ONE

WHAT IS LAW?

WHY IT MATTERS

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

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

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

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

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

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

DISAGREEMENT ABOUT LAW

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

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

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

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

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

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

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

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

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

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

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

THE PLAIN-FACT VIEW

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A THRESHOLD OBJECTION

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

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

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

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

This objection fails by its own standards. It asks for social realism, but the kind of theory it recommends is unable to provide it. Of course, law is a social phenomenon. But its complexity, function, and consequence all depend on one special feature of its structure. Legal practice, unlike many other social phenomena, is *argumentative.* Every actor in the practice understands that what it permits or requires depends on the truth of certain propositions that are given sense only by and within the practice; the practice consists in large part in deploying and arguing about these propositions. People who have law make and debate claims about what law permits or forbids that would be impossible—because senseless—without law and a good part of what their law reveals about them cannot be discovered except by noticing how they ground and defend these claims. This crucial argumentative aspect of legal practice can be studied in two ways or from two points of view. One is the external point of view of the sociologist or historian, who asks why certain patterns of legal argument develop in some periods or circumstances rather than others, for example. The other is the internal point of view of those who make the claims. Their interest is not finally historical, though they may think history relevant; it is practical, in exactly the way the present objection ridicules. They do not want predictions of the legal claims they will make but arguments about which of these claims is sound and why; they want theories not about how history and economics have shaped their consciousness but about the place of these disciplines in argument about what the law requires them to do or have.

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

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

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

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

THE REAL WORLD

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

Elmer's Case

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Snail Darter Case

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

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

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

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

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

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

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

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

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

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

McLoughlin

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Brown

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

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

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

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

SEMANTIC THEORIES OF LAW

Propositions and Grounds of Law

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

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

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

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

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

Legal Positivism

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

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

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

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

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

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

Other Semantic Theories

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

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

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

ism remains deeply implausible as a semantic theory. For it is hardly contradictory—indeed it is common—for lawyers to predict that judges will make a mistake about the law or for judges to state their view of the law and then add that they hope and expect that the law will be changed.

Defending Positivism

I shall concentrate on legal positivism because, as I just said, this is the semantic theory that supports the plain-fact view and the claim that genuine argument about law must be empirical rather than theoretical. If positivism is right, then the appearance of theoretical disagreement about the grounds of law, in Elmer's case and *McLoughlin* and the snail darter case and *Brown,* is in some way misleading. In these cases past legal institutions had not expressly decided the issue either way, so lawyers using the word "law" properly according to positivism would have agreed there was no law to discover. Their disagreement must therefore have been disguised argument about what the law should be. But we can restate that inference as an argument against positivism. For why should lawyers and judges pretend to theoretical disagreement in cases like these? Some positivists have a quick answer: judges pretend to be disagreeing about what the law is because the public believes there is always law and that judges should always follow it. On this view lawyers and judges systematically connive to keep the truth from the people so as not to disillusion them or arouse their ignorant anger.

This quick answer is unpersuasive. It is mysterious why the pretense should be necessary or how it could be successful. If lawyers all agree there is no decisive law in cases like our sample cases, then why has this view not become part of our popular political culture long ago? And if it has not—if most people still think there is always law for judges to follow—why should the profession fear to correct their error in the interests of a more honest judicial practice? In

any case, how can the pretense work? Would it not be easy for the disappointed party to demonstrate that there really was no law according to the grounds everyone knows are the right grounds? And if the pretense is so easily exposed, why bother with the charade? Nor is there any evidence in our sample cases that any of the lawyers or judges actually believed what this defense attributes to them. Many of their arguments would be entirely inappropriate as arguments for either the repair or the improvement of law; they make sense only as arguments about what judges must do in virtue of their responsibility to enforce the law as it is. It seems odd to describe Gray or Burger as bent on reform or improvement, for example, for each conceded that what he took to be the law was open to serious objections of fairness or wisdom. They argued that the statute in question had to be interpreted in a certain way *in spite of* its evident defects so interpreted.

But once the positivist concedes that Gray was trying to state what the law was rather than what it should be, he must also concede that Gray's views about the grounds of law were controversial even within his own court. Earl's rival position must also be understood as a claim about what the law requires—a claim that Gray was wrong—not a disguised maneuver to repair or revise the law. In *McLoughlin* the judges of the Court of Appeal did seem to think that since the precedents were limited to emotional injury at the scene of an accident, there was no law either way on emotional injury away from the scene, and that their task was therefore one of repair, of developing the law in the best way, all things considered. But that was not the view of the House of Lords, and very much not the view of Lord Scarman, who thought he was bound by principles embedded in the precedents. For all we know, Lord Scarman agreed with the judges of the Court of Appeal that the community would be made worse off on the whole by allowing recovery in those circumstances. The various judges who adjudicated Mrs.

McLoughlin's case disagreed about the force and character of precedent as a source of law, and though the disagreement was subtle it was nevertheless a disagreement about what the law was, not about what should be done in the absence of law.

In fact there is no positive evidence of any kind that when lawyers and judges seem to be disagreeing about the law they are really keeping their fingers crossed. There is no argument for that view of the matter except the question-begging argument that if the plain-fact thesis is sound they just must be pretending. There is, however, a more sophisticated defense of positivism, which concedes that lawyers and judges in our sample cases thought they were disagreeing about the law but argues that for a somewhat different reason this self-description should not be taken at face value. This new argument stresses the importance of distinguishing between standard or core uses of the word "law" and borderline or penumbral uses of that word. It claims that lawyers and judges all follow what is mainly the same rule for using "law" and therefore all agree about, for example, the legal speed limit in California and the basic rate of tax in Britain. But because rules for using words are not precise and exact, they permit penumbral or borderline cases in which people speak somewhat differently from one another. So lawyers may use the word "law" differently in marginal cases when some but not all of the grounds specified in the main rule are satisfied. This explains, according to the present argument, why they disagree in hard cases like our sample cases. Each uses a slightly different version of the main rule, and the differences become manifest in these special cases.[34] In this respect, the argument continues, our use of "law" is no different from our use of many other words we find unproblematical. We all agree about the standard meaning of "house," for example. Someone who denies that the detached one-family residences on ordinary suburban streets are houses just does not understand the English language.

Nevertheless there are borderline cases. People do not all follow exactly the same rule; some would say that Buckingham Palace is a house while others would not.

This more sophisticated defense of positivism tells a somewhat different story about our sample cases from the "fingers-crossed" story. According to this new story, Earl and Gray and the other judges and lawyers were in no way pretending or trying to deceive the public. They were disagreeing about the state of the law, but their disagreement was a "merely verbal" one like a disagreement about whether Buckingham Palace is a house. From *our* standpoint as critics, according to this defense, it is better to think of their argument as one about repair, about what the law should be, because we will understand the legal process better if we use "law" only to describe what lies within the core of that concept, if we use it, that is, to cover only propositions of law true according to the central or main rule for using "law" that everyone accepts, like the propositions of the highway code. It would be better if lawyers and judges used "law" that way, just as it would be better if no one argued about the correct classification of Buckingham Palace but instead agreed to use "house" in the same way whenever they could. So positivism, defended in this different way, has a reforming as well as a descriptive character. In any case, the defense protects the plain-fact thesis. It treats the main question in each of our sample cases as a question of repair, even though the judges themselves might not have conceived it that way, and encourages us to evaluate their performance by asking how judges should develop new law when some case cannot be resolved by applying rules about the grounds of law that all lawyers accept.

The new story is in one way like the fingers-crossed story, however: it leaves wholly unexplained why the legal profession should have acted for so long in the way the story claims it has. For sensible people do not quarrel over whether Buckingham Palace is really a house; they understand at once that this is not a genuine issue but only a mat-

ter of how one chooses to use a word whose meaning is not fixed at its boundaries. If "law" is really like "house," why should lawyers argue for so long about whether the law really gives the secretary of the interior power to stop an almost finished dam to save a small fish, or whether the law forbids racially segregated schools? How could they think they had arguments for the essentially arbitrary decision to use the word one way rather than another? How could they think that important decisions about the use of state power should turn on a quibble? It does not help to say that lawyers and judges are able to deceive themselves because they are actually arguing about a different issue, the political issue whether the secretary should have that power or whether states should be forbidden to segregate their schools. We have already noticed that many of the arguments judges make to support their controversial claims of law are not appropriate to those directly political issues. So the new defense of positivism is a more radical critique of professional practice than it might at first seem. The crossed-fingers defense shows judges as well-meaning liars; the borderline-case defense shows them as simpletons instead.

The borderline defense is worse than insulting, moreover, because it ignores an important distinction between two kinds of disagreements, the distinction between borderline cases and testing or pivotal cases. People sometimes do speak at cross-purposes in the way the borderline defense describes. They agree about the correct tests for applying some word in what they consider normal cases but use the word somewhat differently in what they all recognize to be marginal cases, like the case of a palace. Sometimes, however, they argue about the appropriateness of some word or description because they disagree about the correct tests for using the word or phrase on *any* occasion. We can see the difference by imagining two arguments among art critics about whether photography should be considered a form or branch of art. They might agree about exactly the ways in which photography is like and unlike activities they all recognize as "standard"

uncontroversial examples of art like painting and sculpture. They might agree that photography is not fully or centrally an art form in the way these other activities are; they might agree, that is, that photography is at most a borderline case of an art. Then they would probably also agree that the decision whether to place photography within or outside that category is finally arbitrary, that it should be taken one way or another for convenience or ease of exposition, but that there is otherwise no genuine issue to debate whether photography is "really" an art. Now consider an entirely different kind of debate. One group argues that (whatever others think) photography is a central example of an art form, that any other view would show a deep misunderstanding of the essential nature of art. The other takes the contrary position that any sound understanding of the character of art shows photography to fall wholly outside it, that photographic techniques are deeply alien to the aims of art. It would be quite wrong in these circumstances to describe the argument as one over where some borderline should be drawn. The argument would be about what art, properly understood, really is; it would reveal that the two groups had very different ideas about why even standard art forms they both recognize—painting and sculpture—can claim that title.

