, as a form of practical reasoning, belongs to the same genus as moral reasoning but to a very different species of it. For this reason, we may insist that courts of law are courts which properly deal with law as a body of practical rules and principles distinct from moral principles. Legal reasoning should be permeable to moral reasoning; and, in particular, consideration of those aspects of justice to which law necessarily aspires should inform all legal reasoning. But the law best fulfills the moral aspirations implicit in it by abstaining from any direct across-the-board enforcement of moral values. (MacCormick 1992, 130)

Ultimately, MacCormick (1985) offered "a moralistic argument for a-moralistic law." That is, he argued on substantive moral-political grounds for positivist-institutional understanding of law according to which the fundamental components of law owe their status and validity not to their moral merit but rather to being the product of positing by law's core law-making and law-constituting institutions. In this respect, the institutional theory carried forward some of the most important elements of Hart's neo-positivist account, although it seems to have given more prominence to the normative/moral dimension of jurisprudential methodology than Hart was willing to admit (despite inclinations in this direction—see chap. 7, sec. 7.7.5). The institutional theory also overlaps in certain key respects with the most influential statement of positivist theory after Hart, Joseph Raz's exclusivist positivism, to which we now turn.

8.3. Basic Themes in Raz's Theory of Law

Joseph Raz was born in 1939 and began his studies of law and philosophy at the Hebrew University in Jerusalem earning a master's degree in 1963. Oxford University conferred on him the D. Phil. degree in 1967 and immediately he

joined the Law Faculty and Department of Philosophy of the Hebrew University. He returned to Oxford University in 1972, as a tutorial fellow in law at Balliol College, and in 1977 became member of the Oxford's sub-faculty in philosophy. From 1985 to 2006 he was Professor of the Philosophy of Law at Oxford University. Beginning in 1995 he also taught regularly at Columbia University Law School and in 2002 was appointed Professor of Law at there. As a D. Phil. student at Oxford, Raz worked with H.L.A. Hart, whose influence is evident throughout Raz's jurisprudential writings. Yet, it is a tribute to teacher and student alike that Raz's work took a direction all its own.

8.3.1. Hartian Pedigree

Raz summed up his debt to Hart's theory, as well as his own distinctive approach to legal philosophy, in *Practical Reason and Norms* when he wrote, "Legal philosophy is nothing but practical philosophy applied to one social institution" (Raz 1990b, 149). Following Hart, Raz began with the observation that law is a normative social practice that seeks to guide rational agents. This starting point, he realized, imposes an important constraint on the methodology of legal theory. To explain law it is necessary to make intelligible the view of participants in the practice (Raz 1996a, 261; 1996b, 2–3) and central to that view is the idea that law provides them with common standards of behavior and judgment. This is not to deny that law is a matter of social fact, but rather to highlight the special nature of this social fact. Moreover, like Hart, Raz believed that what is distinctive of this social practice is its institutional nature; first and foremost, law is a normative institution, an institutionalized normative system (Raz 1979, chap. 6; 1990b, chaps. 4–5).

Not all systems of social norms embedded in social practices are institutionalized, in Raz's sense of the term—etiquette and manners, for example, are not—and not all social institutions are linked to institutionalized normative systems. Officials of institutions of "absolute discretion," for example, are empowered to make decisions on their best judgment, unguided by any authorized norms (Raz 1990b, 137–41). Institutionalized systems of norms comprise a set of norms that seek to guide the behavior and judgment of people (like Hart's "primary rules") and further norms that empower officials to evaluate the behavior of people according to the primary norms ("secondary rules"). These officials are charged with resolving disputes that arise under and with respect to the norms *authoritatively* (i.e., their determinations are regarded as binding even if mistaken) (Raz 1990b, 142–5). Institutionalized normative systems need criteria of membership by which norms belonging to the system can be distinguished from other social norms; these criteria will be connected to the system's rule-applying institutions in some important way (Raz 1979, 44). Finally, necessarily, such a system is "exclusionary" in the sense that "its norms exclude the application of [...] norms which do not belong to the system or are

not recognized by it" (1990b, 145). (Raz later modified this claim; see sec. 8.6, below.)

The Hartian pedigree of these ideas is evident, but, in developing and defending them, Raz significantly departed from the views of his mentor by both softening and hardening Hart's positivism. He softened it, bringing it closer to natural law in two respects, insisting that by nature law claims moral legitimacy (Raz 1979, 30) and that legal reasoning is just a special case of moral reasoning (Raz 1995a, 340). The former claim, according to Raz, is a conceptually necessary and fundamental feature of law wherever it is found. At the same time, he hardened Hart's positivism, bringing it closer to classical positivism, by insisting that moral principles are never included among criteria of legal validity. Raz's "sources thesis" holds that necessarily all legal norms are exclusively source-based, that the existence and content of all legal norms depend exclusively on non-evaluative matters of fact. Raz argued that these revisions of Hart's positivism, moving in apparently opposite theoretical directions, are nevertheless closely linked; the sources thesis follows from law's essential claim of moral legitimacy. To see how he could link them, we should look first to his view of the methodology of legal theory.

8.3.2. Methodology of Legal Theory

Hart's jurisprudential method was basically empiricist in the sense that he took social facts about legal practice to determine fundamental features of law, including, most importantly, criteria of validity. Raz, as we noted above, regarded legal philosophy as a species of practical philosophy. The contrast with Hart's approach is significant, albeit subtle. While Hart regarded the method of legal philosophy to be "descriptive" or "explanatory," Raz regarded it as fundamentally *conceptual*.[6] Actual beliefs and attitudes of participants in legal practices are relevant as evidence of the dimensions of the concept of law, but they are not conclusive, and there may be general philosophical reasons for attributing beliefs to them (views to which their participation in the practice commits them) that they may not readily recognize. The philosopher reconstructs rather than merely reports the views of participants. We must not make too much of the difference between Hart and Raz on this point; Hart might not have disagreed with Raz's characterization of his methodology in the abstract, but the difference will become salient later when we look at Raz's case for his view that law essentially claims moral legitimacy.

[6] For an austere version of this approach, see Gardner 2001, 202–3. Raz's view was less austere. Conceptual analysis, he argued (Raz 2001b, 8–10), is rarely a matter of identifying necessary and sufficient conditions for the application of the concept. Some characteristics may be essential to an illuminating explanation, but are only defeasible conditions of the application of the concept; sometimes, he acknowledged, focusing on necessary and sufficient conditions can lead theorists to overlook or play down other truly important characteristics of the object of explanation.

Because it explores the *nature* of law—fundamental features of law wherever it is to be found—general jurisprudence, in Raz's view, deals in truths that are universal in scope and necessary in force (Raz 1996b, 2, 6). Nevertheless, he believed that this universality-aspiring enterprise must begin at home, for the concept of law we have and which we work with is ours and could not be otherwise (Raz 1995a, 237; 1996b, 2–7). This does not force us to conclude that other cultures that do not share our concept of law thereby lack law—neither does it force us to despair of ever grasping how that culture understands its social reality—but it does force us to realize that any understanding of another legal culture must start at home. The proper subject matter of legal philosophy is our practical grasp of this concept as we negotiate our social reality (Raz 1995a, 237; 1996b, 5). "Unlike concepts like 'mass' or 'electron'," Raz observed, "'the law' is a concept used by people to understand themselves." Thus, the task of legal philosophy is "to advance our understanding of society by helping us understand how people understand themselves" (Raz 1995a, 237). Since "the way a culture understands its own practices and institutions is not separate from what they are" (Raz 1996b, 5), working out a theory of law is a matter, in the first instance, of explicating our own self-understanding. [7]

Although its aim is resolutely explanatory, this philosophical task is never value-free, on Raz's view; rather, it is inevitably value-laden, "evaluative" (Raz 1985, 735; 1995a, 235–6; 1996b, 15) or "normative" (1996a, 260ff.). This is true not only in the uninteresting sense that explanations will be guided by theoretical values like simplicity, consistency, clarity, and explanatory power, but also in the sense that legal theorists must select from a long and open-ended list of properties that law has *by nature* those that strike them as significant or important, bearing on what matters (Raz 1985, 735; 1995a, 235–7, 294). Our sense of what matters about law is inevitably influenced by what we take to matter in social life generally and that is surely evaluative. Note, however, that both of these claims turn on values of the theorist, not necessarily values of those whom they seek to understand. There is, perhaps then, a further reason why legal philosophy must rely on evaluative or normative concerns. As a normative enterprise, law purports to offer reasons to those subject to it; so, to explain it, the theorist must see how it relates to and is governed by norms of practical rationality. As a species of practical philosophy, legal theory seeks to explicate one important form of rationality, of "conforming to reasons," and its appropriateness in different contexts (Raz 1995a, 277 n. 1; 1999, 68). Moreover, since law as we understand it seeks to provide common standards for conduct and judgment (Raz 1995a, 297), a fundamental task of legal philosophy is to explain how law *could* be so understood. Legal theory, on Raz's view, seeks to make law morally intelligible, "for it must be intelligible that [subjects and

[7] Here we have reproduced, at a more sophisticated level, a debate that occupied legal theorists at the beginning of the century (see chap. 1, sec. 1.4.1, above).

officials] have this attitude to their law" (Raz 1996a, 261). Thus, it seeks to uncover, articulate, and make intelligible the normative assumptions on which legal practice rests. "To understand the nature of law is to understand, among other things, the ideal which the law should live up to, and also to understand that it can fail to live up to that ideal" (Raz 1996b, 10). This is an understanding of the task of legal theory Fuller might fully endorse.

Did Raz, then, abandon Hart's project of a morally neutral explanatory account of law? Not on his view. The evaluative inquiry that legal theory must engage in does not depend on *moral evaluation*, he insisted (Raz 1985, 735; 1986a, 1114; 1995a, 235–7, 301 n. 35). Does legal theory, then, rely on *non-moral* evaluation, that is, evaluation by standards distinct from moral (and, presumably, theoretical) standards? That cannot be, since the task was to make intelligible the alleged tendency of citizens and officials to regard their law as morally defensible (Raz 1996a, 260–62). Any such attempt must operate in the domain of the moral and appeal to concepts, values, and principles that we can recognize as moral, even if we regard them as mistaken. Sometimes Raz suggests that the evaluations of the legal theorist are not moral because they are not evaluations of someone who is *committed* to the moral defensibility of the law or any of the assessments ordinary citizens or officials might make. Legal theorists, while engaging in the same kinds of reasoning and inquiry as committed individuals, remain personally detached from the views they explore and articulate, "not commending them as good" (Raz 1995a, 236). However, this distinction, relying on Raz's important distinction between committed and detached normative statements (Raz 1996b, 17), does not take us very far, for it merely marks the difference in attitude between two people who may be engaging in the same inquiry, not between two kinds of inquiry. Something more must be involved.

Morally evaluative reasoning, according to Raz, *starts from the conviction* that the activity or practice in view is morally justified or good along some dimension and sets out to demonstrate the truth of this conviction.[8] In contrast, the evaluative reasoning involved in legal theorizing seeks to make intelligible the views of those committed to the practice, but also seeks to work out what those who are committed to the view *would have to show* if they were to make a convincing case for their view. This falls short of showing that the view is justified and it does not even start (as Dworkin did, see chap. 9, sec. 9.3.2.1) from the defeasible premise that the view is justified. But it does involve engaging in

[8] This is the methodology that Raz, Hart, and others attribute to Dworkin in an attempt to distinguish sharply their own approach from his. Perry (1989, 947–8; 1995, 128–9) argued that this contrast is exaggerated. However, Dworkin (2004) himself insists that there are sharp differences. In his view, Hart, Raz and others insist on pursuing what he calls "Archimedean" legal theory. We will consider in Chapter 9 whether these differences are deep or are only made to seem so by the rhetoric of the dispute between Dworkin and his critics.

philosophical articulation of important moral-political concepts and their relations to cognate concepts, and in substantive arguments, although the aim of such argument is to set out the conditions for justification rather than the justification itself. While Raz never characterized his inquiry in precisely these terms when he described it in the abstract, this description seems to match his practice (see sec. 8.4.3 below). With this understanding of jurisprudential method in mind, let us turn to two core theses of Raz's theory of law.

8.3.3. Law's Claim to Legitimate Authority

As we have seen, for Hart, the task of legal philosophy was set in part by the fact that law is a normative social practice; yet, because he, like the classical positivists, he was committed to the separability of law from morality, he was keen to identify a *kind* of normativity distinct from morality. Thus, while law claimed to provide common standards of judgment, these standards directly provided reasons only for officials, who were bound by them just because they accepted them. Officials regarded themselves, but not necessarily law-subjects, as bound by them, and even then they did not necessarily regard themselves as bound *morally*. For Hart, the normativity of law was at bottom merely *social normativity*, a matter of general acceptance (by officials) of the law (or the rule of recognition on which it ultimately rested), and legal obligation was a matter of being required to act by rules accepted by officials and effectively enforced. Legal and moral obligations, on his view, were entirely different animals.

From the outset, Raz rejected this part of Hart's doctrine. There are not two kinds of normativity, he argued, there is only one: *justified* normativity (Raz 1979, 134–7; 1981). Likewise, he insisted that the concept of obligation is univocal (Raz 1984a). This general, conceptual point was focused sharply in a thesis on which he built his account of the nature of law: it is fundamental to our understanding of law, he held, that *law claims moral legitimacy* (Raz 1979, 30; 1995a, 215; 1996a, 260–2; 1996b, 10–1, 16). I will dub this the "claimed legitimacy thesis" (CLT). One of the most forceful statements of the view is the following:

> To understand legal statements we should interpret them as meant by those who take them and accept them at face value, those who acknowledge the law in the way it claims a right to be acknowledged. The decisive argument concerning the meaning of statements of legal duties is that the law claims for itself moral force. No system is a system of law unless it includes a claim of legitimacy, of moral authority. That means that it claims that legal requirements are morally binding, that is that legal obligations are real (moral) obligations arising out of the law. (Raz 1984a, 131)

Three striking features of the claimed legitimacy thesis deserve comment. First, Raz (1984a, 131; 2004, 4–7) took CLT to state a necessary truth about law. No practice qualifies as law unless it claims moral force. "Necessarily law, every legal system which is in force anywhere, has *de facto* authority" (Raz 1995a, 215)

and one essential condition of *having de facto* authority is that its bearer *claims de jure*, i.e., morally legitimate, authority (Raz 1979, 28; 1986b, 46). This necessary truth is "crucial to the understanding of the sort of institution the law is" (Raz 1996b, 16). CLT is the foundation of Raz's theory of the nature of law.

Second, to say "law claims" something is to make a statement about how those who are subject to the law are meant to take it (Raz 1995a, 297, 299). It is something "law claims for itself" (Raz 1984a, 131), a matter of its self-image or self-presentation. Who does the claiming? Sometimes Raz seemed to suggest that CLT is a report of what law-subjects and especially officials meaningfully and sincerely say, or at least believe (Raz 1996a, 260–1), but I do not think this is what he had in mind, for, at the very least, CLT understood as an empirical generalization about what people say (out loud or in their hearts) could hardly bear the theoretical weight he loaded on it. Moreover, he typically spoke of how people are *meant* to take the law. At the same time, he insisted that claiming does not make it so, that law often fails miserably to meet even minimal conditions of moral legitimacy. CLT does not offer us a fact; rather, it expresses an *aspiration*. It "does not attest to what the law is but to what it aspires to be" (Raz 1996b, 16). Rather than expressing an empirical generalization, Raz understood CLT to capture a key feature of our concept of law. It is fundamental to our understanding of law that we call for it to meet conditions of moral legitimacy; although it often fails, its aspiring to do so is at the center of its nature as law. This aspiration is manifested in many of the ways in which law functions and the ways officials and law-subjects interact within the boundaries of law. It may well be true that law-subjects and especially officials actually *believe* law has moral force and will say so when the occasion arises, but that is further evidence for CLT, not an instance of the generalization. Moreover, even if they do not believe it to be so, they are committed to the belief, and find themselves forced at least to the pretense of it.[9] The law's claim, on this view, is a pervasive commitment of law, underlying law's ordinary mode of functioning.

Third, as he proposed to understand CLT, law claims not only moral legitimacy, but morally legitimate *authority* (Raz 1979, 30–2, 233–5; 1986b, 23–37).

[9] Hart objected that it was not difficult to imagine a society in which people and officials alike did not believe the law had any moral status whatsoever. Following Hart, Kramer (1999, chap. 4) argued that it is conceivable that a band of rogues could create a legal system consisting entirely of coercively enforced, standing orders, which none of those involved regards as justified, but all recognize as in their collective and individual interest to maintain. (Kramer goes even farther than Hart to maintain that a "gunman situation" if writ large enough could count as law.) However, Raz's CLT is not a claim about what particular officials or law-subjects say or believe, but about how law, in virtue of what it is and does, implicitly presents itself and thus what a society is committed to when it establishes a legal system. For an argument to this effect see Soper (2002, 62–6). (It seems that something like Raz's claim is part of what Fuller had in mind when he spoke of legality (see chap. 4, sec. 4.3.3 above). This response to the Hart-Kramer challenge, of course, leaves Raz with the heavy burden of demonstrating CLT as a claim about the concept of law.

This version of CLT is robust in two dimensions. First, it is *robust in content*. Law claims not only that the use of coercion in its name is morally justified, but also that law-subjects are under moral obligation to obey the law, and that law has the power to create obligations that are meant to operate in a preemptive fashion. The "decisive moment in the legal process," Raz wrote, is the point at which legal standards are authoritatively laid down (Raz 1996b, 14–5). Law imposes its decision on practical matters that hitherto may have been a focus of argument and struggle; by publicly adopting a standard to address the matter, it creates new reasons for action for those who fall within the scope of the law and for those in a position to assess their behavior in light of that standard. The moment is decisive because the new reasons "are there to put an end to the argument and struggle about what is to be done [...]. The law resolves the dispute by pre-empting it" (ibid.). Legal norms and decisions purport to guide action not in virtue of their merits, or merits of the actions they prescribe, but in virtue of features independent of those merits (they are *content-independent*), and they require conformity regardless of the agent's view of those merits (they are *preemptive*). This is all entailed by law's claim to authority (see sec. 8.4.3.1 below).

Second, Raz's understanding of CLT is also *robust in scope*. It is in the nature of law to claim that its authority is comprehensive (capable of regulating any kind of behavior within its territorial jurisdiction, on any occasion), universal (governing *all* citizens of the political community in its jurisdiction), uniform (having invariant normative effect across law-subjects), absolute (defeating all other competing obligations or normative requirements), and supreme (taking precedence over any other normative institutions in the political community) (Raz 1979, 116–20; 1986b, 76–7).

8.3.4. The Sources Thesis

On Raz's view, it is necessary for the existence of a legal system that there are criteria of validity of legal norms that are practiced by law-applying officials, but he rejected Hart's core idea that the criteria validity are determined exclusively by the contingent practice of those officials (Raz 1980, 198–200). Raz held, rather, that it is a conceptual matter—a matter about our concept of law, not merely an empirical matter—what can *count* as criteria of validity: A fundamental fact about what is and is not law is that law is strictly a matter of social fact (Raz 1979, 37–40). (Within these parameters, official practice can determine, e.g., whether custom or decrees of the monarch are sources of law.) This led Raz to his most important jurisprudential thesis, which he calls the Sources Thesis (ST): All law is source-based, that is, all laws are such that their existence and content can be identified by reference to social facts alone, without resort to any evaluative argument. This "parsimonious" thesis holds that "there is nothing more to law than source-based law" (Raz 1995a, 211).

Let us take note of several features of ST. First, along with the positivist tradition at least since Bentham, ST assumes silently that necessary features of *law* are always features of individual *laws* (or discrete relations among them). "Law" in positivist usage always refers to the aggregate of legal norms. Thus, law is source-based just because all *laws* are source-based. Second, the social facts countenanced by ST are facts about the origins or provenance of legal norms; specifically, they are facts about the actions of institutions that authoritatively lay down or endorse those norms (Raz 1996b, 14–5). Thus, all laws are said to be source-based: their existence—their status as valid legal norms—and their normative content—the actions they require, permit, authorize, or prohibit—are exclusively determined by appeal to their sources. No evaluative considerations are needed to determine the existence and content of legal norms. ST rules out moral considerations as potential criteria of validity in any legal system. Thus, if ST is true as a general jurisprudential matter, then, *pace* Hart, *no* legal system includes moral principles among its criteria of validity. Third, the sources are the sole basis for identifying the existence and content of legal norms (Raz 1979, 38–41). Sources alone provide the *epistemic* basis for distinguishing between norms that belong to a legal system and those that do not. This might seem to leave open the possibility that their status as laws is grounded *ontologically* on some other property (Coleman 1996, 307–8). However, it is clear that Raz understood "identifying" the existence of a legal norm to leave no logical space between the epistemic and the ontological determination of legal validity (see below sec. 8.5.2.1). The law, he wrote, "derives exclusively from, or is dependent exclusively on," sources (Raz 1995a, 332).

CLT and ST supply the foundation of Raz's theory of law. Some critics have found this combination paradoxical, one doctrine moving decidedly in a natural-law direction and the other in a resolutely positivist one. Indeed, some critics have argued that CLT undermines ST (Goldsworthy 1990, 486). However, Raz maintained that the two theses are not only consistent, but that CLT provides the major premise of the strongest argument for ST. The two theses are locked together in a close theoretical partnership. Let us look at this argument.

8.4. The Case for the Sources Thesis

A number of arguments for ST are sprinkled throughout Raz's writings, some of which are perhaps more suggestive than persuasive (Raz 1979, chap. 3; 1980, 213–6; 1995a, 206–7, 220). The most important and the most detailed of his arguments proceeds from his thesis that law necessarily claims legitimate authority. We begin with a sketch of the argument and then in sub-section 4.2 look closely at its most important premise.

8.4.1. Authority Requires Sources

Raz's argument falls into two parts.[10] The first part begins with CLT (necessarily, law claims legitimate authority) and unfolds the notion of authority at its center. Law claims authority, so the argument goes, just insofar as laws are taken to be the directives of persons who claim to have authority. To claim authority (whether truly or falsely) is to claim that the directives issued by the authorities should be followed by those subject to them without regard to the practical merits of the actions and the reasons on which the directives are based, because in doing so they are more likely to do what they are supposed to do (as determined by reasons independent of the law's requiring it) than if they were to act on their own assessment of the relevant reasons. Thus, in claiming authority, law claims to *mediate* between the reasons law-subjects have to act and the actions to which those reasons direct them. Law *settles for them* how best to act. The point of according authority to law, it is argued, is to enable law-subjects to act in accord with the reasons they have without having to base their actions on their own estimation of what those reasons direct them to do.

The second part of the argument for ST unpacks implications of the conception of law as *mediator*. The law's claim to authority is not always true, of course, but if it is essential to the nature of law that it makes such a claim, then, Raz argued, certain things follow about what must necessarily be true about law. To begin, law must be at least *capable of* having the authority it claims. Something can fail to have the authority it claims if it fails to meet the moral or normative conditions of having authority—if there are not sufficient reasons to hold the claim to be true or warranted—but something cannot even intelligibly *claim* to have authority if it lacks certain non-normative conditions of having authority. Raz called attention to two critical non-normative conditions of having authority: (a) it must be possible to recognize the alleged authoritative directives as someone's view of how subjects ought to act, and (b) it must be possible to identify the directives as being issued by the alleged authority (and grasp the content of the directives) without engaging in deliberation on matters which the directive purports to settle.

These two conditions make sense, Raz argued, if we keep in mind authority's mediating role. First, since the point of acknowledging authority is to put another practical reasoner in one's own place and to take the results of his deliberation for one's own when it comes to action, a directive can claim to be authoritative only if it can be presented as someone's view about how those to

[10] This argument is adumbrated in Raz 1979, 50–1 and 1980, 64–5 and elaborated in 1995a, chap. 10, which drew on 1986b, chaps. 2–4. See also Raz 1989, 1179–94, 1201–12 and a brief summary in 1996b, 18. He set this argument in a larger context of moral reasoning in Raz 2004. My sketch in this section follows 1995a, chap. 10. In Chapter 10, sec. 1.4, below we will consider his discussion in Raz 2004. A complete view of Raz's argument must combine both of these sources.

be guided by the directive ought to act. If practical directives cannot be presented in this way, they fail as authoritative directives, not because they give bad instruction, but rather because they give the wrong kind of instruction (Raz 1995a, 219). Second, the point of acknowledging authority—to enable us better to conform to the requirements of reason without having to make our own estimates of what those requirements are—would be defeated if we had to figure out what we are supposed to do in order to determine what the authority requires of us. Subjects can reap the benefits that authoritative directives offer only if they can identify them and what they require without addressing the same practical issues the authority is there to settle (ibid.). Authoritative directives, then, must be identified on the basis of considerations that are not tied to the merits of the actions required by them, but rather on facts about who issued them and the norm they sought thereby to establish.

Thus, since law necessarily claims authority and so must at least possess the capacity to have authority, laws must be seen to be the expression of the views of legal authorities about how best to act and they should be identifiable without recourse to what the law is meant to settle, that is, without recourse to the reasons on which the law is based. If these conditions were not met, law's claim to authority would not merely be false, it would not be intelligible, Raz argued. So, the existence and content of laws can be based only on non-evaluative considerations of a specific kind, namely, facts about their sources in the acts and intentions of authorities who establish or posit them. Laws must not only be authoritative, on this view, they must also be authoritatively posited. Because laws are rooted in legislation, judicial decisions, and custom, they are source-based and hence capable of being authoritative directives, i.e., capable of playing the mediating role that is characteristic of practical authority. In sum, since, necessarily, law claims authority, it follows that all laws must be source-based, such that their existence and content is determined strictly by reference to social facts about their authoritative sources.

This argument makes good on the promise to tie in a tight theoretical knot the two focal theses of exclusive positivism: the claimed legitimacy thesis and the sources thesis. If it is sound, it shows that principles or standards that are not source-based—for example, principles of justice, fairness, or other dimensions of morality—cannot qualify as authoritative directives, and hence as laws, and any theory that insists on including them as constituents of a legal system cannot make sense of the existence of legal authorities (Raz 1995a, 299–300). Moral principles fail both tests of capacity for authority. They are not the products of anyone's judgment, but rather are valid just insofar as there are sound and convincing arguments for them. They cannot be presented as any person's view of what people should do. Thus, they fail the first condition. Also, since moral principles can be identified only by recourse to the reasons on which they are grounded—by their nature moral principles are not "pedigreed"—they fail the second condition. Necessarily, moral principles are extra-legal,

never to be counted among the propositions *of law* (Raz 1995a, 224–5). Thus, jurisprudential theories like Dworkin's "law as integrity" (Dworkin 1986; see below chap. 9, sec. 9.4) as well as the Hart's inclusive positivism, are inconsistent with the authoritative nature of law.

This powerful critique of rival legal theories depends entirely on the soundness of the above argument for ST. The full weight of that argument rests on premises in the first part of it—the claimed legitimacy thesis and especially the conception of authority it is thought to bring to bear on the analysis of the nature of law. We will explore this conception in the next section, but we might pause briefly to mention briefly three questions about other parts of the argument that suggest themselves. First, Raz assumed that the normative conditions are conditions of the *truth* of an alleged authority's claim, but that the conditions of the claim's *intelligibility* will be exclusively non-normative. However, one might wonder about this division of labor. Might there not also be a credibility condition on the intelligibility of the claim, such that a claim of authority would fail for not being the kind of thing that could be good at doing what we expect those with authority to do? Consider an analogy. A physician's medical license is no guarantee that she is competent, but the claim of competence of an unlicensed person ordinarily will not be minimally credible. The same seems true of practical authorities. Since the point of recognizing a practical authority is that we are more likely to do what we are supposed to do according to reasons that apply to us by following authoritative directives than by acting on our own assessment of those reasons, it would seem natural to insist on a threshold of competence with respect to that task. What that license would look like and at what level the threshold of credibility would be set are matters that are likely to turn on evaluative considerations. Raz (1986b, 47) says that we are likely to be skeptical of any claims that law or political authorities might make to expertise, but he says that creates no problem for his argument, since his argument depends on the intelligibility of the claim of authority, not on its truth or even plausibility. However, if we grant the need for a credibility condition, we must admit that there may be reasons for skepticism profound enough to challenge not just the truth of the claim to authority but even its intelligibility. (This worry relates to a concern we raise later about the plausibility of CLT as a universal and necessary interpretive thesis about law, see sec. 8.5.2.1, below.)

Second, Raz's argument rests on the strong premise that a directive can be authoritative only if it is *someone's* directive. It is not clear why this *personalism* is necessary for the authority of directives. Why, for example, could not a rule rest on wisdom accumulated within a community over time, even though it is not the wisdom of any particular person? Why, Fuller might ask, could not rules that emerge from social interaction and serve adequately to solve problems of cooperation, carry the appropriate authority? Raz seems to have assumed that the directives must be posited, but this only raises the same ques-

tion again: Why must they be (in order to serve the purpose of authoritative directives)? Perhaps, the reason is that any attempt to formulate the rule of community practice would inevitably involve appeal to considerations the directives are "meant to settle."

Third, this response makes clear an even more serious question: Can Raz's account of law's authority explain the presence and functioning of custom as a source of law. Raz often acknowledged custom as a source of law, but customary rules do not meet the conditions of authority. They typically are not products of anyone's judgment of reasons that apply to law-subjects. Raz (1996a, 259) himself once wondered whether his account of law fits customary law and whether case law established by the courts should be understood on the model of customary law, but these doubts did not cause him to make any adjustments in his theory of law. Fuller, we might expect, would have wondered why.

8.4.2. The Service Conception of Authority

Putting these questions aside, let us turn now to the pivot of Raz's argument for ST, his theory of authority.[11] This theory has two components: (a) a formal analysis of the concept of authority and the kind of reasons those who claim authority purport to offer their subjects, and (b) a substantive account of the kind of arguments that would be sufficient to ground a claim of legitimate moral authority. Consider first the formal part.

8.4.2.1. Authority and Exclusionary Reasons

To understand the authority claimed by law, we need to consider practical authority in general. When we speak of something or someone as having authority we can have a number of different things in mind. Sometimes we mean only that some form of guidance can be trusted or is binding; however, when using it in what Raz took to be its *central meaning* we suggest something more robust: that something is *made binding by* an authority. It is this "central meaning" that Raz (1990a, 2; 2003, 259) sought to capture. It has several key features.

First, and most importantly, since authority is a practical concept, statements about who has authority or what an authority requires figure as premises in practical inferences. Thus, to explain the concept of authority it is necessary to explain its practical import (Raz 1979, 10). To locate conditions of intelligibility of authority claims, we need to inquire into the practical point of acknowledging law's authority. A corollary of this is that the notion of legitimate

[11] For discussions of authority see Raz 1979, chaps. 1–2; 1980, 38–43, 62–5, 191–5; 1986b, chaps.2–4; 1989, 1179–200; 1990a; 1995a, 210–5, 341–60; and 2003, 259–64. Shapiro (2002a) offers a useful discussion of Raz's theory of authority in the context of contemporary debates about the nature of authority, including a helpful summary of major criticisms of the theory.

or *de jure* authority is primary, and the notion of *de facto* authority must be explained in terms of it (Raz 1979, 9–11; 1986b, 27). So the first salient feature of authority is that it is at bottom *normative*. Moreover, the practical point of authority is a morally significant one, and statements about it are contestable on moral grounds, Raz recognized, precisely because the stakes are moral.

The second salient feature of authority is that it is at bottom *personal* in the sense that it is attributed first of all to persons or agents (or institutions personified) and derivatively to other things. We can speak of rules, norms, commands, or directives having authority—or being authoritative—but their authority derives from the persons or parties that issue, establish, or endorse them. This is the implicit starting point of his analysis; it is clear from his informal statement of the "central meaning" of authority. Authority is understood, first of all, in terms of certain properties of *authorities*, that is, persons having authority or in positions of authority (Raz 1979, 21; 1986b, 24; 1990a, 2; 1995a, 211; 2003, 259). In sum, there is no authoritative directive without practical authority, and no practical authority without an author (Marmor 2001b, 54, 89–111). Third, authority is at bottom a *relational* matter. Someone has authority just in case, with respect to some practical matter, that party has authority over some agent (Raz 1979, 21). (If one has authority over oneself, one has *autonomy*.) In fact, authority is a kind of *power* one agent can exercise over another. This leads us to the fourth key point: the power in question is *normative power*: the power to *change another agent's reasons to act* (Raz 1979, 16–20; 2003, 259).[12] Authority is the power to create a special kind of reason which Raz called a "protected reason." A protected reason is a reason for an agent to act in a certain way without regard to other reasons for and against doing so (Raz 1979, 17–18). It preempts other reasons. Obligations are, according to Raz, a kind of protected reason; so a corollary of this fourth point is that authority is at bottom the power to *impose obligations* on another agent (Raz 1986b, 27–8; 1989, 1186). Finally, someone has *de jure*, i.e., justified authority over another agent just in case the former has *the right* to exercise this power to impose obligations on the other (Raz 1989, 1186). Authority is, we might say, the *right to rule*.

A person is entitled to authority over another just when it is reasonable for the latter to recognize the other's authority and treat that person's directives as protected reasons for action.[13] To accord another person authority is not to

[12] *Coercive* power plays no essential role in Raz's analysis of authority. Coercive power plays only the secondary or derivative role of making effective the imposition of authority-created obligations. Authority as understood by Raz always entails a kind of inequality or asymmetry; however, it is inequality not of physical power, but of normative status, a matter of dominion and subordination of wills rather than physical domination.

[13] A person *has* authority (*de jure*) over someone if that person is recognized as an authority (has *de facto* authority) *and* this recognition is justified (the person is entitled to it), see 1986b, 56 and sec. 8.2.2.2, below.

adopt a certain *attitude*, but rather to treat authority's directives a certain way in one's practical reasoning. To explain authority is to explain the role of its directives in practical reasoning and the reasons there might be, if any, for a rational agent to give them that role. Thus, Raz's task of making authority intelligible involves making authority-reasons intelligible by explaining their role in practical reasoning. For this we must make a short excursion into the theory of practical reasoning.

The theory of practical reasoning explores the nature and limits of rationality in action. Practical rationality, according to Raz (1999, 71), is a matter of an agent's being responsive to reasons. A rational agent can be appropriately responsive to reasons in different ways. Reason guides the actions of rational agents by providing reasons for (and against) actions. But an agent fulfills the demands of reasons if her action conforms to them; it is not necessary that the agent *follow* or *comply with* ("act from," Kant would say) those reasons, except in special cases (Raz 1990b, 178–82). Raz rejected what Gardner and Macklem (2002, 461) call the "rationalist myth" that *reasons are for following*, that is, "that there can be no better way of doing what any reason would have one do than by acting for that reason". Moreover, the topography of practical reasoning is stratified (Raz 1990b, 190). Some of our reasons are second-order reasons—reasons to act or not to act *for certain other reasons* (ibid., 39). The idea is more familiar than it might at first seem. Consider the relationship between lovers. The relationship is healthy when the lover gives a gift to the beloved *for the reason that it brings her pleasure*. The lover, knowing the gift will please the beloved, has a reason to buy-the-gift-because-she-will-be-thrilled. Raz's analysis of authority draws on a different kind of second-order reason: *preemptive* or *exclusionary* reasons (we can use these terms interchangeably). Preemptive reasons are negative second-order reasons, that is, reasons *not to act for* certain other reasons (ibid., 39ff.).

Exclusionary reasons in a sense defeat other reasons for action, but the way they defeat excluded reasons is unique. To see this, consider some ways in which reasons can be defeated. Some, for example, are defeated by being outweighed. It is common to imagine that reasons for action have a kind of normative "weight" that is additive such that when they conflict with other reasons, deliberation determines what is best to do in light of these reasons by determining what action the sum of these weights (the balance of reasons) most favors. Reasons against an action favored by the balance of reasons are defeated by being outweighed. They remain valid, of course, and have continuing normative force (often requiring mitigation or compensation for the unfortunate consequences of the action favored by the balance of reasons). Some reasons are defeated by being canceled (Raz 1978, 12–3). In certain circumstances, or faced with opposition by certain other kinds of reasons, reasons that normally are valid lose their normative force; e.g., a promise is normally a good reason to do what is promised, unless it is a promise to murder. Some

reasons come into play only under certain conditions and if those conditions are not met, the alleged reason has no normative force. Some reasons, that is, have certain normative limits or conditions and when these limits have been passed or the conditions are not met, they are not overpowered by conflicting reasons, they are simply canceled.

Excluded reasons are neither outweighed nor canceled. They are defeated by being preempted, excluded as grounds for acting in certain ways. Thus, for example, the military officer's order is a reason for the private to do as ordered, and not to treat the inconvenience of his doing so, or the likelihood of failure, as reasons against doing so. Excluded reasons are not canceled, Raz argued; they remain valid but are rendered inoperative at the point of deciding what to do (Raz 1990b, 183–4; 1989, 1158). This fact, that the normative validity of excluded reasons is not adversely affected by their being preempted, is essential to the normative force of preemptive reasons. For the normative point of preemptive reasons is to enable rational agents to conform better to the reasons that apply to them, including especially the reasons thereby excluded. Excluded reasons are not overridden, neither are preemptive reasons merely indicators of the relative weight of the underlying excluded reasons (Raz 1979, 22–3; 1990b, 37–45, 189–90; 1989, 1165–8). Reasons are excluded by kind, not by their weight (Raz 1979, 24); they are removed from the set of reasons that a rational agent balances on the way to deciding what is to be done. We deploy preemptive reasons in our practical reasoning in order to avoid the need to assess the relative weight of certain competing first-order reasons (Raz 1990b, 190). Preemptive reasons do not stand in the way of an agent's deliberation about the implications of excluded reasons for action, but rather they disengage that deliberation from the agent's immediate decision to act. Preemptive reasons, we might say, permit *off-line* deliberation but prohibit *online* deliberation. Moreover, they disengage the agent's deliberation *only* with respect to the reasons that fall *within the scope of the exclusion*. Preemptive reasons compete in the ordinary way with all reasons that do not fall within that scope.

Raz (1990b, 37–9) sought to demonstrate that preemptive reasons are familiar to ordinary practical reasoning by offering a number of examples; however, many of them, with the exception of his military example, failed to persuade readers (see, for example, Shapiro 2002a, 403–13). His most persuasive argument for the existence of preemptive reasons was a rational-functional argument. Preemptive reasons play an important role in ordinary practical reasoning, he argued, because they provide resources for more effective rational action. Preemptive reasons represent a strategy of indirection (Raz 1990b, 190,193). The value of preemptive reasons lies in the recognition that one can improve one's chances of acting on the balance of reasons by not balancing those reasons oneself.

Exclusionary reasons have a two-fold dimension of scope that is determined by the reasons on which the preemption is grounded. Exclusionary reasons may

be limited with respect to their substance (*substance*-scope): their underlying justification may call for the exclusion of only a certain range of reasons that an agent might have. Exclusionary reasons may also be limited with respect to the subjects who are justified in relying on them (*subject*-scope), because capacities for effective action-oriented deliberating on that range of reasons may vary among rational agents. There may also be certain *external* limits on the appropriateness of deploying exclusionary reasons, for example, there may be kinds of reasons, or occasions for relying on them, that may *never* be excluded from an agent's deliberation. For example, moral autonomy, according to Raz (1979, 57; 1989, 1180), may require that agents always keep in mind a certain range of moral considerations. We might call this the "autonomy proviso."

The notion of preemptive reasons lies at the heart of Raz's account of authority. Authoritative directives claim to provide preemptive reasons for action to those who are subject to them. Our explication of the notion of preemptive reasons and their role in practical reasoning completes one half of our task of making the notion of authority practically intelligible. It also puts us on the path to fulfilling the second half of that task, which is to identify the kind of arguments that might be sufficient to justify our according authority to certain persons and the directives they issue.

8.4.2.2. The Justification of Authority

In his classic discussion of the authority of law in *De Cive*, Hobbes highlighted the distinguishing features of law's authority by contrasting advice and counsel with law's commands. Advice, he wrote,

> is an instruction or precept (*praeceptum*) in which the reason for following it is drawn from the matter itself. But a command is an instruction in which the reason for following it is drawn from the will of the instructor [...]. But since laws are obeyed not for their content, but because of the will of the instructor, law is not advice but command, and is defined thus: law is a command of that person [...] whose instruction is the reason for obedience. (Hobbes 1998, 153–4, emphasis removed)

Not only does the reason for obeying lie not in the content of the command but in the commanding (it is, as we now way, "content-independent"), but also "will stands for reason"—the commanding is meant to be taken as preemptive. Hobbes grounded these two defining features of law in three deeper features of law's authority. First, "law comes from one who has power over those whom he instructs" (inequality of status); second, law imposes duties, unlike advice which leaves actions up to an agent's discretion; and third, while "advice is directed to the purpose of *the person instructed*, law [is directed to] to the purpose of *the instructor*" (Hobbes 1998, 154, original emphasis).[14] This last fea-

[14] In *Leviathan*, Hobbes tied the commander's purpose to his own interest or benefit. From the principle that "the proper object of every mans Will, is some Good to himselfe," he inferred

ture accounts for the fact that commands impose duties whereas the directives of counsel leave compliance up to the discretion of the person counseled (see Hobbes 1991, 176).

The Hobbesian parentage of Raz's analysis of law's authority is clear from this passage. However, Raz made a decisive break from Hobbes on the last point—and it makes all the difference for his understanding of the *point* of authority. Raz agreed that legitimate authority is not limited to serving the interests or promoting the well-being of its subjects. Nevertheless, he insisted that authority is justified only when and to the extent that it *serves those subject to it*. To be legitimate it need not serve their well-*being*, but it must improve their rational well-*doing*. This *service conception of authority* comprises two important theses: the dependence thesis and the normal justification thesis (Raz 1986b, 42–57; 1995a, 214–5). The dependence thesis (DT) captures the idea that authoritative directives are meant to reflect the balance of the subjects' underlying reasons (Raz 1986b, 51)—that is to say, the point of having authorities requires that "all authoritative directives should be based on reasons which already independently apply to the subjects of the directives" (ibid., 47).[15] This thesis requires not only that the authority issue only those directives that can be rationally justified, but also that the justification must be in terms of the subjects' underlying reasons for action. This leads us directly to the normal justification thesis (NJT) which holds that a person's claim to authority is primarily justified by showing that the alleged subjects are more likely to comply with their underlying reasons if they follow the alleged authority's directives than if they act on their own assessment of those reasons (ibid., 53). Sometimes Raz suggested that following authority is justified only if doing so *maximizes* the subjects' conformity to their underlying reasons (e.g., Raz 1980, 193–5), but elsewhere he weakened this claim. He can do so because the normal justification, when successful, offers only a necessary condition of a justified claim of authority. A further necessary condition is that the claim to authority is widely accepted, that is, the alleged authority must also enjoy *de facto* authority (Raz 1986b, 56). In that case, the relevant comparison will be reason-conformity under the *de facto* authority with reason-conformity under unaided judgment. The fact that some other person might be able to do an even better job than the incumbent is not enough to defeat his claim to authority.

that "he that Commandeth, pretendeth thereby his own Benefit," concluding that "between Counsel and Command, one great difference is, that Command is directed to a mans [i.e., the commander's] own benefit; and Counsell to the benefit of another man" (Hobbes 1991, 176–7). Hobbes may have had a wider notion of purpose in mind in *De Cive*.

[15] He adds that they may also be based on other reasons, but just insofar as they enable authorities to be better able to satisfy the normal justification thesis (Raz 1995a, 214 n. 6). Note: throughout his discussion, Raz usually calls the subjects' reasons on which the authoritative directives must be based "dependent reasons." This is misleading. Following his usage in *Practical Reasons and Norms* (Raz 1990b, 193), I shall call them "underlying reasons."

Justification of authority is *instrumental*. The relevant benefits are those of improving the reason-conformity of an agent's actions. One has reason to follow the directives of an alleged authority if doing so "is the best way of acting in accordance with those reasons which are reflected in the authoritative directives" (Raz 1990a, 6). Submission to authority is a rational indirection strategy: "the case for authoritative rules depends on the advantages of the indirect approach, the attempt to maximize conformity with certain [underlying] reasons [...] not through compliance with them but through compliance with an alternative set of reasons" (ibid., 193).

Taken together, DT and NJT constitute the "service conception of authority" (Raz 1995a, 214). NJT implies that submission to authority is a rational indirection strategy; DT guarantees that it is a specific kind of indirection strategy, namely, submitting to a surrogate rational deliberator. The "service" that the authority provides is deliberative. Reasons for acknowledging someone as a practical authority over one are reasons for having a certain matter decided by someone else. The "fundamental point about authority [...] [is that] it removes the decision from one person to another" (Raz 1990b, 193). This is essential to the argument for authority. NJT alone is not enough, because NJT could be satisfied by an impersonal mechanism that generates directives for action in an oracular fashion. No matter how much following its dictates might improve one's reason-conformity, doing so would not be a case of recognizing its authority. Authorities, necessarily, Raz assumed, must be capable of rational deliberation and issuing directives that can be presented as the products of that deliberation.

It is a very short step from this point to what Raz calls the preemption thesis (PT), according to which the "fact that an authority requires performance of an action is a reason for its performance which is not to be added to all other relevant reasons when assessing what to do, but should replace some of them" (Raz 1995a, 214; 1986b, 46; 1990a, 6). Authoritative directives can do their valuable work only if those who are subject to them take them as preemptive reasons. Otherwise, there would be no point in accepting the authority. The service conception of authority, then, makes rationally intelligible the claim authorities make to issue preemptive directives. Authorities *mediate* between subjects and their underlying reasons for action. This mediation is beneficial and rationally justified just when and to the extent that it enables subjects to improve their ability to act in conformity with reason. The same kinds of limits—subject-scope, substance-scope, and external—apply to authority as to exclusionary reasons generally. Thus, directives of legitimate authorities preempt only those reasons which (1) the directives are meant to replace, provided (2) replacing them is consistent with (a) the grounds for accepting the authority of those who posit them, and (b) the constraints of the autonomy proviso are respected (Raz 1989, 1180–82).

If these limits are respected, submission to authority, under some circumstances and with respect to certain pairs of persons, may be rational and even morally justified. It is not necessarily irrational for the same reason that

preemptive reasons are in principle rational: under some circumstances submission can realize important benefits of rational indirection. This is true even if—as must be the case—that authority requires in some cases that one do what is in fact *not* required on the balance of one's underlying reasons. (This must be the case, because it is a necessary feature of legitimate authority that its directives bind even when mistaken.) It is rational to follow authority even then (unless it is "clearly wrong"—Raz 1986b, 62), because the rationality of following it depends on its promise of long-term reason-conformity. It is, in principle, morally justified, again to the extent that authorities can credibly promise to enable subjects to improve their compliance with what morality requires of them. To the philosophical anarchist, who maintains that submission to authority even when this promise can be met is still immoral because it is inconsistent with the subjects' respect for their moral autonomy, Raz (1979, 26–7; 1986b, 38–42) replies that authority presents no fundamental challenge to moral autonomy. First, it does not require "surrender of judgment," as philosophical anarchists charge, but only suspension of one's action-oriented judgment and "online" deliberation with respect to reasons falling within the scope of the authority's jurisdiction. Second, authority is legitimate only when responsible moral agents have good reasons to submit, and when this is so they can submit autonomously.[16]

8.4.2.3. Authority and Coordination

Arguments available to support the authority of government and law in the spirit of the service conception of authority, in Raz's view, are of two kinds: appeals to expertise and appeals to the ability to solve broad problems of social coordination (Raz 1990a, 6; 1990b, 195).[17] It is very difficult to mount a

[16] This argument is inconclusive, because it leaves open the question of the scope of the autonomy proviso. Some such proviso must be recognized, according to Raz; so the dispute with the philosophical anarchist turns on how wide or demanding this proviso is. The philosophical anarchist may argue that there is never sufficient reason to recognize the authority of law or the state, since the matters they deal with are always of matters of moral concern which call for responsible autonomous judgment of every moral agent. Raz's conception of authority gives focus to the debate between philosophical anarchists and their opponents but it does not resolve it.

[17] He also hints at a third argument: that acknowledging the authority of law or government makes possible the creation of a common culture in pluralistic communities (Raz 1986b, 58; 2001a, 18). The mediation offered by law enables citizens to act on "non-ultimate reasons" provided by the authoritative directives, and the reasons for recognizing the authority of those institutions issuing them, without having to appeal to more fundamental moral principles in every case (1986b, 61) and so "enables a common culture to be formed round shared intermediate conclusions, in spite of a great degree of haziness and disagreement concerning ultimate values" (1986b, 181). However, Raz does not develop this suggestion in any detail. For a sympathetic development of Raz's views along these lines see Waldron 2003 (and below chap. 12, sec. 12.4.2). *Law and Disagreement* focuses directly on the role of law in a pluralistically divided society, but is critical of the strong intentionalism implicit in Raz's account of authority (Waldron 1999b, chap. 6).

plausible argument from expertise for the claimed scope of authority of law or government (Shapiro 2002a, 400) and Raz (1979, 9) conceded that expertise plays only a subordinate role in the justification of political authority. As Leslie Green once put the point, "There are experts on whales but not on whether we should save the whales" (Green 1989, 804). In its most plausible versions, the appeal to expertise combines in complex ways with appeals to social coordination (Raz 1989, 1164; 1990a, 6). Appeal to the ability of law to secure social coordination is the most likely candidate argument in justification of its claim to authority (Raz 1989, 1164).

Groups of all sizes, but especially complex modern societies, constantly face problems of social coordination. Game theory offers a sophisticated set of models of social coordination problems, including some, like the prisoner's dilemma and battle of the sexes, in which there is a large admixture of conflict as well as cooperation; however, the problems modeled by game theory are only a small part of the broader class of problems Raz (1989, 1189–94; 1990a, 7–10; 2003, 259–60) had in mind, which included all situations in which there is some legitimate or compelling value, goal, or set of interests (not restricted to the good or interests of the agents in view) that can be effectively promoted or realized only through coordinated efforts of many different people. Coordination in such cases involves enabling people to act in ways that are sensitive to how other people are likely to act, structuring their interactions to increase the likelihood of achieving or realizing the end in view. In many such cases, people are unable to solve on their own the coordination problems they face; they may not even be aware of the existence of the problems. Coordination problems exist, even when people are not aware of them, if they would be better able to promote or realize values or goals that they have independent reason to pursue if their interactions with others were coordinated.

Authorities can be in a position to identify problems of social coordination and to orchestrate solutions to them better than people on the ground, Raz argued. Instructions of authorities can call public attention to a problem and work out potentially complicated schemes of interaction that have some hope of achieving the goal in view. Members of society, then, might have good reason to follow authoritative directives in cases like these because they will thereby participate (and enable others to participate) more reliably in justified schemes of social coordination than if they were to strike out on their own (Raz 1989, 1192). This social coordination justification satisfies the DT constraint, because (or to the extent that) those who are subject to the alleged authority have reason to pursue the values, goals, or interests in view. It satisfies the NJT constraint because (or to the extent that) people who follow the authoritative directives are more likely to promote these values, goals, or interests than they would be by following their own judgment. Thus, law can be seen as a kind of "second order co-ordinating structure" that not only helps solve social coordination problems, but also identifies problems that need solving and publicly

marks those who are in a position to do both (Raz 1996b, 18). In this way, law *mediates* between the actions and interactions of citizens, on the one hand, and the reasons they have to act, on the other. Thus, an argument for law's claim to authority can intelligibly be made along these lines.

However, it is an interesting question whether government and law need the trappings of authority to help us solve social cooperation problems (Regan 1989, 1024–31; Alexander 1990, 7–8). The instructions or directives of law work their magic by bringing to public attention certain problems and by publicly marking certain structures of interaction. This marking makes the law's instructions salient and this has the effect of changing people's behavior by changing their expectations of the behavior of others. Thus, it is argued, law can succeed in coordinating behavior without authority—that is, without issuing preemptive reasons of any kind, or even constituting independent reasons for acting. They merely change the facts of (expectations regarding) social behavior on the ground. To this criticism, Raz (1989, 1188) replied that *the way* law achieves its salience is precisely *through* being generally recognized *as authoritative*, so pre-emption and reason-giving are not dispensable. This response needs elaboration. After all, it is not enough to show that in fact this is usually what law *does* (or rather claims to be doing), because while law may deploy the machinery of authority, the coordinating effect may actually be produced by the mere fact of being sufficiently public. Raz (1989, 1195) might argue that as long as the option of working out the balance of reasons on their own is known to be available to others, one would not have enough confidence that they would in fact follow the law's instructions, despite all signs of their salience, and so the preemptive character of the authoritative directives gives others the assurance they need to find it reasonable to follow the law. I am not sure whether Raz would be inclined to endorse this argument, but he may have reason to hesitate because the argument puts the preemptive status of law on the same footing as that of coercion, which Raz (1990b, 157–62) argued was not essential to law. In both cases, their role in practical reasoning would be ancillary. Both of them work primarily not by offering us reasons to act, but rather by assuring us that others will have sufficient reason to act—through preemption or the threat of sanction—even if their primary reasons are represented by the fact that the law's scheme of interaction promises success in coordinating action and solving the social coordination problem they have reason to have solved. It is an interesting question whether this is sufficient to support the weight of Raz's general argument for law's authority.

8.5. Law's Claim to Authority: Challenges

Many readers have found Raz's argument from authority for exclusive positivism persuasive, but it should come as no surprise that an argument as complex as this would also attract critics from many quite different philosophical quar-

ters. Criticisms have fallen into two large groups, one of which challenges the account of authority on which the argument rests, and the other which challenges its application to law in particular. Since we are interested mainly in jurisprudential matters, we will focus primarily on challenges from the latter quarter. But for that purpose, it will be useful to pause briefly on a few questions about Raz's general analysis of authority.

8.5.1. Questioning Authority

Some critics have challenged the concept of preemptive reasons that lies at the core of Raz's account of authority. They argued either that all of the examples he offered of the operation of such reasons in ordinary practical reasoning can easily be explained without relying on the concept (Hurd 1999, 73–6; Shapiro 2002a, 404ff.), or that the very idea is impossible because it is impossible to justify rationally allowing any reasons to play a preemptive role in our practical reasoning (Moore 1989, 859ff.; Shapiro 2002a, 413). The latter argument is unpersuasive because it ignores the benefits of indirection (Gardner and Macklem, 2002, 461–4). The former argument, however, has been pressed recently with sophistication by Scott Shapiro (1998). Accepting Raz's initial idea that practical reasoning is stratified in various ways and that rules and rule-like phenomena (decisions, personal resolves, orders, and the like) contribute to this stratification, he offers a systematic account of the role of rules in terms of certain psychological mechanisms. Rules guide action not by offering *reasons not* to act on certain reasons, but rather, by causally affecting the feasibility of acting on those reasons. If Shapiro is right, some features of Raz's account of authority may have to be adjusted (Shapiro, 2002a, 415–30), but the adjustments may be relatively minor.

Other critics challenged the role that Raz accorded exclusionary reasons in his analysis of the practical import of political authority. Some objected that authority on the service conception is practically self-defeating. On the service conception, an agent's acknowledgment of an authority is rationally justified only if the authority bases its directives on the agent's underlying reasons and if following those directives improves the agent's conformity to those underlying reasons. So, they argued, even if an agent has good reasons to accord authority to someone at some point in time, the agent will have to monitor the performance of the authority to ensure that the trust placed in it continues to be justified. But, then the agent will have to go through all the work of balancing the underlying reasons to monitor the authority's performance, work that the authority was supposed to do for her, to determine whether the trust placed in the authority is justified. However, this is not a serious challenge to Raz's theory. Monitoring will probably be needed from time to time, but not every time an authoritative directive calls for action. To give the authority a run for its money, periodic performance reviews would be sufficient. Micro-managing the

authority would defeat the point of having an authority, of course, but micromanaging is not necessary to protect the reasonableness of submission to it.

Most resistance to Raz's analysis of authority has come from those who have argued that it is possible to explain the role of authority in practical reason without exclusionary reasons. Two different proposals have been advanced. First, it was argued that we should understand political authority ultimately as theoretical rather than practical authority—that is, authoritative directives are best regarded as *reasons to believe* that the actions required of subjects are best supported by their underlying reasons (Alexander 1990, 8–9, 16–9; Hurd 1999, chap. 3). Thus, authoritative directives are not entitled to replace or preempt any of the underlying reasons. This argument, of course, makes the case for authority rest even more heavily on claims of epistemic expertise than Raz's account. Moreover, this construal of authority overlooks the fact that practical authorities are to be followed even if they are mistaken. Thus, even if the fact that an action is required by the authorities is reason to believe it is supported by underlying reasons, this does not exhaust its normative force. It provides a reason to act as the authority prescribes even when one knows that the action is not supported by those reasons. Critics found such behavior simply irrational, but Raz responded that it would be irrational only if the authority's mistake is clear and unequivocal, but in less clear cases there would be no irrationality, since there may be long-run rationality benefits to be reaped by following the authority.

The second challenge takes a different tack. Critics argued that we can account for the appearance of stratification of ordinary practical reasoning, and the alleged practical difference to an agent's deliberation that an authoritative directive makes, without relying on exclusionary reasons. Authoritative directives, it is argued, either add to or alter the weight of underlying reasons (Waluchow 1994, 131; Perry 1989; Shapiro 2002a, 411–2) or provide strong but rebuttable presumptions in favor of acting as directed (Schauer 1991a, 88–93), or epistemically entrench doing so (Perry 1997, 797–801). These alternatives raise important issues about how to understand authority, but for our purposes the greatest impact of their challenge falls on the conclusions for jurisprudence that Raz sought to draw from his account of authority. In particular, if the effect of an authoritative directive on practical reasoning is merely to alter the weight of first-order reasons or increase our confidence to some degree in the reasonableness of the course of action prescribed, then an agent will still have to weigh all her first-order reasons as usual. Thus, if this objection is sound, the case for the preemption thesis is undermined and the inference to ST is threatened. However, it is difficult to determine whether Raz or his critics have the better argument; this contest appears for the time being to be a draw.

Coleman (2009, 372–3) has recently raised a question about the fundamental direction of Raz's explanation of authority. The service conception, he points out, treats authority as primarily a relationship between reasons and

persons; authorities mediate between persons and the reasons that apply to them. However, the ordinary notion of authority, in Coleman's view, regards authority as a relationship between persons. "One who has authority stands in a particular relationship, not to reason, but to other persons. To have authority is to have standing [...] constituted by distinctive powers" including the power to issue directives (Coleman 2009, 372). We should, then, regard Raz's account as a revisionist conception of authority, rather than a neutral analysis of our already shared view. It is not clear that this offers a serious challenge to Raz's theory. He recognized at the outset that he sought to reconstruct the notion of authority, not merely reproduce it in new terms, so the appearance of a distance separating Raz's account from our ordinary notion would not in itself represent a challenge to his theory.

On the other hand, Coleman's suggestion that to have authority is to have a certain standing may open the door to an alternative way of understanding authority that the tradition from Hobbes to Raz obscures, for the standing may involve not so much (or not fundamentally) a power to direct, but rather the standing to challenge or to hold to account. Coleman is not correct to say that Raz's account does not attend to relationships between persons; it does. But the relationship is necessarily asymmetrical, unequal. However, sometimes authority seems allow for a reciprocal or mutual relationship, or at least a relationship that has important reciprocal dimensions. This is the notion of authority that seemed to be at work in Fuller's notion of law's authority and of a political regime's exercising power *by law* (see chap. 4, sec. 4.3.2).

8.5.2. Law's Authority and Raz's Claims for It

Raz's analysis may be able to withstand the general challenges to his conception of authority mentioned thus far. More interesting for our purposes is the question whether the service conception of authority is well-suited to explicate the authority that, on Raz's view, law necessarily claims for itself. On that score we have several reasons to hesitate. Here again there are two somewhat different sets of objections to consider. Raz can deflect the force of the first set, I think, but not without making even clearer his vulnerability to the second.

8.5.2.1. Non Sequiturs

First consider two challenges to the logic of Raz's argument for ST, which claim the argument is a non sequitur.[18] They both locate the problem in the generality of ST, according to which (a) *for each law* it is the case that (b) *all moral considerations* are excluded from any role in determining its existence

[18] For a third argument that Raz's argument is a non sequitur, see chap. 10, sec. 10.2.3.1, below.

and content. Challenging (a), Kramer (2004, 61–4; 2009, 51) agreed with Raz that if we accept that necessarily law claims authority (CLT), it follows that every legal system must be capable of possessing authority; however, he objected that the fully general ST does not follow from this. It does not follow, he argued, that it must be the case for every legal norm of the system that *its* existence and content must be determined exclusively by social facts concerning sources. From the fact that the system must be capable of authority, it does not follow that every legal norm of that system must be.[19] Thus, if robust inclusivism (see chap. 10, sec 10.1.5) is correct, then there may a legal system in which the moral correctness of a principle is a sufficient condition of its validity in that system (*given* that the practice of officials makes it so). There may be in that system, among authoritative directives, some legal norms that do not guide in the preemptory way, but this does not threaten the system's ability to claim or to have authority and guide in that way *on the whole*. How much allowance can be given to such non-preemptory norms in a system would seem to be a question of law's effectiveness, not its existence. Similarly, on a modest inclusivism, some fairness or basic decency filter may be in place in a legal system, but that would not undermine its ability across a wide range to exercise authoritative guidance.

Waluchow (1994, 129–40) joined Coleman (1996, 306; 1998a, 414–15; 1998b, 271) to challenge (b). The problem, they argued, arises from the fact that ST is rooted in PT, and PT rests on and is limited by the service conception of authority, according to which authoritative directives are meant to settle matters with respect to *certain* underlying but not necessarily all reasons. The scope of their pre-emption, relative to both subjects and substance, is determined by the background reasons for acknowledging the law's authority. The range of moral considerations excluded by the law's authoritative directives will be limited to the range of underlying reasons deliberation about which the directives were meant to settle. That range could fall well short of the class of *all* possibly relevant moral considerations. "The set of all moral reasons is not identical with the set of dependent [i.e., underlying] reasons under dispute" (Waluchow 1994, 139).

Specifically, they argued, the authority argument leaves open the possibility that a legal system might subject all norms meeting source conditions to further conditions, e.g. a fairness, basic decency, or respect for human rights condition as well. These further moral considerations may be binding on judges, requiring them to declare invalid (against basic law, unconstitutional, etc.) even legislation that meets all the conditions of pedigree validity. The service conception of authority and PT do not rule out the possibility of a kind of fairness

[19] Compare the argument we have encountered frequently to the effect that while coercion may be necessary for the existence (or proper functioning) of a legal system as a whole, it may not be necessary that every (mandatory) legal norm be coercively enforced.

or morality filter, but ST evidently does. Fully effective mediation may require something more preemptory, but the argument is meant to address conditions of existence, not effectiveness. Thus, the authority argument is a non sequitur; it does not rule out the possibility of criteria of validity that appeal directly to moral principles. Although it rules out moral reasons that figure in the grounds of particular legal norms, it does not rule out moral reasons that might qualify or constrain these norms (Coleman 1998b, 271). Modest inclusivism, at least, seems to escape the charge that it is inconsistent with the authoritative nature of law.

It is tempting to reply to this challenge on Raz's behalf by pointing out the limitations of ST and explaining how the truth of ST is consistent with a substantial role for direct appeal to moral considerations in legal reasoning (see sec. 6.1, below). For example, one might argue that, in virtue of their "directed powers" judges may be bound by principles of fairness or decency to review legislation and to invalidate bills that in their judgment fail to meet the standards (Raz 2004, 13). This is consistent with the ST and PT, Raz argued, because identification of the legislated rules can still be strictly source-based, and the court's invalidating of legislation is in effect a matter of repealing it. Validly enacted legislation is valid, even if it violates moral standards that legislators are duty-bound to respect, until the courts exercise their directed power to change it (Raz 1995a, 244–50).[20] Or one might argue that ST claims only that the existence and content of laws is exclusively determined by appeal to sources. It does not claim that legal reasoning is limited to identifying source-based rules and it does not claim that source-based rules are conclusive determiners of legal problems brought to the courts. In particular, it does not preclude judges using moral principles to decide whether to follow, distinguish, or set aside the source-based laws, or to interpret those laws when their meaning is left vague or indeterminate (Raz 1989, 1206).

Regardless of the details and merits of Raz's view of legal reasoning, which we will discuss in the next section, the point to register here is that Raz's replies fail to answer fully the critics' challenge. The critics charged that ST was unrestrictedly general in scope (regarding subjects and substance)—all moral considerations are precluded from determination of the validity and content of laws—but that the argument for authority cannot guarantee this generality. They focus our attention on the identification of the existence and content of propositions of law (what the law requires), not on legal reasoning in general (on what judges should decide in light of what law requires). So the fact that it is possible, consistent with ST, for *legal reasoning* (in Raz's very general

[20] This explanation, however, may not satisfy his critics on this matter because it does not explain the fact that judges regard the invalidity of the legislation as the ground for their decision, not the result of it. That is, the issue argued in review of legislation is whether the legislation *is valid law*, not whether valid law should be repealed.

understanding of that word) to include non-source-based considerations does not bear on the question of whether ST follows from Raz's service conception of authority.

Raz might offer a different reply to the challenge, which does seek to close the alleged gap in his argument. Note that the critics' challenge turns on the observation that the normal justification for authority supports exclusion only of those matters authority is "meant to settle." The critics correctly pointed out that for most credible arguments for law's authority this will not exclude all moral considerations (because the autonomy proviso will block exclusion of some moral considerations and the expertise or coordination-facilitating capacities of legal officials will surely be limited in various ways). However, Raz's argument for ST does not depend on the authority-based argument being sound, but only on its being intelligible. There is no gap in an alleged case for restricting identification of the existence and content of propositions of law to source-based considerations from law's claimed authority *if* the claim is that law has universal, unconditioned authority. Of course, that claim is false, Raz would concede, but we might think that that is a problem for the actual legitimacy of the legal system in question, not for the ST or the positivist theory of law which puts ST at its center.

Strictly speaking, this closes the gap in Raz's argument, but at a high price. For CLT and the kind of argument which is supposed to make it intelligible, appear to be false—not just occasionally false, but systematically so. The claim to authority is not just sometimes dubious, but always and without reservation overreaching. This is paradoxical. There is no direct contradiction, of course, because CLT only asserts something about what law claims and is silent about the truth of the claim. Still, Raz's approach faces an interpretive paradox. As a conceptual claim, CLT depends for its support on its ability to make intelligible important features of law's structure and characteristic functioning. But one wonders whether it makes good sense of these many features of law to attribute to law a claim that is not only sometimes false, but systematically and almost always false. Does it make a practice intelligible to attribute to it, at its foundation, an argument for its normative status that almost certainly can never be found credible? Interpretive standards are notoriously wide and forgiving and we may resist taking as our interpretive aim to make the practice the best it can be (as Dworkin suggested), but we might reasonably wonder whether attributing such an implausible claim to the practice makes it even minimally intelligible. The problem may go even deeper, as we can see by looking again at CLT.

8.5.2.2. Just What Does Law Claim?

"Necessarily, law claims legitimate authority": this thesis launches Raz's argument for ST. We have seen that Raz gave CLT a robust reading, according to

which law is said to claim, not just moral legitimacy, but moral *authority*, that is, it claims for itself, as a system, authoritative status. There are two different ways to understand this claim: (1) law claims legitimacy for all of its authoritative elements, and (2) law claims that it is a morally legitimate system of authoritative norms. The key difference that (1) and (2) are meant to highlight is that (2) asserts that it is part of law's claim that nothing is law unless it is authoritative, while (1) is the weaker thesis that necessarily, law has authoritative elements for which it claims moral legitimacy. Law *is* authoritative (that is, consists only of authoritative directives), according to (2); law *has* authoritative elements, according to (1).

It is possible to run Raz's argument from either version of the first premise, since the argument merely unfolds and seeks to make intelligible the claim that law claims authority. However, the conclusions will be different: ST—all law is source-based—follows from (2), the stronger reading, but (1) yields only the weaker conclusion that there are source-based elements in law. Raz's argument, seen as an argument for the robust ST, does not itself *support* a choice between these two readings; it *presupposes* one. ST as a foundational claim about the nature of law—that is, not only as a necessary truth, but a truth around which our understanding of law and legal reasoning must be shaped—rests on (2), but (2) begs the very question the argument is supposed to answer. Unless we are already inclined to think of law in exclusive positivist terms, we are not likely to accept (2) without argument.

