

Chapter 1

The Rhetoric of Modern Law

Failing to remain silent about things one cannot
speak of is what philosophers (and many others)
do for a living.

—Michael Wood, *Children of Silence*

ONE OFTEN HEARS that an absence of voice is an absence of power and an absence of justice and, conversely, that voice means empowerment and justice. In this context, one might well expect “silences of law” to mark the place of the oppressed, of victims, of the powerless and the voiceless at law. That is surely one aspect of law’s silence, but the silences of law are many. They gesture not only toward the justice to be found in laying claim to voice and to the power to be had in speech, but also toward the possibilities of justice that lie in silence.

This work inquires into modern law, its speech and silences, and its relation to what is arguably the traditional concern of jurisprudence—justice. It draws on texts of and about contemporary U.S. law, attending to their language and silences, to open a new perspective on current positivist understandings of law that deny the necessity of a connection between law and justice or (what amounts to the same thing) consider that connection to be socially contingent. The work explores the loquaciousness—the discursive power—that sociolegal studies, political theory, and legal scholarship alike often posit—whether as attribution or aspiration—of modern law and of its speaking subject. The work argues that the justice of modern law lies precisely in positive law’s ostensible silences—which is not to say, despite the current predominant identification of silence with lack, that justice is absent. Neither is it to say that positive law is just. Rather, the conditions of justice, like those of Kantian equity—“a silent goddess who cannot be heard”—cannot be stipulated or definitively pronounced.¹

This chapter presents in broad strokes the issues and arguments of the book. It shows what is at stake in modern law: a potentially new silence

¹ Immanuel Kant, *Metaphysical Elements of Justice*, 2nd ed., trans. John Ladd (Indianapolis: Hackett, 1999), 35; originally published as *Metaphysische Anfangsgründe der Rechtslehre* (Hamburg, Felix Meiner Verlag, 1986), 43: “eine stumme Gottheit, die nicht gehört werden kann.”

as to justice. The first section of the chapter begins with modern law and the issue of its relation with justice. The second section shows how rhetoric approaches such an issue. The third section introduces the sociolegal positivism that today raises the question of modern law and justice most tellingly. And the fourth section shows how that question resounds with what Friedrich Nietzsche, the master rhetorician with ears behind his ears, long ago heard as the question of nihilism. In brief, *Just Silences* concerns modern law. It considers what is particular to law as modern and hence within a tradition. This chapter identifies the tradition of modern law as that of Western jurisprudence. The history and rhetoric of jurisprudence shows that one very striking feature of modern law—its social and sociological character—has not always been so. Nietzsche offers one nonsociological account of the “social” that we moderns, as he puts it, find so compelling; Heidegger another. Both turn our attention to issues of the metaphysics of law and knowledge that contemporary sciences, including sociology, largely ignore.

Law Today

Most texts of and about law today take law to be a social phenomenon. All manner of scholars take even religious law and customary law to be products of the societies of their times. Even scholars interested in what they would call the “normative” aspect of law situate law in an empirical social world. That “society” is real, that “reality” is social and empirical, holds such sway that one wonders what else law could possibly be.

Conceptions of law as an instrument of social power—as positive law—often accompany the attribution of law to the empirically knowable social or societal realm. Sociology is clearly not the same as legal positivism; there are many differences and debates within sociology; and scholars and authors may not themselves believe or intend what their texts seem to presume. The chapters that follow take sociology to refer in a broad sense to the disciplines that grasp law as an emphatically social or societal phenomenon. Likewise, there are a number of views of legal positivism and of debates within it; this book does not deal with all of its intricacies, although some of its complexity will emerge in the course of discussion. Roughly speaking, philosophers compare legal positivism to theories of natural law, which holds that an unjust law is not a law. Legal positivism maintains that the existence of law is one thing; its justice another. Positive law is human-made law. This book shows how, despite their variations and differences, sociology and legal positivism are often implicated in one another in particular ways. This implicatedness of legal positivism and

sociology pervades not only legal positivism and sociological scholarship but also modern law.

The book situates what it thus calls sociolegal positivism as but one moment—admittedly the current moment—in the history of Western jurisprudence. Rather than rejecting sociolegal positivism, the social character of law or positive law as such, the book accepts as starting point the existence and social character of the positive law of the United States. It indeed draws attention to the positivist and social character of law in both avowedly positivist and ostensibly nonpositivist modern legal texts. These texts range from U.S. legislative documents and judicial opinions to law reviews and newspaper articles, sociolegal studies, and philosophical works.

The work argues—with Nietzsche, as shall be explained below—that current attachment to positive law and to the empirical and social reality of law, reveals a way (but not the only way) of conceiving of law and justice. It reveals not only a modern “conception” of law, but modern law. The work claims further that law has not always been positivist, empirical, or, broadly speaking, sociological. Nor need law always be so. Contemporary sociolegal positivism, like every other way of thinking about law, has its own particular extension and limits—and, at those limits, its own particular openings to what Heidegger and Foucault have called the unthought.

One can identify a cluster of characteristics around which legal positivism and sociology converge. First, as mentioned above, sociolegal positivism relegates connections between law and justice, if any, to empirically contingent social realities. Second, as the following chapters will show, sociolegal positivism presumes that positive law is humanly articulable power in at least one of two senses: as the declarations of officials or in scholars’ descriptions—conceptual or empirical—of the order and dynamics of human social systems. Even when positive law is not the command of a distinct human sovereign or the official unification of a system of rules, it appears as a humanly made creation of society—whether as norms or practices or network of institutions—that is describable in sociological terms. Third, sociolegal positivism postulates the completeness of positive law as law. Legal positivism holds that there exists no law outside of that recognized by human positive law and that anything recognized as law is positive law. Sociology, whether attributing the determination of law to particular human actors or to social structures or everyday norms, views law as exclusively social. Sociological positivism, then, as shall be discussed in the section “Sociolegal Positivism,” in effect maintains that any so-called law that precedes a given legal positivist system was itself socially powerful in the manner of positive law or was not really law at all. Sociolegal positivism thus tends toward peculiarly exhaustive and ahistorical accounts of powerful and controlling law that functions

as instrument or strategy within a field of social power. The sociological and positivist commitment of our age—to the human determination of guidelines concerning what exists—threatens to discount as law anything that is not positivist and sociological—including past law.

Describing aspects of sociolegal positivism in the manner of the preceding paragraph can help identify the extensiveness and limits of modern sociolegal positive law, but it fails to show law's nonpositivist possibilities. For language, too, as the following chapters will show, is itself often grasped nowadays as an empirical, positivist, sociological phenomenon, as an expression of power or as a tool to be marshaled in the service of power. To not only identify the extent and limits of an articulate, powerful, existent modern law, but also to recognize its possibilities, one must listen to the silences of modern law and of its language.

Turning to silences suggests possibilities of relations between law and justice that are not articulated or articulable in the terms of legal positivism and that do not exist as the empirical realities of strategic social power. This turn to silence runs against much contemporary work that talks of both law and language as the powerful resources of society in a technical age.² The turn to silence highlights contemporary talk about law and language precisely to ask how law and language might be *otherwise* than in usual talk. It does so, again, not to discard or dismiss positive law, which is indeed modern law, but to explore openings and possibilities of law and justice that sociolegal positivism, in its commitment to the social and empirical character of law and language, does not recognize. The silences in the texts of law today are far from empty. They speak not only of limits, but also of possibilities, of justice in the contemporary law associated with actual empirical and social reality.

Far from securing a definitive truth about law, this work seeks to open—and keep open—questions about law and about law and justice. Unlike legal positivism, the work does not attempt a descriptive theory—whether empirical or conceptual—of law or legal systems; unlike sociology, it does not set out to describe as such the particular legal system that is admittedly its ground. But if the questions this work raises are not those of legal positivism and sociology, neither are they those of natural law. The work claims neither to represent existent relations between law and justice nor to prescribe what those relations should be. The concern rather

² See Martin Heidegger, "The Question concerning Technology," and "The Age of the World Picture," in *The Question concerning Technology and Other Essays*, trans. William Lovitt (New York: Harper Torchbooks, 1977), for background that informs the formulation here and the chapters that follow. See also Martin Heidegger, *Langue de tradition et langue technique* (Brussels: Editions Lebeer Hossmann, 1990), 40 (trans. from *Überlieferte Sprache und technische Sprache*). I am very much indebted to Philippe Nonet for my understanding of these and other works by Martin Heidegger.

is with the possibilities of modern law. The work is not a predictive enterprise, though. Rather than predicting what law will be, it recalls to modern law possibilities that already will have been.

In other words, within the context known loosely as that of “Western thought,” this work explores the law of a necessarily particular time and place: the United States of the late-twentieth and early-twenty-first centuries. The work reads conventional texts of sociolegal studies, of law, and of legal theory that are taken in this time and place to say something about language and silence, power and voice. For many in this time and place, the most obvious silences in contemporary law and politics are those of the powerless. But one also finds many silences of power—of contempt, of entitlement, of authority, of resistance. This work deliberately shifts focus from the familiar silences—and the familiar discourses—of power and powerlessness to the sometimes neglected silences of justice.

The silences of justice that accompany contemporary law vary. Like the familiar hush of a library in which words allow things to come to presence in reading, silences of justice in the law may allow things to be heard. But just as libraries may differ and silences vary, so too does law and do its silences, as the chapters that follow show. Each chapter refers to both limits and possibilities of modern law. In each chapter, the language of modern law shows the extent and limits of modern law and its language; in the interstices and at the limits of language, silences point to law’s possibilities.

Chapter 2 first shows how sociolegal studies generally treat both law and language as matters of power, while remaining silent as to justice. The chapter then shows how appeals to voice, while also often articulated in terms of power, may call to justice even when justice is not mentioned by name.