You might think that the second argument I just described is silly, a corruption of scholarship. But whatever you think, arguments of that character do occur,[35] and they are different from arguments of the first kind. It would be a serious misunderstanding to conflate the two or to say that one is only a special case of the other. The "sophisticated" defense of positivism misunderstands judicial practice in just that way. The various judges and lawyers who argued our sample cases did not think they were defending marginal or borderline claims. Their disagreements about legislation and precedent were fundamental; their arguments showed that they disagreed not only about whether Elmer should have his inheritance, but about why any legislative act, even traffic codes and rates of taxation, impose the rights and obliga-

tions everyone agrees they do; not only about whether Mrs. McLoughlin should have her damages, but about how and why past judicial decisions change the law of the land. They disagreed about what makes a proposition of law true not just at the margin but in the core as well. Our sample cases were understood by those who argued about them in courtrooms and classrooms and law reviews as pivotal cases testing fundamental principles, not as borderline cases calling for some more or less arbitrary line to be drawn.

THE REAL ARGUMENT FOR SEMANTIC THEORIES

If legal argument is mainly or even partly about pivotal cases, then lawyers cannot all be using the same factual criteria for deciding when propositions of law are true and false. Their arguments would be mainly or partly about which criteria they should use. So the project of the semantic theories, the project of digging out shared rules from a careful study of what lawyers say and do, would be doomed to fail. The waiting challenge has now matured. Why are positivists so sure that legal argument is not what it seems to be? Why are they so sure, appearances to the contrary, that lawyers follow common rules for using "law"? It cannot be experience that convinces them of this, for experience teaches the contrary. They say judicial and legal practice is not what it seems. But then why not? The symptoms are classic and my diagnosis familiar. The philosophers of semantic theory suffer from some block. But what block is it?

Notice the following argument. If two lawyers are actually following *different* rules in using the word "law," using different factual criteria to decide when a proposition of law is true or false, then each must mean something different from the other when he says what the law is. Earl and Gray must mean different things when they claim or deny that the law permits murderers to inherit: Earl means that his grounds for law are or are not satisfied, and Gray has in mind his own

grounds, not Earl's. So the two judges are not really disagreeing about anything when one denies and the other asserts this proposition. They are only talking past one another. Their arguments are pointless in the most trivial and irritating way, like an argument about banks when one person has in mind savings banks and the other riverbanks. Worse still, even when lawyers appear to agree about what the law is, their agreement turns out to be fake as well, as if the two people I just imagined thought they agreed that there are many banks in North America.

These bizarre conclusions must be wrong. Law is a flourishing practice, and though it may well be flawed, even fundamentally, it is not a grotesque joke. It means something to say that judges should enforce rather than ignore the law, that citizens should obey it except in rare cases, that officials are bound by its rule. It seems obtuse to deny all this just because we sometimes disagree about what the law actually is. So our legal philosophers try to save what they can. They grasp at straws: they say that judges in hard cases are only pretending to disagree about what the law is, or that hard cases are only borderline disputes at the margin of what is clear and shared. They think they must otherwise settle into some form of nihilism about law. The logic that wreaks this havoc is the logic just described, the argument that unless lawyers and judges share factual criteria about the grounds of law there can be no significant thought or debate about what the law is. We have no choice but to confront that argument. It is a philosophical argument, so the next stage of our project must be philosophical as well.

TWO

INTERPRETIVE CONCEPTS

THE SEMANTIC STING

I shall call the argument I have just described, which has caused such great mischief in legal philosophy, the semantic sting. People are its prey who hold a certain picture of what disagreement is like and when it is possible. They think we can argue sensibly with one another if, but only if, we all accept and follow the same criteria for deciding when our claims are sound, even if we cannot state exactly, as a philosopher might hope to do, what these criteria are. You and I can sensibly discuss how many books I have on my shelf, for example, only if we both agree, at least roughly, about what a book is. We can disagree over borderline cases: I may call something a slim book that you would call a pamphlet. But we cannot disagree over what I called pivotal cases. If you do not count my copy of *Moby-Dick* as a book because in your view novels are not books, any disagreement is bound to be senseless. If this simple picture of when genuine disagreement is possible exhausts all possibilities, it must apply to legal concepts, including the concept of law. Then the following dilemma takes hold. Either, in spite of first appearances, lawyers actually all do accept roughly the same criteria for deciding when a claim about the law is true or there can be no genuine agreement or disagreement about law at all, but only the idiocy of people thinking they disagree because they attach different meanings to the same sound. The second leg of this dilemma seems absurd. So legal philosophers embrace the first and try to identify the hidden ground rules that *must* be there, embedded, though

unrecognized, in legal practice. They produce and debate semantic theories of law.

Unfortunately for these theories, this picture of what makes disagreement possible fits badly with the kinds of disagreements lawyers actually have. It is consistent with lawyers and judges disagreeing about historical or social facts, about what words are to be found in the text of some statute or what the facts were in some precedent judicial decision. But much disagreement in law is theoretical rather than empirical. Legal philosophers who think there must be common rules try to explain away the theoretical disagreement. They say that lawyers and judges are only pretending or that they disagree only because the case before them falls in some gray or borderline area of the common rules. In either case (they say) we do better to ignore the words judges use and to treat them as disagreeing about fidelity or repair, not about law. There is the sting: we are marked as its target by too crude a picture of what disagreement is or must be like.

AN IMAGINARY EXAMPLE

The Interpretive Attitude

Perhaps this picture of what makes disagreement possible is too crude to capture any disagreement, even one about books. But I shall argue only that it is not exhaustive and, in particular, that it does not hold in an important set of circumstances that includes theoretical argument in law. It does not hold when members of particular communities who share practices and traditions make and dispute claims about the best interpretation of these—when they disagree, that is, about what some tradition or practice actually requires in concrete circumstances. These claims are often controversial, and the disagreement is genuine even though people use different criteria in forming or framing these interpretations; it is genuine because the competing interpretations are directed toward the same objects or events of interpretation. I shall try to show how this model helps us to

understand legal argument more thoroughly and to see the role of law in the larger culture more clearly. But first it will be useful to see how the model holds for a much simpler institution.

Imagine the following history of an invented community. Its members follow a set of rules, which they call "rules of courtesy," on a certain range of social occasions. They say, "Courtesy requires that peasants take off their hats to nobility," for example, and they urge and accept other propositions of that sort. For a time this practice has the character of taboo: the rules are just there and are neither questioned nor varied. But then, perhaps slowly, all this changes. Everyone develops a complex "interpretive" attitude toward the rules of courtesy, an attitude that has two components. The first is the assumption that the practice of courtesy does not simply exist but has value, that it serves some interest or purpose or enforces some principle—in short, that it has some point—that can be stated independently of just describing the rules that make up the practice. The second is the further assumption that the requirements of courtesy—the behavior it calls for or judgments it warrants—are not necessarily or exclusively what they have always been taken to be but are instead sensitive to its point, so that the strict rules must be understood or applied or extended or modified or qualified or limited by that point. Once this interpretive attitude takes hold, the institution of courtesy ceases to be mechanical; it is no longer unstudied deference to a runic order. People now try to impose *meaning* on the institution—to see it in its best light—and then to restructure it in the light of that meaning.

The two components of the interpretive attitude are independent of one another; we can take up the first component of the attitude toward some institution without also taking up the second. We do that in the case of games and contests. We appeal to the point of these practices in arguing about how their rules should be changed, but not (except in very limited cases)[1] about what their rules now are; that is fixed

by history and convention. Interpretation therefore plays only an external role in games and contests. It is crucial to my story about courtesy, however, that the citizens of courtesy adopt the second component of the attitude as well as the first; for them interpretation decides not only why courtesy exists but also what, properly understood, it now requires. Value and content have become entangled.

How Courtesy Changes

Suppose that before the interpretive attitude takes hold in both its components, everyone assumes that the point of courtesy lies in the opportunity it provides to show respect to social superiors. No question arises whether the traditional forms of respect are really those the practice requires. These just *are* the forms of deference, and the available options are conformity or rebellion. When the full interpretive attitude develops, however, this assumed point acquires critical power, and people begin to demand, under the title of courtesy, forms of deference previously unknown or to spurn or refuse forms previously honored, with no sense of rebellion, claiming that true respect is better served by what they do than by what others did. Interpretation folds back into the practice, altering its shape, and the new shape encourages further reinterpretation, so the practice changes dramatically, though each step in the progress is interpretive of what the last achieved.