It looks, then, as if we cannot get a sound and valid argument for ST without building in a very strong reading of CLT at the beginning and making part of our concept of law the systematically false claim that law has unconditioned moral authority. This is a high price to pay for admission into the exclusive positivist camp. Or, rather, it appears that the argument for exclusive positivism is likely to appeal only those to who already find themselves comfortably in the camp. And there appear to be reasons to resist the robust CLT/ST combination, apart from the inconclusive nature of Raz's argument for it. We already noted earlier that the strong intentionalism of ST as Raz defended it (the thesis that there is no authority without an author) makes it hard to account plausibly for customary elements of law, including the customary character of common-law reasoning. Positivists following Raz might be tempted to join Bentham and simply deny that common law practice is law, properly speaking,[21] but this would seem no less counter-intuitive than the conundrum regularly attributed to natural-law theory that an unjust law is not a law. Moreover, there is even some reason to wonder whether it can adequately explain the role of legislation in ordinary legal reasoning.[22]

[21] "As a System of general rules, the Common Law is a thing merely imaginary," Bentham (1977, 119) wrote.

[22] See Waldron 1999b, chap. 6. For a strong defense of intentionalism in legal *interpretation*,

Yet, if the rest of Raz's argument from authority on the weaker version of CLT (i.e., (1) above) is compelling, we may be forced to develop a theory in which *authoritative elements* in have a critical role law. Perhaps, we must view law as a complex mix of "deliberative" and "executive" elements. Whether it is possible to construct a coherent and plausible jurisprudential theory along these lines depends on answers to a number of questions that are still open, for example, whether the "executive" elements of law, construed as authoritative in the Razian sense, can be incorporated coherently into a more general theory of legal reasoning. It also depends on whether Raz's service conception of authority can be integrated into a more general account of the nature and foundations of law's authority sufficiently nuanced to explain the normatively binding force of non-source-based elements. Jeremy Waldron and Scott Shapiro, although coming from somewhat different quarters, have suggested that the moral foundation of authority articulated by the service conception of authority is too narrowly instrumental (Waldron 1999b, 99–118; Shapiro 2002a, 431–9). They argued that a better ground for our respect for certain structures of authority and procedures for establishing ground rules of social interaction can be found in an argument for their fairness and capacity to express respect for the autonomy of each member of the community in a social context characterized by deep disagreement not only about matters of life style, but about justice and how best to live together decently. From this point of view one might recognize the need for matters to be settled at certain points, but also the need for regular channels for public reassessment, challenge, and revision of these settlements that are *internal* to the ordinary process of legal reasoning. Or so, anyway, it might be argued (Postema 1995b, 2010b).

8.6. Legal Reasoning

Several times in the course of our discussion we have alluded to Raz's views on legal reasoning. It is time for us to take a careful look at these views. It is sometimes said that legal positivism is a theory of law and not a theory of adjudication (i.e., a theory of how judges do or should go about deciding cases), that ST in particular is silent about legal reasoning (Leiter 1999, 1152). ST, it is true, does not regiment the details of a theory of adjudication, but it is not entirely silent on the matter either.[23]

see Marmor 2001b, chap.5 and, more generally Marmor 1992, chaps. 2 and 8. Raz's view of the nature and role of appeals to intentions in legal interpretation is complex and more ambivalent than Marmor's. See Raz 1995b; 1996a; 1996b, 20–5.

[23] Raz (1995a, 202–3, 323) frequently chides other legal theorists (especially Dworkin) for confusing theories of law and theories of adjudication, as if it is a point of honor that positivism respects the difference, but the question of what it is to honor this distinction, and why doing so is important, is murkier it would first appear. If a theory of adjudication is expected to provide all the resources needed for judges to settle, all things considered, cases brought to them for

8.6.1. Applying the Law, Determining the Law, and Moral Reasoning

Legal positivism is often associated with a formalist view of legal reasoning. We have seen in previous chapters that formalism exists largely in the eyes of its opposers and there are almost as many "formalisms" as views about legal reasoning to oppose. For present purposes we shall focus on just part of the characterization of formalism considered in Chapter 2 (sec. 2.2.1), the view that (proper) judicial reasoning is *autonomous*, that is, not dependent on moral or political reasoning. Legal positivism is thought to be committed to formalism by virtue of its commitment to ST: Since law is said to consist exclusively of source-based norms and judges are duty-bound to decide only according to the law, then, it is argued, judicial reasoning must be restricted to finding and drawing inferences from source-based norms. Hart, of course, rejected this link between positivism and formalism, especially in his Holmes lecture (Hart 1983, 62–72).

Raz did the same. Formalism cannot be reconciled with the realities of legal practice and is open to serious moral objections, Raz (1995a, 330–35) argued, but, fortunately, ST is not committed to formalism. Although ST holds that "all law is source-based," it does not follow that judges must restrict their reasoning to source-based considerations (Raz 1980, 214–5). "The point of ST is not that courts never rely on sourceless considerations," he observed, "but rather that when doing so they are not relying on legally binding considerations but exercising their own discretion" (Raz 1979, 59). In fact, Raz argued, positivism is committed to rejecting formalism: ST and the institutional nature of law taken together entail that formalism is false. According to the institutional account, legal institutions are authorized to apply settled law when disputes arise under it, but also to settle law authoritatively where the meaning of the law is unsettled. Thus, legal reasoning must involve more than application of source-based legal norms; non-source-based, moral considerations play a proper, legally sanctioned, and even essential role in legal reasoning. Although, if ST is right, the *identification* of legal norms and *working out of their content* is autonomous, *legal reasoning* is not (Raz 1995a, 334; 1998, 4). "There is much more to legal reasoning than applying the law, and the rest [...] is—arguably—applying moral considerations" (Raz 1995a, 332).

their adjudication, then all interesting jurisprudential theories currently on the scene, including staunchly anti-positivist ones, would recognize a distinction between a theory of adjudication in that sense and theories of law they offer. (Dworkin's "law as integrity," for example, is a theory of the "grounds" of law—of what makes propositions of law true—but does not address the question of the ultimate moral force of true propositions of law. See below chap. 9, sec. 9.4.1) But, then, the question is where the line between a theory of law and a theory of adjudication should be drawn, and that no longer appears to invite theory-neutral answers.

8.6.1.1. Directed Powers

The court is thrown back on sourceless, extra-legal considerations of morality when unintended vagueness, indeterminacies, and gaps appear in source-based norms, but these same indeterminacies may also be intentional. Legislators leave to courts the job of working out matters of detail of their legislation, expecting them to work within the framework provided to find the morally best determinations of what they leave indeterminate. This is a matter of *judicial law-making*, Raz maintained, even though it is authorized and directed by the legislators. Legislators often direct the exercise of the moral judgment of judges in another way: they adopt or endorse standards that in their very terms invite moral deliberation. Such source-based norms may require that judges ensure that certain procedures are fair and impartial, or that punishments meet some standard of basic human decency, or declare that unconscionable contracts are void, or the like. They may even require that parliamentary legislation respect human rights or fundamental liberties (Raz 1995a, 334). Judges must appeal to moral principles, often highly contested ones, to work out meaning of these norms, but, Raz insisted, they constitute legal reasons for judges to *develop* the law in certain ways, relying on a selected range of moral principles. Judges are granted "directed powers" through which the law provides for its own "internal" development (ibid., 241–52, 263–6).

We must resist two tempting conclusions at this point, Raz cautioned. First, although law may direct its own development in this way, the determination of the law, the clarification of the legislation, is accomplished only as a result of the courts' authoritative action. Thus, for example, the existence and broad recognition and appreciation in a legal community of a powerful argument for understanding the free exercise of religion to include the right to wear traditional religious garments (yarmulkes, head scarves, etc.) is not sufficient to make a guarantee of this form of religious freedom a part of a law. The law is developed in this direction only when authorized courts endorse this argument and the interpretation of the law based on it. Similarly, Raz argued, Hart and inclusive positivists were wrong to treat the moral principles to which the law directs the courts *as legal norms* in virtue of their incorporation in authoritatively adopted laws. Such principles are no more part of the law, he insisted, than the by-laws of corporations are part of the law of the land when courts are required to settle disputes with reference to them, or the laws of economics or mathematics are part of the law of the UK just in virtue of a statute that requires courts to pay special attention to them for certain purposes (Raz 1995a, 333).[24] Insofar as courts appeal to non-sourced considerations beyond the four corners of the law, they create, change, and make law determinate; in short, they *make* law, rather than find it. They exercise discretion, even if it is direct-

[24] We will explore the debate over incorporation in chap. 10, below.

ed by law; their reasoning is *according to law* even if it is not reasoning to establish *what the (already) law is*. To understand the relationship between Raz's sources thesis and his view of adjudication we need to look more carefully at these two aspects of legal reasoning.

8.6.1.2. Two Aspects of Legal Reasoning

Legal reasoning, according to Raz (1995a, 326), is a species of normative, practical reasoning. There is nothing special about it except its subject matter. Courts have a unique place in legal practice, but this does not give their reasoning any special character. "In engaging in legal reasoning one is reasoning as a court does, but one is not imitating the court [...]. People and courts alike attempt to establish the law, or to establish how—according to law—cases should be settled" (ibid., 327). Legal reasoning just is "any reasoning to conclusions which entail that, according to law, if a matter were before a court the court should decide thus and so" (Raz 1998b, 4).

Legal reasoning is embedded in moral reasoning, according to Raz. It is a special case of moral reasoning (Raz 1995a, 340). It is moral reasoning about matters dealt with by the law and its authorized adjudicative institutions. Typically, court decisions significantly affect the lives, fortunes, interests, and liberties of people. Thus, actions and decisions of courts are matters of serious moral concern, and reasoning leading to and justifying them must be morally informed (1995a, 327–8). Similarly, legal reasons and legal standards are not some *sui generis* kind of reason or norm; if they have any normative force this is only because the law's claim to authority is sound (Raz 1995a, 332 n. 10, 340; 1998b, 7–8). Thus, legal reasoning is moral reasoning because it deals with matters of moral concern that call for responsible moral reasoning, and the rules and standards to which it appeals have their normative force only if they are morally adequate to the task.

This view, Raz held, is a natural corollary of his claimed legitimacy thesis. It should be clear also that it does not follow that the conclusion of a sound piece of legal reasoning, to the effect that according to the law the courts ought to decide thus and so, settles what morality requires of judges of that court when all things are considered. For what is required according to law may be morally indefensible. "Thus legal reasoning is an instance of moral reasoning, though sometimes it is morally incorrect, or based on morally deficient legal principles" (Raz 1995a, 340). Following the law may compel judges to endorse results that are immoral and morality may require that in the circumstances the best thing to do is to flout the law. In these cases, when judges reason as they must as responsible moral agents, they no longer reason according to law but rather against it (Raz 1995a, 328; 1998, 6). Within this compass and keeping it always in mind we can identify two aspects of legal reasoning, as Raz understood it.

Legal reasoning comprises (a) reasoning *about* or *to* law—that is, reasoning that attempts to establish the content of the law—and (b) reasoning *according to* law—that is, reasoning that seeks to establish, according to law, how the cases should be settled (Raz 1995a, 327–8, 332; 1996b, 19; 1998b, 4–6). These, it appears, are not two distinct species of legal reasoning, but rather reasoning according to law includes reasoning about law as a proper part (Raz 1998b, 6). Reasoning about law yields conclusions about what the law on some matter currently is. With the results of this reasoning in hand, the courts must work out how they ought to decide in the case before them, reasoning *according to* law.

The aim of reasoning *about* law is to establish the content of the law, to determine *what the law is* on some matter. "When trying to establish the legal status of an action, we need to ascertain whether any of the authoritatively binding rules and doctrines of the law bear on it and if so how. That means establishing what *has been done* by the authorities, what decisions they have taken and what they mean" (Raz 1996b, 19, emphasis added). Although it is embedded in moral reasoning, this aspect of legal reasoning involves *factual reasoning* (ibid., 18) aimed at identifying and establishing the meaning of source-based norms. It is *autonomous* in the sense that it can be carried on without recourse to evaluative reasoning (Raz 1995a, 332; 1996b, 19; 1998b, 5).[25] It is factual, Raz held, because it is concerned with discovering what *has been done* by authorities and what that *means*, and that necessarily involves uncovering or retrieving their intentions in doing so (Raz 1995a, 231, 234; 1996a, 256–60). This includes reconstructing the reasoning of the precedent-setting court in order to determine the *ratio* of their decision (Raz 1979, 184; 1989, 1207–8). The aim is "to reconstruct the actual reasoning engaged in by actual people" (Raz 1998b, 15).

"Every attribution of an intention to the law," he writes, "is based on an attribution of a real intention to a real person in authority" (Raz 1995a, 234). This suggests that reasoning about law is devoted largely to inquiry into the states of mind of authorities, but this does not seem to be his view. Raz was fully aware of the serious problems of intentionalism as an account of what determines the meaning of legislation (see MacCallum 1968; Waldron 1999b, chap. 6; Raz 1995a, 300; 1996a, 257). The intention behind ordinary legislation is not the intention of any group of individual of legislators, but of the legislative body. The technique for uncovering that intention (and the meaning of legislation that it fixes) depends not on psychological insight, but on

[25] By "evaluative" in these contexts Raz means "ordinary evaluative reasoning" which I take to mean "moral" or "morally evaluative" reasoning, (Raz 1998b, 5; see also 1995a, 332 and 1996b, 18–25). This is the kind of reasoning that goes on in the deliberative process that leads to decisions about what is to be done where significant moral interests and values are implicated. This should not be confused with the "evaluative" reasoning that he says legal *theory* inevitably engages in, which, as we have seen (sec. 8.3.2), was said to be different from *moral* evaluation (Raz 1995a, 237).

mastery of specific conventions for determining the public meaning of what authorities do when they make law, conventions established by law-applying institutions (perhaps drawing on linguistic or other conventions in the community generally) in particular legal systems (Raz 1996b, 22–3).[26] This is "factual" reasoning, in Raz's view, because uncovering the public meaning of such acts does not involve evaluative reasoning. He also thinks that there is no need for a "theory" of this kind of reasoning—theory of "re-creative interpretation"—but only mastery of the relevant local conventions (ibid.).[27]

Reasoning about law is autonomous, in Raz's view, but it is not simple, easy, or mechanical, and it may not be uncontroversial; however, it does have very definite limits. As soon as gaps among authoritatively established norms appear, or the factual or conventionally established meaning of an authoritative directive is vague, indeterminate, or abstract in such a way as to require further specification to apply it to a concrete case, legal reasoning must fall back on reasoning *according to* law (Raz 1995a, 331–2, 335). In such cases, courts *must* (as a matter of morality) appeal beyond source-based norms, because when the explicit meaning of source-based norms runs out, their claim to authority runs out (ibid., 334).

Reasoning *according to* law has a broader mandate. Its aim is to determine how courts should decide issues brought to them, insofar as they seek to act broadly in fidelity to the law (Raz 1995a, 327–8, 332). This is reasoning "according to law" because law requires courts to reach decisions in fidelity to law, but also because it often supplies at least some of the considerations that courts are bound to take into account as they proceed to a reasoned decision

[26] Raz's argument for this convention-dependence (1996b, 22) is of some interest. It rests on the necessary mutual interdependence of law-making and law-applying (cf Fuller, chap. 4, sec. 4.2.2, above). The law that legislators intend to make, Raz argued, must be shaped by what they are understood to have made, first of all by the courts and more generally by the public at large. Meaning is public and social. "Words and actions have the meaning they are taken to have" (ibid.). Thus, legislators will intend to make that which, when made public, their words and actions will be taken to mean. However, the upshot of this argument, it would seem, is that, in effect, *intention* drops out of the picture. The public meaning of authoritative acts depends on the conventions by which that meaning is fixed. These conventions will include general linguistic conventions, but may also include a variety of other conventions by which the law-making upshot of various actions is understood and these may have their origins specifically in the practice of courts or they may originate in the ways and customs of the people more generally. But rarely will they involve intentions, strictly speaking, and if intentions drop out, it is not clear such reasoning is focused on *what they meant*.

[27] Raz with some reluctance occasionally spoke of "interpretation" in this context, calling it "conserving interpretation" (Raz 1996a, 252–3), "re-creative interpretation" (Raz 1996b, 21–3), or "retrieval" (Raz 1995b). However, he thought that it is misleading to label this process of identifying meaning "interpretation" which, properly speaking, is an intellectual process that goes beyond this simple identification of meaning (Raz 1995b; 1996b, 19–25). While Raz was somewhat hesitant on this point, Andrei Marmor (1992) explicitly adopts this distinction between establishing the meaning of law and interpreting it.

on matters before them (Raz 1995a, 238–53, 260–5). Nevertheless, when courts rely on considerations beyond those that are authoritatively established, they act in their law-making capacity. They are not acting as legislators, of course, because they rarely have the institutional capacity to remake whole areas of law (Raz 1979, 194–7), but they make law in the straightforward sense that they authoritatively fix or settle what was earlier legally unsettled. This is true when judges are forced to interpret the law. Interpretation that seeks to fix, rather than find, the practical meaning of law always involves two components: establishing to the extent possible the meaning of authoritative legal doctrines and other extra-legal moral considerations that bear on the issue, and these are "inextricably interwoven" (Raz 1996b, 22). This is true even for modest interpretive exercises that seek to apply authoritative standards to concrete or hypothetical cases in an attempt to resolve ambiguities or to develop or concretize them (1996b, 23). Such interpretation never merely applies law, but rather adds to, makes more determinate, develops, or alters the existing law. Legal reasoning is reasoning in the service of judicial law-making.

This reasoning, reasoning according to law, involves "ordinary evaluative reasoning" (Raz 1998b, 5), i.e., "straightforward moral reasoning" (1995a, 333), Raz insisted. Thus, reasoning according to law—legal reasoning proper—is decidedly *not autonomous* (Raz 1995a, 334; 1998b, 4–6). "Legal expertise and moral understanding and sensitivity are thoroughly intermeshed in legal reasoning, though at times, for partial stretches, the one or the other predominates" (Raz 1995a, 335).

Thus, on Raz's view, reasoning about law is only a part of reasoning according to law. Moreover, reasoning about law is dependent on reasoning according to law (and hence reasoning that involves ordinary moral reasoning) because reasoning about law is never by itself conclusive. This is true, at the very least, because the application of its conclusions to any particular case relies on the further premise that there are no competing reasons that justify modifying the existing law (Raz 1998b, 4). Furthermore, it is possible that in the course of such reasoning about matters arising under the law, authoritative legal norms (the existence and meaning of which are established by reasoning about law) may compete with other (non-source-based, "extra-legal") considerations and may even be outweighed by them (ibid., 6). This is still consistent with their being authoritative directives, if the competing and overriding extra-legal considerations do not fall within the scope of the directives' exclusion. And, of course, such directives do not even compete with other considerations if the cases under consideration do not fall unambiguously within their ordinary and established meaning, that is, when interpretation is needed.[28] This can happen very often and very quickly especially in some areas of the law, Raz admitted. So, in some areas of law, reasoning about law may play only a small part in le-

[28] Recall, the authority of the directives runs out when the established meaning runs out.

gal reasoning, and if interpretation to some extent is needed in the lion's share of instances in which legal reasoning seeks to decide cases according to law, the scope of non-autonomous, reasoning in legal practice is likely to be very large.

Sometimes Raz (1998b, 4) suggests something even bolder, that in some legal systems at least it is always in principle open to a court to consider whether the unambiguous law should, according to the law, be modified. This is true, he thought, of common-law courts, especially the highest courts in the system (Raz 1989, 1204). In such case, courts must appeal to non-source-based, moral considerations. If this is available in every case, then, although reasoning about law is a part of legal reasoning generally, it may not be a very large part of it.

One might wonder, however, whether this bolder thesis is consistent with Raz's thesis that law necessarily claims authority (CLT), when combined with his service conception of authority. For if law's claim to authority is understood in terms of a claim to settle disputed or indeterminate matters by taking them off the deliberative agenda, not only for law-subjects but also for courts, then it would seem that courts could not be free to set aside authoritative directives that apply unambiguously to particular cases on the basis of their judgment that another rule might do a better job. For that judgment would very likely rely in part on the very considerations that the authoritative directives were meant to exclude from deliberation. Authoritative directives, on Raz's analysis, purport to offer protected reasons for action (or decision), and those reasons not only support the actions (or decisions), but also exclude some range of them. Of course, it is conceivable that all such instances of courts deciding to set aside or modify the rules involve considerations that fall outside of the scope of exclusion, but that is highly unlikely. The considerations that call for modification will very often be just the considerations that we must expect were deliberated about when the directives were established.

This objection threatens Raz's account of law if nearly all courts have this option of following, distinguishing, or overruling established law. However, if this power is limited to the system's highest court(s), the threat may not be serious, for then we would have to say that law claims authority (in this legal system) with respect to everyone, courts and law-subjects alike, except the highest court. Law settles matters authoritatively for all (but the highest courts) within the limits of the established meaning of the directives, and gives courts generally the power *to settle* matters left unsettled—e.g., in cases of ambiguity or indeterminacy, or in cases where considerations falling outside the scope of the authoritative directives' exclusion compete with those directives—and gives the highest courts the power to alter even those directives that have clear and unambiguous meaning. This is, I suspect, Raz's view of familiar common-law legal systems. It does have the consequence, however, that the realists' charge, that the law is just what the (system's highest) courts say it is, has some truth. Neo-formalists writing at the end of the twentieth century seemed to have taken a more restricted view of law's constraints on judicial reasoning. We will

consider their views in Section 7, but first we should consider Raz's view of the possibility of a theory of legal reasoning, which will put in even greater relief the contrast between Raz's view and that of the neo-formalists.

8.6.2. The Impossibility of a Theory of Legal Reasoning

On this understanding of the nature, scope, and remit of legal reasoning, a theory of law focused exclusively on ST (a theory of *laws*, we might say) turns out to be a relatively small part of a satisfying theory of legal practice, i.e., of a theory of *law* in general. What is more, since ST, and the institutional account of law of which it is a part, is only a theory about the constraints on the identification of laws, ST is entirely silent about the exercise of these institutionalized, directed powers. It offers no account of how these powers are exercised or ought to be exercised; it does not even offer any resources from which to begin constructing such an account. In this sense, exclusive positivism is, after all, largely silent about the theory of adjudication. This led some critics to the view that Raz's jurisprudence is "unsatisfying" since it put most of familiar legal practice beyond the pale of jurisprudence because most of what lawyers and judges deal with is not law or reasoning about law as Raz understood them (Schauer 2004, 1949–50).

It is unsatisfying in a specific respect. It has no appreciation for the role that principles can play within a body of norms, shaping legal doctrines in the direction of their development and relations to other doctrines. There is a significant difference between this kind of intra-systemic role of principles and the effect of appeals to extra-legal principles might have. While the former is systematic, the latter is no more than *ad hoc*. Integrated principles have a systematic influence on the existing law, qualifying some doctrines, enriching and emboldening others; similarly, their impact on particular decisions are likely to be constrained by the existing body of law. They also tend to shape the way particular cases are framed and the doctrines that are deemed relevant to their resolution. Principles applied to cases that are already defined by existing law come into deliberation at a very different point and, it is reasonable to suppose, have a significantly different role to play. In his Holmes lecture, Hart recognized that there was some role for appeals to analogy and principles that run through the law, but he took care to put them beyond the pale of his jurisprudence; Raz seems to have done so with even greater insistence. The result is that an entire dimension of legal practice (at the very center of it, if we, with Dworkin, regard law's argumentative character as essential to it) is ignored.

This silence is not inadvertent; Raz's jurisprudence is intentionally abstemious. Unlike many of the critical and especially post-modernist jurisprudential theories that arose in the 1970s and 1980s, Raz's view of the limits of a theory of legal reasoning does not rely on any form of moral skepticism or skepticism about the power and promise of rationality. There is, I believe, no more ra-

tionalistic philosopher of law in the second half of the twentieth century than Joseph Raz. Yet he has maintained that a general theory of legal reasoning is at least unnecessary and, for the most important part of legal reasoning, simply impossible (Raz 1996b, 19–25). ST, of course, lays out at an abstract level the constraints under which legal reasoning about law must be practiced, but any more concrete account or delimitation of the practice is strictly a matter of the conventions of particular legal systems. That is, which activities of which institutionalized authorities are to be taken as sources of authorized norms of the legal system is to be determined by that legal system, and not by any more general theoretical considerations. Any more detailed account of the nature of the sources would likely be true only of some jurisdictions, not universally or necessarily true. As such, they have no place in a theory of the nature of law (ibid., 2). Reasoning that establishes the content of law involves establishing the meaning of authoritative directives. As we have seen, this does not call for any general theory but rather mastery of the local conventions, linguistic, legal, and otherwise (ibid., 22–3).

Moreover, a general theory of legal reasoning is, Raz argues, strictly impossible. Raz offers three reasons for this view. First, interpretation is central to legal reasoning, but interpretation combines reproduction with creativity, tradition with innovation, and "faithfulness to the past [with] looking towards an unpredictable future." Even if tradition can be captured in a general description, "innovation defies generalisation," and hence, any attempt at a theory of innovation would be self-defeating (ibid., 20). This problem is faced by attempts at theorizing in *any* kind of interpretive enterprise, whether in art, literature, or law.

Second, there cannot be a general theory of legal interpretation because "there cannot be a moral theory capable of stating in specific terms which do not depend on a very developed moral judgement for their correct application what is to be done in all the situations possible in a particular society." It is impossible, Raz held, "to articulate 'useful' moral theories, that is theories which would enable a person whose moral understanding and judgement are suspect to come to the right moral conclusions regarding situations he may face by consulting the theory" (ibid., 21). The point of this argument is obscure, in part because it is not clear who Raz's presumed opponent is. Presumably, it is someone who claims that the point of a theory of legal interpretation is to so regiment the practice of interpretation that an intelligent person deploying the theory would be able to generate concrete results for every situation that could possibly arise in a society, even if that person lacks sensitivity of moral judgment. This kind of complaint about jurisprudential theory is familiar especially in the common-law tradition, but it sets the bar for "useful" theory implausibly high. One might look for a theory that gives some insight into the nature of the process and desirable constraints on it, without expecting it to be deployable as a decision procedure for legal reasoning promising determinate results in

nearly every case. It is tempting to think that it is Dworkin's theory of interpretation, and of law *as* interpretation, that darts in and out of the shadows of Raz's argument here. We will consider in Chapter 9 below whether this and similar criticisms of Dworkin's jurisprudence meet their mark.

Finally, Raz also seems to offer a third reason.[29] To the extent that a theory of legal reasoning is committed to a principle of coherence, even a moderate one, it is either hopelessly unrealistic or it is morally untenable, he argued. If the theory ignores the authoritative nature of law, it is unable to explain perhaps the single most important feature of law, and so it is hopeless. But if it takes the authoritative nature of law seriously, and seeks coherence of all or most of the settled law, it is hopeless again. Settled law consists of decisions, norms, and doctrines that have their place in the legal system, not in virtue of fitting into a coherent moral or political scheme, but strictly in virtue of having been authoritatively established or endorsed. Legal authorities are always subject to the widely variable and conflicting pressures of politics. In democratic societies at least, the existence of a plurality of views on moral, religious, and political matters is likely to be reflected in its law. So, it is utterly unreasonable to expect that the directives they issue can be fitted into a comfortably coherent system.

Suppose, however, the theory instructs decision makers to use the settled law as a base and to find the morally most attractive theory that brings them together into a coherent whole, without regard to the intentions and explicit meaning of the rules and allowing exclusion of recalcitrant elements (as, arguably, Dworkin proposed). This kind of coherence theory is vulnerable to a different objection, in Raz's view. There is no basis in the claim to authority to extend the moral claim of the settled law beyond what it actually and authoritatively settles. Thus, if law's claim to authority is sound, then that which authorities settle through issuing authoritative directives has normative force, but it has that force only to the extent of that which it settles. To extend the reach of the settled law any farther is likely to result in injustice.

> Coherence is an attempt to prettify [law] and minimize the effect of politics. But in countries with decent constitutions, the untidiness of politics is morally sanctioned. It is sanctioned by the morality of authoritative institutions. There is no reason to minimize its effects, nor to impose on the courts duties which lead them to be less just than they can be. (Raz 1995a, 314–5)

Moreover, presumably, in countries with worse legal systems there is even less reason to require judicial attention to coherence with existing law beyond its settled limits. Coherence-based theories, by requiring courts to decide cases on the basis of principles underlying the existing law, require courts to propagate

[29] My construction of Raz's argument is based on his critique of coherence theories of law and of adjudication in Raz 1995a, 277–325, esp. 298–301, 307, 316.

the ideology under the source-based law beyond the scope of strict application of its settled rules. In doing so, they require courts to do injustice when they could do justice (in their reasoning according to law) while still recognizing the authority of the existing law (Raz 1986a, 1111).

This last argument is of a quite different character than the others. It identifies a heavy *moral* cost for any theory of adjudication that takes seriously a standard of coherence or Dworkinian "integrity" (Raz 1986b, chap. 6; see chap. 9, sec. 9.4, below). The argument is not that a theory of legal reasoning is logically or conceptually impossible, but that certain proposals for such a theory are open to serious moral objections. As such, this argument seems to fall outside Razian methodological strictures. This does not signal, I think, any deep inconsistency in Raz's theoretical approach, but it does give us a hint as to why he might not feel entirely discomfited by the fact that his exclusive positivism says little about the nature of legal reasoning. Still, in view of his willingness to insist that a very strong moral aspiration (the claim to authority) is conceptually essential to law, one wonders whether a similar case might be made for something like an aspiration to justice, which is approximated by a demand for principled coherence. If this is to be debated, then it appears that the debate, although couched in terms of our concept of law, is clearly at bottom a debate about moral demands we impose on law. This fundamental issue is a straightforward *moral* issue, not merely an evaluative one in the attenuated sense that Raz was willing to countenance (see sec. 8.3.2, above).

8.7. Formalism Again: The Rule of Rules

In the last decades of the twentieth century there has been a resurgence of "formalism" in Anglo-American jurisprudence. Unlike the "old formalism," this doctrine is warmly embraced, boldly stated, and vigorously defended at least by some legal theorists. Yet, the new formalism is not one thing but many: for example, formalism has emerged in private law (Weinrib 1988; 1992; 1995), in American constitutional law ("textualism") (Scalia 1989), in general jurisprudence (Schauer 1988; 1991a; Alexander 1999a; 1999b; Alexander and Sherwin 2001). Even Posner's brand of law and economics, treated earlier as a descendent of militantly anti-formalist legal realism, has been regarded by some of its critics as a renewed version of formalism (Shaffer and Nourse 2009). No one has explored the formal dimension of law and legal institutions more extensively than Robert Summers (Summers and Atiyah 1987; Summers 2001; 2006). However, this variety of formalisms is marked by such great differences among them that it is misleading to treat them under a single rubric. Indeed, the many forms of formalism are not only distinct, but sharply opposed. For example, Weinrib's Kantian conceptualism, stressing the immanent rationality of law, explicitly sets itself against the external, instrumental rationalism typical of law and economics; Posner's economic jurisprudence

sets itself sharply against the textualism of Scalia and the rule-based formalism of Alexander and Schauer; and rule-based formalism is opposed to the kind of purposive interpretation and legal reasoning advocated by Fuller, yet it is Fuller's focus on procedural forms that inspired much of Summer's work on form in law.

In this concluding section, we will look at only one of these new formalisms, despite the interest of the others.[30] In keeping with the theme of the previous section, we will explore a restatement of one dimension of "old formalism": an account of the formal, i.e., rule-based, elements of legal reasoning. Recall that the old formalism (see chap. 2, sec. 2.2.1 above) not limited to a view of legal reasoning, but sought to develop a systematic, rational "science" of law. The element of the view that drew the heaviest criticism from the realists was its view that law's domain of concepts, norms, and standards was closed and comprehensive, such that all intelligible legal questions could be answered by reasoning from within the four corners of this domain. It represented legal reasoning as "autonomous" in the sense that it was thought to yield determinate solutions to problems without appeal to considerations of purpose, principle, or policy drawn from sources outside this domain. *Pace* most realists, this old formalism did not insist that legal reasoning was only deductive in form or that the materials on which it drew only took the form of proper rules. Yet, this was the core idea of the new formalist model of legal reasoning, which sought to secure a degree and kind of autonomy of legal reasoning (or a key part of it) through subjecting it to the regimentation of rules.

8.7.1. A Neo-Formalist Model of Practical Reasoning

Since mid-century, philosophers have paid a great deal of attention to the logic and force of rules and problems of rule-following in thought and action. Moral philosophers have been actively engaged in this enterprise (Rawls 1955; Lyons 1965), but perhaps the most sustained analysis has come from the pens of legal philosophers.[31] Among these legal theorists, Frederick Schauer (1988; 1991a; 1991b) and Larry Alexander (1999a; 1999b; Alexander and Sherwin 2001)[32] explicitly deploy their general analysis of rules-governed practical reasoning in

[30] Although Weinrib (1988, 1995) preferred the title "formalism" for his view, it is better seen as a natural law theory. For a brief discussion of Weinrib's theory, see chap. 12, sec. 12.1.

[31] See, e.g., Raz 1989; 1990b; 2001a; Schauer 1991a; Alexander and Sherwin 2001; critics include Perry 1989; Regan 1989; Moore 1989; Shapiro 1998; 2001a.

[32] Alexander's co-author of *Rule of Rules*, Emily Sherwin, endorsed the formalist model of practical reasoning laid out there, but it is not clear from that work whether she also accepted its application to law and legal reasoning in the rather robust way Alexander did (see Alexander 1999b). So, to avoid attributing to her views which she might not endorse, I will mention only Alexander in what follows, but ask the reader to keep in mind that Sherwin was an equal partner in the writing of *Rule of Rules* and may accept most or all the views I attribute to Alexander.

a defense of a formalist account of legal reasoning. I will limit our discussion to their work and hereafter refer to them exclusively as "neo-formalists."[33]

Schauer and Alexander developed the formalist theory in two stages. First, they articulated a formalist model of (an important part of) practical reasoning and then defended a formalist jurisprudence, which considered the place of formalist practical reasoning in law. We will consider in this sub-section their formalist model of practical reasoning, which itself comprises an analytic and a normative part. The analysis focuses on the role of two concepts (or techniques) in practical reasoning: the concept of a *rule* and the concept of a *limited domain*, a set or system of rules which partitions the domain of practical reasons in a distinctive way. The normative part of the theory makes a case for deploying these techniques and considers some reasons for being hesitant to do so.

8.7.1.1. Neo-Formalist Analytic

The task of the neo-formalist analytic is to describe the role that proper rules can play if we admit them into our practice of practical reasoning. It is not concerned with the conditions of existence of social rules, as Hart was; likewise, it is not concerned with conditions under which rules can be said to be valid or binding or have authority. It is concerned, rather, to ask the question: if there are valid or binding rules, what work might they do and what difference might they make in practical reasoning? The investigation is not restricted to legal practice—the rules they consider could be purely personal, social, legal, religious, and possibly even moral—and at this stage the question is left entirely open whether rules have any proper place in practical or legal reasoning.

Rule-Based Practical Reasoning.[34] The rules neo-formalists have in mind are practical norms, i.e., general propositions regarding what is to be done. Some rules point agents to actions it is good or reasonable or even mandatory for them to do, but only as rules of thumb summarizing those reasons. Practical reasoning with proper rules ("rule-based decision making") is distinguished by the neo-formalists from practical reasoning without rules or with rules of thumb, which they call "particularistic" or "all things considered" reasoning. These are not happy monikers. The alternative to reasoning with proper rules is practical reasoning that surveys the field of possibly conflicting reasons that are relevant to the matter to be decided, "weighs" them, and takes a decision

[33] It will be clear presently that, although they have co-authored several papers (most notably, Alexander and Schauer 2007) in which they deploy a common formalist framework, there are substantial differences between these two authors.

[34] I summarize here Schauer 1988; 1991a, chaps. 1–6; Alexander 1999b; Alexander and Sherwin 2001, chap. 2.

on the basis of the balance of those reasons. This is not necessarily "all things considered reasoning," since balancing may be done with only a subset of all the agent's reasons to act in the circumstances under consideration. Likewise, such reasoning is not, strictly speaking, "particularistic," for the agent may take into account all sorts of quite general considerations enshrined in principles, policies, standards, or values. Rule-like propositions may play a role in such reasoning, but they merely stand in place for and point to the reasons the agent has to act as suggested by the rule. These rules of thumb are always transparent to the reasons or values for which they are summaries or surrogates.

Rule-based reasoning is thought to contrast sharply with the mode of practical reasoning by balancing competing reasons for action. *Proper* rules (Alexander calls them "serious" rules) call for action and purport in themselves to give reason for agents to do as the rule directs. Although such rules are justified, and thus offer reasons to act, only if they serve other reasons, values, or principles, yet, paradoxically it may seem, they function *as rules* only when they offer reasons *independent* of the reasons on which they depend for their justification. This is what makes reasoning with rules "formal" (Schauer 1988, 537). We can unpack this apparent paradox by looking at the properties of rule-based practical reasoning.

Proper rules, the neo-formalists argued, are general practical norms that set a course of action as required or prohibited (or otherwise deontically marked). They represent the result of a prior balancing of all the competing considerations, including the reasons for treating the practical generalization as a rule; however, in their practical effect they are *opaque* to these background considerations and they *supplant* (exclude or block recourse to) those considerations. Although they are *based upon* the balance of all the relevant competing considerations, rules do their practical reasoning work by (1) *displacing* practical reasoning from deliberative balancing to the rules presumed to have already done the balancing and (2) *isolating* that practical reasoning from the balancing, blocking recourse to it. This requires, further, that rules be relatively determinate, defined (for the most part) in non-evaluative, strictly natural terms,[35] and capable of being applied to particular cases straightforwardly without further appeal to matters of judgment. Thus, the neo-formalists hold that rules proper are applicable to and binding in particular circumstances independent of consideration of background justifying considerations—rule-based practical reasoning is, in this sense, autonomous.

These logical features of proper rules make other features also necessary or inevitable. First, such rules are artificial, *posited* by some rule-maker, and, in

[35] This will be very largely true of proper rules, although Alexander (1999b, 544) insisted, *pace* Raz, that the content of the rules need not be determined by non-evaluative means alone. Determinacy is the key, so if a rule can be formulated determinately in terms that call for evaluative assessment, it can still function as a proper rule.

consequence, they depend on recognition of the authority of this rule-maker. Moreover, determinacy is achieved through explicit formulation of the rules in language: examples and analogies cannot do the job. Third, inevitably such rules will be "blunt"; that is, relative to their background justifications they are likely to be over- or under-inclusive. Inevitably cases will arise in which following the rule will not best serve the background justification (even finely balanced with competing values), as well as cases in which the values are well-served all things considered by actions which do not fall within the scope of the rule. Rules earn their keep in practical reasoning in just such cases, by requiring action, for example, in spite of the fact that the background justification is not served in that case; they earn it, it was argued, because, over the long run, compliance with such blunt rules serves the background considerations better than actions directed by "all things considered" deliberations.

The Limited Domain Concept.[36] This analysis of proper rules enables us to explain another key neo-formalist concept, that of a limited domain of reasons. A "domain" for these purposes is a partition or subset of practical reasons. Some domains, by their nature, are relatively isolated from the rest of the set of all practical reasons, as is the case for the domain defined by the rules of chess. In contrast, some domains might be "limited" in the sense that they are a more or less artificially partitioned subset of practical reasons, carved out from the larger domain. That larger domain might include proper rules as well as goals, values, standards, principles of all sorts; when the rules are posited, they in effect *add* new reasons to that domain. An artificially limited domain would be a partition of the larger domain that not only selects a subset of those reasons, but that also for certain agents or certain purposes focuses deliberation exclusively on the reasons within the subset. The domain is delimited, and deliberative consideration is thereby narrowed, by a general practical proposition that functions like a proper rule, albeit a meta-rule, in three respects. First, it directs deliberation to certain considerations rather than others (it partitions the larger domain); second, it does so by selecting those considerations by identifying determinate (largely non-evaluative) properties of those considerations (e.g., who made them); and third, it excludes from deliberation considerations that fall outside the domain, even if those considerations are necessary to justify or underwrite the considerations that fall within the limited domain.

Thus, the neo-formalists' notion of a limited domain is not merely the idea of some subset of considerations of a larger domain, but rather is the idea of a proper subset of all the practical considerations there are, defined by a proper rule that requires certain agents to focus their decision-making deliberations exclusively on considerations that fall within the domain. Although this notion

[36] See Schauer 1991b; 2004; Alexander and Schauer 2007.

does not entail that the considerations that fall within a limited domain must be limited to proper rules, a domain-defining rule might be so constructed. The possible role of this notion in positivist jurisprudence is easy to see. Law might be understood to define a limited domain of practical considerations, a *subset* of the presumably unlimited domain of moral considerations, by a rule of recognition that not only partitions the larger domain and labels norms falling in the limited domain "legal," but also directs law-applying officials (perhaps *inter alia*) to focus their deliberations on considerations within the limited domain to the exclusion of considerations that fall outside that pale. Thus, in the hands of the neo-formalists, something like Hart's rule of recognition would not only guide the judgment of law-applying officials in their identification of certain rules and norms as valid members of the legal system, but also function as a *proper rule*, directing these officials to take such norms and only those norms into account in their decisionmaking. If we add to this, the further notion that the norms thus identified must be for the most part if not exclusively proper rules, then we have a *neo-formalist positivism*, a jurisprudential theory that in two respects regards law as the "rule of rules."

But this lands us too far in advance of the neo-formalists' argument, since we must first consider whether there are any reasons for allowing proper rules in to our practical reasoning. Neo-formalists think there are compelling reasons, but are equally aware of a deep paradox that remains after that case has been made.

8.7.1.2. The Normative Case for Neo-Formalist Practical Reasoning

Some reasons for reliance in certain contexts on rule-based deliberations and decision making are familiar: achieving fairness of decisions over a range of people affected by them by securing that like cases are treated alike, securing a substantial degree of impartiality of the decision-making process, increasing the predictability of behavior of officials and others, improving decision-making efficiency, and the like. However, the neo-formalists did not find such considerations compelling, if taken by themselves (Schauer 1988, 538–44; 1991a, 135–49). The problem, it seems, is not that arguments based on such considerations are misconceived, but rather that they are fragmented, piece-meal. The neo-formalists proposed a larger framework within which these considerations and others are focused and assessed.

Schauer and Alexander offered slightly different, but complementary frameworks. For Schauer "the essence of rule-based decision-making lies in the concept of jurisdiction, for rules, which narrow the range of factors to be considered by particular decision-makers, establish and constrain the jurisdiction of those decision-makers" (Schauer 1991a, 231–2). In his view, the key feature of rules, their "primary function," is that they allocate decision-making authority (ibid., 158–62). "Rules [...] are the implements by which roles are

established and power is allocated" (ibid., 232–3). Although they can be "devices of arrogance," they are also "devices of modesty," limiting jurisdiction and thus limiting power. They are "desirable devices for allocating responsibility in a complex world," which do their work by taking matters off the agendas of decision makers as well as putting some on those agendas (ibid.).

Rules allocate decision-making power in three dimensions: *temporal*, privileging decisions of the past over the present and present over the future; *interpersonal*, directing power to some and away from others; and *communal*, transferring power away from individuals to (representatives of) communities (Schauer 1991a, 160–2). The rationale for doing so rests on a theory of the second best which seeks to minimize decisional error.[37] The thought is that what might at first appear to be the best decision procedure—namely, allowing individual rational agents to take all relevant considerations into account and then decide what to do on the basis of their best judgment of the balance of those reasons—has potential for a high degree of decisional error. The causes of such error lie in deficiencies in the reasoning capacities of individuals and various sources of bias, distortion, and partiality to which they are vulnerable; but equally important in social groups are problems of lack of publicity of decisions and need for publicly recognized and relatively fixed and determinate patterns of behavior. Rules allocate decision-making power to certain members of a community and channel the decisional authority in publicly recognizable and assessable directions. Constraining such decision making by proper rules also, as we have seen, inevitably yields decisional errors due to their bluntness, but over the long run and in large groups of people can minimize such error.

For Alexander, the essential feature of rules is their capacity to settle matters that in the complex circumstances of daily social life are left uncertain and so are disputed (Alexander 1999b, 531–6; Alexander and Sherwin 2001,11–25). The costs of unresolved disputes in a community are reckoned in terms of inefficient decision making, lack of coordination, and moral error, according to Alexander. Rules supplant moral considerations that are contested in principle or in application with determinate directives that not only are opaque to their underlying justifications (their directions for particular circumstances are clear and public without appeal to those considerations), but also block recourse to those considerations in deliberation. In this way, rules redirect the deliberations of individual agents, settling for them what would otherwise be unsettled and in dispute. The primary and most important function of rules, on his view, is to provide *authoritative settlement* of disputed matters (Alexander 1999b, 532–3), and thereby to promote coordination, efficiency, and expertise (Alexander 1999b, 534).

[37] In this respect, Schauer's view echoes the main outlines of Raz's service conception of authority (see sec. 8.2.3, above).

8.7.1.3. The Asymmetry of Authority

The long-run value of community-wide rule-based decision making, according to the neo-formalists, is obvious in many contexts, but they were quick to admit that a paradox remains. Precisely because rules are able to achieve their vaunted success by abstracting from the specific features of particular cases which tend to generate uncertainty and disputes, rules are insensitive to the nuances of such cases; they are inevitably blunt instruments and the result is that even with the most carefully crafted rule cases inevitably arise in which following the rule's directive is inconsistent with its underlying rationale or with moral assessment of the circumstances considering all the factors that bear on them. It does not follow that the rule (i.e., issuing or instituting the rule) is unjustified or that the rule must be altered, the neo-formalists argued, but only that it would be wrong (morally or rationally) to follow it. There is a "gap" between what it is rational for authorities to introduce and enforce and what is rational or right for individuals subject to their rules to do (Alexander 1991; 1999a, 551–5; 1999b); there is an "asymmetry of authority": what is rational for authorities to insist on may be irrational for individuals to do (Schauer 1991a, 128–34; Alexander and Sherwin 2001, 53–95).

This problem is, of course, very familiar. Aristotle and many medieval jurists looked for its solution to *equity*, a special kind of circumstance-sensitive judgment that could detect when rules, defective only with respect to their necessary generality, must be temporarily set aside in the name of doing particular justice. It was also the problem that greatly exercised Bentham as he sought to reconcile the demands of clear, determinate, public rules with requirements of serving the public good in particular cases. The neo-formalists surveyed a variety of devices, historical and contemporary, meant to close this gap and found them to be unsuccessful (Alexander and Sherwin 2001, 55–95), although at this point Schauer and Alexander part company. Schauer proposed a "presumptive formalism' (or "presumptive positivism") according to which rules block ordinary ("all things considered") deliberation in most cases, but, in cases in which the failure of a rule to lead action to the morally or rationally preferred action is obvious or the reasons against following the rule are very strong, the rule is no longer binding. Rules are "presumptively" binding, but when the action required by a rule is "egregiously at odds" with an assessment of the relevant moral values bearing on the question of what is to be done in the circumstances the agent should not follow the rule (Schauer 1991a, 203–5; 1991b, 674–6; for criticism, see Postema 1991). Alexander, however, found this, like all other proposed strategies (including Raz's exclusionary reasons view) wanting (Alexander 1999b; Alexander and Sherwin 2001, 55–95). There is, they both conclude, a fundamental paradox at the core of rule-based decision making (and Alexander regards the paradox as irresolvable). What is rational and morally justifiable to propose, introduce,

impose, and enforce may nevertheless be irrational and even morally wrong to obey. It is rational to want rules but it may be irrational to have them (Alexander 1999b, 53). While Schauer sought to soften the impact of the paradox, Alexander insisted on its general importance and especially on its fundamental role in law.

8.7.2. Neo-Formalist Jurisprudence: Rules and Law

Neo-formalists were, first of all, theorists *of law*, so we can expect that they would have a clear view of the relevance of the model of formalist practical reasoning to law and legal practice; however, on this issue they were divided. Schauer was rather circumspect. His aim was in part to restore the dignity of the idea of formalism which had been reduced to rubble after nearly a century of relentless attacks by (largely North American) critics. But his advocacy was restrained. Rule-based decision processes are a good thing, he argued, under some social and political circumstances, for some legal systems, or some parts of those legal systems, but not necessarily for all legal systems or all parts of the law; or at least the merits of this mode of decision making must be very carefully weighed against the merits of other institutional arrangements and forms of decision making characteristic of them (Schauer 1991b, 646, 651–7). The functions well-served by the formalist mode of practical reasoning are not well-served by alternative methods (e.g., common-law reasoning), but that is not to say that we must prefer the former over the latter, since other, perhaps equally valuable, functions may be better served by the latter.

But this is to think of the link between the formalist model and law in strictly normative terms. The more pressing question for many legal theorists, however, is whether the formalist model captures features necessary to, or at least characteristic of, legal reasoning in general. Does neo-formalism offer a descriptive account of law as it is actually practiced? To this question, also, Schauer's view was cautious. He explicitly argued at one point that both rule-based decision making and alternatives to it are compatible with the idea of law, although the former has a place in a plausible account of what law is (Schauer 1991b, 657–63). Schauer was willing to maintain as an empirical matter that in most advanced legal systems formalist reasoning with respect to a limited domain of legal considerations plays a crucial role (Schauer 2004, 1914, 1937). Familiar (modern western) legal systems seem to combine both formalist/limited domain features with other (e.g., common-law) forms (Schauer 1991b, 665–79). "Presumptive positivism may be the most accurate picture of the place of legal rules within many modern legal systems" (Schauer 1991a, 206), he wrote, yet he hastened to add that there is no conceptual or logical necessity that this be the case (Schauer 1988, 544; 1991b, 651–7).

But Alexander strode boldly into territory where Schauer, it appeared, feared to tread. "Law is essentially formalistic" (Alexander 1999b, 530), he in-

sisted, because law's defining function is the *settlement function* (1999b; Alexander and Sherwin 2001, 204; Alexander and Schauer 2007, 1583). He understood this to be a conceptual claim: "at its core, the concept of law is bound up with the existence of serious rules. Surely the benefits of law are synonymous with the benefits of serious rules" (Alexander 1999a, 53). His fundamental point was that we look to law just when we find ourselves in conflict over what is to be done and we need the matter to be settled authoritatively; law does the job through creation, imposition, enforcement of rules and through regimenting practical reasoning in court and community by these rules.

On this stronger view, law defines a limited domain of serious rules by a proper rule, from which it follows that judges are bound to decide only according to the formally pedigreed norms valid in the system, norms which themselves block all recourse in judicial deliberation to non-pedigreed, extra-legal considerations. This strong neo-formalist thesis may have been inspired by Raz's exclusive positivism and especially by his argument from authority for it, but it lacks the nuance of the inspiring doctrine. It is bold and clear, and its links to the older, turn-of-the-other-century formalism are clear. But as a descriptive thesis regarding familiar common-law legal systems (not to mention, less familiar systems of a more customary or traditional character) it seems no more plausible that Bentham's original dismissal of eighteenth-century English Common Law as "a thing merely imaginary" (Bentham 1977, 119). Where Raz refused to offer, and even doubted the possibility of, a theory of legal reasoning, this strong neo-formalism offers a very clear and relatively simple theory. But for all of its clarity and boldness, it does not address seriously the challenges that had been leveled against the old formalism which lay beneath its new construction like unexploded ordnance.

For example, it assumes but never adequately shows that determinate rules—that is rules that offer determinate practical guidance—*can* be formulated in such a way that their application depends in no way on a grasp of the considerations and purposes that drive it. The neo-formalist model of practical reasoning conceives of proper rules as semantically discrete and atomistic entities; their "autonomy" depends on this possibility. Fuller, however, would have found such a suggestion incredible and the neo-formalists do not offer arguments to change his mind; rather, they proceed as if it is not a problem. Yet, practical rules of all kinds get their content and practical force at least in part in the course of their use and that calls for some grasp of the point of the rules and the interconnection amongst cognate rules. There does not seem to be any room for this kind of use-context influence on rules that so resolutely displace practical reasoning from its ordinary deliberative context into a limited domain of rules that wear their detachment and arbitrariness (relative to background justifications and challenges) as a badge of courage.

It is also striking that, for all the importance that neo-formalists place on the alleged settlement function of law, no argument was given for its primacy

in understanding law.[38] Yet, it is even more problematic than Raz's claimed legitimacy thesis (secs. 8.1.3 and 8.3.2.2, above). Why this function? we might ask; and why *only* this function? (Hart and Raz would add: why *any* function?) The neo-formalists pointed out benefits of authoritative settlement, but that is hardly enough to demonstrate that settlement is the defining function of law.

The problem of attributing this function to law as part of an explanatory account of the nature of law is greatly exacerbated when we consider the admitted paradox at the core of formalist modes of reasoning. Alexander was convinced that it is rational to *want* a regime of serious rules but not rational to *have* it (i.e., to always follow them as they demand). So he accepted as a consequence "the impossibility of serious rules" and did not shrink from the implication that this "means in the important sense the impossibility of law" (Alexander1999a, 53). Alexander's meaning here is obscure, but by "impossibility of rules" we must assume he means their rational impossibility. That would suggest that there is something fundamentally dysfunctional or self-defeating about practical reasoning structured in the formalist mode, from which it would follow that law, conceived along formalist lines, is also rationally impossible. That is, law is in some fundamental way irrational. It is, of course, wonderfully ironic for a formalist to plead guilty to the most serious charge made against it by the army of formalism's critics, but a quite different response is also possible. One might argue that this irrationalist conclusion should force us reconsider attributing authoritative settlement to law as its defining function, and casting legal reasoning in the mode of formalist rule-based reasoning. Alexander resists this suggestion, arguing that although law so understood is committed to this deep paradox, this does not prevent the legal theorist from casting law and legal reasoning in the formalist light, for the theorist is not in the business of showing law to be justified but only showing it to be intelligible (Alexander and Sherwin 2001, 208–9). However, this response has an air of desperation about it. It is true that if we could avoid the paradox only by abandoning very large or fundamental parts of our understanding of law, we might be persuaded to accept that law is in its core rationally conflicted, but that is not the choice facing us. We need only abandon an undefended thesis about law's defining function and a model of practical reasoning which, although illuminating, might reasonably be abandoned or radically reformulated in a way to avoid this paradox. Of course, if it is possible to avoid the paradox by softening the demands that rules make on individual decision-makers, as Schauer proposed, or reformulating along lines Raz, Shapiro or others have suggested, then the deep rationality paradox no longer threatens the use of such ideas in explaining legal reasoning in whole or at least in some part.

[38] Schauer's reticence in this regard signals that he was aware of this weakness and adjusted his advocacy accordingly.

Neo-formalism promised a more contentful and structured account of legal reasoning than Raz was willing to offer, while still operating within a positivist framework that Raz's work seems to have inspired. However, it appears to have created for itself as many problems as solutions and we are left with the need for systematic theory of legal reasoning with strong positivist credentials. We might be tempted at this point to wonder whether the problems lie not in working out the details of a positivist jurisprudential theory, but in the positivist program itself, problems that emerge with greatest force and clarity when trying to give an account of legal and judicial reasoning in the shadow of law. This, at least, is the point of departure for one major stream of anti-positivist jurisprudence in the wake of Hart's and Raz's influential efforts. It is time for us to take up this very different approach to issues and problems that Hart's ground-breaking philosophical work put on the agenda of analytic legal philosophy in the 1970s and beyond.

Chapter 9

POSITIVISM CHALLENGED: INTERPRETATION, INTEGRITY, AND LAW

9.1. Challengers

Sometimes jurisprudence mimics the physical world, each new theory provoking an opposite and sometimes equally powerful theory. This is not an iron law, perhaps, but the claim is borne out by developments in Anglo-American jurisprudence the last quarter of the twentieth century. Hart's powerful restatement of positivism at mid-century stimulated a revival of natural-law jurisprudence in the last two decades of the century. From different philosophical quarters, a variety of theories emerged pursuing quite different theoretical agendas, but all were united in their opposition to positivism. Rejecting Hart's underlying empiricism, anti-positivist theories like those of John Finnis (1980, 1992, 1998) and Ernest Weinreb (1988, 1995) revived rationalist jurisprudence; Aristotle, Aquinas, and Kant, rather than Hume and Bentham, provided the philosophical foundations for these two quite different contemporary natural-law theories (see below, chap. 12). In contrast, Michael Moore (1985, 1992, 1995) offered a thoroughly modern, revisionist natural-law theory, drawing on philosophical realism in contemporary metaphysics and meta-ethics. In Chapter 12, we will consider the most influential of these natural-law theories, but in this chapter we explore positivism's most widely discussed challenger, Ronald Dworkin's interpretive jurisprudence and "law as integrity."

Born (1931) in Worcester, Massachusetts, Ronald Dworkin earned undergraduate degrees from Harvard (1953) and Oxford (1955) and a law degree from Harvard Law School (1957). After serving (1957–8) as law clerk for Judge Learned Hand, one of the most highly respected jurists on the bench in mid-century, Dworkin joined the firm of Sullivan and Cromwell in New York. In 1962, he joined the faculty at Yale Law School and was named Wesley Newcombe Hohfeld Chair of Jurisprudence in 1968. The very next year, he assumed the Chair of Jurisprudence at Oxford from which H.L.A. Hart had just retired. From 1975, Dworkin split his time between Oxford and New York University Law School. It is just slightly ironic that, in 1998, upon retiring from the Oxford chair, he accepted the Quain Chair of Jurisprudence at University College London, whose first incumbent was positivism's most famous nineteenth-century advocate, John Austin, and later was named Jeremy Bentham Professor of Legal Philosophy at the same institution. He served in this position until 2008.

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Dworkin was reluctant to embrace the natural-law label[1] and, unlike positivism's natural-law opponents (and like the positivists he opposed), he did not look for inspiration to major figures in the history of philosophical jurisprudence, but rather it was the principle-based, local jurisprudence of Cardozo, Fuller, and post-realist American legal theory[2] and John Rawls's views on the methodology of moral theory (specifically the notion of "reflective equilibrium") that gave direction to his early thinking. A no less profound influence was the political reawakening of American political philosophy in the 1960s and early 1970s, Dworkin's formative years, and the spreading conviction that philosophy had something valuable to offer to politics and the struggle for justice. In these years, Dworkin emerged as a public philosopher, articulating a robust and wide-ranging liberalism in a number of influential essays written for the *New York Review of Book* (many collected in Dworkin 1978 and 1985).

His theory of law emerged as the centerpiece of this liberal public philosophy.[3] Law, on his view, makes possible a powerful form of internal critique of contemporary politics. Positivism, because it is anxious to secure an unobstructed vantage point from which to appreciate the failures and hypocrisies of law, denies us the resources we need to "argue that a community was committed to any morality of duty, by its traditions and institutions, except the morality recognized in its uniform social practices [i.e., mere convergent behavior], which generally embrace little of much significance" (Dworkin 1978, 80). Against those who sought to portray law as an ineluctable brake on progressive reform, or worse a ruthlessly efficient instrument of oppression, Dworkin highlighted its capacity for enabling critical, justice-focused politics, providing a "forum of principle" for debating publicly the most important issues of justice. Law makes it possible for citizens to treat one another—and demand to be

[1] Dworkin applied the label to his own theory once, in an essay entitled "Natural Law Revisited" (1982) (not included in *A Matter of Principle*), but he preferred to think of his theory as a challenge to both positivist and natural-law jurisprudence, and hence as a "third way."

[2] See above chaps. 3 and 4; however, Dworkin was always skeptical of the idea of lawyerly craft championed by Llewellyn (see chap. 3, sec. 3.3.3.2). "We need to throw discipline over the idea of law as craft," he insisted at the beginning of *Law's Empire* (Dworkin 1986, 10). For a recent expression of this skepticism, see Dworkin 2006, 49–74.

[3] It is difficult to grasp his egalitarian liberal public philosophy in its full range. No single work of his brings all themes of this wide-ranging philosophy together. *Law's Empire* (1986) and *Sovereign Virtue* (2000), taken together, offer the core of his theory. The former gives expression to his mature theory of law (*Justice in Robes* [2006] adds nuance and aggressively attacks critics) and the latter articulates the egalitarian foundations of his moral, political, and legal philosophy. *Freedom's Law* (Dworkin 1996a) develops the implications of his liberal egalitarianism for constitutional interpretation and argument, while *Life's Dominion* (1993) traces its implications for the hotly contested moral-political issues of abortion, euthanasia, and individual liberty. Guest (1997) sets out the main themes of Dworkin's philosophy in an interpretation accessible to nonprofessional readers. Burley (2004) and Ripstein (2007) collect expository-critical essays on the main aspects of Dworkin's philosophy, while Hershovitz's (2006) fine collection of essays focuses exclusively on Dworkin's jurisprudential work.

treated by the state—under the beneficial and unifying assumption that justice is always relevant to their claims even when it is unclear what justice requires (Dworkin 1978, 238; 1985, chaps. 1 and 2).

Dworkin's jurisprudential theory, more than the work of contemporary natural-law theorists, is inconceivable without Hart's. Hart's theory sprang from the conviction that the task of legal theory is to understand law as a normative social practice. To understand it, he argued, we must give full credit to the role law plays in the ordinary practical reasoning of those who take an active part in the practice; only thus can we grasp its normative dimension. This is Hart's hermeneutic hypothesis. Dworkin transformed this cautious hermeneutic hypothesis into his robust interpretivist thesis: Both law and its theory are essentially interpretive.

As we have seen, Joseph Raz also started from Hart's insight that law is essentially a normative social practice and followed Hart in focusing on the institutional character of law. But he added a claim to the theory-shaping background of Hart's jurisprudence (see above chap. 8, sec. 8.3.3) that can be expressed in two parts: (1) the normativity of law essentially involves law's claim to moral legitimacy, and (2) the institutional nature of law requires that law be seen as essentially authoritative (in his special sense of "authority"). Dworkin accepted the first part, but he decisively rejected the second, and, in a way, that made all the difference. Law is essentially argumentative, he maintained, not authoritative (i.e., blocking appeal to some range of considerations in deliberation). Far from aiming to settle matters debated at a prior, deliberative stage of public practical reasoning, law attracts and invites disagreement and it does so not just at its surface but also at its deepest foundations.

This yields a distinctively Dworkinian reading, or transformation, of Raz's moral legitimacy thesis: by its nature, Dworkin maintained, law claims to justify the government's use of coercion by appeal to principles drawn from past political decisions of the community expressed in terms of protecting or promoting individual rights. The task of legal theory, in his view, is to make this claim intelligible (albeit not necessarily to show that it is always true) and that can be done, he argued, only if we reject legal positivism and its methodological commitments. Unlike natural-law theorists who challenge positivism from a theoretical quarter external to it, Dworkin worked from within to undermine positivist theory and method. His approach poses the more radical challenge, he thought, because it shatters the philosophical foundations on which it rests. This is a grand claim the full scope of which emerges only in his mature jurisprudential writings. In this chapter we will mainly focus on Dworkin's mature theory of law, but we begin with a discussion of two early essays that had a powerful influence on subsequent thinking about the nature of law.

9.2. Principles and Controversy

In his early work, Dworkin (1978, vii) challenged positivism, the era's "ruling theory of law," with three related lines of arguments. These arguments address in turn the three points at which contemporary positivists, following Hart, have sought to separate law from morality. According to the *pedigree* (later *sources*) *thesis*, legal standards are proper action-guiding norms, but their standing and validity is simply a matter of social fact.[4] Societies with effective legal systems have authoritative institutions for making and applying public rules and standards, the legal status and binding nature of which are determined by features independent of their content or merit, in particular features relating to the social facts regarding their origins or sources. According to the *conventionality thesis*, the criteria of validity selecting these features are themselves binding on judges just by virtue of the social fact of their being accepted and practiced by the courts. Thus, law at its foundations rests on a complex social fact: the convention practiced by law-applying officials. Finally, according to *methodological positivism*, the task of legal philosophy is to offer an illuminating analysis of law that relies at no crucial point on appeals to moral considerations. Dworkin systematically challenged positivism at each of these three points.

9.2.1. The Province of Principles

Dworkin's earliest philosophical essays (Dworkin 1963, 1965a, 1965b) challenged the widespread view in legal theory that once black letter law runs out judges have full discretion to decide as they think best, unguided by law. There are resources in law, he insisted, providing binding arguments of principle that direct judges to decisions that are publicly defensible as conclusions of law, not merely expressions of private or personal conviction. In "The Model of Rules I" (Dworkin 1978, chap. 2) he forged this fledgling challenge into a powerful weapon and focused its fire directly on the first thesis of Hartian positivism. He chose to attack Hart's theory of law on its most vulnerable flank, its implications for judicial reasoning, but his criticism is not best seen as merely an attack on Hart's theory of adjudication, which by Hart's own admission was embryonic at best and so a prize too easily won. It is better viewed as an attempt to work out the theory's implications for adjudication as a means of exposing weaknesses at the core of the theory of law. Dworkin saw, perhaps dimly at first, that positivism advanced a strong thesis about the content and grounds of propositions of law. These propositions figure importantly in the life of the polity and are relied upon to defend and challenge exercises of private and public power. But, because they are most self-consciously articulated

[4] For competing post-Hartian positivist views regarding this thesis see this chapter, sec. 9.2.1.2, and chap. 10.

and debated in courts of law, Dworkin thought it was an important test of the plausibility of theses about such propositions of law and their grounds to trace the implications for their use in the ordinary course of adjudicative reasoning. In view of the centrality of such reasoning in legal practice, if the positivist theses fail there, he surmised, they cannot be sustained as components of an adequate philosophical theory of that practice in general.

9.2.1.1. Principles in Practice

According to Dworkin (1978, 17), positivism viewed broadly is organized around three main tenets. The *pedigree thesis* holds that the law of a community is a set of standards determined to be valid law of the community by criteria concerned solely with how they were authoritatively established, and thus not by the moral rightness or reasonableness of their content. Valid standards of law of a given legal system consist of all and only those that meet the system's pedigree test. The *obligation thesis* holds that one has a legal obligation to do something when, but only when, there is a valid legal standard requiring it. Dworkin took this to imply that judges are legally bound to follow and enforce valid legal standards, but are not legally bound to make any particular decision where law is silent or indeterminate, from which follows the *discretion thesis*, according to which, in cases that are not clearly settled by valid legal standards, judges have discretion to settle them and in doing so they do not follow law but rather make or alter it.

Taken together, Dworkin maintained, these three theses yield a model of law which blinds us to important features of legal practice. "Positivism […] is a model of and for a system of rules, and its central notion of a single fundamental test for law forces us to miss the important roles of […] standards that are not rules" (Dworkin 1978, 22). That law is a model of rules—an organizing tenet of positivism as Dworkin characterized it—is a lemma rather than a premise of the argument.[5] The model of law as a system of rules, he argued, best accords with this trio of theoretical constraints but fails to accord with familiar legal practice.

The pivot of Dworkin's initial argument is a logical distinction between *rules* and *principles*. Rules, Dworkin claimed, apply in an all-or-nothing manner such that the practical consequence or requirement follows automatically when its factual conditions are met, while principles *state reasons* that favor a certain

[5] If this is right, one objection to Dworkin's argument falls wide of its target. Hart and others complained that Dworkin attributed to Hart an excessively narrow notion of rules (Hart 1994, 263; Lyons 1993, 87–9; Coleman and Leiter 1996, 250). But the issue raised by Dworkin's argument is not whether Hart, in describing law as a union of primary and secondary rules, understood "rule" to include standards of all kinds (including Dworkinian principles); rather, the issue is whether positivism can make room for principles that function in judicial reasoning in the way to which Dworkin called our attention.

conclusion and that have a certain practical *weight* when set alongside competing reasons (Dworkin 1978, 24–8). Admittedly, this characterization of the distinction is too crude to do all the work assigned to it, and Dworkin did not rely on it in later writings, but the basic idea is serviceable. Standards or norms play different roles in practical reasoning: Some represent determinations of some practical issue such that, within certain limits, it is settled what is to be done, while others offer considerations to be weighed against other considerations. As we saw in Chapter 8, secs. 8.4.2.1 and 8.6.2.1, Joseph Raz suggested that we think about the former as "protected reasons," that is, reasons to act in a certain way conjoined with second-order reasons not to act on certain other competing considerations; while principles are ordinary, and sometimes very weighty, first-order reasons. The guiding thought of Dworkin's initial argument was that rule-like standards fit the positivist pedigree glove very comfortably, and that, of course, was just what Raz argued. According to Raz, authoritative directives meant to function in practical reasoning as protected reasons are best seen as source-based. We might, then, put Dworkin's conclusion this way: Although the model of rules as authoritative directives fits the central tenets of positivism, it fails to fit legal practice.[6]

The model of rules fails, according to Dworkin's argument, because it cannot explain the pervasive role of principles in ordinary judicial reasoning. "Once we identify legal principles as separate sorts of standards, different from legal rules, we are suddenly aware of them all around us" (Dworkin 1978, 28). In ordinary legal practice, Dworkin observed, the guidance of settled legal rules often runs out—the rules are vague or indeterminate, or they conflict with other settled doctrines, or they call for patently unreasonable or unfair treatment of a particular case, or there is simply no settled law on point. In such cases, courts typically base their decisions on broad considerations of principle, appealing to standards that impose themselves on the courts not in virtue of their having been enacted or formally adopted by a court, but in virtue of their reasonableness, justice or fairness. Moreover, Dworkin argued, these principles are treated, and are widely thought to be properly treated, as *binding* on the judges, with as secure and appropriate a place among the resources of responsible judicial deliberation and decision-making as formally adopted codes, statutes, and binding precedents. The principles are often

[6] Many critics pointed out that the claim that principles by their nature could not find their way into the law by way of enactment is clearly false (Raz 1983, 77; Coleman 1982, 151–2; Hart 1994, 265), but Dworkin's argument does not logically rest on that contention. He conceded that the model of rules can include other standards (Dworkin 1978, 292). Whether or not the principles first appeared on the legal scene by enactment (e.g., in a constitution or set of fundamental laws) does not determine how they function in legal reasoning and it is their functioning *as principles* that allegedly makes them unfit for pedigree. The issue is not whether normative propositions at some level of generality were enacted or not, but whether they function as authoritative directives.

