Law and Truth

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Contents

Philosophy may in no way interfere with the actual use of language; it can in the end only describe it. For it cannot give it any foundation either. It leaves everything as it is.

Ludwig Wittgenstein

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Introduction: Realism, Anti-Realism, and Legal Theory

Even the debate about the nature of law, which has dominated legal philosophy for some decades, is, at bottom, a debate within the philosophy of language and metaphysics.

Ronald Dworkin[1]

This book addresses the following question: "What does it mean to say that a proposition of law is true?"[2] On the surface, the current jurisprudential literature provides what appear to be radically divergent answers to this question. For positivists, a proposition of law is true if it accords with certain institutional facts. Some contemporary natural lawyers argue that a proposition of law is true if it is consistent with principles of morality that put the law in its best light. Still others claim that "truth" names a convergence in interpretive assumptions about law.

Perhaps it is best to begin with a defense of the question to which this study is directed. We are comfortable in saying that empirical claims (claims about some state of affairs in the world) are "true," but can the same be said of legal assertions? Are legal propositions the sorts of things about which we can be "right" or "wrong"? Do legal propositions admit of the characterizations "true" and "false"?

The following claims are examples of legal propositions:

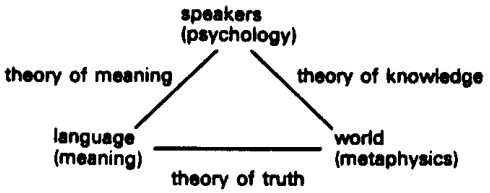
The First Amendment prohibits prayer in the public schools.
No contract is enforceable without consideration.
Manufacturers are strictly liable for injuries caused by their products.
Insanity is a defense to murder.
Payments to creditors within ninety days of the filing of a petition in bankruptcy are voidable as preferential transfers.

1. Ronald Dworkin, Introduction to *The Philosophy of Law* 1 (Ronald Dworkin ed., 1977).

2. I do not intend any technical meaning to attach to the word "proposition." I take the word to mean nothing more than a sentence with a sense. A proposition of law is a claim about the content of law or, put differently, a claim about what the law requires, prohibits, or makes possible (e.g., power-conferring rules).

I take the task of jurisprudence to be that of providing a philosophical account of what it means to say that propositions of law are true and false. This entails spelling out just what is involved in saying something is true as a matter of law. In addition to detailing truth, some account must be given of disagreement and the resolution of disputed cases. Perhaps some propositions of law have no truth value; perhaps legal statements are not bivalent (admitting always of truth and falsity). These are some of the issues that will concern us.

Before we turn to the specifics of jurisprudence, it is perhaps best to get a sense of how these issues are of general philosophical concern. I begin with a broad description of the current debate over realism and anti-realism. To understand the debate, consider the following figure:[3]



The realism/anti-realism debate is over how best to characterize the relationship between the theory of meaning (semantics), the theory of knowledge (epistemology), and the theory of truth (metaphysics). The debate looks at questions like the following:

Can there be truths of which we are unaware?
Does language reflect the world?
Do we have knowledge beyond our senses?
What is the ground of knowledge?
What is the nature of "truth," "language," "the world"?

I begin with a discussion of the larger context of realism and anti-realism because I believe that this discussion helps to frame what is at stake in contemporary jurisprudential debates over justification. In law, we want to know whether a judge "got the law right," whether a lawyer's claim about the law is "true," and what it means to say that another's view of the law is "mistaken." The broader context helps to sharpen our perceptions of what acceptable answers to these questions might look like.

After a brief survey of the broader philosophical terrain, we take our first look at the landscape of current legal theory. This introductory discussion is prefatory: my goal is to get the reader interested in the issues under consideration.[4] To do that, I have to show how any of these questions matter to our reflections on the nature of justification in law. In particular, I want to signal, albeit broadly, what it is in the accounts of others I find flawed. In this way, I hope to justify these questions and anticipate my own responses to them.

3. This is taken from Simon Blackburn, *Spreading the Word* 3 (1984).

4. Thus, in this introduction I do not consider all the views taken up in the following chapters. As stated, my interest here is to focus the reader's attention by providing a sense of the issues involved as well as some of the positions in the literature.

Realism/Anti-Realism

Our understanding of the current debates in jurisprudence over the truth status of legal propositions can be enhanced by considering equally contemporary debates in philosophy over the nature of meaning. These debates are a cluster of controversies to which the terms "realism" and "anti-realism" attach.

Realism and anti-realism are two different approaches to the nature of the truth of propositions. For the realist, the meaning of a sentence[5] is given by the conditions that make it true. So, for example, the sentence "My car is parked in front of the house" is true if, and only if, there is a car, it is my car, and it is indeed parked in front of the house. Now this example may seem confusing, for it appears to conflate the meaning of a sentence with the truth asserted by the sentence.[6] For the realist, one knows the meaning of a sentence when one knows what it would take for that sentence to state a truth. Hence, the proposition is true if the conditions that would make the proposition true obtain. In this way, we see that, at least for the realist, truth depends on a certain sort of approach to meaning, which may be characterized as truth-conditional in nature.

Realism's opposite, anti-realism, does not dispute the contention that truth is a matter of conditions. Where realists and anti-realists part company is over the question whether truth conditions may be "recognitionally transcendent." For realists, the truth conditions for a proposition may lie beyond our capacities to recognize them (a lack of epistemic access). This is of no moment to the realist, for she believes that propositions may be true quite independently of our ability to recognize and discern their truth. This is precisely what the anti-realist denies. As one defender of anti-realism puts it,

> [T]he case for anti-realism rests on the proposition that speakers grasp the meaning of, or understand, a sentence when they know which conditions warrant its assertion. This proposition will be supported by reflection on the

5. A sentence is the linguistic unit that expresses a proposition.

6. D. W. Hamlin does an excellent job in succinctly summarizing the relationship between the meaning of a proposition and what makes it true. See D. W. Hamlyn, *Metaphysics* 28–29 (1984): "Realism involves at least the claim that there is a reality independent of us and our minds, and that what we think, understand and recognize does not necessarily exhaust what reality involves. The facts may go beyond anything we are capable of ascertaining, but the truth is so by virtue of those facts and that reality. In recent times, however, philosophical concern with realism has had to do with its connexion with theories of meaning, because it is taken to be the case by many philosophers that the meaning of propositions is a function of what makes them true or false. The question at issue, therefore, is whether what is to be understood in any proposition lies simply in what sort of fact makes it true—in other words in its truth-conditions. Anti-realism holds that what has to be understood is more than that. To understand a proposition we need also to know its verification-conditions; we need, that is, a recognition of when the truth-conditions apply, and when we are justified in holding that they do. It follows, given this view of what it is to be understood in a proposition, that there is no sense to be attached to the idea of facts going beyond what we are capable of ascertaining."

> sort of training in language use which speakers can receive. If understanding consists in a grasp of warranting conditions, truth cannot transcend what can be warranted. And anti-realism is correct.[7]

Another line of demarcation between realism and anti-realism is the question of objectivity.[8] Realist philosophers of science, for example, are of the view that propositions about the natural world are true in virtue of the way the world is. Scientific theories are true to the degree they comport with facts of nature. Of course, realists see no necessary connection between natural states of affairs (facts) and our ideas about nature (beliefs). Nature is what it is, quite apart from anything we may believe about it. It is in virtue of these natural facts that propositions about nature are either true or false.

Realism is not limited to the realm of naturalistic inquiry. Some moral and legal philosophers posit the existence of moral facts, which make our moral assertions true and false. This thesis, which is metaphysical in nature, is an account of the nature of truth in morals. Recalling the connectedness of truth and meaning, the moral realist affirms that a moral proposition is true if the conditions that render it true (moral facts) obtain. Again, as with the scientific realist, the moral realist unpacks "*p* is true" in terms of the conditions (facts) in virtue of which *p* is true.

The anti-realist in morals denies the existence of moral facts. One form of moral anti-realism, emotivism, characterizes all ethical statements as expressions of personal preference or desire. Thus, for the emotivist, a statement of the form "Killing is wrong" merely states a preference for a world in which there is no killing. Because there are no moral facts, there is nothing in virtue of which "Killing is wrong" might be true or false. Thus, the proposition "Killing is wrong" can never be objective.

This account of realism and anti-realism cannot purport to be an exhaustive survey of what are several debates in ethics, philosophy of language, and metaphysics. Much in these debates is of little concern to the present endeavor, concerned as it is with matters of jurisprudence. However, the broader problems raised in these debates figure directly in matters of current concern to jurisprudence. Let us now turn to these.

Jurisprudential Realism

To get a sense of why legal philosophers have paid attention to the question of truth in law, let us look at how one of the leading figures in modern jurisprudence views the matter. Ronald Dworkin has developed and sustained a position in jurisprudence by returning his critical attention to legal positivism, specifically

7. James O. Young, "Meaning and Metaphysical Realism," 63 *Philosophy* 114, 115 (1988).

8. For an excellent discussion of the objectivity of law, see Brian Leiter, "Objectivity and the Problems of Jurisprudence," 72 *Tex. L. Rev.* 187 (1993) (reviewing Kent Greenawalt, *Law and Objectivity* (1992)).

the version of positivism formulated by H. L. A. Hart. In an introductory essay[9] for a collection of essays on the philosophy of law edited by himself, Dworkin discusses the relationship of philosophy of law in ways that show why the issue of truth is of such importance. His account of the philosophical importance of truth for jurisprudence is perspicuous and persuasive. We shall consider his argument in some detail.

Like his fellow positivists Hans Kelsen and John Austin, Hart advocates the view that "propositions of law are propositions about laws."[10] And "propositions of law are true when they correctly describe the content of laws or rules of law; otherwise they are false."[11] So, on the positivist account of the matter, "truth" means "accurate description." A direct corollary of this view is that "no sense can be assigned to a proposition unless those who use that proposition are all agreed about how the proposition could, at least in theory, be proved conclusively."[12] This, Dworkin maintains, is not a matter of legal theory but a thesis in the philosophy of language:

> [M]any positivists rely, more or less consciously, on an anti-realist theory of meaning.
>
> . . .
>
> Lawyers are agreed, according to positivism about how the existence of a law or a legal rule can be proved or disproved, and they are therefore agreed about the truth conditions of ordinary propositions of law that assert rights and duties created by rules. But controversial propositions of law, which assert rights that do not purport to depend upon rules, are another matter. Since there is no agreement about the conditions which, if true, establish the truth of such propositions, they cannot be assigned any straightforward sense, and must therefore be understood in some special way, if at all.[13]

As Dworkin reads positivism, when it comes to controversial propositions of law, there are two choices: there is no truth of the matter about the propositions in question, or the truth conditions for controversial propositions of law are "special," that is, different from the truth conditions for ordinary propositions.

Dworkin disputes the positivist account of the truth of legal propositions, claiming that the positivist argument rests on a controversial philosophical view of the nature of truth:

> Some readers may object that, if no procedure exists, even in principle, for demonstrating what legal rights the parties have in hard cases, it follows that they have none. That objection presupposes a controversial thesis of general philosophy, which is that no proposition can be true unless it can, at least in principle, be demonstrated to be true. There is no reason to accept that thesis

9. Dworkin, *supra* note 1.
10. *Id.* at 6.
11. *Id.*
12. *Id.* at 8.
13. *Id.* at 8.

as part of a general theory of truth, and good reason to reject its specific application to propositions about legal rights.[14]

Dworkin's dispute with positivism connects jurisprudence directly with philosophy of language.[15]

> There can be no effective reply to the positivist's anti-realist theory of meaning in law, however, unless an alternative theory of propositions of law is produced. That theory must assign a sense to controversial propositions of law comparable to the sense that controversial propositions in science, history, literature, and academic awards are supposed, by those who use them, to have. It must at least show how disagreement about such propositions may seem genuine to lawyers and not, as the anti-realist position would insist, illusory.[16]

Dworkin's alternative to what he terms the positivist's "anti-realist" theory of meaning is an account of legal discourse that shows that the truth of legal propositions is not completely settled by legal practice. Dworkin wants the truth of what we say in law to be independent, at least in part, of the ways in which we agree that a proposition of law is true. In short, Dworkin wants to make the case that the truth of (at least some) legal propositions transcends our current practices. Whether Dworkin is successful in his endeavor will depend on the extent to which he provides an account of truth that is independent of legal practice.

Dworkin's position, at least in the form sketched above, is a version of realism. He seems to be saying that any adequate account of truth in law must explain how beliefs about what law requires can be true apart from mere ***belief*** or ***agreement*** that they are true. What is needed here is a philosophical account of the distinction between "seems true" and "is true."[17]

One clear impetus for realism about propositions of law is the belief that there is some "fact of the matter" about legal discourse. We want to know that what we say about the law is true. However, realists want "is true" to mean more than anti-realists do; for the latter, "true" means the satisfaction of intersubjective criteria. For the realist, there must be something more to "is true" than the fact that with respect to a given proposition of law, everyone believes that proposition to be true. Of course, what some realists—call them "metaphysical realists"[18]—seek is an account of the nature of truth wherein "the meaning of 'is true' is given by the correspondence of some sentences to some mind-independent and convention-

14. Ronald Dworkin, *Taking Rights Seriously* 81 (1977).

15. Dworkin, *supra* note 1, at 1. In fact, Dworkin goes so far as to say that jurisprudential questions concerning the truth conditions for propositions of law can only be settled by the philosophy of language.

16. *Id.* at 8–9.

17. I owe this way of putting the question to Brian Leiter.

18. Because each may properly be referred to as "naturalists," it is important to state that the positions of Ronald Dworkin and Michael Moore are rather different. Moore seems better described as a "metaphysical realist" because of his unwavering commitment to ontology as the engine of metaphysics and truth. Dworkin, on the other hand, speaks in the language of realism but eschews metaphysical commitments like Moore's. Moore, of course, thinks Dworkin is a "deep conventionalist" at best and, thus, no realist at all. See Michael S. Moore, "A Natural Law Theory of Interpretation," 58 *S. Cal. L. Rev.* 277, 299 n.35 (1985).

independent state of affairs."[19] For the metaphysical realist, legal language ***simpliciter*** is an incomplete and, thus, inadequate ground of truth (hence, an inadequate justification for a claim to truth). The realist is not satisfied until and unless the language of the law is itself shown to reflect the ways things "in fact" are.[20]

The aspirations of realism are, of course, completely understandable. When we claim that certain things are "the law," we are interested in getting it (the law) right. But, as Donald Davidson reminds us, we do not want to make truth a function of our epistemic powers. As he puts it, "[B]elieving something does not in general make it true."[21] How, then, does the realist move from mere belief to truth? What is it that transforms an intentional state into a judgment worthy of the name "correct" or "true"?

Michael Moore advances a capacious answer to precisely this question:

> A realist theory asserts that the meaning of "death," for example, is not fixed by certain conventions. Rather, a realist theory asserts that "death" refers to a natural kind of event that occurs in the world and that it is not arbitrary that we possess some symbol to name this thing. (It may be arbitrary what symbol we assign to name this class of events, but it is not arbitrary that we have some symbol to name it). Our intentions when we use the word "death" will be to refer to this natural kind of event, whatever its true nature might turn out to be. We will guide our usage, in other words, not by some set of conventions we have agreed upon as to when someone will be said to be dead; rather, we will seek to apply "dead" only to people who are really dead, which we determine by applying the best scientific theory we can muster about what death really is.
>
> Further, on a realist theory of meaning fact will not outrun diction. Continuing with the example of "death": finding out that not all persons who have lost consciousness and who have stopped breathing, have also had their hearts stop, will not leave us "speechless" because we have run out of conventions dealing with such novelties. Rather, either "dead" or "not dead" will have a correct application to the situation, depending on whether the person is really dead or not. Whether a person is really dead or not will be ascertained by applying the best scientific theory we have about what death really is. Our present scientific theory may be inadequate to resolve the issue, but a realist will assert that there are relevant facts about whether the person is or is not dead even if we presently lack the means to find them. A realist, in other words, believes that there is more to what death is (and thus what "death" means) than is captured by our current conventions.

19. Michael S. Moore, "The Interpretive Turn in Modern Theory: A Turn for the Worse?" 41 *Stan. L. Rev.* 871, 878 (1989).

20. It is important to notice that I have not made the ***demonstration*** of the truth of a proposition of law a requirement of the realist. I do this so that I may bring under the rubric of "realism" the position of Ronald Dworkin, whose claim that there is a right answer to every legal question has always carried with it the tag that the truth of his metaphysical claim about the truth of propositions of law depends in no way on a demonstration that, in a given case, any given answer to a legal question is "right."

21. Donald Davidson, "The Structure and Content of Truth," 87 *J. Phil.* 279, 305 (1990).

> Finally, a realist theory of meaning will not view a change in our conventions about when to apply a word as a change in its meaning. If we supplant "heart stoppage" with "revivability" as our indicator of "death," we will do so because we believe revivability to be a part of a better theory of what death is than heart stoppage. We will not have changed the meaning of "death" when we substitute one theory for another, because by "death" we intended to refer to the naturally occurring kind of thing, whatever the true nature of the event turned out to be. Our linguistic intentions are constant, on the realist theory, even if our scientific theories change considerably.[22]

The picture of knowledge presented by the metaphysical moral realist seems to rest on the assumption that the world makes a contribution to the content and character of our knowledge. This contribution comes by way of language. Somehow language is affected by—and may "reflect"—"the way things are" in the world. Thus, no matter what we may ***believe*** about the world, our ***use*** of language (not "our language") will be correct or incorrect relative to the way the world ***is*** not the way we ***take*** (believe) it to be.

