LEGALITY

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WHAT IS LAW (AND WHY SHOULD WE CARE)?

What Is Jurisprudence?

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

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

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

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

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

Jurisprudence: Normative and Analytical

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

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

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

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

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

What Is "What Is Law?"?

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

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

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

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

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

"Law"

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

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

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

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

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

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

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

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

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

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

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

Law, the Law, and "Law"

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

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

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

The Nature of a Thing

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

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

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

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

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

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

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

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

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

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

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

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

The Structure of the Social World

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

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

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

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

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

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

our friend's rule and we might decide to follow it in his presence in order to support our friend's decision to become a vegetarian. Or it might be a rule of the church in which we were raised and whose teachings we no longer follow as adults. Or our interlocutor might simply be reminding us of our new vegetarian diet.

Thus, we might say that one of the prime philosophical motivations for asking the question "What is law?" is to try to make sense of one important part of our elaborate scheme of social classification. When we understand this as a search for the identity of law, the task is a taxonomical one. When we say that a given rule is a legal rule, what makes it a *legal* rule and not a rule of etiquette, chess, Catholicism, Microsoft, morality, or my friend's conception of morality? And when we say that a rule is a rule of French law, what makes it the case that it is a rule of *French* law and not American, Chinese, Jewish, or Iranian law? These questions challenge us to make explicit the principles that underpin our commonsense conception of the social world.

Alternatively, the question "What is law?" may be understood as the search for the necessary and interesting properties of law. In asking the Implication Question, we are not concerned with why something counts as an instance of law but rather with what necessarily follows or does not follow from that fact. In other words, what must be true of a rule because it is a *legal* rule and not a rule of etiquette, chess, Catholicism . . . and so forth? Does it mean that someone will be punished if he doesn't follow it? Does it mean that he now has a moral obligation to obey it? Do we reason with the rule differently from the way that we reason with nonlegal rules? These questions attempt to make the logic of our social classifications explicit. They prod us to detail what follows, as a matter of necessity, from the fact that something falls into one box on our social grid and not another.

Legal philosophers have not always been interested in pursuing the Identity and the Implication questions at once.[8] As we will see, some philosophers, such as Austin, have focused on the law's identity, while others, such as Hart and Dworkin, have been far more concerned with its necessary implications. I want here to try to address both problems. That is to say, I will be concerned in what follows not only with the question of what makes law *law* but also with the related question of what necessarily follows from the fact that something is law.

Conceptual Analysis

Analytical philosophers have traditionally approached both identity and implication questions by means of a distinctive methodology. This method goes by several different names: "conceptual analysis," "descriptive metaphysics," "reflective equilibrium," and "rational reconstruction." For simplicity, and out of deference to tradition, I will refer to it here as conceptual analysis.[9]

Before I proceed, I should point out that philosophical methodology is, of course, extremely controversial and that philosophers are not all agreed on this issue. There may in fact be no one who completely agrees with the methodology of conceptual analysis that I'm about to describe. I hope nevertheless that my description will capture, at least in broad outline, a methodology widely employed by philosophers in general, and legal philosophers in particular.[10] It is also the methodology that I intend to employ in this book.

Truisms

Conceptual analysis can easily be thought of as a kind of detective work. Imagine that someone is murdered. The detective will first look for evidence at the crime scene, collecting as many clues as she can. She will study those clues hoping that the evidence, coupled with her knowledge of the world and human psychology, will help eliminate many of the suspects and lead her to the identity of the killer.

In conceptual analysis, the philosopher also collects clues and uses the process of elimination for a specific purpose, namely, to elucidate the identity of the entity that falls under the concept in question. The major difference between the philosopher and the police detective is that the evidence that the latter collects and analyzes concerns *true* states of affairs whereas the former is primarily interested in *truistic* ones. The philosophical clues, in other words, are not merely true, but *self-evidently* so.[11]

The key to conceptual analysis, then, is the gathering of truisms about a given entity. Everyone who has mastered the concept of, say, knowledge accepts or would be disposed to accept a certain number of truisms about knowledge. For example, it is a truism that one cannot know some fact unless one believes that fact. This is an obvious truth about knowledge. It is also a truism that if one knows something, one is not wrong about it. If one does not know that knowledge implies truth, then one

does not know what knowledge is. Other truisms about knowledge include: "If you know that p, you are highly confident that p"; "Experts know more about their area of expertise than nonexperts"; "If someone knows that p, it is a good idea to defer to them with respect to p"; "To know a fact about the world, one must have some evidence supporting one's judgment"; "If I believe that p and you believe that not-p, then at most one of us can be in the know"; "It is possible for two people to know the same fact"; "Knowledge is useful for achieving one's ends" and so on.

Again, truisms are the clues that help us determine the identity of the object in question. Although it is not necessary that our answer satisfy every single truism, we must try to come up with a theory that accounts for as many of them as possible. For if our account flouts too many of them, we will have changed the subject and will no longer be giving an account of the intended entity but of something else entirely.

For example, philosophers have thought that knowledge is true, justified belief because such a theory best fits a comprehensive truistic description of the entity in question. The claim that instances of knowledge must be beliefs accounts for the fact that one cannot know something if one does not believe it, and it also explains how it is possible for two people to know the same fact. That knowledge consists of beliefs that are true explains why knowledge is inconsistent with error, why knowing things about the world is useful, why two people who have contradictory beliefs cannot both be in the know, and so forth. That knowledge consists of beliefs that are not only true but also justified accounts for the fact that knowledge warrants deference, that experts know more than nonexperts, that knowledge about the world requires supporting evidence, and so on.

Having determined the answer to the Identity Question in this way, the philosopher may then go on to infer additional necessary truths about the entity in question for the purposes of answering the Implication Question.[12] For example, once we arrive at our characterization of knowledge as true, justified belief, we can see that knowledge is "agglomerable," which is to say that if one knows that p and one knows that q, and one believes that p and q, then it necessarily follows that one knows that p and q. This is so because (1) one possesses the belief that p and q; (2) one will be justified in believing that p and q because one believes that p and believes that q; and (3) both p and q are true given that one knows that p and knows that q. Hence, it follows necessarily from the fact that

knowledge is true, justified belief that one will know that p and q just in case one knows that p and knows that q and believes that p and q.

Truisms about Law

To answer the Identity and Implication questions about law, then, the legal philosopher must assemble a preliminary list of truisms about law. Doing this does not however mean identifying what the layperson would recognize as obvious truths about the law. It means identifying those truths that those who have a good understanding of how legal institutions operate (lawyers, judges, legislators, legal scholars, and so on) take to be self-evident, or at least would take to be so on due reflection.

In assembling a list of truisms about law, the legal philosopher must include truisms about *basic legal institutions* ("All legal systems have judges," "Courts interpret the law," "One of the functions of courts is to resolve disputes," "Every legal system has institutions for changing the law"); *legal norms* ("Some laws are rules," "Some laws impose obligations," "Laws can apply to those who created them," "Laws are always members of legal systems"); *legal authority* ("Legal authority is conferred by legal rules," "Legal authorities have the power to obligate even when their judgments are wrong," "In every legal system, some person or institution has supreme authority to make certain laws"); *motivation* ("Simply knowing that the law requires one to act in a certain way does not motivate one to act in that way," "It is possible to obey the law even though one does not think that one is morally obligated to do so," "One can be a legal official even though one is alienated from one's job"); *objectivity* ("There are right answers to some legal questions," "Courts sometimes make mistakes when interpreting the law," "Some people know more about the law than others") and so on.