Ronald M. Dworkin (1931)

controversial, of course, at least with respect to the weight a court may accord them, but they are no less binding for all that. Lawyers appealing to them in their briefs and oral arguments, and judges relying on them in their opinions, regard their arguments as directed to working out what that *law is* in the particular cases in question—not just what a good, reasonable, or right decision would be, but what the parties can correctly claim *as a matter of right* according to the requirements of law. Legal arguments in these cases, deploying considerations of principle, are directed to determining what law *as it currently stands* requires, not what it *ideally ought to be*, by judges working out what they are bound by existing law to decide, not what it would be good or reasonable for them to decide. Principles deployed in this familiar way are binding legal standards, not mere guides for the exercise of discretion, but they are not binding in virtue of their pedigree. Hence, Dworkin concluded, there is more to the law than is conceived in the positivist's philosophy of pedigreed rules; the discretion, obligation, and pedigree theses each fail because they do not recognize the role of binding principles in ordinary legal reasoning.

The upshot of this argument, if it is sound, is that the positivist doctrine of the limits of law defined by source-based criteria must be abandoned. It does not follow, however, nor was it meant to demonstrate that there is *no* distinction to be drawn between the requirements of law and those of morality (Dworkin 1978, 59–61). Its burden, rather, was to show that no such test can meet the conditions positivists set for it; whatever test we devise will have to include, in some fundamental way, moral argument and evaluation.

9.2.1.2. Positivism's Divided House

This argument left the faith of most positivists unshaken; they uniformly found the argument unpersuasive. Yet, as one long-time critic of Dworkin conceded, "it would be hard to find an essay that has been more influential in the development of contemporary jurisprudence" than "The Model of Rules" (Coleman 2000, 172). This influence was due in part, I suspect, to the fact that this possibly flawed argument did not just "provoke alternative explanations of the place of moral argument in legal discourse" (ibid.); it divided the positivist camp in two. What one wing found persuasive in the argument, the other rejected out of hand, and vice versa. Furthermore, their respective criticisms drove each camp to articulate rival understandings of the deep commitments of positivism[7] and encouraged Dworkin to widen the scope of his criticism and to elaborate his alternative theory of law. We will explore the dialectic between the rival positivist camps in detail in Chapter 10 below, so,

[7] They also stimulated an unproductive squabble over which doctrines were essential to the positivist faith and which camp had the best claim to the positivist birthright handed down by Hart.

to motivate Dworkin's mature theory, we need only to consider here the initiation of the dialectic.

Critics rarely disputed the argument's main premise that principles play a pervasive role in legal reasoning and that the binding status of these principles is due at least in a very large part to their reasonableness or correctness as a matter of morality. The multilateral disagreements among Dworkin and his various critics turned on what theoretical significance to accord to this stipulated fact. According to one line of criticism, advanced for example by Joseph Raz, Dworkin's characterization of the commitments of positivism—the pedigree thesis, the discretion thesis, and the model of rules (i.e., authoritative directives)—was largely correct (although requiring refinement in various respects, of course); and he was right to think that principles are pervasive in legal reasoning, and that typically (although not necessarily) they are not pedigreed. He was even right to think that judges are often professionally obligated to take the principles into consideration and to accord them due weight in their deliberations. However, Raz argued, it is one thing for a principle to be binding on a judge and quite another for it to be binding *in virtue of its being part of the law* (Coleman 2009, 366–7). Dworkin's mistake, it was argued, was to conclude from the accepted premise that principles are binding on judges that these principles are, thereby, valid *legal standards*, binding *as law*; and hence it was a mistake to think that their stipulated role in legal reasoning threatens the positivist account of the nature of law. Moral principles, even those courts are bound to consult, according to Raz, are not legal standards, unless they are pedigreed. Although moral principles are pervasive in legal reasoning, they are still *extra-legal*.[8]

In Dworkin's eyes this positivist accommodation simply fails to fit the facts of legal practice, or at least it fails to fit the understanding of that practice typical of those most intimately involved in it. When litigants and lawyers go to court seeking a decision in their favor, Dworkin liked to argue, they argue about what *the law* is, and the rights they have (or duties others have) in virtue of that law. They are not arguing for a change in the law. They seek not to sway the discretion of the court, but to present arguments in support of claims about the law as it is, even if those claims are controversial. While Raz took this reply to simply beg the question (Raz 1983, 84), Dworkin took this claim about the phenomenology of judging to be fundamental.

Raz's objections notwithstanding, other positivists, including Hart himself, accepted Dworkin's claim about the phenomenology of judging. They conceded not only that principles with an explicitly moral pedigree may play a role in the judicial reasoning in some legal systems, but also that these principles are properly regarded as *legal principles*, *legally* binding on judges, and thus that the model of rules argument undermined the pedigree thesis as a universal

[8] Raz's views on judicial reasoning and the role of moral considerations in it are discussed in detail above, chap. 8, sec. 8.6.

truth about law. In an early influential discussion of Dworkin's anti-positivist arguments, Coleman wrote that if positivism were to

> require particular substantive constraints on each rule of recognition, that is, [require that] no rule of recognition could specify truth as a moral principle among its conditions of legality [...] Dworkin's arguments in Model of Rules [...] would suffice to put it to rest[...]. Dworkin persuasively argues that in some communities moral principles have the force of law, though what makes them law is their truth or their acceptance as appropriate to the resolution of controversial disputes rather than their having been enacted in the appropriate way by the relevant authorities. (Coleman 1982, 142–3)

Positivists like Coleman were prepared to accept this part of Dworkin's argument, because they followed Hart in the view that criteria of legal validity are rooted in law's foundational convention, the rule of recognition, which is manifested in the practice of law-applying officials. On this view, the criteria of validity are what this practice determines them to be; thus, it is a contingent matter what those criteria are in any particular legal system. It is possible, then, that a legal system might include among its criteria of validity substantive reasonableness, justice, or some other dimension of morality. (Recall, Hart seemed to think such was true of the American legal system—see above chap. 7, sec. 7.5.1.)

However, this "inclusivist" camp did not accept that Dworkin's argument posed a challenge for positivism, because they rejected his initial characterization of positivism, in particular the pedigree thesis.[9] Positivism holds, on this view, that law is at bottom a matter of social fact, and the most fundamental social fact is that constituted by the practice of law-applying officials, which provides the conventional foundation of law. Thus, principles that recommend themselves on the basis of their truth or reasonableness as a matter of morality can take their places in a given legal system as valid legal standards alongside pedigreed rules if in that system it is the practice of judges to *accept* such principles *because they are reasonable or true* as a matter of morality, or if it is their practice at least sometimes to resolve disputes about the existing law by appealing to moral argument (Coleman 1982, 148, 159–60). In such a system, it is a fact about judges that they accept, and regard themselves bound to accept, some standards in virtue of the fact that they were duly enacted by the legislature, and they accept, and again feel themselves bound to accept, other standards just because they are right, just, fair, or reasonable.

Dworkin inadvertently invited this response. He argued initially that, while principles are incompatible with the positivist pedigree test, their legal status

[9] The list of critics who made this argument is long including, e.g., Sartorius 1971, 156; Lyons 1977, 423–4; Soper 1983, 16–7; Coleman 1982, 140–8; Hart 1994, 265. It is now a regular weapon in the inclusivist armamentarium, see for example Waluchow 1994, 174–82; Himma 2002b, 138–42.

("origin") lay, rather, "in a sense of appropriateness developed in the profession and the public over time. Their continued power depends upon this sense of appropriateness being sustained." To defend a claim that some attractive principle of justice or fairness is a principle of law, he added, we lawyers and judges mention prior cases in which the principle figured in the argument and legislation exemplifying it. "Unless we could find some such institutional support, we would probably fail to make out our case, and the more support we found, the more weight we could claim for the principle" (Dworkin 1978, 40). To positivists who have dined at Hart's table, this sounds like just another way of saying that to make the case for the legal status of a principle one must show that it is the practice of the courts to recognize it (Sartorius 1971, 156), i.e., a matter of "judicial custom" (Raz 1983, 79–81), just as Hart had argued.[10]

Dworkin's initial response (in anticipation) to this objection was that

> we could not devise any formula for testing how much and what kind of institutional support is necessary to make a principle a legal principle, still less to fix its weight at a particular order of magnitude. We argue for a particular principle by grappling with a whole set of shifting, developing and interacting standards (themselves principles rather than rules) about institutional responsibility, statutory interpretation, the persuasive force of various sorts of precedent, the relation of all these to contemporary moral practices, and hosts of other such standards. We could not bolt all of these together into a single "rule," even a complex one. (Dworkin 1978, 40)

This objection is not very persuasive as it stands, since it rests on the assumption that the criteria of validity must fit together into a relatively simple algorithm. However, this passage hints at a more complex and subtle view, which he articulated first in subsequent essays in *Taking Rights Seriously* and more fully in *Law's Empire*. His anti-positivist "test for law," expressed in embryonic form, is the following: "[A] principle is a principle of law if it figures in the soundest theory of law that can be provided as a justification for the explicit substantive and institutional rules of the jurisdiction in question" (Dworkin 1978, 66). Since this "soundest theory" is charged with *justifying*, to the extent possible, the settled law, this test will itself depend on, as well as incorporate, substantive moral argument. Thus, it is likely not to be a matter of universal agreement, and hence will be a matter of controversy, even among law-applying officials.

Against this suggestion positivists have sought enrich the notion of *convention* and to develop a theory of law's conventionality. A number of versions of

[10] Stephen Perry (1997, 794–801) later developed this idea of "institutional support" in a way that is not obviously positivist in tone (although it was designed largely to counter an exclusive positivist account of common-law precedent). His key idea was that institutional support of the kind Dworkin mentioned here does not establish the *validity* of principles (as if it were a surrogate for enactment), but rather it gives them legal credibility, or epistemic weight, and the more such support is available the more "epistemically entrenched" they are and the harder it is for judges to justify ignoring or overturning them.

conventionalism have emerged in the last two decades of the twentieth century. We will explore representative examples of these conventionalist theories in Chap. 11; however, Dworkin opposed these efforts even before they took articulate shape. Already at the end of "Model of Rules I" he argued that this attempt to rescue positivism was doomed because the moral principles said to be accepted are typically contested, often with respect to their weight or importance, and even sometimes with respect to their appropriateness as grounds for judicial decisions in contested cases (Dworkin 1978, 44).[11] The fact is, Dworkin suggested at the end of his seminal essay, even in the United States, there simply is no *agreed convention* authorizing the appeal to moral principles in judicial reasoning. The criteria of validity, the tests for membership of standards in that legal system, are themselves contested. This line of thought, resting on the essential contestability of law, became the central theme of his maturing attack on positivism and the cornerstone of his alternative theory of law. This theme was first announced in a limited form in the sequel to "The Model of Rules"—entitled in *Taking Rights Seriously* "The Model of Rules II" (ibid., chap. 3). We do well to look at the argument in its simpler form before we explore in detail its elaboration in *Law's Empire*.

9.2.2. The Claims of Controversy

In "Model of Rules II," Dworkin addressed the positivist social-fact thesis as it concerns the ground or authority of the rule of recognition. In Hart's theory, the rule of recognition is unique in the legal system because its authority is grounded not in some further rule of law, but in the judicial practice that underlies the legal system as a whole. Strictly speaking it is not a legal rule, but rather a social rule, a norm rooted in the social facts of convergent behavior and attitudes of officials. It is not merely a test for membership of standards in a legal system, but also a norm imposing an obligation on officials to follow and enforce the standards that pass the test. The rule of recognition explains not only *which* standards are binding legal standards, but also *why* they are binding. Dworkin took aim at this key tenet of positivism (the conventionality thesis) by attacking the account of obligation on which, in his view, it rested in Hart's theory.

According to Hart, judges have a duty to follow and apply the rule of recognition's criteria just when there is a (social) rule that requires it of them, and there is such a social rule in place just when there is convergence of judicial behavior (compliant behavior and behavior holding others to compliance) plus the convergent attitude of judges that such behavior is required and the rule represents a common public standard for them. According to Dworkin (1978,

[11] More recently he argued that even the appropriateness of reliance on moral principles is itself contested among judges (Dworkin 2006, 168).

49), Hart held that this regularity of behavior *constitutes* the social rule; thus, judges have such an obligation just in case there is a regular pattern of recognizing and applying certain standards and not others, and a corresponding internal attitude on the part of judges.

Dworkin argued that this social rule theory of obligation fails for two reasons. First, some of our obligations do not seem to depend on there being any corresponding general regularity of behavior at all. It may be true that we have a duty to respect all living things, but no one would try to defend the claim that there is such a duty by marking its observance amongst most people in North America or Europe. And even where there is general concurrence of behavior, as for example in respecting the lives of human beings, we might think our agreement has little to do with the reasons for respecting human life. While we agree on the duty to respect human life, our agreement reflects a matter of "concurrent morality" (ibid., 53), according to which our concurrence is accidental relative to the reasons we have for acting in its name. When this was brought to Hart's attention he readily conceded the point, maintaining that his account was meant only to cover matters of conventional morality, for which it is true that general conformity with the rule is part of the reason the rule is regarded as binding. Conventional morality involves "consensus of convention," not mere "consensus of independent conviction" (Hart 1994, 255–6). Dworkin's core objection concerns Hart's account of obligations of conventional morality.

Dworkin's *argument from controversy*, stated broadly, is the following (Dworkin 1978 54–8). According to Hart, obligation is based on a rule that is constituted by the conforming behavior of people in the community. This cannot adequately explain obligations of conventional morality, Dworkin argued, for even claims of conventional obligation are often controversial: "[E]ven when people count a social practice as a necessary part of the grounds for asserting some duty, they may still disagree about the scope of that duty" (ibid., 54). Thus, "when people assert normative rules, even in cases of conventional morality, they typically assert rules that differ in scope or in detail." But, on Hart's account of rules and obligation, "two people whose rules differ, or would differ if elaborated, cannot be appealing to the same social rule, and at least one of them cannot be appealing to any social rule at all," because the rule is constituted by the facts on the ground about convergent behavior and at least one of them is not consistent with these facts on the ground (ibid., 55). In such cases, the interlocutors must agree that there is *no disagreement* between them. Either one is strictly wrong, or they have both adopted normative rules that go beyond what the facts on the ground support. Put paradoxically, Dworkin's argument was that disagreement is conclusive proof that there is no disagreement.

This implication is fatal for Hart's account of obligation, especially judicial obligation, Dworkin argued, for it makes disagreement about claims of such obligations impossible. It treats genuine disagreements about the scope of the

rules of a common practice as if they were disputes about which fresh rules to put in the place of old ones that failed to extend to the newly discovered cases. But this, he insisted, misdescribes an important kind of social controversy. We are encouraged to think that one could never argue that one's community is committed to any demands or duties, by virtue of its common practices, except those already uniformly agreed upon (ibid., 80). Applied to the specific case of the social rule of recognition, this implies that controversy about criteria of legal validity is not possible, because the appearance of disagreements marks the outer limits of the conventional criteria. But, manifestly, controversy often arises with respect to these criteria, and arguments in disputed cases are not only intelligible, but also vitally important. Clearly, Dworkin concluded, Hart's social rule account of obligation fails and with it his account of the normative foundations of the rule of recognition.

This argument is puzzling, partly because it seems to run together two different arguments and partly because it attributes views to Hart that he may not have held and that in any case do not seem to be important to his theory. Our chances of understanding Dworkin's more complicated argument in *Law's Empire* are improved if we take a moment to work out some of the wrinkles of this early statement of his argument from controversy. First of all, Dworkin attributed to Hart the view that the obligation-grounding conventional rule is *constituted by* the pattern of convergent behavior. But it is not clear that Hart had this in mind when he said that social rules exist just when there is a convergence of behavior and attitudes in a community (see above chap. 7, sec. 7.3.2). In an insightful essay, Benjamin Zipursky (2001) offered some clarification of the matter.

First, let us set the stage. Hart deploys his social rule analysis at a crucial point in his theory of law. When questions of the validity and hence authority (or normative standing) of ordinary standards are challenged, answers rely ultimately on appeals to the rule of recognition, but all such questions stop at the rule of recognition and questions about the ground of the rule of recognition are answered by reference simply to demonstrable fact of its existence as a social rule. At this point, a problem emerges, for the "rule" appealed to in this challenge-stopping action is the social fact of the convergence of judicial behavior and the proposition stating that "rule" is merely descriptive. It cannot do the work it is supposed to do because it is of the *logically* wrong kind. The appeal to this descriptive proposition, if it were thought to be sufficient to answer the challenge, rests on a category mistake. The only *kind* of proposition that could hope to do the job is a *normative proposition*. The question asking for the normative ground of primary rules is a normative question, requiring an argument that includes a normative premise. The rule of recognition is supposed to do that work, but it can do so only if it is a normative proposition. However, the descriptive proposition is still important, because it can be used to establish that the normative proposition is indeed a rule *of the community*.

On this view, Zipursky observed, when Hart answered the challenge to the authority of the rule of recognition, his appeal to the social facts on the ground was not irrelevant, for it showed that if there is a normative proposition that is warranted, it can be anchored to the community in question. What the descriptive proposition could not do is show that there is any reason for accepting the normative proposition (Zipursky 2001, 238).

Dworkin's argument from controversy now proceeds with this normative proposition in mind, but, following Hart, he focuses on people's *acceptance* of these normative propositions. At this point Dworkin makes two crucial observations: (1) that the normative propositions entertained or accepted by people will often diverge from each other and most importantly from the generalization that describes the externally observable behavior; and (2) that Hart holds that the behavioral generalization determines the scope or extension of the agreed normative proposition (that it "constitutes" the normative proposition in this sense). It is not clear what basis Dworkin had for attributing (2) to Hart, but it might be that, since the rule is regarded as a *conventional* rule, the fact of general conformity will figure importantly among their reasons (Hart 1994, 255). If so, Dworkin might have thought that the scope of that conformity determines the scope of the normative proposition on which it (in part) rests. But Dworkin also seems to have thought that, if a normative proposition is a conventional rule of a community, and thus people are generally agreed in their acceptance of it, then *what* they agree *to* is determined by *what* they agree *on*—the *scope* of the norm they commonly accept (in part for the reason that others also accept it or generally comply with it) is determined by their agreement. If so, then the point at which the agreement runs out is the point at which the rule runs out. Since people have (conventional) obligations only where there is a (conventional) rule imposing it, where there is no rule there is no obligation. But, then there is no obligation where there is no agreement. Therefore, since conventional obligations are rooted in agreement, conventional obligations cannot be controversial—disagreement marks the boundaries of the extension of the convention. We might say, echoing the *lex iniusta* conundrum, a disputed convention is no convention at all (Shapiro 2001b, 165f.).

There seem to be two possible targets of this argument: (1) a certain understanding of social practices, namely, an understanding *in terms of conventions*; or (2) a certain *understanding of conventions*, namely, that which takes conventional agreement to settle the scope or extension of the normative force of those conventions (or their cognate practices). Dworkin's language tends to support the former.[12] However, the way he sets up his argument suggests the

[12] Elsewhere Dworkin took Walzer to task for thinking that arguments about justice can be viewed as a matter of working out a shared understanding of justice, insisting that, since there is deep disagreement about justice, it follows that there is no shared understanding (Dworkin 1985, 214-220).

latter, for what he wants to show is that *even in the case of conventional morality* controversy about the scope of agreed upon rules is not only possible but common (Dworkin 1978, 55). Moreover, he may have thought that Hart was committed to the restricted view of conventions, not so much by his analysis of social rules, but by the role that analysis had to play in Hart's articulation and defense of positivism. Although "Model of Rules II" focuses on a different use of the appeal to social facts by positivists (the conventionality thesis), the worry he has is still the worry of the first "Model of Rules" essay, namely, the implication of the discretion and obligation theses that when the rules run out all significant claims that we can make about judicial obligation run out as well.

Critics of Dworkin's argument from controversy have agreed that it can best be answered by showing that people who accept the same (conventional) rules can nevertheless disagree (Coleman 1982, 156–7; Hart 1994, 258–9). In chapter 11 below we will consider several attempts to substantiate this claim. However, a further question is whether these critics, predominantly defenders of positivism, can explain how such disagreement is possible without further compromising their positivism. Dworkin came to think that they could not. He did not deny that conventional morality is possible, but rather that the explanations of it offered by positivists were either inadequate as accounts of conventional morality—because in effect they ruled out the possibility of controversy—or they fundamentally compromised their positivism. This development of Dworkin's argument did not become evident until the publication of *Law's Empire*, although even there it was obscured by his shift of target once again, this time focusing on the fundamental defects of *methodological positivism*. We pick up the thread of this plot in the opening chapter of *Law's Empire*, where the author introduces us to "the semantic sting."

9.2.3. Positivist Conventions Feel the Sting of Controversy

In *Law's Empire*, Dworkin's critique of positivism took a "sharp methodological turn" (Marmor 1992, 2). The substantive theory of law he first articulated as "the Rights Thesis" in *Taking Rights Seriously* (Dworkin 1978, esp. chap. 4 and App.), was elaborated and focused around the moral notion of *integrity*, and this theory of the nature and grounds of law was embedded in a wide-ranging, radical critique of positivist methodology, a "frontal attack against analytical jurisprudence" (Marmor 1992, 35). He challenged outright the scaffolding of distinctions contemporary analytic jurisprudence used to construct its positivist theory of law, among them the distinction between legal theory and ordinary legal argument and, in particular, between neutral analytic jurisprudence and engaged moral inquiry and argument.[13] He argued that the posi-

[13] Frequently critics complained that Dworkin "runs together," "ignores," "is blind to," or "confuses" these and related distinctions (Hart 1994, 247; Raz 2001b, 36–7; Coleman 2002, 316-

tivists' quest for a disengaged, morally neutral, "observer's" theory of the nature of law is a fool's errand; philosophical jurisprudence is inevitably engaged and *normative*. The primary tool Dworkin used to dismantle methodological positivism was his argument from controversy, refashioned and newly deployed against positivism now conceived as a "semantic theory." The "semantic sting" argument with which he opened *Law's Empire* drew heavy critical fire. It deserves a careful look because it gives us important insight into Dworkin's view of the nature of jurisprudential inquiry.

The task of analytic jurisprudence,[14] as Dworkin saw it (Dworkin 1986, 31–45; 1987, 9–13), is to explicate the concept of law. This concept is understood to comprise criteria for the correct use of the word, criteria that fix the extension of the concept. Communication and disagreement about propositions of law are made possible by people sharing semantic rules for the correct use of the concept. Jurisprudence seeks to bring to light the shared semantic rules used, possibly unawares, by lawyers and others. Since it seeks only to capture and report these common rules, this task is thought to be strictly descriptive, evaluatively neutral, and disengaged from the practical deployment of the concept in the ordinary practice of legal argument; hence, it is must be pursued *prior to* any moral assessment of this practice. Legal positivism—for example that professed by Hart—is offered as a semantic theory of this type, Dworkin contended. It holds that grounds of propositions of law, that which makes them true (or secures the validity of legal norms), are determined by shared criteria for the use of the concept of law. These criteria stipulate that propositions of law are true in virtue of certain social facts about how legal norms are adopted or established. The extension of the concept of law—the set of standards and norms that are determined to be members of a given legal system—is fixed by these shared criteria for the correct use of the concept, according to Dworkin's understanding of Hartian positivism.

However, Dworkin argued that, although criterial semantics[15] may be adequate for some concepts (book, tree, house, vehicle, park), it utterly fails for the concept of law. Herein lies the source of the "semantic sting": Disagreement is possible, indeed common, among lawyers about the very rules that are supposed to establish the grounds of propositions of law. Law's argumentative character is bred in the bone (Dworkin 1986, 13). Competent lawyers and judges disagree not merely about the application of criteria in particular cases

8**;** Waluchow 1994 49–58; Kramer 1999, 128–9). Marmor (1992, 35) is alone among Dworkin's positivist critics to admit that Dworkin meant to *challenge* such distinctions, which he regarded not as theory-neutral but rather as internal to positivist theory.

[14] The positivist methodology of analytic jurisprudence conceivably could be used to defend a natural-law theory of the nature and grounds of law (Dworkin 1986 35–6), but Dworkin's primary target was the positivists' use of methodological positivism.

[15] Dworkin (2006, 217) objected to the label, but his reasons are unclear; in any case it has become firmly established in the jurisprudential lexicon since the publication of *Law's Empire*.

(i.e., whether the facts that the criteria stipulate as conditions of the existence of law obtain), but about *the criteria themselves*, and this disagreement occurs not merely at the borderlines (in the "penumbra" as Hart liked to say), but at the core of the concept's application, in "pivotal cases" (ibid., 39–42). Such "theoretical disagreements" among competent lawyers are familiar in legal practice: Lawyers rely on competing conceptions of what makes propositions of law true or different views about the kinds of arguments that may be used to establish the truth of the claims they make on behalf of their clients. The sting that disables methodological positivism is that criterial semantics cannot explain this fact of pervasive theoretical disagreement in legal practice. It fails because it assumes that communication and hence disagreement is possible only if parties share rules fixing the extension of the concepts they deploy. So, they are committed to the conclusion that where disagreements about the criteria themselves arise, there is by that very fact *no disagreement* at all; apparent disagreement is conclusive proof of the absence of *shared* criteria. Thus, Dworkin argued, the (methodological) positivist project fails because it fails to account for a central feature of legal practice. Its hope of providing an evaluatively neutral, merely descriptive theory of the nature of law is dashed.

We can better focus critical attention on the core of this argument if we clarify it at points where Dworkin's presentation leaves it vulnerable to superficial objections. First, the argument does not take semantic theories to assume that concepts are always used correctly and that users can without much trouble state, or at least immediately recognize correct statements of, their common rules. The argument accepts that semantic theories can recognize disagreements about the rules among people who do not adequately grasp them. It maintains, however, that "theoretical disagreements" in law cannot all be explained as disagreements among users who are not fully competent. Second, the argument is fairly seen as an attack on one form of semantic theory, not on all possible semantic theories of law. Although his language is not sufficiently discriminating, the burden of the argument is clear. The target is a certain view of the nature of fundamental criteria of law and of the form a theory of those criteria should take.

More importantly, I believe, the force of Dworkin's argument is lost if we see it as focused solely on semantic theories. Almost all the commentators on this argument that I have encountered point out that positivists generally and Hart in particular have not engaged in semantic theorizing about law, or at least have not embraced criterial semantics.[16] In the face of this criticism, Dworkin refused to budge, arguing that the best interpretation of *The Concept of Law*

[16] Hart (1994, 246) led the pack, professing that he was "mystified" by Dworkin's attribution of such a theory to him. A host of critics have followed: Kress 1987, 853; Marmor 1992, 6–7; Moore 2000, 89; Coleman 2002, 316, 318-19; Raz 2001b, 2; Endicott 2001 and others. The lone dissenter is Stavropoulos 2001.

reads it as a criterial semantic theory of law (Dworkin 2006, 214; 2006, 165–6).[17] This dispute is an unfortunate distraction, for which Dworkin, of course, is largely responsible, because what legal positivism is committed to, according to Dworkin, is the view that competent lawyers and judges accept as common rules certain criteria for determining which standards are members of their legal system—rules that set out the grounds of propositions of law—and that the task of analytic jurisprudence is to uncover, articulate, and report these agreed upon rules. The "sting" has venom enough, if it has any at all, to bring down this non-semantic version as well as its semantic cousin. Dworkin's target at the opening of *Law's Empire* is the conventionalist view of the foundations of law, which, of course, was also the target of "Model of Rules II," with the difference that in the later work he attacked it as a methodological thesis about the study of law rather than as a substantive thesis about law itself (Postema 1987c, 289 n. 10; Marmor 1992, 8–9). The fatal assumption of this methodological approach is not fundamentally about the semantics of "law," but rather about the nature of disagreement in and about law, and under what conditions it is possible. What makes philosophers prey to the sting, according to Dworkin, is the assumption that "we can argue sensibly with one another if, but only if, we all accept and follow the same criteria for deciding when our claims are sound, even if we cannot state exactly, as a philosopher might hope to do, what these criteria are" (Dworkin 1986, 45). This assumption is tempting to positivists because it encourages them to think of their task as one of "digging out shared rules from a careful study of what lawyers say and do" (ibid., 43). The upshot of the argument from controversy, now in the form of the sting argument, is that this is doomed to fail, because there are no such rules (ibid., 43, 90). This is the argument we need to assess. The debate over semantics is a detour.[18]

Dworkin's argument has been attacked from many directions, but, with some hesitancy, I am inclined to collect them all under one heading. They seek to deny in one form or another that the fact of typical lawyerly disagreement challenges the positivist project of uncovering conventional rules at the foundations of law. Hart argued, for example, that Dworkin's examples of "theoretical" disagreement in law are disputes about the content of *the law* (of some particular jurisdiction), rather than about the content of *law* (what counts as law whatever the jurisdiction) (Hart 1994, 247; see also Coleman 2002, 316–8). Thus, evidence of lawyerly disagreement even if it is pervasive in familiar legal practice does not poison the project of uncovering shared common rules re-

[17] Kress argued with delicious irony that, since criterial semantics is so implausible, Dworkin's interpretation failed to present Hart's positivism in its "best light" (Kress 1987, 853–4).

[18] Coleman (2009, 378-80) argued that Dworkin's argument is a non sequitur because it draws a conclusion about criteria for the use of the word 'law' from an insight about (substantive) criteria of *law*. Even if this objection is sound, it this leaves Dworkin's fundamental argument from controversy untouched.

garding the identification of law in general. Of course, the fact that it is possible to distinguish between these two kinds of disputes does not settle whether there is any significant *continuity* between them. Positivists maintained that they are entirely discontinuous, while Dworkin countered that they are logically continuous. Jurisprudential theories may be very abstract and general, he maintained, but "no firm line divides jurisprudence from adjudication or any other aspect of legal practice [...] . Jurisprudence is the general part of adjudication, silent prologue to any decision at law" (Dworkin 1986, 90; see also Dworkin 1987, 14).

This response struck many contemporary positivists as false on its face, since they saw a clear distinction between a theory of law and a theory of adjudication (Gavison 1987b, 25–7; Waluchow 1994, 49–58; Raz 1995a, 202–3, 323). But Dworkin challenged this distinction. Propositions of law on which courts or lawyers rely claim to be true or warranted, so courts and lawyers presuppose criteria determining the truth of such propositions. Sometimes when in the context of adjudication competent lawyers disagree in good faith, they work with different and conflicting views of what makes the propositions of law on which they rely true, and those disagreements may be rooted in competing general conceptions of law (Dworkin 2006, 164–5, 221). The dependency of lower level claims on higher level or more abstract ones can be substantial and, in light of this dependency, any sharp distinction between abstract and concrete seems arbitrary. Against this argument, positivists have argued that there simply is no need for lawyers to make assumptions about the nature of law to know what the law is on some contested point. As Raz put it, courts may need to presuppose something about the law of their jurisdiction, but not a great deal (Raz 2001b, 34). However, this objection does not appear to be responsive to Dworkin's argument, which concerns the logical or substantive dependency of lower level argument on more general propositions about what makes those arguments relevant or sound, not on any given lawyer's epistemic resources. The point is not that every lawyer has such a theory in mind, but "only that he assumes that his partial account is good in virtue of being a part of the [more general and abstract] account, and hence assumes a responsibility to articulate as best he can the implications or presuppositions of the part he defends, in any direction" (Stavropoulos 2003, sec. 5).[19] One cannot observe

[19] Later, Dworkin called attention to the vulnerability of all legal argument to "justificatory ascent": "When we raise our eyes a bit from the particular cases that seem most on point immediately," he wrote, "and look at neighboring areas of the law, or maybe even raise our eyes quite a bit and look in general, say, to accident law more generally, or to constitutional law more generally, or to assumptions about judicial competence or responsibility more generally, we may find a serious threat to our claim that the principle we were about to endorse allows us to see our legal practices in their best light. For we may discover that that principle is inconsistent with, or in some other way sorts badly with, some other principle that we must rely on to justify some other and larger part of the law" (Dworkin 2006, 53)

the movement of this debate without suspecting that the distinctions and intuitions that are relied on by both sides are not theory-neutral and, perhaps, that the parties are talking past each other.

Other critics of the sting argument have taken a different tack, arguing that it is possible for there to be common rules despite disagreement. Some argue, for example, that the foundational conventions may be complex, and disagreement concerning some *parts* of them does not threaten agreement at a fundamental level, as long as there is agreement with respect to *deep* components (Kramer 1999, 140–6). Others argue that disagreement concerning even deep components does not threaten the conventional status of the criteria, as long as the disagreement is not wide-spread in the legal community (Himma 2002a, 169–71). These objections may not seriously challenge the sting argument, if they amount to variations on the basic Hartian theme that disagreement is possible in the "penumbra" of rules. Seen in this way, they amount to a denial that the examples of disagreement Dworkin has offered are indeed cases disagreement in truly pivotal cases ("theoretical disagreement"). And this still leaves open the more interesting question, whether there still are or could be truly theoretical disagreements in law.

Raz put this challenge in a more fundamental form (Raz 2001b, 15–7; see also Coleman 2002, 316). He observed that we can understand what it is for there to be shared criteria in a community either *individualistically*—each member holds them as personal rules and commitments and seeks to follow them when applicable—or *non-individualistically*—the criteria are common rules of the community but they are not reducible to the rules that any member or aggregate of members entertains or accepts. Rules, understood in the second way, are not reducible to what some or all the people think they are. Raz thought that the individualistic account of shared criteria is hopeless, and that the non-individualistic account, which he favored, allows for the possibility of disagreement, for it allows that members of the community can be mistaken about their shared criteria. Thus common criteria can be the subject of serious disagreement (see also Coleman and Simchen 2003, 9).

This reply is sketchy and more work needs to be done to explain what it is for the rules or criteria to be shared non-individualistically in a community. But, however this account is filled out, the interest in this line of argument for present purposes lies in the light it sheds on Dworkin's sting argument. First, Dworkin might reasonably endorse the non-individualistic account of shared concepts or rules. It is no part of his view that participation in a common social practice precludes fundamental disagreement; on the contrary, the sting argument was meant to raise the question—silenced, he thought, by criterial semantics and positivist conventionalism—regarding how fundamental disagreement in a shared social practice is possible. The burden of his argument is that the criterial or conventional view fails to do so, and *for that reason* must be wrong (Dworkin 2006, 221). If he adopts this line in response, then we

must take him to object not to the claim that law rests on common practices or conventions, but rather on a faulty understanding of these practices or conventions. On this reading, Dworkin's argument calls for a more satisfactory account of the normative force of social practices.

We see now that both the argument from controversy in *Taking Rights Seriously* and the sting argument in *Law's Empire* assume that legal positivism is committed to the view that common rules of a shared practice are *conventions*, and that conventions exist, and are binding, just insofar as there is *consensus*—not consensus of conviction (that is, merely concurrent convictions), but consensus on the rules themselves such that that consensus fixes the extension or applications of the rules—and disputed conventions are not conventions at all. But why saddle methodological positivists with a crude and unsatisfactory view of what it is for a community to share rules? Dworkin, it seems, assumed that they need it to guarantee that their theoretical exploration of these rules will be evaluatively neutral and detached from the normatively engaged reasoning that is typically carried on within the practice. His reasoning seemed to be that methodological positivists are tempted by the individualist account, and the related idea that consensus fixes the extension of the common rule, because when these conditions are in place, it is possible for an observer to capture the rules of the community's practice by describing what each member accepts or believes simply as a matter of empirical fact, while a view that distinguishes the rules of a community's practice from what people take them to be invites (perhaps even forces) those who seek to characterize those rules to engage in reasoning not unlike the reasoning of committed participants in the practice. That is to say, Dworkin seemed to think that positivists must resist the kind of non-individualistic account of community practices precisely because it threatened to undermine their methodological positivism.

Dworkin thought that once the sting does its work, and legal philosophers accept that theoretical disagreement is an important part of legal practice, his thoroughly normative, interpretivist methodology would be difficult to resist. Although widely challenged, Dworkin's argument further intensified the debate over methodology in jurisprudence that Hart's own work first stimulated.

9.3. Interpretive Jurisprudence

9.3.1. Against Archimedes

The "semantic sting" argument was the centerpiece of Dworkin's critique of positivist methodology, but it was not the whole story (*pace* Coleman 2002, 316). It was part of a larger argument against what Dworkin took to be a powerful but self-delusive inclination driving legal theory, and much of moral and political theory, to seek a methodologically detached, "Archimedean," position above the battle of substantive argumentation (about propositions of law, mor-

al judgments and values, political principles and policies, and the like). The inappropriateness and utter inaccessibility of such an Archimedean methodological perspective, in Dworkin's view, forces us to abandon the search for an alternative to the failed semantic theory that he thought motivated methodological positivism and should incline us to find interpretivism, his methodological alternative, attractive. Dworkin intended his critique of the Archimedean ambition to be entirely general, encompassing not only methodological positivism, but also various forms of realism, anti-realism, and pragmatism in ethics and political philosophy, in their skeptical and their anti-skeptical forms. In his view, there is no part of ethics that is "meta." All of ethics, and practical philosophy generally, is substantive. I will consider only his anti-Archimedean arguments as they apply to jurisprudence.

Dworkin's argument against the Archimedean ambition in jurisprudence is rooted in two observations about foundational features of legal practice. First, *law is an argumentative social practice*. This is a "central and pervasive aspect of legal practice"; indeed, it is "the most distinctive aspect of law" (Dworkin 1986, 419, 418). This assumption plays a role in Dworkin's theory parallel to the role in Raz's jurisprudence played by the assumption that law claims moral authority. Both are simultaneously *observations* of familiar legal practice and *interpretations* of it—interpretations, because of the way in which they articulate and elaborate the significance of the observed facts and because of the special place given to them in their respective theories of law. The basic materials for his argument are contained in a short passage near the beginning of *Law's Empire*. Law is an unusual (albeit not in this respect unique) social practice.

> [I]ts complexity, function, and consequence all depend on one special feature of its structure. Legal practice, unlike many other social phenomena, is *argumentative*. Every actor in the practice understands that what it permits or requires depends on the truth of certain propositions that are given sense only by and within the practice; the practice consists in large part in deploying and arguing about these propositions. People who have law make and debate claims about what law permits or forbids that would be impossible—because senseless—without law and a good part of what their law reveals about them cannot be discovered except by noticing how they ground and defend these claims. (Dworkin 1986, 13, author's emphasis)

To understand Dworkin's point, return briefly to Hart's orienting observation that law is essentially a normative social practice—that is, that law purports to guide the actions of rational agents by offering rules or norms meant to operate as reasons for action. No jurisprudential theory could hope to illuminate the complexities of law, in Hart's view, if it failed to give pride of place to this defining feature of legal practice. This insight inspired the "hermeneutic" turn in Anglophone legal philosophy that prevails to this day. Yet participants in normative social practices as Hart conceived of them are not especially reflective. They use or rely on rules as "common public standards" for guidance of their own conduct and criticism of the conduct of others, but they do not much re-

flect on them or treat them as subjects for deliberation, assessment, or debate.[20] Moreover, Hart's hermeneutic theory was content to register what participants in the practice understood the rules of the practice to be. Dworkin's observation of the argumentative nature of law goes beyond and enriches Hart's basic thesis about the normativity of law. With the term "argumentative" Dworkin sought to capture different but related features of law. One of these we have already seen at work in Dworkin's critique of positivism: law's ability to attract controversy even at its foundations. We will return to this feature presently, but in the above passage Dworkin called attention to a different feature of legal practice.

What law "permits or requires depends on the truth of certain propositions that are given sense only by and within the practice" (1986, 13). In this respect law is like many social practices, for example, games or rituals. (Think of "off-sides," "charging foul," "strikeout," for example, or for that matter "let us pray" or "point of order, Mr. Chairman.") Yet, these practices are not argumentative. What makes law argumentative is that it "consists in large part in deploying and arguing about these propositions" (ibid.). It is not just a practice, the rules of which give participants reasons to act in certain ways; it is a practice given over to the enterprise of entertaining, uttering, assessing, and challenging propositions about how people must act. It is a practice *of argument* (among other things, to be sure). So, to say that its propositions are "given sense only by and within the practice" is to say in the case of legal practice that these propositions are given sense only within this discursive practice of offering and challenging reasons for action. No theoretical account of this kind of social practice can hope to be adequate to the phenomena unless it addresses fundamental questions that arise *within* this discursive activity of offering and assessing reasons. Such a theory cannot stand outside this practice without losing a grip on what is essential to the practice. An external theory of the practice would be a theory of a quite different object, just as a purely physical theory of football articulated in terms of velocity, mass, etc. would have a different object than an account of its strategies would have. In particular, no theory that contented itself with reporting what participants took its rules to mean would be adequate. For, according to Dworkin, the internal structure of argumentative social practices requires that an interpretive claim with respect to some aspect of the practice is not a claim about what other participants mean, or think, but what *the practice* means, or requires (Dworkin 1986, 55, 63). Dworkin concluded that an adequate philosophical theory of an argumentative practice will share many core features of the concrete practice, although it will more abstract; in particular we should expect both to be ineliminably normative.

Dworkin's second core observation was that legal practice is a discursive practice put to work in a certain social and political context, having and meant

[20] Hart did not deny the possibility of such reflectivity, but it played no significant role in his account of the practical significance of law.

to have an impact in that context, a context where the stakes are high and are measured in unmistakably moral terms. The concept of law, we might say, is a political concept (Dworkin 2006, 162). This is just another way of expressing the view shared by Dworkin, Raz, and many legal philosophers after Hart that law by its nature makes a claim to moral legitimacy. Not only that, but it is the kind of practice whose fundamental ground-rules can be contested. "The concept of law functions within our legal culture as a contested concept [...] because it provides a focus for disagreement about a certain range of issues, not a repository for what has already been agreed" (Dworkin 1983, 255). Moreover, it is a political concept "because of the way it is contested. It takes its sense from its use: from the contexts of debates about what the law is, and from what turns on which view is accepted" (ibid., 256). If this argument is sound, then the Archimedean impulse of positivist jurisprudence must be resisted. Jurisprudential theory, Dworkin concluded, is inevitably but also unapologetically normative, indeed political. It is, in Dworkin's terminology, essentially *interpretive*. Only interpretive jurisprudence can adequately account for the argumentative nature of law, for the possibility of controversy not only at the penumbra but at the core of the practice.[21]

Of course, the contestability of the concept of law is not a bare observation; it is itself a partial interpretation of legal practice. Leslie Green (1987, 16–21) challenged the assertion that law is a contested concept. Debates about law do not fit the standard picture of contested concepts, he argued. Some concepts can do their work only if they are *not* contestable and law is one of these concepts, because "we have a mutual interest in sharing a common conception" (ibid.) that is not open to challenge. Whether this is true depends on the work we expect law to do. Among classical legal positivists, most notably Hobbes and Bentham, the aim may have been, as Hume put it, to "cut off all occasions of discord and contention" (Hume 2000, 322). The neo-formalists held the same view (see above, chap. 8, sec. 8.7.2). Dworkin, in contrast, treated law as providing a focus, language, and forum for political debate about matters of serious common concern in the community (Dworkin 1978, 338; 1986, 413). These are interesting competing conceptions of the (or *a*) fundamental task of law, but the inquiry we use to determine which of these conceptions is the more reasonable is not likely to be normatively neutral and even less likely to be pursued from a strictly detached, Archimedean perspective. So, Dworkin's challenge to the Archimedean inclination might be reinforced rather than undermined by this objection.

[21] Throughout his career, Dworkin has been greatly wary of metaphysics, in part, perhaps, because of its Archimedean pretensions. For this reason, following Hart's lead, he gave the hermeneutic, interpretive dimension of law pride of place in his jurisprudence. However, for a very sophisticated attempt to establish on metaphysical and epistemological grounds the necessity of appeal to value facts (along with empirical facts about legal practice) for determining the content of legal propositions, see Greenberg 2006a and 2006b.

9.3.2. The Practice of Interpretation

Dworkin's substantive philosophical theory of law is built on two fundamental notions: interpretation and integrity. His theory of interpretation models argument in law and proper methodology in jurisprudence, while the notion of integrity supplies the pivotal moral value of his theory of law. In this section, I will outline his general theory of interpretation and its vocation as the preferred methodology of jurisprudence. In the next section, we will consider "law as integrity" and its rival conceptions of the nature of law.

9.3.2.1. The Interpretive Attitude

Constructive interpretation, as Dworkin conceived of it, is the enterprise of making sense of, or giving meaning to, some object, text, or practice. When the object is an activity or practice, the interpreter seeks to work out its practical meaning, which involves uncovering the concrete and abstract norms that govern their interactions and inform their discourse, and thereby the reasons it gives for participants to act in certain ways. Broadly speaking,

> constructive interpretation is a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong [...]. A participant interpreting a social practice [...] proposes value for the practice by describing some scheme of interests or goals or principles the practice can be taken to serve or express or exemplify. (Dworkin 1986, 52)

Let us elaborate Dworkin's sketch of the interpretive enterprise. For this purpose, we may confine our attention to the interpretation of social practices. According to Dworkin, constructive interpretation of a practice is available only if it supports the "interpretive attitude." It does so where participants characteristically take their practice to serve some value which is constitutive of the practice and hold each other to the standard set by that value (and not just their understanding of it) (Stavropoulos 2003, sec. 3). This interpretive attitude is characterized by two assumptions (Dworkin 1986, 47–8): (1) that the practice serves some interest, principle, or purpose that can be stated without describing the rules of the practice; and (2) that the requirements of the practice are "sensitive to its point," that is, they are understood to serve that point and so are liable to being modified as understanding of that point or the best way to serve it deepens or changes. Interpreters "try to impose *meaning* on the institution—to see it in its best light—and then to restructure it in the light of that meaning" (ibid., 47; original emphasis).[22]

[22] To say they "impose" meaning suggests that the attribution may be arbitrary or strictly subjective. This suggestion is reinforced when Dworkin (1986, 58) says that each participant in participating in the practice "is trying to discover his own intention," that interpretation is "conversation with oneself." But he is speaking loosely here, for when he speaks carefully he

These component assumptions are independent, but both are necessary. The first expects participants not only to be guided by the practice and find their activity to be practically meaningful, but also to be reflective about that meaningfulness. The second assumption introduces a critical dimension into interpretation-worthy practices. Those taking the interpretive attitude towards a practice regard the history of the practice with some ambivalence: The practice is constituted by this history and yet transcends it. Since the value of the practice can be formulated independently of its accepted rules and the rules are sensitive to this value, interpreters recognize the possibility that accepted actions of participants and rules of the practice on which there is wide consensus may nevertheless prove to be mistakes when seen from the perspective of its guiding value. Practice does not always make perfect and to assume that a practice serves a worthy value is not to assume that all currently accepted or historically enshrined aspects of the practice do so. A deeper understanding of the complex value or point served by the practice may lead participants to revise their understanding of what that practice requires or authorizes. And since interpretation is an integral part of the practice, this deeper understanding of the practice will alter their actions and potentially the practice itself. Thus, interpretation "folds back into the practice, altering its shape, and the new shape encourages further reinterpretation, so the practice changes dramatically" (ibid., 48).

The interpreters' task is given shape by the *hypothesis* that the practice in view serves a value and their job is to identify the value or point that can justify the practice and unfold the practical significance of the activity in light of that value. However, this hypothesis is *defeasible*. There is no guarantee that a practice serves *any* recognizable value adequately to fund an at least minimal justification of participation in it. Constructive interpretation always keeps at hand the skeptical option (ibid., 78–85, 237). But this skeptical option is "internal" in the sense that it is offered and defended in the ways and on the grounds that all interpretations are, on substantive arguments weighing proposed interests, principles, or purposes which the practice serve and trying to make sense of the practice in light of them. The only difference is that *after* a good faith survey of that kind the skeptical interpreter concludes that no creditable combination of principles, values, and purposes can account adequately for the practice.

9.3.2.2. The Domain of Constructive Interpretation

We might pause for a moment, before discussing the dynamics of the interpretive project, to fix its object more precisely. Two points beg for attention.

unequivocally states that interpretation is not invention, but discovery (ibid., 66), a matter of determining what *the practice* means, not what any participant (or interpreter) means, let alone what a participant might like it to mean or arbitrarily make it to mean (ibid., 63).

First, we must recognize that there is a kind of interpretive approach to social practices that does not involve Dworkinian constructive interpretation at all. Historians and anthropologists sometimes claim to engage in this kind of interpretation. Dworkin (1986, 14) was aware of this kind of interpretive activity, although he was generally dismissive of interpretation-wielding social scientists, because some legal theorists were tempted to treat their activities as models for *philosophical* inquiry into law. One might say that they are focused on a different object, or at least on a very different aspect of the object than practical philosophy takes as its focus. Viewed in this way, Dworkin tended to think of these alternative forms of inquiry into law as dependent on the deliverances of interpretivist jurisprudence. But there is danger in this thought, for it encourages jurisprudence to regard the enterprise of practical philosophy as entirely autonomous (Simmonds 1987, 481–6). Attention to the wider social and historical context of legal practice may provide resources for a deep critique, perhaps even subversion, of the apparent practical meaning of law's internal logic. Critical theory, as developed in the 1980s and 1990s, represented most vigorously by feminist theory, offers resources of this kind (see above, chap. 6). It is unfinished business of Anglophone analytical jurisprudence—of both its positivist and anti-positivist camps—to integrate the best that such critical perspectives have to offer.

A second, more substantial point is that Dworkinian constructive interpretation is indicated only for a subset of social practices, namely, those that support the interpretive attitude. Hart distinguished regularities of social behavior that can be attributed to nothing more than mere habit from social practices with a normative dimension. But, as we have seen, even the latter may be *unreflective*, or "mechanical" as Dworkin (1986, 47) puts it, in which participants engage in it with "unstudied deference to a runic order." Dworkin does not tell us what social practices he has in mind with this unflattering description, but it is conceivable that a large part of our social life might be brought within its pale. Many of the ordinary practices and conventions of social life rarely break the surface of our awareness; respecting others, like fashion, some of us may be obsessively aware of them, but not reflectively so. What is clear is that these practices cannot support even the first component of the interpretive attitude.

Among practices that support the first feature—the reflective attitude—there are some that do not support the second. This second group includes perhaps practices of measuring and counting. We all can recognize the *point* of fixing and aggregating units of spatial distance—centimeter, meter, kilometer, etc. Yet, there seems to be no direct "interaction between purpose and object" (ibid., 52); in fact, we think it essential for the success of these practices that users be denied any opportunity for challenging the *standard* of measurement—challenges can only take the form of proposals for substituting a new and different standard for the existing one (for example, to introduce the metric system in the United States). Dworkin's examples of practices in this group

are games and contests. A level of reflectivity is appropriate and characteristic of participants in these practices, but the rules are not sensitive to the value of the practice in the way self-critical reflective practices (practices that support the full interpretive attitude) are. "We appeal to the point of [games and contests] in arguing about how their rules should be changed, but not (except in very limited cases) about what their rules now are; that is fixed by history and convention. Interpretation therefore plays only an external role in games and contests" (ibid., 47–8).[23] Constructive interpretation gets a foothold, then, only when interpretation itself can play an internal role in the practice. Reflective practices like games and contests are a special subset of meaningful normative social practices and practices that invite the full interpretive attitude constitute a subset of reflective normative social practices.

It follows that the case for the appropriateness of constructive interpretation for understanding a given social practice must follow a precise protocol. It must be shown that an apparent regularity is not merely a matter of habitual behavior, but normative, and not merely normative but reflective, and not merely reflective but internally critical in a way that supports the interpretive attitude. Clearly, to show that constructive interpretation is indicated for a given social practice is already to engage in interpretation—and that interpretation may be contested. Dworkin surely would not deny this. The argument we considered earlier (sec. 9.3.1) was Dworkin's attempt to make the case for constructive interpretation for the social practice of law. It proposed to take law's alleged argumentative character not only as an important feature of law, but as fundamental to its nature (we might say a *defining feature*, if we keep in mind that for Dworkin no interpretation of law is offered as a "definition" of the word 'law'). However, the location of the proper objects of constructive interpretation among the vast family of normative social practices highlights one striking feature of his argument. It leaves out of the story precisely what Hart, Raz and other positivists treat as central to our understanding of legal practice: its *institutional nature*. Moreover, on their view, law is best understood on analogy with games and contests. While it is reflective to a degree, "interpretation" and normative argument are regarded as external to the practice, inquiries exploring grounds for supporting or changing the rules, but not offering considerations that favor conclusions about what the rules of the practice currently are. It is not quite accurate to say that Dworkin begs the question against positivists at this point (Marmor 1992, 43), because he offered an argument, ap-

[23] In *Taking Rights Seriously*, Dworkin was willing to think of some games as objects of constructive interpretation (Dworkin 1978, 101–5), but he conceded chess is unlike adjudication in an important respect: "In adjudication, unlike chess, the argument *for* a particular rule may be more important than the argument *from* that rule to the particular case; and while the chess referee who decides a case by appeal to a rule no one has ever heard of before is likely to be dismissed or certified, the judge who does so is likely to be celebrated in law school lectures" (ibid., 112).

pealing to the argumentative character of law, for taking this internally critical dimension of law seriously. Nevertheless, it is true that his argument proceeds from an interpretive starting point already at odds with the positivists' institutional perspective. One may be inclined to dismiss both approaches as blinded by their own theoretical preferences, but a more profitable response might be to take up the argument at this point. An intelligible issue joined between contemporary positivism and Dworkinian anti-positivism: Which of these fundamental, admittedly interpretive, approaches is the more illuminating of the practice of law?

Dworkin offered another argument for regarding the interpretive attitude as the indicated frame for argument in legal practice, and for rejecting the game analogy (Dworkin 1986, 136–8). If we look at the way law develops over time, he argued, we will see that it typically does so through internal challenges of the kind modeled by interpretive argumentation. Lawyers, judges, and legal academics did not merely challenge the conventional, accepted ground-rules; they challenged the underlying "orthodoxies of common conviction" in which the more superficial agreement on the rules was rooted. However, these arguments "would have been powerless, even silly," Dworkin maintained, "if everyone thought that the practices they challenged needed no support beyond convention or that these practices constituted the game of law in the way the rules of chess constitute that game" (ibid., 137). Over its history, the substance of the practice of American law, for example, has changed in profound ways, but much of this was driven by internal argument, challenge, and adjustments to them. Over its history, judges in the American legal system, for example, treated

> the techniques they use for interpreting statutes and measuring precedents—even those no one challenges—not simply as tools handed down by the traditions of their ancient craft but as principles they assume can be justified in some deeper political theory, and when they come to doubt this, for whatever reason, they construct theories that seem to them better. (Ibid., 139)

Dworkin, then, rested his case for the strongly interpretive approach to legal practice on an interpretation of its history. Raz, we may recall from Chapter 8 above, also attempted to account for the development, the "inner logic," of law (Raz 1995a, 238–53), but his interpretive story depended on the notion of the exercise of "directed powers" (in Dworkin's terminology: on strong judicial discretion) operating on the rules and principles of law from the outside. Thus, a key issue between the positivists' institutional approach and Dworkin's strong interpretive approach is joined. To settle the issue we must judge which interpretation of legal practice and its history is the more illuminating. However, to make any progress on this question we need a richer repertoire of analogues than those that have been relied on thus far in this debate (chess, friendship, courtesy, and the like). This work remains to be done.

9.3.2.3. The Dynamics of Constructive Interpretation: Data, Fit, and Appeal

Return now to the process of interpretation. Dworkin suggested that it is illuminating (although to a degree misleading) to think of constructive interpretation as falling into three stages to which correspond three different tasks (Dworkin 1986, 65–6). At the *pre-interpretive stage*,[24] the task of the interpreter is to *identify* the object of interpretation, that is, the rules, standards, characteristic activities, claims, and kinds of arguments participants typically make, especially those that informed and active participants widely accept as paradigmatic of the practice. This tentatively locates the content of the practice and provides the data for the interpretive theory to work on.

At the *interpretive stage*, the task is to construct an interpretive theory of the practice, a scheme of values or principles the practice can be said to serve and a demonstration of how, when it is viewed in this way, the practice is shown in its best light. The theory provides a justification of the main elements of the practice and participation in it. This task always involves comparison of competing eligible interpretations (i.e., interpretive theories). The merits of the respective theories are assessed along two dimensions: (1) their *fit* with the data of the practice, and (2) their evaluative (that is, where appropriate, moral) *appeal*. Both of these dimensions allow degrees of satisfaction and the best interpretation will be one that satisfies both to some degree; the relevant values informing both fit and substantive appeal will be determined by the kind of practice it is and the moral and practical stakes involved in its ordinary operation and in the participation of individuals in it. Dworkin imagined that this construction-comparison-evaluation process, ideally played out, will have one of two possible outcomes: in the judgment of the interpreter either (1) one theory emerges from the pack of eligible theories as best or (2) *no* such theory survives (the skeptical option).[25] Because interpretations are offered as accounts of what *the practice* means or requires, not merely what a particular participant or interpreter takes it to mean, interpreters can disagree about which of the eligible theories in fact gives the best account of the practice. So, when an interpreter considers competing eligible interpretations, some of those interpretations may be championed by other interpreters.

Finally, at the *post-interpretive* stage, the interpreter returns to the concrete practice, working out the implications of her theory for participants. Some of the data collected at the initial stage may now have to be regarded as mistaken, inconsistent with or no longer fitting the practice, properly understood. Dworkin sometimes referred to this as the "reforming" stage, but what is reformed, strictly speaking, is not the *practice*, but the participants' *performance* in the

[24] It will soon become clear that we must give no great significance to these labels.

[25] Of course, it is logically possible that two or more candidate interpretations may end up in a tie for "best," but Dworkin did not seriously consider that possibility.

practice, since the result of the interpretive process is a deeper understanding of what the practice *is* and *properly requires* of its participants. In this respect, theory drives practice; the practice is what the best interpretive theory says it is.

To forestall common misunderstandings of Dworkin's account of the dynamics of constructive interpretation several comments are in order. First, Dworkin's sting argument challenged the assumption that we can sensibly argue with each other only if there is consensus among us on the ground rules for deciding when claims are sound (Dworkin 1986, 45). Yet, he acknowledged without hesitation that consensus among participants is necessary for meaningful disagreement, even within self-critical reflective social practices. And consensus is necessary for constructive interpretation. Although there is typically no consensus with respect to interpretation of the object, there must be a substantial amount of consensus to fix the object of interpretation. For constructive interpretation to get off the ground there must be, (1) *background consensus* including a common language and enough common experience to enable participants to "recognize the sense in each other's claims, to treat these *as* claims rather than just noises" (ibid., 63); (2) *boundary consensus* marking roughly the domain of the practice (ibid., 67, 91); (3) *paradigm consensus* around what standards, activities, patterns of behavior, typical claims, and forms of argument are good examples of the practice in action when it is done right (ibid., 72, 88, 91–2); and, finally, (4) *fit consensus* about how much of the "data" an interpretation can relegate to the category of "mistakes" without losing the right to claim that it is offering an *interpretation* of the practice as opposed to advocating a different practice to be put in its place (ibid., 71; Dworkin 1985 171). Notably missing from this list of necessary forms of consensus, however, is consensus with respect to the substantive values or principles in terms of which the point of a practice is conceived and competing interpretations are assessed, for, in Dworkin's view, it is often differences with respect to those posited values or principles that account for diverging and conflicting interpretations, and disputes following from them.

It is not possible to be precise or determinate about just how wide consensus along these dimensions must be, in Dworkin's view. For many practices there may be a great deal of consensus. Yet, for practices that attract the interpretive attitude, the dynamics of interpretation resist convergence and encourage challenges of accepted views, critical reconsideration, and conscientious non-conformist behavior (Dworkin 1986, 88–9). Moreover, while interpretation must *begin* from a base of consensus in judgment (but not in theory or principle), none of the matters of consensus is privileged in the sense that it is invulnerable to challenge at the post-interpretive stage. All "data" of whatever kind is corrigible as participants' understanding of their practice deepens. Moreover, in Dworkin's view, achieving consensus is never an aim of constructive interpretation. Initial consensus that fixes the object of interpretation is sufficient to guarantee the focus of interpreters on the community's shared

practice. Constructive interpretation focuses on the meaning of the practice, not what participants mean or their understanding of the practice (ibid., 63). And from this Dworkin seems to infer that constructive interpretation must not seek to be responsive to the attempts by other participants to make sense of their practice. Herein lies the self-ascribed "protestantism" of Dworkin's view of interpretation. The distinctive attitude of law as Dworkin portrayed it is a "self-reflective attitude addressed to politics in the broadest sense. It is a protestant attitude that makes each citizen responsible for imagining what his society's public commitments to principle are, and what these commitments require in new circumstances" (ibid., 413). The interpretive attitude giving shape to constructive interpretation wherever it is practiced is a generalization of the attitude underlying law as integrity and shares its distinctive protestantism (Postema 1987c, 296–7).

Second, the role of fit in constructive interpretation is complex. If we continue to think of the dynamic process of interpretation in terms of stages, we can distinguish, again for heuristic purposes, two tasks for the criterion of fit. First, it selects from all the conceivable interpretive proposals those that are "eligible," i.e., at least minimally plausible *as* interpretations of the practice in question. The idea is that after a point, a scheme of values and principles, no matter how attractive from a normative or moral point of view, could not be taken seriously as an interpretation of the practice, because it would be forced to jettison as "mistakes" an unacceptably large portion of the practice fixed by the background consensus (Dworkin 1986, 231, 242, 255). Interpreters are committed to making this practice the best it can be, not to finding the best or even the nearest alternative to it (ibid., 255). In constructive interpretation, history and consensus do not count for everything, but they count for something, and usually something substantial. But fit, or fidelity to the history of the practice, also comes into the interpretive process at a second point. For when competing interpretive theories are compared, fidelity to the history of the practice is considered again alongside and potentially in competition with (other) evaluative or normative considerations (ibid., 231, 24–67, 257). At this point, an interpreter may be convinced that fit should be traded off for stronger evaluative appeal, but considerations of fit have their own independent evaluative appeal and can sometimes resist the pull of independent moral or evaluative considerations.

If fit is to be weighed together with evaluative or moral appeal when comparing the merits of competing interpretive schemes, then it too must represent or rest on a distinct value in its own right. No less than substantive appeal, fit reflects an evaluative or normative matter. The constraint of fit "is not the constraint of external hard fact or of interpersonal consensus. But rather the structural constraint of different kinds of principle within a system of principle" (ibid., 257). In the case of law, an interpretive theory that fits legal practice to a higher degree than a competing theory may be preferred (other

things equal) because it accords to the legal system a higher degree of integrity, showing that participants followed with reasonable consistency the principles on which it is grounded. And fit is a normative matter not only when it combines with substantive appeal as dimensions of comparison of competing eligible interpretations, but also in determination of the initial threshold of fit, in Dworkin's view. For interpretation to get off the ground there must be a substantial amount of consensus about where the threshold should be set, but this is still a normative matter. If a proposed interpretation falls below the threshold of fit, it "shows the record of the community in an irredeemably bad light, because proposing that interpretation suggests that the community has characteristically dishonored its own principles" (ibid., 257). The fit threshold is determined by the initial evaluative hypothesis of the interpretation that assigns the practice to a genre or kind of social practice. The constraint that fit imposes on substance is "the constraint of one type of political conviction on another in the overall judgment" (ibid.). In the case of law, this value has to do in part with the fact that legal practice plays important part in the life of the community; it is a practice of the polity, binding the community synchronically and diachronically. The dimension of fit, wherever it is found, is an evaluative matter, not an empirical, a metaphysical, or an evaluatively neutral conceptual matter. Interpretive claims are "dependent on aesthetic or political theory all the way down" (Dworkin 1985, 168).

Third, it is important to note that, according to Dworkin, there is a kind of interpretation at work even at the "pre-interpretive" stage (Dworkin 1986, 66). There are at least three occasions for this "pre-interpretive" interpretation. First, the "data" collected—patterns of behavior, utterances, texts, and the like—are meaningful entities. They must be *taken as* components of a meaningful, normative social practice and so regarded as already bearing some meaning (Dworkin 1985, 167; 1986, 65).[26] Second, constructive interpretation is indicated only if the practice in question supports the interpretive attitude, and, as we noticed earlier, this itself is a matter of interpretation. This is part of the critical, and inevitably evaluative, first step of the interpretive process that assigns the practice to a kind or genre. Finally, identification of the data, fixing the theoretical base for the competing interpretations is also an interpretive matter. There must be a good bit of consensus in the practice community about the matter if interpretation is to be possible (Dworkin 1986, 67), but it is still an interpretive matter, not a matter of sharing the same definition of "law"

[26] Some critics have argued that Dworkin must regard this data as utterly "raw" in the sense of being capable of bare physicalistic descriptions, upon pain of determining arbitrarily the winner of the interpretation sweepstakes at the "interpretive" level of the process (Raz 1986a, 1119; Kress 1987, 855; Postema 1987c, 300-308). Stavropoulos (1996, 128, 132-8) correctly points out that all that is necessary for genuine constructive interpretation to proceed is that the "pre-interpretive" meaning is neutral among potentially competing interpretive theories.

or criteria for identifying legal standards (ibid., 91). And at each point the interpretation involved will be in an important respect evaluative, and where the stakes are themselves moral this evaluative dimension is *moral*. Interpretation begins by identifying (or rather adopting a defeasible hypothesis regarding) the values that the social practice serves when it goes well. These values not only define the light in which the practice is seen, but also fix the interpretive base (ibid., 257).

There is an important lesson to draw from these three general comments about the dynamics of the interpretive process: The whole interpretive process, as Dworkin conceived it, is radically holistic. It may be helpful to distinguish stages of the process, but this is only a heuristic. The "stages" are better conceived of as important *components* of a dynamic, holistic process (Stavropoulos 2003, sec. 6). No stage is privileged, no components are fixed by features that are outside of the interpretive process and competing interpretations face each other *whole*.[27]

9.3.3. Can There Be a Best Theory?

With this understanding of the dynamics of constructive interpretation, as Dworkin understood it, we are in a good position to assess several lines of argument that critics have directed against it. The first criticism focuses on Dworkin's theory taken as a methodology for legal theory. Several critics have charged that, although Dworkin offered jurisprudence as constructive interpretation as an alternative to positivist methodology, in fact Dworkinian interpretation *presupposes* the positivist theory of law (and the positivist approach to constructing it) because interpretation needs "data" and so any interpretive theory of law presupposes a theory of this pre-interpretive data.[28] This line of argument represents the Dworkinian interpretation as a two-stage process. At the first stage, the theorist collects the settled law and at the second subjects it to the coherence-making protocol. The task of the first stage, they insisted, is empirical, non-evaluative, and non-interpretive (because it is *prior to* the value-loaded interpretive process), but it relies on a test, a set of criteria by which the interpretation-relevant data can be identified. Positivism, they argued, excavates *those* criteria and presents them in a compact format as a source-test of legal validity. Thus, Dworkinian interpretation, far from presenting a challenge to standard positivist doctrine, utterly depends on it, critics argue; far from

[27] In these respects, Dworkin's theory of interpretation is very similar to and probably influenced by the methodology of "reflective equilibrium" adopted by Rawls for constructing and defending his theory of justice (Rawls 1971, 20ff.). Dworkin discussed with obvious appreciation Rawls's methodology in *Taking Rights Seriously* (Dworkin 1978, chap. 6).

