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not been asked to do anything that would be a violation of international law, and the failure of his superiors to act on his concerns, even if illegal under international law, relieved Rockwood of any responsibility for wrongs occurring at the prison. Was Rockwood’s case correctly decided? What “law” should take priority in this case?

C. Classical Theories of Law

Natural Law Versus Positivism

On trial at Nuremberg, Nazi officials and officers sought to use a variety of defenses. One defense was presented by Professor Hermann Jahrreiss, an associate defense attorney. Jahrreiss argued that the Enabling Act of March 24, 1933, authorized Adolf Hitler to rule by decree. “Now in a state in which the entire power to make final decisions is concentrated in the hands of a single individual, the orders of this one man are absolutely binding on the members of the hierarchy. Thus individual is their sovereign. . . .” Behind Jahrreiss’ argument lay a view of law familiar to the average person: A state’s law is strong, we must give in to the law.”

Antigone, who is determined to do what is right and bury her brother properly, rebukes her sister, observing that “apparently the laws of the gods mean nothing to you.” Antigone insists that law is what is just, proper, or right—not merely whatever a dictator demands. Antigone sacrifices her life out of fidelity to this ideal.

The history of legal philosophy is importantly shaped by the conflict between these two opposing general conceptions of law and legality: law as power and law as justice. These general views have, of course, been much debated and refined. Our discussion begins with two specific forms of these broad approaches: legal positivism and natural law theory.

Natural law theory, or simply naturalism, holds that the phenomenon we call “law” can adequately be understood only in relation to a certain view about the nature of moral judgments and standards. What we recognize and venerate as law, according to naturalism, is both essentially connected to and grounded in a “natural moral order”—that is, principles and standards not simply made up by humans but rather part of an objective moral order present in the universe and accessible to human reason. Naturalism holds that human practices and institutions are to be measured against these “higher” standards, and where they fall short of the mark, specific human arrangements, whether statutes, executive orders, or constitutions, fail fully to have the character of law.

Positivism, by contrast, holds that the phenomenon of law is best understood as a system of orders, commands, or rules enforced by power. For the positivist, law is that which has been “posited,” that is, made, enacted, or laid down in some prescribed fashion. It is as such a purely human product, “artificial,” rather than “natural.” Moreover, for the positivist, a rule of law need have no connection with what is morally right or correct or true in order to qualify as law: there is no necessary connection between what law is and what it ought to be.

Legal Positivism

As H. L. A. Hart points out in his selection, positivism came into its own as a distinct and well-formulated legal theory in the late eighteenth and early nineteenth centuries in the writings of two British philosophers, Jeremy Bentham and John Austin. Central to the legal theory of both was the conviction that law as it is not necessarily law as it ought to be. It does not, they believed, follow from the fact that because a statute or an ordinance is valid law it is also morally good or right. A statute could, of course, coincide with what is right, but the fact of its being the “law” does not guarantee this. The morality and legality of a rule are in this way distinct and separate. This “separability thesis,” as later positivists have come to call it, led both Bentham and Austin to distinguish sharply between the task of giving an accurate descriptive account of what law is—“expository” or “analytical”—and the task of evaluating the law morally, stating what it ought to be—“censorial” or “normative” jurisprudence.

As Hart makes clear, in addition to their commitment to positivism, Bentham and Austin shared an allegiance to a general moral and political outlook known as utilitarianism. We will have occasion to encounter utilitarianism more later; for now it is enough among several ethical theories or views of moral life that regard the consequences of an act as the sole or exclusive factor to be weighed in determining whether the act is morally right or good.

More specifically, utilitarians such as Bentham argue that an action is right or good only if it brings more overall happiness (or at least less unhappiness) into the world than any alternative course of action open to a person at a given time. Bentham appealed to this “Principle of Utility” frequently when it came to evaluating the law from a moral standpoint, and he often found the laws of the England of his time sadly lacking from the perspective of bringing about the greatest happiness.

The work of contemporary positivist H. L. A. Hart is widely regarded as a central statement of modern positivism. Although not all contemporary positivists agree with Hart, all acknowledge that he has largely set the terms in which the contemporary debate about positivism has taken place. Much of what Hart has to say is written against a background of familiarity with the basic outlines of the theories of Bentham and especially Austin. It is therefore useful to acquaint ourselves briefly with the outlines of Austin’s account and with the deficiencies that Hart and others have noted in it.

In the selection from his book, The Province of Jurisprudence Determined, Austin makes it clear that he has little patience for talk of the “natural law,” “moral law,” or “the law of God.” Along with customs and international agreements, these can be called “law” only in an improper sense. What is law? According to Austin, law “properly so called” is something established by a political superior over subjects and takes the form of a command issued by a sovereign. What is a command? It is a
signification of desire, backed by a credible threat of punishment, a threat that can in all likelihood be carried out. Is anyone's command a law? No; only the command of the "sovereign" can be certified as law. Who (or what) is the sovereign? Austin makes no attempt to define the sovereign in terms of some normative or value-laden criterion, such as "he who has the right to rule" or "he who legitimately rules." Instead, Austin argues that the sovereign is the person or group of persons that is habitually obeyed by the bulk of a given population but that does not in fact habitually obey anyone else; the sovereign is the "unobeying obeyed." If some person, X, is habitually obeyed by the bulk of the population and yet does not in fact habitually obey anyone else, that person is the sovereign. If X then expresses the desire that certain things be done (or not done) and makes a credible threat that failure to comply will be punished, X has issued a command and his or her command is law. Finally, Austin makes it very clear that just because a law, in the sense that he has defined, exists, there is no guarantee that such a law is fair, just, or right.

Austin's model is elegant in its simplicity; but it is open to seemingly decisive objections, as Hart makes it very clear that just because a law, in the sense that he has defined, exists, there is no guarantee that such a law is fair, just, or right.

Austin's conception of sovereignty raises further difficulties. Do all legal systems necessarily have Austinian sovereigns? Consider again our own constitutional democracy. Do we have a sovereign? Who is it? To the extent that we can think in these terms at all, we view ourselves ("we the people") as those in charge. Austin, it seems, would have us then say that we (the people) in our constitution-creating-and-maintaining role are sovereign over ourselves in our role as citizens. But does this preserve any of the simplicity of Austin's initial model? Furthermore, in our constitutional democracy we have grown accustomed to thinking of ours as a limited government. But can Austin's model make sense of limitations upon the power of sovereign? To do so, Austin would have us argue that sovereigns, in their sovereign capacity, issue commands to themselves in thinking of ours as a limited government. But can Austin's model make sense of limitations upon the power of sovereign? To do so, Austin would have us argue that sovereigns, in their sovereign capacity, issue commands to themselves in thinking of ours as a limited government. But then, of course, what distinguishes between these two aspects of sovereignty must be some notion of official capacity, and this idea cannot be spelled out in terms of Austin's theory.

To see why this last is so, consider the following problem. All persons who presently serve as United States senators meet at a football field on a holiday and "vote" to make themselves "kings" of the states from which they come (forget about the problem of having two kings from each state). None of us would be prepared to say that this vote has made "law," because (we would explain) the senators were not acting in their "official" capacity. But Austin has no room for official capacity: his theory sees only these individuals, who are after all the same people (and people habitually obeyed, though not on this occasion) whether in or out of the Senate chamber.

The laws of our own Constitution don't command us to continue our observance. If the citizens of what is now the United States were overwhelmingly to decide to repudiate the Constitution in its entirety next Friday at noon, would we all be punished for doing so? It seems not; but that fact does not incline us to say that the Constitution is not "law," at least in some sense. It merely shows that the Constitution is not law as a command (or series of commands) but rather is law as a structure of system of relative powers and competencies designed to facilitate or effect certain aims.