To establish the identity of law, the legal philosopher aims to determine what the law must be if it is to have the properties specified in the above list. Suppose, for example, that someone proposes the following account of the nature of law: The law is whatever courts say it is. Although this is a popular theory among many politicians and law professors, it is clear that this account fails as an instance of conceptual analysis insofar as it flouts many legal truisms. For if the law is whatever the courts say it is, then courts must be legally infallible—they could never be in the wrong. This conclusion nevertheless violates the objectivity truism, mentioned above, which maintains that courts can make mistakes

when interpreting the law. And it also violates other truisms that I have not listed, such as the following: that some courts have better legal judgment than others, that appellate courts exist in part to correct legal errors, and that the reason why it is often possible to predict what courts will do is we think that courts often correctly follow preexisting law. This account flouts so many truisms that it cannot be seen as revealing the identity of the entity referenced by our concept of law. The theory, in other words, can be true only if we change the subject and talk about some other object entirely.

Disagreements in Conceptual Analysis

The fact that our theories about the identity of law must be tested against the set of statements that strike informed individuals as self-evidently true of course raises a vexing question: what happens when we disagree about whether some statement is a truism or not? For example, it seems to me an obvious truth about the nature of legality that regimes that are morally illegitimate may still have law. I say this because it is easy for me to imagine legal systems that are evil.[13] In fact, human history is littered with examples of precisely such wicked regimes; in the last century alone, there have been the Nazis, the Soviet Union, the Taliban, the Iraqi Baathists, and the Burmese junta, to name only a few of the many possible candidates.

Yet not everyone agrees with my intuitions in this regard. Some legal philosophers deny that the Nazis, the Soviets, the Taliban, and others had law, claiming that these regimes merely had "law-like" systems instead. These reactions strike me as idiosyncratic, but the fact that many people whom I respect have these reactions highlights a particularly disturbing aspect of conceptual analysis. Conceptual analysis, as we have seen, depends on our ability to assemble a list of obvious truths. But when we deal with questions about, for example, whether the Nazis had law, we often find that people's responses about what is obviously and self-evidently true differ significantly. Some think it is obvious that the Nazis had law; others think it is equally obvious that they did not. Because each intuition will lead to a very different theory of law, it is imperative that we resolve this conflict. Yet, conceptual analysis seems to provide no way to adjudicate between rival intuitions.

One possibility that should not be discounted is that the conflict is irresolvable. People might actually possess different concepts of law, and

their clashing opinions may be manifestations of this fact. It is possible that we may actually be referring to different things when we use the word "law," as when I ask you the location of the nearest bank hoping that you will point me to a financial institution, but you instead tell me that the nearest bank is along the Hudson River. If so, conceptual analysis of law would not be possible because there would be no object to which we are all referring when we use the word "law."

Another, more plausible possibility, however, is that those who deny that the Nazis had law recognize that their view goes somewhat against the grain but affirm it precisely because they feel that rival theories cannot account for certain important truisms about the law as well as their theory can. The claim that the Nazis did not have law, in other words, is not a truistic *input* to conceptual analysis but rather its theoretical *output*. For example, one might feel that the only way to account for the fact that legal authorities have the legal *right* to rule and are capable of imposing legal *obligations* on their subjects compels us to impute moral legitimacy to them and hence to deny to wicked regimes such as the Nazis the status of law. On this interpretation, the conflict regarding the legality of a wicked regime would indeed be resolvable. To adjudicate between intuitions, one would need to examine the theories of which they are a part in order to see which better accommodates the *entire* set of considered judgments about the law. Although we are obviously in no position to do this right now, I hope to be better equipped to do this later on in the book.

What I do want to emphasize at this point is the provisional role that intuitions play in conceptual analysis. While conceptual analysis proceeds on the basis of our intuitions, it is obviously important that we not take any of our reactions as sacrosanct and unrevisable. The fact that an account does not square with some of our intuitions—that it requires us, say, to deny that the Nazis had law—may count against that account but it is by no means fatal to it. We must consider the totality of our reactions and be willing to give up some of our views when they don't cohere with other judgments to which we assign a higher priority and are therefore less willing to abandon. In this respect, conceptual analysis is an exercise in rational reconstruction. Unless our understanding of an entity is perfect, it is possible that we will be mistaken, at least somewhat, about what is self-evidently true of the entity in question. Conceptual analysis aims to identify the sources of confusion and help us to resolve them.

Relatedly, we should not infer from the fact that conceptual analysis is supposed to *start* from truistic judgments that it will necessarily *end* in truistic theories.[14] Indeed, there would be no point in engaging in conceptual analysis if the identity of some entity were obvious to everyone. A proper answer to the Identity Question seeks to account for the truistic judgments and explain why those truisms are true. But such an explanation need not itself be truistic. Many of those who are presented with the answer to an Identity Question may not be able to "see" that it is the best account of the entity in question, let alone that it is self-evidently the best account.[15]

The fact, therefore, that theories about the nature of law are contested should not be taken to impugn conceptual analysis. Just as two detectives can disagree about which suspect committed the crime, two philosophers can disagree about what makes an entity the thing that it is. In both cases, the persons in question are attempting to figure out which account best explains the more or less common body of evidence. And in both cases, people can disagree because at least one side engages in fallacious reasoning, overlooks relevant evidence, lacks imagination, indulges in wishful thinking, or brings to bear a different worldview than their interlocutor.[16]

Strategies for the Imagination

As any philosopher will attest, conceptual analysis is a tricky enterprise. Unlike mathematics and logic, both of which possess algorithms for demonstrably proving theorems, philosophy lacks established procedures for guaranteeing that one has discovered an entity's identity. As a result, philosophers never know whether they have simply overlooked some crucial consideration. There is always the lingering possibility that they have pronounced a property to be part of a thing's nature merely because they were not clever or fortunate enough to construct the right counterexample.

The analysis of knowledge as true, justified belief is a case in point. This account had been accepted by philosophers for over two thousand years until Edmund Gettier came along in 1963 and showed that it was untenable.[17] He did this by devising vignettes in which it was clear that the protagonist had a true, justified belief but did not have knowledge. One such example goes as follows: Suppose you see a very realistic statue of a cow in a field, but you mistakenly think it's a real cow. It turns out,

however, that there is a cow in the meadow standing right behind the statue. Now, although you believe that there is a cow in the field, and that belief is true and justified (remember the statue looks just like a real cow), we would not say that you *knew* that there was a cow in the field (after all, you saw a statue of a cow, not an actual cow). This shows that knowledge is not just true, justified belief but something else as well. Philosophers have been on the lookout for that something else ever since.

In what follows, we will see that same dynamic at work in the field of jurisprudence. Accounts of the nature of legality that endured for generations have frequently been felled by a few neat counterexamples. The fact that conceptual analysis is fallible, of course, does not invalidate it as a method of reasoning. After all, scientific reasoning is not foolproof either. But these considerations do underscore the need for caution. They indicate that we should not be overly confident in our assertions that a given property is part of a thing's nature. If anything, the history of philosophy teaches us to be humble in metaphysical matters and to proceed carefully and cautiously.

But conceptual analysis is thorny not only because ingenious counterexamples are hard to conjure up. Perhaps the bigger difficulty is the ever-present danger of overlooking the obvious. As I have noted, when we inspect our concepts, we look for truisms, statements so unobjectionable that they hardly need mentioning. But it is precisely their unremarkable character that makes these truisms so easy to miss. Simply staring at paradigms of law and hoping that connections will pop into our minds is bound to be unproductive, not to mention extremely boring.