People's views about the proper grounds of respect, for example, may change from rank to age or gender or some other property. The main beneficiaries of respect would then be social superiors in one period, older people in another, women in a third, and so forth. Or opinions may change about the nature or quality of respect, from a view that external show constitutes respect to the opposite view, that respect is a matter of feelings only. Or opinions may change along a different dimension, about whether respect has any value when it is directed to groups or for natural properties

rather than to individuals for individual achievement. If respect of the former sort no longer seems important, or even seems wrong, then a different interpretation of the practice will become necessary. People will come to see the point of courtesy as almost the converse of its original point, in the value of impersonal forms of social relation that, because of their impersonality, neither require nor deny any greater significance. Courtesy will then occupy a different and diminished place in social life, and the end of the story is in sight: the interpretive attitude will languish, and the practice will lapse back into the static and mechanical state in which it began.

A FIRST LOOK AT INTERPRETATION

That is a birds-eye view from the perspective of history of how the tradition of courtesy changes over time. We must now consider the dynamics of transformation from closer in, by noticing the kinds of judgments and decisions and arguments that produce each individual's response to the tradition, the responses that collectively, over long periods, produce the large changes we first noticed. We need some account of how the attitude I call interpretive works from the inside, from the point of view of interpreters. Unfortunately, even a preliminary account will be controversial, for if a community uses interpretive concepts at all, the concept of interpretation itself will be one of them: a theory of interpretation is an interpretation of the higher-order practice of using interpretive concepts. (So any adequate account of interpretation must hold true of itself.) In this chapter I offer a theoretical account particularly designed to explain interpreting social practices and structures like courtesy, and I defend that account against some fundamental and apparently powerful objections. The discussion will, I fear, take us far from law, into controversies about interpretation that have occupied mainly literary scholars, social scientists, and

philosophers. But if law is an interpretive concept, any jurisprudence worth having must be built on some view of what interpretation is, and the analysis of interpretation I construct and defend in this chapter is the foundation of the rest of the book. The detour is essential.

Interpreting a social practice is only one form or occasion of interpretation. People interpret in many different contexts, and we should begin by seeking some sense of how these contexts differ. The most familiar occasion of interpretation—so familiar that we hardly recognize it as such—is conversation. We interpret the sounds or marks another person makes in order to decide what he has said. So-called scientific interpretation is another context: we say that a scientist first collects data and then interprets them. Artistic interpretation is yet another: critics interpret poems and plays and paintings in order to defend some view of their meaning or theme or point. The form of interpretation we are studying—the interpretation of a social practice—is like artistic interpretation in this way: both aim to interpret something created by people as an entity distinct from them, rather than what people say, as in conversational interpretation, or events not created by people, as in scientific interpretation. I shall capitalize on that similarity between artistic interpretation and the interpretation of social practice; I shall call them both forms of "creative" interpretation to distinguish them from conversational and scientific interpretation.

Conversational interpretation is purposive rather than causal in some more mechanical way. It does not aim to explain the sounds someone makes the way a biologist explains a frog's croak. It assigns meaning in the light of the motives and purposes and concerns it supposes the speaker to have, and it reports its conclusions as statements about his "intention" in saying what he did. May we say that all forms of interpretation aim at purposive explanation in that way, and that this aim distinguishes interpretation, as a type of explanation, from causal explanation more generally? That description does not seem, at first blush, to fit scientific

interpretation, and we might feel compelled, if we are attracted to the idea that all genuine interpretation is purposive, to say that scientific interpretation is not really interpretation at all. The phrase "scientific interpretation," we might say, is only a metaphor, the metaphor of data "speaking to" the scientist in the way one person speaks to another; it pictures the scientist as straining to understand what the data try to tell him. We can dissolve the metaphor and speak accurately, we might well think, only by eliminating the idea of purpose from our final description of the scientific process.

Is creative interpretation also, then, only a metaphorical case of interpretation? We might say (to use the same metaphor) that when we speak of interpreting poems or social practices we are imagining that these speak to us, that they mean to tell us something just the way a person might. But we cannot then dissolve that metaphor, as we can in the scientific case, by explaining that we really have in mind an ordinary causal explanation, and that the metaphor of purpose and meaning is only decorative. For the interpretation of social practices and works of art is *essentially* concerned with purposes rather than mere causes. The citizens of courtesy do not aim to find, when they interpret their practice, the various economic or psychological or physiological determinants of their convergent behavior. Nor does a critic aim at a physiological account of how a poem was written. So we must find some way to replace the metaphor of practices and pictures speaking in their own voices that recognizes the fundamental place of purpose in creative interpretation.

One solution is very popular. It dissolves the metaphor of poems and pictures speaking to us by insisting that creative interpretation is only a special case of conversational interpretation. We listen, not to the works of art themselves as the metaphor suggests, but to their actual, human authors. Creative interpretation aims to decipher the authors' purposes or intentions in writing a particular novel or main-

taining a particular social tradition, just as we aim in conversation to grasp a friend's intentions in speaking as he does.[2] I shall defend a different solution: that creative interpretation is not conversational but *constructive.* Interpretation of works of art and social practices, I shall argue, is indeed essentially concerned with purpose not cause. But the purposes in play are not (fundamentally) those of some author but of the interpreter. Roughly, constructive interpretation is a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong. It does not follow, even from that rough account, that an interpreter can make of a practice or work of art anything he would have wanted it to be, that a citizen of courtesy who is enthralled by equality, for example, can in good faith claim that courtesy actually requires the sharing of wealth. For the history or shape of a practice or object constrains the available interpretations of it, though the character of that constraint needs careful accounting, as we shall see. Creative interpretation, on the constructive view, is a matter of interaction between purpose and object.

A participant interpreting a social practice, according to that view, proposes value for the practice by describing some scheme of interests or goals or principles the practice can be taken to serve or express or exemplify. Very often, perhaps even typically, the raw behavioral data of the practice—what people do in what circumstances—will underdetermine the ascription of value: those data will be consistent, that is, with different and competing ascriptions. One person might see in the practices of courtesy a device for ensuring that respect is paid to those who merit it because of social rank or other status. Another might see, equally vividly, a device for making social exchange more conventional and therefore *less* indicative of differential judgments of respect. If the raw data do not discriminate between these competing interpretations, each interpreter's choice must reflect his view of which interpretation proposes the most value for the prac-

tice—which one shows it in the better light, all things considered.

I offer this constructive account as an analysis of creative interpretation only. But we should notice in passing how the constructive account might be elaborated to fit the other two contexts of interpretation I mentioned, and thus show a deep connection among all forms of interpretation. Understanding another person's conversation requires using devices and presumptions, like the so-called principle of charity, that have the effect in normal circumstances of making of what he says the best performance of communication it can be.[3] And the interpretation of data in science makes heavy use of standards of theory construction like simplicity and elegance and verifiability that reflect contestable and changing assumptions about paradigms of explanation, that is, about what features make one form of explanation superior to another.[4] The constructive account of creative interpretation, therefore, could perhaps provide a more general account of interpretation in all its forms. We would then say that all interpretation strives to make an object the best it can be, as an instance of some assumed enterprise, and that interpretation takes different forms in different contexts only because different enterprises engage different standards of value or success. Artistic interpretation differs from scientific interpretation, we would say, only because we judge success in works of art by standards different from those we use to judge explanations of physical phenomena.

INTERPRETATION AND AUTHOR'S INTENTION

The constructive account of interpretation will strike many readers as bizarre, however, even when it is limited to creative interpretation or, more narrowly still, to the interpretation of social practices like courtesy. They will object because they prefer the popular account of creative interpretation I mentioned: that creative interpretation is only conversa-

tional interpretation addressed to an author. Here is a representative statement of their complaint. "No doubt people can make claims of the sort you describe the citizens of courtesy making about social practices they share; no doubt they can propose and contest opinions about how these practices should be understood and continued. But it is a serious confusion to call this *interpretation,* or to suggest that this is in some way making sense of the practice *itself.* That is deeply misleading in two ways. First, interpreting means trying to understand something—a statement or gesture or text or poem or painting, for example—in a particular and special way. It means trying to discover the author's motives or intentions in speaking or acting or writing or painting as he did. So interpreting a social practice, like your practice of courtesy, can only mean discerning the intentions of its members, one by one. Second, interpretation tries to show the object of interpretation—the behavior or the poem or the painting or the text in question—*accurately,* as it really is, not as you suggest through rose-colored glasses or in its best light. That means retrieving the actual, historical intentions of its authors, not foisting the interpreter's values on what those authors created."

I shall confront this objection in stages, and the following advance outline of my argument might be helpful, though it is necessarily condensed. I shall argue, first, that even if we take the goal of artistic interpretation to be retrieving the intention of an author, as the objection recommends, we cannot escape using the strategies of constructive interpretation the objection condemns. We cannot avoid trying to make of the artistic object the best, in our opinion, it can be. I shall try to show, next, that if we do take the goal of artistic interpretation to be discovering an author's intention, this must be a *consequence* of having applied the methods of constructive interpretation to art, not of having rejected those methods. I shall argue, finally, that the techniques of ordinary conversational interpretation, in which the interpreter aims to discover the intentions or meanings of another per-

son, would in any event be inappropriate for the interpretation of a social practice like courtesy because it is essential to the structure of such a practice that interpreting the practice be treated as different from understanding what other participants mean by the statements they make in its operation. It follows that a social scientist must participate in a social practice if he hopes to understand it, as distinguished from understanding its members.