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Hart's Theory

In his central work, The Concept of Law,6 Hart attempts to give a fresh start to positivism by resolving the problems implicit in Austin's theory. Austin conceived of law and of a legal system on the analogy of a holdup by an armed robber: orders backed by threats. Law is merely the "gunman situation writ large." Hart argued that this view confuses two quite different states of affairs: being obliged to give my money to the robber (to avoid being hurt) and being legally obliged to pay my taxes by April 15 (to avoid a penalty). Feeling obliged is just that—a feeling, a psychological state. But being under an obligation is a feature of life that is social and that essentially involves the idea of a social rule. Hart argued that a shared activity or practice cannot constitute a social rule unless the people whose rule it is manifest a certain attitude toward it, specifically, that they accept and use the rule to guide their conduct. In this sense, "Pay your taxes by April 15" is a social rule because most of us use it (however reluctantly) to guide our conduct and help us plan. "Give me your money or else" is, on the other hand, plainly not such a rule.

Hart summarized his own theory of law as the view that law is a union of primary and secondary rules. Primary rules are those social rules that concern themselves directly with the way we live and behave. "No one may drive faster than 35 mph" or "Pay your taxes by April 15" are just such rules. Secondary rules, on the other hand, are "secondary" in the sense that their subject matter is not human behavior but rather the primary rules themselves. "The traffic code is exclusively the jurisdiction of the state" and "Proposed changes in the tax code must be approved by Congress" are examples of secondary rules. In order for a body of rules to qualify as legal rules, according to Hart, there must be secondary rules to supplement the primary ones. Of particular interest here is Hart's notion of a rule of recognition. This is a secondary rule that specifies criteria for what counts as a primary rule. "Whatever the chief utterers is law" or "Whatever the legislatures enact consistently with the Constitution is law" are examples of rules of recognition. "Pay your taxes by April 15" is then a valid rule of law because it was created (enacted by a legislature) in the way specified by the ultimate rule of recognition of our legal system.

Much debate has accompanied what Hart says about the existence of rules of recognition. What does it mean for such rules to exist? To say that the rule of recognition exists cannot mean that it is valid because it is enacted in accordance with a procedure laid down in the rule of recognition; plainly, the rule cannot validate itself. The existence of the rule of recognition must be recognized as a descriptve fact; it simply is the rule acknowledged by most legal actors within a given system.

In his essay "Positivism and the Separation of Law and Morals," included here, Hart notes that critics of positivists sometimes confute the separability thesis—the claim that legality and morality are separate issues—with Austin's command theory of law, reasoning that since the latter is open to serious objections, so must be the former. Hart believes, however, that it is possible to adhere to the separability thesis (and to a utilitarian moral outlook) and still reject Austin's command model; and this is indeed Hart's position.

Hart considers several objections to the separation of law and morals so important to positivism. Some critics argue that law and morality cannot be separated for the reason that legal rules cannot always say how they are to be applied. For example, the general rule "No vehicles in the park" cannot be applied to the specific situation of my wearing a powered skateboard without the exercise of moral judgment: Should I be allowed to ride through the park on my skateboard? Any positivists who think differently, so these critics say, are guilty of the error of "formalism," the belief that all rules of law can be unambiguously and straightforwardly applied to any situation with complete logical certainty. Hart responds that this criticism relies on a false dilemma: we can, Hart believes, adhere to the separability thesis and yet not fall victim either to a direct appeal to moral values when interpreting a rule such as "No vehicles in the park" or to the silliness of formalism. Judges can resolve these "penumbral," or "fuzzy," cases by appeal to accepted social policies and purposes.

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A further objection to the positivist insistence that a rule can still be a rule of law even if it is immoral is made by those who have lived under evil legal regimes such as that in effect in Germany during the Nazi period. These critics complain that the positivist separation of law and morals can have (and has had) pernicious effects: by insisting that laws remain valid even if immoral, positivism has been easily exploited by corrupt "law-and-order" regimes eager to exact compliance with their regulations. Hart tries to argue that the proper response to these criticisms is not to reject the separability thesis but to recognize that although they may still be the law, some rules or regulations may simply be too morally outrageous to obey.

Hart does make one seeming concession to the natural law position. We do have, Hart admits, an obvious need for a system of legal protections and regulations with some minimal moral content. Legal rules prohibiting physical violence are necessary, for example, not because the presence of such values is entailed by the very idea of something's being the law, but simply given the contingent fact that human beings are vulnerable to physical harm and abuse. This, says Hart, is the core of good sense in the naturalist position; but it is an error to misinterpret the necessity for such laws as a truth about the nature of law as such.

**Natural Law Theory**

Naturalism has a rich and varied history, extending back to the ancient Greeks and Romans. One of the most elaborate and thorough expositions of the naturalist position was given by thirteenth-century Catholic theologian Thomas Aquinas.

**St. Thomas Aquinas**

In the brief selection included here from his great work, the *Summa Theologica*, Aquinas argues, first, that law necessarily involves rules that (given that they have their source in reason) must have some purpose or goal. Following Greek philosopher Aristotle, Aquinas insists that this goal must be overall happiness or the "common good." Laws must be "promulgated" or made clear to those who are subject to them, Aquinas continues, and this means that God is the ultimate source of such promulgating authority.

Aquinas sets out his famous typology of four distinct kinds of law: eternal, divine, natural, and human. Eternal law represents God's overall plan for the universe. Divine law was for Aquinas the revealed word of God, the principles revealed by Scripture. Divine law is necessary, so Aquinas thought, because human beings have a supernatural destiny to which we must be guided, our natural intellect being inadequate to reveal to us the nature of this destiny and how to secure it. Human law, by contrast with eternal and divine law, is created by us for the purpose of carrying out the requirements of natural law.

What, then, is natural law? Aquinas argued that because all things are subject to divine providence and thus are "ruled and measured" by eternal law, all things "partake" in some way of eternal law. Aquinas believed that humans, as rational beings, occupy a special place in God's eternal plan, in that we can understand eternal law as it applies to us and can allow that understanding to guide our conduct. Eternal law, as it relates to human conduct, Aquinas calls "natural law."

What does natural law tell us to do? In answering this question, Aquinas invoked (as he often did) a distinction drawn by Greek philosopher Aristotle. Aristotle had distinguished between two kinds of reason: speculative and practical. Speculative reason is the capacity we have as reasoning beings to apprehend or understand certain truths, such as the truths of mathematics and geometry. Practical reason is not concerned with these abstract matters but rather with human action. Practical reason tells us what things we should value, what goods we should seek in life, and how to attain them. Aquinas and Aristotle held that, in both speculative and practical reason, certain principles are *per se nota*, known through themselves. These are self-evident propositions, requiring no proof (in the sense of being derivable from something else). As examples of self-evident principles of speculative reason, Aquinas included the principle of non-contradiction ("What is, is, and what is not, is not") and certain truths of mathematics and geometry.

Turning to practical reason, Aquinas claimed that the first and most fundamental principle or "precept" of natural law is "Good is to be done and evil avoided." Other examples he gives include "One should not kill one's father" and "God's precepts are to be obeyed."