In order to elucidate those properties that may be hiding in plain sight, we need to develop compensatory strategies. Let me mention four such strategies. This list is by no means exhaustive—it merely represents a few helpful techniques for doing conceptual analysis, all of which I will go on to use throughout this book.

The first strategy, which I will call the "Comparative Strategy," is an old standard in jurisprudential circles. It aims to stimulate thought through the heavy use of comparisons on the premise that examining institutions and practices that are similar, but not identical, to law, such as games, organized crime, religion, corporations, clubs, etiquette, popular morality, and so forth, will better equip us to appreciate the distinctive aspects of law itself.

Theorists who utilize the Comparative Strategy, especially those who have been influenced by the Ordinary Language School of philosophy that prevailed in Britain during the middle of the last century, typically rely heavily on assessments of linguistic usage. Legal philosophers compare how we speak about various sorts of institutions and practices and try to exploit disparities in use as clues to how these various institutions or practices differ from one another. Hart aptly summarized the point of this exercise: "Many important distinctions, which are not immediately obvious, between types of social situation or relationships may be best brought to light by an examination of the standard uses of the relevant expressions and of the way in which these depend on a social context, itself often left unstated."[18] Hart concluded with a quote from J. L. Austin, perhaps the exemplary practitioner of this form of the Comparative Strategy in modern philosophy. "In this field of study it is particularly true that we may use, as Professor J. L. Austin said, 'a sharpened awareness of words to sharpen our perception of the phenomena.' "[19]

Another traditional method is to analyze puzzles generated by the concept in question and hope that cracking these riddles will yield insight into the character of a thing that falls under the concept. Since the concept of law is a veritable cornucopia of paradoxes, jurisprudes have frequently availed themselves of the "Puzzle-Solving Strategy." I plan to employ it repeatedly in the course of the book, as we examine a number of puzzles involving legal authority, legal obligation, and legal interpretation.

A large portion of the book will be devoted to one paradox in particular. This riddle, which I call the "Possibility Puzzle" and introduce in the next chapter, is an extraordinarily vexing one: it purports to show, by way of seemingly undeniable logic, that legal systems could never have come into existence. Thus, our belief that law is a human invention that currently exists must be an illusion. As we will see, the main disagreements in legal philosophy can profitably be viewed as disputes about the proper solution to the Possibility Puzzle. And, as we will also see, resolving this puzzle and showing how legal institutions are indeed possible will provide invaluable clues for revealing the law's fundamental nature.

A third technique for answering the question "What is law?" involves building a hypothetical legal system. The "Constructivist Strategy," as I will call it, starts with a very simple, easily understandable nonlegal situation. It then uses this scenario to launch a comparison with the law and tries to imagine what would be necessary to transform it into a legal

system. Hart's well-known reconstruction of John Austin's theory of law employs precisely this technique. As Hart showed, one way to understand Austin's theory of law is to imagine it as starting with the simple situation of a gunman demanding money from a person under the threat of harm. It then compares how a gunman demanding money from someone differs from a legal authority demanding obedience from someone. Finally, it suggests how to modify the gunman case so that, after the various adjustments are made, the gunman has turned into the legal sovereign and a legal system has been created.

There are, of course, many other ways to try to build a hypothetical legal system. In Chapter 5, for example, I begin not with a gunman but with a simple egalitarian group activity of cooking together. I then consider the conditions under which it would be advisable for one person to have authority over another and the minimal changes that must occur in order for hierarchical relations to be created. The hypothetical continues by considering the various limitations of such a simple governance structure and the various minimal changes that must take place in order to solve such problems. The construction ends when the hierarchical structure that emerges is so complex and sophisticated that it can justifiably be considered a legal system.

The Constructivist Strategy is an invaluable tool for legal philosophers, and its value derives from the way in which it makes it possible for them to determine several crucial pieces of information. First, it enables philosophers to rule out those properties that are merely contingent features of legality. For if it is possible to build a legal system without using certain objects or appealing to certain concepts, then these objects and concepts cannot be necessary ingredients of law. Second, the Constructivist Strategy helps philosophers uncover those properties that are essential for the existence of law. Because the construction of the hypothetical legal system is supposed to be as economical as possible, the process aims to reveal the minimal core of law, those building blocks that are absolutely needed to establish a legal system and nothing more.[20] Third, the Constructivist Strategy enables the development of noncircular analyses of law. By building legal systems from exclusively nonlegal building blocks, legal philosophers can ensure that they do not appeal to the law in order to explain law.

The last technique, which might be called the "Anecdotal Strategy," attempts to stimulate thought about law through the examination of anthropological and historical evidence about the formation and operation

of legal systems. The aim is to discover what actual participants in the practice consider to be valuable about legal institutions in general, and about their design in particular.

This strategy is relatively novel. Philosophers seldom look to history or other legal cultures when engaging in conceptual analysis, and for good reason. Since philosophers are usually not trained as historians or anthropologists, there is the risk that they will either misrepresent the facts or oversimplify their interpretation (or both). But while it is important to bear in mind the potential hazards of interdisciplinary research, it seems to me that ignoring legal history and anthropology also deprives philosophers of an extremely important source of inspiration and ideas. In this book, therefore, I hope to experiment with the Anecdotal Strategy. I will refer to historical episodes or anthropological research on several occasions in order to make the theory of law that I am developing more vivid and to suggest the plausibility of my general approach.

These four strategies—the Comparative, Puzzle-Solving, Constructivist, and Anecdotal—are indispensable tools for engaging in conceptual analysis. They exercise the imagination and thereby promote the discovery of truths that are elusive precisely because they are so plainly true. They also suggest new approaches and models for explaining such truisms, thus enabling philosophers to gain purchase on the identity of the law and its necessary implications.

Why Care?

As I noted earlier, one doesn't need especially acute powers of social observation to be aware that analytical jurisprudence is not everyone's cup of tea. In my experience, most legal academics and practitioners find the question "What is law?" distinctly unmoving. Unlike philosophers, they simply don't see the point of worrying or speculating about the nature of law and frequently dismiss such questions as formal and arid, far too scholastic to be of any real interest or value. Richard Posner captured this sentiment well in his Clarendon Lectures: "I have nothing against philosophical speculation. But one would like it to have some pay-off; *something* ought to turn on the answer to the question 'What is law?' if the question is to be worth asking by people who could use their time in other socially valuable ways. Nothing does turn on it."[21]

In some cases, this aversion to analytical jurisprudence is simply one manifestation of a distaste for, or skepticism about, philosophy in gen-

eral. Many people undoubtedly perceive philosophizing as a bizarre and silly activity, valuable chiefly as fodder for brilliant Monty Python sketches. My hunch, however, is that most people's antipathy to modern jurisprudence does not reflect a hostility to philosophical thinking in general but rather a number of basic misunderstandings about the project of analytical jurisprudence specifically.

We encountered one such confusion earlier when we considered the widespread assumption that the question "What is law?" is just an inquiry into the meaning of a word—or, in other words, a merely semantic exercise.[22] Those who operate on this assumption find it difficult to fathom why philosophers would spend so much time on "mere semantics." But as we have seen, analytical jurisprudence is *not* primarily a linguistic inquiry; it is an attempt to uncover the basic principles that structure a highly significant part of our social world.

Others may have developed an aversion to analytical jurisprudence because they associate it with a particular debate within the discipline. Many people seem to think that the main debate in jurisprudence is about whether there are moral constraints on legal validity or, to put it slightly differently, whether a rule can be so unjust that it cannot be properly characterized as law. The Fugitive Slave Act of 1850, for example, is an example of one such stunningly unjust rule. It obligated federal marshals or other officials to arrest anyone suspected of being a runaway slave, and stipulated that this obligation could be triggered by nothing more than a claimant's sworn testimony. The suspected slave had no right to testify on his or her own behalf or demand a jury trial in order to contest these allegations. Finally, those who failed to comply with the law were subject to a $1,000 fine.