Chapter 3 points to aspects of language and religion not captured in legislation designed to protect Native American culture. The chapter highlights the notably discursive and articulate, social scientific, rulelike formulations of law in U.S. legal and political forums, while suggesting that there are possibilities of language and law that U.S. law and social science do not hear.

Chapter 4 looks at speech, law, and politics in the U.S. Supreme Court flag-burning opinions and in discussions about them. The chapter shows the pervasiveness in law today of conceptions of speech that grasp language as the resource of a technical age. But the chapter also shows how words of law simultaneously claim and respond to calls for justice.

Chapter 5 focuses on Frederick Schauer’s presumptive positivism as an example of work that takes law to be a social system of rules.³ That justice drops out of Schauer’s work on rules suggests both the limitations and

³ Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Oxford: Clarendon Press, 1991).

possibilities of rule-based approaches to law. The silence about justice in social systems of rules reminds us that in modern law, possibilities of justice lie not in statements of rules themselves, but behind the rules, in the silences where statements of rules run out and responsive action and judgment paradoxically begin anew.

Chapter 6 contrasts the silence about justice in Robert Cover's "Violence and the Word" with some of the more oblivious textual silences that have come before. Cover's silence gestures toward a need for justice—or at least toward its shocking absence in increasingly pervasive conceptions of law as violence or social control.⁴ If modern law, for Cover, plays on a "field of pain and death" in which no common "normative" world is possible, Cover also implicitly appeals to a relating of persons and world that is prior to the betrayal represented by the field of pain and death, in which human beings need a common world. Out of this relating issues law. Law is the correspondence of what Cover calls a "normative order" to the human need for it. Such correspondence opens the possibilities of both the just and unjust in our world, including the possibility of what Cover here judges to be the violence and lack that characterizes modern law.

Finally, chapter 7 turns to one of the most well-known silences of law, the American right to remain silent. The formulation of this right in *Miranda v. Arizona* helps show how silences of modern law point to issues that go beyond knowledge of the social.⁵ The opportunity for silence offered to an accused by the *Miranda* warning reveals an engagement with a possibility of just speech that is not simply an instrument or tool of social power. Contrary as it may be to accounts that emphasize the discontinuity of formal law and legal institutions from ordinary life, *Miranda* (and the law of evidence) recognizes, with J. L. Austin, that the justice of a trial depends on a hearing in which the judge (or jury) who speaks the verdict can presume that conventions of proper speech have been met.⁶

In what follows then, *Just Silences* attends to legal texts for what they say and don't say about justice. Sticking largely to texts of and about positive law, *Just Silences* listens to what is not positivist in law, to what is not clearly articulated and articulable at law, and to what is just. Its claims about justice are not normative or prescriptive. It refuses to relegate the justice of law to empirically contingent social realities. It reveals a multiplicity of legal silences and of possible implications for justice at precisely the limits of positive law, where the language of power and the power of language run out.

⁴ Robert Cover, "Violence and the Word," in *Narrative, Violence, and the Law: The Essays of Robert Cover*, ed. Martha Minow, Michael Ryan, and Austin Sarat (Ann Arbor: University of Michigan Press, 1993), 203–38.

⁵ *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966).

⁶ J. L. Austin, *How to Do Things with Words*, ed. J. O. Urmson and Marina Sbisa, 2nd ed. (Cambridge: Harvard University Press, 1962).

It suggests that words call through voice to justice, even when “justice” is unsaid. Law is the chain of claims and responses calling to justice. Law binds us to our world. It issues from silence as the declarations that correspond with, and correspond to, the human need or necessity out of which voices appeal to justice. From law—the complex correspondence and binding of persons to a world that emerges with the calling, however silently, of words to justice—arise the possibilities of the just and the unjust in our world.

That judgments of justice and injustice today issue from law constitutes a reversal of an earlier tradition (see “The Problem of Nietzsche” below) in which law issued from justice.⁷ Positive law rejects any prior necessity or binding of justice. It is a human and *social* creation. Its necessity lies in the social force or pressure that produces—through compulsion or persuasion—the obedience of subjects. It appeals to technological concepts of social reality—such as legitimacy, welfare, efficiency—to design a correspondence between social needs and social policy. From social study and opinion issue evaluations of the design and fit of law to society and society to law. Claims of, and responses to, positive law are made in terms of the values—equality, liberty, fairness, toleration, self-rule—of society.

That society stands in the former place of justice, issuing law and talking so noisily of its own values and norms, makes one wonder what has happened to justice. Is justice a modality of society? *Simply* a modality of society? Can justice be expressed in *exclusively* social terms? Is a justice that exceeds the limits of the social so nonsensical that it cannot be said? Is it so ingrained that it need not be said? Might it become (or have become) impossible?

This work explores the ways in which both “yes” and “no” can seem obvious answers to all of these questions. It seeks, as Sheldon Messinger used to say of the best of sociology, to make the strange familiar and the familiar strange. The method throughout is a—perhaps idiosyncratic—rhetorical one. As we shall see, it differs from other approaches to law, although it has commonalities with several of them. It seeks to approach the particularity of questions of law and justice in our time, keeping open to them as questions.

Rhetoric

Rhetoricians think about language and what it does and doesn’t do. They think about what is revealed in the use of particular language in particular texts. They expand and contract notions of text: word, figure of speech,

⁷ Friedrich Nietzsche, *On the Genealogy of Morals*, in *Basic Writings of Nietzsche*, trans. Walter Kaufmann (New York: Modern Library, 1968).

image, phrase, claim, paragraph, argument, article, book, library, event . . . They play with genre: oral epic poetry, script, performance, film—even comic strip! Rhetoricians do not commit themselves to causal accounts of change (as backward-looking historians seeking reasons for the appearance or disappearance of signs or phenomena may do) because rhetoricians know that causal accounts are empirically suspect. Like good social scientists, rhetoricians would rather stick to correlations than causes for making connections. Unlike social scientists, though, they do not limit themselves to *empirical* correspondence: they experiment in thought. At the same time, they shudder at precisely the thought of articulating ideals, of identifying or postulating what ought to be, of staking out a position pro or contra silence, for instance, the way law professors might. And rhetoricians certainly do not have the philosophers' respect for logic and logical argument.

An example from a logic textbook helps clarify the difference between logic and rhetoric. Citing an 1826 logic textbook, a contemporary textbook provides the following passage as an illustration of a fallacious argument and, in particular, of the fallacy of begging the question, or *petitio principii*:

To allow every man unbounded freedom of speech must always be, on the whole, advantageous to the state; for it is highly conducive to the interests of the community that each individual should enjoy a liberty, perfectly unlimited, of expressing his sentiments.⁸

Petitio principii refers to what is sometimes called circular reasoning, in which, the textbook explains, a conclusion (“to allow every man unbounded freedom of speech must always be, on the whole, advantageous to the state”) is “buried within” one of the premises (“it is highly conducive to the interests of the community that each individual should enjoy a liberty, perfectly unlimited, of expressing his sentiments”). To a logician, when a premise assumes the truth of what the argument seeks to prove, the argument is fallacious—logically problematic. To a rhetorician, by contrast, the assertion of such a relation may be a source of wonder: How can one claim be “buried within” another? What is the import of burial? Isn't what is buried contained and hidden? Why isn't an argument whose premise contains its conclusion, however hidden, true-in-itself? Truth-in-itself is not the same as tautology. Tautology refers to the truth of a proposition. Begging the question or circularity refers to the status of an argument. Why isn't circularity truth-in-itself? Might truth-in-itself be a logical fallacy? How can logic answer the last question, insofar as the

⁸ Irving M. Copi and Carl Cohen, *Introduction to Logic*, 8th ed. (New York: Macmillan, 1990), 102, citing Richard Whately (1826).

question involves adjudication of logic's own relation to truth? Might logic be contained within truth? Might truth be hidden in logic?

More to the point perhaps, a rhetorician might ask what sort of world—of language and politics, for instance—the logic textbook comes out of when it presupposes that what is “advantageous to the state” (“always” and “on the whole,” to be sure) is buried within what is “highly conducive to the interests of the community”? Or further, presumes that “unbounded freedom” is contained in “liberty, perfectly unlimited,” just as “speech” is hidden in “expressing . . . sentiments,” and “every man” within “each individual”? What sort of world—and of law—does the citation of this passage as an example of *petitio principii* reveal? Is it the same world as that of the text from which the passage was drawn? If, as the logic text implies, obligation to individual enjoyment of liberty entails allowing freedom (and who or what allows it?), is it a Kantian realm in which ought implies can? Is it a Millian world in which states maximize individual interests? What sort of world do these logicians—and their copy-editor—inhabit?

Interestingly, the 1820s textbook that the 1990s textbook cites as its source uses the passage to show how the English language—with its Norman and Saxon roots—is especially prone to circular arguments. The English language, writes Whately,

is perhaps the more suitable for the Fallacy of *petitio principii* [than the Fallacy *ignoratio elenchi* or of irrelevant conclusion], from its being formed from two distinct languages, and thus abounding in synonymous expressions, which have no resemblance in sound, and no connection in etymology; so that a Sophist may bring forward a proposition expressed in words of Saxon origin, and give as a reason [for] it the very same proposition stated in words of Norman origin; e.g. [passage cited above follows].⁹

The world of the 1820s textbook, then, is a world in which a logician takes note of language very differently than does “a Sophist.” The English-speaking Sophist (to whom the example is attributed) seeks to persuade listeners who are ignorant of the roots of their language of the infinite desirability of speech (its “unbounded freedom”), while the logician warns that phrases in even “distinct” languages can state “the very same proposition.”