How does the world perform its guidance function?[23] That is, how is it that the world—even a world that, as Moore puts it, "really is"[24] as we take it to be—guides our usage? Moore's answer is that the world makes its informational contribution[25] through our theories. We know, for example, that someone is "really" dead "by applying the best scientific theory we can muster about what death really is."[26]

But does resort to scientific theory meet the realist's burden of proof? The whole point of metaphysical realism is that the truth of language is a function not of anyone's beliefs (including collective beliefs, i.e., theories) but of "the way the world is." In the case of death, the burden of proof cannot be met by the production of evidence that is not ***independent*** of language. To move from one form of language (law) to another (science) seems not to solve the problem, only change the venue.

Moore is careful to state that he is making no epistemic claim of direct access to reality. To the contrary, Moore embraces a coherence epistemology, one in which "[j]ustification of any belief about anything is a matter of cohering that belief with everything else we believe."[27] The problem with this approach to coherence is, of course, how to square it with Moore's metaphysical moral realism. If the essence of one's metaphysics is appeal to "the nature of . . . things,"[28]

22. Moore, *supra* note 18, at 294.

23. Again, Moore's expression is important here: "We will guide our usage, in other words, not by some set of conventions we have agreed upon as to when someone will be said to be dead; rather, we will seek to apply 'dead' only to people who are really dead, which we determine by applying the best scientific theory we can muster about what death really is." *Id.*

24. *Id.*

25. I label the contribution "informational" because it is the world that is informing us of its actual state or condition.

26. Moore, *supra* note 18, at 294.

27. Michael S. Moore, "Precedent, Induction, and Ethical Generalization," in *Precedent in Law* 183, 198 (Laurence Goldstein ed., 1987).

28. Moore, *supra* note 19, at 882.

then one is committed to the view that the truth of propositions that ostensibly refer to things is a matter of word and world hooking up in a way ***that provides a normative check on our linguistic practices.*** Moore fails to illumine this crucial connection. Instead of providing some account of how it is that "the real nature of death" underwrites the truth of anything we say, we are directed to another body of talk whose truth claims are equally tendentious. It seems that the realist, at least in the person of Moore, has failed to meet his burden of proof. Unless he can show how, as John McDowell puts it, that "a conception of facts could exert some leverage in the investigation of truth,"[29] it seems the claim "the world makes what we say true and false" is, at best, a platitude.

In the end, a nagging problem for realism, of whatever stripe, is its failure to provide a plausible account of how evidence-transcendent conditions constrain linguistic behavior. It is simply counterintuitive and implausible to argue that something that plays no role in our practices of assertion and justification can, in any meaningful sense, be said to limit what we can say and do.[30] Because meaning is normative,[31] nothing that fails to influence meaning can have any normative role to play in the activity of justification. And yet, realists continue with their talk of limits and right answers as if these alleged constraints had normative force.

Varieties of Jurisprudential Anti-Realism

There are varieties of anti-realism in legal theory, just as in mainstream philosophy. Broadly speaking, for the anti-realist in jurisprudence, it can be said that when it comes to semantic constraint, the strictures are either minimal or fanciful. Again, as with realism, the problem is to come up with an account of seman-

29. John McDowell, "Projection and Truth in Ethics," Lindley Lecture, University of Kansas, Department of Philosophy 11 (1988).

30. See P. M. S. Hacker, "Language, Rules and Pseudo Rules," 8 *Lang. & Commun.* 159, 164 (1988): "It is, therefore, an essential feature of rule-governed behaviour that the normative activities of teaching and training, guiding conduct by reference to rules, justifying, explaining, evaluating are part of the standard context of behaviour. In these normative activities rules are cited, formulated, referred or alluded to. They are ***used*** as standards of conduct, guides to behaviour and norms for its evaluation. There is no such thing as a rule which has no role, ***a fortiori*** no such thing as a rule which ***could have*** no such role. . . . For a form of words or a sign to be the expression or 'representation' of a rule is not an ***intrinsic*** feature of the sign, but a feature of its employment in a complex activity (just as being a ruler, a sign-post or a model is not an intrinsic feature of an object but a feature of its ***use***). Just as sounds or marks on paper, slate or sand do not constitute symbols and are not expressions of propositions unless such sounds or marks have a standard use in the behaviour of symbol-using creatures against a complex context of a form of life, so too nothing can be said to be an expression of a rule unless it is ***used*** as a rule."

31. See Crispin Wright, ***Realism, Meaning and Truth*** 24 (2d ed. 1993): "Meaning is normative. To know the meaning of an expression is to know, perhaps unreflectively, how to appraise uses of it; it is to know a set of constraints to which correct uses must conform. Accordingly, to give the meaning of a statement is to describe such constraints; nothing has a claim to be regarded as an account of a statement's meaning which does not succeed in doing so. The argument is now that the realist's truth-conditional conception has indeed no such claim."

tic constraint that has metaphysical bite. The realist wants to say that what we say has to be true in virtue of something beyond the agreement of fellow practitioners. Anti-realists deny that any such constraints exist, or that the whole notion of anything limiting what can be said "truthfully," is an illusion.

Anti-realist arguments come in both strong and weak versions. Before we look at examples of each of these, we would do well to consider just how it is the anti-realist position gets its start. Many in modern jurisprudence see the later work of Wittgenstein, particularly his remarks on rule-following, as providing the best argument for anti-realism. What is Wittgenstein's argument? Let us have a look.

Imagine a scene in which a father is attempting to teach his daughter how to "add." He starts off by showing her the following series of numbers: "0, 2, 4, 6, . . ." He says, "This series shows what it means 'to add.' In this series, the number 2 is added to the number that comes before it. Now, why don't you try to continue the series." The daughter then writes "10." Dad then says "You've made a mistake. I gave you the rule 'add 2' and you failed to follow it."

The *philosophical* problem posed by the example is one of normativity. We can state the problem thus: "What does it mean to say 'You have made a mistake'?" The philosophical problem is about what we mean when we say that someone is or is not "following a rule." By what criteria do we make this judgment? If the judgment is disputed, how can we go about settling the dispute? Are there criteria for deciding the dispute that are "neutral" or "objective"? Is there a "right answer" to the question "Did *X* follow the rule?"

Father claims to have given his daughter a rule, one which, in his view, she has misapplied. Suppose she replies to him "Well, yes, I know what *you* mean by 'add 2.' But I understand the locution 'add 2' to mean 'add 2 up to the number 6 and thereafter 'add 4.'" Dad replies "You don't understand what it means to add." Daughter rejoins "Oh yes I do, I just don't understand it in the same way as you."

Put another way, we might ask "Does the rule itself answer the question 'Who is correct—father or daughter?'"[32] But what do we mean by "the rule"? Surely the bare figures on the page or the sound that emanates from the mouth of the father cannot point the way: they are just scratches and noises. We do not glean the meaning of "add 2" from its material instantiation, either written or oral. But if not, then how is it we understand the locution at all?

Wittgenstein himself, in the voice of his interlocutor,[33] asks this question: "But

32. The outstanding English-language interpreters of Wittgenstein, Gordon Baker and Peter Hacker, believe that "the rule itself" answers this question. See G. P. Baker & P. M. S. Hacker, *Wittgenstein: Rules, Grammar and Necessity* 171–72 (1985): "The pivotal point in Wittgenstein's remarks on following rules is that a rule is internally related to acts which accord with it. The rule and nothing but the rule determines what is correct (PI § 189). This idea is incompatible with defining 'correct' in terms of what is normal or standard practice in a community. To take the behavior of the majority to be the criterion of correctness in applying rules is to abrogate the internal relation of a rule to acts in accord with it."

33. The sentence that I quote next appears in Wittgenstein's text as the first of two sentences, both of which are contained within a single set of double quotation marks. As many readers are no doubt aware, many remarks in Wittgenstein's numbered paragraphs are the words of an imaginary interlocutor. In the *Investigations*, the interlocutor plays the role of the philosophical naif, whom Wittgenstein sets right by showing the varied ways in which the interlocutor's questions prescind from philosophical confusions of various sorts.

how can a rule shew me what I have to do at *this* point?"[34] An immediate observation is then made: "Whatever I do is, on some interpretation, in accord with the rule."[35] Clearly, by "the rule" the interlocutor means the material inscription that is understood to state the rule. In the form of a verbal command, the rule "add 2" tells us nothing: we need to know what "add" and "2" (and, possibly, their combination) *means*. The rule *itself* does not tell us what it means: the meaning of the rule is not "self evident."[36] What is one to do?[37]

The interlocutor has an answer. We can "interpret" the rule, thereby generating a meaning to which we might then appeal as a ground for our claim to have followed the rule correctly. But this will work neither for father nor for daughter (nor for anyone else) as the interlocutor well knows. The upshot of his remark is that whatever is done (2 is added [father's interpretation]) (or 4 is added after reaching 6 [daughter's interpretation]) is correct if by "correct" one means "consistent with one's interpretation." The point is that, in our hypothetical, the daughter could have written any number for the next number in the series and, under *some* interpretation of the rule, the choice of that particular number would be correct.[38]

This, then, leads to Wittgenstein's statement of the paradox raised by these considerations: "[N]o course of action could be determined by a rule, because

34. Ludwig Wittgenstein, *Philosophical Investigations* § 198 (G. E. M. Anscombe trans., 3d ed. 1958).

35. *Id.*

36. For discussion of this point, see John Searle, "The Background of Meaning," in *Speech Act Theory and Pragmatics* 230 (John Searle et al. eds., 1980): "It is a fact about human practices that we count certain moves as good arithmetic and certain other moves as bad arithmetic, but there is nothing in the content of the representations that, so to speak, forces us to accept only one set of moves to the exclusion of all others. The representations are not self guaranteeing, and we do not eliminate this dependence by grounding representations in principles, for the principles are further representations which will have different applications relative to different practices and assumptions. Any set of such principles is grounded in practices which are themselves ungrounded." For elaboration of the specifics of Searle's account of the relationship between meaning, representation, and the "background of meaning," see John Searle, *The Rediscovery of the Mind* 175–96 (1992).

37. As we shall see, all of these questions are designed to suggest that something is wrong with the interlocutor's entire line of inquiry. See Meredith Williams, "Blind Obedience," in *Meaning Scepticism* 104 (Klaus Puhl ed., 1991): "In this passage [§ 198] all the key elements of Wittgenstein's alternative have been introduced. First, we need to change our way of looking at the problem, to ask different questions, for the very way we have posed our problem has directed us towards an intellectualist solution, namely a solution in terms of some interpretive act or decision or the like. Secondly, training into a custom or social practice is the way in which we come to follow rules. The process of learning is crucial to our understanding of understanding. Thirdly, meaning is a social phenomenon and so the individual cannot be radically isolated from the community. And finally, in being so trained, the individual has come to master a technique: '. . . and now I do so react to it' (PI § 199)."

38. The paradox from which this example is drawn owes its existence to Nelson Goodman, *Fact, Fiction and Forecast* (1965).

every course of action can be made out to accord with the rule."[39] By itself, the rule determines nothing: "If everything can be made out to accord with the rule, then it can also be made out to conflict with it. And so there would be neither accord nor conflict here."[40]

So how does the anti-realist propose to resolve the paradox and, armed with an account of truth, answer the question "Who (father or daughter) is correct?" Weak anti-realism is neutral on the question. The weak anti-realist simply points out that there is no "correct" way to understand addition, and that "correct" cannot mean anything more than agreement in use with one's interpretive community. This view,[41] which is defended variously by Stanley Fish,[42] Sanford Levinson,[43] and others, received its first expression in the philosophy of Nietzsche:

> "Everything is subjective," you say; but even this is interpretation. The "subject" is not something given, it is something added and invented and projected beyond what there is.—Finally, is it necessary to posit an interpreter behind the interpretation? Even this is invention, hypothesis.
>
> In so far as the word "knowledge" has any meaning, the world is knowable; but it is *interpretable* otherwise, it has no meaning behind it, but countless meanings.—"Perspectivism."
>
> It is our needs that interpret the world; our drives and their For and Against. Every drive is a kind of lust to rule; each one has its perspective that it would like to compel all the other drives to accept as a norm.[44]

The central idea many take from this paragraph is that our understanding of the world is built on some interpretation of it; that all views of the world are a matter of one or another "perspective."[45] Interpretation is, so to speak, the "bridge" between rule and action. Of course, the weak anti-realist does not disagree that propositions of law can be "true." All the weak anti-realist requires is that "true" be understood to mean an interpretation that comports with interpretations others have of the rule.[46] The interpretive version of anti-realism has obvious appeal. If nothing else, it seems to allow one to have some account of truth without the metaphysical baggage of realism, in its several manifestations. But weak anti-realism is not without its problems. If truth is defined as consensus among the members of an interpretive community, then it seems that the community can never say anything that is not true. In short, whatever the community says is true. What if the entire community agrees that the earth is flat? Or that 2 + 2 = 6? Is the community correct? Are these "truths"? Avoiding the relativistic implications of anti-realism must be of the utmost importance. If one is to live without the metaphysical comforts provided by realism, an alternative to realism has to show that the relativistic implications of interpretive anti-realism can be avoided.

39. Wittgenstein, *supra* note 34, at § 201.

40. *Id.*

41. One expression of weak anti-realism, that of Stanley Fish, is the focus of chapter 6. I focus on weak anti-realism, and Fish's particular expression of it, because his view represents the anti-realist position as it is most commonly understood.

42. See Stanley Fish, *Doing What Comes Naturally* (1989).

43. Sanford Levinson, "Law as Literature," 60 *Tex. L. Rev.* 373 (1982).

44. Friedrich Nietzsche, *The Will to Power* 267 (W. Kaufmann & R. Hollingdale trans., 1968).

45. This view is given its fullest expression in Alexander Nehamas, *Nietzsche: Life as Literature* (1985). For a thorough critique of Nehamas's argument, one that persuades that Nehamas's reading of Nietzsche is seriously flawed, see Brian Leiter, "Perspectivism in Nietzsche's *Genealogy of Morals*," in *Essays on Nietzsche, Genealogy, Morality* (Richard Schacht ed., 1994).

46. For a similar sentiment, see Donald Davidson, "Thought and Talk," in *Inquiries into Truth and Interpretation* 157 (1984) ("[A] creature cannot have thoughts unless it is an interpreter of the speech of another.")

Strong jurisprudential anti-realists have none of these worries. They see the entire range of issues from truth, meaning, objectivity, and the like, to be little more than a collection of philosophical antiquaria. A familiar version of strong anti-realism is the claim from critical legal studies that the law is "indeterminate." In its sophisticated form, the indeterminacy argument sees legal justification as the outward expression of deeper political commitments. As Roberto Unger, the doyen of critical legal studies, puts it: "[E]very branch of doctrine must rely tacitly if not explicitly upon some picture of the forms of human association that are right and realistic in the areas of social life with which it deals."[47] And why is it necessary for one to have a political theory? "Without such a guiding vision, legal reasoning seems condemned to a game of easy analogies."[48]

One could easily take Unger to be saying that there is no content to law apart from that contributed by some political theory. But Unger is saying something more subtle than this crude reading allows. In words that remind one of Kant's famous lines about intuition and content, Unger states that one should neither accept doctrine blindly nor reject it as a whole. This leaves one in the difficult position of deciding just what to include and what to leave out. To make these choices, "you need a background prescriptive theory of the relevant area of social practice, a theory that does for the branch of law in question what a doctrine of the republic or of the political process does for constitutional argument. This is where the trouble starts."[49] The "trouble," as Unger sees it, is the Achilles' heel of the legal reformer: "No matter what the content of this background theory, it is, if taken seriously and pursued to its ultimate conclusions, unlikely to prove compatible with a broad range of the received understandings."[50]

Unger sees no necessity to the present structure of law.[51] His program of "Deviationist Doctrine" is advanced in the hope of expanding the range of materials that are to count as "doctrine" while increasing the likelihood of social transformation. In short, Unger sees legal doctrine as subject to the play of larger political forces, but not so in the ways one finds in the cruder versions of historical materialism. In short, for Unger, the "truth" of law is a product of a political vision, and nothing more.

47. Roberto M. Unger, *The Critical Legal Studies Movement* 8 (1986).

48. *Id.*

49. *Id.* at 9.

50. *Id.*

51. Nor does he see any "necessity" to the present structure of society. For sustained discussion of this point, the so-called context-smashing perspective, see Roberto M. Unger, *Politics* (1987).