In such cases, a philosopher might easily ask: was the Fugitive Slave Act *really* a law or was it so unjust as to be undeserving of this title? Legal positivists respond to this question by claiming that there are no necessary moral constraints on the criteria of legality. A very unjust rule can still be a law as long as it satisfies the criteria of legal validity applied by the institutions of the legal system in question. Thus, from the positivists' perspective, the Fugitive Slave Act belonged to the body of federal law in antebellum America, its manifestly unjust and immoral character notwithstanding. From the perspective of natural law theorists, however, some of the rules that regimes sanction may simply be too unjust to be counted as law.[23] Thus, even though the fugitive slave laws were considered to be lawful at the time, antebellum lawyers were in fact wrong

to respond to them as such, since the Fugitive Slave Act was legally null and void.

The fact that this debate represented the public face of jurisprudence for many generations may be one reason that some legal observers concluded that jurisprudence was less than riveting or at least insufficiently interesting or important to merit an entire field of study. I have some sympathy for those who think to themselves: "Who cares what you call an unjust rule! If you want to call it a law, call it a law; if you want to call it a nonlaw, don't call it a law." Of course, the real question is not what you *call* an unjust rule, but rather what an unjust rule *is*. But I also recognize this genre of response as an expression of frustration at the amount of energy put into answering a question that hardly seems worth the effort.

I have tried to show here, however, that the question "What is law?" encompasses much more than the issue of whether an unjust rule can still be a law. Philosophers of law are for the most part engaged in a much broader inquiry into the identity of law and its implications. To be sure, the latter questions bear on the relation between law and morality and to that extent must take up the issue of whether there are moral constraints on legality. One cannot fully understand the nature of the law without also coming to grips with the question of whether an unjust rule is still a law. But knowing the answer to this latter question would teach us very little about the nature of law in general.

I also suspect that few skeptics will be satisfied by any of the clarifications or arguments I have offered thus far. For the principal objection to analytical jurisprudence almost certainly has to do with its perceived lack of relevance. The objection here seems to boil down to this: questions such as "What is law?" *don't have any practical significance*.

Complaints about the "irrelevance" of jurisprudence are of course neither new nor surprising. In 1879 the great British constitutional scholar A. V. Dicey proclaimed that "[j]urisprudence is a word that stinks in the nostrils of a practicing barrister."[24] Lawyers are pragmatic both by temperament and necessity—their job, after all, is to help their clients, and if they repeatedly fail in this regard, their livelihood is at risk. Why should lawyers care about a discipline that studies their practice without telling them anything that will affect how they engage in it? Those who study, teach, and write about tort law can arguably be said to contribute to the practice of tort law. But those who inquire into *the nature of law* seem to have no discernible effect on the *practice of law* of any kind. What, then,

is the point of jurisprudence? To many members of the bar, and legions of law students, the answer is by no means obvious.

My aim in what follows is to show that, contrary to these venerable jurists, a great deal *does* turn on the question of "What is Law?" In fact, I will argue that it is not possible to address many of the most pressing practical matters that concern lawyers—including who has the legal authority to regulate which conduct and how to interpret legal texts—without addressing the analytical questions that have traditionally preoccupied philosophers of law as well. One of the main goals of this book will thus be to show that analytical jurisprudence has profound practical implications for the practice of law—or, in other words, that the answer to what the law is *in any particular case* depends crucially on the answer to what law is *in general*.

In a nutshell, my reasoning here is as follows: In order to prove conclusively that the law is thus-and-so in a particular jurisdiction, it is not enough to know who has authority within the jurisdiction, which texts they have approved, and how to interpret them. One must also know a general philosophical truth, namely, how legal authority and proper interpretive methodology are established in general. In other words, one must know which facts *ultimately* determine the existence and content of legal systems. For without this information it is not possible to show definitively that a given person has legal authority in a particular jurisdiction and how their texts ought to be interpreted. In short, if one wants to demonstrate conclusively that the law is thus-and-so in any particular case, one must know certain philosophical truths about the nature of law in general—precisely the information that analytic jurisprudence seeks to provide.

Since this point is extremely important to my argument, I would like to dwell on it a bit longer. In the next section I want to say something more about why our ability to answer the legal question "What is *the* law?" depends on our ability to answer the philosophical question "What *is* law?"

The Ultimate Determinants of Legal Facts

Let me begin by introducing the notion of a *legal fact*.[25] A legal fact is a fact about either the existence or the content of a particular legal system. It is a legal fact, for example, that Bulgaria has a legal system. Similarly, it is a legal fact that the law in California prohibits driving in excess of 65 miles per hour.

Legal facts are never *ultimate* facts. In other words, whenever a law or legal system exists, it always does so in virtue of some other facts. For example, if it is against the law to jaywalk in New York City, then this legal fact obtains in virtue of the fact that, say, the city council voted to approve a bill that set out in writing that jaywalking is prohibited within the city and the fact that the mayor signed this bill. By contrast, the existence of any particular quark does not depend on the existence of any other fact (assuming that quarks are fundamental particles). Its existence is ultimate—there is no other fact in virtue of which the quark exists.

The recognition that legal facts are always determined by other facts shapes the practice of legal argumentation in a fundamental way. Suppose we want to show someone that the law is thus-and-so in a particular jurisdiction. Since legal facts are not ultimate, we can only make our case by pointing to the existence of other facts that determine that the law is thus-and-so in the jurisdiction. In the case of legislative, administrative, or judicial rules, we would be required to argue that those with legal authority within the relevant jurisdiction approved certain legal texts and their proper interpretation supports our claim about the law.

Similarly, suppose that our interlocutor denies that the persons we identified have legal authority within the jurisdiction. Because the authoritative status of the persons in question is a legal fact, it cannot be ultimate either. We will therefore be compelled to respond to our interlocutor by making reference to other facts, such as the existence of relevant valid laws that confer such authority.

This dynamic of contestation and rejoinder can continue still further. Imagine that our interlocutor denies that the laws to which we have just referred are valid within the jurisdiction and accordingly concludes that they are incapable of conferring authority. We might reply by adverting to the existence of still other laws that confer authority on officials to create the authority-conferring laws in question. Indeed, we might trace the existence of the laws conferring authority all the way back to the fundamental rules of the legal system. In the United States, for example, in order to establish claims of legal authority within the federal system, one must show that they eventually derive from the United States Constitution. Facts regarding the existence of federal law, therefore, are always partially determined by facts about constitutional law.

The fact that legal facts are never ultimate raises an obvious query: what happens when we run out of legal facts upon which to rely? Suppose, for example, that our interlocutor is so obstinate that he denies that

the fundamental rules of the legal system that we are referencing are legally valid. Or imagine that someone claims that the United States Constitution is not legally binding on federal and state officials in the United States. Perhaps she rejects the idea that state conventions had the authority to ratify the Constitution and claims instead that the Articles of Confederation are still in force.[26] Since the Constitution is fundamental law, we cannot appeal to further legal facts to justify its existence. How might we then respond to these skeptical claims? What facts might we appeal to in order to establish the authoritative status of fundamental laws such as the Constitution?