The contemporary rhetorician's attention to language differs from that paid by either logician or sophist. The rhetorician questions the logician's eternal faith that ideas represented by words can be grasped irrespective of their utterance in particular times and places and languages. To the rhetorician, words do not necessarily represent propositions and neither

⁹ Richard Whately, *Elements of Logic*, 9th ed. (New York: Sheldon and Co., 1873), 223.

words, ideas, nor propositions can be analyzed independently of their use. But this does not imply that the value of words, for the rhetorician, lies only in their ability to persuade or in sophistry. One need not accept the common caricature of the rhetorician as reducing the import of language to its use as persuasive communication or to the transmission of messages from willing senders to passive—or even active—receivers.¹⁰

So how *do* rhetoricians attend to language? They read. They listen. They read very carefully. They read texts for what they say; and they read texts for what they don't say. They read the words of a text; they listen for its silences. They wonder, for instance, about phrases like "law is too important to leave to the lawyers," a phrase with a lovely alliterative lilt. But does the phrase mean that *law* is too important to leave to the lawyers, but that it is all right to leave some less important nonlaw to lawyers (and what might that be)? Does it mean that law is too *important* to leave to the lawyers, rather than too interesting or enriching or complicated (and how is it important)? Does it mean that law is too important to *leave* to the lawyers, as opposed to delegating it to them or letting them borrow it once in a while? Finally, does it mean that law is too important to leave to the *lawyers*, as opposed to those with whom it might otherwise safely be left—law professors, or judges, or legislators, or liberal artists or scholars, for instance?

Rhetoricians don't just read the lines, then. They read between the lines; they read around the lines. They read parentheticals. (They read so carefully that they even read signs that are not there, as the prologue showed!) They love words and silences—and libraries, but they don't usually *say* anything about that. More often they *say* outrageous things about the scholarship of more serious disciplines—like anthropology, history, sociology, law, philosophy—while claiming that these caricatures are based on their own careful readings.

Take the philosophy of law for now. The most familiar way for jurists and jurisprudes to address the question of law philosophically today is to distinguish between positive law as "the law that is, in contrast to the law that ought to be," as Peter Berkowitz puts it. "This simple, preliminary formulation," he continues, "leaves open the question of the consequence of a conflict between the positive law that is and the law that ought to be, between the law of the city and the divine law, between human justice

¹⁰ The following do not fit this caricature: James Boyd White, *Justice as Translation* (Chicago: University of Chicago Press, 1994), and *Heracles' Bow* (Madison: University of Wisconsin Press, 1985); Peter Goodrich, *Oedipus Lex: Psychoanalysis, History, Law* (Berkeley and Los Angeles: University of California Press, 1995), and *Law in the Courts of Love: Literature and Other Minor Jurisprudences* (New York: Routledge, 1996); Linda Ross Meyer, "Between Reason and Power: Experiencing Legal Truth," *University of Cincinnati Law Review* 67:3 (1999): 727.

and what is right by nature or dictated by reason.”¹¹ The subject matter of the philosophy of law thus devolves into an argument between positivists and natural lawyers as to the meaning of law, which leaves open the question of what to do in any particular instance.¹² Natural lawyers maintain that a higher moral law is the measure of the lawfulness or justice of man-made laws.¹³ Positivists provide factual, nonmoral criteria, such as procedural regularity or the command of a sovereign, as the test of a law’s validity and hence existence and maintain that there is no necessary connection between law and justice.¹⁴

A rhetorician, after a careful reading of texts of and about law, might suggest that there are many more interesting ways of talking about law and justice than as a dichotomous conflict between natural law and legal positivism, between ought and is, divine and human. To the rhetorician, jurisprudence appears less a debate as to the meaning of “law” than an inquiry into complicated relations between law and justice around particular questions of action or of what to do—precisely the questions that philosophy does not answer.

Law, the rhetorician notes, seeks to answer the very questions of what to do that concern philosophers but that philosophy (like rhetoric) does not generally answer. Indeed, law tells those whom it addresses (and responds to) what to do. It does so whatever one’s theory or conception of law. And it does so in various ways, compatible with many theories yet

¹¹ Peter Berkowitz, “On the Laws Governing Free Spirits and Philosophers of the Future: A Response to Nonet’s ‘What is Positive Law?’” *Yale Law Journal* 100 (1990): 703.

¹² For an excellent textbook introduction to the philosophy of law, see Frederick Schauer and Walter Sinnott-Armstrong, introduction to *Philosophy of Law: Classic and Contemporary Readings with Commentary* (Fort Worth: Harcourt Brace College Publishers, 1996), 1–7. Schauer and Sinnott-Armstrong are correct that the answer to the broad question “What is law?” can be a moral issue (as when positivist Hart and natural law defender Fuller argue about how the concept of law should be understood) or an ontological one (Soper), whether provided in conceptual (Coleman) or quasi-descriptive (Dworkin) terms. Each and all of these approaches leave open the question of what to do in any particular case—except, of course, in the matter of the particular case of how to answer the broad question “What is law?”

¹³ See Thomas Aquinas, *The Political Ideas of St. Thomas Aquinas: Representative Selections*, trans. Dino Bigongiari (New York: Hafner Press, 1953, 1981); Augustine, *On Free Choice of the Will*, trans. Thomas Williams (Indianapolis: Hackett, 1993), and *City of God*, trans. Henry Bettenson (New York: Penguin, 1984); John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1981).

¹⁴ See John Austin, *The Province of Jurisprudence Determined* (London: Weidenfeld and Nicholson, 1954); H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961); Hans Kelsen, *Pure Theory of Law* (Berkeley and Los Angeles: University of California Press, 1967); Joseph Raz, *The Concept of a Legal System* (Oxford: Clarendon Press, 1970). Note that sometimes legal positivists distinguish the two points, that legal philosophy is concerned with describing (the existence or nature of) law and that there is no necessary connection between law and morality.

irreducible to any single one. Whether law is God-made or man-made, text or behavior or something else or both, law *tells*—gestures (to), indicates, shows, reveals, states, describes, threatens, or commands—its addressee or subject what must be done. It may do so with and without words, with and without rules, as shall be seen.

Parsing out the rhetoric of particular laws raise major constellations of issues having to do with *how* law tells the one *whom* it tells *what* to do. In any particular legal event or text, the rhetorician notes, one can identify, like variations on a theme,

- an addressee or subject, the “one” or “ones” whom law addresses (citizens, residents, persons, corporations, human beings, officials, would-be spouses, Christians, moral actors, utilitarian maximizers) when it tells *someone* what to do;
- a doing, the *what to do* law calls for (the establishment of funding for language programs, the return of particular artifacts, respect for the flag, the introduction of testimony in particular ways, for instance, which may constitute a deed, a conscientious choice, social behavior, rule-following, willing, conforming, calculating);
- a telling (of what to do) in a manner (with or without words) through which, law presumes, addressees discern what must be done (via example, by cognizing statements of rules, by threats and coercion, through revelation, through moral knowledge, through legal reasoning, through deliberation or strategy).

The imperative of law may manifest itself variously as custom, tradition, practice, obligation, command, declaration, rule, sign, calculation, judgment, or something else. That a particular manifestation of an imperative—a “declaration,” for instance—can sometimes be described also as an obligation or as a command or as both suggests that the claim that law tells those whom it addresses what to do is less an empirical or a conceptual answer to the question, “What is law?” than a rhetorical one, in which “must” may hold varying statuses.¹⁵

Furthermore, “telling” implies that one speaks (with or without words) to another in context; it implies action. It suggests that, irrespective of whether one adopts a stance that law does its telling well or badly, the strong distinctions between action and speech or between language and behavior that some scholarship adopts toward law are conceptual distinctions. This does not mean that they are “only” conceptual distinctions—or to be discarded. That the distinctions between speech and action, be-

¹⁵ Rhetorical, in the sense of Goodrich, Meyer, White, above. On empirical and conceptual, see Jules Coleman, “Rules and Social Facts,” *Harvard Journal of Law and Public Policy* 14 (1991): 703.

tween language and behavior, are conceptual distinctions means that they are *also* rhetorical distinctions—and to be explored for what they presume and what their use enables one to learn, or precludes one from learning, about law.

Rhetoric recognizes that legal language is inseparable from legal behavior. Having recognized such inseparability, rhetoric provides a language in which to speak of the ways in which law and studies of the legal system nevertheless sometimes insist on separating language from behavior. In some social scientific scholarship, for instance, scholars rely on a strong distinction between language and behavior to identify and articulate a disjunction between what law claims of itself and what it actually does. They argue also for the primacy of the standards of social sciences, which look to law in action, over the values of a legal profession that takes law as language or as “anything but behavior.”¹⁶ Law itself struggles with its version of the language-behavior distinction, as in attempts to clarify the difference between protected “speech” and unprotected “conduct” under the First Amendment, for instance, which is discussed further in chapter 3 on the flag-burning cases.

Rhetoric also notes that the various tellings and doings of law have different possible relations to justice. Jurisprudence articulates regularities in these relations. In jurisprudence, law corresponds not only to particular understandings of addressees, the collectivities to which they belong, their action and knowledge, but also to justice. The “citizens” of the polis, the “fellow Christians” of the heavenly city, the “moral persons” of a kingdom-of-ends, the “rational agents” of socioeconomic theory and the bearers of everyday life of modern society, that is, correspond to particular conceptions of law and justice. Shifting configurations of words used in jurisprudence for the identity, action, and knowledge of law’s addressee—in works from those of Socrates and Plato, through Augustine and Aquinas, Kant, and the utilitarians, to the contemporary legal, political, and social theory of Rawls,¹⁷ Unger,¹⁸ Habermas,¹⁹ and others—reveal changing understandings—conceptions and practices—of law and of justice. Law (as “The Problem of Nietzsche” will discuss further) may be a way of life (Socrates), natural law (the Christians), moral law (Kant), positive law (the utilitarians), or social policy (Rawls). Justice may be eternal. Or the association of law with justice may be qualified: natural

¹⁶ “Anything but behavior” in Lawrence F. Friedman, “The Law and Society Movement,” *Stanford Law Review* 35 (1986): 763.

