LAW'S EMPIRE

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FOR BETSY

. PREFACE .

We live in and by the law. It makes us what we are: citizens and employees and doctors and spouses and people who own things. It is sword, shield, and menace: we insist on our wage, or refuse to pay our rent, or are forced to forfeit penalties, or are closed up in jail, all in the name of what our abstract and ethereal sovereign, the law, has decreed. And we *argue* about what it has decreed, even when the books that are supposed to record its commands and directions are silent; we act then as if law had muttered its doom, too low to be heard distinctly. We are subjects of law's empire, liegemen to its methods and ideals, bound in spirit while we debate what we must therefore do.

What sense does this make? How can the law command when the law books are silent or unclear or ambiguous? This book sets out in full-length form an answer I have been developing piecemeal, in fits and starts, for several years: that legal reasoning is an exercise in constructive interpretation, that our law consists in the best justification of our legal practices as a whole, that it consists in the narrative story that makes of these practices the best they can be. The distinctive structure and constraints of legal argument emerge, on this view, only when we identify and distinguish the diverse and often competitive dimensions of political value, the different strands woven together in the complex judgment that one interpretation makes law's story better on the whole, all things considered, than any other can. This book refines and expands and illustrates that conception of law. It

excavates its foundations in a more general politics of integrity, community, and fraternity. It tracks its consequences for abstract legal theory and then for a series of concrete cases arising under the common law, statutes, and the Constitution.

I use several arguments, devices, and examples that I have used before, though in each case in different and, I hope, improved form. That repetition is deliberate: it allows many discussions and examples to be briefer here, since readers who wish to pursue them in greater detail, beyond the level necessary for this book's argument, may consult the references I provide to fuller treatment. (Many of these longer discussions are available in *A Matter of Principle,* Cambridge, Mass., and London, 1985.) This book touches, as any general book on legal theory must, on a number of intricate and much-studied issues in general philosophy. I have not wanted to interrupt the general argument by any excursion into these issues, and so I have, whenever possible, taken them up in long textual notes. I have also used long notes for extended discussions of certain arguments particular legal scholars have made.

I have made no effort to discover how far this book alters or replaces positions I defended in earlier work. It might be helpful to notice in advance, however, how it treats two positions that have been much commented upon. In *Taking Rights Seriously* I offered arguments against legal positivism that emphasized the phenomenology of adjudication: I said that judges characteristically feel an obligation to give what I call "gravitational force" to past decisions, and that this felt obligation contradicts the positivist's doctrine of judicial discretion. The present book, particularly in Chapter 4, emphasizes the interpretive rather than the phenomenological defects of positivism, but these are, at bottom, the same failures. I have also argued for many years against the positivist's claim that there cannot be "right" answers to controversial legal questions, but only "different" answers; I have insisted that in most hard cases there are right answers

to be hunted by reason and imagination. Some critics have thought I meant that in these cases one answer could be *proved* right to the satisfaction of everyone, even though I insisted from the start that this is not what I meant, that the question whether we can have reason to think an answer right is different from the question whether it can be demonstrated to be right. In this book I argue that the critics fail to understand what the controversy about right answers is really about—what it must be about if the skeptical thesis, that there are no right answers, is to count as any argument against the theory of law I defend. I claim the controversy is really about morality, not metaphysics, and the no-right-answer thesis, understood as a moral claim, is deeply unpersuasive in morality as well as in law.

I have not tried generally to compare my views with those of other legal and political philosophers, either classical or contemporary, or to point out how far I have been influenced by or have drawn from their work. Nor is this book a survey of recent ideas in jurisprudence. I do discuss at length several fashionable views in legal theory, including "soft" legal positivism, the economic analysis of law, the critical legal studies movement, and the "passive" and "framers' intention" theories of American constitutional law. I discuss these, however, because their claims fall across the argument I am making, and I entirely neglect many legal philosophers whose work is of equal or greater importance.

Frank Kermode, Sheldon Leader, Roy McLees, and John Oakley each read a draft of a substantial part of the book and offered extensive comments. Their help was invaluable: each saved me from serious mistakes, contributed important examples, saw issues that had eluded me, and made me rethink certain arguments. Jeremy Waldron read and improved Chapter 6, and Tom Grey did that for Chapter 2. Most of the notes, though not the long textual ones, were prepared by William Ewald, William Riesman, and, especially, Roy McLees; any value the book has as a source

of references is entirely to their credit. I acknowledge the generous support of the Filomen D'Agostino and Max E. Greenberg Research Fund of New York University School of Law. I am grateful to David Erikson of Xyquest, Inc., who volunteered to make special adaptations to that firm's remarkable word-processing program, XyWrite III, so that I could use it for this book. Peg Anderson of Harvard University Press was exceptionally helpful and long-suffering in tolerating changes beyond the last moment.

I owe more diffuse debts. My colleagues in the jurisprudential community of Great Britain, particularly John Finnis, H. L. A. Hart, Neil MacCormick, Joseph Raz, and William Twining, have been patient tutors to a dense pupil, and my friends at New York University Law School, especially Lewis Kornhauser, William Nelson, David Richards, and Laurence Sager, have been a steady source of imaginative insight and advice. I am grateful, above all, to the powerful critics I have been lucky enough to attract in the past; this book might have been dedicated to them. Replying to criticism has been, for me, the most productive of all work. I hope I shall be lucky again.

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LAW'S EMPIRE

ONE

WHAT IS LAW?

WHY IT MATTERS

It matters how judges decide cases. It matters most to people unlucky or litigious or wicked or saintly enough to find themselves in court. Learned Hand, who was one of America's best and most famous judges, said he feared a lawsuit more than death or taxes. Criminal cases are the most frightening of all, and they are also the most fascinating to the public. But civil suits, in which one person asks compensation or protection from another for some past or threatened harm, are sometimes more consequential than all but the most momentous criminal trials. The difference between dignity and ruin may turn on a single argument that might not have struck another judge so forcefully, or even the same judge on another day. People often stand to gain or lose more by one judge's nod than they could by any general act of Congress or Parliament.

Lawsuits matter in another way that cannot be measured in money or even liberty. There is inevitably a moral dimension to an action at law, and so a standing risk of a distinct form of public injustice. A judge must decide not just who shall have what, but who has behaved well, who has met the responsibilities of citizenship, and who by design or greed or insensitivity has ignored his own responsibilities to others or exaggerated theirs to him. If this judgment is unfair, then the community has inflicted a moral injury on one of its members because it has stamped him in some degree or dimension an outlaw. The injury is gravest when an innocent person is convicted of a crime, but it is substantial enough

when a plaintiff with a sound claim is turned away from court or a defendant leaves with an undeserved stigma.