ART AND THE NATURE OF INTENTION

Is artistic interpretation inevitably a matter of discovering some author's intentions? Is discovering an author's intentions a factual process independent of the interpreter's own values? We start with the first of these questions, and with a guarded claim. Artistic interpretation is not simply a matter of retrieving an author's intention if we understand "intention" to mean a conscious mental state, not if we take the claim to mean that artistic interpretation always aims to identify some particular conscious thought wielding its baton in an author's mind when he said or wrote or did what he did. Intention is always a more complex and problematical matter than that. So we must restate our first question. If someone wants to see interpretation in art as a matter of retrieving an author's intention, what must he understand by an intention? That revised first question will reshape the second. Is there really so sharp a distinction as the objection supposes between discovering an artist's intention and finding value in what he has done?

We must first notice Gadamer's crucial point, that interpretation must *apply* an intention.[5] The theater provides an illuminating example. Someone who produces *The Merchant of Venice* today must find a conception of Shylock that will evoke for a contemporary audience the complex sense that the figure of a Jew had for Shakespeare and his audience, so his interpretation must in some way unite two periods

of "consciousness" by bringing Shakespeare's intentions forward into a very different culture located at the end of a very different history.[6] If he is successful in this, his reading of Shylock will probably be very different from Shakespeare's concrete vision of that character. It may in some respects be contrary, replacing contempt or irony with sympathy, for example, or it may change emphasis, perhaps seeing Shylock's relation to Jessica as much more important than Shakespeare, as director, would have seen it.[7] Artistic intention, that is, is complex and structured: different aspects or levels of intention may conflict in the following way. Fidelity to Shakespeare's more discrete and concrete opinions about Shylock, ignoring the effect his vision of that character would have on contemporary audiences, might be treachery to his more abstract artistic purpose.[8] And "applying" that abstract purpose to our situation is very far from a neutral, historical exercise in reconstructing a past mental state. It inevitably engages the interpreter's own artistic opinions in just the way the constructive account of creative interpretation suggests, because it seeks to find the best means to express, given the text in hand, large artistic ambitions that Shakespeare never stated or perhaps even consciously defined but that are produced for us by our asking how the play he wrote would have been most illuminating or powerful to his age.

Stanley Cavell adds further complexity by showing how even the concrete, detailed intentions of an artist can be problematic.[9] He notices that a character in Fellini's film *La Strada* can be seen as a reference to the Philomel legend, and he asks what we need to know about Fellini in order to say that the reference was intentional (or, what is different, not unintentional). He imagines a conversation with Fellini in which the filmmaker says that although he has never heard of the story before, it captures the feeling he had about his character while filming, that is, that he *now* accepts it as part of the film he made. Cavell says that he is inclined in these circumstances to treat the reference as intended. Cavell's

analysis is important for us, not because anything now turns on whether it is right in detail, but because it suggests a conception of intention quite different from the crude conscious-mental-state conception. An insight belongs to an artist's intention, on this view, when it fits and illuminates his artistic purposes in a way he would recognize and endorse even though he has not already done so. (So the imagined-conversation test can be applied to authors long dead, as it must be if it is to be of general critical use.) This brings the interpreter's sense of artistic value into his reconstruction of the artist's intention in at least an evidential way, for the interpreter's judgment of what an author would have accepted will be guided by his sense of what the author should have accepted, that is, his sense of which readings would make the work better and which would make it worse.

Cavell's imagined conversation with Fellini begins in Cavell's finding the film better if it is read as including a reference to Philomel and in his supposing that Fellini could be brought to share that view, to *want* the film read that way, to see his ambitions better realized by embracing that intention. Most of the reasons Cavell is likely to have for supposing this are his reasons for preferring his own reading. I do not mean that this use of artistic intention is a kind of fraud, a disguise for the interpreter's own views. For the imagined conversation has an important negative role: in some circumstances an interpreter would have good reason to suppose that the artist would reject a reading that appeals to the interpreter. Nor do I mean that we must accept the general claim that interpretation is a matter of retrieving or reconstructing a particular author's intention once we abandon the crude conscious-mental-state view of intention. Many critics now reject the general claim even in a more subtle form, and in the next section we shall have to consider how this continuing quarrel should be understood. My present point is only that the author's-intention claim, when it becomes a method or a style of interpretation, itself engages an

interpreter's artistic convictions: these will often be crucial in establishing what, for that interpreter, the developed artistic intention really is.

We can, if we wish, use Cavell's account to construct a new description of what the citizens of my imaginary community of courtesy are doing in interpreting their social practice, an account that might have seemed preposterous before this discussion. Each citizen, we might say, is trying to discover his own intention in maintaining and participating in that practice—not in the sense of retrieving his mental state when last he took off his cap to a lady but in the sense of finding a purposeful account of his behavior he is comfortable in ascribing to himself. This new description of social interpretation as a conversation with oneself, as joint author and critic, suggests the importance in social interpretation of the shock of recognition that plays such an important part in the conversations Cavell imagines with artists. ("Yes, that does make sense of what I have been doing in taking off my hat; it fits the sense I have of when it would be wrong to do this, a sense I have not been able to describe but can now." Or, "No, it does not.") Otherwise the new description adds nothing to my original description that will prove useful to us. It shows only that the language of intention, and at least some of the point in the idea that interpretation is a matter of intention, is available for social as well as artistic interpretation if we want it. There is nothing in the idea of intention that necessarily divides the two types of creative interpretation.

But now we reach a more important point: there is something in that idea that necessarily unites them. For even if we reject the thesis that creative interpretation aims to discover some actual historical intention, the concept of intention nevertheless provides the *formal* structure for all interpretive claims. I mean that an interpretation is by nature the report of a purpose; it proposes a way of seeing what is interpreted—a social practice or tradition as much as a text or painting—as if this were the product of a decision to

pursue one set of themes or visions or purposes, one "point," rather than another. This structure is required of an interpretation even when the material to be interpreted is a social practice, even when there is no historical author whose historical mind can be plumbed. An interpretation of courtesy, in our imaginary history, will wear an intentional air even though the intention cannot belong to anyone in particular or even people in general. This structural requirement, taken to be independent of any further requirement tying interpretation to a particular author's intention, provides an exciting challenge, which will occupy us later, mainly in Chapter 6. What could be the point of insisting on the formal structure of purpose, in the way we explain texts or legal institutions, beyond the goal of retrieving some actual historical intention?

Intention and the Value of Art

I said, just now, that the author's-intention method of artistic interpretation is disputed even in its most plausible form. Many critics argue that literary interpretation should be sensitive to aspects of literature—the emotional effects it has on readers or the way its language escapes any reduction to one particular set of meanings or the possibility it creates for dialogue between artist and audience, for example—whether or not these are part of its author's intention even in the complex sense we have been noticing. And even those who still insist that the artist's intention must be decisive of what the "real" work is like disagree about how that intention should be reconstructed. These various disagreements about intention and art are important for us not because we should take sides—that is not necessary here—but because we should try to understand the character of the argument, what the disagreements are really about.

Here is one answer to that question. Works of art present themselves to us as having, or at least as claiming, value of the particular kind we call aesthetic: that mode of presenta-

tion is part of the very idea of an artistic tradition. But it is always a somewhat open question, particularly in the general critical tradition we call "modernist," where that value lies and how far it has been realized. General styles of interpretation are, or at least presuppose, general answers to the question thus left open. I suggest, then, that the academic argument about author's intention should be seen as a particularly abstract and theoretical argument about where value lies in art. In that way this argument plays its part, along with more concrete and valuable arguments more directed to particular objects, in the overarching practices that provide us with the aesthetic experience.

This way of seeing the debate among critics explains why some periods of literary practice have been more concerned with artistic intention than others: their intellectual culture ties value in art more firmly to the process of artistic creation. Cavell points out that "in modernist art the issue of the artist's intention . . . has taken on a more naked role in our acceptance of his works than in earlier periods," and that "the practice of poetry alters in the nineteenth and twentieth centuries, in such a way that issues of intention . . . are forced upon the reader by the poem itself."[10] That change reflects and contributes to the growth in those periods of the romantic conviction that art has the value it does, and realizes that value in particular objects and events, because and when it embodies individual creative genius. The dominance of that view of art's value in our culture explains not only our preoccupation with intention and sincerity but much else besides—our obsession with originality, for example. So our dominant style of interpretation fixes on authorial intention, and arguments within that style about what, more precisely, artistic intention is reflect more finely tuned doubt and disagreement about the character of creative genius, about the role of the conscious, the unconscious, and the instinctive in its composition and expression. Some critics who dissent from the authorial style more markedly, because they emphasize values of tradition and continuity in which an

author's place shifts as tradition builds, argue for a retrospective interpretation that makes the best reading of his work depend on what was written a century later.[11] Still more radical challenges, which insist on the relevance of the social and political consequences of art or of structuralist or deconstructionist semantics, or insist on narrative constructed between author and reader, or seem to reject the enterprise of interpretation altogether, deploy very different conceptions of where the conceptually presupposed value of art really lies.