How does natural law relate to human law? Aquinas maintained that human law is necessary to implement and adapt the basic precepts of natural law, which are quite general, to the changing needs and contexts of human societies. The basic precepts are the same for everyone and do not change, but the detailed conclusions drawn from them may differ from place to place and time to time, and human law reflects this fact. "Goods held in trust for another should be returned," according to Aquinas, a requirement of natural law, but it should not be followed when the goods is a gun and the person to whom it should be returned is in a homicidal frenzy. Human law must adjust the principles of natural law to specific situations. Moreover, since human communities need many detailed regulations and ordinances simply to function (for example, tax and traffic laws), natural law requires that they be made, although it does not, of course, dictate their particular content (for human law often requires that we drive on the right; only that the community establish some rule so as to meet the fundamental requirement that health and safety be protected).

What about a situation in which human law fails to conform to natural law? If it is true that Aquinas's naturalism has potentially far-reaching consequences. As he makes clear in the reading, the force of a human law necessarily depends upon its justice: human enactments or measures that contravene natural law are not laws "but a perversion of law"; they are "acts of violence" and do not bind in conscience. Although it is still debated exactly what Aquinas meant by such statements, these remarks have seemed to many to imply that any human legal regimes "at odds with natural law have no legal validity. Even entire legal systems, Aquinas suggests, if they are evil "perversions" of natural law (for example, the legal regime of the Nazis) may stand invalidated on that ground.

**Fuller and the Internal Morality of Law**

The selection by late Harvard jurist Lon Fuller, while careful not to endorse the classical natural law theory of Aquinas, nonetheless bears a recognizable "naturalistic" stamp in its insistence that "law" and "what is morally right" are in an important sense inseparable. In his other writings, Fuller had been especially interested in the legal problems that arose in Germany after the Nazi period, represented, for example, by the case of the housewife-turned-informant. According to Fuller, Hart wrongly assessed these cases, assuming that something persisted throughout the Nazi reign that deserved the name of "law" in a way that makes meaningful the ideal of fidelity to law. Fidelity to law, as Fuller understood it, meant that a statute or an ordinance is deserving of loyalty and respect simply by virtue of its being the law. Fuller maintained that positivism could not explain or make sense of the ideal of fidelity to law and that positivism was therefore descriptive false or incorrect. Fuller conceded that a particular rule of law can still be law even if it is immoral, but he denied that such rules could remain law if they were part of an entire legal system that was itself deeply evil and unjust.

In our selection, Fuller uses a fictional story of a king named Rex to illustrate his view that for a system of legal rules to exist certain minimum moral demands must be met; because Rex failed to heed these demands, Fuller argues, he failed to make "law." Fuller details the demands that form his "internal morality of law" and distinguishes his "procedural" version of natural law from the "substantive" view of classical naturalists like Aquinas.
weary legislative draftsmen who at 2:00 A.M. says to himself, "I know this has got to be right and if it isn't people may be hauled into court for things we don't mean to cover at all, but how long must I go on rewriting it?"

A concentration on the order imposed by law in abstraction from the purposive effort that goes into creating it is by no means a peculiarity of Holmes' predictive theory. Professor Friedmann, for example, in an attempt to offer a neutral concept of law that will not import into the notion of law itself any particular ideal of substantive justice, proposes the following definition:

the rule of law simply means the "existence of public order." It means organized government, operating through the various instruments and channels of legal command. In this sense, all modern societies live under the rule of law, fascist as well as socialist and liberal states.4

Now it is plain that a semblance of "public order" can be created by lawless terror, which may be not conformable to an assumed standard, is a law, though we happen to dislike it, a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation or disapprobation. Does this statement reflect your understanding of "law"? Given this view, how could Austin explain or account for the idea that there is a moral obligation to obey the law? Does the claim that something is the law supply a reason for compliance with it?

Endnotes
1 The Sociology of Georg Simmel (1950), trans. Wolff, ¶4, "Interaction in the Idea of "Law," pp. 186-89 see also Chapter 4, "Subordination under a Principle," pp. 259-67. Simmel's discussion is worthy of study by those concerned with defining the conditions under which the ideal of "the rule of law" can be realized.
2 I have discussed some of the features of this deterioration in my article, "Positivism and Fidelity to Law," 71 Harvard Law Review 650, 648-57 (1958). This article makes no attempt at a comprehensive survey of all the postwar judicial decisions in Germany concerned with events occurring during the Hitler regime. Some of the later decisions rested the validity of judgments rendered by the courts under Hitler not on the ground that the statutes applied were void, but on the ground that the Nazi judges misunderstood the statutes of their own government. See Pappe. "On the Validity of Judicial Decisions in the Nazi Era," 23 Modern Law Review 260-74 (1960). Dr. Pappe makes more of this distinction than seems to me appropriate. After all, the meaning of a statute depends in part on accepted modes of interpretation. Can it be said that the postwar German court gave full effect to Nazi laws when they interpreted them by their own standards instead of the quite different standards current during the Nazi regime? Moreover, with statutes of the kind involved, filled as they were with vague phrases and unrestricted delegations of power, it seems a little out of place to strain over questions of their proper interpretation.
Holmes and the “Bad Man”

Olive Wendell Holmes’s career spanned a vast period in American history, from before the Civil War to the New Deal. Holmes was a teacher, writer, judge, and justice of the United States Supreme Court, and while he has always defied neat classification into one or another jurisprudential camp, his essay “The Path of the Law,” reprinted here, became a classic statement of several key realist themes. To appreciate fully what Holmes has to say, we need a clearer sense of the context within which he and other realists wrote, and in particular a clearer understanding of the concept of law against which he and they were reacting.

The nineteenth century saw a tremendous growth and expansion of the traditional sciences, as well as the birth of new realms of scientific investigation, such as psychology and biology. The growth in social and intellectual prestige of the sciences fueled the desire of legal scholars to make law a “scientific” discipline. In 1870, the new dean of Harvard Law School, Christopher Columbus Langdell, instituted a series of reforms in legal education, with the aim of teaching law as a science. Prominent among these reforms was the introduction of the “case method” of legal study: the student was to confront and analyze the opinions written by judges deciding particular disputes in order to extract from them the fundamental principles of law. Behind Langdell’s case method stood a conception of the nature of law that Langdell shared with other influential scholars and teachers, including James Barr Ames, Joseph Beale, and Samuel Williston. According to these men, law is a completely self-contained and thoroughly consistent and systematic body of principles and rules. After a judge or student extracts the rule from the authoritative sources, he or she can logically deduce what conclusion that rule requires in any given case. In this way, every possible legal dispute has a uniquely correct solution that can be rigorously deduced from a coherent set of basic axioms.

Law becomes a kind of geometry.

No sooner was this vision articulated than realists, including James Barr Ames, Joseph Beale, and Samuel Williston, were doing precisely what it encouraged. They embarked on a program of investigating, such as psychology and biology. The growth in social and intellectual prestige of the sciences fueled the desire of legal scholars to make law a “scientific” discipline. In 1870, the new dean of Harvard Law School, Christopher Columbus Langdell, instituted a series of reforms in legal education, with the aim of teaching law as a science. Prominent among these reforms was the introduction of the “case method” of legal study: the student was to confront and analyze the opinions written by judges deciding particular disputes in order to extract from them the fundamental principles of law. Behind Langdell’s case method stood a conception of the nature of law that Langdell shared with other influential scholars and teachers, including James Barr Ames, Joseph Beale, and Samuel Williston. According to these men, law is a completely self-contained and thoroughly consistent and systematic body of principles and rules. After a judge or student extracts the rule from the authoritative sources, he or she can logically deduce what conclusion that rule requires in any given case. In this way, every possible legal dispute has a uniquely correct solution that can be rigorously deduced from a coherent set of basic axioms.