These are the direct effects of a lawsuit on the parties and their dependents. In Britain and America, among other places, judicial decisions affect a great many other people as well, because the law often becomes what judges say it is. The decisions of the United States Supreme Court, for example, are famously important in this way. That Court has the power to overrule even the most deliberate and popular decisions of other departments of government if it believes they are contrary to the Constitution, and it therefore has the last word on whether and how the states may execute murderers or prohibit abortions or require prayers in the public schools, on whether Congress can draft soldiers to fight a war or force a president to make public the secrets of his office. When the Court decided in 1954 that no state had the right to segregate public schools by race, it took the nation into a social revolution more profound than any other political institution has, or could have, begun.[1]

The Supreme Court is the most dramatic witness for judicial power, but the decisions of other courts are often of great general importance as well. Here are two examples, chosen almost at random, from English legal history. In the nineteenth century English judges declared that a factory worker could not sue his employer for compensation if he was injured through the carelessness of another employee.[2] They said that a worker "assumes the risk" that his "fellow servants" might be careless, and anyway that the worker knows more than the employer about which other workers are careless and perhaps has more influence over them. This rule (which seemed less silly when Darwinian images of capitalism were more popular) much influenced the law of compensation for industrial accidents until it was finally abandoned.[3] In 1975 Lord Widgery, a very influential judge in Britain, laid down rules stipulating how long a Cabinet officer must wait after leaving office to publish descriptions of confidential Cabinet meetings.[4] That decision fixed the

official records that are available to journalists and contemporary historians criticizing a government, and so it affected how government behaves.

DISAGREEMENT ABOUT LAW

Since it matters in these different ways how judges decide cases, it also matters what they think the law is, and when they disagree about this, it matters what kind of disagreement they are having. Is there any mystery about that? Yes, but we need some distinctions to see what it is. Lawsuits always raise, at least in principle, three different kinds of issues: issues of fact, issues of law, and the twinned issues of political morality and fidelity. First, what happened? Did the man at the lathe really drop a wrench on his fellow worker's foot? Second, what is the pertinent law? Does the law allow an injured worker damages from his employer for that sort of injury? Third, if the law denies compensation, is that unjust? If so, should judges ignore the law and grant compensation anyway?

The first of these issues, the issue of fact, seems straightforward enough. If judges disagree over the actual, historical events in controversy, we know what they are disagreeing about and what kind of evidence would put the issue to rest if it were available. The third issue, of morality and fidelity, is very different but also familiar. People often disagree about moral right and wrong, and moral disagreement raises no special problems when it breaks out in court. But what about the second issue, the issue of law? Lawyers and judges seem to disagree very often about the law governing a case; they seem to disagree even about the right tests to use. One judge, proposing one set of tests, says the law favors the school district or the employer, and another, proposing a different set, that it favors the schoolchildren or the employee. If this is really a third, distinct kind of argument, different both from arguments over historical fact and from moral ar-

guments, what kind of argument is it? What is the disagreement about?

Let us call "propositions of law" all the various statements and claims people make about what the law allows or prohibits or entitles them to have. Propositions of law can be very general—"the law forbids states to deny anyone equal protection within the meaning of the Fourteenth Amendment"—or much less general—"the law does not provide compensation for fellow-servant injuries"—or very concrete—"the law requires Acme Corporation to compensate John Smith for the injury he suffered in its employ last February." Lawyers and judges and ordinary people generally assume that some propositions of law, at least, can be true or false.[5] But no one thinks they report the declarations of some ghostly figure: they are not about what Law whispered to the planets. Lawyers, it is true, talk about what the law "says" or whether the law is "silent" about some issue or other. But these are just figures of speech.

Everyone thinks that propositions of law are true or false (or neither) in virtue of other, more familiar kinds of propositions on which these propositions of law are (as we might put it) parasitic. These more familiar propositions furnish what I shall call the "grounds" of law. The proposition that no one may drive over 55 miles an hour in California is true, most people think, because a majority of that state's legislators said "aye" or raised their hands when a text to that effect lay on their desks. It could not be true if nothing of that sort had ever happened; it could not then be true just in virtue of what some ghostly figure had said or what was found on transcendental tablets in the sky.

Now we can distinguish two ways in which lawyers and judges might disagree about the truth of a proposition of law. They might agree about the grounds of law—about when the truth or falsity of other, more familiar propositions makes a particular proposition of law true or false—but disagree about whether those grounds are in fact satisfied in a particular case. Lawyers and judges might agree, for exam-

ple, that the speed limit is 55 in California if the official California statute book contains a law to that effect, but disagree about whether that is the speed limit because they disagree about whether, in fact, the book does contain such a law. We might call this an empirical disagreement about law. Or they might disagree about the grounds of law, about which other kinds of propositions, when true, make a particular proposition of law true. They might agree, in the empirical way, about what the statute books and past judicial decisions have to say about compensation for fellow-servant injuries, but disagree about what the law of compensation actually is because they disagree about whether statute books and judicial decisions exhaust the pertinent grounds of law. We might call that a "theoretical" disagreement about the law.

Empirical disagreement about law is hardly mysterious. People can disagree about what words are in the statute books in the same way they disagree about any other matter of fact. But theoretical disagreement in law, disagreement about law's grounds, is more problematic. Later in this chapter we shall see that lawyers and judges do disagree theoretically. They disagree about what the law really is, on the question of racial segregation or industrial accidents, for example, even when they agree about what statutes have been enacted and what legal officials have said and thought in the past. What kind of disagreement is this? How would we ourselves judge who has the better of the argument?

The general public seems mainly unaware of that problem; indeed it seems mainly unaware of theoretical disagreement about law. The public is much more occupied with the issue of fidelity. Politicians and editorial writers and ordinary citizens argue, sometimes with great passion, about whether judges in the great cases that draw public attention "discover" the law they announce or "invent" it and whether "inventing" law is statecraft or tyranny. But the issue of fidelity is almost never a live one in Anglo-American courts; our judges rarely consider whether they should follow

the law once they have settled what it really is, and the public debate is actually an example, though a heavily disguised one, of theoretical disagreement about law.

In a trivial sense judges unquestionably "make new law" every time they decide an important case. They announce a rule or principle or qualification or elaboration—that segregation is unconstitutional or that workmen cannot recover for fellow-servant injuries, for example—that has never been officially declared before. But they generally offer these "new" statements of law as improved reports of what the law, properly understood, already is. They claim, in other words, that the new statement is required by a correct perception of the true grounds of law even though this has not been recognized previously, or has even been denied. So the public debate about whether judges "discover" or "invent" law is really about whether and when that ambitious claim is true. If someone says the judges discovered the illegality of school segregation, he believes segregation was in fact illegal before the decision that said it was, even though no court had said so before. If he says they invented that piece of law, he means segregation was not illegal before, that the judges changed the law in their decision. This debate would be clear enough—and could easily be settled, at least case by case—if everyone agreed about what law is, if there were no theoretical disagreement about the grounds of law. Then it would be easy to check whether the law before the Supreme Court's decision was indeed what that decision said it was. But since lawyers and judges do disagree in the theoretical way, the debate about whether judges make or find law is part of that disagreement, though it contributes nothing to resolving it because the real issue never rises to the surface.

THE PLAIN-FACT VIEW

Incredibly, our jurisprudence has no plausible theory of theoretical disagreement in law. Legal philosophers are of

course aware that theoretical disagreement is problematic, that it is not immediately clear what kind of disagreement it is. But most of them have settled on what we shall soon see is an evasion rather than an answer. They say that theoretical disagreement is an illusion, that lawyers and judges all actually agree about the grounds of law. I shall call this the "plain fact" view of the grounds of law; here is a preliminary statement of its main claims. The law is only a matter of what legal institutions, like legislatures and city councils and courts, have decided in the past. If some body of that sort has decided that workmen can recover compensation for injuries by fellow workmen, then that is the law. If it has decided the other way, then that is the law. So questions of law can always be answered by looking in the books where the records of institutional decisions are kept. Of course it takes special training to know where to look and how to understand the arcane vocabulary in which the decisions are written. The layman does not have this training or vocabulary, but lawyers do, and it therefore cannot be controversial among them whether the law allows compensation for fellow-servant injuries, for example, unless some of them have made an empirical mistake about what actually was decided in the past. "Law exists as a plain fact, in other words, and what the law is in no way depends on what it should be. Why then do lawyers and judges sometimes appear to be having a theoretical disagreement about the law? Because when they appear to be disagreeing in the theoretical way about what the law is, they are really disagreeing about what it should be. Their disagreement is really over issues of morality and fidelity, not law."