This is a frighteningly simplistic account of the complex interaction between interpretation and other aspects of culture; I mean only to suggest how the argument over intention in interpretation, located within the larger social practice of contesting the mode of art's value, itself assumes the more abstract goal of constructive interpretation, aiming to make the best of what is interpreted. I must be careful not to be misunderstood. I am not arguing that the author's intention theory of artistic interpretation is wrong (or right), but that whether it is wrong or right and what it means (so far as we can think about these issues at all within our own tradition of criticism) must turn on the plausibility of some more fundamental assumption about why works of art have the value their presentation presupposes. Nor do I mean that a critic who is concerned to reconstruct Fellini's intentions in making *La Strada* must have in mind as he works some theory that connects intention to aesthetic value: critical intention is no more a mental state than artistic intention. Nor do I mean that if he reports that intention as including a reworking of Philomel, though this was never recognized by Fellini, he must be conscious of having the thought that the film is a better film read that way. I mean only that in the usual critical circumstances we must be able to attribute some such view to him, in the way we normally attribute convictions to people, if we are to understand his claims as interpretive rather than, for example, mocking or deceitful.[12] I do not deny what is obvious, that interpreters think within

a tradition of interpretation from which they cannot wholly escape. The interpretive situation is not an Archimedian point, nor is that suggested in the idea that interpretation aims to make what is interpreted the best it can seem. Once again I appeal to Gadamer, whose account of interpretation as recognizing, while struggling against, the constraints of history strikes the right note.[13]

INTENTIONS AND PRACTICES

In reply to the objection I set out at the beginning of this discussion, I claim that artistic interpretation in our culture is constructive interpretation. The large question how far the best interpretation of a work of art must be faithful to the author's intention turns on the constructive question whether accepting that requirement allows interpretation to make of the artistic object or experience the best it can be. Those who think it does, because they think genius is the nerve of art or for some other reason, must make more detailed judgments of artistic value in deciding what the pertinent intention of the author really is. We must now consider the objection as it applies specifically to the other form of creative interpretation, the interpretation of social practices and structures. How could that form of interpretation aim to discover anything like an author's intention? We noticed one sense in which someone might think it can. A member of a social practice might think interpreting his practice means discovering his own intentions in the sense I described. But that hypothesis offers no comfort to the objection, because the objection argues that interpretation must be neutral and therefore that the interpreter must aim to discover someone *else's* motives and purposes. What sense can we make of that suggestion in the context of social interpretation?

There are two possibilities. Someone might say that interpretation of a social practice means discovering the purposes or intentions of the other participants in the practice, the cit-

izens of courtesy for example. Or that it means discovering the purposes of the community that houses the practice, conceived as itself having some form of mental life or group consciousness. The first of these suggestions seems more attractive because less mysterious. But it is ruled out by the internal structure of an argumentative social practice, because it is a feature of such practices that an interpretive claim is *not* just a claim about what other interpreters think. Social practices are composed, of course, of individual acts. Many of these acts aim at communication and so invite the question, "What did he mean by that?" or "Why did he say it just then?" If one person in the community of courtesy tells another that the institution requires taking off one's hat to superiors, it makes perfect sense to ask these questions, and answering them would mean trying to understand him in the familiar way of conversational interpretation. But a social practice creates and assumes a crucial distinction between interpreting the acts and thoughts of participants one by one, in that way, and interpreting the practice itself, that is, interpreting what they do collectively. It assumes that distinction because the claims and arguments participants make, licensed and encouraged by the practice, are about what *it* means, not what *they* mean.

That distinction would be unimportant for practical purposes if the participants in a practice always agreed about the best interpretation of it. But they do not agree, at least in detail, when the interpretive attitude is lively. They must, to be sure, agree about a great deal in order to share a social practice. They must share a vocabulary: they must have in mind much the same thing when they mention hats or requirements. They must understand the world in sufficiently similar ways and have interests and convictions sufficiently similar to recognize the sense in each other's claims, to treat these *as* claims rather than just noises. That means not just using the same dictionary, but sharing what Wittgenstein called a form of life sufficiently concrete so that the one can recognize sense and purpose in what the other says and does,

see what sort of beliefs and motives would make sense of his diction, gesture, tone, and so forth. They must all "speak the same language" in both senses of that phrase. But this similarity of interests and convictions need hold only to a point: it must be sufficiently dense to permit genuine disagreement, but not so dense that disagreement cannot break out.

So each of the participants in a social practice must distinguish between trying to decide what other members of his community think the practice requires and trying to decide, for himself, what it really requires. Since these are different questions, the interpretive methods he uses to answer the latter question cannot be the methods of conversational interpretation, addressed to individuals one by one, that he would use to answer the former. A social scientist who offers to interpret the practice must make the same distinction. He can, if he wishes, undertake only to report the various opinions different individuals in the community have about what the practice demands. But that would not constitute an interpretation of the practice itself; if he undertakes that different project he must give up methodological individualism and use the methods his subjects use in forming their own opinions about what courtesy really requires. He must, that is, *join* the practice he proposes to understand; his conclusions are then not neutral reports about what the citizens of courtesy think but claims about courtesy *competitive* with theirs.[14]

What about the more ambitious suggestion that interpretation of a social practice is conversational interpretation addressed to the community as a whole conceived as some superentity? Philosophers have explored the idea of a collective or group consciousness for many reasons and in many contexts, some of them pertinent to interpretation; I discuss some of these in a note.[15] Even if we accept the difficult ontology of this suggestion, however, it is defeated by the same argument as is fatal to the less ambitious one. Conversational interpretation is inappropriate because the practice being interpreted sets the conditions of interpretation: cour-

tesy insists that interpreting courtesy is not just a matter of discovering what any particular person thinks about it. So even if we assume that the community is a distinct person with opinions and convictions of its own, a group consciousness of some sort, that assumption only adds to the story a further person whose opinions an interpreter must judge and contest, not simply discover and report. He must still distinguish, that is, between the opinion the group consciousness has about what courtesy requires, which he thinks he can discover by reflecting on its distinct motives and purposes, and what he, the interpreter, thinks courtesy really requires. He still needs a kind of interpretive method he can use to test that entity's judgment once discovered, and this method cannot be a matter of conversation with that entity or anything else.

We began this long discussion provoked by an important objection: that the constructive account of creative interpretation is wrong because creative interpretation is always conversational interpretation. That objection fails for the interpretation of social practices even more dramatically than it fails for artistic interpretation. The constructive account must face other objections: in particular the objection I consider later in this chapter, that constructive interpretation cannot be objective. But we should study that mode of interpretation further before we test it again.

STAGES OF INTERPRETATION

We must begin to refine constructive interpretation into an instrument fit for the study of law as a social practice. We shall need an analytical distinction among the following three stages of an interpretation, noticing how different degrees of consensus within a community are needed for each stage if the interpretive attitude is to flourish there. First, there must be a "preinterpretive" stage in which the rules and standards taken to provide the tentative content of the

practice are identified. (The equivalent stage in literary interpretation is the stage at which discrete novels, plays, and so forth are identified textually, that is, the stage at which the text of *Moby-Dick* is identified and distinguished from the text of other novels.) I enclose "preinterpretive" in quotes because some kind of interpretation is necessary even at this stage. Social rules do not carry identifying labels. But a very great degree of consensus is needed—perhaps an interpretive community is usefully defined as requiring consensus at this stage—if the interpretive attitude is to be fruitful, and we may therefore abstract from this stage in our analysis by presupposing that the classifications it yields are treated as given in day-to-day reflection and argument.

Second, there must be an interpretive stage at which the interpreter settles on some general justification for the main elements of the practice identified at the preinterpretive stage. This will consist of an argument why a practice of that general shape is worth pursuing, if it is. The justification need not fit every aspect or feature of the standing practice, but it must fit enough for the interpreter to be able to see himself as interpreting that practice, not inventing a new one.[16] Finally, there must be a postinterpretive or reforming stage, at which he adjusts his sense of what the practice "really" requires so as better to serve the justification he accepts at the interpretive stage. An interpreter of courtesy, for example, may come to think that a consistent enforcement of the best justification of that practice would require people to tip their caps to soldiers returning from a crucial war as well as to nobles. Or that it calls for a new exception to an established pattern of deference: making returning soldiers exempt from displays of courtesy, for example. Or perhaps even that an entire rule stipulating deference to an entire group or class or persons must be seen as a mistake in the light of that justification.[17]

Actual interpretation in my imaginary society would be much less deliberate and structured than this analytical structure suggests. People's interpretive judgments would be

more a matter of "seeing" at once the dimensions of their practice, a purpose or aim in that practice, and the post-interpretive consequence of that purpose. And this "seeing" would ordinarily be no more insightful than just falling in with an interpretation then popular in some group whose point of view the interpreter takes up more or less automatically. Nevertheless there will be inevitable controversy, even among contemporaries, over the exact dimensions of the practice they all interpret, and still more controversy about the best justification of that practice. For we have already identified, in our preliminary account of what interpretation is like, a great many ways to disagree.

We can now look back through our analytical account to compose an inventory of the kind of convictions or beliefs or assumptions someone needs to interpret something. He needs assumptions or convictions about what counts as part of the practice in order to define the raw data of his interpretation at the preinterpretive stage; the interpretive attitude cannot survive unless members of the same interpretive community share at least roughly the same assumptions about this. He also needs convictions about how far the justification he proposes at the interpretive stage must fit the standing features of the practice to count as an interpretation of it rather than the invention of something new. Can the best justification of the practices of courtesy, which almost everyone else takes to be mainly about showing deference to social superiors, really be one that would require, at the reforming stage, no distinctions of social rank? Would this be too radical a reform, too ill-fitting a justification to count as an interpretation at all? Once again, there cannot be too great a disparity in different people's convictions about fit; but only history can teach us how much difference is too much. Finally, he will need more substantive convictions about which kinds of justification really would show the practice in the best light, judgments about whether social ranks are desirable or deplorable, for example. These substantive convictions must be independent of the convic-

tions about fit just described, otherwise the latter could not constrain the former, and he could not, after all, distinguish interpretation from invention. But they need not be so much shared within his community, for the interpretive attitude to flourish, as his sense of preinterpretive boundaries or even his convictions about the required degree of fit.