Law becomes a kind of geometry.

No sooner was this vision articulated than realists, like Holmes, began to assail it. They attacked the formalism of the “law-as-science” theorists: “The life of the law has not been logic, it has been experience,” as Holmes famously remarked. And the experience that is most relevant here is the experience and perspective of the “bad man,” the cynic whose only concern is with the bottom line: How much can I get away with before bringing the power of the state down upon me? Holmes provides several examples of this bad-man perspective in “The Path of the Law,” as, for example, in his theory of contract. A contract, he says, is not a moral commitment that the law wants me to keep. This is shown, for example, by the fact that I may be sued for breach of contract even though I intended to make no such commitment. A contract is merely what the bad man would take it to be—a choice to perform as promised or ignore the promise and pay the penalty. In a similar fashion, when I injure another through my negligent behavior, the law of tort requires that I pay damages to the person affected. From the perspective of the bad man, such a penalty is no different from a tax; each is a negative consequence brought on by my conduct. To understand the law, then, is to be able to predict when and under what circumstances one’s conduct will trigger society’s response. By thus washing the law in “cynical acid,” Holmes seeks to boil law down to its bare essentials.

The realists attacked the formalism of the Langdellian legal scholars in another way: by insisting that judges and courts deciding actual disputes do not work backwards from general principles of legal doctrine to particular conclusions in specific situations. As Holmes notes, law and legal doctrine develop only slowly and as a result of judges’ decisions: and this development is embedded in history and tradition in a way far deeper than the law-as-science people were willing to admit. Since law develops in this way, the realists claimed, it is futile to seek or expect much “logic” in it. The law is not a rigid body of fixed and unchanging rules but a shifting and flexible social institution, with sufficient play to accommodate the balancing of various and competing interests within a society.

Rationalization and Rule-Skepticism

Holmes and other realists had to admit, of course, that judges and lawyers often write and talk as if they were deciding a case, or arguing for a particular position, by deducing conclusions from “rules of law” in a straightforward fashion. But the statements made by judges in their opinions, many realists insisted, are frequently less than rationalizations for decisions that they had already arrived at on grounds or for reasons other than the “rules” required them to decide in a particular way. Realists like Jerome Frank argued that legal reasoning characteristically proceeds “backwards,” beginning with an intuitive judgment or “gut feeling” that a particular decision is correct or right and proceeding to a rationalization of that decision so cast in legal jargon that it appears to follow from the rules in a logical way.

Coupled with their theory of legal reasoning as rationalization stands the realist’s rule-skepticism. “The law . . . consists of decisions, not of rules.” By denying that the law consists of rules, some realists pushed their doctrine of the flux and flexibility of the law to the limit. Frank, in particular, challenged the concept of stare decisis or the doctrine of precedent. This is the idea that a court’s decision in one case can serve to guide the decision of future cases that are similar to the original one in relevant ways. (For more on the concept of “following precedent,” see Section E in this chapter.) The realists repeatedly emphasized the indeterminacy or looseness of stare decisis by pointing out that a particular ruling in one case never binds a decision maker in any future case, because the future decision maker can always find some aspect of the later case that can serve as a ground for differentiating or “distinguishing” it from the prior one.

The bottom line for the realists was that law is a matter of prediction: “The prophecies of what the courts will do in fact, and nothing more pretentious are what I mean by the law.”

“The law . . . as to any given situation is either (a) actual law, i.e., a specific past decision, as to that situation, or (b) probable law, i.e., a guess as to a specific future decision.” Accordingly, many realists advocated the study of judicial behavior, arguing that to understand law you must concentrate on the patterns of decisions revealed in actual cases as these are the most reliable guides to, and the most accurate basis for, prediction of what future courts will do.

Legal Reasoning and Intuition

Central to the realist criticism of legal reasoning as a rational procedure bound by rules was the conviction, expressed by Holmes, that “general propositions do not decide concrete cases.” Cases, not rules, were for the realists only the source of law. A few judges even came openly to express this view. Joseph Hutchens, for example, recounted how his training in a mechanical, “slot-machine” view of the law had given way in the face of his many years in the courtroom to the realization that good judges, like good jurors, “feel” their way to a just decision by waiting for the “hunch” or flash of insight that will light the way, the intuition that will point in the right direction. The rest of what the judge typically does, the lengthy opinion that he or she provides as a preface to the decision, was, according to Hutchens, mere rhetoric. Supporting the hunch with appropriate legal jargon is necessary, however, to disguise its arbitrary nature. The task of the judge is therefore to reason backward from an intuition of the “desirable” result to a rationalization that will fit it. In these ways, Hutchens agreed with other realists, many of whom argued that judges deciding particular disputes should be guided by the aim of responding to the real human needs before them, not by the aversion following from the abstract categories and distinctions embedded in “the rules.”

The last point is made very clearly in the excerpt included here from a prominent realist, Karl Llewellyn. Llewellyn frames his discussion as a response to the work of Roscoe Pound, himself an influential figure in American jurisprudence and one-time Dean of Harvard Law School. Llewellyn views Pound as a someone who defines law as something other than it is, by overstating the role of the law in influencing human behavior.

Llewellyn writes that much of the law consists of precepts or rules. However, many realists, including Llewellyn, have argued that judges do not follow rules when making decisions. They argue that judges make decisions based on their intuitions, rather than on the rules that are written into the law.

Llewellyn argues that the law is not a fixed set of rules, but rather a set of principles that evolve over time. He notes that the law is not a static body of rules, but rather a dynamic system that is constantly changing.

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create them. The "rules on paper" exist only insofar as they describe the judgments actually made in particular legal disputes. But, Llewellyn observes, judges are even critical for failing to see that a given rule is "contradictory" or must be followed in a specific case. Real laws, according to Llewellyn, are descriptive claims about the practices of courts and "their effects upon the conduct and expectations" of citizens. If a judge's actual decision or judgment, rather than the verbiage surrounding it, accurately states what the judge will do in the future should look to her decision. This conclusion led some legal realists to believe that the evolution of law was "pedigreeable" rule, the court's resolution of the case cannot involve enforcing any one's legal rights.6

One of Dworkin's primary jurisprudential concerns has been to develop and defend a theory of adjudication: an account of how courts can and ought to reason to a conclusion in those "hard" cases in which no settled rule applies. And it is this concern that animated Dworkin's critique of Hart's positivism. Dworkin's core insight was that when courts reason about hard cases, they appeal to standards other than positivistic rules: they appeal to principles. Unlike rules, principles have no discernible "pedigree" in Hart's sense. Principles function as a reason in favor of a particular decision but do not compel a result in the way a rule does. Moreover, a principle such as "No one should profit from his own wrongdoing," invoked in the famous Riggs case (reprinted at the end of this chapter), can remain a principle of our law despite the fact that it is not always followed. Finally, principles frequently give expression to underlying or background rights held by one of the parties to a dispute, and such rights frequently "trump" or take priority over other considerations.

**Law as Interpretation**

One of the most widely debated theories of law to have emerged in recent decades is the approach developed and refined by Oxford legal philosopher Ronald Dworkin. Published in a number of essays and books, Dworkin's jurisprudence has undergone several changes, at least some of which are briefly noted here.

**Dworkin's Critique of Positivism**

In one of his earliest and most influential works, Dworkin summarized what he took to be the essential commitments of Hart's positivism: (1) The law of a community consists of a body of rules identifiable as legal based on their "pedigree," how they came about. (2) If a given case is not covered by a "pedigreeable" rule, the court must exercise discretion by going beyond the law to reach a decision. (3) Since legal rights can be specified only by rules, in any case that is not covered by rules, the court's resolution of the case cannot involve enforcing anyone's legal rights.6

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**Legal reasoning** for many of the realists, then, was something of a misnomer. What a judge does when faced with a difficult case is much closer to an art or craft than to compliance with a stabile, logical procedure.