[28] See, e.g., Hart 1987, 36 and Hart 1994, 266; Burton 1987, 109-29**;** Gavison 1987b, 30-31; Raz 1986a, 1119; Schauer 1996, 43.

supplanting positivism, interpretive theories of law merely supplement them with a controversial theory of adjudication.[29]

This criticism and the picture of interpretive jurisprudence it sketches can be dismissed easily. As we have seen, as Dworkin conceived of the process of constructive interpretation, determination of the interpretive base is not a task external to the process of interpretation, but a dimension of interpretation itself; the requirement of fit is not an external, empirical issue, but a matter of principle alongside other matters of principle; and the consensus without which it would not be possible to identify the object of interpretation, is consensus with regard to concrete decisions, rules, activities, to paradigmatic components of the practice, a matter of agreement *in concrete judgments* among participants, but not consensus with respect to *criteria of identification*, i.e., not with regard to what it is that makes the various decisions, rules, and activities law. Any account of the practice of law along positivist lines would have to work from a similar base of data and matters of agreement in judgment, and offer an interpretive theory of this data, in Dworkin's view; it can be no less interpretive of this data (although it may approach the task of interpretation in a different way) (Simmonds 1987, 468). Thus, as Dworkin saw it, positivism is a *rival to*, not a necessary *presupposition of*, constructive interpretation. Moreover, in Dworkin's picture, the status of items collected to comprise the base is corrigible, vulnerable to challenge within the interpretive process and ruled "mistakes." Rival interpretive theories meet as whole theories, not after their eligibility as interpretations of the practice in question has been certified by some non-evaluative, interpretation-independent test, and they compete on the basis of the complex measure of fit and (non-fit) substantive (i.e., moral) appeal.

So, Dworkin's theory of interpretation as applied to jurisprudence is not vulnerable to this criticism, but for that very reason it is vulnerable to two others. One problem, critics argued, is that by making the issue of fit and the determination of the interpretive base matters internal to interpretation, Dworkin made it impossible to fund the distinction, essential to his theory of interpretation and especially his theory of law, between *interpreting* a practice and *inventing* or imagining a new one (Marmor 1992, 74–84). In Dworkin's defense it might be said that a significant distinction between interpreting and inventing can be funded, provided the notion of fit rests on a principle that is, while no less normative, still sharply *distinct* from the other normative considerations that make up the dimension of substantive appeal. So, Dworkin's ability effectively to answer this criticism with respect to its application to his theory of law

[29] Raz (1995, 301–3) offered a generic formulation of this picture of law which he called "Adjudicative Coherence"; however, he also recognized a more radical version, "law as coherence," which incorporates identification of the interpretive base into the coherence test itself (ibid., 295–6). He hesitated to attribute this to Dworkin, because he was not sure how deeply Dworkin was committed to a strong notion of coherence (ibid., 319–25).

depends on the intelligibility of the principle of integrity. We will explore this issue below in section 5. Another problem positivist critics alleged is familiar from our study of Raz's theory of law. Raz argued that views like Dworkin's fail because they are unable to explain the authoritative nature of law (Raz 1995a, 299–301). This challenge brings us back to the point noted earlier in section 3.2.2: Raz and Dworkin develop their theories from sharply opposed "paradigms." The question we posed there arises again: Is it possible to conceive of a theoretical framework that can do reasonable justice to both paradigms? Because partisans of Raz's and of Dworkin's approaches have been keen to present the theories as exclusive rivals they have not explored the possibility of integrating them into a single, more complex and nuanced theory.

A second major line of criticism of Dworkin's theory of interpretation focuses on the notions of the "best theory" and of showing a practice in its "best light" that lie at the heart of that theory. One might ask: Why is it not sufficient to aim at an illuminating or interesting interpretation (Marmor 1992, 52–3; Waluchow 1994, 26)? And even if we seek the "best interpretation" why think it must be "morally best" (Marmor 1992, 57; Kramer 1999, 183–4)? One might think that the objection betrays a failure to understand the interpretive project and what is at stake where law is the object of interpretation. We look to interpretation to enable us to answer questions about the grounds of true propositions of law, Dworkin argued. These questions are pressing because the propositions of law are put forward to resolve pressing legal issues where stakes invariably are significant and moral. "Lawsuits matter," Dworkin wrote opening *Law's Empire*, because "there is inevitably a moral dimension to an action at law, and so a standing risk of a distinct form of public injustice" (Dworkin 1986, 1). Where these are the stakes, to settle for a merely interesting or even illuminating reading of the law would be irresponsible, or betray a failure to understand the reason for engaging in the interpretive enterprise. Any interpretation that lays claim to being the best will have to attribute a value to the practice of law that gives some reason to regard as legitimate things done under the color of law, things that are of obvious moral concern. So, if we are to take this objection seriously, I should think, we need to see it as a more fundamental challenge to the interpretive enterprise, an expression of the Archimedean ambition. Whether Dworkin has a satisfactory response to the challenge, then, depends on whether his criticism of the Archimedean ambition is persuasive.

However, the challenge to the notion of a best theory can be put in more radical terms. It might be argued, for example, that the notion is incoherent. In one form, this challenge rests on moral skepticism.[30] The idea of a best in-

[30] See, for example, Mackie 1983, 165. Also some of the most heated criticism coming from various quarters of Critical Legal Studies may rest on this kind of moral skepticism (see above chap. 6, sec. 6.3.3). For a helpful extended discussion of the Critical Legal Theorists' challenge to Dworkin, see Altman (1990, chap. 3).

terpretive theory of law, for example, envisions a comparison of rival theories ranked according to their relative merits where the standards are at bottom principles of political morality. However, the objection goes, there is no rational basis for resolving disputes on matters of political morality because political morality has no rational basis. Hence, the notion of a "best" theory has no coherent content. This criticism, in all likelihood, issues from a general form of what Dworkin called "external skepticism" (1986, 78-86), which, for all its professed skepticism, embraces wholeheartedly the Archimedean ambition of standing above the substantive domain of practical, and especially moral, argument to pronounce upon its objectivity or lack of it. As such, again, it is a threat to Dworkin's enterprise only to the extent that his general critique of the Archimedean ambition fails.[31]

There is also a less radical and more interesting form of the challenge to the coherence of the notion of a best theory. This notion is coherent, it is argued, only if the dimensions in terms of which rival theories are ranked are in principle *commensurable*, but this assumption of commensurability may turn out to be false (Mackie 1983, 165; Finnis 1987, 371–6).[32] First, the dimension of fit may not be commensurable with that of substantive appeal. This would especially be true if fit were conceived of as a fixed empirical constraint on interpretation. We have seen that this was not Dworkin's view, but the problem may still remain if we treat the value-dimension of fit (e.g., integrity, in the case of law) as one principle among others. Thus, second, it may turn out that the principles within a given interpretive theory are not commensurable. Or, third, the principles at the core of one interpretive theory of a practice might not be commensurable with those on which a rival theory is built. In either of these last two cases incommensurability of principles makes it impossible to say which rival theory is best, it is argued, since that presupposes some minimal degree of commensurability. In the absence of commensurability, it may be possible to eliminate some rival theories as nonstarters, but beyond that there may be no rational basis for ranking one theory over another (or, what is no less a problem, different bases may yield different rankings). This criticism, unlike its more radical counterpart, does not rest on any general moral skepticism. It is accepts the rational credibility and even objectivity of many moral judgments; it merely points out that there are at least some fundamentally distinct dimensions of moral value or principle such that there is no rational basis for trading off one value for another. This limited form of skepticism is entirely internal to the moral enterprise. Any claim of incommensurability between two or more values or principles would have to be argued as a matter of sub-

[31] For his extended brief against external skepticism, see Dworkin 1996c.

[32] For a serious attempt to incorporate recognition of deep incommensurability of values into a theory of legal reasoning, see the discussion of Finnis's neo-natural law theory (below, chap. 12, sec. 12.3).

stantive moral theory. To this charge Dworkin's only response was to concede that his account assumes that the important values and principles invoked by interpretation of legal practice are not likely to be incommensurable (Dworkin 1983, 272). It remains an important question of moral philosophy whether Dworkin's assumption is warranted.

9.4. Law as Integrity

Dworkin drew the sting that, in his view, poisoned the positivist approach to philosophical understanding of law and replaced that approach with the method of constructive interpretation. Law, he argued, must be conceived of as an interpretive concept, and legal practice must be regarded as supporting the distinctive interpretive attitude, because only so conceived can we give adequate account of law's essentially argumentative character. Jurisprudence is properly pursued as an interpretive enterprise, he insisted, and he offered his theory of law—once called "the rights thesis," but later, "law as integrity"—in the mode of an interpretive theory. We are now in a position to understand Dworkin's proposal.

9.4.1. An Interpretive Plateau

The task of an interpretive theory of law, according to Dworkin, is to offer a philosophical account—that is, a relatively abstract interpretive theory—of the grounds of propositions of law. Propositions of law might include the following: "[P]laintiffs have a right to damages for emotional injury caused by defendant's negligence," and "to deny same-sex couples the right to marry is a violation of the constitutional guarantee of equal protection of the laws," or "the government must release plaintiffs from unlawful detention immediately." Such propositions can be found anywhere on the spectrum from the very specific to the very general. Sometimes they appear as conclusions of legal argument, sometimes as premises, but lawyers and judges typically regard them as vulnerable to challenge, and challenges are met with further reasons and arguments. They are uttered and grasped publicly with the understanding that their credibility or authority as propositions of law depends on the strength of the case that can be made for them. The reasons validly used to make that case constitute the grounds of those propositions. The core of a philosophical theory of law, according to Dworkin, offers a very general theory of these grounds of propositions of law and only an interpretive theory will suffice. Because law is an argumentative practice, an interpretive theory of that practice must account for the foundations of this argumentative and inferential structure. Because it is a philosophical theory, it will be very general, focusing not on any particular jurisdiction, but on features of this kind of practice wherever it is found.

The interpretive task is structured about the question: What set of principles and values does this practice fundamentally serve—that is, what good or value does law serve when it goes well? But it leaves open the possibility that the best answer to this question, at the end of the interpretive inquiry, is *none at all*, or at least none sufficient to sustain the initial hypothesis that the practice generates genuine rights, duties, and reasons for action. To clarify this question we need to introduce two further structuring ideas. These will establish a plateau from which we can best view rival interpretive theories of law.

First, we need to keep in mind the distinction between the *grounds* of law and the practical or moral *force* of law (and their respective theories) (Dworkin 1986, 108–12). An interpretive theory of law offers a general account of the grounds of propositions of law. It works on the defeasible hypothesis that the legal practice in view lies in the normal range, and that normal-range judgments of legal rights and duties have a certain degree of moral force. That is, they provide a *pro tanto* moral basis for acting as prescribed or permitted. A theory of the grounds of law, however, does not address the question of what moral or practical force such propositions of law actually have; that is the domain of the theory of the force of law. A theory of the grounds of law offers an account of what fidelity to law involves—what an official or citizen should do if she were intent on acting in fidelity to law—but it is silent about the circumstances under which acting in fidelity to law is morally justified all things considered and about what to do when it is not. If the defeasible assumption of the inquiry into the grounds of law ultimately proves to be unfounded, then it follows not merely that any reason there may normally be to comply with the law is overridden, but that there is no reason to comply at all, as far as the law itself is concerned. (There may be prudential or religious or other moral reasons not to act against what the law allegedly requires, but no reasons having to do with the fact that the law requires the behavior in question.) This distinction, it appears, is not the private property of positivist theory; it is part of the theoretical commons on which Dworkin's interpretive theory draws as well. Thus, Dworkin agreed with positivists that from the fact that law claims to require behavior of some sort it does not follow that one has conclusive reason to behave in that way; and he even agreed that it is possible that strictly speaking there may be no reason at all to comply with the law. Moreover, an interpretive theory of the grounds of law does not settle questions of fidelity to law for law-applying officials. So, Dworkin, like the positivists, can distinguish between a theory of (the grounds of) law and a theory of adjudication understood as a theory of how judges ought to decide all things considered.

Second, Dworkin held that the initial interpretive question—what value does the legal practice serve?—is given structure by what he took to be broad consensus around an abstract formulation of an answer. "The abstract and fundamental point of legal practice is to guide and constrain the power of government" in a special way—that is, law purports to offer resources for the justification of

the use of collective power by government and these resources are restricted to the "individual rights and responsibilities flowing from past political decisions about when collective force is justified" (Dworkin 1986, 93). If Dworkin was right, it is common ground that "the law of a community [...] is the scheme of rights and responsibilities that [...] license coercion because they flow from past decisions" (ibid.). This allegedly common ground assumption has four elements: When it is going well, law (a) offers a framework for public justification (b) of governmental exercise of power (c) in defense or in the name of rights and responsibilities (d) flowing from past political decisions of the community.

This abstract understanding, according to Dworkin, provides a "plateau of rough consensus" about the point of law (Dworkin 1986, 108f.) and directly brings to bear considerations of political morality on our attempt to understand law, because interpretive theories are set the task of exploring what, if anything, could substantiate this claim to justify government's use of law-sanctioned coercion. However, Dworkin must admit that, like all matters of "pre-interpretive" consensus, this plateau of agreement is not a theoretical fixed point. It is vulnerable to challenge. Upon further inquiry, it may turn out that law does not or cannot adequately serve this end, even when it is going well. Or, perhaps, it does not do so with respect to the end here articulated—perhaps it can be seen as offering justification for coercion, but not in terms of individual rights, or at least not such as flow from past decisions, or perhaps not exclusively coercion by government acting as the agent of the community as a whole. We may be persuaded by the theory offering the most powerful combination of fit and appeal to abandon this abstract understanding, even if it is deep and widely shared. General theories of law, we learned earlier, must be assessed in their entirety. Nevertheless, this abstract understanding, despite its corrigibility, provides a structure and starting point for our interpretive inquiry, one that Dworkin himself never seriously questioned.

We can conclude, then, that Dworkin's interpretive jurisprudence is structured by two key assumptions: (1) that law is a self-reflective and argumentative practice (see above sec. 9.3.2.2), and (2) that its fundamental point can be put abstractly in terms of offering a framework for public justification of governmental exercise of power in protection or promotion of rights flowing from past political decisions of the community.

9.4.2. Conventionalism: A Challenger in Interpretive Clothing

Dworkin maintained that legal theories are best understood as interpretive theories of law that "begin in some broad thesis about whether and why past political decisions do provide such a justification, and this thesis then provides a unifying structure for the conception as a whole" (Dworkin 1986, 109, 96; 1987, 15). This, Dworkin held, is entirely in line with the way traditional jurisprudential theories have proceeded, before the ambition to provide semantic

or "sociological" theories took hold of analytic jurisprudence (Dworkin 1983, 251–2, 256). Indeed, it is possible to recast contemporary versions of these traditional theories as interpretive theories addressed to the above structuring question. As foils for the development of his preferred theory of law, in *Law's Empire* Dworkin dressed two rival theories of law in interpretive garb. One he called "pragmatism" and the other "conventionalism." The former recalls, albeit vaguely, American legal realism, especially in its recent incarnations (see above chap. 5, sec. 5.5 and chap. 6, sec. 6.3). He offered the latter as an interpretive version of legal positivism. For our purposes, it will suffice to consider Dworkin's discussion of conventionalism.[33]

As Dworkin defined it, conventionalism is exclusive positivism[34] *recast* as an interpretive theory of law. In articulating this theory, he made no pretense of giving a faithful exposition of the work of any actual positivist philosopher, contemporary or historical. Interpretive jurisprudence, in Dworkin's view, provides the tools for a revitalized debate about fundamental issues in jurisprudence, so he offered an articulation—an interpretation—of positivism as an interpretive theory. The aim of this exercise was to capture the appeal of positivist theory, but not necessarily the nuanced views of any actual positivist.

According to positivism recast as conventionalism, law is a structure of rules and norms that can be identified and their content understood without controversy by appeal to widely accepted conventions. The boundaries of legal rights are thought to be determined strictly by these conventionally identified norms. Legal reasoning, strictly speaking, is portrayed as reasoning to and about these rules, but judges are empowered to decide cases that fall outside the agreed-upon and undisputed explicit scope of these rules. In those cases, they exercise discretion, bound only to decide on their best judgment of what justice and social policy require, keeping in mind the need for degree of consistency of governmental actions over time. The resulting decisions establish new, conventionally validated rules. In short, on this view, the law is that set of normative propositions identified without dispute by equally undisputed conventional ground rules.

On this interpretation legal practice is *not itself* interpretive, but rather more closely resembles games like chess, i.e., practices structured by rules that are taken by participants to be "true by convention" and so not sensitive to their underlying point or rationale. Still, this practice *has* a rationale and that rationale is given shape by the abstract frame that law purports to justify official uses of coercion by grounding them in individual rights drawn from past decisions of the community. Conventionalism gives relatively concrete content to

[33] Note, Dworkin's use of the "conventionalism" label is idiosyncratic and the theory to which he applied it should not be confused with the varieties of jurisprudential conventionalism discussed in Chapter 11 below.

[34] See chap. 8, secs. 8.3.4 and 8.4 above and chap. 10, sec. 10.1.4 below.

this abstract frame. The underlying aim of law, on this interpretation, is to hold government decisions to the explicit rules enacted or established in the past, in order to give "fair warning" to citizens of the official use of coercion. "Past political decisions justify coercion because, and therefore only when, they give fair warning by making the occasions of coercion depend on plain facts available to all rather than on fresh judgments of political morality" (Dworkin 1986, 117). Thus, conventionalism explains how law might be taken to justify its use of coercion through appealing to established rules, by showing how in doing so it serves "the ideal of protected expectations" (ibid.). This ideal calls for a kind of "bilateralism" with regard to the matter of deriving legal rights from past political acts of the community. If the established rules clearly and explicitly support a decision in favor of the plaintiff, then the plaintiff has a legal right to such a decision, and if the rules rather support a decision in the defendant's favor, the defendant has the right; but if the rules are contested and so yield no uncontroversial propositions favoring one party or the other, then law is silent, no legal rights can be drawn from the past political decisions of the community, and the judge is authorized to decide the dispute between the parties by his or her best judgment of the overall moral merits of the case. "If convention is silent there is no law, and [...] judges should not then pretend that their decisions flow in some other way from what has already been decided" (Dworkin 1986, 118). This is, very broadly speaking, (exclusive) positivism in the service of predictability and fairness (in the sense of respect for legitimate expectations).

Dworkin thought that this reconstruction gives a good account of what makes positivism appealing, but he argued that, nevertheless, it fails as an understanding of the nature of law. It fails because it does not fit existing legal practice and because it does not offer a morally compelling account of how law might justify the official use of coercion. (Notice that these are precisely the two standards by which competing interpretations of practice are measured in Dworkin's theory of interpretation.) The account fails to fit legal practice, in Dworkin's view, for two main reasons. First, it assumes that there are conventions that constitute the ground rules for identification of law, but, as we have seen, Dworkin insisted that there are no such conventions; that is, the criteria identifying and validating rules of law are often contested (Dworkin 1986, 121–2). This is yet another use of the now familiar argument from controversy (see above secs. 9.2.2 and 9.2.3). Of course, we might think of the "conventions" in question not as uncontested rules, but as practices open to dispute and argument, but, he argued, the only way to understand these more open "conventions" is as interpretive practices, and hence any "conventionalism" of this sort will collapse into a theory of law closely akin to his own theory, law as integrity (Dworkin 1986, 125–8).[35] Moreover, conventionalism

[35] Similarly, Dworkin held that "inclusive" positivism, to the extent that it can be made out as an intelligible theory of law, is just an inferior variation of his own theory.

fails to explain the clear fact that when the explicit law runs out, judges persist in trying to work out what the existing statutory and case-law materials commit them to, even when there is disagreement, seeking to articulate and defend the "correct" reading of these materials in the face of and in answer to this disagreement (ibid., 130–1). When they discover that whatever avenue they explore is likely to provoke opposition from other competent lawyers, judges do not stop trying to work out the law's answer to the legal problem posed by the cases presented to them; rather, they try to uncover the principles on which the agreed-upon rules and norms rest and they think that doing so is critical to determining what the law requires, not merely what they think would be a good solution to the problem starting from scratch, as it were. Conventionalism, he concluded, fails to fit familiar legal practice.

Conventionalism also fails to articulate a morally compelling ground for government's use of coercion. It locates this moral ground in rights flowing from past decisions and those rights, in turn, in the moral concern of fairness, where the notion of fairness deployed is understood simply in terms of avoiding surprise and respecting expectations. However, surprise is not always unfair and upsetting expectations not always a morally bad thing, Dworkin (1986, 140–4) observed. Moreover, we might better protect against unfair surprise by the simpler regime of "unilateralism" which provides that if there is a clear rule that explicitly favors the plaintiff, then the plaintiff wins, otherwise the defendant wins. In this adjudicative regime, the status quo would be preserved unless some rule explicitly and uncontroversially requires otherwise (ibid., 142). More fundamental, in Dworkin's view, is the failure of conventionalism to appreciate the moral significance of the community's principled commitments represented in its past decisions. A morally attractive community, in his view, is one that regards itself as bound not just to explicit rules, but to deeper principles regarded by its members as expressions of their common aspiration to justice. It is this moral notion—the notion of *integrity*—that gives a better accounting of the moral pretense of law to justify present governmental actions in commitments of the community undertaken in the past.

Thus, as Dworkin sees it, conventionalism fails as an interpretive theory of law, and its most serious weaknesses point us in the direction of an alternative theory, a theory that takes legal practice *itself* to be an essentially interpretive practice and that takes the moral notion of *integrity* as the ultimate focus of its interpretive and argumentative efforts.

9.4.3. Law's Integrity

Dworkin's entry in the interpretive jurisprudence sweepstakes is the view he called "law as integrity." The moral notion of integrity, which Dworkin understood as an important value of political morality, gives content to the abstract notion that present official or private actions are warranted by principles de-

rived from past decisions. It explains how past political decisions yield present practical directives. Integrity also offers a rationale for law's alleged capacity to justify government action by linking law's project, understood in terms of integrity, to more fundamental values of political morality. That is, it purports to show why such directives are normative for officials and citizens. So integrity claims to be more than merely a method or technique of practical reasoning specially adapted to law's distinctive task. It also claims to be a substantive value of political morality. Although distinct from other political values, it takes its moral focus and force from the service it renders to more fundamental values, in particular justice and fidelity.

9.4.3.1. Political Responsibility, Justice, and Integrity

In *Taking Rights Seriously*, Dworkin rooted his Rights Thesis in "the doctrine of political responsibility" (Dworkin 1978, 87, 105), according to which "officials who exercise power over other men [...] have a responsibility to fit the particular judgments on which they act into a coherent program of action" (ibid., 160). As a matter of fairness, officials are bound to act only "on the basis of a general public theory that will constrain them to consistency, provide a public standard for testing or debating or predicting what they do" (ibid., 162). Officials are required to act in a principled and coherent manner, extending to everyone in the community the standards of justice and fairness it uses for some (Dworkin 1986, 165). In *Law's Empire*, Dworkin drew an analogy between this consistency of principle as a political virtue and the consistency of action and conviction we associate with the personal virtue of integrity. He presented integrity in this new guise as a virtue of legal officials and their regular practice, and ultimately as a virtue of a certain kind of community (ibid., 211–4).

Integrity, Dworkin argued, is an independent value of political morality, distinct from justice and fairness (ibid., 176–84). This is evident from the fact that these values can conflict and in some cases it is right for integrity to prevail, while in other cases the injustice of the course recommended by integrity may be great enough to override its moral claim. Yet, justice, fairness, and integrity are closely related on a deeper level. Integrity makes sense only among people who want fairness and justice as well (ibid., 263). Integrity is an important political value for people "united in community though divided in project, interest, and conviction" (ibid., 413). The "circumstances of integrity" are conditions that make possible and define the practical task of integrity (Waldron 1999b, chap. 9). Among those conditions we find the following. First, people bound to integrity's quest live together in a community with some degree of unity. Second, members correctly regard it as appropriate to expect, indeed to demand, justice of their institutions and arrangements. Third, members disagree about what justice requires of them and their institutions. Thus, from the perspective of at least some members, existing institutions to some degree fail

to meet standards of justice. Not only are standards of justice contested, but so too are important institutions and arrangements in the community, and the resulting disagreement is formulated in terms of contested principles of justice. Yet, fourth, most members do not believe that the injustice is so extreme that they have no moral reason to seek to preserve the community or to work for justice in it. Finally, while the multiplicity and diversity of convictions of justice have their disparate effects on the community's institutions, these institutions are not regarded by members as irremediably chaotic.

This is the soil into which integrity sends its roots. Integrity has an intelligible social role and moral force where justice is both feasible and in dispute. Where justice is no longer worth seeking, or is unfeasible, or where the claims of justice are clear to all members of the community, there integrity no longer has a mission. But where the circumstances of integrity obtain, integrity charges citizens with forging and acting on a coherent, common vision of justice. They must practice politics with an eye fixed on the ideal of justice. As Waldron observed, integrity is

> a value whose job it is to come into play when the place properly assigned to justice in the life of a community—the role of determining a proper distribution of rights and duties, burdens and benefits, etc.—turns out to have been filled by disparate and competing conceptions of justice itself. (Waldron 1999b, 198)

In such circumstances, people demand that they and others be treated justly, but they also recognize that there are deep divisions in their own community over what justice requires. In such a justice-oriented community, people demand at least that those who exercise power on behalf of the community act conscientiously in the name of justice. They demand that their officials act consistently out of a coherent set of recognizable principles of justice that are arguably principles to which the community is committed as its members seek to do and establish justice in their community, even when they are divided about what justice requires (Dworkin 1986, 166).

On Dworkin's view, the moral value of integrity, like the values of justice and fairness, is grounded in a deeper moral concern: equality—the fundament of political morality, in Dworkin's view. The fundamental requirement of society and its agents in positions of political power is to treat each citizen *as an equal*. The special kind of consistency of principle demanded by integrity is, according to Dworkin, an expression of this more fundamental requirement of equality; it is the form that equal treatment takes in communities divided in interest and conviction but bound together by institutions of law that persist over time and that record the community's patterns of treatment of its members. Law is, in a way, the political memory of a community, the moral record of its members' common life. A community of principle demonstrates its commitment to the treatment of each member as an equal by *striving* for justice, but *insisting* always on integrity in this striving.

9.4.3.2. Law as Integrity

Law as integrity maintains that law can claim that official exercises of political power are justified by appeal to principles drawn from past political decisions when and just insofar as law is governed by the demands of integrity. Integrity demands that officials—for simplicity here let us focus only on judges—endorse and enforce government actions only if they can do so on the basis of a coherent scheme of principles of justice drawn from the practice of the community as a whole as recorded in its settled law—decisions, statutes, constitutions, regulations and the like. According to law as integrity, the best interpretation of legal practice is one that regards law itself as interpretive, and legal argument is best seen as an exercise in constructive interpretation of local legal practice (Dworkin 1986, 225). "Law as integrity [...] is both the product of and the inspiration for comprehensive interpretation of legal practice. The program it holds out to judges deciding hard cases is essentially, not just contingently, interpretive" (ibid., 226). Legal argument is interpretive, because the law serves and is governed by the demands of integrity.[36]

On this view, judges are bound to regard past decisions and settled rules as if they issued from a single author, and to construct a coherent scheme of moral-political principles that best explains and justifies this body of legal materials. The methodology of constructive interpretation is deployed, now for the purpose of determining what the law of the judge-interpreter's local jurisdiction is and what it requires for the concrete case she faces. So viewed, local legal practice is an unfolding political narrative to which judges and other legal officials constantly contribute, but always on the basis of an interpretive grasp of the narrative up to the present point of their deliberations (ibid., 225, 228–54). In their neighborhoods of the vast legal cityscape, judges and lawyers construct serviceable interpretive theories of the practice, and from this base mount arguments in behalf of important propositions of law that are needed to resolve issues of law raised in litigation. Practical demands of time, energy, and ability may keep their interpretive eyes focused sharply on the matters at hand; yet, their arguments are always vulnerable to "justificatory ascent"—the potential challenge to look around the next doctrinal corner and test the consistency and coherence of their conclusions and the arguments for them with wider legal principles, doctrines, and developments (Dworkin 2006, 52). This vulnerability is a direct consequence of the demand of integrity, which calls on officials to act conscientiously from a coherent scheme of principles of justice drawn from the law as a whole. Of course, only a superhuman judge—Dworkin's famed Hercules—could carry off this project for the legal system as a

[36] Notoriously, Dworkin wrote, "jurisprudence is the general part of adjudication, silent prologue to any decision of law" (Dworkin 1986, 90); however, it is law as integrity, Dworkin's preferred version of interpretive jurisprudence, not the method of interpretive jurisprudence itself, that treats legal theory as continuous with adjudication (ibid., 410).

whole, yet Hercules just represents the limit of the demand for justificatory ascent to which all those participating in legal argument are subject (ibid., 54).[37]

Legal argument, then, amounts to offering competing interpretations of relevant corners of the practice of some jurisdiction, subject to demands to take an even broader view from time to time. "Interpretations struggle side by side with litigants before the bar," Dworkin (1986, 87) insisted. These interpretations seek to put the practice in its best light; so, the relative success of arguments drawn from them is measured by the combined standards of fit and substantive appeal. Interpreters must appeal to considerations of political morality to do this job, because the requirements of fit as well as the measures of substantive appeal are drawn from substantive political theory. Yet, the entire process is in service of constructing and defending not private visions of the good society, but public visions of the principles to which the community is committed through its history and conscientious practice. Legal requirements can always be distinguished from (non-legal) moral requirements, because the legal requirements follow from the best interpretive theory of the community's history of political decisions, as required by its fundamental commitment to integrity. Legal obligations and rights are always in that crucial respect "institutional" (Dworkin 1978, 101–6), a function of *history and morality* (although it is history that has relevance for law just because it has moral significance).

We can now generalize this picture of interpretive legal argument and identify Dworkin's preferred account of the grounds of law. "According to law as integrity," he wrote, "propositions of law are true if they figure in or follow from the principles of justice, fairness and procedural due process that provide the best constructive interpretation of the community's legal practice" (Dworkin 1986, 225). "The law—the rights and duties that flow from past collective decisions and for that reason license or require coercion—contains not only the narrow explicit content of these decisions but also, more broadly, the scheme of principles necessary to justify them" (ibid., 227). The law of a community includes more than merely the agreed-upon and settled rules and decisions, the "explicit extension" of the law; it also includes its "implicit extension" (ibid., 123), the principles, rights, and duties that follow from the best interpretive theory of the community's legal practice, whether or not they are widely recognized and whether or not it is controversial which interpretive theory is the best. Moreover, even matters of settled law, when viewed from the perspective of the best interpretive theory of the community's practice, may

[37] It is a mistake, however, to think of Hercules as the jurisprudential analogue of the Ideal Observer in moral philosophy (Waluchow 1994, 46). There is no perspective from which the whole of the law is seen and the true grounds of law identified in some way other than the way in which all ordinary lawyers, judges, and others must seek to uncover them, namely, through painstaking argument that has the structure of constructive interpretation. Hercules deploys the same tools, modes of inquiry, and perceptive equipment as ordinary lawyers or judges; he just has more time, energy, and intellectual capacity (and much less interesting social life) than they do.

turn out to be *mistakes*, ripe for overruling or distinguishing into oblivion, or at least very narrowly interpreted and restricted to their "enactment force," no longer allowed to exert any further gravitational force on other parts of the law (Dworkin 1978, 111).

Thus, the truth of propositions of law, and the legal status of principles or norms, according to law as integrity, are not determined ultimately by consensus and meeting some normatively-neutral pedigree test. They are a function of membership in the best interpretive theory of the legal practice, and that can often be controversial and is always inevitably a complex function of background considerations of political morality. Despite its strong emphasis on the practice-embedded character of legal principles and propositions of law, law as integrity represents a strong departure from all forms of positivism. By the same token, this same emphasis on the practice-embedded character of legal principles distinguishes it from many versions of natural-law theory, in Dworkin's view at least. It is, he insisted, a "third theory," anti-positivist in heart and soul, but unwilling to convert to the natural-law faith.

9.4.3.3. The Problem of the Wicked Legal System

However, in the eyes of critics, Dworkin did not put enough distance between law as integrity and traditional natural-law jurisprudence; it is committed, they argued, to the same Augustinian absurdity—*lex iniusta non est lex*—that has plagued natural-law theories from the beginning. Indeed, Dworkin accepts the Augustinian thought (expressed in the interpretive mode), but he rejects the charge of absurdity. To see why, we need to distinguish two cases, two versions of the problem of the wicked legal system (Dworkin 1983, 257–8; 1987, 20).

Imagine first the *corrupt* legal system. Its moral corruption goes very deep and infects in various ways many parts of the legal system. Its victims, and those who can speak for them, cry out for reform. Faced with such a practice, lawyers, judges, or citizens seek to determine what requirements, if any, this practice imposes on them and those for whom they are responsible. Law as integrity counsels them to construct an interpretive theory of the practice as a whole, which involves identifying a set of principles with plausible moral credentials that provides the root of a theory of this practice. This theory must "fit" the known facts and paradigms of the practice to a sufficient degree and present the practice in its best moral light. This is the task of *identifying* the (genuine moral) rights and obligations that arise from the facts of this ongoing practice. In this first case, we assume that this can be done, that there is a "best theory" of this practice. The legal system does not come out of this interpretive process a spit-polished moral paragon; indeed, moral and political philosophers may join political activists to denounce many of it elements and to call for wide and deep reforms. Yet, it makes sense to think of a *pro tanto* obligation of citizens to comply with the requirements of the law and of of-

ficials to apply, enforce, and protect it. The theory *identifies* the genuine rights and obligations of the practice, and thereby determines *what* is involved in acting in fidelity to this law; however, the question of the moral force of these requirements remains open. We must still ask *whether* and to what extent fidelity to this law is morally incumbent on citizens or officials. This, Dworkin insisted, is a question of general moral-political theory, and, in view of the apparent corruption of the legal system, conscientious reflection on this question may yield the answer that the moral force of the requirements of this practice is really quite limited. It generates *pro tanto* obligations, but they can be defeated by competing moral concerns with relative ease. In this case, the law may be morally corrupt, but we have no basis for saying it is not law.

Now consider the *thoroughly evil* legal system. Again, the corruption and evil of the practice may be evident to many, observers and participants alike, but those who are governed by it and working within it must ask what obligations and rights it generates. Following Dworkin's counsel, they seek to construct the best theory of this practice. However, in this case, we may imagine that no such theory is possible. That is, every attempt to come up with a set of principles that might serve to frame a rationale for the practice fails utterly, either because the principles cannot begin to "fit" the practice (unacceptably large portions of the law would have to be declared inconsistent with its alleged underlying principles) or because the "principles" that are considered fail to offer even a minimally credible moral rationale for the practice. Extended, conscientious efforts directed to constructing an adequate interpretive theory of the practice, and so *identifying* its requirements, repeatedly run aground. The defeasible assumption adopted at the beginning of the interpretive process that the consensus examples and paradigms of the practice could be explained in terms of some credible moral point or purpose must now be abandoned. Skepticism is the only reasonably defensible option. From this it follows, as Dworkin clearly acknowledged, that this legal practice, in view of its evil, yields *no* normative requirements on citizens or officials (not just defeated *pro tanto* ones). The appearance of doing so, through the exercise of attempted interpretation, has been shown to be an illusion. This *lex iniusta*, it turns out, is not law—or put less paradoxically, what appeared to be law turns out, on closer inspection, not to be law at all. Of course, for *some* purposes we might still find it useful and not misleading to talk about it as law, knowing, of course, that it is the superficial phenomena we have in mind. With this understanding, we can say without paradox that in this case "what is law provides no warrant for a judicial decision" (Dworkin 1987, 18).

This, as I see it, is basically Dworkin's solution to the problem of the wicked legal system. However, it is not exactly how he puts his solution (Dworkin 1986, 101–8; 1987, 16–20), and his language compromises his position. He says that we can purge the absurdity from the Augustinian thought by recognizing the flexibility of our language about law. There are two senses of "law," he

conceded; one is the sense we use at the *pre-interpretive* stage of our thinking about law, and the other we use at the *post-interpretive* stage. We can say, using its post-interpretive sense, that it just is not law; but we can make the same point in pre-interpretive language by saying that this law provides absolutely no warrant for any judicial decision, no basis for citizens' obligations or claims of right (Dworkin 1987, 18). This way of putting things struck many positivist critics as a transparent shell game (Waluchow 1994, 60–4). They plausibly insisted that "law" is univocal in meaning, and with that meaning in mind held that it is impossible to make the Augustinian thought intelligible. Dworkin also sometimes distinguished different points of view—from the point of view of the participant in the thoroughly evil (unlike the corrupt) practice, there is no law at all, but from the detached or observer's perspective, it is evil *law* (Dworkin 1986, 106–7). This is much more to the liking of the positivists; indeed, it is a capitulation to the positivist view inspired by Hart. Or at the very least, it offers the critic the option of arguing that positivist legal theory merely seeks to give a theoretical account of law from this observer's point of view. This domesticates Dworkin's challenge, but it does so by making it seem that his jurisprudential project is merely *different from* rather than a *rival to* the standard positivist enterprise. This, again, is not a happy outcome for Dworkin and misrepresents the force of his challenge.

Dworkin may not be able to escape these criticisms ultimately, but it may be possible to blunt their initial impact. His mistake was to think of the distinction between the pre-interpretive and post-interpretive as a distinction of senses of "law" or of perspectives on the practice. More plausible, to my eye, is to see it as distinguishing *stages* in a process of understanding and appreciating an existing social practice. It is not a matter of inside or outside, committed or detached, participant or observer, but rather of before and after, or maybe surface and depth. The pre-interpretive is a relatively superficial view of the practice that registers broad agreement about its major features—examples, paradigms, abstract beliefs about it and its significance—and at that level acknowledges certain similarities with practices elsewhere, historical analogues, and the like. It also assumes (perhaps naïvely) that, as in "normal circumstances," practices with such features tend to have some moral point, and in virtue of serving that point reasonably well tend to have some degree of moral significance. Perhaps none of this takes shape in a theory, or even in an entire set of explicit and articulated propositions—it is not external to the practice but rather *pre-theoretical*. Dworkin's proposal is that jurisprudential theorizing begins with this "data," the same stuff with which positivist theorizing begins. Positivism offers an account (interpretation) of it, although it does so according to a quite different methodology. Following Dworkin's interpretivist methodology, the task is to find the theory that shows the practice in its best moral light. This effort, however, takes the implicit assumptions of the pre-interpretive stage as *defeasible* hypotheses. In many cases, a practice can reasonably be seen as serving a set

of creditable moral principles and can be thought to be not so bad, and so the hypotheses are borne out. In the case of corrupt legal practice, the hypotheses again are borne out, although there is much less that can be said for the practice. But in the case of the thoroughly evil practice, the hypotheses and the efforts to construct a theory to bear them out are utterly defeated. Thus, in this case, *after* the process of investigating the appearances, we must conclude that the reality is not as it appears. The stick in the water is not really bent. It may still *look* bent and we can still recognize similarities with drawings of bent sticks on the blackboard, or bent straws in an empty glass, and the like. Similarly, while the thoroughly evil practice, as we come to realize after reflection, is not law, still the analogies of its superficial properties to other proper legal systems may be apparent. Dworkin would insist, however, that *theory* of the practice would be an attempt to look beyond those appearances. Any view that insisted that it merely rested content with the superficial phenomena could not claim to offer an account that illuminates them or deepens our understanding of them. This, it seems to me, is Dworkin's best response to the positivist critics that convict him of Augustinian absurdity. Of course, this is not the end of the story.

9.4.4. Questioning Integrity

In the spirit of Dworkin's own methodology, we can get some critical purchase on law as integrity, by asking whether it fits legal practice as we know it (not just in this or that jurisdiction, but generally) and whether it gives a morally appealing account of law as a whole. Our verdict regarding law as integrity will be a function of our answers to these two, closely related questions comparing Dworkin's account to its most plausible competitors. Thus, our verdict will rest on a complex comparative assessment. We cannot hope to complete that assessment here. Still, we can explore a few important considerations that we must keep in view when we make that assessment. Of the large number of challenges that have been directed against Dworkin's theory, I will take up just two issues that illustrate the kinds of problems Dworkin's theory faces when placed alongside the most compelling versions of positivist and natural-law theories.

9.4.4.1. On the Possibility of Principles

One fundamental challenge to Dworkin's legal theory is directed to the core notion of *legal principles* and the moral notion of *integrity* on which it rests. For Dworkin, legal principles are essential constituents of legal argument and the backbone of any plausible interpretive theory of the law of a community. Legal principles are not source-based standards. Source-based standards may not themselves be justified, but may justly claim our *compliance* insofar as they issue from genuine authorities; however, legal principles claim to generate genuine (moral) rights and duties because they claim to be morally justified. At

the same time, they are not strictly speaking *moral* principles, that is, the morally best principles or components in the moral theory with the greatest claim to rational support. They are not the morally best principles because they are embedded in actual, morally imperfect practices and institutions; hence, they are, strictly speaking, *morally incorrect* principles. They are the principles of these practices and make their moral claim on participants in virtue of that status. They are said to be able to make that claim with credibility because they are grounded ultimately in the independent political virtue of integrity. Critics have argued, however, that there simply *are no* legal principles, because there is no morally significant independent political virtue of integrity (Réaume 1989; Alexander and Kress 1995; Raz 1995a, 312–4).

The structure of their argument is simple: Either integrity is a moral virtue, but then it is not independent of justice (or perhaps some other dimension of morality), or it is truly independent, but then it cannot be regarded as a moral virtue. The first horn of the dilemma gets its point from the following argument. Integrity requires consistency of principle. We might be tempted to understand this idea of consistency in terms of the familiar injunction "treat like cases alike." But this injunction is vacuous unless we specify *some* respect in which cases and modes of treatment are alike. The injunction, without elaboration, merely says: be consistent. But bare consistency, of course, is no virtue at all. Consistency in the name of justice is morally desirable, but it is only a by-product of the moral desirability of justice (Raz 1995a, 312, 314). Consistency of principle, therefore, is strictly parasitic on justice (Réaume 1989, 392–3). Hence, the consistency required by integrity may be a virtue, but it is not an independent virtue, so can never stand against the claims of justice (rather, it is a trivial consequence of them). Morally justified principles distinct from justice, then, are not possible.

If we cut integrity loose from justice, critics argued, legal principles lose all moral force; they are *res non gratae* (Perry 1997, 815). Consequentialist considerations of predictability and respect for legitimate expectations aside, there is no good moral reason to follow a morally incorrect principle, when correct principles are available (Alexander and Kress 1995, 325; Kress 1999, 99); and there is good moral reason not to perpetuate a moral mistake made by previous courts or officials (Réaume 1989, 393–6). "A past injustice creates no reason, not even a very weak one, to commit a present injustice," Alexander and Kress (1995, 305 n. 100) insisted. "When we have fallen from grace, and acted unjustly, we should admit our mistakes, and do justice in the present, taking proper account of how rule of law virtues [honoring expectations, predictability, etc.] apply to traces of the past" (Kress 1999, 104). Thus, once we accord integrity significance independent of the claims of justice, integrity loses its moral compass.

Is this objection successful? Well, it is clear that we must avoid the first horn of the dilemma; however, the second may not do the damage critics claim it does. Their argument is remarkable for its moral simplicity. Of course, where we

have an unobstructed choice between doing justice and doing injustice, justice wins. But those are not the "circumstances of integrity." Perry observes that these critics assume that morality is epistemically transparent (Perry 1997, 817). But the problem is not merely that we are often faced with situations in which it is unclear about what justice requires, but also that in pluralistic communities—people "united in community though divided in project, interest, and conviction" (Dworkin 1986, 413)—people seek justice knowing however that they disagree deeply about what justice requires of them and their community. Dworkin's claim is that in these circumstances integrity has an important *morally sanctioned* role to play. Integrity counsels a strategy of indirection: It is a way of pursuing justice where the direct pursuit of it is prohibited by justice itself. To pursue justice in the circumstances of integrity without regard to the rest of one's community, as the critics urged, is in effect to *abandon* justice, or at least to fail in a fundamental way to understand the nature of that pursuit. In a justice-oriented community, people demand that those who act on behalf of the community act conscientiously in the name of justice, on a coherent set of recognizable principles of justice that are arguably principles to which the community is committed, even when citizens are divided about what justice requires. Dworkin argued that this is what fundamental equality requires of our legal institutions. Others have added that it is also an expression of *fidelity*. Fidelity calls for keeping faith with the past, and with the principles embedded in the community's practice, as a way of keeping faith with each other. In communities aimed at justice, where not only the reality falls short of the standard, but the standard itself is in dispute, fidelity calls for integrity. Integrity is the form fidelity takes in the circumstances of integrity. That is, integrity is the way members of a community keep faith with each other and with their collective commitment to justice and the fundamental mode of their relationships (Postema 1997, 851–2).

A case, then, can be made for the moral intelligibility of integrity under some circumstances, and so for the possibility of legal principles where they serve integrity. This brings us to another question, however: Does law as integrity adequately capture the way in which law serves integrity when it goes well?

9.4.4.2. Whose Integrity?

Some critics have agreed with Dworkin that the notion of legal principles is not only intelligible but also important for legal theory and that a persuasive case can be made for the moral importance of the political virtue of integrity, but they question the distinctive "protestantism" of Dworkin's method of constructive interpretation (see above sec. 9.3.2.3) and of law as integrity, which understands legal argument as essentially an exercise in constructive interpretation. They argue that Dworkin's interpretivist methodology ill-fits legal reasoning and argument and it does not adequately acknowledge the public character of law (Postema 1987c, 300–9).

Constructive interpretation focuses strictly on the practice, seeking to articulate what *the practice means* rather than what *participants mean*. This has two very desirable consequences in Dworkin's view: (1) it makes room within shared practices for genuine disagreement and internal criticism of the practice, and (2) it also enables him to block the positivist temptation to treat interpretation as a kind of disguised reporting of the beliefs and attitudes of participants. But as a result Dworkin strongly resisted any suggestion that interpreters should take into account the interpretive efforts of other participants and so, to the extent that interpretations of different participants overlap, this will be strictly a matter of "consensus of independent conviction," not "consensus of convention" (Dworkin 1986, 136), and from the point of view of participants it will be just a happy accident. There may be reason to *hope* that concurrence of interpretation occurs; indeed, Dworkin concedes that it may even be necessary for the long-term survival of the practice. But there is no reason internal to the argumentative practice that requires it and much that resists it.

There are three reasons to question Dworkin's account at this point. First, it fails to account for the key fact about law's argumentative practice that legal arguments are meant to be *public arguments*, offering genuinely public reasons to justify the exercise of power under the color of law. They are public in the sense that they are made in public and directed to the public, but also in the sense that they are made on behalf of the community. As Hart reminded us, officials tend to regard legal standards as "public, common standard[s] of correct judicial decision" (Hart 1994, 116).[38] Second, the aim of public argument is to work toward the formation of common judgments. Interpretations offered in this spirit, which seek to integrate the interpretive efforts of other participants, do not, as Dworkin seems to assume, disengage from the practice and ask what *they*, its participants, mean, but rather they make an effort at understanding and articulating what *we participants* are committed to.[39] From such a perspective, the understandings of other participants are neither merely facts to be reported neutrally, nor merely rival theories on some practice existing independently of our interaction, but rather are attempts to articulate our common understanding.[40] Dworkin assumed that there are only two possible positions available to us here: Either matters are regarded as "true by

[38] Hart argued that Dworkin was wrong to think of judicial practice as a matter of "consensus of conviction." It is, rather, a "conventional form of judicial consensus." This is clear enough, he argued, in English and American law, "for surely an English judge's reason for treating Parliament's legislation (or an American judge's reason for treating the Constitution) as a source of law having supremacy over other sources included the fact that his judicial colleagues concur in this as their predecessors have done" (Hart 1994, 266–7). For evidence to support Hart's view of the nature of the consensus in common-law jurisdictions, see Postema 2002c, 600–9.

[39] For development of the idea of practical reasoning from the first person plural perspective, see Postema 1995a, 1995b.

[40] Stavropoulos (1996, 159–60) argues that Dworkin is not subject to this criticism.

convention"—which he takes to mean "true just because everyone else accepts it," in the way rules of chess are regarded as true by those who play it—or true by "consensus of independent conviction," according to which the fact that others accept it is treated as irrelevant to the case for the rules or conventions of a practice (1986, 136-7). However, this does not exhaust the possibilities.

Finally, it appears that the moral requirement of integrity requires greater sensitivity to the interpretive efforts of other participants than Dworkin's "protestant" theory allows. Dworkin argued that we demand integrity of our law because we aspire to be a *community* of principle, and we demand that when our community exercises power through its agent, the government, we do so in pursuit of a coherent conception of justice and fairness. We demand integrity of our law as a whole and of the judiciary *collectively*, yet on Dworkin's account of interpretation, integrity's commission is executed by judges *individually* (Postema 1980, 369–71; Michelman 1986, 66–73). Each judge might enjoy Herculean capacities and achieve admirable coherence of the law with respect to compelling principles of justice, and yet the aggregate result of their efforts on the law will be a cacophony of individually coherent interpretations. Integrity of each of the parts does not guarantee integrity of the whole. Note that this concern is not motivated by any form of skepticism, subjectivism, or worry about radical indeterminacy. It merely recognizes the obvious fact that a demand for integrity of the law cannot adequately be honored by each official seeking integrity on her or his own. Thus, equality-inspired integrity arguably demands that those with official responsibility work to integrate their interpretive activities synchronically and, especially, across time. This is an important dimension of the interpretive process in law that Dworkin's theory of constructive interpretation has not adequately recognized. It remains to be seen whether it can be revised to accommodate it.

This argument is not likely to attract support from Raz and the exclusive positivists, however, for it puts even more emphasis on the idea of the coherence of law than Dworkin's theory does. As we noted earlier (see above chap. 8, sec. 8.6.2), Raz argued that it is wishful thinking to expect law to be coherent to any significant degree. "It would be nice if the law were a coherent rational system, free from the dead hand of past intentions and from the debris of past political struggles. But we all know that this is not so, that the law suffers precisely from all these disadvantages, and that so long as it remains, as it must, the main vehicle of politics, it will remain so marred" (Raz 1995a, 296). Moreover, he argued, there is good reason not to demand that law "speak with one voice." Echoing arguments we have just considered (above sec. 9.4.4.1), Raz maintained that speaking with one voice, when it has a moral claim on us, is simply the by-product of justice, and anything short of that lacks moral force. "In the politics of this imperfect world we know that imposing one voice on the law can be achieved—if at all—only through the imposition of a regime with an inherent tendency to sacrifice justice and fairness, restrict civil rights,

and curtail individual freedom. We therefore design constitutional processes to foster compromises in a way which we hope will approximate the ideal" (Raz 1995a, 312). The moral importance or force of past decisions and settled law is captured fully by the standard argument for authority (because, for example, it helps solve problems of social coordination, we have some reason to follow it even when we disagree), but this moral force runs out when the explicit extension of the rules is exhausted (Raz 1995a, 306–7). There is no further moral reason to extend the reach of law beyond this, and there is good reason not to do so, since it would tend to perpetuate political arrangements that may have only a tenuous claim to justice, where exclusive positivist theory would leave judges free to do justice (Raz 1995a, 325). Theories of law that require coherence or integrity are not only unrealistic, but they are also unacceptably conservative.

Neither Dworkin nor some of his critics (e.g., Michelman or Postema) would accept this assessment, but all must admit that this puts the debate on a new level, bringing questions of the institutionalization of public debate into the heart of jurisprudential theory. Thus, it appears that we have an important multilateral debate over the nature and extent of law's public character and its role in understanding the nature of law and legal reasoning. This theme has emerged as one of the most important debates in Anglo-American philosophy of law at the turn of the new century.

Chapter 10

THE INCORPORATION DEBATE

10.1. Explaining the Difference Moral Principles Make

10.1.1. Elmer, The Duke, and Dr. Bonham

In the final act of Shakespeare's *Measure for Measure*, charges of corruption are brought against Angelo, deputy of the Duke of Vienna, who ruled the town in the Duke's (feigned) absence. Immediately upon his return, the Duke orders a trial with Angelo as judge: "Come, cousin Angelo/In this I will be impartial; be you judge/Of your own cause" (Shakespeare 1997, 185). Solomon might have admired the adroit cleverness of this trap, but English lawyers in the audience surely frowned in displeasure, for the Duke violated a fundamental principle of natural justice and English law: *nemo judex in re sua* (Orth 2003, chap. 2). This principle was the pivot of Lord Coke's argument in *Dr. Bonham's Case* (1610), some six years after the first recorded performance of the play. The Royal College of Physicians charged Bonham with practicing medicine without a license and tried him in its own court, found him guilty, fined and imprisoned him, and pocketed half the fine. All this was done in accord with its Parliament-given charter. Lord Coke, sitting in England's Court of Common Pleas found the charter legally invalid because, like the Duke of Vienna, it made the College judge in its own cause (Coke 2003, I: 264–83). In an elaborate argument, Coke located the principle deep in the common law, but clearly its most important virtue was that it was a dictate of reason, a fundamental principle of fairness.

In his "Model of Rules" and later in *Law's Empire*, Ronald Dworkin built his critique of Hart's positivism on examples of judicial arguments much like Lord Coke's (Dworkin 1978, chap. 2; 1986, chap. 1; see above chap. 9, sec. 9.2.1.1), the most celebrated of which was *Riggs v. Palmer* (1889). Fearing he would be cut out of his grandfather's will, Elmer Riggs murdered the old man and then sued for his inheritance. Citing the principle "no man may profit from his own wrong," the New York court denied the murderer his inheritance, despite the undeniable validity of the will. Again a principle of obvious moral provenance was the pivot of an argument for a decision widely regarded as properly made and legally supported. Dworkin's critique rested on the simple observation that often—very frequently in some legal systems, perhaps less commonly in others—judges explicitly and without apology appeal to general principles that have no obvious pedigree in legislation or specific precedents, but seem to rest their legal authority entirely on their merits as specifications of justice, fairness, or some other dimension of morality. Moreover, they appeal to these principles in the conviction that they are bound, as judges, to do so, and,

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although the principles to which they appeal, or their understanding or use of them in particular cases, are often controversial, their right and duty to do so is not. This proposition, Dworkin insisted, is not the implication of a contested theory of law or adjudication, but a datum based on pre-theoretical observation of the practice of judicial reasoning in familiar legal systems, a datum that demands explanation.

Philosophers before and after Dworkin have acknowledged the datum and have agreed that it demands explanation, but they offer widely varying, competing explanations. Since Dworkin's first broadside, the contest over these competing explanations has taken the form of a debate over the question whether moral principles can be regarded as incorporated into the body of valid legal norms—the incorporation debate. The debate absorbed much of the philosophical energy of analytic legal philosophers in the last two decades of the twentieth century. Our understanding of this debate will be enhanced if we survey its topography before looking at the details of the debate as it played out amongst latter-day positivists.

10.1.2. It's a Mistake

The most straightforward response to the data of regular judicial appeals to moral principles is not to explain them, but to explain them away. One can imagine a latter-day Benthamite—or perhaps a particularly strict, rule-of-law-as-rule-of-rules "formalist"—arguing that the observation is just *mistaken*. One might argue that, although the principles in question often have an obvious moral appeal, that this fact either *does not*, or *should not*, play any role in the reasoning of competent judges or lawyers. It does not play such a role, the argument continues, because every principle apparently appealed to has a proper, strictly legal pedigree, a source in the legislative or constitution-forming acts of authorized legal officials, and their legally relevant content is restricted to their plain legislated meaning (not their construal as principles of social or so-called critical morality). And in those cases of judicial appeal to moral-like principles where the case for their formal pedigree fails, the only explanation is that judges have acted outside their judicial authority. It is just a mistake, albeit a common one, to think that judges have a right, let alone a professional duty, to rely on such extra-legal principles. Of course, this does not have the immediate consequence that the decisions made on that basis lack status as law, for we must recognize the authority of the courts and that requires that we recognize that their actions are binding even when mistaken.

I say one might argue in this way, because, in fact, it is hard these days to find legal theorists explicitly making such arguments.[1] It is surely not the kind

[1] Neo-formalists, like Justice Scalia (1989), might endorse the view—and perhaps Alexander (1999a), although I am not sure. Schauer's somewhat more moderate neo-formalism (see chap. 8,

of explanation entertained by the recent contenders for positivism's crown and, of course, positivism's critics have (with one exception I will mention below) all accepted at face value Dworkin's observation. The dispute amongst all these participants in this *Erklärungstreit* is over whether we must regard as valid laws of a given system principles that recommend themselves on the basis of their moral merits and that judges are bound to follow. The question is whether the principles are thereby incorporated into the body of the law.

10.1.3. A Case for Incorporation

The term "incorporationism" is usually reserved for "soft" or "inclusive" legal positivists, but some jurisprudential approaches that refuse to march under the positivist banner also explain Dworkin's observation in terms of incorporation.[2] An early response to Dworkin's "Model of Rules" essay argued that moral principles are incorporated in the body of law when and to the extent that they underlie and give a coherent rationalization of the explicitly legislated rules of law. These principles are principles *of law* of a given legal system because they "fit" or "rationalize" institutional rules of that system (Sartorius 1971; MacCormick 1978, 232–3). Arguably, Lord Coke's elaborate argument in *Dr. Bonham's* case illustrates this "institutional fit" explanation, for Coke took pains to show that *nemo judex in re sua* was not merely a principle of natural justice with authority on that score, but also and importantly a long-honored principle embedded deep in the thought and practice of English Common Law. Indeed, it appears that the fundamental criterion for the status of a principle or standard as dictate of law, according to classical common-law jurisprudence, was that of its substantive *integration* into the workings of the law (Postema 2002a, 174–5).

sec. 8.5.2, above) would seem to endorse a view closer to that of the exclusive positivists, since on his view judicial appeal to moral principles is blocked only "presumptively," but incorporation of such principles depends entirely on their pedigree.

[2] Unfortunately, the operative terms in this debate have not settled into a consistent pattern. I shall refer to the (alleged or apparent) fact the moral principles are binding legal norms in a given legal system as the (alleged or apparent) *incorporation* of moral principles in law. The claim that this is so, either with respect to a given legal system or all legal systems, I shall call the *incorporation thesis*. *Inclusive legal positivism* accepts the incorporation thesis as at least possibly true and seeks to explain it in a way that is consistent with a positivist understanding of the nature of law. *Exclusive legal positivism* denies that this can ever be true. Non-positivists, including Dworkin and (some) natural law theorists, accept the incorporation thesis in some form, but explain it in ways different from those adopted by inclusive positivists. (Note that this regimentation of the terminology of the debate differs from that of Kramer (2009, 45), who assigns "inclusivism" to the weak possibility thesis: it is possible that consistency with morality in some dimension is a condition of legal validity in some jurisdiction; and assigns "incorporationism" to the stronger possibility thesis: it is possible that the correctness of a moral principle is a sufficient conditions of its legal validity in some jurisdiction.

The "institutional fit" thesis was advanced in the modern era by Sartorius and MacCormick to defend Hart's positivism against Dworkin's attack on the pedigree notion of the rule of recognition. The principles are principles of law, they argued, *because* they function as rationales of its formally pedigreed rules. But anti-positivists, most notably Dworkin, argued that this gets the positivist rendering of this explanation backwards. The principles do not have their authority in virtue of serving pedigreed norms, but rather they provide the most compelling way to organize and rationalize the law overall in virtue of their independent (moral) appeal. Their authority lends authority to law, not the other way around (den Hartogh 2002, 194). This may over-state the common-law view a bit, since the persistence over time of the body of rules and customs constituting the common law, and the integration of principles in that body, was, for classical common-law jurisprudence the main ground of its claim to authority. Yet, that integration was not a simple matter of formal coherence, but rather a matter of making good the law's claim to being an articulation of reason. For that case, the principles had to have some degree of independent appeal, working hand-in-hand with the fact that they were woven deep in to fabric of the working body of practical norms then in force.

Recall from Chapter 9, above, that Dworkin held that the legal status of a principle turns importantly on its truth or correctness from a moral point of view; however, he did not hold that a moral principle is incorporated into the body of law simply in virtue of its truth or correctness (and its ability to help settle a contested case under litigation). According to law as integrity, a principle or other normative proposition is a true proposition of law in a given legal system just in case it figures in or is implied by propositions figuring in the best overall theory of the law at the time, where competing theories are ranked in terms of a complex mixture of *fit* with the recognized rules and principles of the law and its independent *moral appeal*. One may question just how much the requirement of fit constrains the ranking of competing theories (and, hence, the principles recognized in the best such theory), but it must be substantial enough to underwrite a sharp distinction between the task of *interpreting* the existing body of law and proposing to put a new system in its place. The understanding of institutional fit was greatly modified by Dworkin's hand, but it still represents a fundamental component of the case for the incorporation of moral principles (or their approximations) in the law. The most compelling case for the truth of a moral principle is never, on Dworkin's theory, a sufficient basis for holding a judge duty-bound to comply with it. In this respect, the implications of Dworkin's anti-positivist theory are more conservative than those of many of his positivist opponents and of those who march under the banner of natural law (Raz 1995a, 312–4; Perry 1997, 807–15).

10.1.4. Employed But Not Incorporated: Exclusive Legal Positivism

Directly opposed to Dworkinian or classical common-law incorporation accounts is the view championed by Raz and those who espouse exclusive legal positivism.[3] This view takes at face value Dworkin's initial observation about the important role that moral principles play in legal reasoning, but it offers a very different explanation of this phenomenon. Judges, when they rely on moral principles to help solve a contested legal issue, are often bound as judges to do so. However, while they *employ* moral principles and give legal effect to them, this does not entitle the principles to status as valid law. Standards binding on judges, it is argued, are not necessarily binding in virtue of their being part of the law of the jurisdiction. All law is source-based and only source-based considerations are *legal* considerations. When judges appeal beyond source-based considerations, they appeal beyond the law. In the course of doing so, they do not merely find and apply law, in the exercise of their law-directed and authorized discretion, they make law. The considerations they take into account in their legal reasoning are not, by virtue of their being so employed, accorded status as legal norms, any more than the rules of Greek commercial law are incorporated into the Polish legal system because Polish courts are directed by their law to apply rules of Greek law in conflicts of law cases (Raz 2004, 17). The "sources thesis" restricts law to source-based norms, but it does not follow from this that judges do, or must, restrict their reasoning to source-based considerations. As we saw in chapter 8, sec. 4, non-source-based considerations, including moral considerations, inevitably play a proper, legally authorized, and even essential role in legal reasoning.

The case for this exclusive legal positivist explanation of Dworkin's initial observation consists of a set of closely related arguments designed to explain why judges may be duty-bound to reason to propositions of law by appealing only to source-based considerations but also to reach beyond legal norms thus established to settle contested issues and to explain why we should not regard moral principles employed in legal reasoning to be thereby incorporated in the law. In chapter 8, we explored in detail Raz's argument from authority for the "sources thesis" and its implications for legal reasoning. We will only sketch the argument briefly here, relying on a recent version of it (Raz 2004; see also 1995a, chap. 14).

We might divide the argument into three stages. First, he argues that legal reasoning is a special case of moral reasoning (Raz 1995a, 340) and that judges, in the exercise of their judicial responsibilities, are bound naturally by morality, and they are bound by law just insofar as law is made binding by morality

[3] See chap. 8, sec. 8.4, above. For an overview of the dispute between exclusive and inclusive positivists, see Himma 2002b. Marmor (2001b, chap. 3) offers a defense of the exclusivist view along lines Raz first laid down.

(Raz 2004, 2–7). Judges are subject to morality, because by its nature morality applies universally, that is, to all who are capable of understanding its dimensions and demands. Law, in contrast, is of limited jurisdiction and is incapable of normatively binding anyone—offering them sound reasons for acting—of itself alone. Legal norms bind anyone falling within their jurisdiction only if and to the extent that moral principles of legitimacy make them binding. That is, judges are bound by the law just to the extent that its claim to authority is substantiated on moral grounds and only within the scope of the legitimate exercise of its authority. Law cannot empower morality, because it depends on morality entirely for its normative force. Thus, legal reasoning always is and can only be a special case of moral reasoning; however, it is not the case that proper legal reasoning is always simply a matter of deliberation with and about moral considerations. This brings us to the second stage of the argument.

It is a characteristic feature of law that it purports to modify application, and to some extent block the direct consideration, of reasons, including moral reasons, that would otherwise be appropriate for officials or citizens to rely on in deciding what to do. This is entailed by law's claim to authority (see chap. 8, secs. 8.3.3 and 8.4.2, above). Law modifies normative deliberation leading to action by issuing authoritative directives which offers reasons for acting in certain ways and pre-empts some range of reasons for acting in contrary ways. In this way, law makes moral requirements more concrete, or makes their enforcement more uniform and efficient, or enables citizens to achieve moral goals collectively that are beyond their reach as individuals (Raz 2004, 9–10). To do their job of mediating between agents and the substantive reasons that apply to them, law's authoritative directives must be such that they can be identified without the addressees considering the very reasons that the directives are meant to block. Tying the existence and content of authoritative directives to certain non-evaluative sources makes this identification possible. The law successfully modifies the application of morality to judges and citizens in this way just to the extent that its claim to authority is borne out by sound legitimating principles of morality. So, on this account, reasoning *about* the law—identifying legal norms and determining what they require (see chap. 8, sec. 8.6.1.2, above)—proceeds on source-based considerations alone. Reasoning *according to* law to a practical conclusion will be shaped both by the law's authoritative directives and, often, by moral considerations that are not among the law's valid norms. Just how close legally valid norms bring the judge to a sound practical conclusion in any particular case is ultimately determined not by law but by morality in light of which legal reasoning always proceeds.

Finally, the exclusive positivist explains cases of apparent explicit incorporation of moral principles in statutes, conventions, constitutions, and charters by drawing attention to the technique of "directed powers" (Marmor 2001b, 67–8; see chap. 8, sec. 8.4.5.2, above). According to Article 1 (1) of the German Constitution, for example, "Human Dignity is inviolable. To respect and

protect it is the duty of all state authority" (quoted in Raz 2004, 10). Similarly, Canada has its *Charter of Rights and Freedoms*, and the U.S. Constitution enshrines the moral right of free speech and the free practice of religion in the fundamental law of the United States. However, although the rights and principles thus enshrined are meant to be genuine moral rights and principles, it is a mistake, Raz argued, to regard these as instances of the incorporation by law of moral principles into the law of Germany, Canada, or the United States. They are better understood as *limitations* on the various powers of government, especially on the legislature, to exclude or modify the application of morality to law-subjects. "References to moral considerations in constitutions are typically not cases of the incorporation of morality but blocks to its exclusion or modification by ordinary legislation" (Raz 2004, 13). On other occasions, apparent incorporations actually only allocate power to modify the application of morality to law-subjects among lawmaking institutions, Raz argued. And on yet other occasions, they merely indicate that certain considerations are in fact not excluded, despite legislation, because the law-maker has left to the courts the further determination of the legislation and charged them with further articulating and giving effect to certain moral principles (ibid., 12–4).

In other cases, officials are empowered to decide matters and make valid rules; they are directed to make these decisions taking certain moral principles (and not others) as guides. In other such cases of apparent incorporation, law-applying institutions in particular are directed to give effect to certain moral principles, enforcing them or protecting those whom they protect by putting the resources of law at their disposal (ibid.).

Thus, the exclusive positivist seeks to explain Dworkin's observation, and makes room for reliance on moral principles on their merits within proper legal reasoning, by locating legal reasoning squarely within moral reasoning and assigning exclusively source-based legal norms to a partnership role with other principles in legal reasoning.

10.1.5. Incorporation by Common Practice of Argument: Inclusive Legal Positivism

The exclusive positivists' explanation of Dworkin's observation was driven by the conviction that legal positivism is fundamentally a doctrine about the criteria of legal validity and that law's essential claim to authority restricts the content of those criteria to source-based facts about the provenance of legal norms. Inclusive legal positivists, in contrast, start from the conviction that positivism's core commitment is to the conventional foundations of law.[4] The criteria of

[4] In Coleman's original presentation, *negative* positivism holds that "there exists at least one conceivable rule of recognition (and therefore one possible legal system) that does not specify truth as a moral principle among the truth conditions for any proposition of law" (Coleman

validity, they argued, are determined by the practices of legal argument among officials charged with maintenance of the legal system—that is to say, the rule of recognition was regarded as a conventional rule. Both doctrines are forms of positivism, it was argued, because they hold that law is fundamentally a matter of social facts, but they explain the role of social facts in determining law in different and incompatible ways. As Jules Coleman recently put it, exclusivists hold that, necessarily, only social facts (facts about sources) determine the content of law, while inclusivists hold that, necessarily, social facts (alone) determine the determiners of the content of law (Coleman 2009, 383–4). In the latter case, the relevant social facts are facts about the practices of law-applying officials; and since these practices can vary widely, so too can the content of criteria of validity. Thus, on his view, the doctrine of the rule of recognition imposes no constraints on its content; in particular, positivism offers "no reason for assuming" that moral merit cannot be included among the criteria of validity in some legal system (Coleman 1998a, 406–7; 2000, 179; 2001a, 108).