The popularity of this view among legal theorists helps explain why laymen, when they think about courts, are more concerned with fidelity to law than with what law is. If judges divide in some great case, and their disagreement cannot be over any question of law because law is a matter of plain fact easily settled among knowledgeable lawyers, one side must be disobeying or ignoring the law, and this must

be the side supporting a decision that is novel in the trivial sense. So the question of fidelity is the question that demands public discussion and the attention of the watchful citizen. The most popular opinion, in Britain and the United States, insists that judges should always, in every decision, follow the law rather than try to improve upon it. They may not like the law they find—it may require them to evict a widow on Christmas eve in a snowstorm—but they must enforce it nevertheless. Unfortunately, according to this popular opinion, some judges do not accept that wise constraint; covertly or even nakedly, they bend the law to their own purposes or politics. These are the bad judges, the usurpers, destroyers of democracy.

That is the most popular answer to the question of fidelity, but it is not the only one. Some people take the contrary view, that judges should try to improve the law whenever they can, that they should always be political in the way the first answer deplores. The bad judge, on the minority view, is the rigid "mechanical" judge who enforces the law for its own sake with no care for the misery or injustice or inefficiency that follows. The good judge prefers justice to law.

Both versions of the layman's view, the "conservative" and the "progressive," draw on the academic thesis that law is a matter of plain fact, but in certain ways the academic thesis is more sophisticated. Most laymen assume that there is law in the books decisive of every issue that might come before a judge. The academic version of the plain-fact view denies this. The law may be silent on the issue in play, it insists, because no past institutional decision speaks to it either way. Perhaps no competent institution has ever decided either that workmen can recover for fellow-servant injuries or that they cannot. Or the law may be silent because the pertinent institutional decision stipulated only vague guidelines by declaring, for example, that a landlord must give a widow a "reasonable" time to pay her rent. In these circumstances, according to the academic version, no way

of deciding can count as enforcing rather than changing the law. Then the judge has no option but to exercise a discretion to make new law by filling gaps where the law is silent and making it more precise where it is vague.

None of this qualifies the plain-fact view that law is always a matter of historical fact and never depends on morality. It only adds that on some occasions trained lawyers may discover that there is no law at all. Every question about what the law is still has a flat historical answer, though some have negative answers. Then the question of fidelity is replaced with a different question, equally distinct from the question of law, which we may call the question of repair. What should judges do in the absence of law? This new political question leaves room for a division of opinion very like the original division over the question of fidelity. For judges who have no choice but to make new law may bring different ambitions to that enterprise. Should they fill gaps cautiously, preserving as much of the spirit of the surrounding law as possible? Or should they do so democratically, trying to reach the result they believe represents the will of the people? Or adventurously, trying to make the resulting law as fair and wise as possible, in their opinion? Each of these very different attitudes has its partisans in law school classrooms and after-dinner speeches at professional organizations. These are the banners, frayed with service, of jurisprudential crusades.

Some academic lawyers draw especially radical conclusions from the sophisticated version of the plain-fact view of law.[6] They say that past institutional decisions are not just occasionally but almost always vague or ambiguous or incomplete, and that they are often inconsistent or even incoherent as well. They conclude that there is never really law on any topic or issue, but only rhetoric judges use to dress up decisions actually dictated by ideological or class preference. The career I have described, from the layman's trusting belief that law is everywhere to the cynic's mocking discovery that it is nowhere at all, is the natural course of conviction

once we accept the plain-fact view of law and its consequent claim that theoretical disagreement is only disguised politics. For the more we learn about law, the more we grow convinced that nothing important about it is wholly uncontroversial.

The plain-fact view is not, I must add, accepted by everyone. It is very popular among laymen and academic writers whose specialty is the philosophy of law. But it is rejected in the accounts thoughtful working lawyers and judges give of their work. They may endorse the plain-fact picture as a piece of formal jurisprudence when asked in properly grave tones what law is. But in less guarded moments they tell a different and more romantic story. They say that law is instinct rather than explicit in doctrine, that it can be identified only by special techniques best described impressionistically, even mysteriously. They say that judging is an art not a science, that the good judge blends analogy, craft, political wisdom, and a sense of his role into an intuitive decision, that he "sees" law better than he can explain it, so his written opinion, however carefully reasoned, never captures his full insight.[7]

Very often they add what they believe is a modest disclaimer. They say there are no right answers but only different answers to hard questions of law, that insight is finally subjective, that it is only what seems right, for better or worse, to the particular judge on the day. But this modesty in fact contradicts what they say first, for when judges finally decide one way or another they think their arguments better than, not merely different from, arguments the other way; though they may think this with humility, wishing their confidence were greater or their time for decision longer, this is nevertheless their belief. In that and other ways the romantic "craft" view is unsatisfactory; it is too unstructured, too content with the mysteries it savors, to count as any developed theory of what legal argument is about. We need to throw discipline over the idea of law as craft, to see how the

structure of judicial instinct is different from other convictions people have about government and justice.

I have not yet offered reasons for my claim that the academically dominant plain-fact view of law is an evasion rather than a theory. We need actual examples of theoretical disagreement, which I shall soon supply. But if I am right, we are in poor case. If laymen, teachers of jurisprudence, working lawyers, and judges have no good answer to the question how theoretical disagreement is possible and what it is about, we lack the essentials of a decent apparatus for intelligent and constructive criticism of what our judges do. No department of state is more important than our courts, and none is so thoroughly misunderstood by the governed. Most people have fairly clear opinions about how congressmen or prime ministers or presidents or foreign secretaries should carry out their duties, and shrewd opinions about how most of these officials actually do behave. But popular opinion about judges and judging is a sad affair of empty slogans, and I include the opinions of many working lawyers and judges when they are writing or talking about what they do. All this is a shame, and it is only part of the damage. For we take an interest in law not only because we use it for our own purposes, selfish or noble, but because law is our most structured and revealing social institution. If we understand the nature of our legal argument better, we know better what kind of people we are.

A THRESHOLD OBJECTION

This book is about theoretical disagreement in law. It aims to understand what kind of disagreement this is and then to construct and defend a particular theory about the proper grounds of law. But of course there is more to legal practice than arguments about law, and this book neglects much that legal theory also studies. There is very little here about issues

of fact, for example. It is important how judges decide whether a workman has a legal right to damages when a fellow employee drops a wrench on his foot, but it is also important how a judge or a jury decides whether the workman (as his employer claims) dropped the wrench on his own foot instead. Nor do I discuss the practical politics of adjudication, the compromises judges must sometimes accept, stating the law in a somewhat different way than they think most accurate in order to attract the votes of other judges, for instance. I am concerned with the issue of law, not with the reasons judges may have for tempering their statements of what it is. My project is narrow in a different way as well. It centers on formal adjudication, on judges in black robes, but these are not the only or even the most important actors in the legal drama. A more complete study of legal practice would attend to legislators, policemen, district attorneys, welfare officers, school board chairmen, a great variety of other officials, and to people like bankers and managers and union officers, who are not called public officials but whose decisions also affect the legal rights of their fellow citizens.