¹⁷ John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971).

¹⁸ Roberto M. Unger, *The Critical Legal Studies Movement* (Cambridge: Harvard University Press, 1983).

¹⁹ Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg (Cambridge: MIT Press, 1996).

law constitutes imperfect participation in a divine (law of) justice. For some, justice is that which temporal law needs or secular law lacks; for others, it may be that to which human law aspires or fails to aspire. According to some, law is doomed to try and to fail to achieve justice; according to others, justice itself is illusion, ideology, or even outright lie. Some even formulate law's association with justice (the psychoanalytic rhetorician notes) in a denial that there is any necessary connection between the two!

What is named for the rhetorician by all of these words is again not simply concepts. *Citizen* indeed carries with it a conception of law that tells the members of a polis to practice the virtues of the laws of the city. But citizenship is not only a concept; citizens do embody the virtues and law of the collectivities to which—and in the ways in which—citizens belong. Today's citizen, however contested current conceptions of citizenship, is a member of a nation-state whose law is positive law. *Citizen* today tells us about our world, not just about relations between terms in a text. It does so whether or not empirically verifiable or officially recognized citizens are present and despite factual and conceptual disputes over their identification. It does so despite conflicts of laws and contestations over the status of particular states and of state law.

The language not just of philosophy, but of law, reveals worlds. Law today, for instance, often considers the citizen to be a “stakeholder” in enterprises of government.²⁰ Government, conversely, may also become a stakeholder in the community and in its members. The second of the Department of Health and Human Services' six goals for “Healthy People 2010,” for instance, is to “[p]romote . . . personal responsibility for health lifestyles and behavior.”²¹ In 1997, President Clinton established an Advisory Commission on Consumer Protection and Quality in the Health Care Industry. The problems that health maintenance organizations (HMOs) were meant to address—problems with the medical profession—had given way to problems with the very “health care providers” that had replaced doctors, nurses, and medical assistants. Clinton asked thirty-four “citizen-experts” to draft a “bill of rights” protecting Americans, in the words of one commentator, “from the corporations insuring their health.” Former patients became “health care consumers,” in Clinton's terms, and were asked to take responsibility for declaring their rights.²²

At issue here is both a word and a subject, the *patient*. According to the *New York Times*:

²⁰ United States Bureau of Census, *Census ABC's: Applications in Business and Community* (Washington, D.C.: Georgetown University Press, 1990).

²¹ Consortium of Social Science Associations, *Washington Update* 17 (1998): 21.

²² Robert Hunt Sprinkle, “Corporatism in Question: A Note on Managed Care,” *Report from the Institute for Philosophy and Public Policy* 17 (1997): 13.

The chief executive of the King's Fund, an influential British health charity and research organization, says it is high time to abolish the word "patient."

. . . But if "patient" has to go, what word should replace it?

. . . Rabbi Neuberger [of the King's Fund] considered but rejected "client," which she thought made health care delivery sound like a purely financial transaction. . . .

"Consumer" also struck her as wrong, conjuring an image of the "constant ingestion of pills and potions." She finally settled for "user," a word that "despite its lack of elegance," conveys action rather than passive acceptance, confidence rather than bewilderment, power rather than dependency. "It could even suggest an equalization of status between health professional and service user that is nearer the climate in which modern health services should be provided," she declared.²³

If Clinton differs from the British in his terminology of consumers and users, the technique he used—citizen-experts—is nevertheless one of widespread currency. Communities of service users band together to press for what they need, about which they are considered best and local experts.

Clinton called on citizen-experts to articulate not needs but "rights," a locution commonly associated with liberalism's so-called autonomous individuals rather than with their socially encumbered brethren. But Clinton's citizen-expert is not quite the individual of classical liberalism. Rather, the citizen-expert is a *user of services*, the complement to the *service provider* (as "consumer" is to "producer"). While the British "user" conveys "action," "confidence," "power," rather than passivity, "bewilderment," "dependency," the word *user* reminds us of the absence of perfect freedom, as Peter Lyman puts it (in the context of digital library and computer technology), since "all of these choices are given by the technical structures designed by the programmer" and presented by the server.²⁴

In the context of social policies and expertise about human services, the "user" is the offspring of rational choice and marketing theory. S/he embodies the joint hopes born from the shortcomings of both "rational actor" and "consumer." While the "rational actor" assumed by policymakers is too abstract and ethereal, too ungrounded in the things of the world, to serve as a model citizen, the market "consumer" is too indiscriminating and materially oriented to be taken seriously as an expert. The "service user" is heir to both. The "user" combines the techniques of cost-benefit analysis and concern for economic efficiency with utilitarian

²³ Abigail Zuger, "Essay: Patient Suffers from Connotations," *New York Times*, August 31, 1999.

²⁴ Peter Lyman, "What is a Digital Library? Technology, Property, and the Public Interest," *Daedalus* 125 (1996): 7.

calculations as to satisfactions—in new civic form. The user manipulates the things of this world, yet distinguishes between needs and desires. The user draws on experience of these needs to contribute to representations of the public or publics (in user surveys, for instance). But more importantly, as citizen-expert, the user engages with others within given social structures. Indeed, as an entity already situated in relations and dependencies with others, the service user—like all members of contemporary society—engages in a particular politics of association.

That politics goes to the very matter of modern law. In the last twenty-five years or so in the United States, non-strictly-state institutions and organizations—including private and for-profit ones—have come to exercise and manage functions and tasks that, earlier in the century, had themselves come to be associated with the federal state or the states (examples: insurance companies, health maintenance organizations and managed-care providers, charter school programs, credit-checking outfits, private security companies, private prisons, partnerships between volunteer organizations and local governments, and so forth). The adoption—by state agencies, quasi-public organizations, and private parties alike—of the techniques of management, accounting, and evaluation that characterize market enterprises has meant that expertise no longer belongs either to specialists or to social researchers, planners, and efficiency experts, who were held accountable to professional norms and external goals. Expertise now belongs concurrently to the citizen—a citizen trained to community responsibility and appealed to, as responsible community member and local expert, to participate in government that increasingly administers what may loosely be termed the activities of everyday life—working, eating and drinking, learning, resting and recreating, traveling, reading, watching television, driving, and so forth.²⁵

As we have learned from Michel Foucault (a rhetorician second only to Friedrich Nietzsche), particular social projects—the leper colony, the plague city, the Panopticon—carry with them their own “political dreams.”²⁶ In the 1990s, the empowered community emerges as the political dream of the projects of administrative agencies. This dream of the empowered community coincides with the privatization of formerly pub-

²⁵ The public entities alone concerned with these activities make up an alphabet soup. They include for working: OSHA, SSA; eating: FDA; drinking: ATF, local liquor laws, Surgeon General; learning: local school boards to DOE; resting and recreating: the Consumer Protection Agency, bicycle helmet laws, National Park Service, the EPA; traveling: INS, Customs, FAA; television and radio, FTC; driving: NHA, Highway Patrol, DMV, seat belt laws. Quasi-public and private organizations are of course also involved in promoting and structuring these activities.

²⁶ Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (New York: Vintage, 1977), 198.

lic functions. Particular ideological political concerns for security and democracy, identified by Foucault in his work on governmentality and described further in the works of others, together with the growing significance to governance of nontherapeutic social sciences, contribute to the appeal of empowerment as political dream, political tool, and political project.²⁷

As the expertise of the therapeutic professions (the human sciences to which Foucault points—public health, psychology, social welfare, city planning, and so forth) gives way to that of experts in fields of financial planning, management, administration, and public accounting, the latter experts rely increasingly for their “substance” on local knowledge, the input of the democratic citizen or local community member. The accounting and auditing fields hold out a common vocabulary for crossing between public and private, state and market, concerns. They offer tools for organizing and evaluating data in otherwise ostensibly incompatible registers by allowing the translation of data into the transparency and visibility of the ledger book or the account sheet.²⁸

The experience of Health and Human Services (HHS) highlights the sorts of changes in administration that occurred from the 1970s through the 1990s. HHS shifted in the 1970s from an older professional model of evaluation and review to a new quality control (QC) model. The social work professional gave way on the front line to the clerk and at higher administrative levels to the technocratic manager with a background in business administration, argues William Simon in his analysis of the new

²⁷ Michel Foucault, “Governmentality,” *Ideology and Consciousness* 6 (1979): 5; Gordon Burchell, Colin Gordon, and Peter Miller, eds., *The Foucault Effect: Studies in Governmentality* (Chicago: University of Chicago Press, 1991); Barbara Cruikshank, *The Will to Empower: Democratic Citizens and Other Subjects* (Ithaca, NY: Cornell University Press, 1999); Thomas L. Dumm, *A Politics of the Ordinary* (New York: New York University Press, 1999); Pat O’Malley, “Neo-Liberal Police: ‘Partnership Policing’ and the ‘Empowered Community,’ ” paper presented at Law and Society Association Summer Legal Institute, Rutgers, New Jersey, 1999; Nikolas Rose, *Powers of Freedom: Reframing Political Thought* (Cambridge: Cambridge University Press, 1999); Jonathan Simon, “On Their Own: Delinquency without Society,” *Kansas Law Review* 47 (1999): 1, and “Megan’s Law: Crime and Democracy in Late Modern America,” *Law and Social Inquiry* 25 (2000): 1111; Mariana Valverde, Ron Levi, Clifford Shearing, Mary Condon, and Pat O’Malley, *Democracy in Governance: A Socio-Legal Framework. A Report for the Law Commission of Canada on Law and Governance Relationships* (Ottawa: Law Commission, 1999).