Note that inclusivist positivism is not a thesis about what counts as law in any existing legal system or even in all actual legal systems. It is, rather, a claim about what is *possible* according to the concept of law, and so what is permitted by positivist doctrine (Coleman 2001a, 108; Kramer 2004, 2). On this view, it is possible that, in a given legal system, moral principles are valid legal norms in virtue of their merits (correctness, truth) as moral principles (Coleman 1998a, 406) and it is equally possible that legal validity in a different system is exclusively a matter of source-based considerations. These are conceptual possibilities just because criteria of validity are, on this view, conventional, and hence contingently determined and potentially variable.

The inclusivist thesis holds not (simply) that it is possible for a legal system to exist in which moral principles are valid legal norms just in virtue of their merits. The thesis, rather, is that this is possible because and only when it is the conventional practice of officials so to regard them. On this view, necessarily the moral correctness of a principle is never in itself sufficient to make it a valid legal norm; it can be sufficient in some particular legal system only on the further condition that treating it as such is the conventional practice of officials in that system (Kramer 2004, 87–91). Just when "the fundamental requirements of morality do regularly serve as [...] a reference point" for the selection and articulation of sourceless norms, "the true principles of morality have become endowed with the status of legal mandates" (ibid., 91).

1982, 30). *Positive* positivism embraces the conventionality thesis, the view that the existence of law is made possible by the convergence of behavior and attitude of officials constituting a convention regarding the criteria of legal validity (1982, 31–5). Coleman held that negative positivism "distinguish[es] positivism from other jurisprudential theses" (ibid., 29), but it is more accurate to say that it distinguishes a very thin version of legal positivism from an equally narrow understanding of natural-law jurisprudence.

Inclusivism has taken different forms. The limiting case, *incorporation by enactment*, holds that moral principles are incorporated into law when lawmakers or constitution-makers explicitly enact them.[5] However, Dworkin's challenging observations were of judges using principles that had no such enactment pedigree, so enactment inclusivism does not fully respond to that challenge. So, most inclusivists who were challenged by Dworkin's argument were inclined to adopt stronger forms of inclusivism. *Modest inclusivism* holds that it is possible that a legal system includes a minimal moral adequacy test among its conditions of validity. For example, principles of fairness, justice, or fundamental decency might be part of the law when they function (in the practice of legal argument) as filters for the rest of the substantive norms of law. Such principles, it was argued, would thereby be incorporated in the law of that legal system. Kramer (2004, chaps. 1–4) enriched this modest inclusivism, recognizing the possibility of direct appeal to moral principles in hard cases). *Robust inclusivism* accepts the further possibility that the moral merits of certain principles can be enough to make them valid legal norms—that is, morality can be a sufficient condition of validity (Coleman 2001a, 114), subject to the condition that there is a practice of relying on the substantive merits of principles. Robust inclusivism is the view that it is possible for there to a legal system to exist in which the conventional rule of recognition includes among its criteria of validity not just a test of minimal moral decency, but the moral correctness of principles themselves.

Inclusivist doctrine was developed to explain Dworkin's observation of the apparent incorporation of moral principles into law. It does so by accepting the incorporation thesis as *possibly true*, as far as the concept of law is concerned. Thus, the inclusivist holds that, as far as positivism (which, it is maintained, is concerned only with the conceptually necessary features of law) has anything to say about it, it might be true about, say, the American legal system that moral principles figure among its valid legal norms, and that judges are bound to appeal to moral considerations in their judicial deliberations. That is, unless the apparent facts of incorporation prove illusory, the *possibility* envisioned by inclusive positivism is realized in the American practice of law. This proposed explanation of the apparent facts of incorporation prompts two comments.

First, the inclusivist explanation is in important respects different from the exclusivist, Dworkinian, and classical common-law explanations. Law as integrity and classical common-law jurisprudence, like inclusivism, insists that

[5] This was a common response to Dworkin's "Model of Rules" argument among early defenders of Hart's positivism (e.g., Lyons 1977, 422, 425; Raz 1983, 77). Waluchow's extended defense of inclusive legal positivism (Waluchow 1994, chaps. 4–7) can, perhaps, be seen as a supple version of incorporation by enactment, at least insofar as his argument focuses on the role of moral argument in Charter (i.e., constitutional) interpretation and deliberation. If the incorporation by enactment thesis is read narrowly, even some exclusivists have been willing to entertain it (e.g., Shapiro 1998, 58).

moral correctness is not in itself sufficient to make a principle a principle of law, but inclusivism does not require substantive integration of the principles in the body of law. It requires only that a conventional practice of appealing to moral argument in the course of legal reasoning. This constraint is weaker than integration, but it is stronger than that imposed on legal reasoning by exclusivist doctrine, for, according to exclusivist doctrine, moral principles are binding on judges just in virtue of their being correct or true and correctly applicable to the practical matter in hand. On the exclusivisit view, morality needs no endorsement from law's conventions and, apart from morality's prior endorsement of it, law has no capacity so issue any such endorsement.

Second, the inclusivists' explanation of Dworkin's observation is exceedingly thin as it stands. At best, it shows that we are not forced by the concept of law to treat the apparent incorporation of moral principles in the body of law as illusory. However, it does not follow that we must we accept the incorporation thesis with respect to the American legal system. Waluchow (1994, chaps. 4–7), however, argued not only that inclusivism offers a *possible* explanation, but that the incorporation thesis offers the most accurate descriptive account of legal practice in Canada and the United States, capturing features of legal reasoning in those jurisdictions more accurately than law as integrity and exclusivism. Coleman seems to have preferred to remain agnostic. Inclusivism, he maintained, "is a theory of 'possible explanations' of the character of legality or legal validity" (Coleman 1998a, 408). What he offered is an account of what is *possible*, consistent with commitments of positivism (i.e., the positivist understanding of the concept of law).

This reveals an important feature of the dialectic of the recent incorporation debate. The inclusive positivist approach arose directly in response to Dworkin's challenge to Hart's revision of positivism. From the outset, inclusivism looked for ways that philosophers, committed to positivism, could keep their positivist faith while acknowledging the force of Dworkin's most persuasive arguments. Exclusive positivism, on the other hand, took a harder line in response to Dworkin—Hart called it "hard positivism"—offering arguments against the incorporation thesis. Thus, inclusivists, finding the incorporation thesis plausible, found themselves on the defensive concerning their positivist credentials.[6] From its birth in the early 1980s, up to the flurry of writing at the turn of the millennium, this entirely defensive posture has dictated not only the inclusive positivist strategy,[7] but also determined the content of its doctrine. It has been defined exclusively by its opposition to positions on its two theoretical flanks. It offered little by way of a positive case for positivism as a theory of

[6] Coleman (1998a; 2001a) self-consciously manifests this dialectic, but it is also evident in the structure of Waluchow's (1994) defense of inclusivism.

[7] This defensive posture is evident in Coleman's (2009) recent reflections on the incorporation debate and his motivation for advancing the inclusivist thesis.

the nature of law, but rather assumes a plateau of commitment to positivism, relying largely on Hart's defense of a much more robust positivism. And it offered no positive case for its own endorsement of the truth of the incorporation thesis as an interpretation of the practice in familiar legal systems, relying largely on the persuasive power of Dworkin's original arguments.[8]

Thus, the following discussion of the incorporation debate will take the form of considering the most important arguments that critics have leveled against the incorporation thesis, or the inclusivist account of it, and the inclusivists' adroit and resourceful responses to them. It is tempting to dismiss this debate as of only of local interest to those already committed to a rather narrow understanding of positivism and its contribution to jurisprudence, but to do so would be a mistake; for, seen in a wider perspective, the debate over the merits of the incorporation thesis and attempts to explain it engages issues that are central to philosophical reflection on the nature of law.

10.1.6. Natural-Law Perspectives on Incorporation

The debate over incorporation has largely engaged the attention of legal theorists with allegiance to positivism. Although anti-positivist views (mainly Dworkin's) have been clearly on the minds of positivists, the anti-positivists have for the most part let the positivists fight amongst themselves.[9] This near exclusive attention by positivists on the positivists' dialectic overlooks contemporary natural-law perspectives on the issue of incorporation. One might expect natural-law theories to endorse whole-heartedly the incorporation thesis as a universal truth about law, following from the nature of law itself. However, this is not quite the case. While one contemporary natural-law theorist, Michael Moore (2000, chap. 7; 2001, 137–45), has taken a view close to Dworkin's, neo-classical natural-law theorists, working from the same theoretical platform, have taken interestingly different views on the incorporation thesis.

To identify these views we must first profile their common source. We should keep in mind at the outset that it is a mistake—frequently made by its positivist critics—to treat natural law, especially natural law with classical roots, as primarily a theory of legal validity. However, it is more accurate to see natural-law theory as fundamentally committed to the view that law by its nature is a source of compelling reasons for action and genuine obligations. It is not fundamentally concerned with whether principles binding on citizens or

[8] While true of Coleman's work, this may not be an entirely fair assessment of Waluchow's work which makes a serious effort to connect abstract inclusivist doctrine with actual patterns of legal reasoning in Canadian Charter jurisprudence.

[9] A notable exception has been Stephen Perry (1987; 1989; 1997). See also Moore 2000, chap. 5 and den Hartogh 2002, chap. 9. Finnis (2000) and Dworkin (2006) have recently commented on the debate, although from a distance.

officials are best construed as incorporated in the body of the positive law of any given jurisdiction. Yet, one might think that the natural law slogan, *lex iniusta non est lex*, rests on some view of the conditions of law's validity.

The most plausible reading of *lex iniusta* is the "weak natural-law thesis," according to which laws that fail to meet certain minimal standards of human decency, justice, and reasonableness are defective *as laws* (Murphy 2003, 243–54; 2006, chap. 1).[10] Defective laws cannot, in themselves, offer compelling reasons to comply with their dictates. For our purposes we must note several features of this thesis. First, while justice is a condition of legal status, it is at most a necessary condition. Natural lawyers insist that it has never been part of natural-law theory to claim that, if a norm is a standard of natural law it is thereby a norm of human law (Murphy 2003, 243). Second, the injustice of a law does not thereby make it the case that it is *not a law*, but that it is *defective as a law*, that is, that it fails in ways that go to its very nature as a law (Finnis 1980 24, 363–66; Murphy 2003, 353–4; 2006, 10–2). Third, while it might follow from this that the defective law cannot of itself offer sound compelling reasons to act, those to whom it is addressed might still be under obligation to comply with it on grounds that go beyond the content of the law itself (Finnis 1980, 354–62).

To understand natural-law perspectives on the incorporation issue we must understand the place of human (i.e., positive) law in neo-classical natural-law theory (see below chap. 12, sec. 12.3). Natural-law principles of morality and practical reasonableness are said to underwrite positive law: they provide the measure by which they are judged, but more, they provide the ground for law's existence and principle by which it is legitimated. Law (if not wholly defective) can make claims on the practical reasoning and lives of human beings because it is instrumental for the achievement of important human goods, especially goods that can only be achieved collectively through social coordination (Finnis 1980, chaps. 9–10; George 1999, 107–9). Positive law is a human enterprise ordained and authorized by natural law to perform certain key tasks. The characteristic general features of law are directed to performing these tasks. Positive law gives concrete expression or "determination" to relatively abstract natural-law requirements of justice and practical reasonableness. Human law is seen as the concrete *determination* of natural law in institutions, formal procedures, articulated norms and conventions. Natural-law principles regard certain institutions and norms as necessary for every system of law, but it also leaves a great deal to be worked out in light of the specific social and material conditions of the community and the needs, goals, and interests of

[10] A somewhat weaker thesis applies the test only to whole legal systems, rather than to discrete legal norms. On this view, even serious injustice of a particular legal norm would not in itself jeopardize its standing as law, unless it was a part of a body of law that was in a pervasive and systematic way unjust.

its members. Thus, the argument for the application in a legal context of any principle of morality or practical reasonableness must take into account their institutional determination in positive law and the natural-law rationale for utilizing the offices of law to achieve the goods to which those principles direct rational agents.

Within this theoretical framework at least two different proposals have been offered to account for the apparent incorporation of moral principles in legal reasoning. One offers a neo-classical natural-law argument for a view that is closely analogous to inclusive legal positivism (George 1999, 110–1). On this view, the issue is best seen as one of the proper structure of adjudication or the role of the judge. In familiar natural-law fashion it holds that the role of the judge is "fundamentally a matter for *determination*, not translation from the natural law"—a matter to be determined by the practice of the community, in particular the practice of judiciary. Since natural principles only give very broad guidance about the structure of this institution, conventions at the foundations of law have wide leeway. It is possible, then, that the role of the judge in appealing to non-pedigreed moral principles "reasonably varies from jurisdiction to jurisdiction—according to each jurisdiction's own authoritative *determinationes*."

To this point, this proposal approaches closely convention-based inclusivism. However, it proceeds beyond Coleman's *possibility* argument to offer a substantial explanation of one particular legal jurisdiction, the American system. The best explanation of American practice, Robert George argued, is that judges are bound to restrict their legal reasoning within the narrow limits of available enacted rules of law. The rule of law, which is a condition of the just community, he held, morally requires judges to respect these narrow limits on their deliberation and decision-making authority. Thus, this natural-law theory holds that, while it is *possible* for a community's conventions to authorize judicial reliance on non-pedigreed principles, American practice has determined that judges are not authorized to do so. Thus, any cases of judicial appeal beyond formally enacted law are cases of judicial arrogation of power they do not have.[11]

This surprising natural-law perspective rests on assumptions that many fellow natural lawyers might well question. They may wonder, for example, whether background natural-law principles give quite as wide a berth to local practice of adjudication as this argument assumes, and they might wonder whether the strongly formalist characterization of American practice accurately describes that practice. John Finnis offered a significantly different perspective on the incorporation issue. He agreed that human law is the *determination*

[11] Note that this is not merely a localized analogue of exclusive positivism, for on George's view, judges are duty-bound *not* to appeal to non-pedigreed principles. His view, then, is a localized version strong formalism (see chap. 8, sec. 8.7.2 above) and of the *mistake thesis* we briefly considered in this chapter (sec. 10.1.2, above).

of natural law, which can vary from community to community; he also agreed that law is able to fulfill its natural-law assigned tasks only through institutions and officials that effectively exercise authority (understood in broadly Razian terms; Finnis 1980, chap. 9). But he denied that we should regard the duties and responsibilities of the judge as strictly determined by the conventions of local practice (Finnis 2002, 13–5). Rather, he insisted that judges have a fundamental responsibility under natural law to exercise their capacities of practical reason. The institutions of law must make concrete the requirements of practical reasonableness for citizens, but this is not just the task of legislators, it is also the task of the judiciary (Finnis 2002, 10–1). Adjudication requires, in his view, the specification of abstract moral principles to settle complex cases, because formally enacted law can never completely anticipate the circumstances in which practical principles must apply, and natural law authorizes judges to exercise their practical reasonableness. In doing so, judges must simultaneously look to the abstract principles of morality and to the concrete details of the substantive law they are charged administer. Competent judges have and are bound to use their knowledge of their local legal system to help fashion new, recognizably reasonable determinations of human and natural law. It is a mistake to insist, as exclusive positivists do, that in such cases judges *legislate*. While they surely do (and must) go beyond what is dictated by particular enacted legal rules, their activity is categorically different from that of legislators, because it is informed by the special prudence—the practical knowledge of the expert jurist—of the details of the substantive law. We acknowledge this important difference, Finnis argues, by acknowledging that these *determinations* are "in an important sense *already part* of the law" (Finnis 2002, 11, 34–7).

Finnis might find congenial some features of the exclusivist account of incorporation (amended to recognize the distinction between legislative and judicial law-making), depending, of course, on whether natural law principles of authority adequately support the sources thesis. But a major difference lies in the details he was inclined to offer of the structure and responsibilities of the legal reasoning of judges (see below chap. 12, sec. 12.3).

10.2. The Dialectic in the Positivist Camp

Theorists who have been inclined to accept the incorporation thesis in some form (positivists and non-positivists alike) have often done so on the two-fold ground that (1) the thesis takes seriously the deliberation and practical reasoning of participants (especially judges and lawyers) in familiar legal systems, and their self-understandings as they engage in these activities; and (2) these fit into and are explained by key features of the nature of law. (Inclusive positivists and their anti-positivist counterparts draw on different features of law for this explanation.) Those who reject the incorporation thesis (primarily, exclusive positivists) attack both parts of this prima facie case. They have deployed

many different arguments in their challenge, but we can locate the most important lines of the dialectic over incorporation under three heads. Under one head are arguments that challenge the first ground above; arguments under the other two heads challenge the second ground.

10.2.1. The Fiction of the Midas Touch

Exclusivist critics of the incorporation thesis argued that the activities and self-understandings of judges and lawyers actually point away not towards the incorporation thesis. They offered two arguments to this effect. First, critics pointed out that from the premise they share with inclusivists that principles are regarded as binding on law-applying officials inclusivists conclude that the principles are incorporated in the law as legal principles even if not pedigreed. This conclusion, they contended, rests on the suppressed and false premise that principles can be binding on judges in their official capacity only if they are legal principles. This premise was said to make a fundamental mistake about *morality*. Morality does not need the endorsement of law to bind anyone, including legal officials; on the contrary, law is binding on them just in case it is endorsed (i.e., legitimated) by morality (Raz 2004, 6–7). Moreover, they argued, we do not need to attribute this mistaken assumption to officials to give an accurate and sympathetic representation of their self-understanding as they participate in typical legal reasoning.

Second, they charged that those who endorse the incorporation thesis in some form make a further mistake about the phenomena of legal practice. They assume that if a norm or standard is used in legal reasoning it is, and is regarded by judges and lawyers, as part of the law they are committed to apply and maintain. They assume, that is, that, like King Midas whose touch turned everything to gold,[12] the mere fact that officials use principles turns them into legal principle (Green 2003, sec. 3). But, critics argued, this is often not the case and judges and lawyers are fully aware that it is not.[13] Sometimes judges must implicitly or explicitly use rules of logic or grammar, or principles of mathematics, statistics, or economics, but no one thinks that these rules or principles are part of the law they must apply. Similarly, the law often explicitly requires that judges look to rules of some foreign legal system (e.g., in conflicts of law cases), or to rules of clubs, associations, or institutions within their jurisdiction to decide the cases before them, but, again, it would be extravagant

[12] Kelsen may have endorsed, for perhaps different purposes, some such principle when he wrote, "Just as everything King Midas touched turned to gold, everything to which the law refers becomes law, i.e., something legally existing," (Kelsen 1967, 161, 161).

[13] It is interesting that Dworkin (2006, 4–5, 234, 238–9, 292), on the inclusivists' other flank, makes the same objection, although he draws a very different conclusion. For a response to Dworkin's criticism, see Kramer 2007.

to conclude that this use indicates that these rules or norms are incorporated into the law. They are rules of the foreign legal system, or of the Better Banking Bureau, or the National Hockey League, applied and enforced by law, but not absorbed into it (Raz 1995b, 333; 2004, 17). In the same way, moral principles may figure in judicial reasoning leading to authoritative decisions, but this use gives us no reason to regard the moral principles as part of the law. Judges of the State of Massachusetts no more make norms of mathematics, morals, or Mauritania into Massachusetts law by using them, than kings can turn lead into gold by a mere touch. This, Leslie Green explained, is because "legal organs have applicative, but not creative power over [such norms]" (Green 2003, sec. 3; see Raz 1990, 152–4).

Matthew Kramer, in defense of inclusive positivism, recently challenged this argument (Kramer 2004, 39–43; 2007). He maintained that we must look more carefully at the items said to be used by officials. To be eligible for incorporation through official "use" the items must be (a) "free-floating" *and* (b) used as part of the *normative* basis of justification of adjudicative decisions. Laws are practical norms which function as grounds for justification of decisions. Of course, such justifications also may appeal to factual or other non-normative premises, but they are not candidates for incorporation, because they are not practical norms and do not figure in the *normative* bases of the justifications. Thus, failing condition (b), laws of nature, and the particular facts of an accident, may be used but are not thereby incorporated into the law; likewise, rules of grammar, arithmetic, logic, or economics would not be eligible. However, rules of clubs, churches, and private associations, and legal norms of foreign legal systems, all have the proper normative character; they pass the normative basis test but fail the free-floating test because they are products of independent centers of authority. Community customs, by contrast, are free-floating and so too are principles of morality: both are duly normative and free-floating, and hence, if used, may be regarded as incorporated in the law of the jurisdiction in which they are used.

This reply succeeds only if there is some reason for distinguishing those rules which are free-floating from those which are not, otherwise the distinction looks arbitrary and *ad hoc*. It is not entirely clear what rationale Kramer had in mind, but the point may have something to do with control over the norms: not merely that these rules of foreign law and the like are subject to independent control, while others (like custom) are not, but rather that, since they are subject to the control of other centers of authority, they are *not* within the control—the "creative power"—of the home legal system. They are not subject, for example, to the rules of change in the system (Green 2003, sec. 3), nor are they interpreted in light of other governing principles of law. But if this is the rationale, then the relevant difference among norms is whether they are properly regarded as subject to the control of the (home) legal system. And on the test so regarded, foreign law, rules of clubs, *and*, presumably, the principles

of morality, fall into one group, while customary norms into a different group. If so, we still have reason to resist the idea of law's incorporation of moral principles into itself as exclusivists contended.

However, this response may not be entirely persuasive. For what prevents a given legal system from incorporating—and thereby subjecting to its control—the rules of clubs and associations in its jurisdiction and the laws of foreign legal systems is something akin to respect for the sovereignty of those apparently independent normative systems. This respect takes the complex form of applying and enforcing the rules of the independent normative system without exercising further control over the norms or the rule-making authority by which they were made. On this understanding, while often there is no reason of this kind against incorporating a community's customary norms, in some cases there might be. In those cases, the reason against incorporation would not be that the customary norms were explicitly made by some independent center of law-making authority, but rather that they are the proper norms of a community and respect for that community might reasonably take the form of *applying without incorporating* the norms. In each of these cases, the "sovereignty" of the parties or communities is respected. Thus, on this way of looking at them, customary rules fall on the side of rules of clubs and foreign law, although the scruples courts might have against incorporating custom may be weaker than those regarding rules of foreign law. Moreover, on this way of thinking, moral principles would be distinguished from rules of clubs, etc., and from custom, because all would agree that they are not the product, explicitly or implicitly, of any institution or community's law-making, not the expression of any individual's or community's sovereignty. There is no "sovereignty" to respect, so no reason to resist incorporation, Kramer might argue. Moreover, the exclusivist cannot object to subjecting moral principles to legal control, since, by their own account, it is characteristic of law to "modify the application of morality" in practical reasoning (see sec. 10.1.4, above).

One might be tempted to think that this dispute has run to impasse, but even if the last response is successful it does not yet get us to the appropriateness of the incorporation thesis; at best, it only removes one basis for scruples against incorporation. Is there any positive reason for thinking that moral principles, under appropriate circumstances, might be incorporated in the law of a given legal system? If Raz is correct it cannot be that morality depends on law for its binding force on officials (or citizens for that matter), for the opposite is the case. But might there not be moral reason, having to do with the law exercising its authority legitimately, for regarding some moral principles as incorporated in the body of law? Raz presumably would resist this suggestion; such principles might function as limitations on what legislatures or courts may do to modify the application of morality to law-subjects, but they are not incorporated into the law (Raz 2004, 13; see sec. 10.1.5, above). However, this may not be responsive to the thrust of this line of thought. The issue, after

all, is not whether law controls morality, but rather what role morality takes in shaping the substantive doctrines of law. As we noted in chapter 8, there is likely to be a significant difference between the role principles play within a body of norms, shaping legal doctrines in the direction of their development and relations to other doctrines, and the effect of extra-legal principles that apply to specific cases alongside legal doctrine that is developed apart from them. While the former is likely to be systematic, the latter will be only *ad hoc*. Integrated principles have a systematic influence on the existing law, qualifying some doctrines, enriching and emboldening others; similarly, their impact on particular decisions are likely to be constrained by the existing body of law.[14] They also tend to shape the way particular cases are framed and the doctrines that are deemed relevant to their resolution. Principles applied to cases that are already defined by existing law come into deliberation at a very different point and, it is reasonable to suppose, have a significantly different role to play. It is not, then, the fact of morality's being applicable to judicial decision-making or binding on officials or citizens that is signaled by the incorporation of moral principles in law, but rather the influence of those principles in the shaping of substantive legal doctrine. There need be no Midas-magic in this.

These considerations offer some reason, I believe, to look favorably on the incorporation thesis. However, according to exclusive positivists, more decisive reasons for rejecting it come from considering features central to the nature of law itself. Let us turn to these challenges.

10.2.2. The Compatibility of Conventionalism and Incorporation

The first such argument is directed against inclusive positivists who insisted on the foundational conventionality of law. They argued that since, necessarily, the constituents of any given legal systems are determined by the conventional law-identifying practice of its officials it must be *possible* for the moral merits of a standard to figure among the criteria of validity of a legal system. The conventionality of law, they claimed, entails the possibility of the truth of the incorporation thesis. However, critics argued that positivist conventionalism is actually *incompatible* with the truth of the incorporation thesis.

Andrei Marmor (2001b, chap. 3) offered two arguments for this conclusion. First, drawing on his analysis of conventions (Marmor 2001b, chap. 1; 2009, chap. 2; see chap. 11, sec. 11.4, below), he argued that the rule of recognition is a *constitutive convention*. Like rules of chess or the scoring-rule in football, it gives certain actions or activities normative significance within a legal system. It determines how norms come to be legal norms, by tying their creation to certain conventionally established sources. It cannot include among these conditions creation of norms by moral argument, because "there is nothing the

[14] Dworkin might see these as two sides of the demand for "integrity."

conventions could constitute." Following Raz, he held that moral considerations bear on practical reasoning of officials and citizens regardless of legal or other conventions. "Constitutive conventions can make a difference only by determining specific ways in which such moral, political, and other types of concerns become part of law, that is, part of a conventionally established social practice" (Marmor 2001b, 51). The rule of recognition carves out ways to comply with moral norms, but they "cannot constitute reasons for acting according to moral reasons" (2001b, 52). Thus, since the rule of recognition is a constitutive convention, it can only identify pedigreed sources as criteria of validity, as exclusive positivists insist.

To this argument, Matthew Kramer (2004, 79–80) objected, first, that although law in general may be conventional in Marmor's sense, it does not follow that every legal norm is conventional in that way; moreover, it is possible that, while the principles validated by a rule of recognition are not themselves conventional, their status *as laws* may be. Kramer's objections raise points worthy of further consideration, but they do not seem to be responsive to Marmor's argument; they only deny the conclusion of this argument rather than show it to be invalid or in some way unsound. Coleman challenged, however, the soundness of Marmor's argument by challenging the theory of conventions on which it rested. We will explore that theory and critical reaction to it in chapter 11, section 4.

Marmor's second argument has much in common with Dworkin's original criticism of positivism (Dworkin 1978, chap. 3; 1986, chaps. 1–3). On the inclusivist account, disputes can arise regarding the application of criteria of validity. However, Marmor argued, this is incompatible with regarding the criteria as conventional, for "conventions are what they are, because there is a practice of applying the rule to certain cases [...]. Once it is not clear to the norm subjects whether the convention applies to a certain case or not, then there is no conventional solution to that matter, and at least as far as the convention is concerned, this is the end of it" (Marmor 2001b, 58). Since inclusion of principles in the law on the ground of their moral correctness alone invites disagreement about the criteria, these criteria cannot be conventional. "The idea that judges and lawyers can have genuine arguments about what rules of recognition *really require* in controversial cases, and that such a phenomenon shows how morality can determine what the law is, involves a misunderstanding of the concept of convention. It is incompatible with the conventional foundation of law that inclusive positivism adheres to" (Marmor 2001b, 60). Thus, Marmor, like Dworkin, concluded that the two fundamental components of inclusive positivism, conventionalism and the incorporation thesis, are incompatible. From this, Dworkin, the anti-positivist, concluded that the conventionality thesis must be abandoned, while Marmor, an exclusive positivist committed to the conventionality of the rule of recognition, concluded rather that the incorporation thesis must be abandoned.

Facing a concerted attack from two opposing sides, Coleman (1982, 156–62; 1998a, 410 and n. 46; 2001a, 116–17) defended inclusivism by arguing that convention and controversy are compatible, because participants in a conventional practice can agree on the content of the rule but disagree about its application to particular cases. However, Dworkin (1984, 253; see also 2006, 191–4) found Coleman's distinction "doubtful" and Marmor insisted that there simply is no such gap between rule and application. "A convention is constituted by the practice of its application to particular cases" (Marmor 2001b, 58). Yet Coleman (1998a, 410–11 and n. 46) adamantly held his ground, contending that the distinction is obviously valid and very familiar. He is correct that certain kinds of disagreements about the application of a rule that do not involve disagreements about its content. For example, take the rule: "Obey Jones" (i.e., "you are bound to do what Jones commands you to do"). You and I may agree on what this means, but disagree about whether I must signal when making a right turn because we disagree about whether that is what Jones commanded me to do. Similarly, we might agree on the rule "fathers have a right to visit their children," but disagree about whether John is the father of Joanie. In such cases, Coleman's distinction is clear, but these are not the kind of disagreements that are invited by the inclusivist thesis, and in other cases the distinction is not at all clear. If the rule is "fathers have a right to visit their children," does that apply only to biological fathers or also to step-fathers or biological grandfathers? These are questions of application of the rule, but they are answered by settling the rule's content. Disagreement about application of the rule in such cases just is disagreement about the content.

Coleman was correct to think that Dworkin's understanding of conventions, interpreting Hart's initial analysis unsympathetically, was rather crude. Conventions are tethered to regularities of behavior of people, but the relation between the behavior and the rule may be complex. We might argue that the regularities of behavior *fix* the rule, but do not fully determine its content (Coleman 2001a, 79–81). What is it to fix the rule? Coleman says that the behavior enables us "to identify which rule is being practiced" and (when read against the background of common culture and language) it can enable us to know "how to go on," i.e., what following the rule involves (ibid., 81). However, to be able to identify the rule and to know how to follow it seem to be just what grasping the content of the rule is, and, if so, again the distinction collapses.

What Coleman might have had said is that the behavior *locates* the rule in the sense that it enables observers to identify from the outside rough parameters of the practice which constitutes the rule. From this only the roughest and most tentative inferences can be made about the content of the rule, but this is not because participants (or, even less, observers) disagree about what the rule requires, but because, at least on one understanding of rule-constituting practices, it is not possible to grasp the content of the rule without participat-

ing in it and learning through participation "how to go on." This suggests a different view of conventions (see Postema 2007b, 287–91). According to this view, the rule is not constituted by the regularities of behavior (allegedly observable from some external perspective), or even by the regularities plus attitudes of participants, for the very good reason that none of this adds up to anything normative. They are merely empirical facts. The *normative practice* is manifested in the convergent behavior and attitudes (and located by noting these facts), but it is the normative practice, not the behavior and attitudes as empirical facts that constitute the rule. Moreover, on this view, the rule is constituted by the practice, not by what people say about, or think about, the practice. So, there may be disagreements about what the practice commits us to, disagreement about the content of our practice and what we are required to do, even though we are all committed to a common practice. If something like this analysis of conventional rules wins the day, then it may be possible for conventions to live alongside controversy about them. Whether this, or some alternative account, best captures the normative character of conventional rules is a question reserved for later discussion. But even if this is a promising direction to take, it can help the inclusive positivists only if criteria of validity are best understood as the content of conventions of law-applying officials and the kind of disagreements about the content of the criteria of validity permitted by the incorporation thesis are the kind permitted by conventions understood in this way.

If we accept that conventions can be controversial, Coleman acknowledged a further worry. We might wonder whether potentially controversial conventional criteria of validity are inconsistent with the point of having a rule of recognition, for example, providing effective guidance (to citizens or at least officials) regarding what is to count as law in the legal system. Presumably, a controversial rule of recognition would not be able to provide such guidance. Coleman conceded that the *efficacy* of a rule of recognition diminishes with increases in controversy about it, but this, he argued, does not challenge the conventionality thesis or the essential role of the rule of recognition. "The claim that law is made possible by a rule of recognition that supervenes on convergent behavior accepted from an internal point of view is a conceptual claim," that is, a claim designed "to explain how law is possible." For this purpose, "it does not matter [...] whether or not the rule of recognition is controversial," or whether, in consequence, its efficacy is thereby compromised (Coleman 2001a, 118).

This exclusive focus on the "conceptual" issue of explaining the existence rather than concern for the (merely empirical, or in any case non-conceptual) matter of securing the efficacy of the rule of recognition is a hallmark of Coleman's understanding of the task of general jurisprudence and his strategy for defending inclusive positivism. These features will be especially evident as we consider a pair of related challenges to inclusive positivism that Coleman himself regarded as truly formidable.

10.2.3. Implications of the Practical Dimension of Law

Perhaps the most serious challenge to those inclined to accept the incorporation thesis lay in the claim that that incorporation of moral principles in the law undermines its ability to offer practical guidance. This challenge is rooted in an argument we have already explored in Chapter 8, the argument from authority for Raz's sources thesis.

10.2.3.1. The Challenge of the Argument from Authority

Recall the argument: necessarily, law claims authority and thus law must have the non-normative features that make it capable of exercising authority. The point of submitting to authority is that one is thereby better able to act in accord with reasons one has for acting. Authoritative directives, while justified on the basis of the reasons that those subject to them have for acting, settle for them what their reasons require without their having to balance those reasons. So, if authoritative directives are to do their work, it must be possible to identify and work out the meaning of the directives without recourse to the justifying reasons that the directives are meant to replace. However, it is argued, if law's norms must sometimes be identified, and their content grasped, by considering the moral reasons and arguments underlying them, then they cannot function as authoritative guides to action. The matters the law is meant to settle would thereby be opened for reconsideration. Thus, to recognize the possibility of there being moral conditions among the criteria of validity in any legal system is inconsistent with its conceptually necessary claim to authority.

Exclusive and inclusive positivists agree that this argument is not meant to turn on any claim about how well law can perform its assigned functions—that is, about its *efficacy*—but rather on a system's ability to claim authority, and so on its *existence* as a system of law (Marmor 2001b, 54; Coleman 1998a, 386; 2001a, 114). In particular, the argument does not turn on any controversy that might be engendered by including moral conditions among the criteria of validity of legal norms, but solely on the ability, regardless of controversy, of legal norms to play the mediating role at the heart of their claim to authority. Law, by its very nature, is capable of authority; law incapable of authority is no law at all. This is the kind of argument that Coleman said could alone threaten his own *conceptual* claim about "the existence conditions of law." He was bound to take this threat seriously and he did.

Responses to the argument from authority against inclusive positivism have come from three quarters. The most fundamental challenge rejected the argument's basic premises, either Raz's service conception of authority (SCA) or its appropriateness for or centrality to law (i.e., the interpretation of the claimed legitimacy thesis (CLT) in terms of the service conception of authority). There is no need to consider these challenges here both because we have surveyed

them already in Chapter 8 above, and because, until recently, the incorporation debate in the positivist camp proceeded with CLT and SCA stipulated by the parties involved.[15] Inclusive positivists have tended to challenge the validity of the argument, in effect arguing that it is a non sequitur. In Chapter 8, section 8.5.2.1, we considered two such challenges, which Raz could answer, but only by putting a significant strain on the plausibility of his overall explanation of law and legal reasoning. Here I wish to consider a third such charge of invalidity.

Jules Coleman (1996, 292–3, 307–8; 1998b, 273–4; 2001a, 127–8) made the following argument. The core insight of the positivists, he maintained, is that a necessary condition of the existence of law is a practice among law-applying officials of treating certain norms as valid. Whatever else it might do, this practice determines what *metaphysically* counts as law. Now, he continued, the sources thesis sets certain general constraints on such law-constituting criteria; it denies, for example, that truth or reasonableness as a matter of morality may figure among criteria of validity. However, Coleman argued, the authority argument for the sources thesis does not support this conclusion. The authority argument only requires that there be *identification rules*, heuristics by which citizens can identify the existence and content of binding legal norms, which do not depend on the moral evaluation of candidate norms. *Identification* rules and *validation* rules need not be the same; the former perform an epistemic function, but the latter perform the metaphysical function of determining what counts as law. "The argument from authority may justify imposing constraints on the devices by which citizens learn what the law requires of them," Coleman (1998b, 273) argued, "but it says nothing about the criteria in virtue of which certain acts or rules are designated as legal or valid." The argument from authority is a non sequitur.

Coleman's distinction is clear, but less clear is whether it can get any jurisprudential traction. The maneuver faces two problems. First, although it is plausible to think that ordinary citizens only need reliable heuristics for picking out laws and grasping their practical import, the link between the constitutive and epistemic functions would seem to be closer for legal officials than

[15] Recently, Shapiro (2009) offered an argument that does not depend on Raz's theory of authority. On this argument, legal activity just is the activity of social planning (this again is meant to be a conceptual claim), but plans (legal norms) guide action only by cutting off deliberation and directing subjects to act in accord with the plan. So, again, the existence and content of legal norm-plans must be available to those subject to them by means that do not involve their deliberating about precisely the matters the plans are meant to settle. The major premise of this argument appears to be no more plausible than Raz's interpretation of the claimed legitimacy thesis. Some legal systems, at some points in time, or in certain parts, may have a predominant planning dimension, but it is hard to accept this planning theory as universally, let alone necessarily, true as a descriptive thesis. It would not be difficult to imagine responses to this approach from, for example, Fuller or Hayek.

Coleman allowed, especially those officials whose behavior is the foundation of the rule of recognition. Not so, Coleman (2001a, 128–9) replied. It is entirely possible that officials, too, mainly follow a rule of identification, rather than the moral-conditions-including criteria of validity. Moreover, the fact that *someone* must be a reliable expert on what makes norms of the system valid does not imply that that person must be an official of the system; she could be a Swedish expert on American law, for example. Moreover, since to show that inclusive positivism is compatible with law's claimed authority all that needs to be shown is that law that incorporates moral standards is *in principle* capable of being authoritative. Thus, the fact that officials quite generally have recourse to justifying reasons for the norms they certify as valid does not bring inclusivism under the axe of the authority argument, because it is still *in principle* possible that all of them could rather proceed with identification of valid laws by appeal to the Swede.

This reply sounds a definite tone of desperation and the explanation of Dworkin's original observations about the role of moral principles in judicial reasoning has been left far behind. It is hard to see how it is possible for the convergent behavior and attitudes of law-applying officials to constitute the norms that determine metaphysically the existence and validity of legal norms, while the rules they follow are only rules of identification. The concepts of identification and validation are distinct, but it is hard to see how to keep them distinct in fact when the very same practice of officials is involved in both. The distinction *in concept* is left marking no distinction in reality. Another way of putting the point is that there seems to be no way of locating—and so confirming or disconfirming—the distinction in the actual practice of legal reasoning of officials. Coleman's strategy, by escaping into the realm of the merely conceptually possible, has left us without resources to give a satisfactory explanation of phenomena in the real world. Second, if Raz is correct that law's claim to authority is at the core of its nature and that we can make sense of it best by seeing its point as that of settling matters otherwise unsettled in deliberation, then it is hard to drive a wedge between identification and validation. The challenge to Raz's authority argument, it would seem, must address directly his theory of authority and the claimed legitimacy thesis that draws that theory into the argument for the sources thesis.

For positivism—either in its classical or its contemporary form—the distinction would seem to mark no serious difference. The task of determining the validity of legal norms was essentially linked to the task of providing marks for the public identification of those norms. In the abstract, the distinction is clear, but set in the context of positivist theory as a whole, a theory at the center of which was a view about the kind of work we expect law to do in a political community, the distinction has no plausible content. Thus, it appears that, if this maneuver enables inclusive positivism to escape the force of the argument from authority, it does so by emptying most of the interest from the

positivist doctrine it sought to save. The sharp separation of identification from validation marks a departure from the positivist tradition. That, in itself, is not a problem and might even be a substantial mark in its favor. But the result is that it effectively cuts off inclusive positivism from the larger theoretical context, the philosophical problematic, of which the idea of criteria of validity has long been a part. And it does so without supplying any substantial, theoretically meaningful substitute. We are assured that this thin and narrow doctrine of positivism is conceptually compatible with a narrow notion of law's authority, but this tells us almost nothing about the nature of law and it brings us no closer to an understanding of the phenomena of law that puzzled us from the beginning.

10.2.3.2. Practical Guidance, Authoritative Directives, and Directed Powers

It might seem, then, that if we are to take the practical dimension of law seriously—that is, its alleged claim to provide law-subjects with practical guidance—the exclusivists have captured the field, assuming that challenges to the service conception of authority considered in Chapter 8 can be answered. But this conclusion may be too hasty, for there are reasons to think that exclusive positivism may jeopardize law's capacity for giving practical guidance no less than inclusive positivism was alleged to do. Recall that exclusive positivists sought to explain the role of moral principles in legal reasoning by appeal to the notion of "directed powers." Judges, on this view, are empowered to appeal to moral principles in various circumstances, although when they do so they are regarded as making, not discovering, law. Perhaps not every court is so empowered, but the superior courts might be, and in common-law jurisdictions, where it is said that it is always a possibility for a court to extend, distinguish, or overrule a precedent, these directed powers may be widely dispersed. Of course, on exclusivist principles, the considerations appealed to in such cases may be extra-legal, because not source-based, but judges may be no less bound to decide on the basis of their best judgment of their merits and application to the cases they must decide. When they distinguish, overrule, or invalidate a previously established legal norm, they change the law and make new law, on moral grounds.

At this point, an obvious question arises. Would it not be reasonable to expect that legal reasoning with authoritative directives supplemented by extra-legal moral principles in the exercise of directed powers would be as likely to jeopardize the guidance of ordinary citizens as law incorporating moral principles or treating fairness or moral decency as conditions of the validity of legal norms? In both cases, it would seem, the law-subject would be well-advised not to restrict his deliberations about what legal officials are likely to do to what pedigreed legal norms call for. For in the latter case, those norms may turn out to be invalid, but equally in the former case, they may be *invalidated*,

both based on assessments of their moral merits (Waluchow 2008). If practical guidance is restricted to matters of deciding what to do, given that law has a great deal to say about what one ought to do, it would seem that in both cases pedigree is only the beginning of the deliberation story. The prudent and not-necessarily-bad man would pay attention to the moral arguments, his attention would shift from questions about whether the legal norms are properly pedigreed to whether and how those norms, whether pedigreed or not, will play in the legal reasoning of the courts. It is hard to see how law's alleged claim to authority, and so its alleged claim to preempt moral deliberations about matters the law is meant to settle, would stand in the way of the law-subject's doing just the kind of moral deliberation the authoritative directives were meant to preclude (Postema 1996, 99–101; 2010b, 269). The point is not that the likelihoods are nearly the same, but that the effects on practical guidance will be of the same kind.

Of course, exclusivists could avoid this problem by abandoning the doctrine of directed powers, but only at the cost of leaving entirely unexplained the regular judicial appeal to moral principles in ordinary legal reasoning. But that would be to abandon the task set at the beginning to explain the phenomena of judicial appeal to moral principles. It would seem, then, that there is not a *fundamental* practical difference in the practice as modeled by the exclusivist from that modeled by the inclusivist. This is not a victory of inclusivism, but a defeat for all who had hoped to advance our understanding of law and the practice of legal reasoning by tracing the dialectic of the debate over incorporation within the positivist camp.

The dialectic of argument amongst positivists has brought sophisticated legal theory to a curious impasse. Exclusivist theories rest on overly strong, implausible theses regarding the nature of law, theses which in one respect so limit the scope of the term 'law' that it captures only a relatively small corner of modern legal practice, which itself is a relatively small corner of the world of law. Inclusivist theories, attempting with increasing desperation to find some way of reconciling recalcitrant phenomena of legal practice with core dogmas of positivism, have departed further and further from the task of deepening our understanding of the nature of law wherever we find it. Although the phenomena of legal practice—the prevalence of appeals to principles of political morality on their merits in judicial argument—are widely acknowledged by contemporary analytic legal philosophers, their explanations of these phenomena are sharply opposed. However, the arguments offered in favor of competing explanations are in most cases unsatisfying. What is worse, in the course of the dialectic, we have seemed to have lost contact with the original phenomena, problems, and the theoretical and practical motivations that gave them life.

Chapter 11

CONVENTIONS AND THE FOUNDATIONS OF LAW

According to Jules Coleman, "law is made possible by an interdependent convergence of behavior and attitude: what we might think of as an 'agreement' among individuals expressed in a social or conventional rule" (Coleman 1998a, 383). Some version of this "conventionality thesis" has been a key component of Hart's jurisprudential legacy since the 1980s. Few Anglo-American legal philosophers at end of the century denied that law has social foundations or that it is intimately linked to social practice. The conventionality thesis in its refined post-Hartian form, however, makes a stronger and more sharply focused claim: that essential to law is a social practice, primarily among officials, regarding law's formal foundations (its "rule of recognition"), that is distinctively conventional, and in this fact lies a full explanation of the conditions of the existence and the distinctive normativity of law. This complex claim has been the focus of debate for nearly three decades in Anglo-American legal philosophy. This chapter chronicles this debate.

11.1. Conventions, Conventionalisms, and Law

We face two major hurdles immediately off the blocks. First, the words "convention" and "conventional" are, as Nelson Goodman reminded us, "flagrantly and intricately ambiguous" (Goodman 1989, 80, quoted in Rescorla 2007). This hurdle is raised even higher by the fact that the term "convention" has different, quasi-technical meanings in disciplines as diverse as economics, social theory, philosophy, and jurisprudence. Thus, as we proceed, we must take great care to identify the relevant meanings of the terms at work in the debate. Second, within jurisprudence there have been many "conventionalisms"—not just competing versions of a single doctrine, but several different doctrines appropriating the same term. So, the task of this section is, first, to isolate the meanings of "convention" and "conventionalism" that are at the heart of the jurisprudential debate in view and then to identify the alleged problem in Hart's theory that spurred the search for an adequate account of law's conventionality.

11.1.1. Law and Conventions

To fix ideas on a single, if complex, target let us agree that "conventions" are practiced social norms the functioning of which as norms depends on their being practiced. This is meant to exclude those norms that may apply to a popu-

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lation but are not practiced by them and those rules people tend to follow "for their own part only," which Dworkin called "rules of concurrent morality."

Our target is jurisprudential conventionalism. To get this target in focus, let us consider some ways in which legal theorists have sought to explain law in terms of conventions. First, from time to time legal theorists have explored the idea of convention (more specifically, custom) as a "source" of law. This was a major topic in English jurisprudence in the first half of the twentieth century (Salmond 1924; Allen 1964) and is still, of course, an issue of major concern for theorists of international law. In recent years, legal philosophers have argued that specific departments of law (for example, tort or commercial law) depend more or less extensively on conventions (Hetcher 2004; Kelley 1990; Trakman 1983). Others have argued that the objectivity of constitutional adjudication depends fundamentally on interpretive conventions shared in the community of law-applying officials (Fiss 1982; Fish 1984).

These proposals for a role for *conventions in law* are of interest, but they are not the sort of conventionalist theses that have attracted the attention of legal philosophers concerned with matters of general jurisprudence. A more general conventionalist thesis has sometimes attracted their attention, namely, the view that *laws* are best understood *as conventions* in the sense of social rules that function as solutions to problems of social cooperation or coordination. This view has been traced, for example, to Bentham among others (Postema 1989a, 168–90; 1989b) and seems to be at the heart of the *fin de siécle* revision of "formalism" (see chap. 8, sec. 8.7). In *Law's Empire*, Dworkin reformulated positivism as "interpretive theory of law," a competitor to his "law as integrity," roughly on this model and called it "conventionalism" (Dworkin 1986, chap. 4). However, the kind of conventionalism that attracted extended philosophical attention was not this view, but rather the more sharply focused, and specifically Hartian, thesis about the conventions at the foundations of law mentioned at the outset of this chapter, which I will call *foundational conventionalism*.

In philosophical circles, "conventionalism" is often associated (usually by critics) with the crude semantic or metaphysical thesis that some set of propositions, e.g., propositions about what 'law' refers to or what law is, are true just by virtue of people believing them. Occasionally, legal philosophers inclined to more sophisticated versions of foundational conventionalism have been tempted by this view (e.g., Lagerspetz 1995, chap. 1), but only rarely. Foundational conventionalism does not subscribe to this crude semantic conventionalism thesis.

Foundational conventionalism is a thesis about the nature of law and its normative force according to which law can exist and has normative force only when it is founded in social practice. Hart focused foundational conventionalism on the recognitional practice of law-applying officials. This form of foundational conventionalism is narrow and, in a sense, formal, for the conventions on which law is said to rest are conventions of the law-applying elite concerned solely with the matter of identifying valid rules of law. Within the common law

tradition, represented in the recent century by the work of Lon Fuller (see chap. 4, above), a wider foundational conventionalism has also been available (Postema 2002c, 609–16; 2008a). On this view, the conventions, or ordinary customs and practices, of those subject to law also play a critical role in constituting law, although they contribute little or nothing to their legal system's criteria of validity. For most of this chapter we will concentrate on Hartian narrow-base or formal conventionalism, but we will have occasion to return to Fullerian wide-base conventionalism at the end of the chapter.

11.1.2. Normativity and Law's Conventional Foundations

The search for an adequate account of conventions in recent years was spurred by a widely (but not universally) perceived gap in Hart's account of the foundations of law. To understand the particular shape this search has taken, we need to look briefly at the jurisprudential problem to which Hart's appeal to conventions was seen to be the solution and to identify the gap that, in the view of many, Hart's account of social rules left open.

Jurisprudence is vulnerable to a curious circularity (Green 1999, 36; Shapiro 2001a; Marmor 2006a, 348–353): the legal authority of acts or institutions rests on legal rules that confer it, but those legal rules are able to confer authority only if they already have it. Attempts to account for legal authority can escape this circularity through appeal to other legal rules higher in the chain of validity, but, upon pain of a bad infinite regress, this chain has to come to an end somewhere. However, the chain can bottom out either in a brute fact or in another norm. The first option yields some form of (for Hart, unacceptable) reductionism, but the second option either starts another trek around the legal authority circle or grounds law in a moral norm (also unacceptable for Hart). Hart's way out of this circle was to identify a middle way between brute facts and moral (or Kelsenian transcendental) norms. The authority of individual laws, on his view, is grounded ultimately in a social norm, a convention. Speaking for many inspired by Hart, Coleman read in Hart the proposal to treat conventional social practice as the solution to the circularity problem: "legal authority is made possible by a specific kind of conventional social practice" (Coleman 2001a, xvii).

However, Hart's proposal to explain the existence of social rules in terms of convergent behavior and attitudes of people who practice the rules was seen by these same commentators as unsatisfactory. Behavior and attitudes, it was argued, are merely social facts and social facts by themselves did not promise to yield reasons for action for those who are governed by the rules. It was thought that Hart may have traced legal authority chains to regularities of behavior and attitude, but regularities as such are not norms. Thus, Hart's project of explaining the normativity of law via conventions failed because the account of conventions he offered failed to explain the normativity of conventions (Postema

1982, 169–71). Thus, beginning in the early 1980s philosophers sympathetic to Hart's basic project sought ways to bridge the gap in Hart's explanation of law's normativity. The aim was to offer an analysis of ordinary social conventions which (1) fit the facts of official practice at the foundations of law as Hart described them and (2) bridge the gap between the social facts of convergent behavior/attitudes and genuine reason-giving norms. In what follows we will consider several attempts to elaborate Hartian themes and the challenges they faced in doing so.

11.2. Humean Conventions

It was natural for philosophers to look first to Hume who offered the most sophisticated analysis of custom and convention in modern philosophy, and to David Lewis (1969) who offered a rigorous interpretation Hume's account, utilizing the technical tools of contemporary game theory. The Hume-Lewis (or, for short, the Humean) theory was and remains very influential in social, political and legal theory.[1] Although it was never without critics, in certain respects it set the terms of the debate for the last three decades, and only in the late 1990s have serious rivals to it emerged.

11.2.1. Conventions and Social Cooperation

11.2.1.1. Hume on the Conventions of Justice

Hume challenged the contractarian arguments of Hobbes and Locke who sought to ground civil law and government in the exchange of promises by individuals existing in a "state of nature." Hume insisted that we can only understand promises or contractual agreements, or for that matter laws of property, against the background of informal rules of justice. Such rules, however, are not derived from natural law, nor from natural dispositions to respect independently existing rights; rather, "*natural*, as well as *civil* justice, derives its origin from human conventions" (Hume 2000, 347), the artificial, but not arbitrary, product of human intelligence and invention (ibid., 311, 314).[2]

Justice, Hume wrote, "takes its rise from human conventions [...] intended as a remedy to some inconveniencies, which proceed from the concurrence of certain *qualities* of the human mind with the *situation* of external objects"

[1] David Shwayder's *Stratification of Behaviour* (1965) anticipated Lewis's theory by a few years, but *Convention* drew the attention of philosophers, social theorists, economists, and legal theorists. For a very useful general survey of the philosophical discussion of conventions, with emphasis on Lewis's account see Rescorla (2007).

[2] For a discussion of Hume's conventionalist theory of justice and law in its historical context see this Volume 10 of this Treatise, chap. 9.3–4.

(ibid., 317). Justice is needed because, although human creatures can subsist only through association with other human beings (Hume 1998, 28), the scarcity of necessary goods and the instability of possession of them unleash powerful centrifugal forces of selfishness and limited generosity which jeopardize cooperative efforts and put them in potentially deadly competition for scarce material resources (Hume 2000, 312–9). Recognizing their plight, they come to see further that only through some systematic structure of rules governing possession, transfer of goods and agreements will the cooperative efforts on which their survival and development depend be possible (ibid., 319–20). When this recognition and the resolution to do one's part in such a scheme are publicly and mutually expressed (ibid., 315, 319), Hume maintained, a convention is established "which carries [each], in concurrence with the others, into a general plan or system of actions" (Hume 1998, 98; see 2000, 315, 319). This convention consists of "a sense of interest, suppos'd to be common to all [...] where every single act is perform'd in expectation that others are to perform the like" (Hume 2000, 320) This is properly denominated a convention although no promises are exchanged, Hume claimed, because "the actions of each of us have a reference to those of the other, and are perform'd upon the supposition, that something is to be perform'd on the other part. [Just as] two men, who pull the oars of a boat, do it by an agreement or convention, tho' they have never given promises to each other" (ibid., 315).

Several features of Hume's account of the "origins" of justice have influenced contemporary thinking about social conventions. Of special interest are his methodology and key elements of the structure of this account. Consider first his methodology, which we might anachronistically label "pragmatic." Hume did not seek to analyze the concept of convention or capture the ordinary understanding of the term; rather, he sought to give an account of the nature and rational force of (certain) conventions by presenting them as solutions to fundamental problems of social interaction. So, his account begins with an explanation of the reasonableness of certain conventions in terms of the social problems they solve, in virtue of which people subject to them have reason to comply, even if, on the surface, their reasonableness is not obvious. This account of certain fundamental conventions provides the basis for an elaborated account of other conventions which are made necessary and possible by the establishment of the initial ones. This, on Hume's view, explains a natural sense in which compliance with established conventions is obligatory, but he insisted that it is a further question, yet unsettled by his account of the origins of the conventions, whether they are morally binding.

Key features of the structure of Hume's account have also proved influential. First, the natural environment of conventions, on his view, is the thick interdependence and recurrent interactions characteristic of social life. Second, the conventional arrangement consists of different, correlated actions gathered together into a scheme or system which are assigned to each of the

parties. Hume (1998, 96–7) liked to compare such arrangements to a vaulted ceiling, each stone having a place and depending on the others to accomplish their common task. Third, although it is absolutely necessary that there is a structured correlation of individual actions, it is less important (although common) that this pattern is already practiced, a regularity of conduct manifest in a group over time. Such regularities are important just because they make manifest to all the parties the pattern of correlated actions that is normative for them. Fourth, not only are the actions of the parties interdependent, but so too are the parties' expectations: "every single act is perform'd in expectation that others are to perform the like" (Hume 2000, 320). The point of complying with the convention depends on the compliance of others—absent their compliance one does not have reason to comply. Thus, the fact of the others' compliance is part of one's reason for complying as well, but it is only part of the reason, because convention-compliance is not motivated simply by conformism, but rather in the hope of achieving the (individual or common) ends served by the coordinated actions orchestrated by the convention. This feature of *mutuality*, or what we will call *compliance dependence*, is at the core of Hume's understanding of conventions. Fifth, conventions are artificial, by which Hume means that the fact that the patterns of behavior in which conventional rules are manifest are not part of the action/disposition repertoire of human creatures in the absence of their intelligent, purpose-driven, common actions and construction. Conventions are, in one sense of the word, "socially constructed," although, Hume hastened to add, the construction may be inadvertent, implicit, and (as Hayek put it) "spontaneous." Often conventions are also artificial in a further sense that the actions themselves seem to have no obvious intrinsic merit. That, plus the fact that the point of complying depends on the compliance of others, implies further that, typically, one would be as inclined to perform some other action were people known to conform to some other rule requiring it in the place of the established convention and the end in view could also be achieved through conforming to that rule.

11.2.1.2. Lewis Conventions[3]

Like Hume, Lewis offered an explanation of conventions that locates them in their natural habitat of the practical reasoning of human beings trying to make their way through a complex environment of social interaction. Rational agents, Lewis assumed, choose actions on the basis of their assessment of outcomes measured in terms of rationally ordered set of aims or preferences.[4]

[3] The basic game-theoretic notions employed in this section are explained more fully in Volume 5 of this Treatise, chap. 9, sec. 9.3.

[4] Game theory assumes, more precisely, that agents are expected-utility maximizers, but that assumption is not essential to the account we will explore here.

Their environment of choice is one of social interaction of strategically rational agents, in which "the best choice for each depends on what he expects the others to do, knowing that each of the others is trying to guess what *he* is likely to do" (Ullmann-Margalit 1977, 78). In this environment, agents face characteristic problems of cooperation due to (a) the *interdependence* of their preferences: each is likely to benefit more from cooperation with others around some common scheme than from general non-cooperation; (b) *mutually conditional preferences*: certain strategies or actions are preferred to others available if, but only if, other parties also choose appropriately correlated actions, and (c) *uncertainty*: it is uncertain how other parties will act.[5]

In the model Lewis primarily had in mind (pure coordination problems), parties are indifferent among the available options that would secure coordination if generally followed, but, following Hume, we can identify coordination elements in other kinds of games in which conflict is more pronounced, not only so-called Battle of the Sexes games, but also iterated prisoner's dilemma and hawk/dove games with uncertain termination points. We can refer to these as "cooperation problems," reserving "coordination problem" for the special case Lewis initially had in mind. In these cases also the above three conditions obtain.[6]

A key concept in the analysis of cooperation problems is that of *equilibrium*, which is a combination of strategies, one for each party to the cooperation problem, which is such that it is best for the party (in view of his or her individual preferences or reasons) given the choices of all the other parties. Parties' strategies are in equilibrium when no party has reason unilaterally to choose a different strategy instead.[7] Equilibria are self-enforcing in the sense that once achieved, no one has reason to depart from them. Lewis proposed to understand conventions as equilibria-solutions to cooperation problems; however, his claim was not that the concepts of equilibrium and that of convention are the same either in extension or intension. Rather he proposed to explain why conventional social rules have the nature and practical force they seem to have by showing how conventions actually solve cooperation problems.

Conventions are a small subset of equilibria-solutions. For one thing, equilibria are not, strictly speaking, solutions to such problems, because there can

[5] Lewis assumed that this uncertainty is due to ambiguity—i.e., more than one available set of correlated actions of the parties that will achieve the desired coordination—but this is a special case, and uncertainty may have other causes, as in the case of so-called "assurance games," where all parties are strongly inclined to participate in the only available cooperative alternative, but features of the environment introduce doubt about how others might act.

[6] The differences among these kinds of game are significant, of course, but they can be ignored for our purposes. For a justification of this wider scope for convention theory see Vanderschraaf 1995, 1998, Sugden 1998a, and Postema 1998a.

[7] Lewis actually used a stronger notion according to which strategies are in "coordination equilibrium" just in case no party has reason want *any* party unilaterally to defect from the equilibrium set.

be more than one set of strategies in a problem that meets the defining conditions of an equilibrium. Each *would be* a solution *were* the parties to choose them, but their problem of social interaction is *solved* only when the parties have actually all chosen the same set. Thus, equilibria are, in this sense, *potential* solutions; Lewis proposed to treat conventions as *actual* solutions. Furthermore, equilibria sometimes fail to represent anything like the coalescence of disparate choices under some correlated scheme, as Hume proposed. For in situations modeled by the prisoner's dilemma (think of parties in Hobbes's state of nature), for example, the combination of strategies in which each party defects from cooperation (fights rather than seeks peace) meets the definitional conditions of an equilibrium; similarly, in assurance games, the combination of choices which amounts to every party going his own way is an equilibrium. But neither of these count as *solutions* to the problems of cooperation the parties face in the sense that Lewis had in mind and neither fits the intuitive idea of convention Hume had in mind when he linked conventions to a certain kind of "agreement" or coming together.

Putting these two points together we can say that, on the Hume-Lewis proposal, conventions *solve* cooperation problems because they represent established ways in which people caught up in such problems overcome the uncertainty in their situation by adopting a common rule that correlates their choices and actions in a way that enables them to achieve cooperatively their individual (or collective) aims. The convention "anchors" free-floating, mutually conditional preferences or expectations to a single equilibrium. It does not follow, however, that this solution is optimal from anyone's point of view. Not only is it possible for some parties to regard some alternatives as preferable (if there were general compliance with them), but it is possible that *all* may agree that the existing conventional arrangement is sub-optimal. Sometimes the conventional option seems more like a mode of *coping* with a social interaction problem rather than a *solution* to it. Lewis assumed that even in such cases all parties prefer cooperation to non-cooperation in the sense that they prefer *any* cooperative solution to *any* non-cooperative solution. This condition on a conventional solution appears to be too strong.[8] For our purposes, the following

[8] Gaus (2002, 123) considers the following kind of case. Imagine a case in which Dave and Dan wish to meet for lunch and there are three available options: Al's, Bert's, and Cal's. Dave and Dan are not indifferent among the options. Dave prefers Al's to Bert's and Dan prefers Bert's to Al's, but both rank Cal's a distant third and worse than failing to meet for lunch as long as Dave eats at Al's and Dan at Bert's. Meeting at Cal's is an equilibrium, but each prefers the one non-meeting option to the equilibrium. However, this case does not pose a serious challenge to Lewis's basic idea. For in effect the availability of the non-equilibrium point eliminates the least preferred equilibrium from consideration, for each party can do better by choosing either Al's or Bert's. Moreover, if Dan and Dave find themselves at the non-equilibrium outcome, they can *unilaterally* improve the situation for both of them by moving to one of the equilibria. The problem for them, of course, is which should they choose? With this question the coordination problem returns, now focused only on the choice between Al's and Bert's.

weaker version may suffice: at least one set of coordinated strategies available to the parties is preferred by all to any set that is the result of parties going their own way (even though that one set may not be optimal from the point of view of each party or even of the group as a whole).

How exactly do conventions solve cooperation problems? For this part of his theory, Lewis reached beyond standard game theory, drawing on the ground-breaking work of Schelling (1963). Standard game theory predicted that people facing coordination problems with significant ambiguities would reach a rational impasse because their preferences and expectations were mutually conditional (each would prefer one or another of the equilibria just in case the others chose it as well). However, Schelling noticed that in real-life people often were able to coordinate by "read[ing] the same message in the common situation [and] identify[ing] the one course of action that their expectations of each other can converge on" (Schelling 1963, 54). Having at their disposal a stock of common knowledge, parties are able to identify salient patterns or combinations of strategies—patterns they with confidence could judge to be publicly available to all and so to each (Postema 2008b). Lewis argued that conventions are able to solve coordination problems in virtue of their salience.[9] Regular, publicly observable patterns of behavior often will be salient to groups of people facing cooperation problems, either immediately or as the result more or less explicit reasoning from the stock of common knowledge. The observed regularities of behavior confer salience on the pattern manifest in that behavior, thereby anchoring expectations to one of the available equilibria.[10] If this is correct, we can also see that what is essential to the capacity of conventions to solve cooperation problems, *pace* Lewis (1969, 58), is not the regularity of behavior, but rather the salience of the pattern or scheme of action which the regularity's publicity creates. A practiced pattern anchors mutually conditioned expectations to that pattern, but it is the parties' common recognition of its salience, not its being actually practiced that explains its ability to solve their cooperation problem, on this account.

With the above in mind (including the modifications of Lewis's original conditions we have introduced), we can state the essential features of this refined Humean account of convention as follows: A convention exists in a community when, with regard to a pattern or scheme of actions *S*, it is com-

[9] Hume observed that conventions are often the result of the exercise of a common "imagination" operating through "analogical reasonings and comparisons, and similitudes, and correspondences, which are often more fanciful than real" (1998, 99).

[10] Coleman claimed that the reason a party has for believing that others will comply with a convention "rests on a *causal* story about the psychological capacity of humans to form reliable expectations about future human behavior on the basis of stable and consistent behavior" (Coleman 2001a, 94), but this may be a mistake. It is more plausible to think that a rational/normative story gives the best explanation, because what is involved is a matter of inference from common knowledge.

mon knowledge among members of that community that (1) most members expect most of their fellow members to do their parts in *S*, (2) most prefer (or have good reason) not to act unilaterally against this expectation, (3) most on the whole prefer general conformity to some such pattern or scheme to most members going their own ways, and (4) this common knowledge puts rational pressure on members of the community do their part in *S*.[11] So understood, conventions are schemes of correlated actions that enable members of a community to solve the recurrent cooperation problems they face. Where these patterns are actually practiced, the fact that others reliably comply and are expected to comply, puts rational pressure on members of the community to comply, when seen in light of familiar principles of practical reasoning. So, set in their natural habitat of social interaction and practical reasoning, conventions bridge the gap between social facts of convergent behavior and attitudes, on the one hand, and social norms with genuine practical force, on the other. We might even say, with only slight exaggeration, that conventions are social facts with normative force.

Do conventions so understood necessarily give those governed by them reasons to comply with them? Most partisans of the game-theoretic account of conventions have long believed that they do, but this is not so (Broome 2000). For the "rational pressure" and normative force we have noticed is strictly internal to the rational framework of preferences and the ends that can be achieved through cooperation made possible by compliance with the convention. Such rational pressure does not yield *reasons* to comply without considering further whether there is good reason for the parties to seek the cooperation made possible by the convention, or sound reasons (say of fidelity or fairness) for them to continue to participate. When these conditions do not obtain, parties to a convention may be bound to abandon their quest for cooperation rather than, in the name of rational consistency, do their part to bring it about through compliance with the convention. Thus, in some cases, conventions may not generate *any* reasons for action; in other cases, the reasons to comply with existing conventions may be defeated by other more compelling reasons to the contrary.

By way of making the transition back to considering conventions of law, we can note two implications of the above version of the Humean account of conventions. First, because the account holds that conventions are only typically, but not necessarily, manifested in regularities of behavior taking place over some span of time, we are encouraged to regard conventions not as static

[11] This refines the account offered in Postema (1982, 176) along lines suggested by Vanderschraaf (1995). Lewis's original definition reads: "A regularity *R* in the behavior of members of a population *P* when they are agents in a recurrent situation *S* is a *convention* if and only if it is true that, and it is common knowledge in *P* that, in any instance of *S* among members of *P*, (1) everyone conforms to *R*; (2) everyone expects everyone else to conform to *R*; [and] (3) everyone prefers to conform to *R* on condition that the others do, since *S* is a coordination problem and uniform conformity to *R* is a coordination equilibrium in *S*" (Lewis 1969, 58).

routines, but rather as relatively stable nodes in a dynamic network of practical considerations. Actually practiced patterns are critical to this network, but the "precedents" they provide can be grasped by participants only by setting observed conduct in the network. For it is salience in the context of the cooperation problem that determines the content of the convention on any particular occasion of its application; the observations of conduct contribute to, but do not necessarily settle, the parties' recognition of salience. They provide a point of departure, but often not the point of arrival, for such reasoning. Thus, conventions are anything but rigid, static, habit-like behavioral regularities; rather, they are located in a dynamic, intersubjective, rational process providing resources that enable participants to meet novel situations with extensions of the familiar patterns.