Unger's subtle mix of doctrine and politics contrasts with other versions of the indeterminacy critique. In a much-discussed article in the *Yale Law Journal*, Joseph Singer argues for two seemingly contradictory conclusions.[52] First, he claims that legal doctrine is "indeterminate." How does Singer understand "determinate"? He advances an answer in the context of what one can rightfully expect from a legal theory:

> We cannot expect the new to emerge phoenix-like from the old. Traditional legal theorists have assumed that theory is, or should be *determinative*—that the goals of theory is to *generate answers*. For this view to make sense, we must believe that it is possible to find out what to do by thinking in the right way.
>
> . . .
>
> But in the end, all the sophisticated versions of theory that seek to describe it as a decision procedure based on a sure foundation are supremely unconvincing; they cannot convince precisely because they are so sophisticated. The dilemma comes down to this: For a theory to generate answers, it must be mechanical, yet no mechanical theory can render an adequate account of our experience of legitimate moral choice. We cannot even escape the dilemma by trying to make some of our choices (the "core") mechanical and some (the "periphery") open-ended: *No* mechanical choices appear to be unequivocally valid.[53]

This states the first horn of the apparent contradiction: the law is indeterminate. Thus, legal doctrine "does not fully constrain our choices";[54] "The arguments therefore do not determine the result."[55] If doctrine does not generate choices, what does? This brings us to the second horn of the dilemma. The law is predictable because lawyers and judges share the same legal culture.[56]

> To the extent legal decisions are predictable, they can be explained by legal culture. This does not mean that legal decisions are completely predictable. On many issues, no conventions are available. Many other issues are outside mainstream political controversy and therefore we cannot predict what individual judges will think about them. It is precisely because of these uncertainties as well as gaps in the legal rules, and because legal reasoning is indeterminate and manipulable, that judges often surprise us by using existing arguments to justify results we did not expect.[57]

The essence of Singer's account of the coherence and consistency of legal doctrine is not normative but sociological. Lawyers and judges see the world through the same categories. It is in that seeing—not in anything to do with the categories—that the stability of doctrine resides. Singer does not deny that there is a truth of the matter about law: what he denies is that legal truth is normative.

52. Joseph Singer, "The Player and the Cards," 94 *Yale L.J.* 1 (1984).
53. *Id.* at 61.
54. *Id.* at 14.
55. *Id.* at 16.
56. *Id.* at 19–25.
57. *Id.* at 24.

That is, the stability and regularity of law is to be explained *empirically* (e.g., by the methods of sociology), for that is the only form of regularity the law can enjoy. The normative regularity of law is an illusion. Again, no theory can generate answers to legal questions, for to do so "it must be mechanical, yet no mechanical theory can render an adequate account of our experience of legitimate moral choice."[58]

For Singer, legal reasoning is best understood as a sociological phenomenon. The basic form of Singer's account of law is empiricist or social scientific. He asks the question "How is it that we can accurately predict the outcomes of cases?" His answer is causal in form: lawyers and judges are all responding to the same cultural cues. They are not "deciding" cases, because the rules do not compel outcomes. The behavior of lawyers and judges is to be explained as responses to cultural stimuli—shared vocabularies, presuppositions, and so on—and nothing more.

Singer's mistake is classic: he seeks to substitute a causal account of a phenomenon for a normative account.[59] To see the mistake, consider the following from H. L. A. Hart:

> If, however, the observer really keeps austerely to this extreme external point of view and does not give any account of the manner in which members of the group who accept the rules view their own regular behavior, his description of their life cannot be in terms of rules at all, so not in terms of the rule-dependent notions of obligation or duty. Instead, it will be terms of observable regularities of conduct, predictions, probabilities, and signs. For such an observer, deviations by a member of the group from normal conduct will be a sign that hostile reaction is likely to follow and nothing more. His view will be like the view of one who, having observed the working of a traffic signal in a busy street for some time, limits himself to saying that when the light turns red there is a high probability that the traffic will stop. He treats the light merely as a natural *sign that* people will behave in certain ways, as clouds are a *sign that* rain will come. In so doing he will miss out a whole dimension of the social life of those whom he is watching, since for them the red light is not merely a sign that others will stop: they look upon it as a *signal for* them to stop, and so a reason for stopping in conformity to rules which make stopping when the light is red a standard of behavior and an obligation. To mention this is to bring into the account the way in which the group regards its

58. *Id.* at 61.

59. Philip Bobbitt, whose position is the subject of chapter 7, diagnoses the problem with characteristic succinctness. See Philip Bobbitt, *Constitutional Interpretation* 24 (1991): "Although most people may to some extent hold the view . . . that there *must* be some sublime explanatory mechanism that allows our ideas to interact with the world—there is no reason to think so. . . . Law is something we do, not something we have as a consequence of something we do. Sometimes our activities in law—deciding, proposing, persuading—may link up with specific ideas we have at those moments; but often they do not, and it is never the case that this link must be made for the activities that are law to be law. Therefore the causal accounts of how those inner states come into being, accounts that lose their persuasiveness in contact with the abundance of the world, are really beside the point. If we want to understand the ideological and political commitments in law, we have to study the grammar of law, that system of logical constraints that the practices of legal activities have developed in our particular culture."

behavior. It is to refer to the internal aspect of rules seen from their internal point of view.[60]

Hart's point here is one about normativity. One cannot understand the nature of justification without investigating how individuals in a practice *use* rules as justifications in appraising another's behavior. Singer thinks that if a rule does dictate results "mechanically" it can play no justificatory role. This is absurd. Were it true, we could not understand how rules govern everything from cello performance, to chess, to traffic regulations. Are all these activities, which we see as governed by rules, to be dismissed as merely behavioral responses to cultural stimuli?

Beyond Realism and Anti-Realism

Some philosophers argue that the realism/anti-realism debate in philosophy is a pseudodebate. Put succinctly, the problem with the debate appears to be the terms on which it is conducted. The central difficulty is that the participants share a dubious premise about the nature of truth. Both realist and anti-realist alike believe that the truth of propositions of law is a matter of truth conditions. Each believes propositions of law can be true; the disagreement is over what (conditions) in virtue of which propositions of law are true.

Jurisprudential realists and anti-realists share with their philosophical brethren the belief that issues of meaning and truth start from the distinction between beliefs and truths. A belief that some proposition of law is true does not make the proposition true. The belief is true if and only if some state of affairs obtains that makes the proposition true. It is that state of affairs which, when accessed by the lawyer, licenses the attribution of knowledge. What the lawyer has knowledge *of* is a fact of some sort. The relationship of that fact to the asserted proposition is one of truth or falsity. Thus, jurisprudential realists and anti-realists each subscribe to the following account of legal knowledge, meaning, and truth:

1. Take the following legal proposition: "Lawyer *L* knows the meaning of *P*";
2. The meaning of *P* = the truth conditions of *P*;
3. The truth conditions of *P* are *TC*;
4. *L* knows that the truth conditions of *P* are *TC*.[61]

Jurisprudential realists and anti-realists agree that the meaning of legal propositions is given by their truth conditions. What they ***disagree*** over are, at least, the nature of those truth conditions. Realists maintain that the truth conditions for propositions of law are or may be given by states of affairs to which we do not have direct epistemic access. Anti-realists deny that we lack access to the truth conditions for propositions of law. Additionally, and perhaps more importantly,

60. H. L. A. Hart, *The Concept of Law* 89–90 (2d ed. 1994).

61. This is adapted from Richard Rorty, "Pragmatism, Davidson and Truth," in 1 Richard Rorty, *Philosophical Papers (Objectivity, Relativism, and Truth)* 147 (1991).

anti-realists affirm that the truth conditions for propositions of law are entirely social in nature.[62]

Recall Dworkin's criticism of legal positivism. Positivism asserts that a proposition of law is true if the requisite social facts obtain that make the proposition true. Dworkin denies the plausibility of the positivist account with his claim that a proposition of law may be true even if there is no legislative fact of the matter that, on the positivist account, would make the proposition true. Dworkin wants to tell a different story about the truth conditions for propositions of law. For him, "propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice."[63]

Dworkin shares with positivism the premise that the debate over the nature of truth is a struggle over the "correct perception of the true grounds of law."[64] This is the premise I wish to dispute. Further, I believe that the truth of propositions of law depends not at all on the existence of conditions, factual or otherwise. The truth of a proposition of law is not a matter of the relationship of the proposition to something (e.g., a social fact) that ***makes*** the proposition true. Rather, the truth of a proposition of law is shown through the use of forms of legal argument. It is in the use of these forms of argument—the grammar of legal justification—that a proposition of law is shown to be true.

The heart of the position I advocate, one that goes "beyond realism and anti-realism," is in the denial of the truth-conditional account of propositions of law. "True" does not name a relationship between a state of affairs and a proposition of law. "True" is best understood disquotationally. For example, when a statute becomes law, it is true that the legislature has done something. But the ***meaning*** of what the legislature has done is not given by the fact of their having done something. The meaning of their corporate act—what the act amounts to—is given by the practice of statutory interpretation. Apart from the forms of legal argument appropriate to the reading of statutes, the promulgation and passage of a statute has no meaning at all. Only in a practice of reading statutes do we know what the legislature has done. We cannot say that the legislature has done anything (and, thus, we cannot say anything about what the law is) apart from our practice of statutory interpretation. Let us consider an example.

In *United Steel Workers of America v. Weber*,[65] the Supreme Court considered the question whether Title VII prohibits voluntary affirmative action in training activities. One focus of the Court's attention was the following statute:

> It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to dis-

62. For example, Hart argues that the existence of social facts about legislative action are the truth conditions for propositions of law. Stanley Fish argues that propositions of law are true just in case there is a convergence of interpretational presuppositions.

63. Ronald Dworkin, *Law's Empire* 225 (1986).

64. *Id.* at 6.

65. 443 U.S. 193 (1979). This case is discussed in more detail in chapter **4**.

> criminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.[66]

On its face, the statute would seem to preclude the type of plan at issue in *Weber*. The form of argument at work is textual argument, which involves appeal to the ordinary meaning of the words of the statute. The force of the appeal of textual argument comes out in the words of Justice Rehnquist, who dissented from the majority's decision approving the affirmative action plan: "Were Congress to act today specifically to prohibit the type of racial discrimination suffered by Weber, it would be hard pressed to draft language better tailored to the task than that found in § 703 (d) of Title VII."

In affirming the legality of the affirmative action plan, the majority in *Weber* appealed not to the language of Title VII but to the history surrounding the promulgation and passage of the statute. The majority set up the historical argument with a doctrinal argument.

> Respondent's argument is not without force. But it overlooks the significance of the fact that the Kaiser-USWA plan is an affirmative action plan voluntarily adopted by private parties to eliminate traditional patterns of racial segregation. In this context respondent's reliance upon a literal construction of §§ 703 (a) and (d) and upon *McDonald* is misplaced. See *McDonald v. Santa Fe Trail Transp. Co., supra, at 281 n. 8.* It is a "familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892). The prohibition against racial discrimination in §§ 703 (a) and (d) of Title VII must therefore be read against the background of the legislative history of Title VII and the historical context from which the Act arose.[67]

Having set up the need to consult history, the majority then shifted to the historical form of argument. After recounting the motivations of Congress in promulgating this legislation, the majority concluded that "[t]he natural inference is that Congress chose not to forbid all voluntary race-conscious affirmative action."[68] The majority uses three forms of legal argument—textual, doctrinal and historical—to show that the proposition in question[69] is true. The forms of argument are the means by which the Court appraises the proposition in question. Truth and falsity are not properties of legal propositions, nor are the forms of argument truth conditions for propositions of law. They are the means for showing that propositions of law are true or false.

66. 78 Stat. 256, 42 U.S.C. § 2000e–2(d) (1976).

67. 443 U.S. at 201.

68. *Id.* at 206.

69. The proposition was stated by the majority in the form of a question: "The question for decision is whether Congress, in Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e et seq., left employers and unions in the private sector free to take such race-conscious steps to eliminate manifest racial imbalances in traditionally segregated job categories." 443 U.S. at 197.

Plan of the Present Work

This introduction began with the question of how three concepts are related: meaning, truth, and knowledge. I introduced the realism/anti-realism debate to relate the contemporary philosophical discussion of these issues to similar current debates in contemporary legal theory. I have suggested that in law, legal forms of argument constitute the terms for appraising the truth of propositions of law. Nothing *makes* our legal utterances true. Truth in law is neither a property nor a relation. Truth is not an explanatorily useful concept. Likewise, meaning is not to be explained as a matter of conditions. One cannot say something meaningful in law without using the grammar of legal argument. Getting a clear surview of this grammar is the task of jurisprudence.

We now have a context for the question this book addresses, namely, what it means to say that a proposition of law is true. The last chapter presents an answer to the question, albeit one that departs significantly from the answers provided by other commentators who have devoted themselves to this question. Despite my disagreements with their views, my position develops both directly and indirectly from interaction with, and criticism of, their positions. Each view has much to recommend it. At one point or another, something in each has attracted my attention and, in some cases, I have adopted the point of view as my own. But after sustained thinking about the question of truth, I have departed decidedly from almost all the positions discussed here. This in no way undermines the fact that I have learned much from the work of those whom I criticize.

The book moves through each of the major positions with an eye on the final chapter which presents my account of what it means to say that a proposition of law is true. While much of the book is critical, the position I ultimately develop emerges out of the arguments and positions of those other views. Without this background, the alternative nature of my position could not be appreciated.

2

Legal Formalism: On the Immanent Rationality of Law

> Those who dismiss legal formalism as a naïve illusion, mistaken in its claims and pernicious in its effects, do not know what they are in for.
>
> Roberto M. Unger[1]

> The genuine refutation must penetrate the opponent's stronghold and refute him on his own ground; no advantage is gained by attacking him somewhere else and defeating him where he is not.
>
> Hegel[2]

Formalism is the most maligned contemporary approach to jurisprudence. Yet, after countless dismissals, formalism survives. One explanation for its survival is that, at some level, it appeals to our deepest intuitions about law. If anything is to be ordered, structured, or internally coherent, law should be a prime candidate. But if there is a structure to law—a form—what is it? If the law embodies a certain form, an intelligible order, is the order there to be found or is it we who put it there? These are some of the questions at issue in the formalist approach.

Ernest Weinrib's defense of legal formalism[3] is the most sophisticated articulation of a formalist jurisprudence in the literature. The central claim of Weinrib's argument lies in the primacy of what he refers to as ***immanent intelligibility***.[4] Weinrib believes that the only way to maintain the dichotomy between law and politics is to understand law on its own terms or, as he puts it, "from the internal point of view."[5] Fundamental to Weinrib's argument for formalism is his belief that an enterprise such as law can (indeed, must) be understood strictly on its own terms.

1. Roberto M. Unger, *Knowledge and Politics* 92 (1975).

2. G. W. F. Hegel, *The Science of Logic* 581 (A.V. Miller trans., 1969).

3. The most succinct articulation of Weinrib's general jurisprudence is Ernest Weinrib, "Legal Formality: On the Immanent Rationality of Law," 97 *Yale L.J.* 949 (1988) [hereinafter "Legal Formality"]. The fullest expression of his position is Ernest Weinrib, *The Idea of Private Law* (1995) [hereinafter, *Private Law*] (In this latter work, Weinrib defends the proposition that formalism provides the best account of the nature of private law.).

4. Weinrib, "Legal Formality," *supra* note 3, at 955 ("[F]ormalism postulates that juridical content can somehow sustain itself from within.").

5. *Id.* at 951 ("Formalism postulates that law is intelligible as an internally coherent phenomenon.").

This chapter is a presentation and critique of Weinrib's unique approach to formalism, which he has championed over the course of the last two decades. First introduced in the context of tort law, the course of Weinrib's development of formalism culminates in his recent book *The Idea of Private Law*.[6] In that work, Weinrib defends the notion that private law has an internal, conceptual structure that cannot be grasped by "external" critiques of law,[7] such as one finds in virtually every other contemporary jurisprudence.

The plausibility of the formalist enterprise depends upon the success of its metaphysical claims, specifically that law has a conceptual and normative structure independent of the play of external, usually political, interests. In this structure, which thought and critical reflection are capable of disclosing, lies the nature of law.

Apropos of our question concerning the truth of propositions of law, formalism asserts that a proposition of law is true if the stated proposition is consistent with the structure of private law, correctly understood. The structure of private law is dependent in the first instance on Aristotle's distinction between corrective and distributive justice. This distinction is a necessary one: to mix the forms of justice is to embrace incoherence. In short, truth for the formalist is a matter of coherence.

The formalist account of coherence and truth depends ultimately on the degree to which we may ignore Aristotle's distinction between corrective and distributive justice. Traditionally, when a concept or distinction is one which cannot be ignored, the notion may be said to be ***necessary*** to the enterprise in question. In the course of this chapter, I spell out formalism's claims for the juridical necessity of the distinction between corrective and distributive justice. Further, I seek to show that those claims are not successful, in part because the alleged necessity is simply asserted but not shown. Additionally, I argue that formalism's account of human understanding is defective because it fails to take human interests into account. Thus, what is trumpeted as a virtue turns out to be a defect.

The Formalist Account of Legal Understanding

If Weinrib's account of legal formalism is correct, then virtually every other jurisprudence is misconceived. In other words, were Weinrib's claims for the necessity of understanding law from the "internal" perspective to turn out to be correct, then virtually every competing description of legal activity could amount to nothing more than a failed attempt at accurate representation of the true nature of law. The justification for this sweeping characterization is clear: any attempt

6. Weinrib, *Private Law*, *supra* note 3.

7. The meaning of "external" will be enhanced and clarified later in this chapter. Briefly, external approaches to law (economics, sociology, philosophy) attempt to explain law from the point of view of another discourse. For example, tort law might best be explained as the pursuit of efficiency or distributive justice.

to understand law from anything but a perspective "internal" to law is necessarily a defective account of the enterprise. Why? Because, according to Weinrib, only an internal account of law's intelligibility can guarantee the separation of law from politics.[8]

Weinrib's formalism is premised on the claim that law is an "immanently intelligible enterprise."[9] The nature of law is such that it can only be (fully) understood from the internal point of view. As Weinrib puts it, the "internal standpoint cannot be ignored: Only by reference to it is legal philosophy assured of having made contact with its subject matter [law]."[10]

The subtlety of Weinrib's argument lies in his ingenious synthesis of the metaphysics of Aristotle, Aquinas, Hegel, and Kant.[11] Following Hegel, Weinrib links the intelligibility of law to the immanence of the subject (the self) in legal discourse. While the meaning of immanence in Hegel may be somewhat opaque, Weinrib's use of the term is clear. "Immanent" to law means "inside" legal discourse. To understand the structure (form) of law it is *necessary* (but not sufficient) to have a thorough acquaintance with legal subject matter.