²⁸ Michael Power, *The Audit Society: Rituals of Verification* (Oxford: Oxford University Press, 1990). The extension at least of accounting, beyond the firm and even beyond tax and government accounting into other spaces of public concern, was not unintentional: a concerted effort was made by the American Institute of Certified Public Accountants to deal with public relations and to increase the public service of its members. John L. Carey, *The Rise of the Accounting Profession to Responsibility and Authority: 1937–1969* (New York: American Institute of Certified Public Accountants, 1970).

regime. Social workers and caseworkers were replaced with “eligibility technicians” or “income maintenance workers” (1215).²⁹ In conjunction with the rise of the welfare rights movement, QC, with its attention to “error,” as Simon shows, reinforced trends toward formalization of eligibility norms, intensified organizational hierarchy, and increased documentation requirements and shifting of costs toward recipients (1210–12). Congress likewise turned away from counseling, toward economic approaches such as financial incentives and work requirements, for fostering recipient self-support.

The 1990s saw welfare transformed once again, this time to a decentralized block grant system that aims not only to make recipients economically self-supporting but also to engage them in “community.” The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 replaced AFDC, Aid to Families with Dependent Children, with TANF, Temporary Assistance to Needy Families block grants to the states. The act imposes time limits on welfare benefits and requires recipients to go to work, as well as increasing the role of the states in determining and providing benefits. The act aims at not only “work opportunity,” but also “personal responsibility.” It stresses the importance of having some sort of “community work experience” and states that “responsible fatherhood and motherhood” are key to marriage as the “foundation of a successful society” in which the interests of children come first. The most recent state welfare program innovations include cooperative programs for child care and transportation for workfare beneficiaries, many of which are worked out via state and local partnerships.

Despite its goal of financial independence, this latest system of aid to the poor cannot be reduced to an “economic” approach to self-support. Neither does it mark a return to an older therapeutic model nor to a rights-based system. Its emphasis on goals of personal responsibility and civic competence resembles the goals of many other community-oriented programs—Neighborhood Watch campaigns, community arbitration boards, emergency and disaster preparedness programs, community health centers, city or regional planning for public facilities. These programs, too, rely on elaborate information that those who are to be served provide through extensive documentation. They often cite empowerment as a secondary goal. And they require “partnering” between “community” and agency for the integration of good citizen-worker-residents into a civic life that will be fostered by healthy or safe social and civic environments.

²⁹ William H. Simon, “Legality, Bureaucracy, and Class in the Welfare System,” *Yale Law Journal* 92 (1983): 1215.

The epitome of such partnering is encountered in the “emerging field” of “community justice.”³⁰ Community justice may include “a wide array of programs, and ‘community-based initiatives,’ including community policing, ‘weed and seed,’ neighborhood revitalization, drug courts, community corrections, community courts and neighborhood prosecution and defense units, prevention and diversion programs, restitution, community service, victim services, and dispute and conflict resolution efforts in schools and neighborhood organizations.”³¹ Citizens may be involved in these programs, which share an informal nonadversarial approach to sanctioning that is presented as a community-based alternative to court sanctioning, in a variety of ways.³² Through their engagements, community members maintain a relation to the formal criminal justice system, whether to a judge, prosecutor, or court official with whom they share decision making and authority, or to police and probation officers who are responsible for monitoring and enforcement of the program.

One can compare such community justice programs to traditional models of crime and order. The traditional system “performs as a professional service system of state agents who work in response to criminal events . . . [and are] accountable for a set of professional standards that apply uniformly to all who are engaged in the practice of justice,” writes one scholar. The community model, by contrast, “involves professionals who work in response to problems articulated by citizens. . . . Because of the heavy dosage of citizen input and activity in the latter model, professional effort tends to be judged on the basis of citizen satisfaction with justice services.”³³

The citizen takes the place of the fellow professional in judging professional performance. But citizen input does more than simply establish a gauge—satisfaction with services delivered—to judge professionals’ performances. Citizens’ concerns and desires indicate what problems to address and enable policymakers to develop strategies whose success will in turn depend on the evaluations of citizens. Policymaking uses the information provided by citizens to establish both ends and means.

³⁰ David R. Karp, *Community Justice: An Emerging Field* (Lanham, MD: Rowman and Littlefield, 1998).

³¹ Gordon Bazemore, “The ‘Community’ in Community Justice: Issues, Themes, and Questions for the New Neighborhood Sanctioning Models,” in Karp, *Community Justice*, 330, citing National Institute of Justice, *Communities: Mobilizing Against Crime* (Washington, D.C.: National Institute of Justice, 1996).

³² One study describes four models of citizen decision-making in neighborhood sanctioning as “circle sentencing,” “family group conferencing,” “reparative probation,” and “victim/offender mediation.” Bazemore, “Community.”

³³ Todd R. Clear and David R. Karp, “The Community Justice Movement,” in Karp, *Community Justice*, 20–21.

Citizens provide information about themselves, their concerns, their neighbors, and their neighborhood to promote public safety, health, and welfare. They register to take tests, learn interactively and give feedback so that they themselves and future generations of test takers, interactive learners, and ballot punchers will be more ably served by colleges, banks, museums, departments of motor vehicles, election boards, and so forth. They constitute the targets of opinion polls and of surveys of customer preferences and consumer satisfaction, the profiles of demographics and the more recent “psychographics” of media research services. Through the strategies of social science, mass media, and market capitalism, in which they participate, they are constituted as a public, which in turn becomes the basis for local and national policies, as well as for less ostensibly political measures, such as dietary recommendations, for instance, which by law will be disseminated via the market.

These engagements—the behavior of a subject who is arguably both empowered citizen and tool of legitimation—are informed by social study and are the objects of it. They point the attentive rhetorician to a new politics—new knowledges and practices—of society in which narrowly “legal realist” social sciences may have had their heyday, but in which postrealism is by no means nonsociological.

Austin Sarat argues that

[t]he social sciences, and especially sociology (the most social), which had become court sciences at the highest levels in the 1960s and 1970s, are today largely absent from national government and are experiencing their own internal drift and discontent.³⁴

Sarat cites Garth and Sterling to the effect that “social science generally and law and society in particular [have] declined in relative prestige.” Sarat sees a relaxation of “the confident embrace of social science as the dominant paradigm for work that seeks to chart the social life of law.” Like many others, he points to “the decline of the social as a nexus of governing,” and to a crisis in the social that he suggests “is being experienced globally today.”³⁵

The death of the social has been announced prematurely, however, the literal-minded rhetorician would note. The dismantling of “the most florid

³⁴ Austin Sarat, “Visuality Amidst Fragmentation: On the Emergence of Postrealist Law and Society Scholarship,” in *The Blackwell Companion to Law and Society*, ed. Austin Sarat (Oxford: Blackwell, 2004), 5.

³⁵ Sarat, “Visuality,” 4–5. For others, see Jean Baudrillard, *In the Shadow of the Silent Majorities or, The End of the Social and Other Essays* (New York: Semiotext(e), 1983); Austin Sarat and Jonathan Simon, “Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship,” in *Cultural Analysis, Cultural Studies, and Law*, ed. Austin Sarat and Jonathan Simon (Durham, NC: Duke University Press, 2003), 1–34.

forms of the social,” as Sarat calls them—social insurance, public transportation and housing, public health and social medicine, as well as socialism—comes in the name of the preferences of society and its ostensibly empowered service users. These preferences may not accord with the liberal reform agenda of many academic social researchers, but they are gathered and known precisely through the techniques of managerial social sciences that pervade the new quasi-public/private networks and relations by which governing occurs. The last decade or so has indeed seen a transformation in the social, but insofar as “society” continues to be both object and subject of government, it is in no danger of disappearing. On the contrary, one sometimes looks in vain for aspects of the world that are exempt from human government.

The “death of the social” then refers only narrowly to particular approaches to law and policy. The assumptions and techniques of social research still pervade law and the legal system. Social researchers have complained for decades that their work is not taken seriously enough in legal institutions.³⁶ Such neglect may indeed characterize the reception of particular studies in particular formal institutions. But it is in the *name* of the social, even the nonrhetorician must grant, that the grand social programs of the twentieth century have come under attack. The social science methods that premeate government and society may not produce tenurable works. A sociological worldview nevertheless predominates in the everyday norms and rules of institutions of modern law and government. This work explores that worldview.

Sociolegal Positivism

If rhetoric discerns in law today a socio-logical worldview, the academic disciplines of society provide a privileged—and generally more articulate—entrée into that worldview and relations within it, than do their managerial cousins. Insofar as law today is a social phenomenon, the academic social sciences—sociology, anthropology, political science—include law within their domain. Even when they do not make positive law their explicit object of study, one often discerns in them the positive law that today is taken to be law. While some sociology is silent about, or does not explicitly concern itself with, justice, some interpretive work turns pointedly to the “justice” of law and provides insight into modern law and its silences.

³⁶ See Rosemary J. Erickson and Rita J. Simon, *The Use of Social Science Data in Supreme Court Decisions* (Urbana: University of Illinois Press, 1998) and studies cited therein; Jonathan Yovel and Elizabeth Mertz, “The Role of Social Science in Legal Decisions,” in Sarat, *Blackwell Companion*, 410–31; Marianne Constable, *The Law of the Other: The Mixed*

In a careful analysis of British colonial administration in Tanganyika, for instance, Sally Falk Moore explores the British conception of “justice” that appears in a colonial directive to officers in charge of African local courts.³⁷ She looks at what the document states “is the main function of a court—to dispense justice” (18). According to Moore, British commitment to “the rule of law” was grounded in an “ideal of rule standardization” that Moore associates with H.L.A. Hart’s positivist model of a legal system (22). The simultaneous British “commitment to discovering and respecting the authentic African legal ‘tradition’ ” that was not simply a set of rules *and* “to writing it down in the form of rules” indicates the ambivalence in and tension of the colonial administration in Tanganyika, she writes. British “aims of empowerment” and “aims of control” were “bound to face in opposite directions” (24, 40).