Legal Positivism and Natural Law

In the philosophy of law, there have been two different answers to this sort of question. The first kind of answer, advanced by legal positivists, is that all legal facts are ultimately determined by social facts alone.[27] For those who endorse this answer, claims about the existence or content of a legal system must ultimately be established by referring to what people think, intend, claim, say, or do. Positivists disagree with one another about the nature of these ultimate social facts, but one plausible version goes as follows: the fact that legal officials treat the state conventions as having had the power to ratify the Constitution makes it the case that the Constitution is legally binding on them. Thus, following the positivist account, the practice of U.S. legal officials is ultimately responsible for the content of all federal law.

The second position, advanced by natural lawyers, holds that legal facts are ultimately determined by moral *and* social facts.[28] For those who hold this position, claims of legal authority and proper interpretation must in the end be justified through morally sound reasoning. Although natural lawyers disagree with one another about the nature of these ultimate moral facts, one plausible version of their position is as follows: the fact that the Constitution was ratified by all of the state conventions invests it with moral authority and hence legal authority. The Constitution is legally binding, on this view, not because it *is* but rather because it *ought* to be followed.

I will have much more to say about these positions in the chapters to come. But there are two initial things to note about this debate. First, the disagreement between legal positivists and natural lawyers concerns the *necessary properties of law* and, therefore, *the nature of law.* The

positivist believes that it is a necessary property of the law that its existence and content is ultimately determined by social facts alone. In this respect, the positivist treats the law like custom: it is in the nature of both law and custom that facts about their existence or content are ultimately determined by social facts alone (it is a custom to eat turkey on Thanksgiving just because people take it upon themselves to eat turkey on Thanksgiving). By contrast, natural lawyers claim that it is a necessary property of the law that its existence and content are ultimately determined by social and moral facts, and they believe that the nature of law is similar in this regard to the nature of political morality.

Second, and more importantly, this philosophical debate has important implications for practice. These implications may be obscured by our example of the Constitution insofar as everyone agrees that it is legally authoritative and binding on all federal and state officials in the United States. No one seriously doubts this legal fact, and as a result, philosophical disagreements about which facts determine the authority of state constitutional conventions are merely academic. To take a different example, however, American lawyers do not all agree with one another about the correct way to *interpret* the Constitution. And it is here that philosophical disagreements about the nature of law can make a profound practical difference.

To see this, consider the ongoing debate about the constitutionality of the death penalty in the United States. The Eighth Amendment to the United States Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[29] This constitutional provision has given rise to endless discussions about whether it should be read as prohibiting punishments that are actually cruel or only those that were thought to be cruel by those who drafted and ratified the provision. Following the first interpretation, the death penalty would be unconstitutional only if state-sponsored executions could be shown to be actually cruel. Following the second interpretation, the death penalty is definitely constitutional because it is clear from other provisions in the Constitution that the framers thought that the death penalty *was* constitutional.

Notice that this interpretive disagreement is a dispute about what determines the content of United States constitutional law. The first position states that the plain meaning of the text determines the content of the Eighth Amendment prohibition (because "cruel" means cruel, U.S. law prohibits punishments that are actually cruel). The second position states

that the intentions of the framers determine the content of the Eighth Amendment (because "cruel" must be interpreted according to the beliefs of the framers, U.S. law prohibits punishment that the framers thought was cruel).

The crucial question here is: how are we to resolve this disagreement? What determines the content of the Eighth Amendment: plain meaning or original intent (or perhaps something else)? And it is here that the debate between the legal positivists and natural lawyers becomes relevant. For the only way to figure out whether plain meaning or original intent determines United States constitutional law is to know which facts *ultimately* determine the content of *all* law. So, for example, if the positivists are right, the only way to demonstrate that one interpretive methodology or another is correct is to point to the social fact or facts that make it so, perhaps by showing that courts routinely follow one methodology and not the other. On the other hand, if the natural lawyer is right, then the only way to establish one's position is by engaging in moral and political philosophy. Thus, for example, one might argue for one methodology over another by showing that considerations of democratic theory support reading the Constitution in a certain way.

What this line of reasoning implies is that analytical jurisprudence is capable of making a crucial practical difference. For there is often no way to resolve specific disagreements about *the* law without first resolving disagreements about *the nature of law* in general. In order to show conclusively that the law is thus-and-so in a particular case, it is not enough to assert that the law was created by someone with authority and that one is interpreting the legal texts properly. One must also be capable of demonstrating that one is *justified* in ascribing legal authority to that person and in interpreting their texts accordingly.

It is in this sense that the resolution of certain legal disputes depends on the ability to resolve certain philosophical disputes as well. If the positivist is right and the existence and content of legal systems are ultimately determined by social facts alone, then the only way to demonstrate conclusively that a person has legal authority or that one is interpreting legal texts properly is by engaging in sociological inquiry. Only by looking to what people think, intend, claim, say, or do can the lawyer definitively demonstrate that the law is thus-and-so in any particular instance. On the other hand, if the natural law theorist is right and the existence and content of legal systems are ultimately determined by moral facts as well, then it is impossible to demonstrate conclusively what the law is in any

particular case without engaging in moral inquiry. Moral philosophy would be indispensable for establishing the truth of legal propositions because it would be essential for establishing the validity of claims about legal authority and proper interpretive methodology.

Labels

What I hope I have shown here is that doubts about the relevance of analytical jurisprudence are unwarranted insofar as questions about the nature of law have direct and important implications for legal practice. When legal disputes are predicated on conflicting claims about who has authority in a particular system or how its texts ought to be interpreted, it will often be necessary to advert to philosophical truths about what ultimately determines legal authority or interpretive methodology in every legal system.

My hunch is that lawyers' failure to recognize the relationship between these two questions derives from their unduly cramped understanding of what legal philosophers are up to when they investigate the nature of law. As we have seen, it is widely assumed that legal philosophers are responding primarily to concerns about a *label,* trying to figure out either what the label "law" means or where to apply it. A jurisprudential theory, on this narrow view, is a labeling theory, which involves providing either a definition of a word or a procedure for deciding whether to affix it to some object or another.

It is undeniably true that legal philosophers have sometimes made it seem as though they were responding to labeling anxieties. As we noted earlier, legal theorists have worried whether rules like the Fugitive Slave Act of 1850 really merit the label "law" or whether the Nazis really had a legal system. Philosophers have also debated whether international law is law or whether "primitive" cultures have legal systems. But it is a mistake to think that concerns about proper labeling practices have by any means occupied the bulk of their time and effort. Most of the time, of course, it is perfectly obvious when something is law. For example, we have no doubt that the United States has a legal system and that the Eighth Amendment to its Constitution is existing law. Yet, as we saw in the first half of the chapter, the mere fact that we know that something has the property of legality does not exhaust our philosophical curiosity. For there are two questions that arise in relation to any bona fide example of law, namely, *what makes it law* and *what necessarily follows*

from that fact. Jurisprudential theories, in other words, are less interested in whether something merits the label "law" than in why it merits this label when it does and what the implications are. The label "law" is not the major *output* of the theory—it is the *input.*

As we noted before, when legal positivists and natural lawyers disagree about which facts ultimately determine the existence and content of the law, they are disagreeing about *the necessary features of law.* In other words, they are at odds about the right answer to the Implication Question. The positivist believes that it necessarily follows from the fact that something is law that its existence and content are ultimately determined by social facts alone, whereas the natural lawyer thinks that it necessarily follows that its existence and content are ultimately determined by moral facts as well. This dispute is far more than a disagreement about labels.