The necessity of examining law from the internal perspective is grounded in the requirement of reflection.[12] Again, the inspiration is Hegel for whom the idea of philosophical method requires not reflection upon an object merely as it appears in sensory experience but rather a method that "by contrast, does not behave as an external reflection, but takes what is determinate from its object itself, for it is itself its soul and immanent principle."[13] Reflection is a process of thought that is triggered by the situation in which the reflecting subject finds herself. It is the

8. In Weinrib's view, the importance of critical legal studies lies in its highlighting the importance of keeping separate the political and legal spheres. See Weinrib, "Legal Formality," *supra* note 3, at 1016: "For the formalist, the salutary contribution of Critical Legal Studies is to show that once we step outside the most rigorous notion of internal coherence, the slide to nihilism is swift and easy. In this sense, Critical Legal Studies captures the essence of contemporary scholarship by accentuating—and then exploding—its makeshift compromises. The significance of Critical Legal Studies is that it forces us to confront anew the problem of coherence in law. It raises the eternal question of legal philosophy, and presents us with its own skeptical answer."

9. As Weinrib states, "Immanent intelligibility is not a subclass but a paradigm of intelligibility." Weinrib, "Legal Formality," *supra* note 3, at 963. The importance to Weinrib's account of the necessity of understanding from the internal point of view places his account of knowledge within the tradition of Hegel: "Immanent criticism must give up the deeply felt epistemological need to impose its own standards upon the subject matter. Any such external input, what Hegel calls 'our addition' (*unsere Zutat*), must be avoided by the philosopher, who is allowed only to observe (*Zusehen*) consciousness. There is no point, then, in trying to determine a priori rules of evidence for what is to count as knowledge or how it is to be verified. The idea of an immanent critique, or phenomenological self-reflection, means rather that we need only test knowledge against itself." Steven B. Smith, *Hegel's Critique of Liberalism: Rights in Context* 153–54 (1989).

10. Weinrib, "Legal Formality," *supra* note 3, at 952.

11. The thought of Aristotle, Aquinas, Hegal, and Kant runs throughout the entire body of Weinrib's work, but is most explicit in Ernest Weinrib, "Corrective Justice," 77 *Iowa L. Rev.* 403 (1992).

12. "Juristic activity includes reflection on its own self-understandings and aspirations." Weinrib, "Legal Formality," *supra* note 3, at 952.

13. G. W. F. Hegel, *Wissenschaft der Logik* 491, quoted and translated in Michael Rosen, *Hegel's Dialectic and Its Criticism* 89 (1982). In terms of the dichotomy between subject and object,

promise of formalism to render experience intelligible as an idea: if you think about (reflect on) what is going on you will come to see that (legal) experience not only "makes sense," but must make sense *in a certain way*.

The fundamental problem with all current attempts at legal theory, so the formalist argues, is that they merely take account of law from one or another external perspective.[14] Because these perspectives are external to (the Idea of) law, they are at best *partial* perspectives and thus *necessarily* defective.[15] Likewise, positive law (what we *call* "law") may itself be defective because it fails to conform to the Idea of law understood from the internal point of view.[16]

The Idea of Form

Law is constituted by form. Form renders juridical relationships intelligible as such. Form is what makes something intelligible, making it what it is and distinguishing it from all other things.[17] In other words, form makes the object or idea intelligible to a subject capable of cognition.[18] As an object of consciousness, form must be grasped as a unity, that is, as a unity of content.

For Weinrib, form and content "are correlative and interpenetrating."[19] Form determines content, and content determines form. A form without content "would not be a form *of* anything"[20] and a content without form would be unintelligible: it would simply be a congeries of particulars. Form gives content to an ensemble of particulars by organizing them into a coherent notion.[21] Content is what form renders intelligible, such that it can be recognized as a something.

reflection takes "consciousness as its own object, thinking about thinking, examining (as opposed to employing) the understanding." Robert Solomon, *In the Spirit of Hegel* 282 (1983).

14. For example, critical legal studies sees law as a discourse that imports politics. Law and economics conceives of law as an expression of nonlegal values such as efficiency.

15. For a thoroughgoing critique of the partiality of modern contract theory from the Hegelian perspective, see Peter Benson, "Abstract Right and the Possibility of a Nondistributive Conception of Contract: Hegel and Contemporary Contract Theory," 10 *Cardozo L. Rev.* 1077 (1989) (a critique of the theories of Michael Sandel, Charles Fried, and Anthony Kronman).

16. Weinrib's principal example of such an analytical failure is the incorporation of strict liability into tort law. See Weinrib, *Private Law*, *supra* note 3, at 171–203 (asserting that strict liability is incompatible with corrective justice).

17. As Weinrib puts it, "When we seek the intelligibility of something, we want to know *what* the something is." Weinrib, "Legal Formality," *supra* note 3, at 958.

18. In short, form is both causal and normative. See Ernest Weinrib, "Why Legal Formalism?" in *Natural Law Theory* 341, 353 (Robert George ed., 1992): "When applied to law, form refers to the structure of justification immanent in a juridical relationship. Formalism focuses on the ensemble of concepts and institutions that gives a specific juridical relationship its character. The coherence of the juridical relationship consists in the participation by these concepts and institutions in a single justificatory structure. Generic differences between juridical relationships reflect differences in their underlying justificatory structures. Formalism accordingly elucidates the possibilities from justificatory coherence latent within specific juridical relationships."

19. Weinrib, "Legal Formality," *supra* note 3, at 959.

20. *Id.*

21. It is form that a subject comprehends

The analysis of form and content, and the necessary relation of one to the other, is enlarged and clarified by Weinrib's discussion of the three interrelated aspects of form and content. They are character, unity, and genericity. The character of a thing is what makes it what it is; those things the lack of which would destroy its uniqueness. This is its essence.[22] The structure or unity of a thing displays the integrative element of form. When we grasp a thing's form, "we understand the thing neither as an aggregate of independently intelligible properties nor as a homogeneous unit consisting of an extended single property."[23] Rather, what we see is one *thing* with a number of *integrated* parts. It is the "oneness" of the parts that is their structure. Finally, the genericity of a thing's character is that by virtue of which we are able "to regard all the instances of the matter in question as having the same character and as being other than whatever has a different character."[24]

To make his point here, Weinrib offers the example of a table, the set of properties of which "is found in all tables."[25] This set of properties "constitutes the genericity of what it is to be a table."[26] He explains:

> The form of a table is the design that guides the artisan to impart to the chosen material a set of attributes (elevation, flatness, hardness, smoothness, and so on) that make something a table. In the classical understanding of form, the representation present to the artisan's mind— . . . "the form, plan, or design of the table"—is the principle that organizes these attributes into the single thing known as a table. The set of properties that embodies this form is what makes something a table. Accordingly, the form of a table is present in all tables and enables us to classify them *as* tables.[27]

For the formalist, form and content are inherently related: one is inexplicable without the other. Form organizes the ensemble of particulars that is its content; but only certain content can cohere under a given form. This is the idea of genericity. A thing's essence is what marks it as what it is, and without which it would not be what it is. Having unpacked the idea of form, we now move from the level of necessary conceptual structure to that of epistemology. Now that we know why things are what they are (conceptual necessity) we need to know how we recognize them as such (epistemology).

Immanent Intelligibility

Let us continue to discuss the notion of "table" as a preliminary to introducing the central metaphysical element of formalism, that of immanent intelligibility.[28]

22. Weinrib, "Legal Formality," *supra* note 3, at 960.
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. Weinrib, *Private Law*, supra note 3, at 28.
28. Weinrib, "Legal Formality," *supra* note 3, at 961.

The centrality of immanent intelligibility lies in the fact that it alone guarantees the separation of law from politics. This separation is both conceptual and epistemological. When dividing the world into this and that, it is of the utmost importance that in deciding which things are which, we find them as they *are* and not as we take them to be. Again, this is a matter of getting their form right. In discerning form we need to be wary of the danger of externalism—that in our inquiry we "are not exhibiting anything about the thing but only about ourselves."[29]

So what of the table? In discerning its form, how are we to avoid the dangers of externalism? Weinrib cautions against taking the obvious route and approaching the object "from the outside"—that is, from the perspective of "our external requirements as users, observers, and inquirers."[30] For instance, to see the rectangular shape before us as a table is to see that it fits the purposes for which we have tables.[31] But this, Weinrib urges, is the wrong way to go about the business of intelligibility. Form, on this view, "bespeaks an intelligibility introduced from the outside."[32] Form, Weinrib insists, is illuminated from within.

Why is the external mode of understanding defective? Because it presupposes the existence of "a qualitative disjunction between the inquirer's thought and the object of the enquiry."[33] Objects are not merely given to us in experience, they are, as it were, "constituted" by thought.[34] Like Hegel, Weinrib wants to eliminate the barest possibility that true judgments could be contingent at all.[35] He says exactly this: "Inasmuch as law's nature is to be immanently intelligible,

29. *Id.*
30. *Id.*
31. See, e.g., Stanley Cavell, *The Claim of Reason* 71 (1979) (a Wittgensteinian analysis of the grammar of "chair").
32. Weinrib, "Legal Formality," *supra* note 3, at 961.
33. *Id.* As Michael Rosen points out, the point Hegel makes in this connection is, *contra* Kant, that there is no "distinction between the way things are and the way they appear to the subject." Rosen, *supra* note 13, at 132. See G. W. F. Hegel, *Logic*, Part 1 of *Encyclopedia* 232 (W. Wallace trans., 1975): "To form a notion of an object means therefore to become aware of its notion: and when we proceed to a criticism or judgment of the object, we are not performing a subjective act, and merely ascribing this or that predicate to the object. We are, on the contrary, observing the object in the specific character imposed by its notion."
34. Weinrib makes precisely this claim when he states that "law is *constituted* by thought: Its content is made up of the concepts (e.g., cause, remoteness, duty, consideration, offer and acceptance) that inform juridical relationships." Weinrib, "Legal Formality," *supra* note 3, at 962.
35. The following summary of the positions of Kant and Hegel on this point will make clearer Weinrib's view of the details of understanding: "To sum up: Hegel and Kant agree that sense or intuition are cognitively deficient because of their intrinsic particularity. Their joint position can be expressed as a simple argument: (1) Intrinsically what we receive through our senses is a manifold of particulars. (2) *But* our experience shows order and universality; it is cognitive. (3) *Therefore* our experience contains a further component which is the source of this order and universality. The two disagree, however, about the nature of this source. Hegel rejects Kant's transcendental psychology according to which the synthesis is a subsuming, ordering activity of the knowing subject. The source of order is now a realistically construed component of reality, the Absolute Spirit as *Logic*. The knowing subject comes into harmony with reality not by imposing his order on a received material but because there is present and active in him-self (even if unconsciously) the freely self-developing Thought." Rosen, *supra* note 13, at 104–05. Weinrib appears to agree with Hegel

one can grasp this nature without distortion. Just as one can understand geometry by working through a geometrical perplexity from the inside, so one can understand law by an effort of mind that penetrates to, and participates in, the structure of thought that law embodies."[36]

In sum, understanding is internal, coherent, and integrative.

The Truth of Coherence

As we have seen, there are three central, related aspects to the understanding of concepts or notions:[37] character, unity, and genericity. Every notion must have its central elements (character)—those that mark it uniquely as what it is. These elements must go together and must do so "all of a piece" (unity); only then can we see all instances of the notion as being "of the same character" (genericity). Understanding, seeing something as what it is and not as something else, is a matter of seeing the congruence between idea and actuality, the idea of the thing and its instance, the universal and the particular.[38]

Although necessary to it, these three aspects do not complete Weinrib's picture of conceptual understanding. In identifying the essential elements of a juridical notion, it is of the utmost importance to see that not only do the elements of a notion go together in a certain way, they *must* go together in *just* that way if the notion is to be at all intelligible. When we reflect upon law or, more precisely, the nature of juridical notions, we must—if understanding is to be achieved—reach the point where we see the essential elements of a notion cohere in a certain way and, further, appreciate the fact that they must so cohere if we are to make any sense at all of legal relations.

In this connection, consider the concept of negligence. One does not learn the meaning of negligence simply by studying specific contexts in which the concept or word "negligence" is used.[39] One understands the meaning of negligence when one sees the various acts of negligence as "representing broader legal concepts (for instance, duty, cause, and fault)."[40] When we think through the

and Kant that it is thought that constitutes the ideas with which we make sense of experience. However, he agrees with Kant rather than Hegel that when it comes to putting ideas and experience together, the process is subsumptive—experience is subsumed under mental categories. See Weinrib, "Legal Formality," *supra* note 3, at 976 ("[I]nclusiveness is achieved not by adding another item to an aggregation, but by subsuming the item under a higher level of abstraction.").

36. Weinrib, "Legal Formality," *supra* note 3, at 961.

37. I shall use "concept" or "notion" interchangeably. Hegel uses the German term "*Begriff*," which sometimes means one or the other, but is usually translated as "notion."

38. Weinrib, "Legal Formality," *supra* note 3, at 959 ("We understand something when form and content are congruent.").

39. Formalism is not about "the meaning of words." See Weinrib, *Private Law*, *supra* note 3, at 31: "[It is a] misconception . . . that formalism is concerned with the meaning or the use of words like "private law" and "tort law." Under this misconception, questions like "What is private law?" or "What is tort law?" are queries not into the salient features of private law and tort law, but into the entitlement to use the words "private law" and "tort law." The formalist specification of the character of private law or tort law is seen as an attempt to determine proper semantic meaning

categories that constitute tort law, those that make it what it is, we see that it is these notions that constitute the very means of intelligibility, without which we would be unable to make sense of a battery as a tort. Again, this understanding—which is by its nature juridical—can only be achieved through reflection—reflection upon and movement toward recognition of those concepts that, taken, together, constitute the notion of a "tort."

Central to Weinrib's account of immanent intelligibility is the idea of coherence. Not only must juridical notions have certain elements, those elements must be *coherently* related to each other.[41] As he sees it, the central question is: "Do they [the elements] constitute a coherent ensemble?"[42] To continue with the tort example, the elements of the concept of "tort" must be both internally coherent, one to the other, and they must be coherently related to other aspects of the juridical system. For example, in negligence law the internal coherence of the concept of negligence requires a bipolar litigational structure of plaintiff and defendant. Damages, which represent "the remedial expression of bipolarity,"[43] mandate that the defendant and not some third party be the agent responsible for paying compensation.[44] Were some other entity, an insurance fund for instance, required to compensate the successful plaintiff, the coherence of the juridical relation between notion (negligence) and structure (bipolarity) would be

or linguistic usage. The upshot is that features of positive law that do not satisfy the formalist strictures are not really what is meant by "private law" or "tort law"—a conclusion that, even if it were at all important, might be confirmed or refuted simply by canvassing the appropriate community of language users."

40. Weinrib, "Legal Formality," *supra* note 3, at 967.

41. A different conception of unity is at work in material objects than one finds in legal notions. See Weinrib, *Private Law*, *supra* note 3, at 29–30: "A different conception of unity applies to the attributes of tables than applies to the features of a juridical relationship. A table brings together a group of predicates that . . . 'have in their own nature no affinity with one another.' The table may be hard, smooth, and elevated, but hardness has in itself nothing to do with smoothness, nor smoothness with height. These otherwise diverse properties come together in a single object 'only in so far as the form . . . demands the copresence of them all.' Although coexisting in the table, the properties as such are indifferent to one another. A more stringent conception of unity applies to juridical relationships, especially to those of private law. As I have noted, private law values its coherence. The coherence of a private law relationship refers to more than the copresence of a number of otherwise independent features. . . . For a juridical relationship to be coherent, its component features must come together not through the operation of something beyond them that brings them together but because they are conceptually connected in such a way that, in some sense still to be explained, they intrinsically belong together."

42. Weinrib, "Legal Formality," *supra* note 3, at 968.

43. *Id.* at 969.

44. As Weinrib explains, "The idea that money should be exacted from some for the benefit of others in order to spread the burden of a catastrophic loss as lightly and as widely as possible is as pertinent to a non-tortious, as to a tortious, injury. The levies loss-spreading justifies are not confined to tortfeasors. Accordingly, the appropriate institutional setting for loss-spreading is not the bipolarity of litigation, but a general scheme of social insurance or taxation that would spread accidental loss as thinly and broadly as possible. The restrictions arising out of the adjudicative format do not, therefore, correspond to any feature internal to the idea of loss-spreading. Rather, they are imposed on this idea from outside it, so that it is not operationalized to the full extent of its normative reach." *Id.* at 971.

upset. The unity of the various elements must be coherent, with the price of failure being the creation of a "conceptual monstrosity."[45]

But what is the ground of coherence and incoherence? For this, we must return to Aristotle's discovery of private law.[46] Aristotle identified two forms of justice: corrective and distributive. According to Weinrib, Aristotle's two forms of justice are "so inclusive and abstract . . . that [they] apply to any legal ordering of external interaction."[47] In short, taken together, corrective and distributive justice exhaust the possibilities of justice. Additionally, central to the formalist position is the requirement that the forms of justice remain distinct: to mix the forms is to embrace incoherence.