PHILOSOPHERS OF COURTESY

Institutional Identity

In Chapter 1 we reviewed classical theories or philosophies of law, and I argued that, read in the way they usually are, these theories are unhelpful because paralyzed by the semantic sting. Now we can ask what kind of philosophical theories *would* be helpful to people who take the interpretive attitude I have been describing toward some social tradition. Suppose our imaginary community of courtesy boasts a philosopher who is asked, in the salad days of the interpretive attitude, to prepare a philosophical account of courtesy. He is given these instructions: "We do not want your own substantive views, which are of no more interest than those of anyone else, about what courtesy actually requires. We want a more conceptual theory about the nature of courtesy, about what courtesy is in virtue of the very meaning of the word. Your theory must be neutral about our day-to-day controversies; it should provide the conceptual background or rules governing these controversies rather than taking sides." What can he do or say in reply? He is in a position like that of the social scientist I cited, who must join the practices he describes. He cannot offer a set of semantic rules for proper use of the word "courtesy" like the rules he might offer for using "book." He cannot say that taking off one's hat to a lady is by definition a case of courtesy, the way *Moby-Dick* might be said to be a book by definition. Or that sending a thank-you note is a borderline case that can properly be treated as either falling under courtesy or not, as a

large pamphlet can properly be treated either as a book or not. Any step he took in that direction would immediately cross the line the community drew around his assignment; he would have provided his own positive interpretation, not a piece of neutral background analysis. He is like a man at the North Pole who is told to go any way but south.

He complains about his assignment and is given new instructions. "At least you can answer this question. Our practices are now very different from what they were several generations ago, and different as well from the practices of courtesy in neighboring and distant societies. Yet we know the practice we have is the same *sort* of practice as those. There must therefore be some feature all these different practices have in common in virtue of which they are all versions of courtesy. This feature is surely neutral in the way we want, since it is shared by people with such different ideas of what courtesy actually requires. Please tell us what it is." He can indeed answer this question, though not in the way the instructions suggest.

His explanation of the sense in which courtesy remains the same institution throughout its career of changes and adaption and across different communities with very different rules will not appeal to any "defining feature" common to all instances or examples of that institution.[18] For by hypothesis there is no such feature: courtesy is at one stage regarded as a matter of respect, and at another as something very different. His explanation will be historical: the institution has the continuity—to use the familiar Wittgensteinian figure—of a rope composed of many strands no one of which runs for its entire length or across its entire width. It is only a historical fact that the present institution is the descendant, through interpretive adaptations of the sort we noticed, of earlier ones, and that foreign institutions are also descendants of similar earlier examples. The changes from one period to another, or the differences from one society to another, may be sufficiently great so that the continuity should be denied. Which changes are great enough to cut the thread

of continuity? That itself is an interpretive question, and the answer would depend on why the question of continuity arises.[19] There is no feature that any stage or instance of the practice just must have, in virtue of the meaning of the word "courtesy," and the search for such a feature would be just another example of the lingering infection of the semantic sting.

Concept and Conception

Can the philosopher be less negative and more helpful? Can he provide something in the spirit of what his clients want: an account of courtesy more conceptual and less substantive than the theories they already have and use? Perhaps. It is not unlikely that the ordinary debates about courtesy in the imaginary community will have the following treelike structure. People by and large agree about the most general and abstract propositions about courtesy, which form the trunk of the tree, but they disagree about more concrete refinements or subinterpretations of these abstract propositions, about the branches of the tree. For example, at a certain stage in the development of the practice, everyone agrees that courtesy, described most abstractly, is a matter of respect. But there is a major division about the correct interpretation of the idea of respect. One party thinks respect, properly understood, should be shown to people of a certain rank or group more or less automatically, while the other thinks respect must be deserved person by person. The first of these parties subdivides further about which ranks or groups are entitled to respect; the second subdivides about what acts earn respect. And so on into further and further subdivisions of opinion.

In these circumstances the initial trunk of the tree—the presently uncontroversial tie between courtesy and respect—would act, in public argument as well as private rumination, as a kind of plateau on which further thought and argument are built. It would then be natural for people to regard that tie as special and in the way of conceptual, to say,

for example, that respect is part of the "very meaning" of courtesy. They mean, not that anyone who denies this is guilty of self-contradiction or does not know how to use the word "courtesy," but only that what he says marks him as outside the community of useful or at least ordinary discourse about the institution. Our philosopher will serve his community if he can display this structure and isolate this "conceptual" connection between courtesy and respect. He can capture it in the proposition that, for this community, respect provides the *concept* of courtesy and that competing positions about what respect really requires are *conceptions* of that concept. The contrast between concept and conception is here a contrast between levels of abstraction at which the interpretation of the practice can be studied. At the first level agreement collects around discrete ideas that are uncontroversially employed in all interpretations; at the second the controversy latent in this abstraction is identified and taken up. Exposing this structure may help to sharpen argument and will in any case improve the community's understanding of its intellectual environment.

The distinction between concept and conception, understood in this spirit and made for these purposes, is very different from the more familiar distinction between the meaning of a word and its extension. Our philosopher has succeeded, we are supposing, in imposing a certain structure on his community's practice such that particular substantive theories can be identified and understood as subinterpretations of a more abstract idea. In one way his analysis, if successful, must also be uncontroversial, because his claim—that respect provides the concept of courtesy—fails unless people are by and large agreed that courtesy is a matter of respect. But though uncontroversial in this way, his claim is interpretive not semantic; it is not a claim about linguistic ground rules everyone must follow to make sense. Nor is his claim timeless: it holds in virtue of a pattern of agreement and disagreement that might, as in the story I told earlier, disappear tomorrow. And his claim can be challenged at any

time; the challenger will seem eccentric but will be perfectly well understood. His challenge will mark the deepening of disagreement, not, as with someone who says *Moby-Dick* is not a book, its superficiality.

Paradigms

There is one more task—less challenging but no less important—the philosopher might perform for his constituents. At each historical stage of the development of the institution, certain concrete requirements of courtesy will strike almost everyone as paradigms, that is, as requirements of courtesy if anything is. The rule that men must rise when a woman enters the room, for example, might be taken as a paradigm for a certain season. The role these paradigms play in reasoning and argument will be even more crucial than any abstract agreement over a concept. For the paradigms will be treated as concrete examples any plausible interpretation must fit, and argument against an interpretation will take the form, whenever this is possible, of showing that it fails to include or account for a paradigm case.

The connection between the institution and the paradigms of the day will be so intimate, in virtue of this special role, as to provide another kind of conceptual flavor. Someone who rejects a paradigm will seem to be making an extraordinary kind of mistake. But once again there is an important difference between these paradigms of interpretive truth and cases in which, as philosophers say, a concept holds "by definition," as bachelorhood holds of unmarried men. Paradigms anchor interpretations, but no paradigm is secure from challenge by a new interpretation that accounts for other paradigms better and leaves that one isolated as a mistake. In our imaginary community, the paradigm of gender might have survived other transformations for a long time, just because it seemed so firmly fixed, until it became an unrecognized anachronism. Then one day women would object to men standing for them; they might call this the

deepest possible discourtesy. Yesterday's paradigm would become today's chauvinism.

A DIGRESSION: JUSTICE

The distinctions and vocabulary so far introduced will all prove useful when we turn, in the next chapter, to law as an interpretive concept. It is worth pausing, however, to see how far our account of interpretive concepts holds of other important political and moral ideas, and in particular the idea of justice. The crude picture of how language works, the picture that makes us vulnerable to the semantic sting, fails for justice as it does for courtesy. We do not follow shared linguistic criteria for deciding what facts make a situation just or unjust. Our most intense disputes about justice—about income taxes, for example, or affirmative action programs—are about the right tests for justice, not about whether the facts satisfy some agreed test in some particular case. A libertarian thinks that income taxes are unjust because they take property from its owner without his consent. It does not matter to the libertarian whether or not the taxes contribute to the greatest happiness in the long run. A utilitarian, on the other hand, thinks that income taxes are just only if they do contribute to the greatest long-run happiness, and it does not matter to him whether or not they take property without the owner's consent. So if we applied to justice the picture of disagreement we rejected for courtesy, we would conclude that the libertarian and utilitarian can neither agree nor disagree about any issue of justice.

That would be a mistake, because justice is an institution we interpret.[20] Like courtesy, it has a history; we each join that history when we learn to take the interpretive attitude toward the demands, justifications, and excuses we find other people making in the name of justice. Very few of us self-consciously interpret this history the way I imagined the people in my story interpreting courtesy. But we each—some

more reflectively than others—form a sense of justice that is an interpretation nonetheless, and some of us even revise our interpretation from time to time. Perhaps the institution of justice started as I imagined courtesy starting: in simple and straightforward rules about crime and punishment and debt. But the interpretive attitude flourished by the time the earliest political philosophy was written, and it has flourished since. The progressive reinterpretations and transformations have been much more complex than those I described for courtesy, but each has built on the rearrangement of practice and attitude achieved by the last.