Second, it also follows from the above account that there is no sharp distinction between mere compliance with a conventional rule and interpreting it (i.e., between "easy" and "hard" cases of following the rule). For in cases where the convention is practiced, while the pattern instantiated in the practice may be manifest in many cases, in some circumstances it may be less obvious. Nonetheless, the process of practical reasoning involved, and the resources available for its successful deployment, are the same as in those instances in which the pattern is immediately manifest. Disagreements regarding what the convention requires are possible, arising from different understandings of the scope or force of the conventional rule. But, by the same token, precisely because these different understandings arise within and with respect to a practice regarded by all as the practice of a common rule, the interpretations are correctly regarded as *discrepant* and thus in need of being made *consilient*, not on the part of this or that party individually but on the part of all governed by it.

11.2.2. Humean Conventions and the Law

It may have been Conrad Johnson (1976) who, in an unjustly neglected essay, first explicitly introduced analytic jurisprudence to David Lewis. Johnson sought to capture the "non-legislative" precedential effects of judicial decisions by casting them as coordination conventions. He argued that it was a mistake for positivists to say that when judges face cases not decidable by reference to determinate pre-existing rules they simply act as mini-legislators; rather, in such cases it is typical for courts to work out what reasonable persons would do in the situation of the litigants' original interaction. This involves identifying salient features of the situation which would have enabled the parties to resolve their interaction problem, features which supply the parties with "precedent" for their interaction. Moreover, when the courts make their decisions, they do not, strictly speaking, create new legal rules exercising their legislative powers, but rather they make salient a certain solution to a coordination problem and in this indirect way establish a non-legislative precedent.

11.2.2.1. The Rule of Recognition as a Humean Convention

A few years after Johnson used Lewis's notion to explain judicial law-making, Jules Coleman (1982) and Gerald Postema (1982) argued that we can understand Hart's view of the conventional foundations of law on Lewis's model of conventions. They argued that if he was successfully to account for the normativity of law, Hart must explain how the social facts of the convergent behavior and attitudes of law-applying officials can have normative force. This could be done, they thought, by explaining the rule of recognition as a rule of coordination (Coleman 1996, 317, n. 10; see Coleman 1996, 300–2; 1998a, 398–402; Postema 1982).

The behavior and attitudes characteristic of the official practice constituting the rule of recognition, it was argued, can be understood as regularities of behavior that focus nested reciprocal expectations of the officials and thereby give rise to a Humean conventional rule. The rule of recognition was seen as a solution to a cooperation problem. To support this suggestion it was argued, drawing on Hart's general framework, that a coherent and unified legal system is possible only if conditions for the membership or validity of rules and norms in that system are established. This is accomplished by the practice of law-applying officials. In view of the high stakes involved, officials might disagree about what those conditions are or should be; still, they all recognize that, for the legal system to exist and maintain its unity, they must come to some agreement regarding those conditions. Thus, despite their disagreements (including disagreements of principle), they recognize the deeper need to coordinate their law-applying decisions around a common set of criteria. Thus, it was argued that at the foundations of law is a problem of social interaction among officials that has the earmarks of a classic cooperation problem. If the practice of officials converges on certain regular patterns and these shape their reciprocal expectations, then, in circumstances of social interaction structured in this way, there is normative pressure on each official to follow the patterns. That is, the "rule" instantiated in those regular patterns of behavior and associated attitudes (i.e., reciprocal expectations) is a convention, whose normativity is explained by the fact that it solves the persisting cooperation problem faced by law-applying officials.

Despite their possible disagreement over ideal criteria of validity, officials are committed by their mutually acknowledged need for coordination to treat the established, practiced criteria as normative for them. The convention represents a practical equilibrium in the sense that *given* the compliance of others with the convention, there is normative pressure on each official to comply and no basis for defecting unilaterally from them, that is, no one has reason to "go it alone" and follow one's individually preferred set of criteria. Of course, it is possible that parties to the convention might find that competing considerations defeat any reason to comply in some cases (and perhaps in all cases, if the

legal system is so seriously unjust or unreasonable that there is no reason of significant weight to do what is necessary to sustain it). So, we might rather say that each has a reason to comply and no reason unilaterally to defect, relative to the considerations falling within the parameters of the cooperation framework.

Clearly, the convergent behavior and attitudes of others is important to an official's reasoning. They form part of a good reason for an official to comply—but only *part of* such a reason, because the practical relevance of the convergence depends on the context of practical considerations that call for cooperation and the convention's providing the best available way to achieve it. Likewise, a given official has reason to follow a particular set of criteria *only if* they are regularly practiced by most other officials. Thus, if it were the case that behavior of one's fellow officials coalesced around a different pattern of responses, then one *would* have reason to follow that pattern. Thus, there seems to be some basis for interpretation of the practice at the foundations of law as a convention, but it is not *crudely conventionalist*, that is, it is not the case that the participants' thinking makes it so. That practice, and the beliefs about it (especially those linked to reciprocal expectations about compliance and dependability), are *parts of* an argument that appeals also to principles of rational choice in contexts of social interaction calling for cooperation, which when all are taken together may yield for individual participants reasons for acting in accord with the convention (or at least subject them to normative requirements).

It is important to note, further, that what is *essential* in the Humean convention story is not the actual regularities of behavior, for regularities have convention-significance just due to their ability to focus nested reciprocal expectations on a scheme of action that will solve the cooperation problem facing the parties. Rather, the essential feature, the driving force, in this account of conventions is the process of practical reason by which the parties negotiate a solution to their problem. As we have seen, Humean convention theory "encourages us to view social rules not as static entities, but as dynamic, intersubjective, rational processes located in on-going practices of social interaction which provide resources for solving cooperation problems they in part generate" (Postema 1998a, 472). Conventions, on this view, are not static, fixed points, determined strictly by descriptions of the convergent behavior from which they emerge, but rather relatively stable nodes in a dynamic matrix, the full significance of which cannot be appreciated if removed from this matrix. It is that matrix, available to all and to which all contribute, that gives practical force to particular conventional arrangements and provides resources to enable participants to solve novel situations that arise in the course of the practice. Thus defenders of this analysis of conventions have argued that, *pace* Dworkin (see chap. 9, sec. 9.2.2, above), conventions need not be limited to convergent behavior such that their practical force runs out when the convergent behavior runs out. Rather, the context that gives the convergent behavior its practical

significance also provides participants with resources for dealing with novel situations in which behavior does not converge (possibly because of disagreements of principle regarding how best to proceed).

If this characterization of the practice of law-applying officials is correct, then we have a solution to Hart's puzzle. For although the social facts of convergent behavior and attitudes of one's fellows do not, of themselves, give one reason to act, when these are considered in light of the problem of social interaction that the officials face, and the rational pressures in it to find a solution, these social facts take on normative significance providing reasons for, or at least normative requirements on, each to comply on the condition that most others do so as well. (Moreover, since these reasons are relative to reasons officials have to seek cooperation, they may be overridden or even canceled when the background normative conditions do not obtain.) Viewed from the outside, as it were, the rule of recognition is merely a complex set of social facts, but viewed from the perspective of those who bear responsibility for maintaining a unified legal system those facts can have normative significance. "If [...] the internal attitude in question includes the recognition or common knowledge of nested and mutually conditioned expectations focused by the regularity, and if the situation in which the expectations arise is one of strategic interaction, then a distinctive reason for action, and a form of obligation, does naturally arise" (Postema 1982, 198), or at least it may do so if there are sound reasons for officials to seek cooperation. By understanding the internal attitude involved in conventions in this way, a bridge is constructed from externally observable social facts of judicial practice to familiar kinds of normative considerations.

So, on this view, Hart was right in a way to argue that, when challenged to demonstrate the existence of the rule of recognition, judges need simply point to the convergence of behavior and attitude of their fellow judges. This is explained by the fact that the rule is a conventional rule, and its existence and practical force are conditioned upon regular compliance and "acceptance" of those who practice it. Of course, this, by itself does not *explain* its normative force; for that, we need to set those social facts into the context of the practical problem of social interaction the judges face together and show how the rule provides an effective solution to that problem.

At the same time, nothing seems to follow directly concerning the *moral* merits of the rule itself, or of the reasons for action they generate. The rule itself is not recommended, ultimately, on the ground of its justice or reasonableness from a moral point of view, but rather because it promises to solve a pressing problem of coordination. "It provides a common way of acting on a large number of occasions, where often it is more important that there be a common way of acting than that it be *the* right, just, or otherwise best way" (Postema 1982, 199). Similarly, the reasons for action that the rule generates are not necessarily moral reasons; at least we cannot conclude that they are morally significant from this account of the rational dynamics of the social in-

teraction involved in law-recognition alone. Whether the alleged rational pressure has moral dimensions cannot be settled on this account by appeal to the convention-frame alone; for this we need to consider further whether the ends sought by law identified by the rule of recognition meet conditions of justice, fairness or other relevant dimensions of morality, and whether these ends are effectively served at a reasonable moral cost. The Humean account of conventions is not meant to provide resources for this further moral investigation, although it locates precisely the point at which it becomes relevant.

In *Mutual Expectations*, Govert den Hartogh (1998; 2002) developed a sophisticated conventionalist theory of law on foundations similar to those sketched above, but he argued that the reason-giving potential of conventions so understood can only be explained by appeal to preferences of officials rooted in cooperative virtues and substantive moral principles of fairness and fidelity. In this he echoed Fuller, rather than Coleman and Hart, in regarding the conventionalist account as fundamentally an anti-positivist theory of law. Postema's (1982, 195–7) position was somewhat different: from the fact that, on the model of conventions *so far specified*, nothing can be said about the moral character of the conventions at the foundations of law it does not follow that, *when fully specified* for specific kinds of conventions, the result will still be non-committal on those moral dimensions. That is, it may turn out that when we consider other features essential to *law* or legal practice, but not essential to all kinds of conventional practice, we will not be able to deny the inevitable or even absolutely necessary moral dimensions of that practice. As we will see in the next sub-section, Postema argued that officials have professional *obligations* to follow the rule of recognition, and these professional obligations have moral dimensions; however, his argument for this conclusion rests on special, morally significant features of their position vis-à-vis ordinary citizens. Again this is due to the special features of their relationship to the law and legal officials. The difference between Postema's view and den Hartogh's is that den Hartogh holds that we must explain in distinctive moral terms the normativity of conventions in general, not just the normativity of the conventions at law's foundations.

11.2.2.2. Humean Conventions and the Normativity of Law: Two Approaches

We shall consider presently important questions that have been pressed against the Humean conventionalist account of the rule of recognition. But, even if we accept that it has solved Hart's basic puzzle about social rules (how mere social facts of a practice can be normative for those engaged in the practice), we still have not answered fully the question about the normativity of law in general, that is, of ordinary legal rules for those who are not members of the official law-elite. For the only participants in the convention-constituting practice are law-applying officials and hence it would seem to follow that only they have

convention-based reasons for applying the rules recognized as meeting the established criteria of validity. We do not yet have an account of the reason-giving, let alone duty-imposing, character of ordinary legal rules. Defenders of the Humean conventionalist account sought to close this gap in different ways, two of which merit consideration.

Coleman, in his essay "Authority and Reason," argued that the problem lies not in accounting for the normativity of conventional foundations of law, but in accounting for the normativity of the laws thus identified. The rule of recognition on Hart's understanding provides only "a guide for officials, not [for] ordinary citizens" and so it cannot transfer its "authority" to ordinary legal rules governing citizens (Coleman 1996, 298). The solution to this problem, he argued, is not to revise the account of the rule of recognition's conventional normativity, but rather to *supplement* it with an independently motivated account of the authority of legal rules (ibid., 302–5). He proposed in this essay a hybrid account of law's normativity: at the foundations we find Humean conventions (understood as generating reasons for officials to decide and act), while ordinary legal rules validated by those conventions make their claim on the compliance of ordinary citizens in virtue of their authority as explained by Raz's "service conception of authority" (see chap. 8, sec. 8.4.2). That is, legal rules have normative force not in virtue of their validity, but rather in virtue of their enabling citizens to act in accord with reasons that, apart from the law, they have to act. Among those reasons may be reasons to cooperate with other citizens to achieve common goals or goods, or to coordinate their efforts so that they are each able to achieve to some reasonable degree their individual or private aims, but the reasons citizens have are not necessarily limited to coordination in this way.

Coleman did not link the two parts of this hybrid account in any substantive way. On the contrary, Coleman thought it important to keep them separate, for the argument for the authority of ordinary legal rules turns on moral considerations, but the case for the normativity of the rule of recognition need not. This is important because the Humean convention story was meant solely as an account of the *possibility* of law, whereas the Razian story was offered to explain how it is law can *truly* claim authority. In contrast with Coleman's strategy, Postema offered a more integrated approach to bridging the gap between the Humean-convention account of the rule of recognition and the normative force of ordinary legal rules.

Drawing inspiration from Fuller's interactional theory of law (Fuller 1969; 2001, 231–66; see chap. 4, sec. 4.2.2, above), Postema (1982, 186–93) argued that the structure and the rational dynamics of the interaction among officials, especially judges in their law-identifying, law-interpreting, and law-applying activities, are influenced by the simultaneous interaction between officials and citizens. The decisions and choices of officials and of ordinary citizens, he argued, are in complex ways interwoven, and this interdependence is rooted in

the very nature of law. Law is a distinctive mode of governing: it governs by addressing rules to rational agents who are capable of grasping their general import and applying them to their particular circumstances. Thus, law's ability to guide in this manner depends crucially on the uptake of the rules by those to whom they are addressed. Moreover, its rules are *public*, addressed to the community at large, rather than to each law-subject personally. So, each individual's grasp of the rule's import depends in part on anticipating how the rules are understood by their peers and by officials who have responsibility for administering them. "The structure of practical reasoning on which the practical import of rules of law depend[s] cannot be a matter of private insight but must be part of a shared, public practice of rule understanding and rule following" (Postema 1982, 189). Law-applying officials, charged to maintain the system of laws, mediate between the law and law-subjects, so their actions tend to shape the practical import of legal rules. Thus, "the law-identifying, law-applying, and law-interpreting activities of both officials and lay persons essentially involve a complex form of social interaction having the structure of a coordination problem—or, rather, of an interrelated, continuous series or overlapping network of coordination problems" (ibid., 187).

The "horizontal" interaction among officials is decisively shaped by this "vertical" interaction, successful navigation of which is essential to law's effective guidance, whatever objectives the substantive law may have. The project of achieving a relatively unified and coherent system of legal rules persisting over time must not be understood as a project of a self-appointed elite, Postema argued (Postema 1982, 193), but rather as the professional responsibility of each law-applying official, and of the judiciary collectively. This is due to the fact that law-subjects attempt to anticipate the law-applying activities of the judiciary as a whole, rather than those of this or that judge. So, judges must coordinate their law-applying activities to achieve something close to institutional coherence.

With these "horizontal" and "vertical" dimensions in mind, we can ask whether these forms of social interaction are capable of generating genuine *obligations*. Addressing a similar question, Lon Fuller (1969, 204, 209) argued that the positions of officials and law-subjects are symmetrical: both are bound by obligations of reciprocity to do their parts in the cooperative enterprise defined by law's distinctive mode of governance. However, Postema argued for an asymmetrical answer: officials are morally obligated to do their part, but law-subjects may have no *moral* obligations to comply, although they may have sound non-moral reasons to do so (or, we might add, if they have moral obligations they are owed to each other, but not to officials or the government). The law-applying officials' obligations have two sources, he argued. First, the official "preferences" that structure their interaction are not merely personal but are determined by their professional responsibility to maintain the unity and integrity of law and mediate between the law and law-subjects. Effective adju-

dication and execution of the law is possible only if officials coordinate their efforts; thus, it is a matter of professional obligation that they do so (Postema 1982, 196). We might add (although Postema at this point did not) that this professional obligation can have a manifest moral dimension when the case for coordinating these efforts depends at least in part on moral considerations. Second, following Dworkin (1978, 162–3) and Fuller, Postema argued that, due to their special, authoritative position in the relationship with law-subjects, they bear a special responsibility to do their part faithfully. This argument rests, ultimately, on considerations of fairness: officials generate legitimate expectations of such behavior on the part of law-subjects; they are entitled to expect officials will seek coordination at the vertical level and hence at the horizontal (inter-official) level (Postema 1982, 197, see also 179–82).

11.2.3. Humean Conventions Challenged

Despite its influence in jurisprudence and social theory generally, the Humean explanation of social conventions has not escaped searching criticism. Some have argued that it fails as a general account of conventions,[12] while others have argued that it fails as an account of the social foundations of law.[13] The challenges to the Humean account of conventions at the foundations of law came largely from two quarters. Some challenged the applicability of the Humean model to the social practice of law-applying officials; others argued that that model fails to explain the special normativity of law's foundational conventions. We will consider the latter set of objections in this section and postpone to section 11.5 consideration of the former objection, which, generalized, also applies to other proposed accounts of conventions we will explore below.

Critics based their objections on certain key assumptions about broad features of the normativity of law-grounding conventions. They were willing to accept that parties to a convention may have reasons to act in accord with the convention; however, they argued, these reasons are not of the right kind adequately to explain the normativity of the law's founding convention.

The first objection is, perhaps, the most fundamental. Critics accepted that in a coordination problem, certain strategies of choice may emerge as rational for the parties and that the case for the rationality of these strategies weaves together observations about the regularities of behavior and reciprocal expectations; however, it was argued, the result is not a *norm*, but rather only a combination of personal choice strategies for each of the parties. There are no norms at work here, first, because these strategies are private and personal, hence not

[12] See, e.g., Gilbert 1989a, 1989b, 1990; Marmor 1996.

[13] Adler 2006a; Benditt 2004; Coleman 2001a, 94–5; den Hartogh 1998, 2002; Gilbert 1999; Green 1985, 1999; Kutz 2001; Marmor 2001b, 7–14; 2006a, 353–63; Postema 1998a; Shapiro 2002b, 392–3.

social, and second because they simply do not function in the practical reasoning of the parties *as norms*. To function as norms, they must not only plot out a sequence of actions to be done, but they must function for each as standards for evaluating and justifying conduct (their own and that of others). On Hart's account, the social practice of law-applying officials is meant to provide standards that function in the practical reasoning of officials as norms in this way. Therefore, it is argued, this account of law's conventional foundations simply fails in its primary task to explain the normativity of such foundations.

This argument is telling against so-called "evolutionary game theoretic" accounts of conventions (e.g., Skyrms 1996), because they have no room in their theories for proper norms.[14] So, what may evolve, if their explanations are sound, are not conventions but certain widely distributed but nevertheless private dispositions to act in ways that mimic convention-following behavior (Postema 1998a, 471). However, against the Humean explanation the objection has less force. For the Humean argument does not deny individual agents the resources for conceiving—perhaps reasoning *together*—to identify common norms which can solve their cooperation problems (Postema 1998a, 469–70; 2008b). It proposes to explain conventions by showing how the reasoning with conventional *norms* can solve cooperation problems. Game theory often does not avail itself of such resources, and its explanations are often the poorer for this abstemiousness, but the Humean account's use of the game theoretic materials is not forced to the same abstemiousness.

Perhaps the conventions can function as norms, critics respond, but the reasons for action that they generate are still of the wrong kind. For one thing, Leslie Green has argued, conventions often concern matters of moral indifference—fashion conventions, for example. So, conditions for the existence of conventions are not sufficient to yield *obligations* (Green 1999, 43–4). Moreover, the reasons that are associated with conventions explained in the typical Humean way are generated by the personal preferences of the parties to the social interaction, so, it was argued, the reasons will always be only reasons of personal benefit of one form or another, and the reasons appropriate to conventions of law are not simply reasons of personal benefit.

These objections can also be answered, for they do not fully appreciate how the structure or logic of the Humean explanation is further filled out when we consider specific kinds of conventions, in particular the conventions at the foundations of law. It was stressed earlier that the practical, normative force of Humean conventions was very generic; indeed, we characterized it only in terms of "normative or rational pressure" which can mature into full-fledged reasons for action only with the addition of premises regarding the nature of the convention-governed enterprise. Thus, it is only as further filled out that

[14] Hayek's account of the evolution of social rules, on which he built his theory of law (see chap. 4, sec. 4.4, above), is also vulnerable to this criticism (Postema 2011).

there is a basis for claiming that conventions yield obligations. Some conventions, then, may be trivial, and some may be grounded only in merely personal preferences. On the Humean account, the kind of reasons for action provided by an established convention depends on the reasons the parties have for seeking a cooperative solution to their interaction. Some conventions may yield only reasons of personal benefit, other conventions may rest on morally more significant grounds. At least one argument considered above (Postema 1982, 196–7) concluded that law-applying officials are bound by something like considerations of fairness to comply with the rule or recognition (see also Marmor 2001b, 28–9). This argument may fail, of course, but that failure has yet to be shown.

Three further objections have been pressed along this same line, each claiming that, while Humean conventions may yield moral reasons for action, nevertheless they are not *binding*; and so, to the extent that there are reasons for complying with them, these are not reasons of the kind needed to explain the normativity of law, or official practice at the foundations of law. Margaret Gilbert has argued that the Humean account fails to capture the characteristic normative dimension of social conventions, namely, that they impose *reciprocal* obligations on those governed by them, obligations parties *owe to each other* (Gilbert 2005, 23–4). This is an intriguing objection, but it assumes that the official obligations actually have this reciprocal nature. We will consider whether this is true when we look more closely at Gilbert's account of conventions below (sec. 11.3.2.1).

Leslie Green also argued that Humean conventions cannot explain the binding character of law and official practice. They are not properly binding, in his view, because the requirement of conformity with them is *conditional* on the preferences of the parties and on the conformity of other parties; but authority, he maintained, binds *unconditionally*, it "insulate[s] agents from conditional, calculating allegiances" (Green 1988, 121). Green's argument can be taken in two ways. First, it may rest on the premise that binding obligations, by their nature, are *unconditional*. But, as we have seen, the reasons generated by Humean conventions are not necessarily conditioned on mere preferences; so that part of the objection can be answered satisfactorily. This form of the argument also denies the claim at the heart of the Humean account that proper obligations may be "compliance-dependent" (see above 11.2.1.1). This denial, however, is not very plausible. Although some obligations hold, regardless of the behavior of others, others, especially those which serve values or principles the realization of which requires collective effort, are reasonably regarded as compliance-dependent. There is no reason why we should not think them obligatory or binding even if conditioned on the general compliance of others.

The full weight of Green's challenge rests, rather, on a different premise, which gives his argument quite different shape. His challenge was addressed specifically to conventionalist accounts *of law*, which, in his view, fail because

they cannot account for a defining feature of law's normativity: its claim to *authority* (Green 1988, 118–20; 1999, 43–6). Green agreed with Raz (see chap. 8, sec. 8.3.3), that, necessarily, law claims authority, and therefore its norms must function in practical reasoning in the way characteristic of authority-bearing norms. Such norms, and the obligations they underwrite, do not offer agents ordinary, *pro tanto* reasons for action, reasons that are balanced against others with which they may compete; rather, they necessarily offer both positive reasons for action and *exclusionary reasons*, reasons which exclude from an agent's on-line practical reasoning a certain range of otherwise potentially competing reasons (see chap. 8, sec. 8.4.2.1). Law does not necessarily provide such reasons, Green argued, but it necessarily *claims* to do so, so any account of its putative normative force must be able to explain how its directives could provide exclusionary reasons. The Humean account, even supplemented so as to generate obligations of fairness or the like, simply fails to do so, he concluded.

The main force of Green's challenge was directed against those who wish to argue that the normativity of law in general can be understood on the Humean convention model (Green 1983; 1988, chap. 4; 1999). As a challenge against a Humean convention account of official practice at the foundations of law, the argument turns on whether its premise—that the normative force of the rule of recognition must be understood in terms of authoritatively binding obligations—is compelling. If the rule of recognition is regarded simply as a rule of identification and not as mandatory, then the objection gets no traction. If, however, it is thought to be (perhaps, in addition) a mandatory rule, then we can still reasonably wonder whether it is best to understand it as an *authoritative directive* providing officials with exclusionary reasons, as opposed to merely providing strong, morally significant reasons for complying (assuming a case can be made for achieving the cooperation made possible by the rule of recognition). It is not easy to see how the debate between these two positions must go and it is rarely directly addressed. Andrei Marmor (2001b, 28–9) argued that Humean conventions would be obligatory, and therefore offer exclusionary reasons, if officials actually are bound to resolve the coordination problems they face. He assumed that the norm must be *authoritative* in the sense Green had in mind, because he thought the background duty in question excludes consideration of merely subjective preferences. But this is too weak to fund Green's premise which was used to argue that the *moral considerations* acknowledged by defenders of the Humean account cannot ground authoritatively binding obligations (Green 1988, 118).

The Humean account faces more fundamental objections, but we will first consider two other theoretical approaches, before we explore these objections in section 5 below.

11.3. Conventions as Joint Commitments

According to Jules Coleman (2001a, 70), the central task of jurisprudence is to explain the possibility of legal authority and its distinctive normativity and, he thought, Hart's conventionalism provides the framework for addressing this task. On his understanding of Hart's conventionalism, the authority of ordinary legal rules—their claim to govern the conduct of ordinary citizens—is grounded in criteria of validity that actually guide the practice law-applying officials. This social practice, the convergent behavior and attitudes of officials, constitute the conventional criteria of validity which impose duties on officials to evaluate the conduct just according to the norms that satisfy the criteria (Coleman 2001a, 67–73). This basic positivist orientation poses for jurisprudence two questions that have occupied Coleman's mind since the early 1980s: how is it possible for social conventions, bound as they are to the empirical social facts of convergent behavior and attitudes, (1) to provide genuine reasons to those who practice them, and (2) to be disputed by them? These questions represent business left unfinished by Hart and made more pressing by Dworkin's influential attack on positivist conventionalism (see "the argument from controversy" in chap. 9, sec. 9.2.2, above). Since "Negative and Positive Positivism" (1982), Coleman had been inclined to embrace an account of conventions along Humean lines in answer to the first question. Recently, however, he abandoned that approach for an account that focuses on the special nature of and interrelations among the intentions of participants in the social practice at the foundations of law (2001a, 67–102).

In *The Practice of Principle*, Coleman argued that the foundational conventions of recognition are best understood not as coordination conventions, but rather as the product of the joint commitments of law-applying officials to a shared cooperative enterprise. This, he argued, enables us to explain the special duty-imposing normativity of these law-grounding conventions while allowing for disputes to arise among them regarding the content and application of those very conventions (Coleman 2001a, 96–100). Coleman's account relies on Alan Gibbard's (1990) work in metaethics and Michael Bratman's (1999) work in the philosophy of action. Separately, and not specifically with jurisprudential issues in mind, Margaret Gilbert also developed a joint-commitment account of conventions in opposition to Lewis's coordination account, taking a robustly holistic, so-called plural-subject approach. The interesting question for our purposes is whether these accounts can illuminate and underwrite conventionalist claims about the foundations of law.

11.3.1. Joint Commitments and Shared Cooperative Activities

11.3.1.1. Existence Conditions of Social Conventions

Following Hart, Coleman maintained that "the possibility of legal authority is to be explained in terms of a *conventional* social practice" (Coleman 2001a, 77, author's emphasis). A convention is a practiced social rule. The rule's claim to govern conduct depends on its being practiced (ibid., 77–8). A rule is practiced in a community, according to Hart, just when (1) there is a pattern of convergent behavior of members of that community and (2) a "critical reflective" attitude shared by them toward that pattern. Coleman specified this attitude in three ways. First, it is an attitude toward the convergent behavior *as rule-governed*, that is, as behavior regulated by and complying with the rule. "If the majority of those whose behavior has converged in some way [...] do not share the view that their behavior in the convergent areas is governed by a rule, then it is not governed by a social rule" (ibid., 82).[15] Second, it is a shared commitment to take the practiced rule, and not some associated sanction or other consideration external to the rule, "as the reason for one's compliance" (2001a, 82). Finally, it is a shared commitment to project the established pattern of the convergent practice in a particular way. Compliance with conventions is a matter of rule-following, not merely convergent behavior, so it always casts its shadow on future cases that do not fall strictly within the pale of the empirical description of observed behavior (ibid., 80–1).

This refinement of Hart's familiar analysis of social rules was meant to accomplish two things: to set necessary and sufficient conditions for the existence of a convention in a given community and to answer Dworkin's objection that conventions, just because they are constituted by convergent behavior and attitudes, *cannot* be disputed. Dworkin's objection rests on the assumption that the convergent behavior of a convention determines fully its content and thus what the convention requires cannot be in dispute, since dispute entails disagreement over directions for behavior that is not yet convergent. Against Dworkin, Coleman argued that "the convergent behavior fixes the rule, but does not [fully] determine its content; [...] [nor] the scope of obligations the rule purports to impose" (Coleman 2001a, 83). This is a dark saying. Perhaps he meant that although participants share a commitment to go on as the rule embedded in their practice prescribes, this does not entail that they will formulate the rule in the same way. The rule to which they share a commitment will govern unanticipated as well as routine situations and participants may disagree about application of the rule to these cases. The prior convergence of behavior and judgment "can help us to identify which rule is being prac-

[15] Thus, on Coleman's view, social conventions are transparently compliance-dependent. (For this terminology see sec. 11.4. 1, below.)

ticed" enabling us at least to "eliminate the vast majority of potential candidates" even if it does not fix beyond dispute on a single candidate (ibid., 81). Of course, Coleman conceded, the parties' formulations cannot diverge too greatly or it will no longer be true of them that they share an understanding of the same rule (2001a, 80–1). Social rules are "frameworks of interaction," depending for their existence on shared intentions which are "filled out as the participants go along." Thus, "parameters within which the terms of ongoing interaction are negotiated or evolve" (ibid., 80 n. 12).

11.3.1.2. Conventions, Dispositions, and Reasons

The above explanation was Coleman's first installment towards fulfilling his promise to explain Hartian convention. His second installment was his account of the specific kind of normativity social conventions enjoy. He explained first how such conventions can generate genuine reasons and then argued that these reasons are properly understood as duties. The internal point of view figured decisively in the first stage of his explanation (Coleman 2001a, 87, 88). He proposed to understand it not as a matter of believing that a rule is binding on oneself or others—believing does not make it so, even if it is community-wide believing, he argued (ibid., 87)—but rather as involving the exercise of a capacity to adopt a practice or pattern of behavior as a norm (see Gibbard 1990). This capacity is manifest in the psychological disposition to conform to the norm, to evaluate oneself and others in its terms, and the like. Such psychological dispositions constitute a kind of commitment (Coleman 2001a, 88–9). For example, one may adopt a personal rule to engage in strenuous physical exercise for an hour each day and thereby be disposed to conform to a standard and use it to evaluate one's behavior. By adopting the rule, Coleman claimed, "I have created a reason that is additional to and different from the reasons of fitness and health I already had" (ibid., 89). Similarly, taking the internal point of view on a conventional practice "creates an analogous reason for those who adopt it" (ibid., 89). Dispositions of the right kind, according to Coleman, turn social facts into norms (ibid., 89).

This is the hard core of Coleman's current account of the normativity of conventions, and hence of the reason-giving nature of conventions of recognition. It is not the whole story, he hastened to add, but it is the core and the rest of the story just elaborates the account, specifying the context and object of this disposition-commitment. Before we proceed with his elaboration we might pause briefly to make some observations. First, note that on this view, for one to take up the internal point of view on some convergent behavior just is for one to adopt it as a norm, to be disposed psychologically to act and think in a certain way; and that, in itself, is sufficient for one to have a reason to conform to its requirements, and presumably to entitle one to use it to evaluate not only one's own behavior but also that of others. It does not follow, of course, that

they, in turn, have reasons to comply with the norm, unless they too take up the internal point of view with respect to it. Second, since having the dispositions characteristic of the internal point of view is allegedly sufficient to generate genuine reasons for action for the person who has them, there is no need to inquire into the reasons for which one adopts or acquires these dispositions (let alone the reasons there are for one to do so). One may take up this point of view for a reason, but also one might take it up (or acquire it) for no particular reason; and, more importantly, whatever reasons there may be for adopting something as a norm do not influence whether the adopting results in reasons to comply with the norm. Adopting it is sufficient for that purpose. Finally, note that, on this view, conventions necessarily provide convention subscribers with genuine reasons for action, for conventions exist in a community just when members generally take the internal point of view with regard to their convergent behavior and the internal point of view by its very nature provides its bearers with genuine reasons to conform. Thus, wherever conventions exist in a community, not only do they *claim* to provide reasons, but that claim will always (necessarily) be true.

This is an especially strong thesis about the relationship between conventions and reasons for action; it tracks, but also goes far beyond, what Hart wished to claim about social rules. While it purports to explain how conventions *can* provide reasons for action, if it is correct, it *guarantees* that they will. We will consider presently whether this is a plausible account of the norm-constituting and reason-giving character of conventions, but at this point it is useful merely to note the contrast between the Humean account and Coleman's account. On the former, convergent behavior and beliefs (expectations) do not individually or collectively provide (complete) reasons for action, and may provide no reason whatsoever. To explain the practically rational relevance of these social facts, on that account, it was necessary to set them into a wider context of social interaction that takes on rational action-guiding significance in virtue of background principles of rationality (on a narrow reading) or perhaps moral principles (on a wider one). The facts of convergent behavior and belief play a critical role in the account, but their relevance is accounted for only in terms of principles of rational or moral choice under those circumstances. The contrast with this part of Coleman's approach could not be sharper or more significant.

11.3.2. Duties and Joint Commitments

According to Coleman, law claims to offer reasons for action, but it claims further that the reasons take the shape of duties—indeed, duties of a specific kind. The requirements imposed by law's foundational conventions are binding, they are not unilaterally extinguishable, and they call for cooperative actions that are responsive to the intentions and actions of others (Coleman 2001a, 90–2,

95–6). "When judges adopt the practice of applying the rule of recognition, the actions and intentions of the other judges are reasons for each" to act in ways indicated by that rule (2001a, 92) It is in this normative structure of judicial practice—which dictates that the fact that some judges apply the criteria of legality is a reason for others to do so as well—that explanation of the distinctive normativity of law's foundational conventions lies (ibid., 91–2). How is it to be accounted for? Having abandoned the Humean explanation, Coleman looked rather to the complex structure of interlocking intentions said to be characteristic of judicial practice at the foundations of law. This structure of intentions more precisely describes the nature of the officials' "acceptance" of the rule of recognition, he argued. However, in order to sharpen the outlines of Coleman's account, I turn first for contrast to Margaret Gilbert's account of conventions with which it shares some features.

11.3.2.1. Conventions as Collective Fiat

On Gilbert's view, a population has a convention to conform to a pattern of conduct in certain situations just in case its members are jointly committed to accept as a body the fiat: we are to do this in these situations (Gilbert 1989, 377; 2000, 84). Gilbert constructs her alternative account of conventions out of three essential components: a holistic understanding of joint commitments, the idea of fiat, and the idea of commitments as self-addressed commands.

Consider first the *social holism* of her account (Gilbert 1989, 373–7; 2000, 81–5; 2005, 24–5).[16] Conventions, on her view, are the product of commitments involving many individual members of the group in which the convention obtains—not merely the product of conjoined personal commitments, but rather of joint commitments made together, as a group ("by us" they would say). Members of the population together undertake *as a body* to accept a certain pattern as normative for them. "Each of the parties plays a part in the creation of a joint commitment, not by creating an appropriate personal commitment, but by expressing to the others his or her willingness to be jointly committed with them" (Gilbert 2001, 115). The group is committed by this joint willing and its members are committed *in virtue of* their membership in the committed group—*all* are committed *and therefore* each is bound, absent the concurrence of all to abandon the commitment. Although explicit agreements can generate such collective commitments, they often emerge informally over time, as individuals express their readiness to be jointly committed in the relevant way and others acknowledge this readiness and reciprocate with a similar expression (Gilbert 1989, 396–8).

[16] Gilbert held that individuals who undertake joint commitments constitute a collective entity she called a "plural subject" (1989, 17–8, 199–200, 357–61). For a general discussion of collective subjects and collective intentionality, see Volume 5 of this Treatise, chap. 10.

Secondly, groups governed by a convention commit themselves to a certain *fiat*. A fiat is an imperative, a proposition that sets out a type of action as to be done in certain circumstances by members of the group. An observable regularity of conduct among members of the group is not necessary for a convention to exist in a group, for they may exist as the product of agreements even though no one has yet had occasion to conform to them. The idea of fiat captures the essential feature of conventions, in Gilbert's view, that no rationale for the prescribed action is presupposed. *Customs*, in contrast, add the reason that others regularly do it; and *traditions* add the reason that it has been done in the past or has been handed down (Gilbert 1989, 404–5); however, *conventions* add nothing: members of the group are to perform the action, period—"no questions asked and no reasons given" (ibid., 403).

She explained the reason-giving character of conventions, not in terms of some rationale, but rather by appeal to the notion of self-addressed and self-legitimating commands. Conventions, she argued, are products of joint commitment to acceptance as a body, but the commitments are not to be understood as mental states, but as *acts* with specific normative consequences. Joint acceptance as a body of some fiat is an imposition of a demand, a collective self-imposition which generates for the members of the collective reciprocal obligations and rights (Gilbert 2000, 84). It is possible to *will an obligation*, Gilbert insists, provided the party willing it is of the right kind. Like Coleman, Gilbert started from the model of an individual's personal commitment, but she understood it as a self-addressed command (ibid., 55). Such commands are self-legitimating both in the sense that the issuer is authorized to issue it and in the sense that the resulting order is normative, i.e., "ought-imposing" or reason-giving for the individual addressed (Gilbert 1989, 374; 2000, 55–6), although the reasons or "oughts" generated by such commitments do not directly entail either moral or prudential reasons.

This bindingness is qualified, however, because the addressee is also the commander, and thus is also in a position unilaterally to abandon the commitment (Gilbert 2000, 82). In contrast, joint commitments to a fiat have the proper structure to determine binding obligations, not on the collectivity (which still retains the power to rescind the order), but on its constituent members. Indeed, "the basic [...] structure of any joint commitment" is constituted by a framework of obligations and rights (ibid., 105). Because the commitment is not the product of any one member of the group, but rather of all of them together, it is not possible for any one member unilaterally to remove the yoke of obligation. Each is bound while all are bound and because they collectively are bound. Moreover, the joint commitment binds the members *to each other*; the obligations are *reciprocal* and *owed to each other* (ibid., 54–7, 86; 2001, 116). This, she argued, is the logical consequence of their joint commitment. Mutual expressions of readiness create a joint commitment and "obligations of joint commitment necessarily ensue" (ibid., 105). "Each member of the popu-

lation in question has a claim on every other member for conformity to the rule" (ibid., 86).

In the context of our reflections on the alleged conventional foundations of law, four features of Gilbert's account stand out. First, it is a collectivist version of familiar will theory of obligation. Individuals cannot on their own will themselves into obligations, because obligations are not unilaterally extinguishable and personal commitments are vulnerable to such extinction, but individuals, when they *together* make a joint commitment, are (as a matter of conceptual analysis) necessarily so bound, she argued. Unilateral defection is not rationally permitted because the actions creating the convention-fiat were not unilateral, but collective, and so require collective action to extinguish them. Second, self-commitments are self-legitimating and rationally binding *sui generis*, since nothing follows, on her view, regarding the moral or prudential reasons parties to a convention might have. This *sui generis* character of conventions is reinforced by her view that conventions are collective commitments to imperatives that demand conformity "no questions asked." Third, conventional obligations have a specific direction: they are owed to other co-members of the jointly committed group. Fourth, although the existence of a collectivity is a (logically) necessary concomitant of the joint commitment that constitutes a convention, Gilbert explicitly rejected the view that the existence (and normative force) of conventions depends on the regular compliance of members of that collectivity with the convention. Thus, in her view, a convention exists not only *before* anyone acts on it, but also in the face of general defection from it.[17] The existence of a convention and its normative force are entirely determined by the initial joint commitment; they do not depend in any way on expectations of compliance of others with the convention. In this respect, her account departs significantly from the Humean view of convention and from a common pre-theoretical understanding of conventions which Hart seemed to have had in mind. Nevertheless, two remnants of compliance dependency remain: (1) conventional obligations arise only as individuals link their willing with, and so with a view to, the willing of others, and (2) obligations are extinguished if the community so determines. Thus, Gilbert is committed to a community will dependency that parallels the Humean compliance dependency.

Although Gilbert (2000, 71–96) proposed her account of conventions as an alternative to Hart's analysis of social rules, she did not take up the question whether it adequately captures essential features of the official practice that Hart claimed lies at the foundation of law. Some of its features might appeal

[17] Marmor (1996, 357) plausibly argued, however, that Gilbert's examples of conventions that exist in the face of general non-compliance are better characterized as conventions that are dying or have already died. We might add that many dead conventions often live on as personal commitments or mere habits.

to Hartian positivists, because it addresses systematically the questions that Hart left unanswered, but its strong will and fiat components and its assumption (rather than explanation) of a structure of rights and obligations which the mutual expression of wills mobilizes, seemed to have made these theorists reluctant to embrace her account. Coleman, in particular, found the work of Michael Bratman (1999, chaps. 5–8) far more congenial.

11.3.2.2. Shared Cooperative Activity, Obligation, and Disagreement

Like Gilbert, Coleman believed that mere convergence of independent individual commitments to treat some pattern of behavior as normative is not sufficient to explain the duty-imposing character of conventions of recognition, because individual commitments can be unilaterally abandoned and because they are not dependent on the commitments and actions of others, as Hart's notion of a convention requires. He argued that to explain this we must recognize that legal practice is a matter of joint commitment to a cooperative activity.

Law-applying officials adopt a shared attitude to their joint activity which has the structure of interlocking individual intentions (Coleman 2001a, 96–8), with the following characteristics. First, it is common knowledge among them that each intends their activity *as a joint activity*, although they may come to this intention for different reasons. If we understand the joint intention as a plan, as Bratman suggested, then there will be roles for each participant to play, with sub-plans for successful execution of their roles which commonly will be worked out *in media res*. Second, each participant seeks to be mutually responsive to the intentions and actions of the others, and does so in pursuit of their commitment to the joint activity. This requires at a minimum (upon pain of instability or failure of the joint effort) that participants seek to mesh their sub-plans with those of other participants with the ultimate aim of achieving the master plan of the joint activity. Third, each is committed to mutual support of their fellow participants' efforts to play their respective roles in the joint activity, again because they see these supportive actions as important for the efficacy of the joint activity. This interlocking structure of intentions enables participants to achieve objectives that can only be achieved through cooperation. It also provides a general framework of interaction and a system of interdependent expectations.

The recognitional practice of law-applying officials has the three essential features just mentioned, Coleman (2001a, 96) maintained. The best explanation of their activity attributes to them a "commitment to the [essentially cooperative] goal of making possible the existence of a durable legal practice" (ibid., 97). In the absence an official practice with these features, law would not be possible, he held, and this is a *conceptual truth*, not merely a truth about what would make law more effective or efficient (ibid., 98). Although Coleman did not offer an argument for this strong claim in *The Practice of Principle*,

Shapiro (2002b, 418–21) suggested the following argument. A legal system exists as a unified and continuous set of rules, he argued, only if it is grounded in a practice of officials who are charged to maintain it to identify and apply only those rules that meet shared criteria of legality. The adoption and practice of these criteria is necessarily a cooperative activity. Officials can maintain a unified and continuous set of legal rules only if they work cooperatively to that end through adoption of shared criteria of legality. This cooperative activity is possible only if all officials are jointly committed to the shared cooperative activity, that is, only if they are committed to this project by submitting candidate legal rules to the test of these criteria and to applying (only) those rules that pass the test, and are committed to mutual responsiveness and mutual support in the course of engaging in this activity.

With this understanding of the intentional structure of official law-recognition activity, Coleman offered an explanation of its distinctive normativity, but at this point he departed from Bratman's account. Bratman argued that the normative requirements on participants in a shared cooperative are rooted in demands of instrumental rationality: given their commitment to the cooperative goal and the necessity or aptness of these actions to the fulfillment of that goal, participants ought to do their part in these actions. Unilateral defection from the shared cooperative activity may be legitimate, although if strong prudential or moral reasons press for achievement of the cooperative goal, defection would be unreasonable, imprudent, or even morally wrong. Thus, on Bratman's view, whether there is reason to do one's part in a shared cooperative activity, and in particular whether one has an obligation to do so, is strictly determined by the reasons calling for the cooperative activity. In contrast, Coleman looked for reasons internal to the commitment, that is, to the nature of the relations among the participants and the structure of their intentions. These intentions are interdependent, he argued; the intentions of each are conditioned on the intentions and actions of the others (and call for mutual support when those intentions shows signs of flagging). No one has reason to commit to the practice in the absence of the participation of others, or to continue should general compliance no longer be expected. This suggests sympathy with Gilbert's account and, in fact, Coleman (2001a, 91) referred to Gilbert with approval at this point in his argument. But, in fact, his argument moved in a different direction. Rather than asserting that the structure of joint commitment *just is* the structure of reciprocal obligations and rights, Coleman (relying on Himma 2002b, 134–5) pointed to the *expectations* induced in the participants by their joint commitments. Fairness requires that we not defeat legitimate expectations, especially those we voluntarily and knowingly induce, he argued. Fairness underwrites the requirements marked out as one's particular role in a shared cooperative activity; thus, law-applying officials are duty-bound, in the name of fairness to the other participants, to conform to that practice and the criteria it supports.

It also follows, although Coleman did not call attention to this fact, that the duties in question are *moral duties*.[18] Of course, whether the joint commitments to shared cooperative activities actually generate moral duties (or any duties at all) will depend on the nature of the cooperative activity. Even induced reliance on the undertakings of others will not put those who generate that reliance under moral obligation if the activity is criminal or morally objectionable. Thus, while, on this view, the obligations to conform to conventions rest on a substantive moral principle, there is no guarantee that a conventional practice will generate obligations, since that moral principle supports such obligations only under certain conditions, which, in Coleman's view, it is the task if substantive moral theory to spell out.

If this argument is correct, the conventions at the foundations of law bind officials to apply the criteria of legality in their efforts to maintain the legal system. But, the convention is binding only on officials and binds officials only to other officials, since it is these other officials alone with whom they jointly participate and whose reliance is induced through their individual commitments. Coleman's account is silent about citizen obligations under the law. Recall that Coleman adopted a two-tiered approach to explaining the normativity of law. The normativity of ordinary law—for example, the primary rules of law applying to ordinary citizens—is strictly a matter of systemic validity of those rules. A necessary condition of the validity of legal rules is that there is a convention among officials that determine criteria of validity. Coleman's characterization of official law-recognition activity as a shared cooperative activity was meant to explain how that convention can be genuinely obligatory. But the authority of this convention is not transitive; it does not pass through to the ordinary rules of law. So, while ordinary citizens have *legal* obligations under such rules, nothing follows from that fact about whether they have any reason to comply with those rules (other than prudential reasons arising from effective sanctions attached to their violation). Coleman welcomed this result, since it confirms an important component of Hart's own positivist theory of law: the sobering truth of law that, although legal rules meet conditions of validity determined by conventions that impose obligations on officials, ordinary citizens may have no reason voluntarily to comply with them (see chap. 7, sec. 7.4.2, above). Whether laws are legitimate, then, turns not on their formal validity, but rather on whether the ends they serve and the means they use to serve them are morally worthy (Coleman 2001a, 101–2).

[18] Himma (2002c, 1166 and n.124) argued that they are not necessarily moral duties because, if the shared cooperative activity can give rise to a moral obligation which is the most stringent kind, it can also give rise to less stringent, merely social obligations, but this is a non sequitur. The case for the duty-constituting character of the structure of the practice rests on an appeal to induced reliance and respect for legitimate expectations. These are relevant, duty-supporting considerations just because and insofar as they invoke distinctively moral principles of fairness or fidelity. If they underwrite duties, they underwrite moral duties.

This account of conventions also explains how disagreement is possible within the context of conventional practice, according to Coleman; for a shared cooperative activity requires shared intentions converging on a common goal, but, he argued, this does not determine concrete rules; rather, it provides a broad framework within which participants work out how to proceed (Coleman 2001a, 97–9, 157). Thus, law-applying officials commit themselves to a project of working out together what the criteria of validity, and hence what the law, should be (Kutz 2002, 1655). Shared cooperative activities provide "a framework for ongoing negotiation about the very content as well as the aims of the practices." This opens up the possibility of "fundamental and penetrating disagreement about how to continue the activity." Moreover, "it is not surprising that in resolving such disputes, the parties offer conflicting conceptions of the practice in which they jointly participate, conceptions that appeal to differing ideas of its point or function" (Coleman 2001a, 157). Thus, while the practice at the foundations of law is conventional, precisely because "its existence does not depend on the arguments offered on its behalf, but rather on its being practiced" (ibid., 158); nevertheless, the existence of such a practice is consistent with fundamental disagreements within it, disagreements which surface in competing conceptions of the practice resting on substantive moral arguments. Thus, Coleman concluded, Dworkin's fundamental challenge to conventionalism has been met.

11.3.3. Commitments, Reasons, and Obligations: Some Questions

The joint-commitment approach to understanding conventions at the foundations of law has only recently been suggested. It is perhaps too early to tell whether it offers a more compelling understanding than the Humean approach. Still, it might be useful to mention a few problems it appears to face.

11.3.3.1. Dispositions, Commitments and Reasons

Both Coleman and Gilbert, despite significant differences in their approaches, base their accounts of the normative foundations of conventions on analogues to the adoption of personal rules. But this strategy faces a quite general philosophical problem: neither self-addressed imperatives, nor intentions or personal resolutions generate reasons for action. As John Broome (2000) has argued, intentions and resolutions may impose on those who indulge in them a kind of *normative pressure* in the form of a rational conditional of the following kind: do as you intend or resolve, *or else* give up your intention or resolve, *upon pain* of internal practical inconsistency. In virtue of the rational connection that seems to obtain between intentions, means of realizing them, and actions, if an agent formed an intention that agent is subject to rational pressure to choose means to realize the intention, but that pressure is internal to the rational con-

nections. One cannot detach the conclusion that, thereby, the agent has reason to choose the means. Forming an intention does not, in itself, yield any reason to act. The same is true of self-directed imperatives.

Gibbard's metaethical expressivism cannot help Coleman here. His reliance on it at this point confuses levels of philosophical explanation. There is no legitimate direct inference from Gibbard's metaethical account to substantive judgments regarding the reasons agents have for action. Those two claims or theses operate in different conceptual domains and are addressed to different issues. Of course, it may be true that dispositions or commitments or the like, taken just at the substantive level succeed in generating reasons for action, but the argument for that conclusion must rely on further substantive practical principles, whether principles of rationality, or morality, or some other kind. Metaethical analyses are not equipped for that job.

In fact, dispositions cannot do the job either, because, no matter how they are dressed up, they are still nothing more than matters of psychological fact, mental states, or properties of mental states. They (logically) cannot play the role of norms or norm-constitutors, for familiar Wittgensteinian reasons (see Kripke 1982). Dispositions are not the kind of thing that can be mistaken in the way that normatively evaluable acts can be. Dispositions that do not yield their expected results in particular cases are simply variations or alterations of the disposition. Similarly, just as believing something to give one a reason does not make it so, so being disposed to treat something as giving one reason to act does not by that fact alone give one reason to act.

11.3.3.2. Do Joint Commitments Yield (the Right Kind of) Obligations?

Of course, Coleman and Gilbert did not rest their accounts of the normative force of conventions on personal dispositions or self-addressed commands alone. For *obligations*, more is needed, they insisted, and that additional element is supplied by the fact that the commitments involved are *jointly* undertaken. For Gilbert, joint commitments have a conceptually necessary structure: to undertake a joint commitment just is to submit to a network of claims and obligations. This implies that joint commitment gives structure and direction to the resolve, now understood as the resolve of the group in view. It follows, then, that Gilbert's account of the ground or source of the normative force of conventions throws all of its weight on the argument that collective commitments, like personal ones, are self-legitimating. This view is vulnerable to the objections we explored in the preceding section.

Coleman's account is open to different objections. The shared cooperative activity, he argued, has a distinctive normative structure involving complexly interlocking intentions which have the normatively relevant consequence that they induce reliance. Obligations generated by shared cooperative activities rest on a principle of fairness or fidelity that puts responsibility on those who

induce reliance to avoid disappointing legitimate expectations of others. Induced reliance has normative significance of its own and seems to do all the normative work. Fairness requires that parties respect the legitimate expectations of those whose reliance they have induced. However, critics have argued that this does not yield obligations of the right kind. For one thing, as Stephen Perry (2002, 1783–4) pointed out, the principle of respecting induced reliance does not block unilateral withdrawal. Individual actions and commitments induce reliance, not joint commitments, but the obligation they generate is at most a disjunctive obligation: to perform or warn against relying or compensate the losses due to reliance (see also Christiano and Sciaraffa, 2003, 495–6). Coleman might object that this challenge overlooks the interlocking nature of the intentions and the commitments thereby constituted. It would be practically incoherent for a participant to intend mutual responsiveness and support while at the same time warning other participants against relying. Perhaps so, but it is not clear that this yields obligations not conditioned on an individual's willingness to participate, unless Coleman were to follow Bratman and concede that the obligation depends on the strength of the (moral) reasons for the joint cooperative activity.

More puzzling, perhaps, is the alleged direction of the obligations owed as a result of the induced reliance. Coleman (like Gilbert) is committed to the view that the obligations of law-foundational official practice are owed to other officials, for it is with them that they are engaged in a joint activity, and it is their reliance which is induced. Yet, it is difficult to fund the notion that officials owe to each other obligations to do their part in the cooperative activity. Whatever reciprocal collegial obligations they have would seem to be secondary to their primary task of securing the unity and coherence of the legal system. And that has normative force as a proper and binding task, not because some group (for whatever reason) happens to take it up, like basket-weaving or bird-watching, but because of the importance—in view of the stakes we must say the *moral* importance—of the task. That is not true of all shared cooperative activities, of course, but we have already seen that Coleman must accept that the case for the *duties* imposed by the convention at the foundations of law cannot rely entirely on the case for the relevant practice possessing the defining properties of shared cooperative activities. The additional considerations needed to make this case must take into account the nature and aims of that activity and any plausible proposal in that regard will surely put the collegial relations between the participant officials in a secondary position. Indeed, if any obligation-generating reliance is induced by their practice it is not the reliance of their fellow officials on their compliance, but rather the reliance of the general public. If duties are owed to anyone, it would seem that they are owed to *citizens*, not to fellow participating officials. As Christopher Kutz (2001, 455–7) observed, Coleman's account of the obligations associated with the conventions at the foundations of law seems to go in the wrong direction.

Lon Fuller would put this argument in slightly different terms (see chap. 4, sec. 4.3.2, above). The duties of fidelity that bind officials to and in their cooperative activity are not, first of all, duties to each other (even less to "the constitution" or some other revered text or historical event), but rather duties to citizens with whom they partner in the project of governance under the rule of law. In this light, it is striking that Coleman was keen to block all suggestion that such a relationship obtains at the heart of the case for law's normativity. He set up his account of the alleged foundational conventions of law to insure this result, but he gave us no reason, apart from fidelity to positivism, to reject Fuller's suggestion. In consequence, his account of the normative foundations of law appears to be ill-focused, taking on its greatest plausibility and appeal just at the point that his positivism turns it away.

11.3.3.3. On the Possibility of Fundamental Disagreement within Shared Cooperative Activities

Since the writing of "Negative and Positive Positivism" (Coleman 1982), Coleman has sought to answer Dworkin's "argument from controversy" against Hart's positivism. By conceiving of the recognitional practice of officials as a shared cooperative activity, he hoped to provide a philosophically satisfying account of the conventionality of law that makes room for pervasive and fundamental disagreement on substantive moral grounds about how to carry out this joint activity (2001a, 99, 157–8). A couple of reasons might make us hesitate to judge the project as success.

First, if we grant that disagreement is possible with respect to the articulation and proper execution of the common goal of the shared cooperative activity allegedly embraced by law-applying officials, we might ask whether the arguments used to resolve those disagreements is of the right kind, that is, the kind most typically used in debates among judges and officials regarding the foundations of their legal system. Following Bratman, Coleman characterized this conciliatory activity as "bargaining" and "negotiation." If he intends for us to take his characterization literally, we have good reason to doubt that he has captured the right kind of argument. For, while horse-trading is common in actual debates regarding fundamental rules and principles of law, it is not at the center of such debates. Legal practice is first and foremost a practice of discursive argument; a matter of giving, taking, assessing, expanding, restricting, and deploying *substantive reasons*, considerations that connect with others in practical arguments for conclusions, some of which are very concrete and some of which are very general. Propositions uttered in legal discourse take their content and force from their place in a network of substantively related rules, principles, conceptions, and reasons. The kind of argument characteristic of legal practice generally, and presumably no less so when truly fundamental matters are debated, is discursive argument. It is not a matter of offering

incentives to some parties here in exchange for reduction of costs to others, but a matter of offering public reasons available, assessable, and having force for all the participants.

Of course, Coleman may have used the terms "bargaining" and "negotiation" loosely to indicate a process of achieving consilience of conflicting views through practical reasoning and he might welcome this emphasis on the discursive aspect of legal practice, but Bratman's simple planning view of intentions on which he builds his account of shared cooperative activity seems too thin to accommodate this development. The nature and content of the participants' intentions and the nature of the practical reasoning in which they engage will need to be carefully reconsidered. A final judgment on whether the shared cooperative activity model fits official practice at the foundations of law must wait on further development of the theory.

Second, one may wonder whether Coleman's account, elaborated to better accommodate the essentially discursive dimension of legal practice, can retain its positivist credentials. For many, of course, this is not an issue of any consequence; for them the question is not whether one can give positivism its due respecting the position worked out, but whether the position is due our respect as approximately true or at least illuminating. For Coleman, however, the issue of fidelity to the positivist project was of paramount importance. It can be secured so long as it is it clear that the existence of the practice depends not on "arguments offered in its behalf" but "on the fact that individuals display the attitudes constitutive of shared intentions" (Coleman 2001a, 158). This distinction, perhaps, is not as clear as Coleman thought it was, once we allow for the kind of disagreement within the practice that he was willing to countenance. For what is essential for the existence of a shared cooperative activity is convergent behavior of the right kind, i.e., behavior that essentially involves extended discursive argument, and intentions with the right content and in the right interlocking relationships. One of those intentions is a commitment on the part of each of the participants to the common goal of the activity. Within that commitment, Coleman argued, it is possible for there to be disagreement—with roots in competing substantive moral principles and visions—not only about the application of criteria of legality, or over the appropriateness of candidate criteria, but even about the very point of the practice (ibid., 99, 157), disagreements that have implications for the other kinds of disputes. But if we allow disputes this fundamental into the "project," then it becomes difficult to distinguish between disputes within the practice and arguments on behalf of the practice. In both cases, the nature of the practice and the basis of its claim on officials is the focus of discussion.

Coleman must reply at this point that what guarantees the conventionality of the practice is that the *existence* of the practice depends not on which (if any) of the arguments tendered by the participants is correct, but rather solely on the fact that participants' intentions manifest in these disputes are of the

right kind and related in the right way. The question we must ask, however, is whether the participants who engage in disputes at this fundamental level can accurately be described as committed to a common goal. Coleman runs the risk at this point of characterizing the goal in such abstract terms in order to secure its place as common among participants that the attribution of the goal to the group is drained of all significance. These worries do not appear to be decisive, however, and perhaps with further development the account can win our allegiance. But it is not without competitors, not only the Humean theory, but also an even more recent proposal from Andrei Marmor, to which we now must turn.

11.4. Constitutive Conventions

The fault of conventionalist understandings of the social foundations of law, Andrei Marmor recently argued, lies not in the conventionalist thesis itself, but in the accounts of social convention offered. Marmor found Humean accounts wanting for some of the reasons we canvassed in section 11.2.3 above. In particular, he argued that the rule of recognition cannot plausibly be seen as a solution to an antecedent cooperation problem (Marmor 2001b, 12–3; 2006a, 353–63); moreover, Humean accounts fail to grasp the nature and the depth of law's conventional foundations, he charged. The alternative account he offered, while it differs sharply from Humean efforts, like them sought to explain the social foundations of law in terms of social rules that are truly normative (reason-giving and obligation-grounding), potentially disputable, and recognizably conventional, depending on the regular decisions and actions of legal officials and others.

Marmor's account of law's conventional foundations rests on a background analysis of conventions with three components: a general analysis of conventions, an analysis of a class of conventions distinct from coordination conventions which he calls *constitutive conventions*, and an analysis of *deep*, as opposed to *surface*, constitutive conventions. His thesis is that rules of recognition are (surface) constitutive conventions which determine what counts as law in particular legal systems and instantiate deeper conventions that determine for societies practicing them what law consists in for those societies (Marmor 2006a, 363, 369–71).

11.4.1. The Concept of Convention Analyzed

Marmor's account of conventions differs from Humean accounts in scope and methodology. He argued that the Humean view leaves out of consideration conventions that are not immediately directed to social coordination and so he offered an account that embraces both Humean and non-Humean conventions. Also, his account is, or at least appears to be, strictly formal, whereas

Lewis's was rationally substantive. Lewis offered a rational-functional *explanation* of social conventions, locating conventions in a framework of rational decision-making in contexts of social interaction, explaining their nature by showing how they give rational agents reasons for action in those contexts. In contrast, Marmor was content to offer an analysis of the concept of convention in the form of the following definition (paraphrasing Marmor 2006a, 354–5).

A norm, N, is a social convention just in case N is a rule that some population, P, normally follows, for the following of which by members of P there is a set of reasons, A, and there is at least one other rule, N*, such that *if* members of P had followed N*, A would have been sufficient for members of P to follow N*, partly because N* would have been the rule normally followed in P.

It is useful to isolate several key elements of this definition.

(1) *The norm-rule element*. Conventions, according to Marmor (1996, 352–4), are *norms*, not mere regularities of behavior. They direct conduct and are meant to function in practical reasoning; they set out the way things are to be done, not merely the way things have been (or are regularly) done. Moreover, conventions are *binding rules* in the sense that they are not simply generally accepted reasons for acting, but rather constitute what Raz called "exclusionary reasons," which replace some first-order reasons of the agent (Marmor 1996, 361–2; 2001b, 3–4; see above chap. 8, sec. 8.4.2.1).[19]

(2) *The compliance element*. Conventions are *social* rules and so exist just insofar as they are *practiced*, that is, *followed*, in some group of agents, where following a rule involves not only acting in conformity with it, but also treating the rule as a reason for action, behaving as required *because it is required* (Marmor 2006a, 354 n. 19). Since the boundaries of the group in question and of the rule followed may be uncertain or vague at times, it is possible that there is uncertainty whether there is a particular convention in a given population or what that convention really requires.

(3) *The reasons element*. Conventions are rules for which there are (or at least are widely believed in the population to be) reasons to comply. The reasons may be weak and easily defeated by (non-excluded) countervailing reasons, but there must be some at least minimal reason for compliance with the

[19] The assumption of the necessary exclusionary nature of the reasons offered by conventional rules is undefended. It also appears to be false as a general claim about the conventions Marmor has in view; whether it is true of conventions associated with law is a matter that depends on features alleged to be distinctive of law. Marmor argued, following Raz, that law necessarily claims legitimate authority (see chap. 8, sec. 8.3.3), but, as we have seen, this is a very controversial claim (chap. 8, sec. 8.5). I will ignore this assumption in what follows since nothing in Marmor's argument for law's conventionalism turns on it.

rule for it to qualify as a convention. Marmor intentionally says nothing about the kinds of reasons conventions can give for action—in this respect also, his account is formal. Thus, whether any particular convention gives moral reasons to comply depends strictly on the nature of the convention and arguments that can be marshaled in its behalf. Some conventions may be morally binding, but this is not by virtue of their being conventions, but in virtue of the kind of moral reasons for complying with them.

(4) *The compliance-dependence condition*. The compliance-dependence condition and the arbitrariness condition (below) together secure the conventionality of social rules, in Marmor's view (1996, 350–9). A rule is compliance-dependent just when the reasons for an agent's following it are conditional upon other people also complying with it: "the fact that the rule is efficacious forms an essential part of the reasons for complying with it" (Marmor 1996, 356); "there is no point in following a conventional rule which is not actually followed by the pertinent community" (Marmor 2001b, 17–8). Note that the dependence in view here is dependence of the point or reason for complying with a rule, not with its being a social rule. So, we might say all social rules are dependent on general compliance with them insofar as they are *social* rules, but only conventions (a sub-class of social rules) are compliance-dependent in the further sense that *the point* of complying with them depends on general compliance.

(5) *The arbitrariness condition*. Arbitrariness is a relation among four components: a *practiced rule*, a *population* that practices that rule, *reasons* served by their following it, and another *rule* that is *alternative* to the first, available to that *same population*, and capable of serving those *same reasons* if *it* were practiced.[20] Conventions are *arbitrary* just when there is an alternative rule that would serve the same reasons as are served by the established convention, were the alternative actually followed in the same circumstances by the same population that follows the established convention. Parting with Aristotle, Marmor (1996, 355–6) stressed that arbitrariness is not to be confused with indifference. The alternative rule must serve the relevant reasons only to the extent that, were it normally followed by the same population, those reasons would be sufficient for all members of the population to follow it; they may, however, have good reason to prefer that an alternative were practiced, or they may disagree about whether the existing convention or some alternative is preferable.

[20] Marmor defined arbitrariness as follows: "Given that *A* is the main reason for members of a population, *P*, for following a rule, *R*, in circumstances *C*, *R* is an arbitrary rule if and only if – there is at least one other rule, *R′*, so that if most members of *P* in circumstances *C*, were complying with *R′*, then for all members of *P*, *A* would be a sufficient reason to follow *R′* instead of *R*. The rules *R* and *R′* are such that it is normally impossible to comply with them concomitantly in circumstances C" (Marmor 1996, 351–2).

(6) *The non-transparency element*. Perhaps the most striking feature of this account of conventions is that, contrary to the common understanding of conventions, Marmor (1996, 354; 2001b, 12; 2006a, 355) held that the arbitrariness of conventions and the compliance-dependence of their reasons—the core of their conventionality—need not be a matter of common belief. A rule can be conventional even if no one in the population following it regards it as such, on his view. It is necessary, of course, that a rule, by virtue of its being a rule, is regarded by the population as providing them reasons for acting; indeed, they must regard it as binding. But it is not necessary that the reasons they recognize be the compliance-dependent reasons which actually justify the convention, and it is not necessary that they recognize this compliance dependence as the result of the availability of alternative rules that would adequately serve those reasons.

Two comments on these defining features of conventions are in order. First, it follows from Marmor's definition of conventions (although he did not highlight this fact) that the conventionality of a practiced rule is directly a function of the reasons there are for complying with it. Thus, if those reasons are compliance-dependent, i.e., if failure of general conformity undermines those reasons, then the rule "loses its point," but only insofar as those reasons are concerned. If there are other reasons for complying with it, the rule may retain its point, but it will lose its status as a convention. Thus, the same rule (on some reasonable understanding of "the same") may be conventional when understood relative to one set of reasons, but also transcend its conventionality when understood relative to a different set of reasons.

Second, we need to consider more closely the relationship between arbitrariness and compliance dependence. Marmor (2007, 590–2) insisted that the former is the more fundamental, but this may be a mistake. Strictly speaking, arbitrariness entails compliance dependence (Marmor 1996, 356); in fact, arbitrariness is a special case of compliance dependence. However, if arbitrariness is a necessary condition of conventions some good candidates are excluded from the class of proper conventions. Seamus Miller (1986, 136–8) correctly pointed out that in a classic "stag-hunt" (assurance) game, for example, a cooperative convention may be required to secure our hunting stag together, although no convention is required for our hunting rabbits. Hunting rabbits may be a regularity of our behavior (and an equilibrium), but it may be strictly a matter of our "going it alone"—no common rule is needed. So, there is no alternative *rule* to that of hunting stag together. Nevertheless, although it does not meet Marmor's condition of arbitrariness, the stag-hunting rule would seem to be a proper convention, for (1) the compliance-dependence condition still holds—the reasons for following the stag-hunt rule are conditional upon others following it as well—and (2) as Hume would have emphasized, the rule is *artificial*—the product of human intelligence and invention (albeit not neces-

sarily intentional construction)—and, as a long tradition from the Greeks onward insisted, it is a matter of "coming together" (*conventio*) and "agreement" (*kata synthēkēn*, i.e., *agreeing in* the practice, if not explicitly *agreeing upon* it) in contrast with the "going it alone" of rabbit-hunting. Compliance-dependence is also true for arbitrary social rules, but it is not true only of them. It appears then that compliance-dependence is the more fundamental defining feature of conventions.