Corrective justice is the structure of private law. Weinrib summarizes the features of corrective justice thus:

> Justice is effected by an award of damages and the consequent transfer of a certain amount of money from one party to the other. The award of damages simultaneously quantifies the wrong suffered by plaintiff and the wrongfulness inflicted by the defendant. It thus expresses the integration of action and injury in the wrong that one litigant has done to the other. This wrong, and the damage award that undoes it, represents a single nexus of activity and passivity where actor and victim are defined in relation to each other.[48]

Under distributive justice, by contrast, the law's task is "to divide the benefit or the burden according to some criterion."[49] Distributive justice is a form of mediated interaction.[50] It is mediated because what it regulates does not come from the form of justice itself but from outside it. Distributive justice integrates three elements:

1. the benefit or burden that is the subject of the distribution,
2. the recipients among whom the benefit or burden is to be established,
3. the criterion according to which the distribution is to take place.

In this connection, consider a decision by a legislature to set up a scheme of worker's compensation that denies a benefit to one group but not others. The benefit in question is worker's compensation. Who is to receive this benefit? All workers? Some? If less than all, by what criterion is the distribution of the benefit to be made? These are the questions with which distributive justice is concerned.

Because corrective justice is the structure of private law, no juridical decision worth the name may prescind from the framework of corrective justice. Form requires that justification proceed from within the form appropriate to the question at hand. If the question is a matter of justice between persons, then private

45. Strict liability is just such a monstrosity, for it imposes liability in the absence of fault, thereby joining conceptually a scheme of corrective justice (tort law) with a scheme of distributive justice (loss spreading).

46. This is Weinrib's characterization. See Weinrib, *Private Law*, *supra* note 3, at 56 ("In the history of legal philosophy, private law is Aristotle's discovery.").

47. Weinrib, "Legal Formality," *supra* note 3, at 977.

48. *Id.* at 978.

49. *Id.* at 979.

50. *Id.* at 980.

law is the appropriate form. If the issue is one of the distribution of a benefit or burden across a population, then distributive justice is the appropriate framework. Incoherence results when the wrong form is employed to solve a legal problem or when the forms are mixed together.

An example of the difference between a coherent ordering and a conceptual monstrosity is found in *Lamb v. London Borough of Camden*.[51] In *Lamb*, the plaintiff homeowner sued a municipality for negligence that caused damage to her residence. In the course of repairing a broken sewer pipe, a contractor hired by the municipality breached a water main, which flooded the plaintiff's house. Squatters moved into the plaintiff's house soon after it became vacant. They were ejected and, despite the plaintiff's boarding up the house, squatters returned, this time damaging the premises. The legal question raised by the case was whether the municipality was liable for the damage caused by the second group of squatters.

The case comes down to the quite specific question whether the damage caused by the second group of squatters was sufficiently proximate to the act of the contractor that the judgment could be made that the negligence requirement of proximate cause had been met. The majority opinion of the court, written by Lord Denning, cast the question as one "of policy."[52] He put the matter this way:

> [T]he criminal acts here, malicious damage and theft, are usually covered by insurance. By this means the risk of loss is spread throughout the community. It does not fall too heavily on one pair of shoulders alone. The insurers take the premium to cover just this sort of risk and should not be allowed, by subrogation, to pass it on to others.
>
> . . .
>
> So here, it seems to me, that, if Mrs. Lamb was insured against damage to the house and theft, the insurers should pay the loss. If she was not insured, that is her misfortune.[53]

In his concurring opinion, Lord Justice Watkins reached the same result as Lord Denning, but did so on completely different grounds. Lord Watkins's framework was not the uncertain realm of policy but the juridical category of negligence. From the juridical perspective, there was only one question to answer: "Was the damage done to Mrs. Lamb's house by the second group of squatters too remote to be a consequence of the council's initial negligent and damaging act which partly destroyed support for the house and for which they had to compensate her?"[54] On the facts before him, Lord Watkins's judgment was based on his "instinctive feeling that the squatters' damage is too remote"[55] and, thus, liability on the part of the municipality is not indicated.

For Weinrib, the approaches to the question of liability in *Lamb* represent paradigmatic examples of the proper use (Watkins) and abuse (Denning) of juridical categories. For his part, by

51. 2 All E.R. 408 (C.A.) (1981).

52. He stated, "[U]ltimately it is a question of policy for the judges to decide." *Id.* at 414.

53. *Id.* at 414–15.

54. *Id.* at 420.

55. *Id.* at 421.

To this query, Weinrib responds:

> Circularity is a consequence of the self-contained nature of intelligibility. Because form is the distinct principle of unity that renders intelligible the content that realizes it, no criterion of understanding can exist outside form's encompassing embrace. Provided that the circle is inclusive enough, circularity is here, as elsewhere in philosophical explanation, a strength and not a weakness. For if the matter at hand were to be non-circularly explained by some point outside it, the matter's intelligibility would hang on something that was not itself intelligible until it was, in its turn, integrated into a wider unity. Criticism on the grounds of circularity implies the superiority of the defective mode of explanation that leaves outside the range of intelligibility the very starting point upon which the whole enterprise depends.[64]

Can this amount to anything more than mere assertion? In the end, does Weinrib do anything more than simply stand on his claim that his account of coherence is correct because, as he puts it, "no criterion of understanding can exist outside form's encompassing embrace"?[65]

With this insistence, all Weinrib manages to accomplish is a begging of the very terms of the debate. Intelligibility must rest on coherence. Why? Because coherence is the criterion of truth. How do you know that? Because to claim otherwise "implies the superiority of the defective mode of explanation."[66] But how do you know the other mode of explanation is defective until you have demonstrated the truth of the perspective you advance, which, after *its* truth has been demonstrated, will reveal the false character of the opposing view?

The importance of this question of the criterion for coherence is clearest in Weinrib's discussion of "Justificatory Coherence."[67] In the course of discussing the elements that comprise a legal form, the claim is made that the elements all comprise a unity: the elements "are cognizable only through the unity they comprise, the intelligibility of each simultaneously conditions, and is conditioned by, the intelligibility of all the others."[68] The truth of the claim that the elements of tort are unintelligible apart from the unity they comprise is, of course, normative and not descriptive. No one has any trouble understanding the law and economics literature on tort law: the arguments *are* "intelligible" (i.e., they can be understood). The intelligibility of the arguments is not in question, only their relevance. Weinrib claims that, owing to their external character, the law and economics arguments are incoherent. The efficacy of this claim is directly dependent on the efficacy of Weinrib's prior claim that the formalist account of tort law is the only possible account. Thus, the critical account of the failure of external perspectives stands or falls on the success of the prior claims for coherence as the only defensible criterion of legal truth.

To succeed, Weinrib must show that the formalist account of justice—grounded in the distinction between corrective and distributive justice—is a logically or conceptually necessary feature of legal thinking. For Weinrib, truth in law is a function of first principles. For an account of truth based on first principles to succeed, the necessity of those principles must be demonstrated. For Weinrib's argument to succeed, he would have to show the absolute necessity to legal thinking of the distinction between corrective and distributive justice.[69] This he has not done.

I can only conclude that, in the end, Weinrib's claims for the truth of his perspective are ungrounded assertions and not, as he argues, demonstrable truths. The only way his account of juridical intelligibility gets off the ground is with the assumption that coherence, and in particular his account of juridical coherence, is the correct criterion of truth. His claim is true because it is correct, and it is correct because it is true. No, it does not work, does it?[70]

One Form of Reflection?

I have referred to Weinrib's approach to legal formalism as a "mode of critical reflection." This is in keeping with Weinrib's own view of the importance of reflection in properly understanding the law.[71] For the formalist, the proper mode of critical reflection on the practice of law is immanent intelligibility. The centrality and importance of immanent intelligibility to the formalist project are described as follows:

> Immanent intelligibility is not a subclass but a paradigm of intelligibility. Its virtue is that whatever is immanently intelligible can be understood self-sufficiently without recourse to something external that would pose the prob-

64. Weinrib, "Legal Formality," *supra* note 3, at 974–75.
65. *Id.* at 974.
66. *Id.* at 975.
67. *Id.* at 970–71.
68. *Id.* at 970.

69. For example, Weinrib's formalism places strict liability outside the reach of tort law. Further, it prohibits remedial devices such as market share liability. For the formalist, the justice of a tort system is a function of the degree to which it adheres to the demands of immanent intelligibility. It is not clear how far formalism takes us by pointing out that we are not following the dictates of immanent intelligibility. Again, without the needed metaphysical bite, the formalist critique of positive law is less than efficacious.

70. The problem here duplicates the very criticism Weinrib levels against that champion of the economic approach to legal understanding, Richard Epstein: "Often, those who wish to defend the centrality of these features can do no more than baldly reiterate that what has been impugned is deeply embedded in our comprehension of the situation at hand. For example, Richard Epstein attempts to stave off the implications of the Coase theorem by (1) pointing to the transitive verbs used by Coase himself, and (2) distinguishing between causal reciprocity and the notion of redress for harm caused. Epstein does not explain (1) why linguistic structure overbears economic insight, or (2) how Coase can be refuted by rehashing the very distinction that Coase's analysis challenges. Epstein's assertion that a normative theory of torts must take into account common sense notions of individual responsibility is a conclusion that is consequent on the dismissal of economic analysis, not a reason for dismissing it." *Id.* at 968 n.48

71. See Weinrib, "Legal Formality," *supra* note 3, at 951–52: "The implications of the formalist claim extend to every aspect of reflection about law. It affects one's view of the nature of legal justification, the limits of the judicial role and judicial competence, the meaning of legal mistake, the relevance of instrumentalism, the relation of law and society, the viability of contemporary legal scholarship, and the place of law among the intellectual disciplines. The scope and importance of these issues attest to the unescapably fundamental nature of the formalist claim."

> lem of intelligibility afresh. If something is not intelligible in and through itself, it must, if it is intelligible at all, be intelligible through something else. But unless that other thing is in its turn intelligible through itself, it will merely point to something else on which its own understanding depends. This regression continues until the understanding alights upon something that is immanently intelligible. Therefore, intelligibility that is immanent to its subject matter is the most satisfactory notion of understanding, and not merely one among many.[72]

The entirety of Weinrib's formalism flows from and depends upon his claims for the importance of immanent intelligibility. What, exactly, is the claim Weinrib makes for immanent intelligibility? It is this: As a mode of reflection on law, immanent intelligibility is, as Weinrib states, "a paradigm." In other words, as a reflective activity, immanent intelligibility is not the ***preferred*** method of reflection, it is "the most satisfactory . . . and not merely one among many."[73]

We are entitled to ask, by what means does Weinrib identify immanent intelligibility as the most satisfactory mode of understanding? Yes, he claims for immanent intelligibility the virtue of self-sufficient understanding, but may we not ask this question: "Why is the intelligibility of something in and through itself necessarily superior to the intelligibility of something through something else?" Put another way, we are entitled to ask the question "What activity of reflection tells us that immanent intelligibility is the most satisfactory activity of critical reflection?"

Weinrib does, indeed, have an answer to this question.[74] Among the many virtues he claims for the formalist approach to legal understanding, none is more important than the assertion that immanent intelligibility—that is an understanding of law from the "internal" point of view[75]—"is not a subclass but a paradigm of intelligibility."[76] Immanent intelligibility is a paradigm, and not one among many ways of understanding, because to understand in this way is to understand something in itself and not by reference to some other notion. Weinrib articulates this claim thus:

> If something is not intelligible in and through itself, it must, if it is intelligible at all, be intelligible through something else. But unless that other thing is in its turn intelligible through itself, it will merely point to something else on which its own understanding depends. This regression continues until the understanding alights upon something that is immanently intelligible. Therefore, intelligibility that is immanent to its subject matter is the most satisfactory notion of understanding, and not merely one among many.[77]

72. *Id.* at 963.
73. *Id.*
74. Again, I must stress that the burden on Weinrib is not to show that the formalist account of law "makes sense." Of course, it does. His claim is that the formalist account is the *only* one that renders the law intelligible. It is with this contention that I take issue.
75. Weinrib, "Legal Formality," *supra* note 3, at 955 ("[F]ormalism postulates that juridical content can somehow sustain itself from within.").
76. *Id.* at 963.
77. *Id.*

Weinrib's argument takes the following form:

> Premise 1. If something is not intelligible in and through itself, it must, if it is to be intelligible at all, be intelligible through something else.
>
> Premise 2. Unless that other thing is in turn intelligible through itself, it will merely point to something else on which its own understanding depends.
>
> Intermediate Conclusion. This regression continues until the understanding alights upon something that is immanently intelligible.
>
> *Conclusion*. Therefore, intelligibility that is immanent to its subject matter is ***the most satisfactory*** notion of understanding, and not merely one among many.

The core of this argument lies in its first premise. It is at this point in the argument that Weinrib sets out the false dichotomy between internal and external understanding. In an effort to reduce all "external" modes of understanding to some version of functionalism, Weinrib provides the example of an instrument which, he states, "can be understood only by reference to the purpose it serves."[78] Legal forms are not instruments.

But are these the only two choices? That is, must we inevitably choose between immanent intelligibility and crass functionalism? Weinrib apparently thinks as much. He states:

> The mere possibility of a non-instrumental understanding renders instrumental understandings of the same legal material superfluous, but not vice versa. This follows from the paradigmatic quality of immanent intelligibility. Instrumental understandings are by their nature imperfect. They first transfer the burden of intelligibility from the subject of the inquiry to the external end this subject serves and then, in turn, require that end to be grasped somehow, presumably by reference to some further external end. Unless this endless shifting of ends can be arrested at a point of non-instrumental stability, the understanding is caught in a game of musical chairs, in which it seems to know everything only because it knows nothing.[79]

The conclusion Weinrib draws from these considerations is crucial and can be read as a further conclusion to the argument recited at the beginning of this section: "[I]nstrumental and noninstrumental understandings do not have an equal footing."[80]

There are, so Weinrib argues, two ways to understand legal materials: instrumentally and noninstrumentally. This expression of the modes of understanding is but a rephrasing of premise 1 in the argument given above. This premise, as

78. *Id.* at 964.
79. *Id.* at 965.
80. *Id.*

well as the distinction between instrumental and noninstrumental understanding, rests upon an assumption implicit in Weinrib's account of understanding and intelligibility, which premise is both unargued and problematic.

Weinrib holds out the possibility that the same legal material can be understood *either* instrumentally or noninstrumentally. What is the assumption that makes the dichotomy possible? It is none other than the assumption that "material" can be identified as "legal" apart from some mode of understanding. Weinrib seems to think that there are three elements at work in every question of law: legal material, internal understanding, and external understanding.[81] But this claim is fallacious. The entire debate is not over ***how to think about*** legal materials. The debate is over ***what counts*** as legal material or, if you will, the content of law. It is to this aspect of his position that Weinrib turns a blind eye.

To see this point more clearly, let us return to Weinrib's discussion of the concept of a table. The question was "What makes a table a table?" Expressed in a more nominalist vein, the question is "What set of properties makes an object a table?" The social constructionist view of the matter[82] is that what makes an object a table is the aggregation of qualities that serve the function of tables. Weinrib rejects this approach in his claim that "[t]he set of properties that makes something a table, for instance, is found in all tables and constitutes the genericity of what it is to be a table."[83]

But Weinrib's rejection of this view goes beyond a rejection of functionalism: his fundamental objection to this approach to conceptualization is its "crucial presupposition . . . that a qualitative disjunction exists between the inquirer's thought and the object of inquiry."[84] And there is the presupposition that drives formalism. What his criticism reveals is the unarticulated presupposition that the "object" of thought has an existence outside of the subject of inquiry. In other words, there are "tables" in the world (both the real world and the world of thought) quite apart from anyone's using the object as a table (or anything else). The problem with all nonformalist accounts of understanding is that they attempt to impose "intelligibility . . . from the outside,"[85] that is, from outside the object.[86]

What does it mean to say that tables "exist" apart from some way of life in which tables are used? The very notion of a table depends upon the things we do with tables. Apart from the activities that give the concept of "table" its point, it seems that there is nothing to the notion. Weinrib's position on the conceptualization of so simple a notion as "table" reveals both the depth of presupposition in his formalism and the problematic nature of the position. The point of a concept is simply unknowable apart from some activity or enterprise by which the concept is given content. The content of law is coextensive with and constitutive of the point of its notions. These both arise in the course of social life and are frequently contestable. It is this last, and most important, aspect of law that formalism seems to ignore.

81. These distinctions drive concepts like transference of "the burden of intelligibility." *Id.*

82. This view is developed in the next section.

83. Weinrib, "Legal Formality," *supra* note 3, at 960.

84. *Id.* at 961.

85. *Id.*

86. In a very Hegelian expression of this view, Weinrib states that "[a]ccording to this view, the object is the target but need not be the embodiment of thought." *Id.* Further, "[L]aw is *constituted* by thought." *Id.* at 962. There is an obvious tension in Weinrib's account of conceptualization for he sometimes wants to say that the object exists independently of thought while at others claiming that thought constitutes the object.