Political philosophers can play the various roles I imagined for the philosopher of courtesy. They cannot develop semantic theories that provide rules for "justice" like the rules we contemplated for "book." They can, however, try to capture the plateau from which arguments about justice largely proceed, and try to describe this in some abstract proposition taken to define the "concept" of justice for their community, so that arguments over justice can be understood as arguments about the best conception of that concept. Our own philosophers of justice rarely attempt this, for it is difficult to find a statement of the concept at once sufficiently abstract to be uncontroversial among us and sufficiently concrete to be useful. Our controversies about justice are too rich, and too many different kinds of theories are now in the field. Suppose a philosopher proposes, for example, this statement of the concept: justice is different from other political and moral virtues because it is a matter of entitlement, a matter of what those who will be affected by the acts of individuals or institutions have a right to expect at their hands. This seems unhelpful, because the concept of entitlement is itself too close to justice to be illuminating, and somewhat too controversial to count as conceptual in the present sense, because some prominent theories of justice—the Marxist theory, if there is one,[21] and even utilitarianism—would nevertheless reject it. Perhaps no useful statement of the concept of justice is available. If so, this casts no

doubt on the sense of disputes about justice, but testifies only to the imagination of people trying to be just.

In any case, we have something that is more important than a useful statement of the concept. We share a preinterpretive sense of the rough boundaries of the practice on which our imagination must be trained. We use this to distinguish conceptions of justice we reject, even deplore, from positions we would not count as conceptions of justice at all even if they were presented under that title. The libertarian ethic is, for many of us, an unattractive theory of justice. But the thesis that abstract art is unjust is not even unattractive; it is incomprehensible as a theory about justice because no competent preinterpretive account of the practice of justice embraces the criticism and evaluation of art.[22]

Philosophers, or perhaps sociologists, of justice can also do useful work in identifying the paradigms that play the role in arguments about justice that I said paradigms would play in arguments about courtesy. It is paradigmatic for us now that punishing innocent people is unjust, that slavery is unjust, that stealing from the poor for the rich is unjust. Most of us would reject out of hand any conception that seemed to require or permit punishing the innocent. It is a standing argument against utilitarianism, therefore, that it cannot provide a good account or justification of these central paradigms; utilitarians do not ignore that charge as irrelevant, but on the contrary use heroic ingenuity to try to refute it. Some theories of justice do contest much of what their contemporaries take as paradigmatic, however, and this explains not only why these theories—Nietzsche's, for example, or Marx's apparently contradictory thoughts about justice—have seemed not only radical but perhaps not really theories of justice at all. For the most part, however, philosophers of justice respect and use the paradigms of their time. Their main work consists neither in trying to state the concept of justice nor in redefining paradigms but in developing and defending what are plainly full-blooded conceptions of justice, controversial theories that go well beyond paradigms

into politics. The libertarian philosopher opposes income taxes and the egalitarian philosopher calls for more redistribution because their conceptions of justice differ. There is nothing neutral about these conceptions. They are interpretive but they are committed, and their value to us springs from that commitment.

SKEPTICISM ABOUT INTERPRETATION

A Challenge

My exposition of interpretation has thus far been subjective in one sense of that troublesome word. I described how creative interpretation looks to interpreters, what someone must think in order to embrace one interpretation rather than another. But the interpretive attitude I described, the attitude I said interpreters take up, sounds more objective. They think the interpretations they adopt are better than, not merely different from, those they reject. Does this attitude make sense? When two people disagree about the correct interpretation of something—a poem or a play or a social practice like courtesy or justice—can one sensibly think he is right and others wrong? We must be careful to distinguish this question from a different one, about the complexity of interpretation. It sounds dogmatic, and is usually a mistake, to suppose that a complex work of art—*Hamlet,* for example—is "about" any one thing and nothing else, so that one production of that play would be uniquely right or accurate, and any other production that stressed another aspect or dimension just wrong. I mean to ask a question about challenge, not complexity. Can one interpretive view be objectively better than another when they are not merely different, bringing out different and complementary aspects of a complex work, but contradictory, when the content of one *includes* the claim that the other is wrong?

Most people think they can, that some interpretations

really are better than others. Someone just converted to a new reading of *Paradise Lost,* trembling with the excitement of discovery, thinks his new reading is *right,* that it is better than the one he has abandoned, that those yet uninitiated have missed something genuine and important, that they do not see the poem for what it really is. He thinks he has been driven by the truth, not that he has chosen one interpretation to wear for the day because he fancies it like a necktie. He thinks he has genuine, good reasons for accepting his new interpretation and that others, who cling to the older view he now thinks wrong, have genuine, good reasons to change their minds. Some literary critics, however, believe this is all deep confusion; they say it is a mistake to think one interpretive opinion can really be better than another.[23] We shall see, in Chapter 7, that many legal scholars say much the same thing about the decisions judges make in hard cases like our sample cases of Chapter 1: they say that there can be no right answer in hard cases but only different answers.

Much of what I have said about interpretation throughout this chapter might be thought to support this skeptical critique of the ordinary, right-wrong view. I offered this general and very abstract characterization of interpretation: it aims to make the object or practice being interpreted the best it can be. So an interpretation of *Hamlet* tries to make of the text the best play it can be, and an interpretation of courtesy tries to make of the various practices of courtesy the best social institution these practices can be. This characterization of interpretation seems hostile to any claim of uniqueness of meaning, for it insists that different people, with different tastes and values, will just for that reason "see" different meanings in what they interpret. It appears to support skepticism, because the idea that there can be a "right" answer to questions about aesthetic or moral or social value strikes many people as even stranger than that there can be a right answer to questions about the meanings of texts and

practices. So my abstract description of the most general aim of interpretation might well reinforce, for many readers, the skeptical thesis that it is a philosophical mistake to suppose that interpretations can be right or wrong, true or false.

Internal and External Skepticism

In what remains of this chapter we measure the scope and force of this skeptical challenge, and we begin with a crucial distinction: between skepticism *within* the enterprise of interpretation, as a substantive position about the best interpretation of some practice or work of art, and skepticism *outside* and *about* that enterprise. Suppose someone says that *Hamlet* is best understood as a play exploring obliquity, doubling, and delay; he argues that the play has more artistic integrity, that it better unites lexical, rhetorical, and narrative themes, read with these ideas in mind. An "internal" skeptic might say, "You are wrong. *Hamlet* is too confused and jumbled to be about anything at all: it is an incoherent hotch-potch of a play." An "external" skeptic might say, "I agree with you; I too think this is the most illuminating reading of the play. Of course, that is only an opinion we share; we cannot sensibly suppose that *Hamlet*'s being about delay is an objective fact we have discovered locked up in the nature of reality, 'out there' in some transcendental metaphysical world where the meanings of plays subsist."

These are different forms of skepticism. The internal skeptic addresses the substance of the claims he challenges; he insists it is in every way a mistake to say that *Hamlet* is about delay and ambiguity, a mistake to suppose it is a better play read that way. Or indeed in any other particular way. Not because no view of what makes a play better can be "really" right, but because one view *is* right: the view that a successful interpretation must provide the kind of unity he believes no interpretation of *Hamlet* can provide. Internal skepticism, that is, relies on the soundness of a general interpretive attitude to call into question all possible interpreta-

tions of a particular object of interpretation. One can be skeptical in this way not just about a particular play but more generally about an enterprise. Suppose a citizen surveys the practices of courtesy his neighbors count as valuable and decides that this shared assumption is a shared mistake. He has convictions about what kinds of social institutions can be useful or valuable to a community; he concludes that the practices of courtesy, root and branch, serve no good purpose or, even worse, that they serve a malign one. So he condemns as perverse all the different interpretations of courtesy his colleagues construct and defend against one another: his internal skepticism is, with respect to courtesy, global. Once again he relies on, instead of scorning, the idea that some social practices are better than others; he relies on a general attitude about social value to condemn all the interpretations of courtesy offered by his fellows. He assumes his general attitudes are sound and their contrary ones wrong.

Global internal skepticism of this sort, if it were plausible for law and not just courtesy, would threaten our own enterprise. For we hope to develop a positive theoretical account of the grounds of law, a program of adjudication we can recommend to judges and use to criticize what they do. So we cannot ignore the possibility that some globally skeptical view about the value of legal institutions is, in the end, the most powerful and persuasive view; we cannot say that this possibility is irrelevant to legal theory. We shall return to this threat in Chapter 7. Our present interest is in the other, external form of skepticism.

External skepticism is a metaphysical theory, not an interpretive or moral position. The external skeptic does not challenge any particular moral or interpretive claim. He does not say that it is in any way a mistake to think that *Hamlet* is about delay or that courtesy is a matter of respect or that slavery is wrong. His theory is rather a second-level theory about the philosophical standing or classification of these claims. He insists they are not descriptions that can be

proved or tested like physics: he denies that aesthetic or moral values can be part of what he calls (in one of the maddening metaphors that seem crucial to any statement of his view) the "fabric" of the universe. His skepticism is external because disengaged: it claims to leave the actual conduct of interpretation untouched by its conclusions. The external skeptic himself has opinions about *Hamlet* and slavery and can give reasons for preferring these opinions to those he rejects. He only insists that all these opinions are projected upon, not discovered in, "reality."

There is an ancient and flourishing philosophical debate about whether external skepticism, particularly external skepticism directed to morality, is a significant theory and, if it is, whether it is right.[24] I shall not enter that debate now, except to consider whether external skepticism, if it is sound, would in any way condemn the belief interpreters commonly have: that one interpretation of some text or social practice can be on balance better than others, that there can be a "right answer" to the question which is best even when it is controversial what the right answer is.[25] That depends on how these "objective" beliefs (as we might call them) should be understood. Suppose I say that slavery is wrong. I pause, and then I add a second group of statements: I say that slavery is "really" or "objectively" wrong, that this is not just a matter of opinion, that it would be true even if I (and everyone else) thought otherwise, that it gives the "right answer" to the question whether slavery is wrong, that the contrary answer is not just different but mistaken. What is the relation between my original opinion that slavery is wrong and these various "objective" judgments I added to it?