Some critics will be anxious to say at this point that our project is not only partial in these various ways but wrong, that we will misunderstand legal process if we pay special attention to lawyers' doctrinal arguments about what the law is. They say these arguments obscure—perhaps they aim to obscure—the important social function of law as ideological force and witness. A proper understanding of law as a social phenomenon demands, these critics say, a more scientific or sociological or historical approach that pays no or little attention to jurisprudential puzzles over the correct characterization of legal argument. We should pursue, they think, very different questions, like these: How far, and in what way, are judges influenced by class consciousness or economic circumstance? Did the judicial decisions of nineteenth-century America play an important part in forming the distinctive American version of capitalism? Or were those decisions only mirrors reflecting change and conflict,

but neither promoting the one nor resolving the other? We will be diverted from these serious questions, the critics warn, if we are drawn into philosophical arguments about whether and why propositions of law can be controversial, like anthropologists sucked into the theological disputes of some ancient and primitive culture.

This objection fails by its own standards. It asks for social realism, but the kind of theory it recommends is unable to provide it. Of course, law is a social phenomenon. But its 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. This crucial argumentative aspect of legal practice can be studied in two ways or from two points of view. One is the external point of view of the sociologist or historian, who asks why certain patterns of legal argument develop in some periods or circumstances rather than others, for example. The other is the internal point of view of those who make the claims. Their interest is not finally historical, though they may think history relevant; it is practical, in exactly the way the present objection ridicules. They do not want predictions of the legal claims they will make but arguments about which of these claims is sound and why; they want theories not about how history and economics have shaped their consciousness but about the place of these disciplines in argument about what the law requires them to do or have.

Both perspectives on law, the external and the internal, are essential, and each must embrace or take account of the

other. The participant's point of view envelops the historian's when some claim of law depends on a matter of historical fact: when the question whether segregation is illegal, for example, turns on the motives either of the statesmen who wrote the Constitution or of those who segregated the schools.[8] The historian's perspective includes the participant's more pervasively, because the historian cannot understand law as an argumentative social practice, even enough to reject it as deceptive, until he has a participant's understanding, until he has his own sense of what counts as a good or bad argument within that practice. We need a social theory of law, but it must be jurisprudential just for that reason. Theories that ignore the structure of legal argument for supposedly larger questions of history and society are therefore perverse. They ignore questions about the internal character of legal argument, so their explanations are impoverished and defective, like innumerate histories of mathematics, whether they are written in the language of Hegel or of Skinner. It was Oliver Wendell Holmes who argued most influentially, I think, for this kind of "external" legal theory;[9] the depressing history of social-theoretic jurisprudence in our century warns us how wrong he was. We wait still for illumination, and while we wait, the theories grow steadily more programmatic and less substantive, more radical in theory and less critical in practice.

This book takes up the internal, participants' point of view; it tries to grasp the argumentative character of our legal practice by joining that practice and struggling with the issues of soundness and truth participants face. We will study formal legal argument from the judge's viewpoint, not because only judges are important or because we understand everything about them by noticing what they say, but because judicial argument about claims of law is a useful paradigm for exploring the central, propositional aspect of legal practice. Citizens and politicians and law teachers also worry and argue about what the law is, and I might have taken their arguments as our paradigms rather than the

judge's. But the structure of judicial argument is typically more explicit, and judicial reasoning has an influence over other forms of legal discourse that is not fully reciprocal.

THE REAL WORLD

We need relief from the daunting abstraction of these introductory remarks. I shall try to show how the plain-fact thesis distorts legal practice, and I begin by describing some actual cases decided by judges in the United States and Britain. These are all famous cases, at least among law students, and continue to be discussed in classes. I set them out here and together for several reasons. They introduce certain technical legal terms to readers who have had no legal training. They provide extended examples for the various arguments and discussions of later chapters. I hope they will provide, in a more general way, some sense of the actual tone and texture of legal argument. This last reason is the most important, for in the end all my arguments are hostage to each reader's sense of what does and can happen in court.

Elmer's Case

Elmer murdered his grandfather—he poisoned him—in New York in 1882.[10] He knew that his grandfather's existing will left him the bulk of the estate, and he suspected that the old man, who had recently remarried, would change the will and leave him nothing. Elmer's crime was discovered; he was convicted and sentenced to a term of years in jail. Was he legally entitled to the inheritance his grandfather's last will provided? The residuary legatees under the will, those entitled to inherit if Elmer had died before his grandfather, were the grandfather's daughters. Their first names are not reported, so I will call them Goneril and Regan. They sued the administrator of the will, demanding that the property now

go to them instead of Elmer. They argued that since Elmer had murdered the testator, their father, the law entitled Elmer to nothing.

The law pertaining to wills is for the most part set out in special statutes, often called statutes of wills, which stipulate the form a will must take to be considered valid in law: how many and what kinds of witnesses must sign, what the mental state of the testator must be, how a valid will, once executed, may be revoked or changed by the testator, and so forth. The New York statute of wills, like most others in force at that time, said nothing explicit about whether someone named in a will could inherit according to its terms if he had murdered the testator. Elmer's lawyer argued that since the will violated none of the explicit provisions of the statute it was valid, and since Elmer was named in a valid will he must inherit. He said that if the court held for Goneril and Regan, it would be changing the will and substituting its own moral convictions for the law. The judges of the highest court of New York all agreed that their decision must be in accordance with the law. None denied that if the statute of wills, properly interpreted, gave the inheritance to Elmer, they must order the administrator to give it to him. None said that in that case the law must be reformed in the interests of justice. They disagreed about the correct result in the case, but their disagreement—or so it seems from reading the opinions they wrote—was about what the law actually was, about what the statute required when properly read.

How can people who have the text of a statute in front of them disagree about what it actually means, about what law it has made? We must draw a distinction between two senses of the word "statute." It can describe a physical entity of a certain type, a document with words printed on it, the very words congressmen or members of Parliament had in front of them when they voted to enact that document. But it can also be used to describe the law created by enacting that document, which may be a much more complex matter. Consider the difference between a poem conceived as a series

of words that can be spoken or written and a poem conceived as the expression of a particular metaphysical theory or point of view. Literary critics all agree about what poem "Sailing to Byzantium" is in the first sense. They agree it is the series of words designated as that poem by W. B. Yeats. But they nevertheless disagree about what the poem is in the second sense, about what the poem really says or means. They disagree about how to construct the "real" poem, the poem in the second sense, from the text, the poem in the first sense.

In much the same way, judges before whom a statute is laid need to construct the "real" statute—a statement of what difference the statute makes to the legal rights of various people—from the text in the statute book. Just as literary critics need a working theory, or at least a style of interpretation, in order to construct the poem behind the text, so judges need something like a theory of legislation to do this for statutes. This may seem evident when the words in the statute book suffer from some semantic defect; when they are ambiguous or vague, for example. But a theory of legislation is also necessary when these words are, from the linguistic point of view, impeccable. The words of the statute of wills that figured in Elmer's case were neither vague nor ambiguous. The judges disagreed about the impact of these words on the legal rights of Elmer, Goneril, and Regan because they disagreed about how to construct the real statute in the special circumstances of that case.