As discussed earlier, Weinrib's aspiration is to provide a foundation for law that is conceptually distinct from the reach of other (mostly "external") disciplines (e.g., economics, critical theory, pragmatism). In short, as a form of critical reflection, immanent intelligibility is the preferred mode. If we are not satisfied with the self-evidence of Weinrib's claims for immanent intelligibility, the discussion might continue as some other ground is appealed to, and then another, and another, and another. Short of a claim of self-evidence,[87] nothing will stop the infinite regress of justification.

Unhappily, claims to self-evidence have too much the quality of faith and not enough of the attributes of argument. Arguments of this sort take on the character of an unending shift in the burden of proof. As each justification is offered, a further question is posed until the questioner is either satisfied or dismissed as a skeptic or some sort of vile creature. But this dismissal does not end the argument; it merely postpones it to another day.

The Social Construction of Form and Matter

The criticism just advanced will, in this section, be developed to show that the distinction between form and content can be understood in a way that is primordially social. The account will be successful if the distinction between form and content can both organize our thought about experience in ways that formalist accounts of knowledge deem important while avoiding the hermetic quality of the formalist rendering of the relationship between word and world. In taking this approach, it is hoped that the truth in formalism will be preserved; that in the process of thinking through the relationship of word to world,[88] the concerns and insights of the formalist account will not only be preserved but improved.

87. I take it Weinrib regards it as self-evident that it is always better to understand something in itself and not through something else. Hegel was equally enamored of self-evidence. See G. W. F. Hegel, *The Philosophy of Right* 3 (T. M. Knox trans., 1952). "The unsophisticated heart takes the simple line of adhering with trustful conviction to what is publicly accepted as true and then building on this firm foundation its conduct and its set position in life. Against this simple line of conduct there may be at once be raised the alleged difficulty of how it is possible, in an infinite variety of opinions, to distinguish and discover what is universally recognized and valid." But can we ever be satisfied with such an appeal? "[T]he classical model of rationality faces serious problems when it is consistently developed. The model requires that rationally acceptable claims be justified, and that the justification proceed from rationally acceptable principles in accordance with rationally acceptable rules. Each of these demands leads to an infinite regress unless we can find some self-evident principles and rules from which to begin, but these have not yet been found, and there is no reason to expect that they will be forthcoming." Harold I. Brown, *Rationality* 77 (1988).

88. I have taken this opposition from Michael Mulkay, *The Word and the World: Explorations in the Form of Sociological Analysis* (1985).

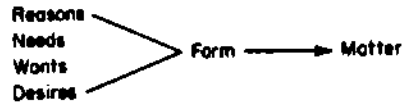
Let us return to Weinrib's discussion of what it is that makes a table a table. Weinrib argues that a table is a set of properties, but not just any set of properties. To be a table, a thing must be composed of the same elements that are "found in all tables [for these constitute] the genericity of what it is to be a table."[89] Can this be true? Think of tables: they are composed of many varied elements. Some are square, some are round, some have four legs, others three. Tables are made of many different kinds of things, for example, wood, plastic, or metal. With all these disparate elements and materials, which of these is it that, in Weinrib's words, marks "this" as a "table"?[90]

This is the wrong question. The intelligibility of something as a "this" and not a "that" depends not on the necessary integration of form and content. Rather, it depends upon the recognition of the role of form in the stream of social life.[91] The relationship of form to content is not, as Weinrib would have it, a *necessary* one. Forms tells us what any kind of object is. But the form is alive not in the mind but in the world.[92]

Consider the disparate elements of tables. These—that is, height, shape, material composition—we shall refer to as material elements.[93] What is it that brings these together under the rubric "table"? The answer is simple: the form of a table. But what is the form of a table? It is nothing more (nor less) than "[a]n answer to the question why we call a large variety of objects 'tables' and refuse the word to other objects."[94]

Why is it that *this* particular concatenation of things is referred to as "table"? Because it is objects having these (and other, similar) characteristics that we use to do the sorts of things we do with tables. Owing to certain features of our biology, it is usual to find tables being of roughly a certain height.[95] It is important to remember, however, that there is nothing necessary about our biology. If our bodies had a different constitution this would no doubt impact upon, but not absolutely determine, the formation of our concepts.[96]

These considerations suggest that the relationship between the formal and material elements of concepts is tied not to any process of thought as such but to human purposes. The things we do with tables, our reasons for having them, determine what counts as a table.[97] The relationship between these reasons, form, and matter can be represented thus:



Human reasons or interests form what is, in effect, a point of view: a perspective from which material elements are collocated or brought together under one notional or conceptual category. There is a *point* to joining certain features together. It is that point or purpose that forges the link between formal and material elements. Without human needs there would be no notions or concepts. The connection between human reasons or, if you will, needs, wants, and desires (e.g., for tables and chairs) and the constitution of forms does not, contrary to Weinrib, constitute an unchanging relation between formal and material elements. As human needs, wants, desires, and reasons change, so too will our notions.

The reconstruction of the form/content relation offered here can be expanded further to show that it is sometimes the case that two situations with completely different material elements can be classed as being of the same form.[98] Consider the following two cases:

> I reach across the dinner table to pick up the bowl of potatoes and with my elbow knock over the salt.

89. Weinrib, "Legal Formality," *supra* note 3, at 960.

90. Weinrib's question in this regard is "When we seek the intelligibility of something, we want to know *what* the something is. This search for 'whatness' presupposes that the something is a *this* and not a *that*, that it has, in other words, a determinate content." *Id.* at 958.

91. See Peter French, *The Scope of Morality* 83–84 (1979). For tables, this would include information about "how we came to have the need to distinguish types of furnishings in our homes, why we wanted to do so, and where it is important in our lives to do so; in addition, we would have to consider the physiological facts that necessitate that tables be a certain height, etc. The concept of a table emerged from such a sociohistory and the extension of "table" is governed by the concept (or intention) of that complex idea."

92. See Henry Focillon, *The Life of Forms in Art* 130 (E. Ladenson trans., 1989): "Forms transfigure the aptitudes and movements of the mind more than they specialize them. Forms receive accent from the mind, *but not configuration*. Forms are, as the case may be, intellect, imagination, memory, sensibility, instinct, character; they are, as the case may be, muscular vigor, thickness or thinness of the blood. But forms, as they work on these data, train and tutor them ceaselessly and uninterruptedly."

93. My term "material element" is synonymous with Weinrib's term "matter." I prefer "material element" to "content" because, in context, it is less cumbersome. The discussion that follows is informed by Julius Kovesi, *Moral Notions* (1967); Cavell, *supra* note 31, at 73–124; Wilfrid Sellars, *Philosophical Perspectives: History of Philosophy* 73–124 (1959).

94. Kovesi, *supra* note 93, at 4.

95. It is likewise true that because our legs bend at the knees, chairs are also made to be of a certain height.

96. As Wittgenstein has remarked, "I am not saying: if such-and-such facts of nature were different people would have different concepts (in the sense of a hypothesis). But: if anyone believes that certain concepts are absolutely the correct ones, and that having different ones would mean not realizing something that we realize—then let him imagine certain very general facts of nature to be different from what we are used to, and the formation of concepts different from the usual ones will become intelligible to him." Ludwig Wittgenstein, *Philosophical Investigations* 230 (G. E. M. Anscombe trans., 3d ed. 1958). If the human body develops to the point where our legs no longer bend at the knee, then what will count as a table will change as well.

97. All that is required is that whatever material elements the proffered "table" has, those properties in relation must satisfy the social need for tables. Now one might object, "But can a chair not serve as a table? Can it not perform the function of a table and, thus, 'be' a table?" The very form of the question contains its own answer. Surely it is possible to treat a chair *as a* table; or a table *as a* chair. But, as Stanley Cavell reminds us, "[w]hat can serve *as a chair* is not a chair, and nothing would (be said to) serve as a chair if there were no (were nothing we called) (orthodox) chairs. We could say: It is part of the grammar of the word 'chair' that *this* is what we call 'to serve as a chair.'" Cavell, *supra* note 27, at 71.

98. The following example is taken from Kovesi, *supra* note 93, at 15–17.

While walking down the beach contemplating the relationship of metaphysics to reality, I am startled by a wave, jump back, and destroy a child's sand castle.

Other than the presence of a person in each scenario, there is virtually nothing that makes them the same. And yet they are the same, for each case constitutes an act of inadvertence. These two cases constitute, as it were, two of the many and "various ways in which we can perform inadvertent acts."[99] In seeing this, it is important to notice two things. The first is that inadvertency is not "extra element" over and above the "doing" of the acts in question. Inadvertency is what the doing of these acts amounts to.[100] The second thing to notice is that without this formal element, we should not be in a position to identify new cases of inadvertent acts. It is by virtue of the form of inadvertency that we are able to identify these two scenarios and others as examples of the same phenomenon. It is the form, and not the interpenetration of form and content, that enables us to see these different cases as instances of the same thing.[101]

Conclusion

Formalism's promise is to show that beneath the surface play of legal argument lies an immanent juridical structure, the nature of which must be disclosed for true understanding of law to be achieved. Grounded as it is in Aristotle's distinction between corrective and distributive justice, Weinrib's formalism succeeds to the degree that this distinction limits what can intelligibly be said from the juridical point of view. I have criticized Weinrib's argument for its failure both to demonstrate the necessity of Aristotle's distinction and, further, have suggested why Weinrib's claims for the primacy of immanent intelligibility cannot be sustained. Without the backup of necessity, the formalist's claims for coherence—and, thus, truth—are severely undermined. This is exacerbated by formalism's failure to take human interests into account in the theory of human understanding. For these reasons, and despite its many virtues, the formalist account of truth is ultimately unpersuasive.

99. *Id.* at 16.

100. *Id.*

101. Weinrib, of course, claims just the opposite: "Form is not separate from content but is the ensemble of characteristics that marks the content as determinate, and therefore marks the content as content." Weinrib, "Legal Formality," *supra* note 3, at 958.

3

Moral Realism and Truth in Law

> Surely if the history of philosophical reflection on the correspondence theory of truth has taught us anything, it is that there is ground for suspicion of the idea that we have some way of telling what can count as a fact, prior to and independent of asking what form of words might count as expressing truths, so a conception of facts could exert some leverage in the investigation of truth.
>
> John McDowell[1]

As noted in the introduction, realism—explaining truth by resort to something that transcends a particular enterprise—is a widely defended philosophical position. One finds the fullest convergence between realist philosophers and realist lawyers with respect to a certain picture of truth. The central question for realists is "What is it that makes our (moral or legal) beliefs true?"[2] For moral philosophers and lawyers of a realist orientation, the answer is the same: facts. Of course, once one claims there is some fact of the matter about a moral or legal proposition, then one must ask what it is that ***makes*** the proposition in question true or false. Realists of whatever stripe or discipline are united in the opinion that whatever renders a claim true, it is ***not*** a belief. Beliefs, realists argue, make nothing true (or false). This point is often made in the form of the assertion that the truth of propositions is "mind independent."

In this chapter, we examine the arguments of two contemporary defenders of the virtues of realism in law. We first consider the position of Michael Moore, who has championed the cause of realism in law from the perspective of ontology. In addition to Moore, David Brink has argued that the realist perspective in the philosophy of language illuminates the nature of legal disputes, in particular, questions of interpretation. Taken together, Moore and Brink present the best cases for the realist account of truth in law.

1. John McDowell, "Projection and Truth in Ethics," Lindley Lecture, University of Kansas, Department of Philosophy 11 (1988).

2. This is, perhaps, another way of asking the question "What are the truth conditions for propositions of law?"

Michael Moore's Ontological Realism

Michael Moore's metaphysical realism is the most vigorous modern defense of natural law theory. In what he terms "full-blooded realism,"[3] there are five elements: ontology, a theory of truth, a theory of logic, a theory of (sentence) meaning, and a theory about the meaning of words used in sentences.[4] Briefly stated, ontology is the theory of what there is in the world. The theory of truth, which is distinct from ontology, "examines the relation between what there is and the sentences we use to describe what there is."[5] Logic concerns bivalence; that is, the question whether propositions are always true or false.

Moore's metaphysical approach to sentence and word meaning is what concerns us most in his position. For Moore, a sentence is "true" when the proposition asserted by the sentence "corresponds" with the way the world is. A proposition is true to the degree it is consistent with the world (facts). To the degree it is not, the asserted proposition is false. In short, on Moore's account, a "realist sees sentences as corresponding to states of affairs in the world, her semantics will ignore all forms of deviant utterance that do not have to do with inaccurate representation of how things are."[6]

Moore is not only a participant in the realist/anti-realist debate, but its leading enthusiast. In "The Interpretive Turn in Modern Theory," Moore argues for the proposition that all contemporary efforts in legal theory are implicated in the realism/anti-realism debate, but only he is explicit about his commitment to its terms. Central to Moore's position is his argument that the truth of moral propositions is and must be directly implicated in legal reasoning. In short, Moore embraces the relational thesis—that the truth of a legal proposition depends, at least in part, on a true moral proposition.[7]

The relational thesis is best approached from a slightly tangential point of view, that of epistemology. As mentioned in the introduction, epistemology concerns itself with the question of what knowledge consists in (i.e., what it means for an agent to say "I know"). On Moore's realist theory, the truth of a legal proposition is "mind independent." That is to say, for Moore, legal truths exist apart from the beliefs of anyone. There is a fact of matter about law, which fact may be, but is not necessarily *to* be, discovered by us. Thus, for Moore, no theory of law can be complete without an epistemology.

3. Michael S. Moore, "The Interpretive Turn in Modern Theory: A Turn for the Worse?" 41 *Stan. L. Rev.* 871, 879 (1989) [hereafter "Interpretive Turn"] (describing the commitments of the full-blooded realist).

4. *Id.* at 875.

5. *Id.*

6. *Id.* at 879.

7. See Michael S. Moore, "Law as a Functional Kind," in *Natural Law Theory* 189 (Robert George ed., 1992) [hereinafter "Functional Kind"] ("As I shall use the phrase, a 'natural law theory' contains two distinct theses: (1) there are objective moral truths; and (2) the truth of any legal proposition necessarily depends, at least in part, on the truth of some corresponding moral proposition(s). The first I shall call the moral realist thesis, and the second, the relational thesis.").

Moore's epistemology is an epistemology of coherence. When it comes to beliefs, the question is what we are justified in believing. The test of coherence is Moore's test for the justification of belief. As he puts it: "[Justification] of any belief about anything is a matter of cohering that belief with everything else we believe."[8]

With this view of epistemology in mind, let us return to the relational thesis. The following paragraph sums up the commitments of Moore's metaphysical legal realist:

> To begin with, the legal realist as I shall define her is both a scientific and moral realist. That is, without regard to the law, she takes the metaphysically realist line on many entities or qualities such as electrons, intentions, justice, or kindness. Such an individual believes, first, that things like causal relations, intentions, and moral turpitude exist in a way not dependent on what we or anyone else thinks about them; second, that truth about such entities is a matter of correspondence between sentences and the way things are; third, that there is a right answer to all scientific queries and moral dilemmas; fourth, that the meaning of sentences about such entities is just the conditions under which such sentences are true; and fifth, that the meaning of words like "causation," "intention," and "culpability" is given by the nature of the things to which such words refer and not merely by conventional English usage.[9]

Moore is a "one-worlder";[10] that is, he believes that the moral and natural worlds are, in a real sense, the same.[11] There is no distinction between natural and moral entities. Here is where the metaphysics, truth, and coherence epistemology come together. For example, consider Moore's description of the realist lawyer's task in interpreting a statute:

> [The] legal realist will rely on her scientific and moral realism when applying these terms to particular cases. These metaphysical views will thus lead her to practice law in a quite distinct way. When statutes use such terms, she will understand judges to be directed to apply them in light of the best theories they can muster about the nature of the things to which the terms refer. This generates two very distinct features for the legal realist's theory of statutory interpretation. First, even when there are legal, linguistic or moral conven-

8. Michael S. Moore, "Precedent, Induction, and Ethical Generalization," in *Precedent in Law* 183, 198 (Laurence Goldstein ed., 1987).

9. Moore, "Interpretive Turn," *supra* note 3, at 882.

10. Michael S. Moore, "Moral Reality Revisited," 90 *Mich. L. Rev.* 2424, 2492 (1992) [hereinafter "Moral Reality"] ("I too am an empiricist 'one-worlder': if moral qualities exist, moral propositions are true, and moral beliefs are justified, it will be only in the sense of *exist*, *true*, and *justified* that science applies to the natural world.").

11. One reason Moore's arguments are so unconvincing is that as he embraces the mantle of empiricism, he fails to provide any role in his theory for the essence of empiricism, experiment. No one puts the point better than George Steiner. See George Steiner, *Real Presences* 75 (1989): "Two indispensable criteria must be satisfied by theory: verification or falsifiability by means of experiment and predictive application. There are in art and poetics no crucial experiments, no litmus-paper tests. There can be no verifiable or falsifiable deductions entailing predictable consequences in the very concrete sense in which a scientific theory carries predictive force. One must be crystal clear on this."

tions that purport to define such terms, even when such conventions clearly seem to cover some case, judges are not to base their interpretations on them. In the realist view, such conventions are but provisional theories or heuristics about the nature of the things referred to, to be put aside whenever a better theory about the true nature of the things demands that they do so. Second, the meaning of statutory terms will not run out—such statutes will not have a "penumbra" of uncertain application—even though legal, linguistic and moral conventions will have no clear application to many cases. Although conventions run out—novel cases may present situations quite unlike those covered by conventional definitions—reality doesn't run out. And it is reality, not convention, that fixes the meaning of terms like "contend," "cause," or "culpability."[12]

Moore's central contention, one that flows directly from his commitment to ontological metaphysical realism, is that the truth of a legal proposition flows from its correspondence with a mind-independent state of (moral) affairs.[13] As Moore himself states, it is not *we* who fix the meaning and reference of our terms; it is reality.[14] The promise of moral realism begins in the assertion that there is a fact of the matter about the truth status of our beliefs about law. Certain of our beliefs are true and certain of them false. If we accept Moore's account of truth as correspondence between a legal proposition and a mind-independent state of affairs, will that bring us any closer to deciding which of our beliefs are true and which false?