**Dworkin's Theory of Law**

In "Natural Law Revisited," reprinted here, Dworkin restates his theories of law and adjudication so as to show the question "What is law?" depends for its solution on correct answers to moral questions. At the same time, Dworkin tries to situate his theory within the context of recent work by various legal scholars who compare literary texts and the approaches to interpreting and reasoning about them with legal texts and the processes of legal reasoning. A central controversy in both the law of literary theory has turned on the extent to which textual interpretation, whether it be of a novel or a constitution, is merely a "subjective" process in which the interpreter imposes whatever meaning he or she chooses. Is there any sense in which textual interpretation can be said to be "objective"? And what would that mean? Are there meaningful constraints upon interpretive activity? These questions take on particular significance in the law as they intersect with the common assumption that legal reasoning must be conceived as a special form of interpretive activity, distinct from the political decision making. Dworkin's discussion of these issues in his selection presents in outline the theory developed at much greater length in his book, Law's Empire.

Adjudication, according to Dworkin, is a form of interpretive activity. Judges are like contributors to a "chain novel": they must take the statutes, prior cases, and other legal materials before them and try to make sense of them in a way that allows them to continue to exist. Whatever "trump" or the materials tell in a definite direction. In Law's Empire, Dworkin argues that this concept of judicial interpretation follows from a more general view of what it means to interpret anything, be it a text, a work of art, or what have you. This general view says that in order for me to interpret a theatrical play, for example, I must seek to understand it "from the inside out," trying to grasp what it means to the "society" (actors, audience, critics) whose play it is. Similarly, the interpretation of a social practice such as law involves the attempt to understand it as a way of life created and sustained by its participants, people who see themselves as part of a larger community ("community of principle," "interpretive community") held together by a commitment to the rule of law. And this means, Dworkin believes, that interpretation cannot simply involve discovering the intent of the author of the play or the drafter of a statute. Instead, interpretation must be constructive. This means that interpreters must try to see the play or the law in its best light, as the coherent embodiment of a unifying theme or point. For judges trying to interpret a series of earlier precedents, this means that they must seek to state the best constructive interpretation of the legal doctrine of their community as it is expressed in those precedents. And this will require that judges, at some point, rely upon their own opinions and convictions as they attempt to find the best interpretation of the existing law.

Dworkin cautions us not to misunderstand the last point. Because interpretation is not a mechanistic process, the interpreters' own opinions must inevitably shape their interpretations to some degree, but this does not mean that judges can, for example, simply do whatever they please when faced with a hard case. Part of understanding and interpreting the law of their communities requires that judges respect values that are deeply rooted in their society. Values of fairness and democratic rule, for example, require that they must balance their own opinions against public opinion (as expressed, say, by the votes of representatives in Congress) and the value of due process requires that judges protect people's expectation by not allowing judges' interpretations of the law to deviate radically or break too decisively with the past.

Judges, then, look for a "reading" or interpretation that will contribute to the legal "story" by portraying the law in its best light. But what several competing interpretations or readings of that past are possible? More interpreters must measure and compare these readings along two dimensions. First, the dimension of "fit": How well does that reading present our law as something coherent and worthwhile? Whichever interpretation succeeds best on both of these scorecards becomes the interpretation judges must choose and enforce. Dworkin sets up his overall theory by calling it "law as integrity": The law is the product of the interpretation that most faithfully sums up the texts, principles, and
Although he does not object to the label "naturalism" to describe this view, Dworkin makes it clear that this is a naturalism of a very different sort from that defended by Aquinas. Dworkin's judges are not free to follow just any normative or moral principle, nor do the principles to which they do appeal derive their validity from a natural moral order. Dworkin's judges are permitted to recognize only the moral principles and values "present," either explicitly or implicitly, in the legal history and tradition of their communities and to recognize them only for that reason, not because they have some independent moral or religious basis.

10. The Path of the Law

Oliver Wendell Holmes

When we study law we are not studying a mystery but a well-known profession. We are studying what we shall want in order to appear before judges, or to advise people in such a way as to keep them out of court. The reason why it is a profession, why people will pay lawyers to argue for them or to advise them, is that in societies like ours the command of the public force is intrusted to the judges in certain cases, and the whole power of the state will be put forth, if necessary to carry out their judgments and decrees. People want to know under what circumstances and how far they will run the risk of coming against what is undesirable and retaining only the facts of legal import, up to the final analyses and abstract universals of theoretic jurisprudence. The reason why a lawyer does not mention that his client wore a white hat when he made a contract, while Mrs. Quickly would be sure to dwell upon it along with the parcel gilt goblet and the seacoal fire, is that he foresees that the public force will act in the same way whatever his client had upon his head. It is to make the prophecies easier to be remembered and to be understood that the teachings of the decisions of the past are put into general propositions and gathered into text-books, or that statutes are passed in a general form. The primary rights and duties with which jurisprudence buses itself again are nothing but prophecies. One of the many evil effects of the confusion between legal and moral ideas, about which I shall have something to say in a moment, is that theory is apt to get the cart before the horse, and to consider the right or the duty as something existing apart from and independent of the consequences of its breach, to which certain sanctions are added afterward. But, as I shall try to show, a legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court; and so of a legal right.

The number of our predictions when generalized and reduced to a system is not unmanageably large. They present themselves as a finite body of dogma which may be mastered within a reasonable time. It is a great mistake to be frightened by the ever-increasing number of reports. The reports of a given jurisdiction in the course of a generation take up pretty much the whole body of the law, and restate it from the present point of view. We could reconstruct the corpus from them if all that went before were burned. The use of the earlier reports is mainly historical, a use about which I shall have something to say before I have finished.

I wish, if I can, to lay down some first principles for the study of this body of dogma or systematized prediction which we call the law, for men who want to use it as the instrument of their business to enable them to prophesy in their turn, and, as bearing upon the study, I wish to point out an ideal which as yet our law has not attained.

The first thing for a business-like understanding of the matter is to understand its limits, and, therefore I think it desirable at once to point out and dispel a confusion between morality and law, which sometimes rises to the height of conscious theory, and more often and indeed constantly is making trouble without reaching the point of consciousness. You can see very plainly that a bad man has as much reason as a good one for wishing to avoid an encounter with the public force, and therefore you can see the practical importance of the distinction between morality and law. A man who cares nothing for an ethical rule which is believed and practised by his neighbors is likely nevertheless to care a good deal to avoid being made to pay money, and will want to keep out of jail if he can.

I take it for granted that no hearer of mine will misinterpret what I have to say as the language of cynicism. The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race. The practice of it, in spite of popular jests, tends to make good citizens and good men. When I emphasize the difference between law and morals I do so with reference to a single end, that of learning and understanding the law. For that purpose you must definitely master its specific marks, and it is for that I ask you for the moment to imagine yourselves indifferent to other and greater things.