The tension in British aims vis-à-vis positive law that Moore finds in Tanganyika can be found also in Hart’s own positivist conception of law, as well as in sociolegal studies. The most recent theoretical work in legal positivism develops in an explicitly sociolegal fashion from Hart’s now-classic sociological and legal positivist account of a modern “municipal legal system.”³⁸ Despite the differences between (and within) contemporary legal theory and sociolegal scholarship, sociolegal studies generally conform to—and share the limitations of—legal positivist conceptions of law. Where Hart argued that there is “no necessary connection” between law and justice, contemporary legal positivism and sociolegal study converge, as we shall see, in affirming that the connection between law and morality is an empirically contingent matter of social factors.³⁹

For Hart, the existence of a legal system requires two kinds of rules: first, the rules generally obeyed by citizens, whatever the motive, that are recognized as valid by the system’s ultimate criteria of validity; and second, the rules accepted by officials that specify the criteria for validity of the first set of rules (113). The “unification” of rules that Hart associates with the emergence of a modern legal system combines the propositionally articulated customs of what he calls a primitive society with the similarly propositional secondary rules of officials.

The tensions that Moore points out in British incorporation of tradition into rules or into positive law in Tanganyika suggests an instability that characterizes the emergence and existence of any positivist legal system.

Jury and Changing Conceptions of Citizenship, Law, and Knowledge (Chicago: University of Chicago Press, 1994), 49–50.

³⁷ Sally Falk Moore, “Treating Law as Knowledge: Telling Colonial Officers What to Say to Africans about Running ‘Their Own’ Native Courts,” *Law and Society Review* 26 (1992): 11.

³⁸ Hart, *The Concept of Law*, v, 17.

³⁹ Brian Tamanaha, *Realistic Socio-Legal Theory: Pragmatism and a Social Theory of Law* (Oxford: Clarendon Press, 1997).

According to Hart, the first step in the unification of rules (or the establishment of a modern legal system) is the “mere reduction to writing of hitherto unwritten rules” (92). But the “traditions” of which Moore speaks (like the “practices” in Raz’s analysis of rules) were not necessarily unwritten “rules” before the British made them so.⁴⁰ Furthermore, “what is crucial” for Hart is the second step, “the acknowledgment of reference to the writing or inscription as *authoritative*, i.e. as the *proper* way of disposing of doubts as to the existence of the rule” (92). Moore’s analysis points to difficulties not only with writing down tradition in the form of statements of rules, but also with the closure Hart implies is achieved in his “crucial” second step, the acknowledgment of a mark of authority to settle doubts as to the existence of a rule.

Moore implies that there is never a moment in which the Africans in question fully acknowledge the authority of the British, nor of British writings of rules, for determining the validity of British articulations of local custom. “Not only has much of the British-designed structure of the courts been inherited, but so have many of the resistances to it and circumventions of it” (21), she writes. She suggests that, at least in Tanganyika, the emergence of the Hartian positivist legal system of the British directive is—perhaps perpetually—incomplete.

Such incompleteness paradoxically seems to be an attribute of the emergence of any Hartian positivist legal system. The very law that British officials in Tanganyika took as their model of a modern legal system, the common law, also lacks a determinate moment of “acknowledgment of authority.” Common-law history is a history of the acknowledgment of the authority of the king’s courts over local custom. History locates the acknowledgment of authority, which would mark the emergence of the common law as a properly positivist legal system, in a perpetually receding moment of origin. The shift from custom to law in common-law histories appears as a long continuum, to which no determinate origin can be affixed. Official practice has always already begun to emerge through invasion and the imposition of new ways, even as its power is continually contested.⁴¹ The origin or source of legal positivism thus lies in a perpetual imposition of authoritative will, in an eternal retrospective reenactment of human conquest and command.

The inaccessibility of a singular determinate moment of either “acknowledgment of authority” or of complete conquest in both the future of Tanganyika and in the past of the English common law suggests an

⁴⁰ See also Joseph Raz, *Practical Reason and Norms* (Princeton: Princeton University Press, 1975, 1990), 49–58. Raz argues in a quite different context that rules are not practices.

⁴¹ Constable, *Law of the Other*, chap. 4, 67–95; Peter Fitzpatrick, *The Mythology of Modern Law* (New York: Routledge, 1992).

eternal deferral of the coming-into-existence of any actual positivist legal system. Either a positivist system of law already exists (and is replaced by or transformed into another) or it is interminably incomplete. Like the oscillation of the origin in Foucault's famous chapter on "man and his doubles" in *The Order of Things*,⁴² the emergence of the positivist legal system is not locatable at nor attributable to a determinate moment in chronological time. The acknowledgment of its authority has always already been grounded in the conquering will or else it is not yet. Legal positivism thus cannot acknowledge the prior or continuing existence as law of non-legal-positivist forms of legal authority, without undermining its own claims that law is always positive law.

The genesis of the legal positivist system is admittedly not the focus of Hart's conception of law, nor is it usually of concern for most sociolegal scholars, intent on studying the empirically contingent law (and sometimes justice) that exists. Incompleteness and indeterminacy beset histories of legal positivist systems (and other quests for origins), though. Such histories raise questions about the exhaustiveness of legal positivism as a description of actual law over time. They suggest that faith in the adequacy of socially descriptive accounts of legal systems sustains a belief in the social and empirically contingent character of law and justice. Such faith, manifest in many sociolegal studies, reinforces a sense of the completeness of positive law without recognizing problematic issues of its temporality and coverage. At best, such issues are recognized, as by Moore, as a tension between "empowerment" and "control."

In sociolegal studies (as shall be discussed further in chapter 2), law is foremost a socially powerful system. Power and resistance to law are for sociolegal scholars normal; studies of the everyday and of legal consciousness diffuse the locations of what is still nevertheless human or social power. Even when they do not consider law to be the declarations by state officials of rules of behavior that most people generally obey, whatever their motives most of the time, sociolegal scholars presume that the social practices that constitute the force or power of law are descriptively articulable.

Hart had argued that the first condition for the existence of a modern legal system (as opposed to the first step in its emergence) is that rules of behavior that are valid according to the system's ultimate criteria of validity be generally obeyed.

[T]he first condition is the only one which private citizens *need* satisfy: they may obey each "for his part only" and from any motive whatever; though in a

⁴² Michel Foucault, *The Order of Things: An Archaeology of the Human Sciences* (New York: Vintage, 1994).

healthy society they will in fact often accept these rules as common standards of behaviour and acknowledge an obligation to obey them, or even trace this obligation to a more general obligation to respect the constitution. (113)

In discussing obedience, the sociologist of legal consciousness or everyday life displaces this systematicity of Hart's healthy union of rules to the norms and narratives of so-called legal consciousness. Sociological analysis brings to light the obedience or conformity or compliance—or its obverse—that is produced in forums of consciousness or unconsciousness. The turn from the command of the sovereign of Austinian legal positivism to “control by rules” to account for obligation does not amount for Hart to a “necessary connection between law and morality.” Neither does legal consciousness amount to such a connection for sociologists.

In other words, for Hart, the rules of a positivist legal system are not necessarily moral or just (202). They are grounded in what he calls “social pressure” (84), a pressure that is ultimately coercive. For the sociolegal scholar, too, behavior of citizens—even when considered an obligation—is also often a matter of social pressure.

Tom R. Tyler's *Why People Obey the Law* provides a case in point. Tyler analyses interviewees' responses to telephone questionnaires to discover citizens' attitudes toward the authority of law.⁴³ He investigates the influence on compliance “of what people regard as just and moral as opposed to their self-interest” (3). Showing that attitudes toward law fit what Hart would call a “healthy society,” Tyler contrasts what he calls normative models of compliance to models that focus on outcomes or instrumental ends. For Tyler, “Normative commitment through personal morality means obeying a law because one feels the law is just; normative commitment through legitimacy means obeying a law because one feels that the authority enforcing the law has the right to dictate behavior” (4). Tyler's conjunction of “normative” and “feeling” here takes the social psyche to be the forum that produces systems of obligation. Tyler concludes that people generally obey law because of its legitimacy or because of their perceptions of the procedural justice or fairness of the legal system. For Tyler, legitimacy is constituted by people's acknowledgment of what Hart would call the authoritativeness of the mark, or of what Tyler calls “the right to dictate behavior” of “the authority enforcing the law.”

Even as Tyler affirms that people acknowledge the authoritativeness of law, the “experiences, attitudes, and behavior” that contribute to such affirmation or acknowledgment are, according to Tyler, grounded in a “process of socialization” (168). Tyler and most sociolegal scholars of discourse consider conformity to rules, including rules that establish au-

⁴³ Tom R. Tyler, *Why People Obey the Law* (New Haven: Yale University Press, 1990).

thority, to be the effect of social power. Social power is admittedly not that of classical threatening commanders nor even that of duly constituted officials. It takes the form of socialization or of an often amorphous social production of meaning. For Tyler, socialization involves communication and conformity. Socialization is the way that “a society or organization communicates values within a group concerning the meaning of ‘fair’ procedures and ‘fair’ outcomes” (176).

Tyler’s grounding of authority in socialization very much resembles the way that Hart grounds the validity or authoritativeness of a legal system in “social pressure.”⁴⁴ Acknowledgment of authority stems from social power, for Tyler, as authority “dictates” behavior to those who obey. In grasping the authoritativeness of law as dictatorial social power that, through the communication or expression of values, tells members of society what to do, Tyler’s work shows the importance of both language and power to contemporary sociolegal conceptions of law (discussed further in chapter 2).