My point here again is that many of the questions that lawyers truly care about simply *cannot* be answered in a philosophical vacuum. Philosophical theories about the nature of law provide necessary truths about the law that are crucially relevant for adjudicating particular disputes about legal authority and interpretation. Before I go on to explore this claim in subsequent chapters, I would like first to clarify it in a couple of ways. First, I am not suggesting that it is *impossible* to answer a legal question correctly unless one is also fully in possession of a correct philosophical theory about the nature of law. Most legal questions can be answered simply by asking a lawyer, reading a hornbook, or typing the query into Google. Nor do lawyers normally need the assistance of philosophers either. Lawyers have a basic understanding of the fundamental ground rules of legal practice, which give them a working knowledge of how to answer garden-variety legal questions. Even when their knowledge runs out, it is likely that the answers to their questions will not depend on any particular view about the nature of law. It is probable, in other words, that both positivism and natural law theory will give the same answers to many of these questions. My claim is rather that the answers to *some* questions do depend on which view about the nature of law is correct. And in these cases, knowing the nature of the law is indispensable.

Second, while it is true that an inquiry into the nature of law has implications for practice, it does not follow that the legal philosopher's task is to answer legal questions. The legal philosopher's job is to identify *the proper method for determining the content of the law;* the

lawyer's job is to put that method into practice. Last, it is entirely possible that the correct method for determining the content of the law will indicate that there is no correct legal answer to certain types of legal questions. Just because one might want an answer to the question "What is the law?" does not mean that there is one patiently waiting in the wings.

The Truism of Trust

My aim in this chapter was to unpack the question "What is law?" and to show how we might begin to answer it. I also tried to suggest that some of the antipathy and skepticism that such a question provokes may derive from simple misunderstandings. In particular, I have tried to make clear that philosophical inquiry into the nature of law is *not* an exercise in lexicography; it extends far beyond the issue of whether an unjust rule is a law; and it is of more than merely academic interest. To understand the nature of law is to figure out the principles that structure our social world and, as we have seen, these principles have profound implications for how we ought to engage in legal practice.

There is, however, one grievance that lawyers have toward legal philosophy that I do think is valid. Many legal practitioners have complained that jurisprudence as it is currently practiced is too removed from the everyday activity of lawyers and judges. Their point is not that legal philosophy is irrelevant to practice but rather that the theories of law expounded by philosophers do not seem to reflect the activity of actual legal institutions. In particular, lawyers often complain that legal philosophers ignore considerations of institutional competence in developing their accounts of law, and especially their theories of legal interpretation.[30]

To get a feel for the disconnect between lawyers and philosophers in this regard, consider the way that interpretive debates proceed in the "real" world. When judges, lawyers, and law professors argue for one interpretive methodology over another, they routinely justify themselves by referring to the degree to which certain members of the group can be trusted to act competently and in good faith. Textualists like Justice Antonin Scalia, for example, believe that judges should be constrained to follow the plain meaning of the statute because they do not trust judges to look beyond the text. They fear that judges will insert their own personal political views in the name of effectuating legislative purpose. Other textualists such as Judge Frank Easterbrook reject the search for

purpose because they do not trust legislators to fashion public-interest legislation. Statutes, on this view, are built on compromises between opposing interest groups, not unified visions of the general welfare developed by altruistic public servants that can be extended to unanticipated cases. Purposivists such as Henry Hart and Albert Sacks, on the other hand, presumed legal officials to be people pursuing reasonable ends reasonably and thus accorded judges broad powers to delve into the "spirit" of the statute when its letter produces results that strike them as objectionable.

But in contrast to the important role that practicing lawyers attribute to trust relations when assessing interpretive method, the concept of trust almost never figures in philosophical discussions of legal interpretation. Ronald Dworkin's theory of legal interpretation is a case in point. As we will see, Dworkin argues that interpreters should always interpret legal texts in a way that will present these texts in their best moral light. But Dworkin never considers in any meaningful way whether such a methodology is appropriate for participants with normal cognitive and moral capacities. On the contrary, Dworkinian interpretation presupposes a tremendous trust in the philosophical abilities of group members and in their good will for carrying out such rigorous intellectual exercises. If, as is reasonable to suppose, most individuals are not particularly adept at, or likely to engage in, philosophical analysis, it seems imprudent to demand that they interpret the practice as a moral or political theorist would.

Dworkin's disregard for considerations of trustworthiness is not unique to him; it is a pervasive feature of modern analytical jurisprudence. Jurisprudential theorists have tended to approach issues of legal interpretation through the lens of traditional philosophical concerns, such as linguistic meaning, political morality, and conceptual analysis. And in keeping with this, their work has been marked by a striking enthusiasm for debates about the proper semantics of words like "vehicle" and "cruel," the relation of justice to fairness, and the conceptual preconditions of law's claim to legitimate authority.

This indifference to institutional considerations such as trust is not only irritating to lawyers but deeply ironic, given that it flies in the face of a core assumption to which most philosophers of law subscribe. As we have seen, an inquiry into the nature of law treats the considered judgments of informed individuals as the object of explanation. This means that legal philosophers are supposed to listen to the claims that legal

participants use to defend and justify their actions. They study the actual practice of legal reasoning and argumentation in an effort to determine the law's nature.

Most of the accounts of law that legal philosophers have proposed nevertheless fall conspicuously short of this standard and seldom reflect the actual structure of legal argumentation. In stark contrast to legal practitioners, legal philosophers rarely take questions of competence and character seriously. And their failure to take these questions seriously is one of the reasons legal participants do not take legal philosophers seriously either.

I hope to address this oversight in the pages that follow. My aim will be to develop a theory of law in which considerations of competence and character are central to the understanding of legal institutions and the structure of legal reasoning and argumentation. Before I begin to advance this new account, however, I want first to look at some of the jurisprudential accounts that have already been formulated, paying attention not only to their logical coherence but also to the extent to which their representations of legal practice are faithful to the shared understanding of legal participants.

NOTES

Abbreviations

AL Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 1979)

CL H. L. A. Hart, *The Concept of Law,* ed. Joseph Raz and Penelope Bullock, 2d ed. (Oxford: Oxford University Press, 1994)

EJP H. L. A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Oxford University Press, 1983)

LE Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986)

PJD John Austin, *The Province of Jurisprudence Determined,* ed. Wilfred E. Rumble (Cambridge: Cambridge University Press, 1995)

PRN Joseph Raz, *Practical Reason and Norms,* 2d ed. (Oxford: Oxford University Press, 1999)

1. What Is Law (and Why Should We Care)?

1. By contrast, law departments in Continental universities are often called departments of jurisprudence.

2. Admittedly, the line between analytical jurisprudence and the interpretive branch of normative jurisprudence is not always very clear. Is it possible, for example, to understand the concept of a tort, and how it differs from, say, a crime, without understanding why we hold people liable for the torts that they commit? It would seem that, in these cases at least, one couldn't do analytical jurisprudence without engaging in normative jurisprudence as well.

3. Unfortunately, the term "legality" has its own ambiguities. Sometimes, it refers to the property of being legal or lawful. Thus, we might ask about the legality of making a U-turn in the middle of the street. Other times, "legality" refers to a value or set of values, in particular, those values associated with the Rule of Law. The principles of legality, for example, require that laws be clear, prospective, promulgated, etc. On the value of legality, see Chapter 14.

4. See Joseph Raz, "The Problem about the Nature of Law," in *Ethics in the Public Domain* 196–198 (Oxford: Oxford University Press, 1994).