I do not say that there is not a wider point of view from which the distinction between law and morals becomes of secondary or no importance, as all mathematical distinctions vanish in presence of the infinite. But I do say that that distinction is of the first importance for the object which we are here to consider—a right study and mastery of the law as a business with well understood limits, a body of dogma enclosed within definite lines. I have just shown the practical reason for saying so. If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vague sanctions of conscience. The theoretical importance of the distinction is no less, if you would reason on your subject aright. The law is full of phraseology drawn from morals, and by the mere force of language continually invites us to pass from one domain to the other without perceiving it, as we are sure to do unless we have the boundary constantly before our minds. The law talks about rights and duties, and malice, and intent, and negligence, and so forth, and nothing is easier, or, I may say, more common in legal reasoning, than to take these words in their moral sense, at some stage of the argument, and so to drop into fallacy. For instance, when we speak of the rights of man in a moral sense, we mean to mark the limits of interference with individual freedom which we think are prescribed by conscience, or by our ideal, however reached, yet it is certain that many laws have been enforced in the past, and it is likely that some are enforced now, which are condemned by the most enlightened opinion of the time, or which at all events pass the limit of interference as many conscience would draw it. Manifestly, therefore, nothing but confusion of thought can result from assuming that the rights of man in a moral sense are equally rights in the sense of the Constitution and the law. No doubt simple and extreme cases can be
political morality, or rather that part of his background morality which has become articulate in the course of his career. Sometimes this heuristic distinction between fit and substantive justice, as dimensions of a successful interpretation, will itself seem problematic, and a judge will be forced to elaborate that distinction by reflecting further on the full set of the substantive and procedural political rights of citizens a just legal system must respect and serve. In this way any truly hard case develops as well as engages a judge's style of adjudication.

Endnotes
2. R. Dworkin, Law and Interpretation; Critical Inquiry (1982).

Study Questions
1. Holmes attempts to show that concepts such as law, contract, and malice (as in "malice aforethought"), even though they appear at first to contain or imply moral or value judgments, can be explained without reference to moral notions from the perspective of the bad man (or woman). Do you find his attempt successful?
2. Holmes claims that "the prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." Suppose that you are a judge on the highest court in the land. How would Holmes' claim guide your understanding of what you should do in deciding a legal question?
3. Realists such as Llewellyn and Joseph Hutcheson insist that (in Hutcheson's words) "the judge does not decide cases by the abstract application of rule of rules, but having heard the cause and determined that the decision ought to go this way or that way" he looks for "some category of the law into which the case will fit" in order to "support his desired result" ("The Judgment Intuitive"). In The Common Law Tradition, Llewellyn argued that same point: lawyers must seek an understanding of the law, not in the ratio decidendi (the reasoning) of a case, but in patterns of results or actual judgments, all the while making the results look inevitable. If the realists are correct and the process of trying to reason within the concepts of the law is a fake, why should lawyers or judges continue to do it? Can the realist explain what value might attach to continuing such a pretense?
4. The legal realists emphasize the role of "intuition," or "insight"—a hunch—in the process of resolving legal cases. Llewellyn argues that the best judges operate in what he calls the "Grand Style," by appealing to "situation sense" to craft their decisions. Is there a danger in allowing judges to follow their feelings and hunches openly and candidly in this way? What if their feelings lead to evil decisions? Do Llewellyn and Hutcheson assume that the judges' hunches or situation sense will guide them to just and "right" results? If so, is the assumption likely to be correct?
5. It has been suggested that the realist insistence on the almost complete indeterminacy of the law resulted from a distorted or skewed perspective, one explained by the so-called selection hypothesis. Cases that reach the appellate court level, and upon which legal scholars (like the realists) tend to focus, are just the cases in which the law is uncertain and in which the opposing arguments are fairly equally balanced. However, the great bulk of the law, the argument continues, is far more stable and determinate than the realists would admit. Does this explanation undermine legal realism?
6. Does the realist indeterminacy thesis express a necessary feature of law or legality? Or is it simply a contingent claim about a specific legal system or legal culture, namely, our own?
7. Dworkin argues that the "law" as it applies to any given case is more than simply the positive rules, encompassing as it does all of the principles and ideals that are part of the best or soundest overall justification or interpretation of the existing rules. Could there be such a "best" theory? And if so, could any of us come to know it?
8. Dworkin argues that the task of a court is always to search for the interpretation of the existing state of the law that depicts it in the best moral light. How would this procedure apply to a judge in Nazi Germany who rejects the Nazi laws as immoral?
9. Dworkin refined and elaborated upon his basic interpretive theory in subsequent work. In Law's Empire, Dworkin argues that legal theory must be interpretive because useful theories of law must try to understand the "argumentative character" of legal practice—that is, the fact that people debate about what their law means. Taking up this "internal" perspective on law means that the interpretation of the law must be "constructive," it must try to see the law as it expressed a unifying vision or ideal. What could Dworkin say to a legal realist or other skeptic who challenges the assumption that such an "internal" perspective is the best one from which to understand what law is?
10. Is Llewellyn accepting the positivist claim that the law as it "ought to be" is distinct (or should be viewed as distinct) from the law "as it is"?
11. Llewellyn argues that the "received" categories around which the law is structured must be replaced with categories that arrived at from a "fresh look" at the "raw data." What are such categories going to look like? Can we tell? Why won't those categories also fall prey to the tendency to "take on a life of their own"?
12. Read People v. Hall (included under "Cases for Further Reflection" at the end of this chapter). Imagine that you are a judge faced with deciding this case and that you also subscribe to Dworkin's concept of law as interpretation. Is there any way to depict the legal situation in Hall in a good light? If not, what should a Dworkorinian judge do in a case like Hall?

E. Contemporary Perspectives

Contemporary legal scholarship covers a broad array of fascinating perspectives upon and activism with regard to the law. In addition to the work of such theorists as Ronald Dworkin, positivists Joseph Raz, and natural law scholar John Finnis, several newly emerging "schools" of legal thought have captured much attention in the last two decades. Included within this category are the Critical Legal Studies movement; the Law and Economics movement; Feminist Jurisprudence; and Critical Race Theory. This section of Chapter One provides a brief overview of these philosophies of the law.

Critical Legal Studies
Throughout this chapter, we have been concerned with the questions, What does it mean to live under the "rule of law" as opposed to the "rule of men?"

and What is legality and how does it differ from morality? We have so far examined several theories that try to answer these questions by offering accounts of the nature of law and the value of legality. The newly emerging schools of legal theory each challenge the assumptions about the nature and importance of the rule of law held, so it is claimed, by many representatives of the established theories.

Many members of the critical legal studies (CLS) movement have challenged the very possibility of a society based upon the "rule of law." They perceive a deep inconsistency between the concept of the rule of law and the theory of political liberalism with which that concept has come to be associated. The work of one prominent critical legalist, Roberto Unger, illustrates the CLS position. The "theory" of CLS is in some ways hard to pin down precisely, for in many ways CLS focuses upon the fragmentary character of the law—the fact that it doesn’t really “hang together” very well (if at all). We will see what that means in a moment; for now it is best to try to get our bearing by comparing CLS with legal realism.

CLS scholars share with legal realists the basic conviction that the rules that (when seen as a system) are taken by positivists to form the essence of law are in fact inherently indeterminate; that is, they provide no constraints or challenges legal reasoning at all, arguing against any attempt to make sense of adjudication as a rationally defensible process in a way that distinguishes it from a purely political act. Courts do not, as positivists such as Hart would say, legislate only in the restricted "penumbral" zone, but all the time.

The assertion that law is thoroughly political is a direct attack upon the possibility of a society governed by the rule of law defended by Langdell (see section D). And, like the realists, CLS proponents are deeply skeptical about the doctrine of following precedent, claiming that it provides very little in the way of constraining or challenging legal reasoning. Both legal realists and CLS scholars place more of an emphasis on the role played by factors other than the written law in the shaping of court decisions. CLS theorists have, for example, argued that economic interests have driven many changes in the law: the development of personal injury law in the nineteenth century can be explained, according to one prominent critical scholar, as an effort to further the expansion of large industries.