Although Tyler attributes citizens’ compliance to socialization, he claims that citizens themselves comply with law as a matter of procedural justice or fairness, much as Moore’s British administrators name their *own* conformity to British rules and the rule of law “justice”—not socialization. In transforming justice into a matter of socialization and conformity, Tyler’s study affirms the empirically contingent character of connections between positive law and justice or morality.

Even as positive law extends to characterize ostensibly all systems of law, sociolegal studies circumscribe the domain of law. Some set aside justice; some fail to mention it at all; others treat it as does Tyler as the communication of values that are articulable in sociological terms. The latter thereby seem to imply that the justice of the law they study is no other than social power; the others that sociology has nothing to say on the matter, or that, sociologically speaking, “justice” is nonexistent. These claims may in fact all be correct. But their correctness is limited to the frame in which they are asserted: that of sociology. Sociology takes as object only that which is pregiven as social, while extending the social to all. It commits itself to human articulations and determinations of what exists. The chapters that follow challenge the correspondence of sociologically correct knowledge to truth. The claims of sociology are thus the basis on which the chapters that follow suggest that thinking more fruitfully about law and justice requires something other than the sociological and legal positivist frames and limits established through sociolegal studies’ assertions.

⁴⁴ See also Stanley Fish, “Force,” in *Doing What Comes Naturally* (Durham, NC: Duke University Press, 1989), 517.

The pervasiveness of sociolegal positivism is a symptom of current conditions, in which “social power” or the power of society threatens to become the sole or unlimited frame of reference for knowing the law—or determining what to do. These conditions constitute a peculiar moment in a history of jurisprudence that has long associated law with matters of justice but threatens to do so no more. This moment marks the convergence of legal positivism and sociological study in a sociolegal positivism that is as important as any natural law/positive law distinction for understanding modern law.

The Problem of Nietzsche

Contemporary sociolegal positivism appears toward the end of the Western tradition that uses reason and truth to attend to questions of law and justice. In its many guises—as modern law, as sociological study, as philosophical legal positivism—it turns a skeptical eye toward the metaphysical truths that have long held sway in the law. Affirming the social and empirical character of law (and of justice, when it takes there to be such a thing), sociolegal positivism grounds itself in a “real world” that has no use for such former transcendental ideals as those of the natural law tradition; it turns, in the very name of truth, away from what it takes as false idols constructed of religion, morality, formal rules.

Sociolegal positivism seldom reflects on itself as standard-bearer of truth; it takes its own truths and its own world, in all sincerity, as the norm for judgment. Friedrich Nietzsche provides a perspective on judgments of truth by sociology. He shows how today’s empirical “real” world is a version of the very metaphysics against which sociolegal positivism would turn. (Metaphysics can be thought as the philosophy that addresses the question of what is—of what determines experience or the things that are. Roughly speaking, our experience of the world formerly was founded on truths that were conceived as beyond us. Today, the issue of our experience of the world comes to be posed more locally: is experience determined by human subjectivity or by what objectively exists?) With Martin Heidegger, Nietzsche allows us to see how the issue of the “justice” of the sociologically real world raises profound questions, related to metaphysics, about who or what we are becoming.⁴⁵

⁴⁵ Joseph William Singer, “The Player and the Cards: Nihilism and Legal Theory,” *Yale Law Journal* 94 (1984): 1; Peter Goodrich, *Reading the Law: A Critical Introduction to Legal Method and Technologies* (Oxford: Blackwell, 1986). Nietzsche’s popularity among legal circles has grown recently. See, for instance, “Nietzsche and Legal Theory, Symposium at Cardozo School of Law, New York, Oct. 14–15, 2001,” *Cardozo Law Review* 24:2 (2003).

Nietzsche himself recognizes the downfall of a doomed, yet formerly necessary, quest to once and for all establish truth. He celebrates truth's turning back on itself and its creations. For Nietzsche, the end of the tradition of metaphysical truth is the overcoming of the nihilism of a will to truth. Today, one asks to what degree the challenges to metaphysical justice of sociolegal positivism portend a similarly joyous overcoming of nihilism. The answer is not so clear. Nietzsche contrasts the joy of his own free spirits to the "weariness of soul" of false free spirits, whom he describes as preferring a certain nothing to an uncertain something. Could contemporary legal thought correspond to the nihilism of the naysayer—to Nietzsche's false free spirits, that is?

Reading Nietzsche's pithy "History of an Error" or history of metaphysics in *Twilight of the Idols* helps reveal the import of these questions. Nietzsche's "How the 'True World' Became a Fable" traces transformations in metaphysics (*meta-phusis*, after or beyond matter or nature) or the philosophy of what things are.⁴⁶ The six moments in Nietzsche's history show how the relations of truth to what appears in the world have changed (see appendix 1). The "true world" of the Greek polis (or of the Platonic idea) is no longer the "true world" of the Christian heaven nor the "true world" of Kantian things-in-themselves nor the "true world" of the empiricists. And yet the truths of these worlds, posited by reason as beyond *this* world, have always judged this—ephemeral, temporal, phenomenal, apparent—world the same way: negatively, as lacking.

Just as reason has constructed metaphysical truths which have served as standards or measures that point to the inadequacies of this world, Nietzsche writes, so too the laws of philosophers, moralists, and priests have judged human beings and their actions in this world to be lacking. They have sought to improve them. From the truths of the Christian divine eternal order to those of the Kantian noumenal world to those of the positivist empirical world, he writes, have issued laws and practices of morality that, in the name of their respective truths, have turned against previous moralities only to cultivate, for the most part, unhealthy human life that does not and cannot flourish.

⁴⁶ Friedrich Nietzsche, *Twilight of the Idols*, trans. R. J. Hollingdale (London: Penguin, 1968). Hollingdale translates "Wie die 'wahre welt' endlich zur Fabel wurde" as "How the 'Real World' Became a Myth." "True" is a more fitting translation, as the true world of metaphysics, *meta-phusis* or what "lies beyond matter and nature," becomes today's empirical "real" world. In what follows, I have generally used Hollingdale's translation (and indicated his page numbers within my text), but substituted *true* for *real* in quotations from pages 40 and 41. (I thank Philippe Nonet for emphasizing the significance of this.) Hollingdale does note the connection. For a related reading of these two pages, see Marianne Constable, "Genealogy and Jurisprudence: Nietzsche, Nihilism, and the Social Scientification of Law," *Law and Social Inquiry* 19:3 (1994): 551, and "Rejoinder: Thinking Nonsociologically about Sociological Law," *Law and Social Inquiry* 19:3 (1994): 625.

Many place Socrates at the origin of Western reason and the quest for metaphysical truth and justice. Nietzsche shows how Plato sought to produce virtue, by having the Athenians imitate his teacher Socrates' mastery of his own unruly instincts. In Plato, Nietzsche suggests, truth and action become less events of becoming than matters of correct sight. In Heidegger's terms, truth or *aletheia*, as the unconcealment of beings that man experiences in their appearing to him, withdraws with Plato, in favor of truth as examining and securing—as *eidos* or *idea*—the form of a being. As *eidos*, truth is no longer an event of appearance, but becomes with Plato knowledge of what is unchanging or always present in a being, that without which a being would not be.

So begins the Western quest for supersensible or metaphysical (beyond nature) knowledge that Nietzsche calls the will to truth. This quest culminates with Nietzsche in a new articulation of the question of what determines experience. The will to truth erects successive metaphysical worlds from out of criticisms that destroy, in the name of truth, each preceding world and its respective truth. Nietzsche recognizes that these truths, in some sense, have been needed by man. They have been last-ditch efforts on the part of the will to power of life to stymie the decay and decline characterizing human life at any given moment. Nietzsche now calls on readers to recognize that these truths and their moralities are successful untruths. They can no longer possibly serve strong will to power or flourishing life. Nietzsche thus transforms metaphysics into the determination of will to power. Read as a history of jurisprudence, the history of metaphysics leads into sociolegal positivism.

Nietzsche begins his history:

1. The true world, attainable to the wise, the pious, the virtuous man—he dwells in it, *he is it*.

(Oldest form of the idea, relatively sensible, simple, convincing. Transcription of the proposition “I, Plato, *am* the truth.”) (40)

Like Platonic truth and its “true world,” the just law of the polis is “relatively sensible.” It is known through reason, not simply as an exercise of cognition but as the practice or know-how of the virtuous and wise citizen, Socrates. Perceiving that Socrates suffered evil at the hands of those who knew no better, Plato distinguishes the Athenians from their law. Surrounded by less virtuous Athenians, the Socrates of Plato's early dialogues embodies law and attains justice in his way of life and, ironically, of death (*Apology*, *Euthyphro*).⁴⁷ Plato's failure to distinguish clearly be-

⁴⁷ Plato, *The Collected Dialogues of Plato*, ed. Edith Hamilton and Huntington Cairns (Princeton: Princeton University Press, 1963).

tween what is (or becomes) and what is true (or is conceived) in the *eidos* or the form suggests to Nietzsche that “I, Plato, *am* the truth.” Socrates’ impersonation or at least ventriloquization of the laws (in *Crito*) suggests that “I, Socrates, *am*—live and die—the law.”

Plato’s dialogues, according to Nietzsche, transform just law from the skillful practice—whatever else it is also—of a Socrates who denies he knows into a recipe for virtue. In the middle dialogues, the idea of justice becomes the lawlike truth of a Socratic character (*Republic*, *Statesman*). In the late dialogues, a counterfactual exiled Socratic figure—the Athenian Stranger—monologically presents a code of law (*Laws*).