The dissenting opinion, written by Judge Gray, argued for a theory of legislation more popular then than it is now. This is sometimes called a theory of "literal" interpretation, though that is not a particularly illuminating description. It proposes that the words of a statute be given what we might better call their acontextual meaning, that is, the meaning we would assign them if we had no special information about the context of their use or the intentions of their author. This method of interpretation requires that no context-dependent and unexpressed qualifications be made to

general language, so Judge Gray insisted that the real statute, constructed in the proper way, contained no exceptions for murderers. He voted for Elmer.

Law students reading his opinion now are mostly contemptuous of that way of constructing a statute from a text; they say it is an example of mechanical jurisprudence. But there was nothing mechanical about Judge Gray's argument. There is much to be said (some of which he did say) for his method of constructing a statute, at least in the case of a statute of wills. Testators should know how their wills will be treated when they are no longer alive to offer fresh instructions. Perhaps Elmer's grandfather would have preferred his property to go to Goneril and Regan in the event that Elmer poisoned him. But perhaps not: he might have thought that Elmer, even with murder on his hands, was still a better object for his generosity than his daughters. It might be wiser in the long run for judges to assure testators that the statute of wills will be interpreted in the so-called literal way, so that testators can make any arrangements they wish, confident that their dispositions, however amusing, will be respected. Besides, if Elmer loses his inheritance just because he is a murderer, then that is a further punishment, beyond his term in jail, for his crime. It is an important principle of justice that the punishment for a particular crime must be set out in advance by the legislature and not increased by judges after the crime has been committed. All this (and more) can be said on behalf of Judge Gray's theory about how to read a statute of wills.

Judge Earl, however, writing for the majority, used a very different theory of legislation, which gives the legislators' *intentions* an important influence over the real statute. "It is a familiar canon of construction," Earl wrote, "that a thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute, unless it be within the intention of the makers."[11] (Notice how he relies on the distinction between the text,

which he calls the "letter" of the statute, and the real statute, which he calls the "statute" itself.) It would be absurd, he thought, to suppose that the New York legislators who originally enacted the statute of wills intended murderers to inherit, and for that reason the real statute they enacted did not have that consequence.

We must take some care in stating what Judge Earl meant about the role intention should play in constructing statutes. He did not mean that a statute can have no consequence the legislators did not have in mind. This is plainly too strong as a general rule: no legislator can have in mind all the consequences of any statute he votes for. The New York legislators could not have contemplated that people might bequeath computers, but it would be absurd to conclude that the statute does not cover such bequests. Nor did he mean only that a statute can contain nothing that the legislators intended that it not contain. This seems more plausible, but it is too weak to be of any use in Elmer's case. For it seems likely that the New York legislators did not have the case of murderers in mind at all. They did not intend that murderers inherit, but neither did they intend that they should not. They had no active intention either way. Earl meant to rely on a principle we might call intermediate between these excessively strong and weak principles: he meant that a statute does not have any consequence the legislators would have rejected if they had contemplated it.[12]

Judge Earl did not rely only on his principle about legislative intention; his theory of legislation contained another relevant principle. He said that statutes should be constructed from texts not in historical isolation but against the background of what he called general principles of law: he meant that judges should construct a statute so as to make it conform as closely as possible to principles of justice assumed elsewhere in the law. He offered two reasons. First, it is sensible to assume that legislators have a general and diffuse intention to respect traditional principles of justice unless they clearly indicate the contrary. Second, since a statute forms

part of a larger intellectual system, the law as a whole, it should be constructed so as to make that larger system coherent in principle. Earl argued that the law elsewhere respects the principle that no one should profit from his own wrong, so the statute of wills should be read to deny inheritance to someone who has murdered to obtain it.

Judge Earl's views prevailed. They attracted four other judges to his side, while Judge Gray was able to find only one ally. So Elmer did not receive his inheritance. I shall use this case as an illustration of many different points, in the argument that follows, but the most important is this: the dispute about Elmer was not about whether judges should follow the law or adjust it in the interests of justice. At least it was not if we take the opinions I described at face value and (as I shall argue later) we have no justification for taking them in any other way. It was a dispute about what the law was, about what the real statute the legislators enacted really said.

The Snail Darter Case

I now describe a much more recent case, though more briefly, in order to show that this kind of dispute continues to occupy judges.[13] In 1973, during a period of great national concern about conservation, the United States Congress enacted the Endangered Species Act. It empowers the secretary of the interior to designate species that would be endangered, in his opinion, by the destruction of some habitat he considers crucial to its survival and then requires all agencies and departments of the government to take "such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species."[14]

A group of conservationists based in Tennessee had been opposing dam construction projects of the Tennessee Valley Authority, not because of any threat to species but because these projects were altering the geography of the area by converting free-flowing streams into narrow, ugly ditches to

produce an unneeded increase (or so the conservationists believed) in hydroelectric power. The conservationists discovered that one almost finished TVA dam, costing over one hundred million dollars, would be likely to destroy the only habitat of the snail darter, a three-inch fish of no particular beauty or biological interest or general ecological importance. They persuaded the secretary to designate the snail darter as endangered and brought proceedings to stop the dam from being completed and used.

The authority argued that the statute should not be construed to prevent the completion or operation of any project substantially completed when the secretary made his order. It said the phrase "actions authorized, funded, or carried out" should be taken to refer to beginning a project, not completing projects begun earlier. It supported its claim by pointing to various acts of Congress, all taken after the secretary had declared that completing the dam would destroy the snail darter, which suggested that Congress wished the dam to be completed notwithstanding that declaration. Congress had specifically authorized funds for continuing the project after the secretary's designation, and various of its committees had specifically and repeatedly declared that they disagreed with the secretary, accepted the authority's interpretation of the statute, and wished the project to continue.

The Supreme Court nevertheless ordered that the dam be halted, in spite of the great waste of public funds. (Congress then enacted a further statute establishing a general procedure for exemption from the act, based on findings by a review board.)[15] Chief Justice Warren Burger wrote an opinion for the majority of the justices. He said, in words that recall Judge Gray's opinion in Elmer's case, that when the text is clear the Court has no right to refuse to apply it just because it believes the results silly. Times change, however, and the chief justice's opinion was in one respect very different from Judge Gray's. Burger recognized the relevance of congressional intention to the decision what statute Congress had

made. But he did not accept Earl's principle about the *way* in which congressional intention is relevant. He refused to consider the counterfactual test that Earl's analysis made decisive. "It is not for us," he said, "to speculate, much less act, on whether Congress would have altered its stance had the specific events of this case been anticipated."[16]

Instead he adopted what I called, in discussing Earl's opinion, the excessively weak version of the idea that judges constructing a statute must respect the legislature's intentions. That version comes to this: if the acontextual meaning of the words in the text is clear—if the words "carry out" would normally include continuing as well as beginning a project—then the Court must assign those words that meaning unless it can be shown that the legislature actually intended the opposite result. The legislative history leading up to the enactment of the Endangered Species Act did not warrant that conclusion, he said, because Congress plainly wanted to give endangered species a high order of protection even at great cost to other social goals, and it is certainly possible, even if not probable, that legislators with that general aim would want the snail darter saved even at the amazing expense of a wasted dam. He rejected the evidence of the later committee reports and the actions of Congress in approving funding for the continuation of the dam, which might have been thought to indicate an actual intention not to sacrifice the dam to this particular species. The committees that had reported in favor of the dam were not the same as the committees that had sponsored the act in the first place, he said, and congressmen often vote on appropriations without fully considering whether the proposed expenditures are legal under past congressional decisions.