Consider disagreement over the truth of legal propositions. When it comes to legal propositions, even moral realists will disagree—they will have conflicting beliefs about the nature of moral reality. How do moral realists choose which beliefs to accept as true?[15] Does "moral reality" tell us which of our beliefs are true and which false? Again, it is important to remind ourselves that, for Moore, the truth of legal propositions is a matter "the way the world is." We find out the

12. Moore, "Interpretive Turn," *supra* note 3, at 882–83.

13. Even artifactual terms like "mower" have a mind-independent meaning. In "Law as a Functional Kind," Moore discusses the Seventh Circuit's opinion in *In re* Erickson, 815 F.2d 1091 (7th Cir. 1987). Moore endorses the court's finding that mowers have "a nature," which he describes in the following terms. "I call kinds like mowers functional kinds. Unlike nominal kinds, items making up a functional kind have a nature that they share that is richer than the 'nature' of merely sharing a common name in some language. Unlike natural kinds the nature that such items share is a function and not a structure. A stomach, for example, could have a silicon-based chemistry and be cubical in shape (rather than carbon-based and roundish) and still be a stomach because it performs the first-stage processing of nutrients distinctive of stomachs." Moore, "Functional Kind," *supra* note 7, at 208.

14. Moore, "Interpretive Turn," *supra* note 3, at 883.

15. As Jeremy Waldron points out in his critique of Moore's realism, there are questions of democratic legitimacy at issue here. See Jeremy Waldron, "The Irrelevance of Moral Objectivity," in *Natural Law Theory*, *supra* note 7, at 181: "The issue comes down to comparing like with like. If moral realism is true, then judges' beliefs clash with legislators' beliefs in moral matters. If realism is false, then judges' attitudes clash with legislators' attitudes. What we must not allow the realist defender of constitutional review to say is that it is a case of judge's beliefs clashing with legislators' attitudes. She is not entitled to be realist only about those whom she favours as decision-makers."

way the world is not by peering directly into moral reality, but by constructing theories about it. Theories are systems of beliefs. We believe a proposition to be true based upon how that proposition hangs together with everything else we take to be true (a succinct statement of Quinean holist epistemology). How do we choose which beliefs to regard as true and which not? Whence come the criteria for making such choices? Of course, they do not come from "the world" because that is the very thing under analysis.

Let us consider a specific example from Moore's work, his analysis of the meaning of "death":

> A realist theory asserts that the meaning of "death," for example, is not fixed by certain conventions. Rather, a realist theory asserts that "death" refers to a natural kind of event that occurs in the world and that it is not arbitrary that we possess some symbol to name this thing. (It may be arbitrary what symbol we assign to name this class of events, but it is not arbitrary that we have some symbol to name it). Our intentions when we use the word "death" will be to refer to this natural kind of event, whatever its true nature might turn out to be. We will guide our usage, in other words, not by some set of conventions we have agreed upon as to when someone will be said to be dead; rather, we will seek to apply "dead" only to people who are really dead, which we determine by applying the best scientific theory we can muster about what death really is.
>
> Further, on a realist theory of meaning fact will not outrun diction. Continuing with the example of "death": finding out that not all persons who have lost consciousness and who have stopped breathing, have also had their hearts stop, will not leave us "speechless" because we have run out of conventions dealing with such novelties. Rather, either "dead" or "not dead" will have a correct application to the situation, depending on whether the person is really dead or not. Whether a person is really dead or not will be ascertained by applying the best scientific theory we have about what death really is. Our present scientific theory may be inadequate to resolve the issue, but a realist will assert that there are relevant facts about whether the person is or is not dead even if we presently lack the means to find them. A realist, in other words, believes that there is more to what death is (and thus what "death" means) than is captured by our current conventions.
>
> Finally, a realist theory of meaning will not view a change in our conventions about when to apply a word as a change in its meaning. If we supplant "heart stoppage" with "revivability" as our indicator of "death," we will do so because we believe revivability to be a part of a better theory of what death is than heart stoppage. We will not have changed the meaning of "death" when we substitute one theory for another, because by "death" we intended to refer to the naturally occurring kind of thing, whatever the true nature of the event turned out to be. Our linguistic intentions are constant, on the realist theory, even if our scientific theories change considerably.[16]

The meaning of our words remains constant over time. The explanation for the constancy of meaning is the constancy of reality: to the degree speech fails to

16. Michael S. Moore, "A Natural Law Theory of Interpretation," 58 *S. Cal. L. Rev.* 277, 294 (1985) [hereinafter "Natural Law Theory"].

mirror reality, what we say will not be true. We make no contribution to the meaning of what we say. The facts about meaning are all out there, waiting for us to find them. If we do, we will be able to say meaningful things; if not, we are doomed to error.

Moore draws rhetorical strength for his position from a supposed distinction between realism and conventionalism.[17] Moore makes conventionalism the bogeyman in his story.[18] But the choice is not between the determinism of realism and the "idealism"[19] of conventionalism. A few examples will illustrate this thesis.

Consider the temperature of water.[20] We divide temperature into measures of degree, in whole numbers from 1 to 100 (degrees Celsius). Of course, we could have created any number of scales—perhaps an infinite number—so the choice of our present system is, in some (special?) sense of the word, "arbitrary." When we employ adjectives such as "hot," "cold," and "lukewarm," we are simplifying matters even further than the use of measurement by degrees. It is accurate, then, to say that the language of temperature is "conventional."

Suppose one says that "the bath water is hot." On a realist account of things, that statement is true if and only if there is some fact of the matter in virtue of which it is true. But there is no fact of the matter in virtue of which water is either hot or cold. We have chosen to take nature (water) and impose a conventional system[21] of designation upon it. Without our conventional systems of designation, water would be neither hot nor cold. And yet, variations in temperature "must exist and be perceptible to allow the contrast between *warm* and *hot* to *mean anything*."[22]

The words "warm" and "hot" do give us information about the world. And when those words are used correctly, the information we receive is true. What is the lesson to be drawn from this? It is the following: "*It is just as wrong to say that warmth is simply a fact of nature as it is to say that warmth is simply a fact about language*; and the greatest error of all would be to assume that the falsity of the first of these alternatives required us to turn to the second."[23]

Of course, this is precisely the error Moore makes.[24] For Moore, there are only two conceptions of truth. On the realist account, propositions are true only if there is some fact of the matter in virtue of which they are true. To believe otherwise is to be an "idealist,"[25] one who believes that "true" is a label meaning nothing more than "we all agree." Moore's dichotomy between realism and anti-realism is utterly false. We could not say that water was warm if there were no water. Yet water does not come from nature either "hot" or "cold." The desire to see the correct use of these terms through the lens of the metaphysics of realism or anti-realism blinds Moore to the fact that his choice of terms is just too simplistic to make sense of something as straightforward as the vocabulary of temperature.[26]

These questions lead to the recognition that Moore's joinder of metaphysical moral realism with a coherence epistemology is an unhappy marriage. Uniting metaphysical realism to a coherence epistemology renders appeal to "the nature of things" empty. What Moore's theory fails to provide is any account of how "the nature of things" constrains in any way what we believe to be true. In short, for all its promise, Moore's metaphysical realism fails to demonstrate how "the world" provides a normative check on our talk about it. Unless Moore can show, as John McDowell puts it, how "a conception of facts could exert some leverage in the investigation of truth,"[27] it seems that the claim "the world makes the what we say true and false" is at best, a platitude.

17. See Moore, "Interpretive Turn," *supra* note 3, at 881: "The form of antirealism most appealing to lawyers is conventionalism. A conventionalist, like any antirealist, denies much of what the realist asserts in each of the five metaphysical theories mentioned earlier. In addition, social convention does the work for the conventionalist that convention-independent reality does for the realist."

18. See Moore, "Interpretive Turn," *supra* note 3, at 904: "Telling us we must choose and that some choices will *seem* better than others, without giving any reasons why we should choose one way or the other or why the 'seeming-better' should be taken to *be* better, does not engage us. Such suggestions are empty in the way that noncognitivist and existential ethics are always empty. For what it is worth, here in the realm of the noncognitivist, Rorty's world does not seem better to me. It seems a barren place in which all arguments are made only by pulling oneself out of deep existential nausea, itself possible only by bad-faith forgetfulness that all arguments are rhetorical substitutes for the bullets one either does not possess or is unwilling to use."

19. Moore has a distinct proclivity for referring to almost everyone who disagrees with him an "idealist." See Moore, "Moral Reality," *supra* note 10, at 2495

20. Thus use of this example was suggested to me by John Ellis. See John Ellis, *Against Deconstruction* 46–50 (1989).

21. As the discussion of the adjectives "hot," "cold," and "warm" suggests, there is more than one group of terms to describe temperature.

22. Ellis, *supra* note 20, at 48–49.

23. *Id.* at 49. This sentiment is echoed and amplified by Hilary Putnam. See Hilary Putnam, *Realism with a Human Face* 28–29 (1990): "What I am saying, then, is that the elements of what we call 'language' or 'mind' *penetrate so deeply into what we call 'reality' that the very project of representing ourselves as being 'mappers' of something 'language-independent' is fatally compromised from the very start*. Like Relativism, but in a different way, Realism is an impossible attempt to view the world from Nowhere. In this situation it is a temptation to say, 'So we make the world,' or 'our language makes up the world,' or 'our culture makes up the world'; but this is just another form of the same mistake. If we succumb, once again we view the world—the only world we know—as a *product*. One kind of philosopher views it as a product from a raw material: Unconceptualized Reality. The other views it as a creation *ex nihilo*. *But the world isn't a product. It's just the world*. Where are we then? On the one hand—this is where I hope Rorty will sympathize with what I am saying—our image of the world cannot be 'justified' by anything but its success as judged by the interests and values which evolve and get modified at the same time and in interaction with our evolving image of the world itself. Just as the absolute 'convention/fact' dichotomy has to be abandoned, and for similar reasons. On the other hand, it is part of that image itself that the world is not the product of our will—or our dispositions to talk in certain ways, either."

24. Interestingly, we will see the flip side of this error in chapter 6, when we take up the view of Stanley Fish that all knowledge is interpretive in nature.

25. Moore goes so far as to label Putnam an idealist. See Moore, "Moral Reality Revisited," *supra* note 10, at 2495 (referring to Richard Rorty and Hilary Putnam as "sophisticated idealists").

26. This approach to "facts" is an important element in the pragmatism of Richard Rorty. See Rorty, "Texts and Lumps," in 1 *Philosophical Papers* (*Objectivity, Relativism, and Truth*) 81 (1991) ("facts are hybrid entities; that is, the causes of the assertibility of sentences include both physical stimuli and our antecedent choice of response to such stimuli.").

27. McDowell, *supra* note 1, at 11.

But where does this leave us? Again, McDowell's words are instructive here: "We have no point of vantage on the question of what can be the case, that is, what can be a fact, external to the modes of thought and speech we know our way around in, with whatever understanding of what counts as better and worse execution of them our mastery can give us."[28]

Moore seems to want to say that current juridical and legislative practices are, in some way, defective or may be improved upon. Of course, the realist maintains that "the world" will be the measure of better and worse. As it turns out, Moore returns us to the very conventionalism he disdains. Even if we accept Moore's picture of current legal practice as a "theory" of the nature of things, Moore provides no reason for preferring some alternative picture of the world to the one we already have. Failing an alternative, Moore's theory seems more like a complaint than a genuine critique.

Realism and Normativity

Realism in law is least persuasive as an account of normativity in law. Such an account would, at least, explain what it means to say that a proposition of law is true; or, to put it differently, what making correct or incorrect legal judgments consists in. In short, justification—the activity of showing that a given proposition of law is true or false—is the central normative activity in law. I say that realism provides us with an unpersuasive account of normativity in law. Why?

The principal reason is that realism, at least from Moore's point of view, sees the participants in the practice of legal justification making no contribution to the constitution of truth in law. Realism's paradigm for truth is verisimilitude—harmony between facts asserted by a given proposition and some mind-independent state of affairs (truth conditions) that, should it obtain, makes the proposition in question "true."

Consider the act of the testator signing a will. What is the significance of the act of affixing a signature to this document? In the law, the proposition "This will is valid" (let us call this proposition *p*) is, *ceteris paribus*, true. How is this shown? This is a question that asks after the nature of juridical truth.

Assuming the existence of a statute of wills, one produces the relevant portion of the text of the statute, the section that details the validity requirements for wills. What is the connection between the statute of wills and *p*? In the law, the statutory text is the way one shows that *p* is true. The act of repairing to the text of the statute of wills has no normative significance outside legal practice. Without the status accorded the statutory text, the act of producing the text of the statute of wills would be an empty gesture. An explanation of legal justification must illuminate the normative significance of the text—the role it plays—in

28. McDowell, *supra* note 1, at 11. For a similar critique of Moore, see Brian Bix, *Law, Language, and Legal Determinacy* 149 (1993) ("Having meanings 'in the world' would only help us if there were some way for us to have cognition of, to grasp somehow, those meanings.").

the practice of legal justification. Moore's realist account does not do this. Thus, as an account of justification in law, it fails.

Moore sees legal justification as essentially causal in nature.[29] His question "Why do we have the beliefs we do?" tells us nothing about the normative character of law. Moore misses the normativity of law by treating all legal assertions as hypotheses. The realist account of law transforms an enterprise of justification into a quasi-scientific practice of hypothesis generation. Recall Moore's discussion of statutory interpretation.[30] The meaning of legal norms is not to be found in legal practice, but in a realm of facts to which we have no direct epistemic access. Legal terms are mere "provisional theories or heuristics about the nature of the things referred to, to be put aside whenever a better theory about the true nature of the things demands that they do so."[31] But assertions in law are not hypotheses about mind-independent states of affairs. Assertions in law are claims the truth of which are vindicated by intersubjective (not mind-independent) justificatory criteria (e.g., appeal to the text in the context of answering the question whether a will is valid). The forms of argument are the grammar of legal justification—the way lawyers show that propositions of law are true or false. Apart from these forms of argument, there is no legal truth.

Realism attempts to locate the authority for the meaning of legal norms in a realm removed from legal practice. This accomplishes nothing, save the introduction into law of an idling discourse (the empirical). If we want to know whether a given proposition of law is true, we must ask the participants in law how judgments of truth and falsity, correctness and incorrectness, are made. A perspicuous description of the way the truth and falsity of propositions of law is shown is the point of the inquiry; for this is what the normativity of law consists in.

David Brink and Natural Kind Semantics

In "Legal Theory, Legal Interpretation, and Judicial Review,"[32] David Brink advocates a central role in legal interpretation for considerations of human purpose. He states:

> It is important to remember that the primary objects of legal interpretation—statutes, constitutional provisions, and precedents—like most objects of interpretation, are human artifacts, the products of purposeful activity. In interpreting the products of purposeful activity, we must appeal to the purposes which prompted and guided the activity whose product we are trying to understand.[33]

29. This is what Moore means by the self-description "one-worlder." See Moore, "Moral Reality," *supra* note 10, at 2492.

30. See Moore, "Interpretive Turn," *supra* note 3, at 883.

31. *Id.*

32. David O. Brink, "Legal Theory, Legal Interpretation, and Judicial Review," 17 *Phil. & Pub. Affs.* 105 (1988).

33. *Id.* at 125.

The view that the meaning of human activities is best discerned from the point of view of the participants in the activity is one that is shared by philosophers from both the analytic and continental traditions.[34] Like others who argue for consideration of purpose in the interpretation of law, Brink recognizes that no account of the purposive nature of law as a human activity can be complete without considering problems of meaning. In jurisprudence, this recognition finds specific focus in the problem of legal indeterminacy. Given the "open texture" of legal norms, no theory of law can be adequate without some account of how problems of contextual indeterminacy are to be resolved. Indeed, without such an account, we cannot even make sense of the notion of "disagreement" in law.[35]

As Brink reads its history, contemporary jurisprudence has attempted to solve problems of indeterminacy with an inadequate tool: an empiricist semantic theory.[36] According to Brink, proponents of this theory make the following claims: "(1) the meaning of a word or phrase is the set of (identifying) properties or descriptions that speakers associate with it, and (2) the meaning of a word determines its reference."[37] Brink believes that traditional empiricist semantic theory[38] is flawed.[39] The nature of the flaw can be simply stated: empiricist semantic theory fails to draw a distinction between the meaning of a term and anyone's belief about its meaning.[40] By confusing meaning with belief, so Brink argues, legal theorists who embrace traditional semantic theory cannot account for the phenomenon of conceptual disagreement nor can they illuminate the connection between meaning and reference.[41]

34. See Hans-Georg Gadamer, *Truth and Method* (Garrett Barden & John Cumming trans., eds., 1975); Alasdair MacIntyre, "The Intelligibility of Action," in *Rationality, Relativism and the Human Sciences* 63–80 (Joseph Margolis et al. eds., 1986).