5. Jeremy Bentham, *Of Laws in General,* ed. H. L. A. Hart, 9 (London: Athlone Press, 1970).

6. It is also sometimes said that legal philosophers are never interested in the meaning of the word *law.* Just as chemists care about the chemical composition of water, not the semantic properties of the word "water," legal philosophers care about the nature of a certain social practice and its products, not the word used to refer to the practice. But this position is also too strong. There seems to be no reason why legal philosophers should not opine on the meaning of "law," as well as the metaphysics of law. For an excellent analysis of the word "law," see Jules Coleman and Ori Simchen, "'Law,'" 9 *Legal Theory* (2003). While I see no reason why investigating the semantic question should not be considered to be part of the proper province of jurisprudence, we will have very little to say about it in this book. Our main concern will be with investigating the nature of law, not the word "law."

7. The distinction between the identity of an entity and its necessary implications dates back to Aristotle. See, e.g., Aristotle, *Topics* I.5, 102a18–25. See also, Gareth B. Matthews, "Aristotelian Essentialism," 50 *Philosophy and Phenomenological Research* (Autumn 1990): Supplement, 251–262. For a modern elaboration, see Kit Fine, "Essence and Modality," 8 *Philosophical Perspectives* (1994).

8. Nor have legal philosophers been careful to distinguish between the Identity and Implication questions. Consider, for example, the notorious "Separability Thesis," which is usually formulated as the claim that "there is no necessary connection between law and morality" (see, e.g., Jules L. Coleman, *Markets, Morals and the Law* 4 [Cambridge: Cambridge University Press, 1988]). Tradition tells us that legal positivists accept the Separability Thesis whereas natural lawyers deny it. Recently, a number of philosophers have questioned whether the Separability Thesis is an issue between these two schools of thought. See, e.g., Joseph Raz, "Authority, Law and Morality," in *Ethics in the Public Domain* 226–227 (1994); Jules Coleman, "Beyond the Separability Thesis: Moral Semantics and the Methodology of Jurisprudence," 27 *Oxford Journal of Legal Studies* (2007); Leslie Green, "Positivism and the Inseparability of Morals," 83 *New York University Law Review* (2009). For example, Raz argues that no legal positivist can plausibly deny that there is a necessary connection between law and morality.

As he points out, it is plausible to suppose that the social order that law necessarily brings about is morally desirable. It follows that all legal systems have some morally desirable aspects to them, even if on balance the harm created outweighs that good, and hence law and morality are necessarily connected. But I think that the Separability Thesis is best seen as a claim about the identity of law, not its necessary implications. The positivists, in other words, concede that law and morality may share some necessary properties in common. They maintain, nonetheless, that law and morality are not *essentially* connected, that the properties that make law what it is are nonmoral in nature. The natural lawyers, on the other hand, insist that a social institution is a legal institution because it possesses some desirable moral properties. They believe that morality is part of the identity of law. Understood in this manner, then, the Separability Thesis is a point of contention between legal positivists and natural lawyers.

9. The terminology "conceptual analysis" is slightly confusing insofar as it might suggest that the object of analysis is a concept, rather than entities that fall under the concept. As I will be using the term, however, it denotes a process that uses a concept to analyze the nature of the entities that fall under it. As Raz notes, even though Hart called his book *The Concept of Law,* his theory is best understood as the analysis of the nature of law, rather than the concept. See Joseph Raz, "Can There Be a Theory of Law?" in *The Blackwell Guide to the Philosophy of Law and Legal Theory,* ed. Martin Golding and William Edmundson, 324–325 (Malden, MA: Blackwell Publishing, 2004).

10. For a dissenting view in legal philosophy, see Brian Leiter, "The Naturalistic Turn in Legal Philosophy," in Brian Leiter, ed., "New Directions in Analytic Jurisprudence," *American Philosophical Association Newsletter on Philosophy and Law* (Spring 2001): 142–146.

11. Another way of distinguishing true statements from truistic ones is by examining our interpretation of their respective denials. If we are content to impute strange beliefs to the speaker, then the speaker is merely denying a true statement; but if we are totally baffled by the denial and as a result infer that the speaker has changed the subject on us, then the speaker is denying a truism. On the role of truisms (or what Frank Jackson calls "subject-determining platitudes") in conceptual analysis, see Frank Jackson, *From Metaphysics to Ethics: The Role of Conceptual Analysis,* chap. 2 (Oxford: Oxford University Press, 1996). See also Michael Smith, *The Moral Problem,* chap 2 (Oxford: Blackwell, 1994).

12. To answer an Implication Question about X, it is often necessary to answer Identity questions about entities other than X. Thus, to figure out the relation between law and morality, it is necessary to have some understanding of the identity of morality.

13. For similar intuitions, see H. L. A. Hart, *The Concept of Law,* 2d ed., 207, ed. Joseph Raz and Penelope Bullock (Oxford: Oxford University Press,

1994) (hereafter CL); and Joseph Raz, *Practical Reason and Norms,* 2d ed., 164 (Oxford: Oxford University Press, 1999) (hereafter PRN).

14. Cf. Ronald Dworkin, *Justice in Robes,* chap. 6 (Cambridge, MA: Harvard University Press, 2006).

15. Answers to an Implication Question need not be truistic either. For even if there were complete agreement on the identity of an entity, some might not know, or be able to see, that some truth necessarily follows from various truths about the identity of that entity, especially when the derivation is subtle or complicated. Disagreements might also arise when the derivation of a necessary truth about the entity in question depends on truths about other entities and these latter truths are controversial as well.

16. In some instances, conceptual analysis can be completed only by consulting a scientific theory. For example, the analysis of the concept WATER tells us that something is water just in case it has the same internal structure as the stuff that is in the lakes, rivers, and oceans that we see around us. But the concept alone does not specify what the internal structure of water is (the ancient Greeks grasped the concept WATER even though they didn't know that water is H_20). In order to know the internal structure of water, one must look to the a posteriori theory that tells us about the inner structure of material bodies, namely, chemistry. To give a more complete answer to the question "What is water?" therefore, one must look to a scientific theory that tells us about the constitution of water.

Traditionally, legal philosophers have not treated the concept LAW like the concept WATER, namely, they have not supposed that discovering the nature of law requires deference to another outside a posteriori theory. Even though Hart claimed that *The Concept of Law* was "an exercise in descriptive sociology" (CL vi), his analysis bears little resemblance to standard procedure in the social sciences—he didn't perform or examine any detailed case studies, engage in statistical analysis, etc.—nor did he consult findings in that field. He seemed to have assumed that the nature of law could be determined exclusively by conceptual analysis.

A few philosophers, however, have rejected Hart's approach and suggested instead that the concept LAW does require that we consult some other theory in order to determine the proper application of the concept. One popular position is that the concept LAW makes implicit reference to the best social scientific theory. The law, on this view, is what social science tells us law is, or would tell us if it were correct. This approach is plausible, at least at first glance, because the law is a social institution and social science is in the business of analyzing the nature of other social institutions. See David Lyons, *Ethics and the Rule of Law* 57–59 (Cambridge: Cambridge University Press, 1984); Brian Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* 183–192 (Oxford: Oxford University Press, 2007). My own view is that Hart was right with respect to the concept of law. Social science

cannot tell us what the law is because it studies *human* society. Its deliverances have no relevance for the legal philosopher because it is a truism that nonhumans could have law. Science fiction, for example, is replete with stories involving alien civilizations with some form of legal system. These examples show that it is part of our concept of law that groups can have legal systems provided that they are more or less rational agents and have the ability to follow rules. Social scientific theories are limited in this respect, being able to study only human groups, and hence cannot provide an account about all possible instances of law.

17. "Is Justified True Belief Knowledge?" 23 *Analysis* (1963): 121–123. Gettier attributes the view of knowledge he critiques to Plato at *Meno* 98; Roderick Chisholm at *Perceiving: A Philosophical Study* 16 (Ithaca, NY: Cornell University Press, 1957); and A. J. Ayer at *The Problem of Knowledge* 34 (London: Macmillan, 1956). Bertrand Russell made the same point in 1912. See Bertrand Russell, *The Problems of Philosophy* 132 (Oxford: Oxford University Press, 1994).