Justice Lewis Powell wrote a dissent for himself and one other justice. He said that the majority's decision constructed an absurd real statute from the text of the Endangered Species Act. "It is not our province," he said, "to rectify policy or political judgments by the Legislative Branch, however egregiously they may disserve the public inter-

est. But where the statutory and legislative history, as in this case, need not be construed to reach such a result, I view it as the duty of this Court to adopt a permissible construction that accords with some modicum of common sense and the public weal."[17] This states yet another theory of legislation, another theory of how the legislature's intentions affect the statute behind the text, and it is very different from Burger's theory. Burger said that the acontextual meaning of the text should be enforced, no matter how odd or absurd the consequences, unless the court discovered strong evidence that Congress actually intended the opposite. Powell said that the courts should accept an absurd result only if they find compelling evidence that *it* was intended. Burger's theory is Gray's, though in a less rigid form that gives some role to legislative intention. Powell's theory is like Earl's, though in this case it substitutes common sense for the principles of justice found elsewhere in the law.

Once again, if we take the opinions of these two justices at face value, they did not disagree about any historical matters of fact. They did not disagree about the state of mind of the various congressmen who joined in enacting the Endangered Species Act. Both justices assumed that most congressmen had never considered whether the act might be used to halt an expensive dam almost completed. Nor did they disagree over the question of fidelity. Both accepted that the Court should follow the law. They disagreed about the question of law; they disagreed about how judges should decide what law is made by a particular text enacted by Congress when the congressmen had the kinds of beliefs and intentions both justices agreed they had in this instance.

McLoughlin

Elmer's case and the snail darter case both arose under a statute. The decision in each case depended upon the best construction of a real statute from a particular legislative text. In many lawsuits, however, the plaintiff appeals not to

any statute but to earlier decisions by courts. He argues that the judge in his case should follow the rules laid down in these earlier cases, which he claims require a verdict for him. *McLoughlin* was of this sort.[18]

Mrs. McLoughlin's husband and four children were injured in an automobile accident in England at about 4 P.M. on October 19, 1973. She heard about the accident at home from a neighbor at about 6 P.M. and went immediately to the hospital, where she learned that her daughter was dead and saw the serious condition of her husband and other children. She suffered nervous shock and later sued the defendant driver, whose negligence had caused the accident, as well as other parties who were in different ways involved, for compensation for her emotional injuries. Her lawyer pointed to several earlier decisions of English courts awarding compensation to people who had suffered emotional injury on seeing serious injury to a close relative. But in all these cases the plaintiff had either been at the scene of the accident or had arrived within minutes. In a 1972 case, for example, a wife recovered—won compensation—for emotional injury; she had come upon the body of her husband immediately after his fatal accident.[19] In 1967 a man who was not related to any of the victims of a train crash worked for hours trying to rescue victims and suffered nervous shock from the experience. He was allowed to recover.[20] Mrs. McLoughlin's lawyer relied on these cases as precedents, decisions which had made it part of the law that people in her position are entitled to compensation.

British and American lawyers speak of the doctrine of precedent; they mean the doctrine that decisions of earlier cases sufficiently like a new case should be repeated in the new case. They distinguish, however, between what we might call a strict and a relaxed doctrine of precedent. The strict doctrine *obliges* judges to follow the earlier decisions of certain other courts (generally courts above them but sometimes at the same level in the hierarchy of courts in their jurisdiction), even if they believe those decisions to have

been wrong. The exact form of the strict doctrine varies from place to place; it is different in the United States and Britain, and it differs from state to state within the United States. According to most lawyers' view of the strict doctrine in Britain, the Court of Appeal, which is just below the House of Lords in authority, has no choice but to follow its own past decisions, but American lawyers deny that the comparable courts in their hierarchy are constrained in this way. Lawyers within a particular jurisdiction sometimes disagree about the details, at least, of the strict doctrine as it applies to them: most American lawyers think that the lower federal courts are absolutely bound to follow past decisions of the Supreme Court, but that view is challenged by some.[21]

The relaxed doctrine of precedent, on the other hand, demands only that a judge give some weight to past decisions on the same issue, that he must follow these unless he thinks them sufficiently wrong to outweigh the initial presumption in their favor. This relaxed doctrine may embrace the past decisions not only of courts above him or at the same level in his jurisdiction but of courts in other states or countries. Obviously, much depends on how strong the initial presumption is taken to be. Once again, opinion varies among lawyers from jurisdiction to jurisdiction, but it is also likely to vary within a jurisdiction to a greater extent than opinion about the dimensions of the strict doctrine. Any judge is likely to give more weight to past decisions of higher than of lower courts in his own jurisdiction, however, and to past decisions of all these courts than to courts of other jurisdictions. He may well give more weight to recent decisions of any court than to earlier ones, more weight to decisions written by powerful or famous judges than to those written by mediocre judges, and so forth. Two decades ago the House of Lords declared that the strict doctrine of precedent does not require it to follow its own past decisions[22]—before that declaration British lawyers had assumed that the strict doctrine did require this—but the House nevertheless gives

great weight to its own past decisions, more than it gives to past decisions of courts lower in the British hierarchy, and much more than it gives to decisions of American courts.

Differences of opinion about the character of the strict doctrine and the force of the relaxed doctrine explain why some lawsuits are controversial. Different judges in the same case disagree about whether they are obliged to follow some past decision on exactly the question of law they now face. That was not, however, the nerve of controversy in *McLoughlin.* Whatever view lawyers take of the character and force of precedent, the doctrine applies only to past decisions sufficiently like the present case to be, as lawyers say, "in point." Sometimes one side argues that certain past decisions are very much in point, but the other side replies that these decisions are "distinguishable," meaning they are different from the present case in some way that exempts them from the doctrine. The judge before whom Mrs. McLoughlin first brought her suit, the trial judge, decided that the precedents her lawyer cited, about others who had recovered compensation for emotional injury suffered when they saw accident victims, were distinguishable because in all those cases the shock had occurred at the scene of the accident while she was shocked some two hours later and in a different place. Of course not every difference in the facts of two cases makes the earlier one distinguishable: no one could think it mattered if Mrs. McLoughlin was younger than the plaintiffs in the earlier cases.

The trial judge thought that suffering injury away from the scene was an important difference because it meant that Mrs. McLoughlin's injury was not "foreseeable" in the way that the injury to the other plaintiffs had been. Judges in both Britain and America follow the common law principle that people who act carelessly are liable only for reasonably foreseeable injuries to others, injuries a reasonable person would anticipate if he reflected on the matter. The trial judge was bound by the doctrine of precedent to recognize that emotional injury to close relatives at the scene of an ac-

cident is reasonably foreseeable, but he said that injury to a mother who saw the results of the accident later is not. So he thought he could distinguish the putative precedents in that way and decided against Mrs. McLoughlin's claim.