Proponents of CLS (or "crits") do disagree with the legal realists on some key points. For the crits, the realists did not go far enough in terms of developing a thorough critique of the ideological bias concealed within legal doctrines and procedures. The realists were too willing to trust to the social sciences as a way to reform law and legal practice, but even these assumptions, say the realists, must be critiqued.

The central challenge of CLS is directed at the assumption—centrally a part of legal positivism—that the law consists of clear rules that can be applied in an objective and neutral fashion to reach predictable, correct results in a given case. What lawyers and judges call "rules" of law are often vague and indeterminate, in a way that conveniently hides their ultimately political nature. Nor do CLS theorists accept Dworkin’s view that an expanded concept of “law”—consisting of rules and principles—can yield right answers in legal cases. Courts do not, as positivists like Hart would say, legislate only in the restricted "penumbral" zone, but all the time.

The assertion that law is thoroughly political is a direct attack upon the possibility of a society based upon the "rule of law," and it is therefore not surprising that much critical literature has focused on this ideal. The most familiar concept of the rule of law, according to CLS scholars such as Roberto Unger, presupposes a society characterized by certain features: a pervasive belief in the "subjectivity" of values; a concomitant pluralism and diversity of moral, religious, and political viewpoints; and the conviction that the government must be seen as independent and neutral on questions dealing with the "best" way to live. The presence of these conditions, some critics believe, gives rise to two problems that the idea of the rule of law is supposed to solve: how to form and sustain a workable social order under conditions of deep moral and political disagreement, and how to develop a way that won’t amount simply to domination of one group through subjugation to the values of another. The attempt to solve these problems gives rise to the ideal of the rule of law, the view that the exercise of collective force should be regulated by general, clear, and authoritative norms that have been set out in advance and are made applicable to all.

The fundamental critical objection to this "liberal legalism" is that the very conditions that give rise to the need for the rule of law also make it impossible. The rule of law requires government neutrality in both the enactment and the interpretation of law, neutrality in both legislation and adjudication. However, statutes and ordinances invariably are colored by the value biases of those with sufficient political power to get them voted into law, and the interpretation of such laws, once established, inevitably relies on the subjective views and values of the interpreter (usually a judge). Since there can be no neutral process either for the enactment or for the interpretation of law, a paradox is created in the very idea of legality. As an example of this critique, some CLS writers have pointed to the debate over the proper interpretation of the U.S. Constitution (see the next section for material on that debate). Some critics have argued that no defensible theory of legal reasoning—no interpretive methodology—about the meaning of the Constitution has been or can be produced that would account to or legitimate the “discovery” of fundamental rights in the Constitution—rights such as the right to privacy.

A further and central preoccupation of the cri­ ts lies with the manipulable and indeterminate or vague character of legal doctrine. The critical point here is not simply that the "law on the books" isn’t the whole story; the point is rather that it isn’t a coherent story at all. Legal doctrines, concepts, and cases can be read and interpreted in almost any way a judge wishes, according to one main CLS argument. At its most radical, some critics try to "deconstruct" or "trash" the law by seeking to expose it as a tangled mess; at the very least, most critical legalists believe that the law is a collection of not entirely compatible moral, social, and political perspectives.

Many of the aspects of CLS just outlined can be unified around one theme: an attack upon what has been called "liberal legalism": the view that the concepts and rules of the law are required to be neutral as between differing religious, political, and social ideals or views about what is good in life. In this view, a natural playing field that secures equal rights and freedoms for everyone. This ideal is fatally flawed, according to the critical legalists, since the law simply cannot be neutral or objective in any meaningful sense.

In the selections included here, CLS scholar Mark Tushnet looks more specifically at the ways in which CLS is an outgrowth of the concerns of the legal realists. Tushnet argues that a core part of the theory of CLS is the rejection of the "policy analysis" so prevalent in the law today. An ordinary lawyer or judge, Tushnet maintains, has very likely been taught to argue and decide cases in a way that best balances the competing interests that are always at stake in legal disputes. As Tushnet observes, this approach to law and adjudication is itself one of the long-lasting effects of legal realism—part of the realists’ "constructive program." Tushnet then looks at what he calls the "dominant" project within the CLS movement and the ways in which it "deconstructs" and "critiques" the reigning views of the law.

Philosopher Andrew Altman argues that the position of CLS is best conceived as an attack on the ideal of the rule of law—an ideal according to which political power is confined and channelled in a way that promotes the liberal values of liberty, tolerance, and individualism. Altman distinguishes CLS from the more radical versions of CLS and sketches some objections to the more radical form.

Law and Economics
One characteristic of many new fields of jurisprudence is the effort to look at the law from a different perspective, whether it be the "outsider" perspective of a person of color victimized by discriminatory laws, or the perspective of a different academic discipline, such as women's studies. One of the most successful of such recent interdisciplinary efforts is the law and economics movement.
The many writers who have contributed to this view of the law again make it somewhat difficult to generalize; nonetheless, the theory of law and economics has at least two basic dimensions: one descriptive or prescriptive (or normative). In its descriptive form, law and economics say that an economic analysis of the formation and function of legal rules and doctrines provides the best explanation for the law as it exists. "The logic of the law is economics," as economics scholar and federal judge Richard Posner has claimed. In its normative dimension, the theory of law and economics says that an economic analysis of the law is the one that should be used by judges and legislators to work out the meaning and application of legal doctrines.

A concept basic to the law and economics perspective is that of economic efficiency. In a very rough sense, we can say that a legal rule or arrangement is economically efficient when no one can be made better off except at another's expense. The efficiency of a legal rule is to be measured according to whether O should be made to pay. The idea of holding liable the one who caused the injury is therefore of little help. What the courts must do instead is view the problem as one of social cost: to adjust the law's response to suits like H's by at least equating the amount of benefit conferred by the factory's total product—steel plus pollution—against the amount of costs generated, the most efficient allocation of the joint resources of O and H. A simple example illustrates how the economic theory is supposed to work. Suppose that O receives $5,500 per ton for the first 100 tons of steel manufactured; and suppose that this 100 tons of steel imposes a total cost of H and his neighbors of $550 per ton. Clearly the net result for society as a whole is a benefit of $4,500. Under these circumstances, the economic theory says the courts should find that O has not been negligent and should not be liable for damage to H. Suppose, on the other hand, that the manufacture of ten thousand tons of steel brings only $1,500 per ton for O (given the marginal decline in the value of every extra lot of 200 tons produced), but that, because the factory's pollution-control equipment becomes less efficient at higher volume, it imposes a cost upon residents of the surrounding community of $1,800 per ton. Here the production of so much polluting steel is not cost-justified on an overall basis, so the law must find O liable as a way of forcing him to absorb the excess cost imposed on the community and thereby return the overall level of social expenditures to an efficient point. The question of whether the defendant caused the plaintiff's injury drops out of the picture altogether.

In the economic view, the question is not so much who is responsible or should be blamed for pollution, but rather, how overall social wealth can be maximized.