18. CL vi.

19. Ibid.

20. Of course, the fact that one set of components are sufficient to create a legal system does not entail that they are necessary. In practice, induction from one case of law to all cases is rendered plausible through the subtle use of caricature: the hypothetical legal system is constructed so that certain abstract features of law are made especially prominent, even slightly exaggerated, thus drawing our attention to those properties whose ordinariness might cause them to be overlooked. The expectation is that we will recognize that the features present in the hypothetical legal system are in fact present in every legal system. For a use of this device, see the introduction to Chapter 6.

21. Richard Posner, *Law and Legal Theory in the UK and USA* 3 (New York: Oxford University Press, 1997).

22. See, e.g., Glanville L. Williams, "Language and the Law" (pt. 4), 61 *The Law Quarterly Review* 389 (1945). ("[E]very question of the form 'What is . . . ?', or 'What is the nature of . . . ?', or 'What is a . . . ?', or 'What is the nature of a . . . ?' (followed in each case by the name of a class, quality or relation) is a request for the definition of a word.")

23. According to tradition, the classical exponents of this position were Aquinas and Blackstone. See Thomas Aquinas, *Summa Theologica,* IaIIae.95.2, in Aquinas, *Political Writings,* ed. R. W. Dyson, 130 (Cambridge: Cambridge University Press, 2002); William Blackstone, *Commentaries on the Laws of England,* Introduction, section 2. This interpretation of Aquinas and Blackstone has been contested by John Finnis, see John Finnis, *Natural Law and Natural Rights* 364–365 (Oxford: Oxford University Press, 1980) and John Finnis, "Blackstone's Theoretical Intentions," 12 *Natural Law Forum* (1967), though accepted by Mark Murphy, see Mark Murphy, "Natural Law Jurisprudence," 9 *Legal Theory*

(2003). The idea that the extreme injustice of a rule precludes its status as law has also been associated with Gustav Radbruch (often called the "Radbruch formula"). See Gustav Radbruch, "Statutory Lawlessness and Supra-Statutory Law," (1946), trans. Stanley Paulson in 26 *Oxford Journal of Legal Studies* (2006). The Radbruch formula has been endorsed by the German Constitutional Court in upholding the murder conviction of a former East German border guard. See 95 BVerfGE 96 (1996). It has also been accepted by a number of contemporary theorists. See, e.g., Robert Alexy, *The Argument from Injustice: A Reply to Legal Positivism,* trans. Stanley Paulson and Bonnie Litschewski Paulson (New York: Oxford University Press, 2002); Neil MacCormick, *Institutions of Law* 277–279 (Oxford: Oxford University Press, 2006); Philip Soper, *The Ethics of Deference* 96–99 (Cambridge: Cambridge University Press, 2002); Michael Moore, *Educating Oneself in Public* 303–304 (Oxford: Oxford University Press, 2000); Deryck Beyleveld and Roger Brownsword, *Law as a Moral Judgment* 13–18 (London: Sweet & Maxwell, 1986); and Mark Greenberg, "The Standard Picture and Its Discontents," 1 *Oxford Studies in the Philosophy of Law* (Oxford: Oxford University Press, 2010). Ronald Dworkin claims that wicked regimes are legal systems only in the "pre-interpretive" sense. See Ronald Dworkin, *Law's Empire* 101–108 (Cambridge, MA: Harvard University Press, 1986) (hereafter LE).

24. "The Study of Jurisprudence," 5 *Law Magazine and Review,* 4th Service 382 (1880). For similar comments expressing the jaundiced attitudes of practicing lawyers to jurisprudence in the Victorian era, see Neil Duxbury, "English Jurisprudence Between Austin and Hart," 91 *Virginia Law Review* 71–77 (1995).

25. My presentation in this section was greatly influenced by Mark Greenberg, "How Facts Make Law," 10 *Legal Theory* (2004).

26. See generally Bruce Ackerman and Neal Katyal, "Our Unconventional Founding," 62 *University of Chicago Law Review* (1995).

27. See, e.g., Joseph Raz, *The Authority of Law: Essays on Law and Morality* 37 (Oxford: Oxford University Press, 1979) (hereafter AL); Jules Coleman, *The Practice of Principle* 75 (Oxford: Oxford University Press, 2001); Gerald J. Postema, "Coordination and Convention at the Foundation of Law," 11 *Journal of Legal Studies* (1982).

28. See, e.g., Ronald Dworkin, "'Natural Law' Revisited," 34 *University of Florida Law Review* (1981); Beyleveld and Brownsword, *Law as a Moral Judgment* 11; Nicos Stavropoulos, "Interpretivist Theories of Law," available at http://plato.stanford.edu/entries/law-interpretivist; Greenberg, "How Facts Make Law" (Greenberg uses the label "anti-postivism" as opposed to "natural law theory"). No doubt, this description of the natural law position is contentious. Some theorists characterize natural law theories as merely holding that immoral or unreasonable laws are *defective as laws*. See, e.g., Murphy, "Natural

Law Jurisprudence," 254, who calls this the "weak" reading of the natural law thesis. My reason for rejecting this characterization is threefold. First, as Murphy himself recognizes, the weak reading of the natural law thesis is consistent with the central tenet of legal positivism. A positivist can coherently maintain that the law is ultimately grounded in social facts alone but that immoral laws are defective as law. Indeed, I will propose such a theory later on. My characterization of natural law theory in the text is meant to capture the traditional understanding that natural law theory is a *rival* to legal positivism. Second, the weak reading of the natural law thesis cannot explain why so many natural lawyers have claimed that unjust rules are not laws. On my characterization, natural lawyers accept this view because they hold that legal facts are ultimately determined by social and moral facts and, in the case of unjust rules, the right sort of moral facts are missing. Third, the weak reading of the natural law view, while not uninteresting, is not so interesting that the dispute over it should constitute the major debate in analytical jurisprudence. As I intend to show in this book, the debate over whether the law ultimately rests on moral facts is capable of playing such a role.

29. U.S. Constitution, amend. VIII.

30. See, e.g., Cass Sunstein and Adrian Vermeule, "Interpretation and Institutions," 101 *Michigan Law Review* (2003).

2. Crazy Little Thing Called "Law"

1. Thomas Hobbes, *Leviathan,* ed. Richard Tuck, 2d ed., chap. 13, p. 89 (Cambridge: Cambridge University Press, 1996).

2. See, e.g., *The Cambridge Encyclopedia of Hunters and Gatherers,* ed. Richard Lee and Richard Daly, 1–4 (Cambridge: Cambridge University Press, 1999).

3. The anthropological literature suggests that intergroup violence between hunter-gatherers was quite extensive. See Azar Gat, *War and Human Civilization* (Oxford: Oxford University Press, 2006).

4. Hobbes, Leviathan, p. 89.

5. U.S. Constitution, art. I, §8.

6. U.S. Constitution, art. VII.

7. "Norm" is also used by European lawyers to refer to what Anglo-American lawyers call a "rule."

8. Another reason for its use is that rules are often contrasted with principles (a rule being an all-or-nothing standard, whereas principles lend support to various options without being conclusive) and sometimes with standards (rules being objects that can be applied without evaluation, whereas standards must be applied using evaluation). On these distinctions, see Chapter 9. Since rules, principles, and standards are all normative entities—they purport to tell you what to do or what is valuable, desirable, acceptable, and so on—they are all norms.