She appealed his decision to the next highest court in the British hierarchy, the Court of Appeal.[23] That court affirmed the trial judge's decision—it refused her appeal and let his decision stand—but not on the argument he had used. The Court of Appeal said it *was* reasonably foreseeable that a mother would rush to the hospital to see her injured family and that she would suffer emotional shock from seeing them in the condition Mrs. McLoughlin found. That court distinguished the precedents not on that ground but for the very different reason that what it called "policy" justified a distinction. The precedents had established liability for emotional injury in certain restricted circumstances, but the Court of Appeal said that recognizing a larger area of liability, embracing injuries to relatives not at the scene, would have a variety of adverse consequences for the community as a whole. It would encourage many more lawsuits for emotional injuries, and this would exacerbate the problem of congestion in the courts. It would open new opportunities for fraudulent claims by people who had not really suffered serious emotional damage but could find doctors to testify that they had. It would increase the cost of liability insurance, making it more expensive to drive and perhaps preventing some poor people from driving at all. The claims of those who had suffered genuine emotional injury away from the scene would be harder to prove, and the uncertainties of litigation might complicate their condition and delay their recovery.

Mrs. McLoughlin appealed the decision once more, to the House of Lords, which reversed the Court of Appeal and ordered a new trial.[24] The decision was unanimous, but their lordships disagreed about what they called the true state of the law. Several of them said that policy reasons, of the sort described by the Court of Appeal, might in some circum-

stances be sufficient to distinguish a line of precedents and so justify a judge's refusal to extend the principle of those cases to a larger area of liability. But they did not think these policy reasons were of sufficient plausibility or merit in Mrs. McLoughlin's case. They did not believe that the risk of a "flood" of litigation was sufficiently grave, and they said the courts should be able to distinguish genuine from fraudulent claims even among those whose putative injury was suffered several hours after the accident. They did not undertake to say when good policy arguments might be available to limit recovery for emotional injury; they left it an open question, for example, whether Mrs. McLoughlin's sister in Australia (if she had one) could recover for the shock she might have in reading about the accident weeks or months later in a letter.

Two of their lordships took a very different view of the law. They said it would be wrong for courts to deny recovery to an otherwise meritorious plaintiff for the *kinds* of reasons the Court of Appeal had mentioned and which the other law lords had said might be sufficient in some circumstances. The precedents should be regarded as distinguishable, they said, only if the moral *principles* assumed in the earlier cases for some reason did not apply to the plaintiff in the same way. And once it is conceded that the damage to a mother in the hospital hours after an accident is reasonably foreseeable to a careless driver, then no difference in moral principle can be found between the two cases. Congestion in the courts or a rise in the price of automobile liability insurance, they said, however inconvenient these might be to the community as a whole, cannot justify refusing to enforce individual rights and duties that have been recognized and enforced before. They said these were the wrong sorts of arguments to make to judges as arguments of law, however cogent they might be if addressed to legislators as arguments for a change in the law. (Lord Scarman's opinion was particularly clear and strong on this point.) The argument among their

lordships revealed an important difference of opinion about the proper role of considerations of policy in deciding what result parties to a lawsuit are entitled to have.

Brown

After the American Civil War the victorious North amended the Constitution to end slavery and many of its incidents and consequences. One of these amendments, the Fourteenth, declared that no state might deny any person the "equal protection of the laws." After Reconstruction the southern states, once more in control of their own politics, segregated many public facilities by race. Blacks had to ride in the back of the bus and were allowed to attend only segregated schools with other blacks. In the famous case of *Plessy v. Ferguson*[25] the defendant argued, ultimately before the Supreme Court, that these practices of segregation automatically violated the equal protection clause. The Court rejected their claim; it said that the demands of that clause were satisfied if the states provided separate but equal facilities and that the fact of segregation alone did not make facilities automatically unequal.

In 1954 a group of black schoolchildren in Topeka, Kansas, raised the question again.[26] A great deal had happened to the United States in the meantime—a great many blacks had died for that country in a recent war, for example—and segregation seemed more deeply wrong to more people than it had when *Plessy* was decided. Nevertheless, the states that practiced segregation resisted integration fiercely, particularly in the schools. Their lawyers argued that since *Plessy* was a decision by the Supreme Court, that precedent had to be respected. This time the Court decided for the black plaintiffs. Its decision was unexpectedly unanimous, though the unanimity was purchased by an opinion, written by Chief Justice Earl Warren, that was in many ways a compromise. He did not reject the "separate but equal" formula

outright; instead he relied on controversial sociological evidence to show that racially segregated schools could not be equal, for that reason alone. Nor did he say flatly that the Court was now overruling *Plessy.* He said only that *if* the present decision was inconsistent with *Plessy,* then that earlier decision was being overruled. The most important compromise, for practical purposes, was in the design of the remedy the opinion awarded the plaintiffs. It did not order the schools of the southern states to be desegregated immediately, but only, in a phrase that became an emblem of hypocrisy and delay, "with all deliberate speed."[27]

The decision was very controversial, the process of integration that followed was slow, and significant progress required many more legal, political, and even physical battles. Critics said that segregation, however deplorable as a matter of political morality, is not unconstitutional.[28] They pointed out that the phrase "equal protection" does not in itself decide whether segregation is forbidden or not, that the particular congressmen and state officials who drafted, enacted, and ratified the Fourteenth Amendment were well aware of segregated education and apparently thought their amendment left it perfectly legal, and that the Court's decision in *Plessy* was an important precedent of almost ancient lineage and ought not lightly be overturned. These were arguments about the proper grounds of constitutional law, not arguments of morality or repair: many who made them agreed that segregation was immoral and that the Constitution would be a better document if it had forbidden it. Nor were the arguments of those who agreed with the Court arguments of morality or repair. If the Constitution did not as a matter of law prohibit official racial segregation, then the decision in *Brown* was an illicit constitutional amendment, and few who supported the decision thought they were supporting that. This case, like our other sample cases, was fought over the question of law. Or so it seems from the opinion, and so it seemed to those who fought it.

SEMANTIC THEORIES OF LAW

Propositions and Grounds of Law

Earlier in this chapter I described what I called the plain-fact view of law. This holds that law depends only on matters of plain historical fact, that the only sensible disagreement about law is empirical disagreement about what legal institutions have actually decided in the past, that what I called theoretical disagreement is illusory and better understood as argument not about what law is but about what it should be. The sample cases seem counterexamples to the plain-fact view: the arguments in these cases seem to be about law, not morality or fidelity or repair. We must therefore put this challenge to the plain-fact view: why does it insist that appearance is here an illusion? Some legal philosophers offer a surprising answer. They say that theoretical disagreement about the grounds of law must be a pretense because the very meaning of the word "law" makes law depend on certain specific criteria, and that any lawyer who rejected or challenged those criteria would be speaking self-contradictory nonsense.

We follow shared rules, they say, in using any word: these rules set out criteria that supply the word's meaning. Our rules for using "law" tie law to plain historical fact. It does not follow that all lawyers are aware of these rules in the sense of being able to state them in some crisp and comprehensive form. For we all follow rules given by our common language of which we are not fully aware. We all use the word "cause," for example, in what seems to be roughly the same way—we agree about which physical events have caused others once we all know the pertinent facts—yet most of us have no idea of the criteria we use in making these judgments, or even of the sense in which we are using criteria at all. It falls to philosophy to explicate these for us. This may be a matter of some difficulty, and philosophers may

well disagree. Perhaps no set of criteria for using the word "cause" fits ordinary practice exactly, and the question will then be which set provides the overall best fit or best fits the central cases of causation. A philosopher's account of the concept of causation must not only fit, moreover, but must also be philosophically respectable and attractive in other respects. It must not explain our use of causation in a question-begging way, by using that very concept in its description of how we use it, and it must employ a sensible ontology. We would not accept an account of the concept of causation that appealed to causal gods resident in objects. So, according to the view I am now describing, with the concept of law. We all use the same factual criteria in framing, accepting, and rejecting statements about what the law is, but we are ignorant of what these criteria are. Philosophers of law must elucidate them for us by a sensitive study of how we speak. They may disagree among themselves, but that alone casts no doubt on their common assumption, which is that we do share some set of standards about how "law" is to be used.