35. Brink, *supra* note 32, at 114.

36. *Id.* at 112. H. L. A. Hart is identified as a proponent of this view. *Id.* at 113.

37. *Id.*

38. Brink describes two versions of traditional semantic theory. He states, "An individualistic theory makes the meaning of a word depend upon the criteria which *the speaker* associates with the word, while a conventionalistic theory makes the meaning of a word depend upon the criteria with which the word is *conventionally* associated or with which it is associated by a *majority of speakers*." *Id.*

39. As he describes it, I think he is right. But the strength of Brink's critique of the theory he identifies as "traditional" depends upon the degree to which it is shared by linguistic philosophers as a whole. I don't believe the theory Brink denominates "traditional" is the sort of theory advocated by, for example, Wittgenstein (Kripke's claims to the contrary notwithstanding). Therefore, I believe that the claims made against the theory Brink labels "traditional" leave untouched positions that challenge the claims he makes for a realist semantics. Brink admits as much in his statement that his "discussion of these semantic issues will, of necessity, ride roughshod over many interesting details." *Id.*

40. *Id.* at 117, 118, 121. Brink urges that legal theorists give up the claim of traditional semantic theory that meaning determines reference and follow a realist semantics whereby reference determines meaning. *Id.* at 117.

41. *Id.* at 113.

The inadequacies of traditional semantic theory can be avoided, so Brink argues, by a realist semantics. Following Saul Kripke[42] and Hilary Putnam,[43] Brink urges legal theorists to adopt a semantics of natural kinds,[44] whereby the meaning of general terms is determined not by anyone's beliefs about their meaning but by reference to properties in the world. As he puts it, "[N]atural kind terms . . . are general terms which refer to properties."[45]

Brink's realism is grounded in a metaethics of moral realism.[46] As he states, "Determination of the meaning and reference of legal standards will often require reliance on theoretical considerations [the metaethics of moral realism] about the real nature of the referents of language in the law."[47] This is potentially a powerful claim for, if true, it means that disputes over the meaning of general legal terms are irresolvable by traditional legal methods, which are clearly institutional.

Despite the initial appeal of the argument, it is far from clear that a realist semantics represents a viable alternative to conventional approaches to legal interpretation.[48] The meaning and reference of legal terms is not reducible to natural kinds because law is an institutional and not a scientific practice. Contrary to Brink's claims for the felicity of a natural kinds analysis, the meaning of general legal terms cannot be divorced from the beliefs of institutional participants in legal discourse nor can the meaning of general legal terms be discerned without reference to the beliefs and purposes reflected in legal institutions.

Not All General Terms Are Natural Kind Terms

Brink asserts that the realist semantics of Kripke and Putnam advance "claims for the semantics of both proper names and general terms, such as natural kind terms."[49] As Brink reads Kripke and Putnam, there is no *in principle* distinction between natural kinds and artificial kinds. As with scientific terms, the meaning and reference of legal terms "is given by the way the world is."[50] Like "atom," "neutrino," and "mass," "'[f]air' and 'cruel' are natural kind terms[;] . . . they

42. See Saul Kripke, *Naming and Necessity* (1980).

43. Hilary Putnam, "Meaning and Reference," in *Naming, Necessity, and Natural Kinds* 119–32 (Stephen Schwartz ed., 1977), and "The Meaning of 'Meaning,'" in *Mind, Language, and Reality* (1975).

44. Brink, *supra* note 32, at 118.

45. *Id.* at 120

46. Brink's metaethical program does not figure directly in his arguments for the assimilation of general legal terms into a natural kinds analysis. The arguments in support of a metaethics of moral realism are advanced in David Brink, *Moral Realism and the Foundations of Ethics* (1989).

47. Brink, *supra* note 32, at 121.

48. *Id.* at 147–48.

49. *Id.* at 118. Brink also states that "Kripke and Putnam have defended these semantic claims for the semantics of general terms, such as natural kind terms." *Id.* at 120.

50. *Id.* at 123.

are general terms which refer to properties."[51] Therefore, the meaning of, say, constitutional terms is not "created," it is discovered.[52]

The meaning of a natural kind term is fixed in the following way: "The substance is defined as the kind instantiated by (almost all of) a given sample. . . . [T]he identity fixes a reference: it therefore is *a priori*."[53] As mentioned previously, Brink does not limit his realism to the domain of science or natural (as opposed to artificial) kinds. His semantic realism is presented in the form of a general argument for the meaning of all general terms.

To demonstrate the shortcomings of Brink's wide-ranging claims for realism, it is not necessary that one prove false the claim of Kripke and Putnam that there are natural kinds: it is only necessary to show that not *all* general terms refer in the way Kripke and Putnam claim that natural kind terms refer.[54]

Consider the meaning of the general legal term "negotiable instrument." This term is central to the conventions of drawing, assigning, and paying what are ordinarily referred to as "checks."[55] What counts as a check, the legal rights and obligations of the parties to a check, and the manner by which checks are processed for collection are all a matter of human institutional conventions. If there were no human beings, or no interest in a system of payment by means other than gold and silver, there would be no negotiable instruments.

Like the vast majority of general legal terms, "negotiable instrument" is an artifact, a creature of convention. The meaning of "negotiable instrument" is not "given by the way the world is";[56] there is no "real nature"[57] of a negotiable instrument. We do not "discover"[58] the meaning of "negotiable instrument" by discerning objects in the world having rigidly designated natural properties. It is only in and through the institutional conventions of commerce that "negotiable instrument" has its meaning. To know the meaning of this general legal term, one must consult the conventions for its use, for it is solely against that background that participants in legal discourse frame interpretive arguments. Those arguments are shaped through and through by institutional conventions that are constitutive of law.

Natural Kinds and Legislative Intent

I shall maintain my neutrality on the question of the possible existence of natural kinds, for that neutrality is convenient to my argument.

51. *Id.* at 120.
52. *Id.* at 123
53. Kripke, *supra* note 42, at 136.
54. For a fuller demonstration of this claim, see T. E. Wilkerson, "Natural Kinds," 63 *Philosophy* 29 (1988)
55. The rules governing negotiable instruments are found in articles 3 and 4 of the Uniform Commercial Code (U.C.C.).
56. Brink, *supra* note 32, at 123.
57. *Id.* at 121
58. *Id.* at 123

One of Brink's central claims about interpretation is that the meaning and reference of legal terms is a function of the way the world is and is not dependent upon the beliefs of anyone.[59] When this claim is brought to bear on the question of how far, and to what extent, legislative purpose determines statutory meaning, the results are problematic.

According to traditional semantic theory, close attention must be paid to the intentions of constitutional or statutory framers[60] because "their intentions place constraints upon constitutional interpretation independently of the plausibility of the framer's moral or political beliefs."[61] But proponents of traditional semantic theory fail to distinguish between specific and abstract intent. An abstract intent takes the form of a policy or principle that is the impetus for particular legislation.[62] Specific intent reduces the extension of abstract intent to "certain actions and not others."[63]

Brink claims that specific intent is less important than proponents of traditional semantic theory take it to be.[64] The nub of his argument is that the meaning of statutory terms should not be tied to the intentions of their authors but is properly determined by our best current theory of the meaning of those terms.

Brink's example is a statute passed in 1945 imposing "strict standards of due care"[65] in the handling of toxic substances. If a court is today to decide a case under the statute involving a substance that, according to the best available theory in 1945, would not be considered toxic, is the court to decide the case on the basis of the best theory in 1945 or today's best theory? According to Brink, if one follows the traditional semantic theory, the court must decide the issue on the basis of the best theory in 1945.[66] On a realist semantics, the court's obligation is to decide the question of toxicity relative to our current best theory of the matter.

A realist semantics runs into trouble when we consider a different hypothetical. Consider a statute written in 1945 that prohibited all fishing within fifty miles of shore. Assume that at the time the statute was promulgated, Congress mistakenly believed that whales and dolphins were fish. In the preamble to the text of

59. *Id.* ("The meaning and reference of our terms is given by the way the world is"); *Id.* at 117 ("Beliefs do not determine reference.").
60. Brink explicitly rejects any "global" distinction between constitutional and statutory interpretation. See *id.* at 119 n.20.
61. *Id.* at 123.
62. *Id.* at 122. An example would be the U.C.C.'s purpose to simplify, clarify, and modernize the law governing commercial transactions. See U.C.C. § 1-102(2)(a).
63. To continue with the U.C.C., an example of a specific intention is the drafters' particular desire to repeal the common law that firm offers are not enforceable without consideration. See U.C.C. § 2-205 (firm offers need not be supported by consideration).
64. Brink, *supra* note 32, at 122 ("Proponents [of traditional semantic theory] . . . insist that the correct interpretation of any legal provision must be guided by, or at least not violate, the framers' (specific) intentions.").
65. *Id.* I presume Brink intends the reader to take the quoted phrase to mean strict liability as opposed to liability for negligence.
66. I must confess that the cogency of this claim escapes me, but I will not pursue the matter here.

the statute, Congress announced that the statute was passed to prevent the extinction of all forms of fish "including whales and dolphins." Our best current theory shows that whales and dolphins are not fish but mammals. Is it now the case that the clear meaning of the statute is to be ignored because Congress mistakenly classified whales and dolphins as fish?

The problem for a realist semantics is plain: ignoring Congress's "mistake" in classifying animals comes at the price of direct frustration of Congress's power to regulate "fishing." Obviously, Congress intended to include whales and dolphins within the purview of the statute and did so on the basis of a mistaken theory of classification. But if the court applies the statute to preclude the fishing of whales and dolphins, it can only do so on the basis of an inadequate semantic theory (the traditional theory). The meaning of "fish" is not determined "by the way the world is":[67] it is determined by the way Congress then thought the world was. In other words, it is the *belief* of Congress, not natural kind predicates, that determines the interpretive obligations of a court applying the statute.

The Realist Rejoinder

Brink maintains that his use of the word "real" "does not obviously require metaphysical realism."[68] As I will show directly, Brink equivocates in his use of "real." This equivocation produces a fundamental ambiguity in his argument. "Real" has two senses for Brink: (1) "true" or "correct" nature of "X" as determined by a theory of "X," and (2) real "in the world." In his original essay,[69] Brink advocates the second of these two senses of realism. In rejoinder to my argument, Brink seems clearly to be advocating the first sense of realism.

In his rebuttal, Brink describes the following three claims as "realist":

> [T]here are facts about social institutions, practices, and relations in the following senses: (i) those social phenomena are the *object of* people's conceptions and so antedate those conceptions; (ii) people's conceptions about those phenomena can be mistaken about the real nature of the phenomena; (iii) when people's conceptions of those phenomena are correct it is in virtue of correctly describing the nature of those institutions, practices, and relations.[70]

In reading this paragraph, one gets the impression that the second sense of "real" is intended.[71] In the next paragraph, Brink signals that he does not mean to make the bolder claim for realism at all. He says, "All these semantic claims presuppose is the kind of objectivity and fallibility in social domains secured by claims (i)–(iii) in the previous paragraph."[72] Following this caveat, Brink con-

67. Brink, *supra* note 32, at 123.

68. David O. Brink, "Semantics and Legal Interpretation (Further Thoughts)," 2 *Can J.L. Juris.* 181, 185 (1989).

69. Brink, *supra* note 32.

70. Brink, *supra* note 68, at 184.

71. I at least have that sense from the use of the phrase "real nature of the phenomena."

72. Brink, *supra* note 68, at 185.

firms our suspicion that "real" doesn't mean "real in the world" at all but something roughly equivalent to "what our best theory of 'X' is." Consider: "[T]he relevant sense of 'natural' in the claim that TDR [theory of direct reference] offers a semantics for natural kind terms is ***not*** 'natural scientific' or 'non-artifactual' but something like 'theoretical' or 'explanatory.'"[73] This definition (explication) of "real" shows Brink distancing himself from the second sense of "real."

Brink's use of the word "real" hides more than it reveals. If the meaning of "X" is coextensive with a theory of "X," then I fail to see what is added by the claim that "there is a real meaning of 'X.'" If "real 'X'" simply means "the best theory of 'X,'" then why not drop the adjective altogether? If it does no work, then it just obscures the discussion. I think that much is clear.

Does "Real" Do Any Work?

As with the metaphysical moral realism of Michael Moore, appeals to "the way the world *really* is" do no work in Professor Brink's reformulation of his position. Perhaps the best evidence are Brink's own words. At no point does Professor Brink make any claims about the way the world *really* is. What he does offer is further elaboration of his theory of statutory interpretation. In response to my mammalian counterexample to his original claims for the theoretical power of semantic realism, Brink advances a purposive theory of interpretation. The key to the theory is in the distinction between abstract and concrete intent. As Brink puts the matter:

> [I]n the interpretive appeal to underlying purpose, we must often decide how best to characterize this purpose or intent and, in particular, that we must choose between the *abstract* intent or purpose (i.e. the kind of principle, policy, or value that the framers of the legal provision were trying to implement) and the *specific* intent or purpose (i.e. the particular activities that the framers expected the provision to regulate).[74]

I do not see that this distinction supports Brink's contention that his "semantic claims block the standard argument for legal indeterminacy and judicial discretion because they show that that standard argument rests on mistaken semantic assumptions."[75] What Brink needs to show is how "the way the world is" connects up with the judicial construction of "abstract intention." The reason this is so important is that any statute or line of cases is amenable to more than one purposive reconstruction. If purpose can be theoretically overdetermined, then appeals to realism must demonstrate how choice among competing purposive interpretations of legal materials is accomplished. For a realist this is no small task.

I have argued for two claims. The first is that Brink's claim that all general terms are natural kind terms cannot be sustained. Institutional practices such as

73. *Id.* (emphasis added).

74. *Id.* at 186.

75. *Id.* at 188.

law are replete with general terms the meaning of which can only be discerned by investigation of the beliefs and attitudes of participants in the practice.

My second claim is that a realist semantics is not itself free from difficulty when we are invited to adopt it as an exclusive semantic theory for legal interpretation. It is frequently the case that the meaning of a statute in a present context cannot be determined by direct consultation of the specific intentions of the drafters of a statute. But it is sometimes the case that to do otherwise would be to elide the distinction between legislation and adjudication. Disregard of the limitations of a realist semantics leads to just such undesirable outcomes.

Conclusion

In this chapter we have considered two approaches to a realist jurisprudence. Michael Moore urges that we take ontology seriously, to the point where we view justification in law as an exercise in theory construction about mind-independent moral entities and purposes. As argued, such an approach makes little sense of justification as we have come to know it in law. This is due no doubt to the fact that unlike science, law is not an empirical activity. Lawyers are not making sense of nature, they are characterizing the legal status of states of affairs. If Moore's account of the nature of legal justification had any suasive character, it would make sense of the distinction between a proposition's being "true" and its being "legally speaking true." Regrettably, Moore's realism cannot accommodate such a distinction.

David Brink's metaphysical moral realism is as robust as Moore's, albeit in a different way. In true realist spirit, Brink sets out to argue that "the way the world is" limits what we can say from the legal point of view. When pressed about the relationship between belief and truth, Brink is forced to concede that belief and not nature is the ground of truth in law. When lawyers interpret statutes, they are always interested in legislative aspiration and legislative belief. Yet there is a relationship between the way the world is and what legislators believe about the world. What Brink fails to realize is that it is law and not nature that determines what in that relationship is to count, and how it is to do so.

4

Legal Positivism

> Laws are unavoidably indeterminate prescriptions of general adverbial obligations.
>
> Michael Oakeshott[1]

Legal positivism is a theory about the nature of law and legal institutions. Apropos of the present study, positivism is also a theory about the truth conditions for propositions of law. The focus of this chapter will be on the work of the most important legal positivist of the twentieth century, H. L. A. Hart. In his most celebrated work, *The Concept of Law*,[2] Hart advances both an account of the idea of a legal system as well as a theory of adjudication. The present chapter focuses on Hart's theory of law, with particular emphasis on a central feature of his jurisprudence, the rule of recognition. Hart embraces a truth-conditional account of legal propositions. The rule of recognition is the source for the criteria for evaluating the truth status of propositions of law. For the present study, this is the most important aspect of Hart's jurisprudence.

Hart's Theory of the Legal System

We cannot understand Hart's legal positivism without understanding the question that animates it. That question—"What is law?"—is answered by Hart in the form of a theory of the nature of a legal "system."[3] For Hart, the legal system is a system of social rules. In this respect, legal rules are not unlike the rules of morality, etiquette, or the social club. Legal rules are social also in the sense that they originate from human social practices, such as legislation.

Unlike other sorts of social rules, however, legal rules have a systematic or "institutional" character. This character is reflected in the distinction between

1. Michael Oakeshott, "On History," in *On History and Other Essays* 144 (1983).

2. H. L. A. Hart, *The Concept of Law* (2d ed. 1994). The second edition of *The Concept of Law*, which was originally published in 1961, is no different from the first edition of the book, save for a postscript completed shortly before Hart's death in 1992. Where Hart's postscript is cited, an indication will be made.

3. See Hart, *supra* note 2, at 79–123. In putting the point this way I draw upon Richard H. Fallon Jr., "Reflections on Dworkin and the Two Faces of Law," 67 *Notre Dame L. Rev.* 553, 555 (1992).