11.4.2. Kinds of Conventions

Humean conventions characterized in Section 11.2.1.2 meet the conditions of Marmor's definition; however, they are only a subset of conventions, according to Marmor, because only some conventions can plausibly be seen as solutions to antecedently existing coordination (or cooperation) problems (Marmor 1996, 363–7; 2001b, 12–3). Rules of games like chess, rules of etiquette and fashion, and artistic genres did not evolve, do not exist, to solve coordination problems, he argued, although they may give rise to such problems which then can generate coordination conventions (ibid., 364–5). "Antecedent to the game of chess, there was simply no problem to solve" (Marmor 2001b, 13). There is a second type of conventions, *constitutive conventions*, the primary function of which is simply to constitute certain social practices.

11.4.2.1. Constitutive Conventions

Like MacCormick and the new-institutionalists (see chap. 8, sec. 8.2.2 above), Marmor (1996, 349–51) began his analysis of this sub-class of conventions with Searle's distinction between constitutive and regulative rules. Constitutive conventions both constitute certain social practices and regulate conduct within them. Strictly speaking, Marmor admitted, rules do not constitute behavior or conduct, rather they require or permit or empower certain forms of behavior; however, in doing so they give activities new or different social significance. By defining these activities, the conventions constitute the point or value of the activities and "it is impossible to specify them independently and antecedently of the conventions themselves" (Marmor 1996, 366). More precisely, the meaningful activity is constituted by the conventions, and engaging in that activity is seen to have value, at least for those who participate in it. These values and the corresponding standards by which performances within the practices are evaluated are internal to the practice—they can only make sense in the context of the practice constituted by the conventions (ibid., 366–7). Thus, the practices are *autonomous* in the sense that they supply their own point and standards of evaluation, or at least, "the point of engaging in them is not fully determined by any particular purpose or value which is external to the conventions constituting the practice" (Marmor 2001b, 14).

Sometimes Marmor allowed that at least some practices are fully autonomous,[21] but generally his view was that the autonomy of social practices is always to some degree "partial" because "all social practices are related to general human concerns of one kind or another" (Marmor 2001b, 15); "there are always some reasons (or needs, functions, etc.) in the background for having that kind of practice, and those reasons are closely entangled with the various values the practice instantiates" (Marmor 2006a, 359). These human concerns are external to the practices in the sense that they can be grasped, at least in abstract form, apart from their instantiation in concrete practices. Yet, because of their very abstractness they are realized only through instantiation in concrete practices. The autonomy of a social practice thus "consists in the fact that the conventions constituting the practice are *radically underdetermined* by those general values and human concerns that they instantiate" (Marmor 2001b, 15, original emphasis). These values, in turn, are realized only through being concretely instantiated in particular convention-constituted social practices. Moreover, once a practice is established, it may constitute further values that are instantiated only by engaging in it (Marmor 2006a, 359–60). "Thus, in each social practice constituted by conventions, there is a mixture of general concerns these practices are there to serve or instantiate, and values associated with the practice in ways which are constituted by the conventions constituting the practice itself" (Marmor 2001b, 15). The autonomy of social practices, then, is a matter of degree, determined in part by the mixture of values and in part by the degree of remoteness of the practice from the background, non-conventional concerns and values (1996, 367; 2001b, 15).

With this understanding of constitutive conventions in hand Marmor sought to explain the normativity—the reason-giving character and obligation-generating character—of these conventions. Conventional rules give or constitute reasons to follow them to those governed by them, but they are not *complete* reasons. The reasons are completed, and depend upon, the background values or purposes served or instantiated by the conventions (Marmor 2001b, 26–8). It follows that the nature and force of the reasons for following a convention are entirely a function of the nature and importance of the purposes it is meant to serve. This has the further implication that constitutive conventions impose moral obligations (or non-moral obligations, if there are such) only if the reasons they offer are of the kind that can ground (moral) obligations. So, for example, compliance with a Lewis-convention designed to solve a coordination problem would not only be rationally favored, but also obligatory only if parties have an obligation to solve the coordination problem (Marmor 2001b, 28–9). Likewise, there are reasons to comply with constitu-

[21] They are constituted by "conventions [...] we may have reasons to comply with, although there are no particular reasons for having the convention[s] [or corresponding practices] in the first place" (Marmor 1996, 366).

tive conventions only if the practice constituted by them has a valued practical point. Typically, Marmor (2001b, 30–1) held, constitutive conventions are, at best, only "conditionally mandatory," the obligation being conditioned also on an agent's commitment to participating in the convention-constituted practice. This approach leaves open the possibility that our participation may be morally required, although Marmor doubted that there are any such conventional practices.[22]

It follows from this approach to the normativity of conventions that while we can at least provisionally credit a functioning social convention with reason-giving force, the final word on whether it does give reasons for action and on the nature and force of these reasons is entirely a function of the values it serves, some of which may take on importance only when embraced and adopted by individuals via their commitment to the practice. Of course, participants who take the social rule to serve certain background values may be mistaken, in which case the rule may not give them reasons to participate (unless it serves other values of which they are not fully aware).

Are the practice-constituting social rules to which Marmor calls attention proper conventions? On his understanding, they are proper conventions just in case they are arbitrary and the values they serve are compliance-dependent. The "internal values" constituted by the constitutive rules of a practice, obviously, are compliance-dependent, for if the rules were not generally followed the activity constituted by them would not exist, in which case the value of that activity, and the standards of evaluation implied by it, would not exit either. However, relative to those values the rules are not arbitrary in Marmor's sense because there are no relevant alternatives to them. So, the conventional status of the practice-constituting rules rests entirely on their relationship to the background purposes and values they serve. Marmor gives just one reason for thinking that partially autonomous, practice-constituting rules are arbitrary and hence proper conventions: the background values underdetermine the rules. Underdetermination entails that the values can be served or realized in more than one way and, thus, that there are conceivable alternatives to the existing social rules. This argument is unpersuasive, but before we explore its problems we must consider Marmor's important distinction between two levels of constitutive conventions.

[22] I see no serious reason for this skepticism. There is nothing puzzling about the idea of its being morally wrong for an individual or a group to fail to participate in some convention-defined activity. Perhaps, Marmor thought that convention-*constituted* practices always serve relatively minor human concerns. That may be true of some of them—certain games, for example—but there is nothing in the idea of a constitutive convention that limits them to morally insignificant parts of life. Indeed, a good candidate for a morally more demanding concern is that served by law-founding constitutive conventions, if Marmor is correct that we must understand rules of recognition as constitutive conventions.

11.4.2.2. Deep vs. Surface Conventions

Some constitutive conventions, according to Marmor, serve human needs or values directly, but others serve them only indirectly, through the mediation of yet deeper conventions. These "deep conventions" are more abstract social norms of which "surface conventions" are specific determinations (Marmor 2006a, 363–7; 2007, 593–600). Deep conventions are a species of constitutive conventions, so they are relatively autonomous and instantiate or "respond to" human needs, purposes, and concerns. They are deep in a two-fold sense: (1) they are "responsive to [...] deep aspects of human society and human nature" (Marmor 2006a, 365) and "serve relatively basic functions in our social world" (ibid., 363), and (2) they "enable" the formation more specific, shallower conventions, and only through following of these surface conventions are deep conventions practiced (Marmor 2006a, 363; 2007, 599).

Deep conventions and surface conventions are mutually dependent. Deep conventions exist only if they are concretely specified in surface conventions; they cannot be followed on their own. Surface conventions, in turn, could have emerged, according to Marmor, only as instances of certain deep conventions. Moreover, deep conventions "constitute what the practice is" (Marmor 2007, 600)—that is, I take it, they make the practice *the kind of practice* it is, providing its fundamental albeit abstract point or social meaning—while the correlative surface conventions specify the concrete features of the practice, and in that respect *constitute the practice*. For example, the specific rules of chess constitute the it as a game of a certain kind, but this "is only an instantiation of a more general human activity that we call 'playing a (competitive) game'" and that activity is governed by general social norms requiring that the activity be rule-governed, with rules determining what counts as winning and losing, detached to some degree from real life concerns (Marmor 2007, 594–5).

Deep conventions are proper (constitutive) conventions, Marmor insisted, not merely understandings widely shared in a society or culture. They are practiced social norms that meet the key conditions of conventionality, arbitrariness and compliance dependence. Again his argument for this claim turns entirely on the observation that the deep human needs and values served by deep conventions underdetermine them; hence, they represent only one way adequately to serve the values.

11.4.3. Constitutive Conventions and the Foundations of Law

Marmor deployed his analysis of conventions to defend jurisprudential conventionalism. At the foundation of every legal system, he maintained, is a constitutive convention of recognition practiced by law-applying officials. Like the rules of chess that constitute the activity of playing chess, the primary function of a convention of recognition is to constitute the (partially) autonomous prac-

tice of law (Marmor 2001b, 19–24). The rule of recognition of a given jurisdiction is a constitutive convention for determining what is law—what rules count as rules of law—in that jurisdiction, and it manifests deeper conventions in the community and culture that constitute what (kind of thing) law is.

Thus, Marmor (2006a, 363, 369) proposed to treat the rule of recognition of a legal system as a surface convention made possible by and instantiating a deep convention about the nature of law (a "model of law") that in turn mediates between the rule of recognition and general reasons there are for having law. His argument for this proposal rested entirely on the observation that rules of recognition and the models of law they instantiate, are underdetermined by the external social needs and values they serve (Marmor 2001b, 20–1; 2006a, 368–9). Essential to the account of the place of any rule of recognition in a given political community is its history and it is clear that that history could have been different. This shows that the practice could have taken quite different shape and from this he concluded that the legal system's founding rules are arbitrary in just the way conventions are, as are our deeper models of law, for they, too, are underdetermined by the complex of fundamental social needs that call for law and are products of its history.

Since rules of recognition are constitutive conventions, Marmor argued, we can explain their normative force. Like chess, law is (partially) autonomous, so the conventions that constitute the practice also constitute certain practice-specific values and standards of assessment of conduct within the practice. These internal standards yield reasons for participants to act as the rules specify, but they do so only *conditionally*. They are reasons only for those parties who are antecedently committed to participating in the practice.[23] Moreover, the recognition convention does not by itself constitute reasons for participating in the practice; those reasons derive, rather, from the values served or instantiated by it (or rather, by the needs and values served by its correlative deep convention), if any (Marmor 2001b, 30–31). These reasons can take the shape of binding moral obligations when the reasons for participating are weighty moral reasons that bind agents to the means necessary to achieve the moral purposes in view.[24] Thus, while constitutive conventions are not, merely by virtue of being conventions, capable of generating binding *moral* obligations, constitutive conventions underwritten by weighty moral values or principles may do so. The

[23] Marmor sometimes suggests that participants' commitments (understood either as acts or states of mind) ground the reasons for action that the practice gives them, but his considered view seems to be that it is ultimately the reasons *there are* for the commitment (or at the very least the reasons participants take themselves to have) that discharge the conditional reasons (Marmor 2001b, 32).

[24] Of course, since rules of recognition are conventions, they are by definition *rules* and hence offer those governed by them exclusionary reasons for complying (see sec. 11.4.1, above). So, we can regard the reasons as obligation-constituting reasons. This is a very substantial interpretive claim about rules of recognition, but Marmor never defended it.

case for moral obligations at the foundations of law, then, is strictly a matter of moral argument, identifying and working out the implications of the values (if any) served by the conventions. The existence of the convention and the determinations of validity that it calls for are, in contrast, merely a matter of the dictates of the convention-constituted practice. Marmor thus insists that this account of the conventions at the foundations offers us an *explanation* of how practices *might* generate genuine reasons for action without thereby showing that any particular practice succeeds in doing so; this latter claim can be made only through straightforward substantive moral argument.

The account also offers an explanation of how conventions of recognition can be accorded serious moral weight and even can be contested. As conventions, rules of recognition are arbitrary and compliance-dependent, but this does not imply that they must be regarded as morally indifferent. Since constitutive conventions, even those of relatively autonomous practices, make normative sense only insofar as they can be seen to serve values or needs external to them, participants may find it necessary to interpret the practice in light of proposed background needs and values and of the standards that arguable are constituted by the practice. There is no guarantee, of course, that participants will always share the same or compatible conceptions of the point of the practices (Marmor 2001b, 16); indeed, the practice may even be "essentially contested" (2006a, 358 and n. 28).[25] Furthermore, it is not necessary for participants to treat the rules as arbitrary—having reasonable alternatives which would be attractive if they were to attract the general conformity enjoyed by the established rule of recognition—and, hence, compliance-dependent, since the conventionality of a practice need not be transparent to its participants (ibid., 21–1). Thus, it is possible to explain the fact that judges sometimes accord moral-political significance to their practice and the rules that constitute it and regard themselves as committed to them in a way that is not dependent on the behavior of any other officials. Thus, in Marmor's view, the theory of constitutive conventions explains all the key features of rules of recognition highlighted by Hart, including the normative force they can enjoy, and the features of perceived moral significance and contestability that Dworkin thought inconsistent with positivism.

11.4.4. Constitution, Cooperation, and Convention

Marmor offered his account of conventions, and in particular law's foundational conventions, as a sharply distinct and superior alternative to the Humean and joint activity accounts. The key differences, in his view, are (1) the *consti-*

[25] Not only is it unnecessary that participants commit themselves to the practice for the same reasons, but Marmor insisted, following Hart, that it is not necessary that they commit for *any* substantial reason at all, (Marmor 2001b, 32; see chap. 7, sec. 7.3.2.1, above). This claim seems to be open to objections directed against Hart's thesis (see chap. 7, sec. 7.3.4, above).

tutive function of some conventions (notably chess and rules of recognition) as opposed to the assumption of an essential cooperative or coordinative dimension at the center of the alternative accounts; (2) the concomitant *autonomy* of the practice; and (3) the possible *non-transparency* of the conventional nature of the practice to its participants. However, although these accounts obviously differ in details, they, including Marmor's, actually converge (as, arguably, they must) around the essential cooperative dimension of conventions. Moreover, his view, especially (2) and (3), appears to be in tension with the underlying jurisprudential positivism which the account was meant to serve. We turn to the latter issue first.

11.4.4.1. Is Law Like Chess?

Marmor's argument for interpreting rules of recognition as constitutive conventions is remarkably thin. It rests on just two claims, first, that the social needs served by the rule of recognition (and its deep convention) are underdetermined (this makes them conventions) and, second, the main function of rules of recognition is not to solve some antecedent coordination problem but rather simply to constitute a largely autonomous activity (this makes them constitutive). Notice that we must understand these two claims not as observations regarding the internal attitudes or beliefs of participants (the non-transparency thesis makes them irrelevant for this purpose), but rather as strongly interpretative proposals for understanding official practice at the foundations of law. Thus, we can reasonably ask for further interpretive argument to support them.

For example, we need some reason for thinking that the best understanding of the practice is one of constituting an autonomous activity *rather than* solving a cooperation problem. The proposal is interesting, but unsupported, especially in this strong, cooperation-excluding form. The argument has to be made, because there is nothing that logically or in general precludes constituting the activity *as a means* of solving a cooperation problem. Of course, we cannot pursue this question any farther without looking to the kinds of background values or principles the practice is meant to serve. The same is true for the second claim.

Marmor's only argument for his claim that the practice is conventional is that the values served by it are underdetermined. However, the fact that an activity gives specific form (in that sense determines) an indeterminate value does not entail that it meets the condition of arbitrariness which defines conventions in Marmor's view. Underdetermination means that a value can be realized, respected, or served in a number of different ways; however, only when the value is *compliance-dependent*—that is, only when, if most other people realize the value in some other manner one would have reason to abandon one's practice and adopt that of the others—is the determining activity a conven-

tion. Thus, we need an argument to show that the underdetermined values are compliance-dependent. We need to know more about kind of values meant to be served by law's foundational practice. Moreover, for this inquiry we cannot treat as decisive the views of participants in the practice; rather, we need an interpretative argument of some complexity to make the case.

That argument can help us decide just how autonomous the practice is; that is, help us decide just how much like chess law really is. Absent such argument we have no way of telling, for the conventional status of a practice and the nature and degree of its autonomy depend entirely on the values it serves. One might reasonably argue, in quite general terms, that law practice is not likely to be very much like chess—its internal values and standards are not likely to be very autonomous—in view of some signal facts about law, for example, that it deals on a daily basis and by design with matters in which the moral stakes are very high. Much of moral significance to ordinary folks—their lives, liberties, property, civil rights, organization of their family affairs, and the like—depends on the laws officials recognize, apply, and enforce. It will be hard, then, to make a plausible case for treating the official practice at the foundations of law as autonomous from major moral concerns in the way many games are autonomous. Equally, it will be hard to maintain that the main reasons for carrying on the practice depend solely on the commitments of the participants, as is the case for most games. Of course, officials themselves may think of the practice as a game; or they may treat it as deeply serious and anything in between. Such attitudes may guide us to the right kind of values served by the practice, but the case for them as the values thereby served cannot appeal to those attitudes, since, according to Marmor's non-transparency thesis, it is entirely possible that they have misunderstood their own practice.

We can draw three surprising conclusions from these reflections. First, Marmor has not yet offered a sound or even valid argument for regarding the rule of recognition as a convention. His argument is a non sequitur. Second, the argument that must be given will have to be one that offers an interpretation of the practice in view, one which makes a case for its serving certain important values in the way distinctive of constitutive conventions (especially, their being arbitrary and strictly constitutive). Third, in virtue of the non-transparency condition and the value-relativity of the arbitrariness condition, the case for treating any regularity of social behavior as a conventional practice will not be a matter of reporting, or working out, the beliefs and arguments of participants, but rather a matter of making a substantive moral argument about the values served by the practice. We may begin our interpretation with the hypothesis that it is a reason- or obligation-grounding convention, but after attempting to make the case for this understanding come to the conclusion that it fails to do so. This, of course, constitutes a substantial movement away from the kind of methodological positivism Marmor (2006b) elsewhere championed. Whether the account of the recognitional practice at

the foundations of law remains more distinctively positivist depends on the substantive argument Marmor has not yet given. Thus, surprisingly, it appears that it is just possible that the account of the practice at the foundations of law to which Marmor is ultimately committed is indistinguishable from Dworkin's.

11.4.4.2. Convergence

The three general approaches to the analysis of conventions and the conventional foundations of law share the assumption that conventions have an essentially cooperative dimension. Only Marmor denied this. There are two reasons for thinking he is mistaken. First, his notion of the constitutive function of (some) conventions does not, as he insisted, exclude a substantial cooperative "function" (or rather dimension) of the same conventions. These are not natural competitors and in some cases they may be complementary. Marmor's objection against the Humean account of conventions rests in part on the claim that it is committed to the false thesis that the sole or primary function of conventions is to solve pre-existing problems of cooperation (Marmor 2006a, 357–9). This view is false, he maintained, because some conventions are concerned simply to constitute certain activities, for example, ways of expressing respect for another person. However, Marmor's objection rests on confusion about the Humean theory. The Humean account assumes the existence of a cooperation problem, of course, but this is a logical, not a temporal "pre-existence." Moreover, conventional practices need not be and rarely are solely, or even primarily, concerned with solving cooperation problems. They are concerned with achieving, realizing, respecting, or promoting certain values, principles, or aims (individual or collective). Solving a cooperation problem is the (or an important) *means* for doing so. In the absence of the values, principles, or aims, the convention would have no point. The explanation of the *conventional aspect* of the practice appeals solely to solving cooperation problems, but that does not mean that that sole aim of the practice is to solve the problem. Indeed, seeking cooperation for its own sake is (except in rare cases) hardly intelligible. Coordination is intelligible just when it can be seen in service of other intelligible ends, aims, values, or principles.

The same must be said for the function of *constituting* activities according to Marmor's account. Constituting an activity is practically intelligible just to the extent that doing so is in the service of some further aim or value. Marmor may be right that the constitution of an activity can give rise to further values or standards of conduct that are in some sense internal to the practice, but the practice has a general point only by virtue of serving some such further aim or value. Marmor admitted as much when he recognized that all conventions are only *partially* autonomous. But, then, constitutive conventions are not a distinct kind of convention, but rather constituting an activity should be

seen as a particular task or function that conventions can perform; just as solving cooperation problems is a task or function of conventions. Moreover, it is not difficult to see how the two might be combined and complementary. Take Marmor's case of constituting ways of expressing respect for persons. The value of respect for persons is not only abstract and indeterminate, requiring determination in some specific mode of action, but it also calls for communicating the respect to the intended recipient (and typically to a wider audience as well). Respect has a necessary public dimension. But to secure publicity of the determination requires fixing a certain publicly accessible meaning of specific actions. This involves a kind of cooperation problem. Constituting and solving the cooperation problem are not exclusive or competing modes of convention-forming, but rather complementary and in this case mutually necessary. Moreover, if the solution of a cooperation problem is not an integral part of the task of constituting a mode of respect, that will be due to the fact that the mode of communication relied upon is entirely natural (if such is conceivable); and if that is so, then not only would cooperation not be necessary, but likewise there would be no compliance dependence. That is, if a natural means of expressing respect were somehow available, then, on Marmor's own account, a *convention* would not be necessary.

This leads us directly to the second point of convergence. Marmor cannot offer his account as a distinct alternative to the Humean or joint activity accounts of conventions, because he is committed, like them, to an essential cooperative dimension of conventional practices. Compliance dependence is an essential component of arbitrariness, as Marmor understood it, and arbitrariness is a defining feature of conventions on his account. But service of compliance-dependent values necessarily has an ineliminable cooperative dimension. This is not difficult to see. In order to realize compliance-dependent values it is necessary that there be in place a structure of actions of a variety of agents such that when taken together in the right circumstances the value is realized. That is just to say that realization of the value depends on a scheme by which the interaction of those agents is coordinated. Service of compliance-dependent values requires a scheme of coordination. Compliance-dependence of a convention would be unintelligible in the absence of this sort of explanation.

It does not directly follow from this argument that agents complying with the convention do so with cooperation in mind, seeking to do their part in a cooperative scheme, for it is logically possible that their cooperation-securing interactions may be pre-programmed such that the agents will unselfconsciously perform the actions that constitute doing their part. Thus, we might conclude that, while conventions, in virtue of their necessary compliance-dependence, have a necessary cooperative dimension, this need not be transparent to those who follow the convention. So, perhaps, Marmor's objection to the Humean and joint activity accounts is only directed to their apparent commitment to the *transparency* of the cooperative dimension of conventions. Whether this

is true of Marmor's expressed view, it may be the most sympathetic reading of that view. But we need to proceed cautiously here, for not just any "pre-programming" of the interactions to cooperation is consistent with the agents achieving coordination of their conduct and realization of compliance-dependent values *through following conventions*. Conventions are norms and "hard-wired" cooperative structures of human behavior are typically not consistent with the agents following norms. As norms, conventions give reasons to act in certain ways to those to whom they apply. In view of the necessary compliance-dependent values to which the convention, by definition, is directed, it follows that those agents will be normatively required also to take steps to do their part to maintain the cooperative structure of the convention. Thus, although it is not true that, necessarily, participants in conventional practices must explicitly recognize their conventionality, in the sense of holding or expressing beliefs to that effect, a kind of transparency-in-practice is required of them. That is, it must be true that, when occasions arise in which acting to maintain group cooperation focused by the convention, or shifting to an alternative means of achieving the point of the practice when most others have done so, participants will behave in the cooperation-supporting way or come to see a significant discrepancy between their current understanding of their practice and their sense of what is required of them in the circumstances. This may not be the transparency Marmor had in mind, but then one might think that the examples he seemed to have in mind were thinly described and rather simplistic.

It appears, then, that, while Marmor's account of conventions may add something to our understanding of conventions, namely, their role in some cases of constituting partially autonomous activities, nevertheless, his view converges with core features of the other two accounts of conventions we surveyed earlier. All recognize a strongly compliance-dependent and cooperative dimension of conventions, although they understand it in somewhat different ways. It is this feature, however, that has attracted the strongest objections from critics of conventionalism as a jurisprudential thesis. We are now in a position to consider this fundamental challenge.

11.5. Legal Conventionalism Disputed

Hart's core claim that law rests fundamentally (that is, its existence, continuity, and unity depend) on a conventional practice of law-applying officials, and dissatisfaction with certain features of his proposed social rules account of this practice, set analytic legal philosophers in the later decades of the twentieth century in quest of an analysis of the notion of convention that can do the jurisprudential work Hart's theory assigned it and thereby offer an illuminating explanation of the allegedly conventional foundations of law. We have explored three such approaches to the analysis of conventions and considered individually their adequacy for this task; however, the entire project has at-

tracted critics both from within the positivist camp and from those unsympathetic with contemporary positivism. They have argued that it is a mistake to conceive of the foundational practice as a convention, however that notion is understood. It is time to consider these wholesale objections to the thesis of legal conventionalism.

11.5.1. Conformism, Arbitrariness, and Moral Seriousness

The conventionalist project has been criticized on many grounds; some of them can be dismissed relatively quickly by noting refinements of the notion that have already been made. They focus on features of some conventions, or of some unrefined understandings of conventions, but they are not true of all and so an account of the conventional foundations of law need not be saddled with these features.

First, some critics urge rejection of legal conventionalism on the ground that the reason for any judge to apply the rule of recognition is never simply that it is generally followed. This objection is a non-starter because it confuses convention-compliance with mere conformism, doing what is done. Although the compliance of others in the practice plays an important, perhaps defining, role in convention-guided behavior, no available account of convention makes this confusion. All of them recognize that convention-compliance is typically seen by participants as a means of carrying out projects serving important goals or values. Moreover, they recognize that however compliance dependency is understood, it is mutual, not one-sided as in the case of conformism.[26] Mere conformism is possible amongst those who appear to follow a convention, but no serious account of conventions takes it as convention-defining conduct.

Second, it is often thought inappropriate to explain the foundations of law in terms of conventions because conventions, unlike those foundational practices, are typically trivial matters, with regard to which participants are largely indifferent. Conventions cannot explain the moral or political seriousness of the practices at the foundations of law, it is argued, and hence they cannot explain the possibility of serious disagreement of principle arising within them. This objection, however, focuses on features of conventions that, as we have seen above, are not essential. It is true that both the Humean account and Marmor's treat "arbitrariness" as a defining feature of convention, but this is understood in a very special sense that does not support the offending implications. Conventions *may* be pointless or trivial and those who follow them

[26] The conformist identifies a pattern in the behavior of others to which he then seeks to match his conduct, but he views that behavior parametrically. He recognizes no reciprocity. He may not even recognize the pattern as *a rule* for them, at least not in the sense that he recognizes lack of conformity on their part as a *failure* to comply; moreover, he does not see his conduct as making any contribution to the practice.

may be entirely indifferent about following the established convention or some replacement, but conventions may also serve and may be seen to serve important social or moral goals. Nothing in the notion of convention (or the ways in which that notion has been articulated) prevents combining convention and conviction.

Nevertheless, some critics find the alleged arbitrariness of conventions troubling, because convention-followers seem to be fickle, willing to shift to any new pattern just as soon as it is apparent that it is likely most others will do the same. As Shapiro put it: conventions "are arbitrary in the sense that the players' preferences that all act on a certain solution can always be 'flipped' to some other solution by simply changing the background behavioral assumption" (Shapiro 2002b, 392–3). The arbitrariness of conventions makes them especially poor vehicles for morally serious commitments. But, again, this worry is misplaced. First, as we have seen, what is essential for conventions (*pace* the Humean and Marmorian accounts) is not arbitrariness, but compliance-dependence. It may be true that, in the absence of compliance with the established rule or pattern, people might correctly judge that it would be better to go it alone—i.e., that there may be no alternative in the circumstances that could adequately serve the value or principle that gives point or significance to the existing practice. It does not follow from this that serving that point is not compliance-dependent. Moreover, it may be a common achievement of some significance to have found a mode of coordinated behavior that can do the job. Established rules, then, are not necessarily arbitrary in the technical sense here employed, but may still be conventions. The worry is misplaced, secondly, because it confuses compliance-dependence with a kind of furtive looking over one's shoulder to measure one's own moral action by the actions of others. But this image simply misrepresents compliance-dependent values or principles, treating conduct meant to serve them as a kind of conformism. Compliance-dependent values are such that, either by their very nature, or by virtue of certain abiding features of human nature or the circumstances of pursuit of those values within contexts of social interaction, modes of pursuing them *lose their point*—the values cannot be achieved—in absence of general compliance. There is nothing in the fact that conventions serve compliance-dependent values that necessarily stands in the way of moral seriousness, and followers of such conventions need not be seen as fickle.

On the contrary, it may be those who insist on some form of conduct in service of a compliance-dependent value despite the fact that they will not be joined by others who are more reasonably convicted of a lack of moral seriousness. For the only reason there may be for such go-it-alone behavior may be preserving the agent's unsullied record of commitment to the ideal, despite the fact that the conduct will not and cannot contribute to realizing that ideal. But that is self-indulgence, not moral seriousness. Like Hegel's knight of virtue who refuses to bloody his sword (Hegel 1977, 231), this agent of misplaced

integrity refuses to do the messy, real-world work of seeking cooperation with others to achieve a goal that can be achieved only through cooperation. Apparently futile moral gestures in service of compliance-dependent values are not always lacking in moral seriousness, if those making such gestures look with some degree of realism to mobilizing others to the cause, but their seriousness is directly a function of their willingness to look to the potential compliance of others. In the absence of attention to such matters, moral seriousness is surely in doubt. It remains to be seen, of course, whether there are any genuinely compliance-dependent values or principles and especially whether law, or the practice of officials at its foundations, is best seen as serving any such values. That is an issue yet to be considered.

These objections, we may conclude, do not fundamentally challenge legal conventionalism. Yet, it would be a mistake to dismiss them as entirely wrongheaded. They seem to express crudely and awkwardly concerns about casting law's foundations in terms of conventions that are serious and need to be quieted if conventionalism is to do its jurisprudential work.

11.5.2. Law as a Discursive Practice

One such concern can be seen in the following objection: in order to make the notion of convention fit for the specific jurisprudential task at hand it is not enough to explain the connection of conventions to intelligible practical reasons, or to explain how conventions can accommodate conflict, or even disagreement of principle, or to explain the moral seriousness with which one might participate in the conventional practice; what is missing is recognition of the fact that the practice of law is essentially, if not wholly, a practice *of argument*—a practice constituted by *deeds*, to be sure, but the deeds essentially involve *words*, that is, publically articulated arguments.

The observation from which this objection arises is fundamental. No theory of law can hope to illuminate its nature, structure, and characteristic mode of operation without putting at the center of its explanation an account of its *discursive*, *argumentative*, and *forensic* character. Law's practice, even in its most immature forms, is not merely a matter of behavior responding to discrete rules; nor is it enough to see the discrete rules gathered into a collection. Law is a normative system, the components of which are internally related, that is, related in terms of content-determined (logical and substantive) normative links. To the extent that it is useful to conceive of these components as rules, the rules must be seen as connected and interdependent, mutually supporting, and mutually qualifying. The practice of law, while it always has a substantial component of conduct, is essentially a practice of articulating, offering, and assessing reasons for that conduct that are drawn from and contribute to the normative system. Law is a normative practice. To learn that practice is to learn how to make one's way in its discursive network, addressing practical problems

of action and social interaction by deploying its resources. This practice is argumentative in a two-fold sense: first, moves within the network are or involve practical arguments, using some components as reasons or grounds for other components and contributing to the development of the network by elaborating its components through argument; and, second, that this is done always subject to challenge and assessment. Finally, it is also forensic; that is, its core or primary mode is the *public* exchange of arguments with interlocutors, usually in the presence of and ultimately addressed to some third party empowered with a range of decision-making powers. Moreover, it would be a serious mistake to think that, while legal practice in general is essentially discursive, it is not so at its foundations. On the contrary, the recognitional practice of officials, as Hart and those who follow him understood it, is continuous with the practice of legal reasoning and law-applying generally. It is not sealed off from that activity but rather participates in it, shaping and being shaped by it.

Much more must be said about this discursive, argumentative, and forensic character of the practice of law, but already we can recognize that no account of law's conventional character can ignore it. Yet none of the proposed accounts considered above have attended to it or sought to explain it. It is not clear that they have resources to do so. Arguably, Humean conventions, even in the substantially revised form proposed in Section 11.2.1.2, cannot do so. The task of identifying a cooperation problem and negotiating to a solution is rational, but not fundamentally discursive. The arguments typically deployed involve offering others reasons *for them* to *sign on to* a solution, not reasons for the solution; the aim is common or coordinated conduct, not consilience of disparate views regarding that conduct. There may still be elements of the practice that are usefully modeled on Humean conventions, but one might reasonably have serious doubts about relying on that model entirely (Postema 1998a). Similarly, it does not appear that either Marmor's constitutive conventions or the fiat version of the joint activity account has resources to accommodate law's essentially discursive character. Coleman's shared cooperative activity account may be able to do so, but as Coleman and others developed it little attention was paid to discursive activity.

Although of fundamental importance, this objection does not force us to abandon the quest for an account of conventions that illuminates the foundations of law. It argues that none of the accounts of conventions explored in earlier sections is adequate to this purpose; it does not deny the conventional or convention-like character of some discursive practices. Rather, it encourages the search for an account of this sub-class of discursive practices.[27] However, such practices, if they are to be considered conventional even in an extended sense, must be compliance-sensitive, that is, compliance-dependent and recognized in the practice as such, and it is precisely this feature that critics of

[27] For one recent attempt to do so, see Postema 2007b, 292–5.

legal conventionalism have argued is not true, or at least not necessarily true, of practices at the foundations of law. They have concluded that, to paraphrase Raz (1998a, 162), the recognitional practice is a normative practice, but not a conventional one. This is a direct and fundamental challenge to legal conventionalism, whatever more specific form it takes. It deserves careful scrutiny. Some recent attempts to restate the conventionalist thesis have sought to weaken this cooperative or compliance sensitivity component (Kutz 2001; Shapiro 2002b) and Marmor retained compliance dependence but tried (unsuccessfully, we argued) to separate it from its transparency to participants. But the critics' challenge cuts very deep and retains its force against these attempts at accommodation (Smith 2006). The criticism must be addressed directly.

11.5.3. Getting It Together vs. Getting It Right

Critics charge that conventionalist accounts fail to fit the phenomena of legal practice at its foundations; it is not at all uncommon for judges to intentionally and manifestly go it alone rather than seek to act in concert, and this behavior apparently is tolerated in the practice (Benditt 2004, 619–20, 624–7; Marmor 2001b, 12). As Christopher Kutz put it, "it is a salient feature of adjudication that getting it right is often more important than getting it together"; conventionalist models fail to "make room for that degree of independence within the collective institution" (Kutz 2001, 456f.). Moreover, critics have argued, this sort of conduct can be expected once we recognize the moral seriousness with which officials approach their task and the obvious fact that principled disagreement even on foundational matters is not uncommon.

Dworkin would argue that these phenomena are fully explained by the fact that the existence and unity of law is fixed not by convention, but rather by theory (provided that the theories start from roughly the same data, are meant as interpretations of that data, and for the most part do not diverge radically in their implications for particular cases). This is the widely remarked "protestant" dimension of Dworkin's interpretive jurisprudence (see chap. 9, secs. 9.3.2.3 and 9.4.4.2 above). Coming from a very different jurisprudential quarter, a Razian approach would argue that law's unity is provided by the widespread according of authority to law-applying officials. Both such accounts recognize that a substantial degree of convergence of official theories or activities is an external condition on the existence of a unified legal system, but they deny that it must play a role in the practice itself, let alone in the aims, intentions, or arguments of its participants. In quite different, indeed opposed ways, they adopt called a "naturalist" as opposed to conventionalist understanding of the practice at the foundations of law (Postema 1987b, 96–103).

It is possible, of course, to answer this challenge by denying the phenomena, but that is not likely to yield a plausible response. A more promising, albeit difficult, strategy is would be to attempt to explain the phenomena without

abandoning the claim of compliance-sensitivity of the practice at the foundations of law; it would be even better if a positive account of its importance for law could be given. This strategy may not succeed, and it has not yet been attempted in full-scale fashion, but it is possible to describe its outlines by stitching together suggestions that can be found in the literature.

First, consider an attempt to explain the phenomena. To begin we must acknowledge that the discussion of conventions has been dominated by examples of very simple conventions—driving right, for example, or traffic signals—so any extension of an analysis of conventions to the practice of law must take account of a number of complexities that the simple examples do not raise.[28] Four such complexities must be kept in mind. First, we must recognize that conventions have a life-cycle; they are born, mature, and can eventually die out. It is possible to encounter conventional phenomena at any of these life-stages. Embryonic or developing conventions on the one end and ageing or dying conventions on the other may lack features that are salient or even essential in mature ones. Even dead conventions may still survive but in some transformed state, as, for example, ossified habit or merely personal preference. A full theory of conventions, we might suppose, needs to offer a complete account of the biology of the phenomena, but for many purposes it will be sufficient if the account does a good job accounting for mature examples of the species. If we keep in mind this life-cycle, some counter-examples to an account might be explained by arguing that the cases fall outside the pale of mature conventions.

However, this complexity, while helpful in sorting central from peripheral examples of conventions, is not likely to help conventionalists defend against the "getting it right" objection, since they are not likely to claim that the conventions at the foundation of law are just adolescent conventions, let alone conventions in old-age decline. A second complexity may prove more useful. It must be acknowledged that practices, including conventional practices, often attract a number of quite different participants. In addition to the core of active, mindful, practice-skilled participants, one might find novices just learning how to navigate the practice and, on the fringes, mere conformists or those who although largely alienated from it find they must go along for personal reasons. An account of a conventional practice must recognize the possibility of such outside-the-core participants, but it would surely distort the practice to see it entirely through their eyes, or to give an account of it that reduces its components to the lowest common denominator.

[28] One may object that incorporating these complexities into an account of conventions moves too far from the commonly accepted examples of conventions, but we must keep in mind that the task here is not to offer an analysis of conditions for existence of paradigm cases of conventions, but rather to explain how the core feature of conventions—compliance sensitivity—is consistent with features of legal practice which at first appear to be indifferent to it.

Third, although it is common for theories of convention to explain the essential components of conventional practice in terms of the actual beliefs, desires, preferences, or intentions of participants, such psychologism is not essential for an account of the practices. In fact, as we saw in Chapter 7, Section 7.3.2.2, there may be good reason to resist this tendency and to focus on the practice, that is, on correct conduct in the practice, rather than what participants say or think (or prefer or intend) with regard to the practice. So, from the previous point we might conclude that to understand a practice we must look to the conduct of active, mindful, skilled participants for clues about the core features of the practice, but further we must recognize that it is always *the practice*, not any participant's view of it that is decisive. Understanding the practice requires understanding standards of correct practice. It is in this light we must assess the conduct of "go it alone" judges; that is, we must look to what the practice, properly understood, requires of participants, not merely to their beliefs or attitudes.

Finally, legal practice presents a further complexity: in mature legal systems (the current focus of our attention) the practice is structured by a complex network of institutions. It is possible that features that conventionalists and their critics have been inclined to attribute to the beliefs, preferences, or intentions of particular participants are better seen as structural features of the institutions in which they interact. Indeed, it may even be possible that, for reasons internal to the proper functioning of the practice as a whole, what appear to be non-conventional elements will be accommodated, tolerated, or even perhaps encouraged.

Keeping the last three complexities in mind, a defender of legal conventionalism might try to explain the allegedly troubling phenomena of "go it alone" officials in the following way. Such behavior and attitudes on the behalf of officials, it might be argued, may not be uncommon or discouraged, but this is consistent with the compliance-sensitivity of the practice as a whole because a fundamental regulative principle of the practice calls for such sensitivity, and it may permit or even encourage some degree of loyal opposition in the structure of its institutions. This strategy of explanation can succeed only if a strong case can be made for compliance-sensitivity as a regulative principle of legal practice. Again, there has been very little attention given directly to this issue, but some lines of argument have been suggested.

In an early defense of conventionalism, Postema (1987b) offered two considerations that support the claim in the previous paragraph. First, he noted that even the ("naturalist") opponents of legal conventionalism acknowledge that a substantial degree of convergence of views about law's foundations is necessary for the existence, continuity, and unity of law. On their view, and especially from the perspective of participants in the practice, this convergence would be at most a happy accident. However, he argued, officials, committed to the maintaining the unity of law, "will not be indifferent to conditions nec-

essary for the existence and continuity of their practice, if they are aware of them. And this is not a condition [that is] difficult to grasp" (Postema 1987b, 102). Whether this is true as a matter of the actual attitudes of officials, it is plausible to see it as a condition or regulative principle of the practice.

This suggestion is reinforced by the following consideration. Any theory of the practice of law in a community must start from rough consensus regarding the settled rules or aspects of the practice, and no adequate account of such practice can deny the status of the rules as *public rules*. Their claim to be the necessary starting points of the theory rests not just on their being uncontested, but on their being settled (at least temporarily) publicly, that is, for the community. But, then, no private, idiosyncratic account of the practice can be adequate, because it will fail to recognize and take account of this public dimension of the "data" to be explained or justified (Postema 1987b, 102–3). Bentham turned just this point into a devastating criticism of Common Law theory of his day. Since it refused to recognize any canonically formulated rules of law, and regarded any formulation of the *rationes decidendi* of precedent cases as corrigible and open to reformulation, Common Law was committed, he argued, to allow that "from a set of data [...] law is to be extracted by every man who can fancy that he is able: by each man, perhaps a different law: and these then are the *monades* which meeting together constitute the rules which taken together constitute" the law (Bentham 1970, 192). The problem with such a theory, Postema pointed out, is that "it transforms a matter of *public* rules into a matter of essentially and unavoidably private conjecture" (Postema 1987b, 103). To acknowledge this dimension of law, he suggested, not only calls for rules that are publicly accessible, but also for conditions on their identification and interpretation—and the discipline of argument about interpretation and the criteria for identification—that require argument to be sensitive to the compliance of others in the practice.

This public character of law is essential if law is to provide the kind of normative guidance which is said to be its fundamental *modus operandi*. For laws are not (could not be) individually addressed directives from individual officials, as Fuller reminded us (see chap. 4, sec. 4.2.2, above); they are addressed to the public at large and are meant to be grasped by individual members of this public relying on their understandings meshing with those of other members of the public and of officials charged with administering and enforcing them (Postema 2010b, 271–2). In view of this deep feature of law, the participants in the practice of law cannot (that is, ought not) be indifferent to how a proposal for understanding of some portion of the law might be taken up by others participating in the practice. Coherence of the practice is one of the important regulative principles of the practice, and with it a requirement of compliance-sensitivity. As Justice Brennan of the United States Supreme Court wrote, "when justices interpret the Constitution, they speak for their community, not for themselves alone" (Brennan 1986, 434). An official misunderstands

his role if he sees decision-making as a matter of taking a moral stand purely on his own account. This is not to say that judges always *do* speak for the community and not for themselves, but that the practice calls for this kind of attention, the first (necessary but not sufficient) step of which involves officials speaking as a community. In *Law and Disagreement*, Waldron (1999b, 5–6) reminded us that it is a fundamental misunderstanding of the nature of the legal enterprise to think that it is one in which, in Dworkin's own words, "each person tries to plant the flag of his convictions over as large a domain of power or rules as possible" (Dworkin 1986, 211). We look to law to provide a framework of public justification. It does not necessarily or always succeed, but it is a defining aspiration of law. Rousseau recognized as much when he wrote,

> Whatever is good and in conformity with order is such by the nature of things and independently of human conventions. All justice comes from God; he alone is its source. But if we knew how to receive it from so exalted a source, we would have no need for government or laws. Undoubtedly there is a universal justice emanating from reason alone; but this justice, to be admitted among us, ought to be reciprocal [...] There must therefore be conventions and laws to unite rights and duties and to refer justice back to its object. (Rousseau 1983, 36)

If these considerations are persuasive, then it may be possible to meet the fundamental challenge to legal conventionalism. Yet, these suggestions have never been developed into full-fledged arguments and tested for their logical tensile strength, so we must conclude that, regardless of the merits of any of the theories of convention canvassed in previous sections, the prospects for legal conventionalism may be promising, but they are not yet secure.

11.5.4. The Limits of Formal Conventionalism

Criticism of contemporary legal conventionalism also comes from a quite different quarter. Without denying that law rests on conventional foundations, these critics charge that contemporary legal philosophers have focused their search too narrowly, looking for these foundations in the wrong place. Analytic legal philosophers since Bentham have located conditions for the existence, continuity, and unity of law in criteria of legal validity, either grounded broadly in the practice of the population generally recognizing as authentic the law-making activities of some sovereign body (Bentham and Austin) or more narrowly in the law-recognizing practice of law-applying officials (Salmond, Hart, and many others). Hart seemed to allow the possibility that portions of the general population might also be included in what we might call "the recognitional community" (Adler 2006b, 725), but he thought it highly unlikely. More recently, analytic legal philosophers have held that only the practice of officials counts; citizens "are not *participants* in conventional legal practice and hence do not directly figure, as a conceptual matter, into the existence conditions for a rule of recognition" (Himma 2003, 154 n. 8; original emphasis),

for, as Shapiro has insisted, "the business of law is the creation and exercise of authority, and its participants are the officials who operate the levers of legal power" (Shapiro 2002b, 418).

Thus, recent analytic legal philosophers have greatly narrowed the foundational base of law. Some recent critics countered, arguing for a wider, or at least different, scope of the recognitional community (Adler 2006a, 2006b; Waldron 2009, 691–7). But the more fundamental challenge targets the thesis of conventionalist positivism that it is criteria of validity, and their foundations, that provide a fully adequate account of the conditions of the existence, continuity and unity (and, hence, of the foundations) of law. We might call this *formal* conventionalism. This view contrasts sharply with a tradition of understanding law extending from Aristotle's *Politics* II.8, according to which *nomos* has no power to secure obedience without *ethos* (Aristotle, *The Politics* II.8 [1962, 83]), a tradition that also took root in classical common-law theory (Postema 2002a, 172–6) and emerged again in Fuller's interactional theory of law (Postema 1994; see chap. 4, sec. 4.2.2, above).

A practice of law-applying (or law-making) officials over a significant period of time is not altogether necessary for the existence, persistence, and substantial identity of a functioning system of law. History offers many examples of healthy bodies of law that did not depend on centralized law-applying institutions. Medieval *lex mercatoria* is a well-known example (Trakman 1983, 7–21; Kadens 2004).[29] If we can accept recent accounts as accurate (there is debate among legal historians, of course), informal legal norms were widely recognized and practiced by merchants from many different political jurisdictions, speaking many different languages, and participating in distinct cultures; and disputes with respect to them were adjudicated by more or less *ad hoc* tribunals at local fairs in towns across a wide swath of Europe. Contrary to Hart's sketch of "pre-legal" customary societies, *lex mercatoria*, it appears, governed a widely diverse population with rules that were flexible and relatively efficiently enforced.

It is also remarkable that during major political upheavals and revolutions, large portions of established bodies of law have been known to survive radical disruptions of the activities of, and even wholesale disarray among, governmental institutions, including courts. Revolutions tend radically to alter constitutions and hence "basic law" of political communities, but they do not thereby or necessarily alter other parts of the community's legal system. On the contrary, law can persist in substantial part, it would appear, even when governments disintegrate. But, if so, then this persistence cannot depend wholly on the regular practice of those who participate in those governments.

More fundamentally, it appears that a coherent and persistent practice of officials may not be sufficient to secure the identity and continuity of law. For

[29] Another fascinating example is the *leges marchiarum* on the Anglo-Scottish border in the late middle ages. See Neville 1998; Leeson 2009.

law to exist in a community it must be in force in that community (Raz 1979, 104). The idea of a norm that is not practiced by someone is surely intelligible, but the idea of a system of legal norms that has never been practiced is the idea of a possible or notional, but not a real, legal system. So, for us to understand what it is for law to exist it is important to understand what it is for law to be in force in a community. Hart, we may recall, maintained that general compliance with law that is recognized and practiced by law-applying officials is a necessary condition of its existence, but he did not explain what is required for general compliance. It is very clear that for a set of norms to exist in a community it is not enough that the behavior of people in that community is largely consistent with the norms, for that fact may be entirely coincidental. Moreover, it is not sufficient that, when the norms change, the behavior changes in sync with them. For, again, the way (and the reasons why) behavior changes makes all the difference. The connection between the norms and the behavior must not be merely causal or casual, but in some way internal to the law, explained by the nature of law. We might say that in order for law to be in force in a community, it must be used generally in the community. But that, too, is not sufficient, for it must be used *in the right way*, i.e., used *as law* (Postema 2008a, 49).

It is tempting to say that law is in force in a community just in case it is *enforced* in that community, but this would be a mistake. Enforcement may not be necessary and it certainly is not sufficient for law's existence in a community. This is clear from the following example (Postema 2008a, 50–51). We can (just barely) imagine a small community in which each citizen is assigned a "minder" capable of issuing intelligible particular commands backed by credible threats of sanction for non-compliance. Suppose the minders, but not the ordinary citizens, know and understand some set of norms that are meant to govern the conduct of the citizens, and the minder issues commands tailored to specific situations facing their charges. In such cases, the behavior of the citizens might be consistent with the norms, and effectively enforced by the minders, but no one would think that law was in force in that community, even if some elite of law-appliers duly recognized the norms in their ordinary practice of judging the work of the minders. Law may be in force among the minders, but not in the community at large. Law must be used by the right folks in the right way.

It is very difficult to say what this "right way" is. It would be implausible to hold that law is in force in a community only when most of the time most of those governed by it act from a grasp of the norms, i.e., act specifically on the reasons that the norms purport to offer them. Nevertheless, the arguments of the preceding paragraphs insist that mere coincidental consistency is never sufficient. We are faced, then, with a jurisprudential problem of great complexity, but also of great significance, since our answers to it will determine, not conditions of law's efficacy for achieving certain purposes, but rather conditions

for the existence and identity of law itself over time. Contemporary theories of law's conventional foundations have not begun to address this issue. A conventionalist solution to the problem may be possible,[30] but that possibility cannot even be explored until contemporary jurisprudence looks beyond the dominant formal, narrow-base paradigm inherited from Hart.

Thus, in response to challenges to Hart's conventionalist understanding of law's foundational practice, three quite different analyses of conventions were developed or adapted for jurisprudential use since the early 1980s. In the process, it is fair to say, conventional practices have been shown to be capable of far more flexibility, rational scope, and moral depth, and the concept of conventions has been shown to have greater explanatory power, than had been widely assumed. This is an important theoretical development. It is less clear whether this deeper understanding of the potential rational and moral dimensions of conventions advances significantly our understanding of law. Perhaps it is too early to say with any confidence.

[30] For one attempt to answer this question along Fuller-inspired conventionalist lines, see Postema 2008a, 53–5.

Chapter 12

ANALYTIC JURISPRUDENCE CONFRONTED

As we have seen, twentieth century legal theory was dominated by various versions of legal positivism, or positivism-inspired approaches, both in the relatively disciplined Austin-Hart tradition of analytic jurisprudence and in the more eclectic Holmes-realist tradition. Two notable challenges to this dominant focus arose in the decades circling the turn of the new century. One explicitly embraced its natural-law heritage, the other self-identified more with positivism; yet, both wove together features of historical and contemporary natural-law and positivist theories of law while resisting dominant positivist, or more accurately analytic, methodology. In doing so, they highlighted the strengths and weaknesses of the century's contributions to jurisprudence and effaced the differences between the two traditional rival approaches to understanding the nature of law. In this chapter, we will explore the theories of John Finnis and Jeremy Waldron, taking them as representatives of jurisprudential thinking in a new key at the end of the old century and the early years of the new one.

From mid-century, within the analytic tradition, Hart and later Raz made overtures towards natural-law jurisprudence. As we saw in Chapter 7, Hart explored relations between law and morality which, while never conceptually necessary, nevertheless were to compelling enough for him to acknowledge a "naturally necessary" minimum moral content of law, but he took pains to emphasize the minimal character of this link. A more substantial concession is evident in his willingness to entertain what later came to be called "inclusive positivism." Raz, of course, resisted this weakening of the positivist position, but he did insist, against Hart's objections, that there is a unitary and morality-rooted notion of *obligation* to which claims of legal obligation must be related. This was a consequence in part of his methodological assumption that fundamental notions of jurisprudence must be understood in light of a larger philosophical exploration of practical rationality. Yet it is fair to say that these overtures were cautious, even grudging, and all the while many analytic legal philosophers were anxious to define, refine, and protect the core of a robust positivism. The one prominent figure in Anglo-American legal theory that embraced the natural-law label, and stood in staunch but lonely opposition to positivism in its realist and Austinian forms, was Lon Fuller, but even he was keen to distinguish his "procedural" version from classical, substantive natural law.

In the 1980s, the landscape changed, as natural-law jurisprudence emerged with renewed vigor in three quite different forms. Inspired by Aristotle and Kant, Ernest Weinrib (1988, 1995) revived the Langdellian project of understanding law as a rational enterprise and embodiment of immanent rationality

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(see above chap. 2, sec. 2.2.2.1). Viewing law less as a historically and socially situated practice ("positive law") and more as the ideal conceptual structure of juridical relationships which may be more or less adequately instantiated in the positive law of any given polity (Weinrib 1988, 957–8), Weinrib has often been classified as a natural-law theorist, rather than a "formalist" as he described himself. Like other natural lawyers, he insisted that law is "an ordering of reason," hence a "structure of justification" and "normative framework for legal argument" (Weinrib 1992, 341). Its rationality, the foundation of its normativity, lay not in its service to any ideal, end, or principle external to it—Weinrib was militantly opposed to all forms of "instrumentalism"—but rather is immanent in its structure. The task of legal theory, in his view, is to articulate and make explicit this immanent legal rationality.[1]

In contrast, Michael Moore (1985, 1992, 2000), drew on work in contemporary metaethics to defend a (quasi-platonist) moral-realist theory of legal interpretation and law. The task of statutory interpretation and the identification of the rules of precedent-determining judicial decisions alike, he argued, is to identify the relevant moral kinds implicated in the enactments or decisions. Thus, common-law judicial reasoning just is ordinary, all-things-considered moral reasons, which, of course, gives dues weight to "institutional" or "rule of law" values like predictability and fairness. Although a moral realist of a sort, John Finnis, in *Natural Law and Natural Rights* (1980), drew on a very different philosophical tradition. More than any other theorist of his generation, he gave new life to classical natural-law jurisprudence, systematically developing insights and arguments from the rich Thomist tradition. Of these three revivals of natural-law thinking,[2] Finnis's work had the greatest impact on Anglo-American jurisprudence by the end of the century and represented the most important natural-law challenge to central methodological themes and strategies of analytic jurisprudence. For this reason, we will focus our attention in this chapter on Finnis's neo-classical naturalist challenge.

Another challenge, this one arising from within analytic jurisprudence itself, emerged gradually in the work of Jeremy Waldron (1999b). Trained in and continuing to work within that tradition, Waldron nevertheless has been one of its most persistent and penetrating critics. While sympathetic with central substantive elements of positivist doctrine of law, he challenged the tendency of analytic methodology to separate legal theory from neighboring theo-

[1] Weinrib focused his efforts primarily on tort law, the most fully developed expression of his view being *The Idea of Private Law* (1995). For an excellent discussion of Weinrib's theory of torts, see Martin Stone (2002b).

[2] Ronald Dworkin, of course, also challenged contemporary positivist jurisprudence (see chap. 9), and many commentators have regarded his work as a contribution to natural law jurisprudence. However, for good reason, Dworkin himself did not embrace the label (but see Dworkin 1982), since he drew little inspiration from the tradition and shared few of its philosophical ambitions.

retical and practical modes of thought and inquiry. Like Bentham[3] and Finnis, he took jurisprudence to be a fundamentally normative enterprise, continuous with and relying on normative political theory (Waldron 2001) and the theory of politics (Waldron 2002). This led him, again like Bentham, to see close links between questions about formal or very general features of law and questions about law's systematic structure and institutional manifestations. He also insisted on the importance and dignity of legislating and legislation against the strong tendency of jurisprudence in the common-law world to focus exclusively on the activities of (appellate) courts. Waldron's theory, overlapping in certain ways with Finnis's theory and yet departing in significant ways at other points, provides the second *fin de siècle* challenge to the dominant positivist jurisprudential paradigm.

12.1. Natural-Law Theory's Ambitions

At least since Bentham, Anglo-American legal positivism has defined itself in opposition to natural-law jurisprudence. Created in the positivists' own reverse image, it is typically either reduced to absurdity or rendered harmless. In the first case, it is regarded as a rival to the core positivist doctrine of legal validity committed to the allegedly absurd thesis, *lex iniusta non est lex*; in the second, it is treated as no rival at all, since it is thought to be concerned only with ideal moral standards for law and adjudication that may be prescriptive for positive law, but are not descriptive of it. However, these caricatures of traditional natural-law jurisprudence misrepresent its theoretical ambitions. Natural-law jurisprudence has posed a serious challenge to analytic jurisprudence, and its dominant positivism, precisely because it refuses to restrict itself to a position on the nature of legal validity but rather insists on integrating that position, and the theory of positive law of which it is just one part, into a comprehensive practical philosophy (Finnis 2007).

Natural-law theory, in both its classical and its neo-classical forms, adopts a fundamentally different view of the jurisprudential enterprise from that of contemporary analytic jurisprudence. It seeks to offer a critical, comprehensive, philosophical theory of law, open to issues and contributions from cognate fields of moral philosophy, metaphysics, even (in some cases) philosophical theology. It distinguishes, but does not sharply separate, issues of explanation from issues of evaluation, exploring both as interconnected parts of practical philosophy. It is inclined to a cognitivist, or at least a non-skeptical, view of the fundamental principles of practical rationality and morality, but it also acknowledges a large role for conventions and positivity in practical social life and seeks to explain that role by connecting them ultimately to fundamental moral and practical principles. Typically, natural-law theorists have looked

[3] See Postema, 1989a, chap. 9.

equally to contemporary legal practice and the long tradition of philosophical reflection on the nature of law for materials and models. This is especially true of the work of John Finnis, who gave contemporary expression to Thomist legal theory.

Born in Adelaide, South Australia in 1940, John Finnis completed his law studies in 1961 at the University of Adelaide. He earned a D.Phil. degree from Oxford University in 1965, under the supervision of H.L.A. Hart. In 1966, he joined Oxford University's Faculty of Law and its Faculty of Philosophy in 1987; two years later he was named Professor of Law and Legal Philosophy there. Since 1995, he has also held the post of professor of law and philosophy at the University of Notre Dame. In addition to his jurisprudential writings, Finnis has collaborated with Catholic moral theologian, Germain Grisez, on work in moral and political philosophy.

Following the lead of Grisez, Finnis sought to recover classical natural-law theory, traceable to Plato but centered in the work of Aristotle and Aquinas, from its "modern" variants (Finnis 2002, 3–8).[4] On the classical view, he argued, what is "natural" or "of nature" is not a matter of physical or psychological features of human beings to be detected by empirical or theoretical inquiry,[5] but rather is a matter of investigation of an essentially practical sort into the fundamental goods to which beings of a certain nature are rationally drawn. "Epistemologically, (knowledge of) human nature is not 'the basis of ethics'; rather, ethics is an indispensible preliminary to a full and soundly based knowledge of human nature" (Finnis 1983, 21). Modern natural-law theory, in Finnis's view, lost the classical insight that "a nature such as ours is *known* by understanding the objects that make sense of the acts by which the capacities of a being of such a nature are realized."[6] Its first principles of practical reason are "natural" in the sense that they are rooted in basic human goods yielding ultimate reasons for action which "instantiate and express human nature" (Finnis 1992, 136). Participating in those goods instantiates human flourishing.

[4] Finnis associated the "modern" natural-law approach with the view emerging in the seventeenth century in the work of Grotius, Hobbes, and Locke, and epitomized by the work of Pufendorf, although the voluntarist strain of the "modern" tradition can be traced to Aquinas's near contemporaries, Duns Scotus and Ockham, and to later scholastics like Suárez. Westerman (1998) argues that Finnis perversely ignored this development of the tradition and argues that his work represents the final stage in the "disintegration" of the natural-law tradition, which circumvents rather than solves tensions in Aquinas's theory of law.

[5] Indeed, Finnis (2002, 4) insists that the (normative) order we bring into our deliberating, choosing and acting is not reducible to the (empirical and metaphysical) order of that which is independent of our thinking.

[6] Finnis 2005, 117 (emphasis in the original). See also 1998, 29–34, 90–4; 2002, 8; 2005, 123.

12.2. A Natural-Law Theory of Practical Reasonableness

12.2.1. Basic Human Goods

Finnis set his theory of law in a comprehensive theory of practical reason and judgment. In contrast with the Humean strategy of grounding practical rationality in preferences of individuals guided by a principle of instrumental rationality, Finnis grounded his theory in a set of basic human goods. There is no practical rationality, he argued, unless there are goods that are in themselves worthy to be sought; there is no reason for adopting means to ends, if one has no reason to embrace the ends (Finnis 2008, 22–3). "If reasons did not go all the way down, there is no way they could enter directively into our deliberations at all" (Finnis 2005, 113). Basic human goods, which are fundamental aspects of authentic human flourishing, provide the needed foundational reasons for action. All other goods or values are instantiations or specifications of these basic goods, modes of participating in them, or means of realizing them. Among these goods we find life (including health and procreation), knowledge, play, aesthetic experience, sociability and friendship, religion (i.e., all forms of inquiry into human nature and its place in the universe), and practical reasonableness (Finnis 1980, 86–90). In "Natural Law and Legal Reasoning," he characterized these goods in this way:

> *knowledge* of reality (including aesthetic appreciation of it); *excellence in work and play* whereby one transforms natural realities to express meanings and serve purposes; *harmony between individuals and groups* of persons (peace, neighbourliness, and friendship); *harmony between one's feelings and one's judgements and choices* (inner peace); *harmony between one's choices and judgements and one's behaviour* (peace of conscience and authenticity…); and *harmony between oneself and the wider reaches of reality* including the reality constituted by the world's dependence on *a more-than-human source of meaning and value*. (Finnis 1992, 135, emphasis in the original)

As Finnis understood them, these goods are: *ultimate* and irreducibly *normative*, providing fundamental reasons for action and for social arrangements and institutions, and grounding all practical normativity; *objective*, independent of inclination and preference; *abstract*, needing to be articulated or specified in order to provide concrete guidance; irreducibly *plural* and diverse; and *incommensurable*, submitting to no rationally grounded metric or principle of priority. Our epistemic access to basic human goods is direct via insight or perception in concrete experience; their choice-worthiness is self-evident (Finnis 1980, 65–9; 371). Practical reason and its directiveness depend on "a responsive awareness of the value of human beings and their flourishing" (Finnis 2005, 127). The basic goods are incommensurable, he argued, because "they are aspects of human persons […] and human persons cannot rationally be reduced to […] commensurable factors" (Finnis 1992, 147). I take this to mean that they are goods to be respected and promoted just in virtue of the fact that they are goods, i.e., aspects of the flourishing, of individual human persons; they have no normative significance abstracted from their location in the lives

and personhood of individual human beings. Yet, despite their irreducible plurality and incommensurability, basic human goods invite an overarching ideal of "integral human fulfillment"—fulfillment of each human being (and their communities) in all basic human goods (Finnis 1992, 137; Finnis 1997, 224).

12.2.2. Principles of Practical Reasonableness and Morality

The abstractness and diversity of basic human goods, and the ideal of their integral fulfillment, together call for the exercise of a distinctive kind of practical rationality guided by distinctive principles of practical reasonableness. Although the basic human goods ground and direct deliberation, choice plays a large role in practically rational deliberation, in Finnis's view, for two reasons: (1) the goods are always incompletely specified and in need of further determination, and (2) options directed to specifications of incommensurable goods are often practically incompatible (Finnis 1992, 136, 141). Choice is not a matter of arbitrary picking, but rather involves adopting one of two or more rationally appealing but incompatible alternatives (ibid., 136). A practically rational agent will have reasons for each option but they may be neither rationally nor causally determinative (Finnis 1997, 220). Thus, Finnis, striking a somewhat existentialist note, described the practical life as a domain of creativity. "Every human choice is a step into a new world," he wrote; indeed, it is a domain of self-creativity: "One transforms oneself by making the choice, and carrying it out, and by following it up with other free choices in line with it" (ibid.). This open-endedness is even more evidently true of the life of communities, including those governed by law, where choices specifying the common good must be made (Finnis 1997, 221).

Although it is never entirely eliminated, practical choice is guided by practical and moral principles which constrain rather than direct choice. They govern the choice among options realizing basic human goods. The fundamental principle of practical reason, according to Finnis, requires that one "act to some intelligible point," i.e., act only in pursuit of basic goods and adjust one's choices and actions to the instantiation and achievement of these goods. But to respond to the directiveness of these goods requires that one consider their relationship to other goods and to means of achieving them; one must consider how the goods hang together such that the pursuit of them is reasonable. One must, as Finnis puts it, commensurate the (rationally) incommensurable. This activity is a matter of practical judgment, *prudentia* (Finnis 2005, 120–1). Because reason cannot direct this commensuration, *prudentia* involves, rather, "one's intuitive awareness, one's discernment, of one's own differentiated *feelings* toward various goods and bads as concretely remembered, experienced, or imagined" (Finnis 1997, 227, emphasis in the original; see Finnis 1992, 146–9).

Rational choice, in pursuit of one or more basic good, is not necessarily moral choice. The most basic *moral* principle requires that one choose "only

those possibilities whose willing is compatible with a will toward fulfillment of all human persons in all the basic goods," i.e., towards the ideal of (universal) integral human fulfillment (Finnis 1992, 137; 1997, 225). In another place he put the point this way: Morality's master principle requires "that one should remain open, in all one's deliberating and willing, to integral fulfillment—fulfillment which is not one's own, nor indifferent to one's own, but locates it in the fulfillment of all human persons in all their communities" (Finnis 2005, 122). Intermediate moral principles, which he calls "requirements of practical reasonableness" or "modes of responsibility" (Finnis 1980, 100–33; 1992, 137), are specifications of this master principle (Finnis 1997, 225). These intermediate principles, which rank options without commensurating incommensurable goods (ibid., 224), operate as second-order guides to ways of choosing among options, ruling out certain modes of choosing rather than directing choice to a single determinate option. One such principle requires, for example, that one never intend, either as one's end or as a means to some other end, to do evil (i.e., to destroy or damage some basic good) so that good may come (Finnis 1992, 138; 1997, 226); another requires that one not answer injury with injury (Finnis 1992, 137; 1997, 225); a third requires that one not limit the range of goods or people one cares about to those singled out by feelings of self-preference (Finnis 1992, 137; 2005, 227).

Practical reasoning, according to neo-classical natural-law theory, has another domain irreducibly distinct from, yet related to, the domain of morality and practical reasonableness: the cultural and technical domain of making (*poiesis*).[7] In this domain, choices are regimented by principles of technique or craft to achieve some limited range of relatively specific purposes (Finnis 1980, 137; 1992, 139–40; 2002, 4). The structures and techniques of reasoning in this domain are artificial and conventional, constructed by human choice and intelligence to achieve specific (moral) purposes. Morally significant choices, especially in and of communities, largely depend for achievement of their ends on the use of some such culturally posited techniques (Finnis 1992, 140). To an extent, the practical intelligibility of each such technique can be explained without reference to the moral ends for which it is deployed (ibid.); yet, ultimately, these techniques acquire practical intelligibility or force only to the extent that they serve morally (hence, practically) intelligible ends.[8]

[7] According to Finnis (1997, 219), the distinction between these domains is not grounded in some moral or practical principle, but rather "in the realities involved in freely chosen action."

[8] Finnis seems to deny this at 1992, 140, yet his argument against the independent intelligibility of instrumental reasoning (see above sec. 12.2.1) implies that the force of technical reasoning depends on dictates of practical reasonableness. Such techniques cannot, strictly speaking, be derived from dictates of morality or practical reasonableness, since they exist only to the extent that they are created and sustained as conventions of reasoning within specific communities; yet, their practical force depends ultimately on the morally and practically significant ends which they serve and for which they were posited.

12.3. Natural-Law Jurisprudence: Law, Authority, and the Common Good

Natural-law jurisprudence, as Finnis characterized and practiced it, seeks an explanation of the distinctive *positivity* of positive law, locating that explanation in its comprehensive theory of practical reasoning. This is a departure from a common understanding of the natural-law tradition, which takes the fundamental natural-law idea to be classically expressed by Cicero in the following well-known passage from *De re publica*, 3.22:

> True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrong-doing by its prohibitions. […] We cannot be freed from its obligations by senate or people, and we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times, and there will be one master and ruler, that is, God, over us all, for he is the author of this law, its promulgator, and its enforcing judge.