Here is one suggestion. The objective statements I added are meant to supply some special kind of evidence for my original opinion or some justification for my acting on it. They are meant to suggest that I can prove slavery is wrong the way I might prove some claim of physics, by arguments of fact or logic every rational person must accept: by showing that atmospheric moral quaverings confirm my opinion,

for example, or that it matches a noumenal metaphysical fact. If this were the right way to understand my objective claims, then my claims would assert what external skepticism denies: that moral judgments are descriptions of some special metaphysical moral realm. But it is not the right way to understand them. No one who says slavery is "really" wrong thinks he has thereby given, or even suggested, an argument why it is. (How could quaverings or noumenal entities provide any argument for moral convictions?) The only kind of evidence I could have for my view that slavery is wrong, the only kind of justification I could have for acting on that view, is some substantive moral argument of a kind the "objective" claims do not even purport to supply.

The actual connection between my original judgment about slavery and my later "objective" comments is very different. We use the language of objectivity, not to give our ordinary moral or interpretive claims a bizarre metaphysical base, but to *repeat* them, perhaps in a more precise way, to emphasize or qualify their *content.* We use that language, for example, to distinguish genuine moral (or interpretive or aesthetic) claims from mere reports of taste. I do not believe (though some people do) that flavors of ice cream have genuine aesthetic value, so I would say only that I prefer rum raisin and would not add (though some of them would) that rum raisin is "really" or "objectively" the best flavor.[26] We also use the language of objectivity to distinguish between claims meant to hold only for persons with particular beliefs or connections or needs or interests (perhaps only for the speaker) and those meant to hold impersonally for everyone. Suppose I say I must dedicate my life to reducing the threat of nuclear war. It makes sense to ask whether I think this duty holds "objectively" for everyone or just for those who feel, as I do, a special compulsion in this issue. I combined these two uses of objective language in the conversation I just imagined about slavery. I said slavery was "really" wrong, and the rest, to make plain that my opinion was a moral judgment and that I thought slavery was wrong

everywhere, not just in communities whose traditions condemned it. So if someone says I am mistaken in this judgment, and our disagreement is genuine, he must mean to express the opinion that slavery is *not* wrong everywhere, or perhaps that it is not wrong at all. That is a version of internal skepticism: it could be defended only by moral arguments of some kind, for example by appealing to a form of moral relativism that holds that true morality consists only in following the traditions of one's community.

So there is no important difference in philosophical category or standing between the statement that slavery is wrong and the statement that there is a right answer to the question of slavery, namely that it is wrong. I cannot intelligibly hold the first opinion as a moral opinion without also holding the second. Since external skepticism offers no reason to retract or modify the former, it offers no reason to retract or modify the latter either. They are both statements within rather than about the enterprise of morality. Unlike the global form of internal skepticism, therefore, genuine external skepticism cannot threaten any interpretive project. Even if we think we understand and accept that form of skepticism, it can provide no reason why we should not also think that slavery is wrong, that *Hamlet* is about ambiguity and that courtesy ignores rank, or, what comes to the same thing, that each of these positions is better (or is "really" better) than its rivals. If we were external skeptics, then in a calm philosophical moment, away from the moral or interpretive wars, we would take an externally skeptical view of the philosophical standing of *all* these opinions. We would classify them all as projections rather than discoveries. But we would not discriminate among them by supposing that only the latter were mistakes. I hasten to add that recognizing the crucial point I have been stressing—that the "objective" beliefs most of us have are moral, not metaphysical, beliefs, that they only repeat and qualify other moral beliefs—in no way weakens these beliefs or makes them claim something less or even different from what they might be thought to claim.

For we can assign them no sense, faithful to the role they actually play in our lives, that makes them not moral claims. If anything is made less important by that point, it is external skepticism, not our convictions.

Which Form of Skepticism?

How, then, should we understand the skeptic who makes such heavy weather of declaring that there cannot be right answers in morals or interpretation? He uses the metaphorical rhetoric of external skepticism; he says he is attacking the view that interpretive meanings are "out there" in the universe or that correct legal decisions are located in some "transcendental reality." He uses arguments familiar to external skeptics: he says that since people in different cultures have different opinions about beauty and justice, these virtues cannot be properties of the world independent of attitude. But he plainly thinks his attack has the *force* of internal skepticism: he insists that people interpreting poems or deciding hard cases at law should not talk or act as if one view could be right and others wrong. He cannot have it both ways.

He attacks our ordinary beliefs because he attributes to us absurd claims we do not make. *We* do not say (nor can we understand anyone who does say) that interpretation is like physics or that moral values are "out there" or can be proved. We only say, with different emphases, that *Hamlet* is about delay and that slavery is wrong. The practices of interpretation and morality give these claims all the meaning they need or could have. If he thinks they are mistakes—poor performances within these practices properly understood—he needs to match our reasons and arguments, our account of ourselves as participants, with contrary reasons and arguments of his own. We do better for this critic, therefore, by seeing how far we can recast his arguments as arguments of internal skepticism. Can we understand him to be accusing us of moral rather than metaphysical mistakes?

"Since people do not agree about the injustice of social rank," he might say, "and since people are likely to think rank unjust only if they are born into cultures of a certain sort, it is unfair to claim that everyone must despise and give up rank. The most we should say is that people who think it unjust should despise and reject it, or that people who live in communities of that opinion should do so." Or: "The fact that others, in different cultures, reject our moral views shows that we have these views only because of the moral upbringing we happen to have had, and realizing that casts doubt on those views."[27]

These are internally skeptical arguments because they assume some general and abstract moral position—that moral claims have genuine moral force only when they are drawn from the mores of a particular community, for example, or that moral beliefs are false unless they are likely to be accepted in any culture—as the basis for rejecting the more concrete moral claims in hand. Substantive moral arguments like these have actually been made, of course, and their latent appeal might explain why skepticism, disguised as external skepticism, has been so popular in interpretation and in law. They might not strike you as good arguments, once that disguise is abandoned, but that is, I suggest, because you find global internal skepticism about morality implausible.

The metamorphosis I describe is not costless, because the skeptic's arguments, recast as arguments of internal skepticism, can no longer be peremptory or a priori. He needs arguments that stand up as moral (or aesthetic or interpretive) arguments; or if not arguments, at least convictions of the appropriate kind. His skepticism can no longer be disengaged or neutral about ordinary moral (or aesthetic or interpretive) opinions. He cannot reserve his skepticism for some quiet philosophical moment, and press his own opinions about the morality of slavery, for example, or the connection between courtesy and respect, when he is off duty and only acting in the ordinary way. He has given up his distinction

between ordinary and objective opinions; if he really believes, in the internally skeptical way, that no moral judgment is really better than any other, he cannot then add that in his opinion slavery is unjust.

Conclusions and Agenda

I end this long section with an apology and some advice. We have marched up a steep hill and then right down again. We know no more about interpretation, or about morality or courtesy or justice or law, than we did when we began to consider the skeptical challenge. For my argument has been entirely defensive. Skeptics declare deep error in the interpretive attitude as I described it; they say it is a mistake to suppose that one interpretation of a social practice, or of anything else, can be right or wrong or really better than another. If we construe that complaint on the model of external skepticism, then, for the reasons I gave, the complaint is confused. If we construe it more naturally as a piece of global internal skepticism, then all the argument waits to be made. We stand where we did, only put on more explicit notice of the possible threat of this latter, potentially very damaging, form of argument.

I marched up this hill and down again only because the skeptical challenge, sensed as the challenge of external skepticism, has a powerful hold on lawyers. They say, of any thesis about the best account of legal practice in some department of the law, "That's your opinion," which is true but to no point. Or they ask, "How do you know?" or "Where does that claim come from?" demanding not a case they can accept or oppose but a thundering knock-down metaphysical demonstration no one can resist who has the wit to understand. And when they see that no argument of that power is in prospect, they grumble that jurisprudence is subjective only. Then, finally, they return to their knitting—making, accepting, resisting, rejecting arguments in the normal way, consulting, revising, deploying convictions

pertinent to deciding which of competing accounts of legal practice provides the best justification of that practice. My advice is straightforward: this preliminary dance of skepticism is silly and wasteful; it neither adds to nor subtracts from the business at hand. The only skepticism worth anything is skepticism of the internal kind, and this must be earned by arguments of the same contested character as the arguments it opposes, not claimed in advance by some pretense at hard-hitting empirical metaphysics.

We must continue our study of interpretation, and of law, in that spirit. I shall offer arguments about what makes one interpretation of a social practice better than another, and about what account of law provides the most satisfactory interpretation of that complex and crucial practice. These arguments will not—because they cannot—be demonstrations. They invite disagreement, and though it will not be wrong to reply, "But that's only your opinion," neither will it be helpful. You must then ask yourself whether, after reflection, it is your opinion as well. If it is, you will think that my arguments and conclusions are sound and that other, conflicting ones, are unsound and wrong. If it is not your opinion, then it falls to you to say why not, to match my arguments or naked convictions with your own. For the exercise in hand is one of discovery at least in this sense: discovering which view of the sovereign matters we discuss sorts best with the convictions we each, together or severally, have and retain about the best account of our common practices.