In our selection, judge and scholar Richard Posner defends the economic approach to law. The actions of legislators and the decisions of judges do, Posner thinks, facilitate wealth-maximizing transactions and many common-law doctrines can be explained on the assumption that they are wealth maximizing. Posner examines the objection that, even if the idea of wealth maximization accurately describes what many courts and legislators have done in fashioning the law, the criterion of wealth-maximization is not one that should serve in this capacity. One important criticism of law and economics insists that the goal of wealth maximization is not one that should serve in this capacity. One important criticism of law and economics insists that the goal of wealth maximization is not one that should serve in this capacity. One important criticism of law and economics insists that the goal of wealth maximization is not one that should serve in this capacity. One important criticism of law and economics insists that the goal of wealth maximization is not one that should serve in this capacity. One important criticism of law and economics insists that the goal of wealth maximization is not one that should serve in this capacity. One important criticism of law and economics insists that the goal of wealth maximization is not one that should serve in this capacity. One important criticism of law and economics insists that the goal of wealth maximization is not one that should serve in this capacity. One important criticism of law and economics insists that the goal of wealth maximization is not one that should serve in this capacity. One important criticism of law and economics insists that the goal of wealth maximization is not one that should serve in this capacity. One important criticism of law and economics insists that the goal of wealth maximization is not one that should serve in this capacity. One important criticism of law and economics insists that the goal of wealth maximization is not one that should serve in this capacity. One important criticism of law and economics insists that the goal of wealth maximization is not one that should serve in this capacity. One important criticism of law and economics insists that the goal of wealth maximization is not one that should serve in this capacity. One important criticism of law and economics insists that the goal of wealth maximization is not one that should serve in this capacity. One important criticism of law and economics insists that the goal of wealth maximization is not one that should serve in this capacity.

Feminist Jurisprudence

According to one of its principal spokespersons, feminist legal theory is defined by two central tasks: the exposure ("unmasking") and critique of patriarchy underlying purportedly neutral and ungendered legal doctrine and legal theory—revealing the "male tilt" in existing law; and the attempt to reconceive law on the basis of categories and concepts distinctively rooted in "women's voice." According to advocates of a feminist jurisprudence, the job of the philosopher of law is to uncover the myriad of ways in which the law wrongly assumes, reflects, and builds upon the experiences of men.

Much early work in feminist legal theory owed its inspiration to the path-breaking work of psychologist Carol Gilligan.2 Gilligan sought to describe, in broad outline, two distinct moral outlooks or perspectives that she argued, corresponded roughly to the perspectives of men and of women.

The typically "male" outlook, according to Gilligan, tends to regard the moral and social world as a hierarchy of rules and duties. For the male social world is hierarchical and competitive, formal and abstract. Women's voice, according to Gilligan, speaks differently. Women tend to emphasize nurturance and care over competition, and networks of relationships with others over hierarchy.


3 See Carol Gilligan, In A Different Voice (Cambridge: Harvard University Press, 1982).
The symmetrical approach had been apparent in the 1960s and 1970s in arguments for equal pay, equal work, and the proposed Equal Rights Amendment to the Constitution. The asymmetrical model has been urged more recently by those concerned that women have special needs concerning, for example, pregnancy, child care, and work hours, that cannot be assimilated to parallel needs of men. The law must, therefore, make special accommodation for the “real difference” between men and women.

The asymmetrical approach argues that the moral (and constitutional) ideal of sexual equality is best understood as one of complete gender neutrality or “assimilationism,” in which sex-based biological differences are assimilated to that of (say) eye color, so that they become insignificant with regard to the distribution of social goods. Advocates of the asymmetrical approach—the so-called “difference” theorists—argue that an ideal of gender neutrality cannot bring about a condition of substantive equality when the allegedly “neutral” state of affairs against which moral and social progress is to be judged itself conceals a bias against women. Difference theorists argue that assimilationism misses real differences between men and women, for instance, the unique needs of women arising out of pregnancy and childbirth. A specific issue in labor law has been whether employers respond to the needs of female workers regarding pregnancy and childbirth. A specific issue in labor law has been whether employers respond to the needs of female workers regarding pregnancy and childbirth.

A specific issue in labor law has been whether employers respond to the needs of female workers regarding pregnancy and childbirth. A specific issue in labor law has been whether employers respond to the needs of female workers regarding pregnancy and childbirth. Should women be allowed only as much of a “disability” leave as would a man with, say, a hernia, with the consequence that new mothers may, upon returning to work, face hardships (loss of benefits, demotion) not encountered by men? Should women be allowed only as much of a “disability” leave as would a man with, say, a hernia, with the consequence that new mothers may, upon returning to work, face hardships (loss of benefits, demotion) not encountered by men? Or should pregnancy be treated as a special “condition,” for which employers should be required to give leaves of a certain length whether or not leaves with similar conditions are given to men with disabilities? Is pregnancy a “disability”? What do “equal protection” or “equal treatment” in this context amount to?

The asymmetrical approach argues that the philosophical tradition of pragmatism can illuminate and clarify the aims of feminist jurisprudence. Radin sees the primary problem of women and the law as one of a “double-bind”: an impasse created when one way of using the law to improve the condition of women has a “backlash” effect, worsening women’s prospects in other ways. Following American pragmatist philosophers such as William James and John Dewey, Radin claims that such double-binds must be dealt with by “dissolving” or side-stepping the legal and conceptual frameworks that give rise to them. Radin goes on to claim that pragmatism in philosophy and feminism in legal theory hold several methodological views in common: a commitment to seeking knowledge in the situated particulars of actual experience; a concept of truth as provisional; a rejection of sharp dichotomies (reason versus feeling; theory versus practice, and so on). Radin explores the pragmatist notion of truth as coherence among beliefs and questions whether such a view is compatible with the activist and progressive dimension of a feminist jurisprudential outlook.

Angela Harris takes a different point of view, looking at the nature and limits of feminist jurisprudence from the standpoint of critical race theory (see below). Harris attacks what she calls “essentialism”: the assumption, quite apparent in feminist theory, that there is one and only one “women’s voice,” one and only one set of experiences that qualify as “women’s experience.” Harris tries to show how such gender essentialism is pre-supposed in the work of other feminist scholars, and she explains the connection between gender essentialism and “racial essentialism,” the idea that the experience of white women stands for that of all women. Harris, racial essentialism wrongly excludes the experience of people of color.

Critical Race Theory

The last of the jurisprudential movements to be covered in this chapter is critical race theory. While sharing some of the same convictions about law and its manipulability as CLS lawyers and scholars, critical race theorists agree that CLS does not get at a crucial fact of American law and culture: its racial stratification. Critical race theorists seek to focus attention on the extent to which racial categories deeply affect not only the way that the law is realized in the streets, but also how the law itself is structured and administered. Just as feminist legal scholars have tried to call attention to the gendered nature of many legal statutes and doctrines, critical race scholars have worked to show the various ways in which the law supports racial hierarchies that subordinate people of color, while concealing this fact under the guise of allegedly “neutral” laws. Such laws—the backbone of traditional civil rights doctrine—are not equipped to reveal the historical and cultural ways in which people can be discriminated against, or the manner in which a person’s race can be used as a weapon to harm him or her.

In the selection included here, law professor Derrick Bell advocates the need for a “racial realism” in legal thought. Bell outlines an agenda for critical race theory that parallels that of legal realism. The realists, as we have seen, attacked the idea of law as a set of neutrally defined rights, abstracted through an apolitical and objective form of legal reasoning. Realism exposed ways in which this myth of formalism was used to preserve the economic status quo in the early part of the twentieth century. In the same way, Bell suggests, critical realism can expose how law is used to preserve a status quo regarding the oppression of Blacks and other people of color. Contemporary civil rights law, Bell contends, has been co-opted to perpetuate racist in less overt forms than the outright segregation prevalent in many parts of the nation in the past. It is these forms that a racial realism seeks to unmask.