The classic notion, captured by Cicero, identifies law with divine or at least eternal reason, uncreated, unchangeable, and universal. Human institutions qualify as law just when and to the extent that they approximate this eternal exemplar. As long as law is conceived in these terms, the natural-law jurisprudential project, as Finnis (and, as he reads him, Aquinas[9]) conceived it, could not get off the ground, for it is law's very *positivity*, and in particular law's continued claim to allegiance and authority in the face of that positivity, that calls for explanation and critical examination. Once law is acknowledged as positive—i.e., artificial (made, imposed, or at least conventional), abstractly technical, and hence in some sense arbitrary and community-relative—Cicero's identification of law with reason seems to confuse (positive) law with something else; and yet the realist or skeptical response, rejecting law's claim to normativity and acknowledging only the fact of brute power, seems equally blind to essential features of law, not to mention that it leaves us without a way of understanding how law might be able to rule and direct the exercise of power. The aim of natural-law jurisprudence, according to Finnis, is to explore how law's very positivity—its apparent artificial, conventional, made, and technical character—might be important for human communities.

[9] Finnis (1996) argued that Aquinas was the first major practitioner of this mode of natural-law jurisprudence, about one hundred years after the concept of positivity was introduced to jurisprudence in Paris and Chartres. There is good reason to think that Aquinas's attention to law's distinctive positivity marked an important development in the history of philosophical jurisprudence, although Sten Gagnér's claim that in Aquinas's *Summa Theologiae* we "find a full ideology of legal positivism" (Gagnér 1960, 279, quoted in Murphy 2005, 57) is greatly exaggerated. However, I do not think Finnis would deny that Plato and especially Aristotle were keenly aware of the positive and conventional aspects of legal and political institutions (as well as language) and contributed a good deal to the theoretical understanding of conventional social arrangements. (For a measured and insightful assessment of Aquinas's theory of law's positivity, see Murphy 2005, chap. 2.)

12.3.1. A Natural-Law Challenge to Methodological Positivism

Natural-law jurisprudence, practiced by Finnis, is mindful that, as a cultural artifact, positive law is both a structure of reasons for actions and a matter of social fact of power and practice that is given shape, content, and direction by facts of opinion and thought of those who participate in it. Thus, a general theory that seeks to make positive law intelligible seeks to take both aspects fully into account. In particular, it takes seriously what Hart called the "internal point of view," but not, as Hart insisted, without engagement in critical moral reasoning.

Rejecting the methodological positivism to which Hart and many of his followers were committed, Finnis argued that "descriptive" jurisprudence cannot be moral value-free (Finnis 1980, chap. 1; 2003, 115–25; 2007, sec. 5). A general descriptive theory of a cultural artifact like law, must identify, relate, and make intelligible concepts and general propositions that structure the community's practice of that law. However, because there are many such concepts and general propositions and to give equal consideration and treatment within a theory to all of them would make it unintelligible, some selection must be made and some ideas and salient features of law must be relegated to the explanatory foreground and others to background. For this purpose, the views of participants are relevant but not determinative, for they may not fully understand their own practice. The theorist's own values inevitably will guide this selection, and these values will not be limited to formal or theoretical values of consistency, coherence, and the like, since they alone could never guide selection that would yield an intelligible explanation.[10] The theorist's estimation of what is important or valuable for social life, of the ends or values to which the institution is directed and their relative merits, will play a decisive role. These values are not decisive, either, of course, since putting into view the theorist's judgment on such matters, in Finnis's view, exposes them to rational critical assessment.

To deny the role of such considerations, Finnis argued, sublimates rather than eliminates their influence, hiding them from view and shielding them from critical scrutiny (Finnis 2008, 7, 16–7). Critical jurisprudential method that hopes to yield illuminating explanations of law must acknowledge and make explicit the valuations that guide selection and ordering of concepts and general propositions about law and subject them to scrutiny (Finnis 2007, sec. 5).

[10] Raz could follow Finnis up to this point, but he would part company here (see above, chap. 8, sec. 8.3.2). His view was that the task of legal theory is to make intelligible the views of those committed to the practice of law, including working out what those who are committed to the view *would have to show* if they were to make a convincing case for their view, but he insisted that this falls short of showing that the view is justified and it does not even start, as Finnis insisted, from the defeasible premise that the view is justified.

> Trying to understand the internal point of view makes, I would say, no sense as a method in social theory unless it is conceived as trying to understand the intelligible goods, the reasons for action, that were, are, and will be available to any acting person, anyone capable of deliberation or of spontaneously intelligent response to opportunities. (Finnis 2008, 25)

Hart correctly recognized the dependence of descriptive theory on the internal attitude in which rules figure as reasons for action, but he was content to report that people believe they have reasons for their behavior. He refused "to seek to understand those reasons as reasons all demand to be understood—in the dimension of soundness or unsoundness, adequacy or inadequacy, truth or error" (Finnis 2008, 17). The central question of natural-law jurisprudence, according to Finnis, is how and why law, and its positing in legislation, judicial decisions, and customs, can give its subjects reasons for acting in accordance with it (Finnis 2007, sec. 1).

12.3.2. Practical Reasonableness in Community: Common Good and Poiesis

To explore the potential of law to provide reasons for action, the natural point of departure for natural-law theorists is their account of practical reasonableness. Since law is a complex cultural object, if it is to generate genuine reasons for action, it must do so because it enables individuals to realize their good, including the good of practical reasonableness, in the communities in which they find themselves. Inevitably, individuals seek their good in communities. Many basic human goods are not fully realizable, or are entirely unavailable, outside of communities; moreover, participation in communities is itself a basic human good. Integral human fulfillment—fulfillment of each human being in all aspects of human good—is possible for human beings only in community, Finnis argued. The common good, encompassing the good of all and of each, is a specification of integral human fulfillment, relative to a particular community (Finnis 1997, 233), laying out ways in which the behavior and social interactions of individuals can respect and promote this ideal. But the common good, being yet indeterminate and a not fully integrated set of diverse and rationally incommensurable goods, needs further determination, its component goods need commensuration, and individual behavior must be coordinated to these ends. The common good needs a cultural making (*poesis*) that defines, enables, and coordinates the achievement of the common good. The community must settle for itself the content of its standards and the coordination of its members.[11] "In the life of a community, the preliminary commensuration

[11] Note that, while he would not deny what Rawls called "the fact of reasonable pluralism," Finnis's argument for the necessity of law's *determination* of the common good depends on a metaphysically deeper value-pluralism. The problem calling for social *poesis* is not (merely), as Waldron (following Rawls and Dworkin) maintained (see below sec. 12.4.1), that we care about justice or the common good but *disagree* about what they consists in, but more fundamentally

of rationally incommensurable factors is accomplished not by rationally determined judgments but by *decisions* […] Within the rational/moral limits fixed by [abstract] standards [of fully reasonable conduct] much remains to be settled by individual and group commitment" (Finnis 1997, 228, 233, emphasis in the original). Like individuals, communities must *choose*, determine for themselves, and thereby *constitute* themselves through these choices.

Authority and law, Finnis argued, are the primary devices socially constructed to specify the common good and practical reasonableness for individuals in their communities and to coordinate their engagement in them. Law creates new, public reasons, which replace or specify the convention-independent reasons that practically reasonable members of community have.[12] Law, by choice of those in authority in the community, *determines* the indeterminate and *commensurates* the rationally incommensurable, thereby providing a common rule and measure for guiding and evaluating action in the communities it serves (Finnis 1997, 228–33). Law is "a technique adopted for a moral purpose […] because there is no other available way of agreeing over significant spans of time about precisely how to pursue the moral project well" (Finnis 1992, 141). On this view, law at its best coordinates the deliberation and actions of subjects by positing and making public clear, general, and stable rules, thereby treating them as partners in public reason (Finnis 2007, sec. 1.5). The source-based character of law is fundamental to its ability to serve the common good (ibid., sec. 1).

With this in mind, natural-law theory offers an explanation of the normative force of law. Source-based legal rules are, as it were, minor premises in a practical syllogism, the major premise of which is the moral requirement that authoritative institutions specify standards of the common good (Finnis 1980, 315). Positive law is morally binding

> when and because it takes its place in a scheme of practical reasoning whose proximate starting point is the moral need for justice and peace, and whose more foundational starting-point is the range of basic ways in which human wellbeing can be promoted and protected, the way picked out in practical reason's first principles. (Finnis 2007, sec. 1.5)

Thus, social facts of enactment and promulgation "make a positive legal rule a reason for action because the desirability of authority as a means of securing common good" is a strong reason "for acknowledging such facts as an instance of valid legislation giving presumptively sufficient reason for compliance" (ibid.). In this way and just to this extent positive legal rules are binding morally; they have "the moral form or meaning of *legal obligatoriness*" (ibid.)

that justice and the common good are themselves *indeterminate* and *composite*, combining incommensurable components, but nevertheless impose rational demands on individuals and the communities they inhabit.

[12] Finnis at this point deploys Joseph Raz's notion of exclusionary reasons and the notion of authority he based on it. See above chap. 8, sec. 8.4.2.1.

12.3.3. Positive Law and Legal Reasoning: Dimensions of Natural-Law Positivism

Remarkably, Finnis (1980, 266–70) argued that this approach to explaining the potential reason-giving character of law yields an account of the core or defining general features of law that closely resembles that of contemporary (exclusive or formalist) positivism (see above chap. 8). "The enterprise of exercising authority through law proceeds by positing a system of rules which derive their authority not from the intrinsic appropriateness of their content but from the fact of stipulation in accordance with rules of stipulation" (ibid., 355). Law is a form of public practical reason, stipulating solutions to problems of coordinating action in pursuit of the common good. To do this effectively, it is necessary to mark legal rules as authentic (valid) by tracing them to publicly recognized sources, and to stipulate contents that are publicly accessible and not subject to the indeterminacies of judgment that the rules are meant to settle. Moreover, the rules are to be treated as sufficient and exclusionary reasons, notwithstanding disagreement citizens might have with the law's authoritatively stipulated standards (ibid., 269, 319, 351–2; Finnis 1997, 230). Legal rules are artificial and formal, specific instruments designed to achieve a recognizably moral purpose; and legal reasoning is (largely) a mode of *technical* reasoning, designed to achieve the particular purpose of resolving disputes (Finnis 1992, 141–2). This special technique of reasoning, which takes past acts as giving sufficient reasons now for what was provided for then (1980, 269), adopts as working postulates that law is (1) supreme, (2) gapless, and (3) comprehensive and that (4) its rules have invariant binding force (i.e., invulnerable to being overridden by conflicting rules or principles) (Finnis 1980, 148–9, 268–9, 309–11). Hence, it postulates the autonomy of legal reasoning, "sealed off (so to speak) from the unrestricted flow of practical reasoning about what is just and for the common good" (ibid., 355, see 312, 317–8). Law seeks to provide the citizen, legal adviser and judge "an algorithm for deciding as many questions as possible" (Finnis 1992, 142).

Up to this point, Finnis's substantive conception of law closely resembles that of Raz and other exclusive positivists. The difference between his account and theirs lies not in his initial answer to questions about the distinctive nature of (positive) law, but rather in the reasons he gave for this answer and in the range of further questions he regarded as central to the enterprise of legal philosophy. He rejected *methodological* positivism, arguing for his account of the central, salient, and defining characteristics of law on explicitly normative grounds. His apparent "positivism" is "normative" to that extent, in much the same way Bentham's was (Postema 1989a, chap. 9). However, Finnis qualified his endorsement of this positivist picture of law. Positive law, apparently for good natural-law-recognized reasons, *presents itself* in this (exclusive positivist) way, but the natural-lawyer cannot give full credit to this claim. Finnis insisted on several qualifications.

First, he conceded that the above postulates, especially that of the autonomy of legal reasoning, treats legal obligation only from a strictly intra-systemic point of view, and that to determine the actual moral force of law's claims, they must be relocated in the flow of moral reasoning. Legal rules enjoy their alleged pre-emptive binding force only by virtue of the background moral principles that call for pursuit of common good as a specification of the more fundamental moral demand of integral human fulfillment. Thus, the full story of law's binding force is one that can only be told within the ordinary flow of moral reasoning. Thus, "when deliberation runs it course, the really good and only truly sufficient *reasons* we have for action […] are moral reasons" (Finnis 2000, 1604). Moreover, the binding force of law is only *presumptive* and *defeasible* (Finnis 1980, 319; 2007, sec. 1.5.1), and it is defeated if the authoritative reasons offered by law conflict clearly with the needs, goods, or principles that law is meant to serve. The grounds for exclusionary force of law-provided reasons, while weighty, may in some cases be outweighed by even more demanding moral considerations. Thus, the scope of these exclusionary reasons is restricted (see above, chap. 8, sec. 8.4.2.1, on determination of the scope of exclusionary reasons).

It seems that this qualification compromises Finnis's account of the distinctive features of law and distinctive techniques of legal reasoning, in much the same way that the formalists' recognition of the asymmetry of authority (chap. 8, sec. 8.7.1.3) compromises their account of legal reasoning. For, if the aim of law and its artificial/technical mode of reasoning was to provide a public frame of practical reasonableness *in the place of* the private deliberations of individual citizens, then recognizing that there is room for individual recourse to extra-legal considerations either undermines the project of coordinating efforts in pursuit of the common good, or shows that the law's autonomy postulate to be systematically false and insupportable, and hence ought not to be endorsed as salient and distinctive features of law (on the kind of argument Finnis offered for them). Finnis seems to agree that the argument for the autonomy of legal technique calls for limits on that autonomy. He wrote,

> both the effectiveness of laws as solutions to coordination problems and promoters of common good, and the fairness of demanding adherence to them, are dependent upon their being treated both by the subjects and the administrators of the legal system as legally and morally entitled, precisely as validly made law, to prevail against all other reasons *save* competing *moral* obligations of greater strength. (Finnis 2007, sec. 1.5.1., first emphasis added)

Indeed, Finnis called attention to ways in which legal practice recognizes these limits. Legal reasoning is, he acknowledged, only "in large part" technical and opaque to its background principles (Finnis 1992, 142). Indeed, "legal thought in fact (and reasonably) does allow the system of rules to be permeated by principles of practical reasonableness which derive their authority from their appropriateness (in justice and for the common good) and not, or not merely,

from their origin in some past act of stipulation or some settled usage" (Finnis 1980, 356). Legal systems are more "open […] to the unrestricted flow of practical reasoning" than the postulates of legal thought acknowledge, although the extent to which this is so tends to vary from system to legal system (ibid.).

Thus, explicit social-fact sources can never fully account for all valid legal norms, in Finnis's view. For example, among criteria of validity are included content-based standards that call for practical consistency among valid propositions of law and that recognize later transactions to prevail over earlier ones, and the like (Finnis 2005, 110). Also, he called attention to the fact that there are some quite general principles articulating requirements of basic decency and humanly appropriate behavior that must be regarded as among law's sources even though they cannot be traced to any social facts of custom, enactment, or adjudication (ibid.). Likewise, he acknowledged the familiar judicial practice (elaborately theorized by Dworkin) of uncovering morally significant principles in the law that judges are bound to apply even though they have not been posited by custom, enactment or precedent (Finnis 2002, 10; see above, chap. 9, secs. 9.2.1.1 and 9.4.3). Typically, these principles are specifications of general moral principles, e.g., a principle of fairness, but the specification proceeds by way of "close attention to the way classes of persons, things, and activities are already treated by the indubitably posited law" and so "can be done only by those who know the relevant body of posited laws well enough to know what new dispute-resolving standard really fits them better than any alternative standard" (ibid.). There is no good reason, in Finnis's view, to follow the exclusive positivist and treat this as a matter of judicial enactment of a new legal norm, and much reason to see it, as Dworkin insisted, as a matter of discovering principles embedded in the law that are not traceable to social-fact sources (Finnis 2002, 11).

Thus, it appears that Finnis's neo-classical natural-law account of legal reasoning is close kin of Dworkin's "law as integrity" (see above, chap. 9, sec. 9.4.3.2). Despite early criticism of the account (Finnis 1987), Finnis later endorsed a basically Dworkinian view of the intermingling of technical and moral reasoning in the process of establishing legal norms (Finnis 1992, 143–8; 1997, 230–3; 2007, sec. 3.2). In Finnis's view, legal reasoning is simultaneously a culturally specified technique and a moral activity. "In many respects the law […] is a technique, and many aspects of legal reasoning are, for good reason, technical"; however, "law is also a moral undertaking by society and by each of those individuals and groups whose acts go to constitute, maintain, put into effect, and develop the law" (Finnis 1997, 221). Unlike Raz (see above chap. 8, sec. 8.6.1.2), who also recognized this dual aspect but insisted on regarding only the first as the proper object of legal theory, Finnis sought to integrate these two aspects in his unified theory of practical reasoning. The two aspects do not represent, as in Raz's view, two *stages* in the process of reasoning, the first distinctively legal and the second entirely extra-legal and moral; rather,

they represent two intersecting dimensions of legal reasoning. Any proposal of a binding legal norm must meet both the standard of "fit" and consideration of "moral soundness," which, in Finnis's view, stem from two irreducibly different dimensions of practical thought—the technical and the moral.

Early on, Finnis criticized Dworkin not for his characterization of the process of legal reasoning in hard cases, but rather for maintaining that for every such case there is a single right answer. Because these two dimensions are irreducibly different, he argued, their recommendations and standards are incommensurable, and thus no uniquely right answer to a legally disputed question that pits demands of fit against requirements of moral soundness is possible (Finnis 1987, 372–5). There is no common measure in terms of which it is possible rationally to commensurate the deliverances from these two different practical domains, so there is no way to decide rationally between rival interpretations of the existing legal materials. In such hard cases, Finnis concluded, judges who are forced to come to some resolution must simply *choose* among the available options, guided but not rationally determined by their reasoning within the two domains. The choice element in judicial decision-making was, on his view, large and must not be minimized.

Ten years later, in "Commensuration and Public Reason," Finnis argued that there is a common measure of sorts between these two domains. But he concluded it still does not in the end promise any narrowing of the scope of judicial *choice*. His argument proceeded from the observation we noted above that legal reasoning is simultaneously a matter of technique and a morally significant activity; that is, "rule finding [using the special techniques of law] is no mere game" indifferent to its moral stakes, but rather "a morally significant act which, like all other choices to act, will be fully reasonable only if in line with integral human fulfillment" (Finnis 1997, 231). The use of legal technique serves a moral purpose and is reasonable to the extent that it serves it well and within the limits defined by moral principles. Thus, the dimension of fit—which are determined strictly by formal techniques of legal reasoning—has a moral valence, and that valence can be related in the moral domain to other moral considerations. Thus, there is a measure common to the two dimensions, namely, the dimension of moral soundness.

However, this does not eliminate or even substantially reduce the room for judicial choice in such cases, he conceded, for indeterminacy and plurality of the core human goods insures that the available interpretive options will still be fundamentally incommensurable by rational means. Assessing the moral significance of different degrees of moral soundness and fit may be governed by the principle of fairness, but fairness must in the end be specified in part by feelings, and the commensuration of the incommensurable is done by discernment of feelings and ultimately by choice, not by reason (Finnis 1997, 231–2). Thus, the conclusion he drew in "Natural Law and Legal Reasoning" holds equally on this revised view: "Much academic theory about legal reasoning

greatly exaggerates the extent to which reason can settle what is greater good and lesser evil" (Finnis 1992, 151).

Thus, the existentialism that characterized Finnis's general theory of practical reasonableness emerges again in his theory of public practical reasonableness. It is not a little surprising that a this natural-law theorist, working self-consciously within the rationalist, Thomist tradition should come to a view of judicial reasoning not unlike that of the radical moral skeptic, Oliver Wendell Holmes, Jr. (see above chap. 2, sec. 2.5.2). It is even more interesting that they draw similar highly conservative conclusions from their accounts of the possibility of rational constraints on judicial reasoning. Theories that exaggerate the ability of reason to settle disputed questions of value and principle also tend to minimize the need for authoritative sources, Finnis concluded. However, "such sources, so far as they are clear, and respect the few absolute moral rights and duties, are to be respected as *the only reasonable basis for judicial reasoning and decision*, in relation to countless issues which do not directly involve those absolute rights and duties" (Finnis 1992, 151, emphasis added).

Despite his embrace of the Dworkinian analysis of the practice of legal reasoning, Finnis, like Holmes, shied away from Dworkin's strongly anti-positivist view of adjudication, recommending rather that judges not venture far from the four corners of formal legal technique. Surprisingly, perhaps, Finnis's neoclassical natural-law theory in yet another respect endorses a view many would associate with legal positivism, albeit, again, for reasons that are rooted ultimately in his natural-law theory of practical reason.

12.4. Retrieving Normative Jurisprudence

Like Finnis, Jeremy Waldron (1953-) was critical of the methodology of contemporary positivism; also like Finnis, he developed a theory that brings together positivist and Dworkinian elements, not without tension, but he sought to resolve that tension through more careful attention to institutional design.

Like John Salmond at the beginning of the twentieth century, Jeremy Waldron was born and initially trained in law and philosophy in New Zealand, earning a B.A. (1974) and LL.B. from the University of Otago. Continuing his studies in England under Ronald Dworkin in Oxford, he was awarded a D.Phil. in 1986. He taught legal and political philosophy at the University of Otago (1975–8), Lincoln College, Oxford (1980–2), the University of Edinburgh (1983–7). He has held regular academic posts at Boalt Hall Law School at the University of California, Berkeley (1987–96), Princeton University (1996–7), Columbia University Law School (1997–2006) and New York University Law School (since 2006). In 2010 he was named Chichele Professor of Social and Political Theory at All Souls College, Oxford. His earliest writings, some of which are collected in *Liberal Rights* (1991), focused on topics in normative political philosophy including the theory of property (1988). In

the 1990s he turned his attention more directly to issues of special and general jurisprudence, retaining the distinctive orientation on political philosophy and politics that characterized his earlier work. We will focus here exclusively on his contributions to general jurisprudence.

12.4.1. The Poverty of Methodological Positivism

As we have seen, analytic jurisprudence, from its earliest days, carefully defined and vigorously defended the boundaries of its enterprise (see above chap 1, sec. 1.4; chap. 7, sec. 7.7.5; chap. 8, sec. 8.3.2). Jurisprudence, it was argued, is an enterprise of purely conceptual analysis, free of all philosophical ambitions and entangling alliances with moral, political and social theory. In the thought of Hart and many of those who followed him, this abstemious attitude matured into a fiercely defended methodological positivism that insisted on the separation of jurisprudence from morality and hence on the strictly descriptive nature of jurisprudential theory. Waldron argued that this dominant methodological attitude impoverished contemporary jurisprudence in two respects.

First, it fostered and rewarded ignorance of and disdain for the history of philosophical reflection on the nature of law and its role in the polity (Waldron 2002, 377–81) and an even greater and entirely unacknowledged ignorance of the history of law and legal institutions. This is not merely an impoverishment of style, but of the philosophical enterprise as a whole, a loss of one of the most important tools of critical reflection.[13] Philosophical reflection becomes increasingly parochial and uncritical, Waldron charged, "as we distance ourselves from the intellectual resources that would enable us to grasp conceptions of law and controversies about law other than our own conceptions and our own controversies, and law itself as something with a history that transcends our particular problems and anxieties" (ibid., 381). Explorations of the history of legal institutions and of serious, and practically engaged, reflection on them, enable us to see with fresh eyes "how unhelpful our *current* models are […] [and] point us towards alternatives" or at least "open up a space in legal philosophy for new ways of thinking" about law and its most important institutions (Waldron 1999b, 68, emphasis in the original).

Contemporary methodological positivism is impoverished in a second respect, in Waldron's view: It abstracts the concept of law and the phenomena of legal practice from the normative and practical-political contexts which decisively shape our understanding of them (Waldron 2002, 368). Jurisprudence, he argued, is fundamentally a normative enterprise because law (like its sibling, legality) is fundamentally a normative concept that gets its content from its place in a network of normative concepts—justice, authority, obliga-

[13] Echoes of Oakeshott's 1930s critique (see above, chap. 1, sec. 1.4.3.3) are unmistakable, although Waldron may not have been aware of Oakeshott's essay.

tion, rights, agency, public good, and the like—which itself is situated in a understanding of what he called "the circumstances of politics." The concept of law is a normative concept, not just in the sense that it embraces the notion of norms that purport to guide action, but in the stronger sense that it is itself used to evaluate, appraise, and guide the political choice of modes of governance (Waldron 2001, 424–6), just as the mundane concept of a hospital or the contested concept of democracy are used to appraise other social and political institutions (Waldron 2002, 371). It is used to sort political practices, especially modes of governance, and in doing so presupposes an understanding of the point or value of ordering modes of governance in a law-like way (Waldron 2001, 426; 2008, 12). What we call law, therefore, is inevitably influenced by a sense of why law is a valuable mode of governance (Waldron 2001, 420).

12.4.2. Law's Habitat: The Circumstances of Politics

Thus far, Waldron's view echoes Finnis's methodological recommendation, but Waldron's normative jurisprudence took a different shape. General jurisprudence, he held, is a branch of political theory, or more precisely, of the theory of politics (Waldron 1999b, 3, 6–7; 2002, 352–3). Situating jurisprudence in the theory of politics, Waldron set law in a particular context and focused thinking about law on solutions to problems that arise in that context. The habitat of law is "the circumstances of politics"—the circumstances of a polity that aspires to justice and decency but that harbors deep and pervasive disagreements among it members about what justice requires of them and their institutions (Waldron 1999b, 6–7). Law's fundamental task is to enable members of a community to live together and act in concert in the face of disagreements of this sort. Law "with its respect for authority, its idea of doctrine, and the discipline it imposes on the free range of our individual ideas" presumes amongst us "a spirit of sharing the social world with intelligences, consciences, and sources of normative ideation other than our own" (ibid., 6). But law is not a mere ideal or aspiration; it is "an existing (and developing) framework ordering our actions and interactions in circumstances in which we disagree with one another about how our actions and interactions should be ordered." It seeks to "adjudicate such conflicts […] and claims authority for its adjudications on principles which are themselves controversial in society" (ibid., 7).

It is important to note that Waldron's focus on the circumstances of politics and its problems does not stem from moral skepticism; but equally, neither, are its challenges, in his view, obviated in any substantial way by assumptions of robust moral realism or cognitivism, like that recommended by Moore. Debates among competing metaethical theories are, in his view, irrelevant to the solving the problems of the circumstances of politics (Waldron 1998b, 76–9; 1999b, chap. 8). Metaethical theories offer a variety of explanations of the possibility of disputes regarding matters of justice and the public good, but it is

the fact of these disputes and the pressing need to order our lives and interactions and to coordinate our common efforts in the face of them that define the problems of the circumstances of politics for law and jurisprudence.[14] Locating law in the circumstances of politics helps to explain an important but sometimes puzzling general feature of law: Law is oriented towards and aspires to justice and the public good, and yet it is expected that law's efforts may offend our sense of justice and conflict with our judgments of public good. Law must do its justice-oriented work not only in a context of disagreement about justice, but also respecting those disagreements, and, more importantly, respecting those who disagree. This respect involves recognizing their capacity to grasp law's rationale and relate its work of governance to their actions and purposes (2008, 8, 23–4, 35–6) and even providing resources and forums for exploring and challenging the rationale.

Orienting jurisprudence to the circumstances of politics in which law does its work, in Waldron's view, requires that jurisprudence pay close attention to the nature, structure, and limits of *institutions* and *procedures* that seek to mediate or adjudicate fundamental conflicts and that focus common efforts in the face of such conflicts. It must take seriously questions of institutional design, the allocation of decision-making power, and the institutional provenance of legal norms. Questions of institutional focus and competence and the balance or interaction among legal institutions are integral to the inquiries of general jurisprudence into the nature of law. No philosopher in the Anglophone tradition since Bentham has focused on such questions to the extent Waldron has. His primary concern has been with the institution of legislation—its constitution, structure, authority, powers, scope, limits, and products—and the relation between legislatures and the judiciary, especially powers of judicial review (Waldron 1999b, 1999c, 2006b, 2007a, 2007b, 2009b).

12.5. Authoritative Rules, Systematic Integrity, and Argument: Waldron's Normative Jurisprudence

12.5.1. The Normative Case for a Positivist Conception of Law

Law is designed to enable members of a community in the circumstances of politics to coordinate efforts and protect against abuse of power. To order their interactions and common efforts in the face of profound and pervasive

[14] In this respect, Waldron's diagnosis of the problems that law fundamentally addresses is very different from Finnis's diagnosis. Finnis traced them to the nature of value and the capability of reason to manage it (see above, sec. 12.3.2), but the problems, as Waldron conceives them, are epistemic and fundamentally political, not metaphysical. This difference may explain in part differences in their respective understandings of the resources law brings in response to these problems.

disagreements, the community must authoritatively settle on public norms governing social interactions, norms whose content, authenticity, and practical authority are publicly accessible without recourse to the very considerations of justice and public good that are the focus of those disputes (Waldron 1999b, 38–9). Law conceived of along substantive positivist (neo-formalist) lines is well-suited to this task. Law-making authorities posit public rules and direct the attention of law-subjects to these rules; formal criteria of validity, tracing the rules to public activities of institutional sources, assure law-subjects of the authenticity of the rules. These views, values, and rules, once perhaps matters of private judgment, are marked as public and thus binding on law-subjects despite their reservations about them (ibid., 38–40, 99–106). Since the content and the authenticity of the rules are publicly available without recourse to disputed matters of justice and the public good, legal judgment is separated from and not dependent on moral judgment and legal reasoning is restricted to the more or less technical task of uncovering the public meaning of these norms, leaving open the question of the ultimate moral force of the rules.

Considerations of democracy and the ideal of legality (rule of law) further support this positivist model of law, Waldron argued (2007a; 2009a, 684–9). Law's distinctive mode of governance is governance by means of identifiable, posited norms issued for the guidance of rationally self-directing agents. Law's positivity—its character as the contingent, changeable, product of historical processes, and participants' understanding of that product—is critical to this mode of governance. Equally essential to it—Waldron regarded it as "definitional" of law—are the generality and publicity of its norms (Waldron 2008, 24–8).

First consider generality. Governance by ad hoc decrees is not governance by law; officials issue particular orders, of course, but law rules only when officials have warrant for their orders in general, public norms (and, as we shall see, demands for that warrant can be made, heard, and adjudicated). Law's necessary generality signals, in Waldron's view, that law's mode of governance subjects the exercise of power to requirements of rationality. "Generalization across acts and across persons is a token that the law is being imposed for reasons (and that those reasons are being followed where they lead), rather than arbitrarily or on a whim" (Waldron 2009a, 706). Publicity is also essential to law's mode of rational, normative guidance. Law's norms are publicly accessible, made and administered in public, and publicly identifiable and authenticated (Waldron 2008, 25–6). This is due to the more fundamental fact that law's means of providing normative guidance is by addressing its norms *in public* and *to the public* (that is, not secretly, nor privately one person at a time) (see Postema, 2010b, 271-2). Moreover, law is oriented to the public in the sense that it presents itself as a body of norms dealing with matters of public concern in the name of society as a whole (Waldron 2008, 31–2; 2009a, 700). Law *claims* this orientation no less fundamentally than it claims authority (2009a, 701–2; recall Raz's fundamental premise, see above, chap. 8, sec. 8.3.3).

Rule of law considerations of transparency, public accountability, and prospectivity of law-making force attention of modern legal systems to legislation as the primary institutional source of legal norms, Waldron maintained. Courts, in contrast, are inferior in all these dimensions, since at best only a few vague, apparently conflicting guidelines for inferring rules from cases and results of their use leave determination of the content and authenticity of law haphazard and uncertain (1998a; 2009d, 334–6). Equally, respect for the deliberative activities in institutions committed to representation based on political equality requires scrupulous attention to the fact of enactment and the canonical text enacted, i.e., to the products of the law-making process, abstracted from judgments of their moral or practical wisdom (1999b, 40-41, chap. 4). Thus, not only the need to settle contested matters, but also the demand to respect democratic processes that legitimate the rules enacted and to respect formal constraints of the rule of law on law-making processes and their products, support the demand that the rules enacted be treated, despite our disagreement with them, as final for public practical purposes until revised or rescinded by the same processes.

Waldron's arguments recall arguments for a substantive positivist or formalist conception of law we have encountered in the work of Raz, the neo-formalists, and even Finnis (see also Campbell 1996), although Waldron gives more play to democratic and rule of law values and is more insistent on the dignity of legislation and legislatures. Although critical of the methodology of contemporary positivism, he seems to have embraced a substantive conception of law that is unmistakably positivist. However, some of his recent work is highly critical of this substantive positivist model of law. "The *fallacy* of modern positivism," he charged, "is its exclusive emphasis on the command-and-control aspect of law, without any reference to the culture of argument that it frames, sponsors, and institutionalizes" (ibid., emphasis added).

"A society ruled by law is a society committed to a certain method of arguing about the exercise of public power" (Waldron 2004, 330). Waldron wrote this to capture a key dimension of Dworkin's view of law, but it also expresses well his own view. Modern positivist jurisprudence, with its exclusive focus on public, rule-like norms and legal reasoning restricted to identification and application of such rules, ignores or distorts the fact that law institutionalizes a practice of argument. "The institutionalized recognition of a distinctive set of norms may be an important feature [of law], but at least as important is what we do in law with the norms that we identify" (Waldron 2008, 56). We do not merely identify, apply, and obey them, or resist, skirt, and circumvent them; we also, and typically as an essential part of legal practice, *argue over them*. "We argue over them adversarially, we use our sense of what is at stake in their application to license a continual process of argument, and we engage in elaborate interpretive exercises about what it means to apply them faithfully as a system to the cases that come before us" (ibid.). Echoing Dworkin, Waldron

charged that modern positivist legal theory fails recognize and incorporate into its account of law its fundamental argumentative character.

12.5.2. Publicity, Systematicity, and the Argumentative Nature of Law

The argumentative character of law is consequent upon and reflected in a number of distinctive features of law often ignored by contemporary positivist jurisprudence (Waldron 2008, 19–36). One is the fact that special procedures and institutions are established for applying and enforcing its norms and holding accountable officials acting under color of law (ibid., 20–4). Courts do not merely translate general legal norms into concrete directives, they do so in a way that provides those who are subject to these norms an opportunity for active engagement in their administration (ibid., 23–4). Law subjects are empowered to call on legal officials, including the courts themselves, to provide legal warrant for their decisions and actions by setting them in the context of coherent body of public norms (ibid., 35–6; see MacCormick, 2005, chap. 2).

An equally important defining feature of law, essential to its distinctive mode of governance, is its *systematicity*: Law presents itself as a systematic body of public norms, a *corpus juris* (Waldron 2000b; 2008, 32–6). The positivist notion of systematicity is impoverished, Waldron argued. Although it is not quite accurate to say that, for positivists, law is just a heap, legal norms form a system, on the positivist view, simply by virtue of common membership marked by common origin in recognized sources. Every norm of law rests on its own source-based bottom (Waldron 2000b, 39). This external, content-independent form of systematicity ignores and obscures a richer form that, in Waldron's view, is essential to law. The positivist understanding of law "does not give enough attention to the importance of structure and system in the law—the way various provisions, precedents, and doctrines hang together" (Waldron 2005, 1721), "each new ruling and each newly-issued norm taking its place in an organized body of law" (Waldron 2008, 33). This systematicity is doctrinal, i.e., content-determined: A set of legal norms works as a system in this sense "if the application or change of any one or more members tends to have an impact on the consequences of applying any of the others, whether those consequences are intended by those who make the laws or not" (Waldron 2000b, 40). Doctrinal systematicity is a matter of norms interlocking with each other, each contributing something to an integrated, coherently functioning whole. Doctrinal systematicity is typically marked by technical vocabulary, the very abstraction from ordinary usage signaling the web-like structure of norms in which the technical terms centrally figure (ibid., 25).

Doctrinal interconnectedness is a familiar, pervasive feature of law. For example, rules of contract formation link to rules concerning consideration, duty, breach, liability, and damages (Waldron 2005, 1722); likewise, rules regarding action, intention, excuses, justifications, attempts, complicity and the

like are linked in criminal law (Waldron 2000, 25). Similarly, the technical notion of legal personality signals the web of norms regarding agency, rights, obligations, liabilities of such entities and their relationships with the rights, obligations, and liabilities of natural persons (ibid.). In each case, Waldron observed, "what we might regard as distinct legal provisions interact to constitute a unified realm of legal meaning and purpose, a structured array of norms with a distinctive spirit of its own" (Waldron 2005, 1722). Moreover, legislation does not merely add a rule to an existing set, but it modifies, and is immediately modified by, the *corpus juris* into which it is incorporated (Waldron 2008, 34).

This kind of systematicity requires those thinking and working with the set of existing general, public norms of law not only to seek consistency within the set, but even more to think in terms of its practical coherence, what Dworkin called "integrity" (Waldron 2008, 33–4). Law has to make some practical sense, and the individual norms of law must "make sense in relation to each other […] so that the point of one does not defeat the point of another" (ibid., 34). Doctrinal systematicity and the requirement of integrity explain the foundational importance of analogy as a mode of legal argument (ibid., 34; see Postema 2007a). Arguments from analogy have their force from the "sense that individual norms are not self-contained and that the point of any one of them may have some bearing on how it is appropriate to think about any other" (Waldron 2008, 34). This feature of law also explains why principles, not themselves source-based, may nevertheless figure prominently among true and valid propositions of law. As Dworkin pointed out, principles represent the underlying integrity of the source-based elements of law (ibid.; Waldron 2005, 1721–2, 1736; see above, chap. 9, secs. 9.2.2.1 and 9.4.3.1). Because of law's doctrinal systematicity it is appropriate to treat the way judicial decisions change the law as a kind of reason-guided discovery: Courts make law by "projecting the existing logic of the law into an area of uncertainty and controversy, using devices such as analogy and reference to underlying principles" (Waldron 2008, 35).

Doctrinal systematicity, as Waldron characterized it, is both a (normative) fact and a demand or project. It is a fact, in the sense that the content—the meaning, scope and force—of any norm or doctrine is fixed by the role it plays in the network of norms, concepts, and doctrines of which it is a part; and hence, that the alteration of the network in some way, e.g., by the addition or removal of some component, will be felt throughout the network. Law operates de facto as a system (Waldron 2000b, 47). But the norms and doctrines are substantively interrelated in this way, and the results of changes are felt throughout the network, because those who think within, and especially those charged with maintaining it, are subject to the demand to seek so far as possible the practical integrity of the body of law as a whole. Positivists, legal realists, and critical legal scholars have been inclined to treat all claims of the doc-

trinal systematicity of law as false and illusory.[15] Attending only to law's sources and the political contingencies and conflicting forces that manipulate them led them to expect only incoherence, or at best accidental, local, and temporary coherence. But this assessment is the product of a curiously disengaged and external view of the law and reasoning within it. It fails to attend to the real normative pressures that the law itself imposes on reasoning of those who seek to understand what the law requires in any particular case and its implications for those subject to it. These pressures are born of the fact that law presents itself as a scheme of and for practical reason, and its norms and propositions as products of reasoned deliberation.

For this reason, doctrinal systematicity is not merely a familiar feature of law; in Waldron's view, it is essential to the way law presents itself and essential to its distinctive mode of normative guidance. Law presents itself "as a unified enterprise of governance that one can make sense of […] with an understanding of how the regulation of one set of activities relates rationally to the regulation of another" (Waldron 2008, 35), and thus as offering normative guidance in public to a public capable of grasping and making practical sense of it as a set of norms and structures that coherently fit together. Herein, then, lies the root of law's essentially argumentative character. Argumentation, he insisted, is not just window dressing or after the fact rationalization (as some of the more radical legal realists maintained); it is, rather, "a medium through which legal positions are sustained, modified, and elaborated" (Waldron 2005, 1736), positions about *what the law is*, not what it ought to be (Waldron 2008, 49). "Our account of what the law is, then, is not readily separable from our account of how the law aspires to present itself. Our response to the pressure for coherence may well alter our sense of what the law already contains" (ibid.)

Such arguments, of course, are often challenged by competing theories of the relevant area of the law. Determining whether some proposition of law it true or valid or not often is a matter of dispute (Waldron 2008, 49). Legal reasoning often, even typically, is a matter of entertaining and seeking to resolve substantial doctrinal disagreements; conflict and disagreement are not symptoms of the pathology of the practice but rather key elements of it (ibid., 49–50; MacCormick 2005, 27). However, full appreciation of this fact and the essential features of law on which it is consequent undermines the substantive positivist or formalist view that sees finality, settlement of disputes, and certainty as core features of law and legal reasoning (Waldron 2004, 324, 326; 2008, 8, 55–61). Law's demand for finality is qualified by its recognition of the need for and its institutionalization of open argumentation. No general issue of law is absolutely immune to being revisited and challenged (Waldron 2004, 326). While it makes a difference to the status of some proposition of law that

[15] See Raz, 1995a, 314-5; and above chap. 3, sec. 3.2.2 (realists), chap. 6, sec. 6.3.2.2 (critical scholars), and chap. 8, sec. 8.6.2 (positivists).

it has been authoritatively decided, the difference it makes is itself a matter of argument. "Any principle of settlement is subordinated to the importance of procedures that allow citizens as well as judges to pursue the possibility that the law is not what it says on the rule-books" or what it has been officially declared to be.[16]

It appears, then, that Waldron's positivist model of law articulated in the previous sub-section is in tension with the Dworkinian elements explored in this sub-section. Dworkin, of course, took the considerations mentioned in this sub-section as reasons to abandon the positivist "model of rules"; Waldron, it appears, sought rather to combine the two, although there is good reason to wonder whether he can do so while maintaining the theoretical coherence of his hybrid view, or at least the normative arguments he relied on most to defend that view. These questions may remain with us as we consider next Waldron's attempt to bring the two theoretical perspectives together.

12.5.3. The Artificial Reason of Law: Judicial Reasoning as an Institution-Shaped Hybrid

This view of law and reasoning within law has unmistakable overtones of Dworkin's "law as integrity"; however, Waldron was as keen to distinguish practical reasoning within law from what he called "fully deliberative moral reasoning" as he was to distinguish it from narrowly cabined formalist reasoning. Typical judicial reasoning, he insisted, is a "mélange of reasoning […] which, in its richness and texture, differs considerably from pure moral reasoning as well as from the pure version of black-letter legal reasoning that certain naïve positivists might imagine" (Waldron 2009b, 12). Reasoning within law is not a simple matter of identifying and applying determinate rules; it is system-respecting, integrity-honoring, reasoned deliberation, seeking coherence among disparate practical sources including moral principles and value. However, some morally and practically relevant considerations are systematically excluded from this domain, and for this reason practical reasoning exercised within it cannot count as *justification*, i.e., offering reasons for action (Waldron 2007b, 129), Waldron held, because proper justification, reasons-yielding reasoning, is open, unrestricted, and inclusive (ibid., 117).[17] "What we call the courts' 'giving reasons for their decisions' is actually a matter of explaining why a decision for the plaintiff (say) rather than a decision for the defendant follows from the existing legal materials" (ibid., 129). Reasoning within law can

[16] Waldron here (2004, 326) is giving expression to Dworkin's model of law and we might hesitate to attribute the view to Waldron himself were it not for his explicit endorsement of this view in "The Concept and Rule of Law" (Waldron 2008).

[17] Waldron here explicitly challenges Schauer's formalist model of law's limited domain of practical reasoning (for which, see above chap. 8, sec. 8.7.1.1).

show that certain practical conclusions are, in David Lyons' terminology, *derivable* from relevant legal materials (Lyons 1993, 119–40), but nothing follows directly from this about anyone's reasons for action, Waldron argued. At best, judges and other officials reasoning in this mode offer warrants or authorization for their decisions and actions, but no practical, let alone moral, reasons for anyone else to comply or respect the decisions (Waldron 2007b, 127-30). Reasons-yielding justification, in Waldron's view, is the product of open, fully deliberative moral reasoning.

At this point, Waldron's view, somewhat surprisingly, calls to mind Raz's model of bifurcated reasoning (see above, chap. 8, sec. 8.6.1.2), which divided reasoning of judges into two discrete stages, one strictly technical, the other engaging all-things-considered moral reasoning. However, Waldron also found Raz's model unsatisfactory, arguing that it does not do justice to actual practice. Rather, he argued, the two components are inseparably mixed in a way that alters both. "The sensibility that informs judgment at every stage [in judicial reasoning] will be a hybrid of moral and legal sensibility" (Waldron 2009b, 13). Raz's bifurcated model misrepresents practice in two respects: It artificially separates the two components into discrete stages and it fails to appreciate the effect that the mixture has on the moral sensibility that judges bring to the task of decision-making within the law (ibid., 12–3).

The impact of intra-systemic and system-seeking practical reasoning on untutored ordinary moral sensibility is also typically ignored by natural-law jurisprudence and by Dworkin, according to Waldron. Although surely unintentional, Waldron argued for what classical common-law jurists like Coke and Hale called "the artificial reason of the law" (and of lawyers and judges) (Postema, 2002a, 2003). It is neither strictly technical, rule-bound, exclusionary practical reasoning, but neither is it fully deliberative moral reasoning (Waldron 2006b, 1383; 2009b, 9, 14-15). Against those who insist that judicial reasoning just is moral reasoning (or moral philosophy—Waldron here ignores the differences between the two) applied to the problems and materials of law (e.g., Dworkin's "moral reading of the constitution," Waldron 1996a), Waldron insisted that "judges are not really in a position to do pure moral philosophy or use it as a touchstone for law, because any moral reasoning they engage in is utterly entangled within and—from the point of view of moral philosophy—wholly compromised by their simultaneous attention to texts, doctrines, precedents, and decisions by others […] If the standards of ordinary moral argument are the touchstone, then judicial reasoning falls short" (Waldron 2009c, 74).

Judicial reasoning, in Waldron's view, is decisively shaped, and the sensibility at work is deeply influenced, by the institutional context in which it is deployed and the institutional responsibilities to which it is held. First of all, judicial reasoning, and legal reasoning more generally which is oriented to it, is deployed in adversarial contexts in which binary solutions are sought to matters strictly contested. Secondly, it is fundamentally answerable to text,

precedent, decision, and enactment—that is demands of past official acts and decisions, publicity, and systematicity—that structure the *corpus juris*. It is answerable in the two-fold sense that it starts from these materials and it must find its principles in them. Unlike deliberating moral agents, who might start from considered judgments but abandon them after further systematic reflection (on Rawls' familiar model of reflective equilibrium), judges are not entitled to abandon the fixed points of precedent and text. Third, judges are not private citizens wrestling with moral questions for themselves; rather they are responsible for making decisions in the name of society as a whole, knowing that their society includes many members who reason from premises quite different from their own privately held views to conclusions at odds with the conclusions they would be inclined to draw (Waldron 2009b, 5-6, 15-17). While the reasons canvassed by judges under these circumstances and responding to these normative pressures are moral reasons, they are "such importantly complicated moral reasons as to create—in a sense — a normative world of their own" (Waldron 2009b, 14), a world different from and distant enough from the ordinary moral world as to "render any operational comparison with familiar ideals of moral reasoning inapposite" (ibid.). Thus, despite the inevitable and pervasive influence of moral considerations, and a sensibility nurtured in ordinary moral reasoning, judicial reasoning, in Waldron's view, is a kind of "artificial" practical reasoning, different from, but no less important or accountable, ordinary moral reasoning.

Waldron's insistence on the hybrid and artificial nature of judicial reasoning yields a critique of Dworkinian jurisprudence no less pointed than Waldron's critique of neo-formalist jurisprudence. Thinking in terms of the kinds of institutions best suited to meet the needs of a society in the circumstances of politics, he argued that it is a serious mistake to equate judicial reasoning with public moral reasoning, i.e., reasoning that takes seriously its responsibility to be arguing in and for the community as a whole. Thus, he argued, if we have need of an institution in which fully deliberative, open moral reasoning can be engaged to explore publicly the definition and scope of fundamental rights and basic terms of association in a community in the circumstances of politics, we should not look to the courts or the judiciary (Waldron 2006a; 2009b; 2009c).

Dworkin's mistake was to take moral reasoning as a model for judicial reasoning (at least in the context of constitutional adjudication). Rawls made the mirror image mistake of taking constitutional adjudication as a model of public moral reasoning.[18] On this view, political issues are reshaped as judicial issues, the language of law becomes the language of politics, and, in the words of de Toqueville, "the spirit of law, which is produced in the schools and courts

[18] Waldron 2007b criticized Rawls for suggesting that the Supreme Court of the United States might be seen as an "exemplar of public reason" (Rawls 1993, 224–5).

of justice," penetrate "beyond their walls into the bosom of society" and "the whole people contract the habits and tastes of the judicial magistrate" (de Toqueville 1994, 280, quoted in Waldron 2007b, 134). This, in Waldron's view, would be a "disaster":

> Honest and open debate about the justification of public decisions would be truncated. Deliberation would be limited to a consideration of the bearing on the issues presented of a limited set of shallow considerations, excluding from debate many or most of the things that citizens really care about or that they regard (perhaps rightly) as of ultimate importance to the decisions they face. Instead of asking citizens to say to each other what they think is most important about the decisions they face, instead of inviting them to do their best to grapple openly and conscientiously with each other's ultimate convictions, we would reduce deliberation to a process of matching controversial decisions to items on a rather ashen and abstract list of pre-certified considerations. (Waldron 2007b, 134)

While the model of rules is unable to capture the essential argumentative character of law, legal and judicial argument fails as a model for the public reason of a politically responsible people, in Waldron's view. Responsible public reasoning must be open, untrammeled by constraints of text, precedent, technical terms, and system, capable of raising and addressing afresh fundamental questions regarding the terms of association in a community existing in the circumstances of politics. The legislature, not the courts, is the proper venue for such open-ended moral-political argument.

Waldron's careful analysis of the characteristics of judicial reasoning serves only to distinguish it from ordinary moral reasoning; it does not yet resolve the tension between the positivist and Dworkinian elements of Waldron's view of law. The recommendations for institutional design that he made on the basis of this analysis, also, fruitful as they are, do not resolve that tension. We still need some argument to show that the fundamental coordinative task of positivist-construed legal rules is not deeply compromised by the controversy-inviting aspects of law's essential systematic and argumentative dimensions, or at least some way to recalibrate the demand for finality and certainty of legal rules, grounded in the argument for coordination in the circumstances of politics, to make room for a kind of temporary or qualified finality and limited certainty. Waldron does not offer any such argument and this leaves us uncertain about the internal stability of his view. Arguably, Dworkin failed to give adequate attention to the rule-governed aspects of law and legal reasoning, as his exclusive positivist critics have insisted, and equally arguably positivist and formalist models have ignored law's argumentative dimension. However, combining them into a theory that does justice to the apparent truth in both is not simply a matter of conjoining the two. The arguments on which the competing theories rest look incompatible, so some significant revision of them is needed in order effect a genuine and coherent theoretical reconciliation. Waldron has not yet provided this theoretical reconciliation.

In fairness, we must acknowledge that this is not a problem just for Waldron. We have seen that Raz, Dworkin, and Finnis also must find some basis for accommodating the moral and technical elements of judicial reasoning in a comprehensive theory of law. A fully satisfying comprehensive account of legal reasoning has yet to be offered in contemporary Anglo-American legal philosophy, although any such theory would do well to keep in mind the weaknesses, but also the significant strengths, of the attempts by Raz, Dworkin, Finnis and Waldron to work their way to such a theory.

Chapter 13
CONCLUDING NOTE

13.1. *Vera Philosophia*

Guillaume Budé, the sixteenth century French jurist, wrote that if we understand law, following Ulpian, to be "the art of the good and just,"[1] then it must be the job of the jurist "to philosophize on this point." However, he concluded ruefully that, judged by this standard, "the study of law has degenerated from its original state. Today there are no longer jurisconsults, or philosophers, but only lawyers (*iurisperiti*)" (quoted in Kelley 1976, 268).

Budé, like his Renaissance colleagues, was inclined to think of jurisprudence (or, as they called it, civil science[2]) as *vera philosophia*—"true philosophy."[3] For if law is the art of the good and the just, systemic reflection on the practice of that art is the most comprehensive, yet most practically focused, reflection on human good in social life. "There is nothing either human or divine," wrote one Renaissance student of jurisprudence, "which the jurist does not treat and which does not pertain to civil science."[4] Sir Edward Coke, at the close of his report of *Calvin's Case*, perhaps unintentionally echoed this ideal when he wrote of seventeenth century English Common Law: "*Jurisprudentia legis communis Angliae est scientia socialis*"—English Common-Law jurisprudence is a *sociable science*—"in that it agreeth with the principles and rules of other excellent Sciences, divine and human" (Coke 2003, vol. 1, 231–2).

This Renaissance ambition was as complex as it was bold. It refused to relegate jurisprudence either to pure speculation or to mere practice (Kelley 1976, 267–70; 1988, 84–95). Jurisprudence was a science, that is, a matter of knowledge and theoretical understanding, not merely an applied art or practice of prudence that is innocent of theory. It was regarded as the very heart of theoretical studies, drawing to itself all that the traditional sciences of theology, metaphysics, and moral philosophy, as well as the newly emerging humanist sciences of philology and hermeneutics, had to offer. No less resolutely, it refused to abandon its foothold in the practical. "Jurisprudence consists not in speculation but action," wrote one fifteenth-century jurist, just after invoking Accursius's notion of *vera philosophia*.[5] Rather than reject philosophical reflec-

[1] Dig. 1.1.1.1: "ius est ars boni et aequi."

[2] "*Civilis scientia*" was the conventional term for academic jurisprudence; see Kelley 1988, 86.

[3] They took their cue from the great thirteenth century glossator, Accursius who, commenting on Dig. 1.1.1.1, wrote, "Civilis sapientia vera philosophia dicitur" (Kelley 1976, 267 n 2).

[4] François le Duoaren, *Opera Omnia* (1598), quoted in Kelley 1976, 269.

[5] Kelley 1976, 270, quoting Claude de Seyssel, who had just written: "civil science is true philosophy and it is to be preferred to all other fields because of its purpose" (ibid., 267).

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tion, he sought to locate it in concrete human life and experience. Law, on this view, embraced most comprehensively and penetrated most profoundly the practical dimensions of daily social life. Philosophy was most true to its vocation, they thought, and was most engaged in human life, when its reflections were anchored in the social life acknowledged, comprehended, and informed by and informing law. Jurisprudence, *vera philosophia*, was neither serene speculation nor pure prudence, but the point at which the theoretical and the practical joined. Neither subordinating practice to theory nor theory to practice, jurisprudence, at its "sociable" best, sought to integrate them.

However, Budé found that the actual practice he surveyed fell short of its profession. The jurisprudence of his day had lost its way; men of wide philosophical vision and practical wisdom had been replaced by blinkered professionals, mere *iurisperiti*.[6] As we conclude this long survey of Anglophone legal philosophy over the past century, we may wonder whether Coke's sunny assessment or Budé's rather gloomy response is the more warranted. The answer, it seems to me, is complex. There are reasons to think that with increasing technical and philosophical sophistication, it is not the *iurispiriti* that reign but their theoretical counterparts, who, despite their philosophical expertise, lack the vision and ambition of *vera philosophia*. However, philosophy, whenever it gets serious, gets technical and we must not confuse technical difficulty with loss of vision. And, of course, the aptness of the ideal of *vera philosophia* is itself open to challenge. Even so, if we cast our eyes over the entire canvas of this survey a much more complex and ultimately more hopeful assessment seems most in order. In these remaining few pages, I propose to view the story told in the previous chapters from a vantage point far above the details we explored earlier. Perhaps a lantern on the stern can shed some light on way forward.

13.2. On the Threshold of a Philosophical Jurisprudence

The Renaissance ideal of jurisprudence as *vera philosophia* contrasts sharply with the very different point of departure for jurisprudential reflection that the legal theorists we have discussed in the preceding chapters inherited at the end of the nineteenth century. An ideal of "science" also shaped the enterprise and ambition of legal theory, as they pursued it, but over the centuries since Budé wrote the notion of science radically changed. Empirically-oriented and taking as its model the physical sciences, the modern notion seemed to admirers more opposed to, than allied with, comprehensive, speculative, normatively-oriented philosophical reflection. Thus, to nineteenth century theorists of law, positivism, with its eyes on the ground, offered better hope for an intelligible

[6] Recall Oakeshott's strikingly similar assessment of the state of British jurisprudence in the late 1930s (see above chap. 1, sec. 1.4.3.3).

science of law, than old-fashioned and abstract natural-law jurisprudence, with its eyes on the heavens (as it seemed to nineteenth century positivists), and traditional common-law jurisprudence with its head in the sand of rigid professional practice (as it seemed to Bentham). As we have seen, both streams of Anglophone jurisprudence that we have considered—Holmesian and Hartian legacies—can be traced to their headwaters in classical positivism, specifically in Austin's positivism. This is true, of course, for British analytic jurisprudence at the turn of the twentieth century, which developed from and in critical conversation with *fin de siècle* Austinians (see above chap. 1); but it is no less true for Holmes, whose "static conception of law" was a stripped-down version of Austin's positivist conception of law (see above chap. 2, sec. 2.3).

Yet, Austin was no great jurisprudential innovator; the positivism he articulated and passed on was a revised and circumscribed version of Bentham's far more radical and revisionary theoretical proposal. Bentham's positivist approach to and theory of law was developed in self-conscious opposition to the practice and theory of English Common Law of his day (see, in Volume 8 of this Treatise, Lobban, chap. 6; Postema 1989a). Austin corralled and domesticated Bentham's wide-ranging and practice-challenging theory, using it not to guide theoretical exploration of law in all of its aspects, but rather to define a narrow province for the jurisprudential studies of students preparing for practice in English courts and chambers. In addition, Austin, writing at the time for an English audience, had to make his peace with common-law practice. The task he and Bentham faced—reconciling their positivist conception of law with recalcitrant common-law practice—became a recurring task for much of the jurisprudence in the twentieth century that flowed from this classical source.

Indeed, from our current vantage point it is clear that one of the distinctive features of twentieth century Anglophone jurisprudence is its recurring attempts to reconcile the theory-wary, bottom-up, practice-inspired and in that sense empirically-oriented, common-law spirit with the top-down, concept-oriented, rationalist orientation of classical positivism. In civil law jurisdictions this might take shape as the task of reconciling *ius* and *lex* in a single juridical theory, but in the common-law world "*ius*" not only demands systemic, internal coherence or "integrity," but also gives an active role and responsibility to the judiciary to maintaining that integrity. Hence, courts play a central role in these theories. Much that appears distinctive of Anglophone jurisprudence over the past century can be traced to the need to address and reconcile this tension.

A second, closely related theme or task running through much of the work considered in the preceding chapters is the need to rethink and recast the inherited categories of positivism. This became explicit and obsessive in last few decades amongst those who traced their intellectual ancestry to Hart. It began, of course, with Hart's seminal lecture of 1958, "Positivism and the Separation of Law and Morals" (Hart 1983, 49–87) and it continues to this day. It is also evident in the struggles of writers in the early analytic jurisprudence tradition

and those following Holmes and Langdell to find a conception of law which both fit the practice and promised to dignify it as a science.

Engaged in similar projects flowing from the same intellectual and legal-cultural sources, the writers in the two streams of Anglophone jurisprudence we have surveyed developed theories and approaches to understanding law that are in many respects strikingly different. In one stream, inspired by Austin, Holmes gave birth to a mode of thinking about law that was brash, provocative, and innovative while also being ill-focused, impatient with philosophical niceties, and insistent on being "realistic." In the other, also inspired by Austin, analytic jurisprudence developed, especially in the first five decades of the century, in very narrow, circumscribed fashion, lacking not only philosophical vision, but also showing little interest in engaging in genuine philosophical reflection on the nature of law and legal reasoning. There are, no doubt, many explanations for this difference. Differences of national character perhaps played some role, but such hypotheses tend to reinforce stereotypes rather than offer illuminating explanations. More illuminating, perhaps, are differences of character of some of the key figures at the beginning of the movement down the two streams. Holmes was, of course, brash and larger than life, intellectually curious but lacking the intellectual patience required for careful, systematic philosophical thought, with a strong weakness for the *bon mot* when a more cumbersome formulation might have achieved greater clarity or precision. The result was that Holmes's work, perhaps more than that of any other writer we have considered, encouraged a wide variety of different readings some more radical than Holmes himself might have endorsed. In contrast, no one in the analytic jurisprudence camp had the intellectual *hubris* of Holmes. Salmond, the most creative and critical of the analytic jurisprudence lot, developed his views in such a reserved manner that his challenges to the Austinian conceptual framework, while fundamental, appeared to be no more than friendly amendments and glosses. It took Hart's more philosophically sophisticated articulation of Salmond's criticisms to bring to light their force and importance.

Yet, personalities and intellectual style surely are not enough to explain the differences in focus and upshot in these two different streams. Three further factors may also have played a role. First, the ideas to which Holmes gave birth were nurtured and brought to such maturity as they achieved by a progressive, politically active group. Although they worked at the academic fringe, to be sure, they were influential nevertheless, and they developed their ideas in an academic and institutional context that tolerated and to a degree nurtured a kind of academic radicalism. Second, although Holmes was influenced by (while remaining critical of) Austin's positivist account of law, he never embraced Austin's narrow conception of the province of jurisprudence. From the very beginning, he was inclined to draw on any and every intellectual resource and tool that was ready to hand. Furthermore, the academic institutions that

nourished the generation following Holmes was also open to a wide range of models and methods. This methodological openness has been characteristic of the Holmesian legacy throughout the century. It is noteworthy, however, that despite this methodological openness, rarely did the jurisprudence of Holmes's descendents take for its model philosophy rooted in the long tradition of reflection on the nature of law and larger concerns of morality, practical reasoning, epistemology and metaphysics.

The third factor is entirely speculative, but it is hard to resist the thought that it played some role. That factor is the early death of Wesley Newcomb Hohfeld. All the resources for a radical rethinking of the nature of law in starkly formal, conceptual terms were available in Hohfeld's two seminal essays, and the force of his intellect among those who knew him was such that it is very likely that his theory, had he been able to elaborate it, could have played a decisive role in the development of American jurisprudence in early-to-mid-century. As it happens, he died before he could develop that theory and his seminal ideas were embraced by realist colleagues, but, to my eye, put to a quite different use than Hohfeld might have done had he lived. One can only speculate about what the trajectory of realism might have been had Hohfeld developed and actively pushed his embryonic theory. He might have replaced Holmes as the leading figure of the American jurisprudential *avant garde*. There might even have been far more interaction and cross-fertilization with emerging British analytic jurisprudence. Who knows.

The contrast of this American tale with the emergence of British analytic jurisprudence in these respects is clear. Austinian ideas, and criticisms of them, were developed by an intellectually cautious and conservative academy for a politically conservative bar and bench. While critical of many of the details of Austin's conception of law, analytic jurisprudence lacked the will to replace the theory with a less problematic alternative. Perhaps this was because almost all practitioners found his theory useful for its intended purpose, namely, to delimit the boundaries of the province of jurisprudence. Their narrow conception of the boundaries of its subject, and its exclusive focus on the daily practice of attorneys, led analytic jurists to be skeptical of broader philosophical reflection, and its "vague and viewy" deliverances, as Bryce (1901, 623) put it. Analytic jurisprudence, like its American counterpart, rarely looked to philosophy as a model method for understanding law.

A result of the differences between the broad methodological orientations characteristic of the two streams of Anglophone jurisprudence is that, starting with the emergence of realism, we see in the Holmesian legacy an explosion of different and competing methodologies and approaches, while in analytic jurisprudence there was an implosion. Jurisprudence in the legacy of Holmes embraced empirical behavioral and sociological studies, rational choice and welfare economics, Marxist critical theory, feminist methods of many kinds, and approaches developed by critical race theorists. Jurisprudence in this mode

was hyper-"sociable," even promiscuous, but it lacked any organizing core or discipline. It was not a single enterprise, but rather an aggregation of many different and often competing enterprises which rarely communicated and even more rarely offer mutual support, none of them showing much patience for systematic philosophical reflection.

In contrast, Hart brought philosophical sophistication to analytic jurisprudence, but his insistence on methodological positivism revealed and amplified analytic jurisprudence's "unsociable" tendency. Indeed, Hart and his descendants were often careful to identify questions not within the domain of legal philosophy and hand them off to other disciplines, never to be entertained again. At the same time, as debates in the latter decades of the century among positivists proceeded down their complex, winding paths, the core of dominant positivist jurisprudence narrowed dramatically. This trend had reached such a point that by the turn of the century, the current incumbent in Hart's chair of jurisprudence at Oxford, could boldly declare that "Legal positivism is not a whole theory of law's nature. It is a thesis about legal validity only" (Gardner 2001, 210).[7] We noted in Chapter 10, that the fundamental debate between the two major camps of contemporary positivists—the exclusive positivists and the inclusive positivists—rested solely on contested claims about what is conceptually possible. Both camps were willing to consign a very large number of what we might regard as salient and perhaps very important features of law to the category of the non-conceptual and merely empirical—and thus not matters proper for positivist jurisprudential attention.

The positivist doctrine that emerged from the pages of these debates was strikingly self-effacing. It did not deny the relevance or importance of other important inquiries into the nature of law, but rather assigned them either to some other discipline or to some philosophical approach other than positivism. Thus, in contrast with the Holmesian legacy's hyper-"sociable" but undisciplined practice, analytic legal philosophy at the end of the century tended to be hyper-disciplined and very sophisticated philosophically, but highly "unsociable," keen to keep its intellectual distance from other modes of inquiry.

[7] Later in this same essay, Gardner wrote, "once one has tackled the question of whether a certain law is valid there remain many relatively independent questions to address concerning its meaning, its fidelity to law's purposes, its role in sound legal reasoning, its legal effect, and its social functions, to name a few. To study the nature of law one needs to turn one's mind to the philosophical aspects of these further questions too. To these further questions there is no distinctively 'legal positivist' answer, because legal positivism is a thesis only about the conditions of legal validity" (Gardner 2001, 224). In a similar vein, Leslie Green wrote: "No legal philosopher can be *only* a legal positivist. A complete theory of law requires also an account of what kinds of things could possibly count as merits of law (must law be efficient or elegant as well as just?); of what role law should play in adjudication (should valid law always be applied?); of what claim law has on our obedience (is there a duty to obey?); and also of the pivotal questions of what laws we should have and whether we should have law at all. Legal positivism does not aspire to answer these questions" (Green 2003, concluding paragraph).

In its strictly positivist mode, contemporary analytic jurisprudence insisted on only the narrowest of subject matter, leaving the rest to philosophy in general (and perhaps other cognate disciplines). However, as a result, it offered a disciplined philosophical core only with respect to the narrow questions of conceptual parameters of legal validity. While open to the possibility of a role for wider, more comprehensive philosophy, it offered little thought about how to pursue that larger project. Moreover, it had since its inception also denied itself the resources available from reflection on the long history of philosophical reflection on the nature of law and the central role of law in human life organized into political communities.

There are two ways to view current state of Anglophone jurisprudence that emerged from this survey. We could regard it, in the manner of Budé and Oakeshott, as a chaos, the last stage of a process of intellectual disintegration. However, this does not do justice to the intellectual vigor and the intellectual rigor evident in the current practice of jurisprudence flowing in the two streams and ignores the potential for cross-fertilization that is also evident albeit insufficiently realized. Alternatively, we can view this development as liberating and challenging. It is liberating, because no longer is legal theory dominated by a single dogma. Austinian positivism and its offspring, analytic jurisprudence, no longer define the field and set the agenda for legal philosophy. The field is wide open. As we have seen in Chapter 12, natural-law theory has returned with sophistication, and there is perhaps some hope that jurisprudence inspired by classical common-law theory might also make a contribution. Waldron has argued for a closer partnership between jurisprudence and political theory and others have extended their reflections on the informal foundations of law to social theory in various forms, as we observed in Chapter 11. There is room, and perhaps also an increasing sense of the need, for a genuinely philosophical jurisprudence, one that is not only sensitive to legal practice, but also deeply rooted in the history of philosophical reflection on the place of law in human social life. There is, perhaps, momentum in the direction of practice of the broad-scope jurisprudence of the Renaissance ideal, integrating comprehensive, constitutionally critical, philosophical reflection with appreciation of the complex practical dimensions of social life in general, not limited to the narrow perspective of the *iurispiriti*.

This brings to mind Sir Edward Coke's salutation in the epilogue of his *Institutes of the Lawes of England* (First Part):

> And for a farewell to our Jurisprudent I wish unto him the gladsome light of Jurisprudence, the loveliness of Temperance, the stabilitie of Fortitude, and the soliditie of Justice. (Coke 2003, vol. 2, 744)

Might a genuinely philosophical jurisprudence, while not, perhaps, living up to the full ideal of *vera philosophia*, nevertheless provide hope of shedding some gladsome light on the path ahead?

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