Philosophers who insist that lawyers all follow certain linguistic criteria for judging propositions of law, perhaps unawares, have produced theories identifying these criteria. I shall call these theories collectively semantic theories of law, but that name itself requires some elaboration. For a long time philosophers of law packaged their products as definitions of law. John Austin, for example, whose theory I shall shortly describe, said he was explicating the "meaning" of law. When philosophers of language developed more sophisticated theories of meaning, legal philosophers became more wary of definitions and said, instead, that they were describing the "use" of legal concepts, by which they meant, in our vocabulary, the circumstances in which propositions of law are regarded by all competent lawyers as true or as false. This was little more than a change in packaging, I think; in any case I mean to include "use" theories in the group of seman-

tic theories of law, as well as the earlier theories that were more candidly definitional.[29]

Legal Positivism

Semantic theories suppose that lawyers and judges use mainly the same criteria (though these are hidden and unrecognized) in deciding when propositions of law are true or false; they suppose that lawyers actually agree about the grounds of law. These theories disagree about which criteria lawyers do share and which grounds these criteria do stipulate. Law students are taught to classify semantic theories according to the following rough scheme. The semantic theories that have been most influential hold that the shared criteria make the truth of propositions of law turn on certain specified historical events. These positivist theories, as they are called, support the plain-fact view of law, that genuine disagreement about what the law is must be empirical disagreement about the history of legal institutions. Positivist theories differ from one another about which historical facts are crucial, however, and two versions have been particularly important in British jurisprudence.

John Austin, a nineteenth-century English lawyer and lecturer, said that a proposition of law is true within a particular political society if it correctly reports the past command of some person or group occupying the position of sovereign in that society. He defined a sovereign as some person or group whose commands are habitually obeyed and who is not in the habit of obeying anyone else.[30] This theory became the object of intense, and often scholastic, debate. Legal philosophers argued about whether certain obviously true propositions of law—propositions about the number of signatures necessary to make a will legally valid, for example—could really be said to be true in virtue of anyone's *command.* (After all, no one has commanded you or me to make any will at all, let alone to make a valid will.) They

also debated whether any group could be said to be an Austinian sovereign in a democracy, like the United States, in which the people as a whole retain the power to alter the form of government radically by amending the constitution. But though Austin's theory was found defective in various matters of detail, and many repairs and improvements were suggested, his main idea, that law is a matter of historical decisions by people in positions of political power, has never wholly lost its grip on jurisprudence.

The most important and fundamental restatement of that idea is H. L. A. Hart's book, *The Concept of Law,* first published in 1961.[31] Hart rejected Austin's account of legal authority as a brute fact of habitual command and obedience. He said that the true grounds of law lie in the acceptance by the community as a whole of a fundamental master rule (he called this a "rule of recognition") that assigns to particular people or groups the authority to make law. So propositions of law are true not just in virtue of the commands of people who are habitually obeyed, but more fundamentally in virtue of social conventions that represent the community's acceptance of a scheme of rules empowering such people or groups to create valid law. For Austin the proposition that the speed limit in California is 55 is true just because the legislators who enacted that rule happen to be in control there; for Hart it is true because the people of California have accepted, and continue to accept, the scheme of authority deployed in the state and national constitutions. For Austin the proposition that careless drivers are required to compensate mothers who suffer emotional injury at the scene of an accident is true in Britain because people with political power have made the judges their lieutenants and tacitly adopt their commands as their own. For Hart that proposition is true because the rule of recognition accepted by the British people makes judges' declarations law subject to the powers of other officials—legislators—to repeal that law if they wish.

Hart's theory, like Austin's, has generated a good deal of

debate among those who are drawn to its basic idea. What does the "acceptance" of a rule of recognition consist in? Many officials of Nazi Germany obeyed Hitler's commands as law, but only out of fear. Does that mean they accepted a rule of recognition entitling him to make law? If so, then the difference between Hart's theory and Austin's becomes elusive, because there would then be no difference between a group of people accepting a rule of recognition and simply falling into a self-conscious pattern of obedience out of fear. If not, if acceptance requires more than mere obedience, then it seems to follow that there was no law in Nazi Germany, that no propositions of law were true there or in many other places where most people would say there is law, though bad or unpopular law. And then Hart's theory would not, after all, capture how all lawyers use the word "law." Scholars have worried about this and other aspects of Hart's theory, but once again his root idea, that the truth of propositions of law is in some important way dependent upon conventional patterns of recognizing law, has attracted wide support.

Other Semantic Theories

Positivist theories are not unchallenged in the classical literature of jurisprudence; I should mention two other groups of theories generally counted as their rivals. The first is usually called the school of natural law, though the various theories grouped under that title are remarkably different from one another, and the name suits none of them.[32] If we treat these as semantic theories (in Chapter 3 I describe a better way to understand them), they have this in common: they argue that lawyers follow criteria that are not entirely factual, but at least to some extent moral, for deciding which propositions of law are true. The most extreme theory of this kind insists that law and justice are identical, so that no unjust proposition of law can be true. This extreme theory is very implausible as a semantic theory because lawyers often

speak in a way that contradicts it. Many lawyers in both Britain and the United States believe that the progressive income tax is unjust, for example, but none of them doubts that the law of these countries does impose tax at progressive rates. Some less extreme "natural law" theories claim only that morality is sometimes relevant to the truth of propositions of law. They suggest, for instance, that when a statute is open to different interpretations, as in Elmer's case, or when precedents are indecisive, as in Mrs. McLoughlin's case, whichever interpretation is morally superior is the more accurate statement of the law. But even this weaker version of natural law is unpersuasive if we take it to be a semantic theory about how all lawyers use the word "law"; Judge Gray seems to have agreed with Judge Earl that the law would be better if it denied Elmer his inheritance, but he did not agree that the law therefore did deny it to him.

Students are taught that the second rival to positivism is the school of legal realism. Realist theories were developed early in this century, mainly in American law schools, though the movement had branches elsewhere. If we treat them as semantic theories, they argue that the linguistic rules lawyers follow make propositions of law instrumental and predictive. The best version suggests that the exact meaning of a proposition of law—the conditions under which lawyers will take the proposition to be true—depends on context. If a lawyer advises a client that the law permits murderers to inherit, for example, he must be understood as predicting that this is what judges will decide when the matter next comes to court. If a judge says this in the course of his opinion, he is making a different sort of predictive hypothesis, about the general course or "path" the law is most likely to take in the general area of his decision.[33] Some realists expressed these ideas in dramatically skeptical language. They said there is no such thing as law, or that law is only a matter of what the judge had for breakfast. They meant that there can be no such thing as law apart from predictions of these different sorts. But even understood in this way, real-