Plato thus becomes for Nietzsche the bridge to Christianity. Christianity too strives to make sense of the problem of Socrates that Plato bequeaths: the difference between the flawed human law of the Athenians, under which Plato’s teacher Socrates suffers in being sentenced to death, and the virtuous law to which Plato would have Socrates subscribe. As in Plato’s *Phaedo*, the Christians of Nietzsche’s second moment find a solution to the problem of undeserved suffering in this world in eternal life, in the metaphysical hope that constitutes the justice of a divine and perfect order. Although justice is temporally unattainable, it is promised in the Christian heaven of the world beyond.

2. The true world, unattainable for the moment, but promised to the wise, the pious, the virtuous man (“to the sinner who repents”).

(Progress of the idea: it grows more refined, more enticing, more incomprehensible—it *becomes a woman*, it becomes Christian . . .) (40)

God gives human beings free choice of the will. Human beings owe God a debt of gratitude for this gift. They fulfill their obligation (paradoxically, some argue) by accepting full responsibility for the right or wrong exercise of their God-given wills. God promises divine justice to “the sinner who repents”—to the sinner who accepts that, given the perfection of God’s order, suffering evil in this world is just punishment; reward will come in the next (Augustine).⁴⁸ *Natural law* names the participation through reason of rational creatures in the eternal order—and still has contemporary adherents.⁴⁹

Kant’s categorical imperative or *moral law* emerges in Nietzsche’s third moment, when the skeptic Kant (as Nietzsche reads him)⁵⁰ forgoes proof

⁴⁸ Augustine, *On Free Choice*, book 1 and book 3, 100.

⁴⁹ Thomas Aquinas, *Treatise on Law: Summa Theologica*, Questions 90–97, in *Political Ideas*.

⁵⁰ Nietzsche takes Kant to be a skeptic as to God (see for instance the third moment, *Twilight of the Idols*, 40, cited in my text below). Kant, however, argues only that proofs as to the existence of God are fallacious; he does not express skepticism about God. See for instance, Immanuel Kant, “The Ideal of Pure Reason,” in *Critique of Pure Reason* (New

as to the existence of God, but nevertheless seeks to ground the good, which he presumes a person of ordinary intelligence must know, in another version of human will.⁵¹ In Nietzsche's words,

3. The true world, unattainable, undemonstrable, cannot be promised, but even when merely thought of a consolation, a duty, an imperative.
(Fundamentally the same old sun, but shining through mist and skepticism; the idea grown sublime, pale, northerly, Königsbergian.) (40)

If the justice of the Christian heaven of the second moment is unattainable, according to Kant, the categorical imperative and the kingdom of ends are nevertheless reasoning man's gift to himself. The very thought or "Idea" of freedom and of the intelligible world, a presupposition that cannot be demonstrated, makes one free. Autonomous persons as ends in themselves give themselves the law as the "ought" that binds them when they *think* of themselves as free or as belonging to both an intelligible world of ends in themselves and to a sensible phenomenal world of appearances and experience.⁵²

With the realization that a metaphysical moral law cannot be known empirically, utilitarianism, in Nietzsche's fourth moment, brings justice and the true world down to earth.

4. The true world—unattainable? Unattained at any rate. And if unattained also *unknown*. Consequently also no consolation, no redemption, no duty: how could we have a duty towards something unknown? (40)

So reasons the empiricist in what Nietzsche calls the "grey morning" of the "first yawnings of reason. Cockcrow of positivism" (40). The principle of utility provides the lawful measure of behavior for human beings, who can rely on their experience of bodily sensations of pleasure and pain to calculate, as rational agents, how to behave. The Benthamite legislator extrapolates from experience to create the human *positive law* that is to improve society and its members in the future.⁵³ At its most extreme, the

York: St. Martin's Press, 1965), 485–572. ("Its [the Supreme Being's] objective reality cannot indeed be proved, but also cannot be disproved, by merely speculative reason" [531].) See also Meyer, "Between Reason and Power," 732 (citing Kant, *Critique of Pure Reason*, 29 [Norman Kemp Smith trans., 1929]): "I have therefore found it necessary to deny *knowledge*, in order to make room for *faith*."

⁵¹ Immanuel Kant, *Groundwork of the Metaphysics of Morals*, trans. H. J. Paton (New York: Harper and Row, 1964), preface, 59.

⁵² Neither a being with perfect reason (god) nor a being without reason (beast) would have need or use of obligation, for different reasons. See Kant, *Groundwork*, idea of freedom (115), makes us free, (121), categorical imperative (chaps. 1 and 2), kingdom of ends (100), persons (96); thought of two worlds (119).

⁵³ Jeremy Bentham, *Introduction to the Principles of Morals and Legislation* (Oxford: Oxford University Press, 1948); J. S. Mill, *Utilitarianism* (New York: Meridian, 1962); Aus-

command of an earthly sovereign backed by threats compels subjects to obey. Strategic rationality replaces reason; law becomes (in Kantian terms) not a categorical but a hypothetical imperative.⁵⁴

Many contemporary legal scholars share the legal realist faith of Nietzsche's fourth moment, the faith that sociological inquiry or empirical knowledge of institutions and practices of society can improve law and that law can improve society.⁵⁵ The improvement of society or the clarification of law motivates philosophers such as Bentham and Hart. Like the early law-and-society movement, these philosophers take laws to be phenomena—and law to be a phenomenon—of a real empirical world of experience. They are motivated by a faith that clearer knowledge can conceivably be used to produce a better future: less suffering or greater understanding perhaps, in a more educated, more civilized, society.

The recognition that these hopes of improvement themselves rest on inherited ideals of bygone cultures marks the unfolding of the fourth moment into the fifth, which questions the pragmatism of the very terms that have been used so far. Older ideals of justice, like the concept of the “true world” (placed in quotation marks in Nietzsche's fifth moment), seem “no longer of any use” (40).

5. The “true world”—an idea no longer of any use, not even a duty any longer—an idea grown useless, superfluous, *consequently* a refuted idea: let us abolish it. (40)

In the context of a proliferation of social demands and identities, the singular appeal of justice breaks down. Once absolute, ideal and universal, meta-

tin, *Province of Jurisprudence Determined*. Mill writes that judgment is by those who are qualified by knowledge of both “higher” and “lower” pleasures, not by those without “nobler feelings,” *Utilitarianism*, 261. See also Bentham, chap. 2.

⁵⁴ “Hypothetical imperatives declare a possible action to be practically necessary as a means to the attainment of something else that one wills (or that one may will)” (Kant, *Groundwork*, 82). This has a contemporary resonance, in that it reveals something that Brian Bix, in his critique of Anthony Sebok on the legal process school, misses. Bix argues that Sebok confuses the issue of the separability thesis when Sebok maintains that “Hart and Sack's claim that law was instrumental is essentially the same as the separability thesis.” But if the separability thesis holds “that questions regarding the existence of law are to be distinguished from questions as to its merit [or morality],” as Bix puts it, then Sebok's reference to the legal process school's understanding of law as instrumental can be read as a claim that law is strategically rational (a hypothetical imperative) and *not* moral. See Anthony Sebok, *Legal Positivism in American Jurisprudence* (Cambridge: Cambridge University Press, 1998); and Brian Bix, “Positively Positivism: Reviewing Legal Positivism in American Jurisprudence,” *Virginia Law Review* 85 (1999): 909.

⁵⁵ Spokespersons to this effect in the law-and-society movement, for instance, include Friedman, “Law and Society Movement”; and Frank Munger, “Inquiry and Activism in Law and Society,” *Law and Society Review* 35:1 (2001): 7.

physical “justice” threatens to become superfluous, subsumed under any number of more relevant socially constructed values. The ability of a single principle or even of the extension of “rational prudence to the system of desires constructed by the impartial spectator” to judge the good of society gives way to the procedural justice-as-fairness of Rawls’s abstracted persons-in-the-original-position, whose principles regulate “the basic structure of society.” The considered convictions of Rawls’s own readers both inform construction of a fair initial position and allow readers to vet the principles of fairness chosen by the parties in the original position. These principles “specify the kinds of social cooperation that can be entered into and the forms of government that can be established.”⁵⁶

The positive human law of the fifth moment now becomes public or *social policy*. It grounds itself in social knowledge, in cost-benefit analyses of facts and values, and in socially constructed (and constructing) procedural systems and institutions of principles, rules, and norms.

Contemporary thought about law resonates with the instability of Nietzsche’s fifth moment, however. The fifth moment inherits the challenge to metaphysical ideals that characterized the empiricist fourth moment. But its skepticism turns also against the very grounds of the challenge to metaphysics insofar as these grounds lay in a science or knowledge that took the objects and value of knowledge as pregiven.

Legal critics today challenge the former ideals of a “science” of “justice” from all sides. Despite their differences, philosophers, social theorists, and legal commentators and activists alike participate in the task. They fixate on the formalism of norms. “Realistic” work now asserts that Hart’s own concept of law was not “sociological” enough. It claims to strip Hart’s conception of any remaining “normative” quality and to “demonstrate that a rigorous legal positivism would actually be grounded in the [pragmatic] social theory of law.”⁵⁷ Realistic sociolegal theory claims to be a “non-political source of knowledge about the nature, function, and effects of legal phenomena. As such it will be the only predominantly descriptive, *non-normative* alternative available among the current schools in legal theory.”⁵⁸

⁵⁶ Rawls, *A Theory of Justice*, 29, 11. Neat categorizations of contemporary work into Nietzsche’s moments are difficult. As Unger, *Critical Legal Studies Movement*, 99–102, points out, despite the obvious differences between utilitarianism and Rawls’s “subtle contractarianism,” both share a notion of “a choosing self whose concerns can be defined in abstraction from the concrete social worlds to which it belongs.” To reach concrete results, both methods “define the wants or intuitions that constitute the primary data of the[ir] method restrictively,” and both “identify the[ir] ideal method . . . with the existing institutional arrangements of democracy and the market.”

⁵⁷ Tamanaha, *Realistic Socio-Legal Theory*, 129–52. Compare Brian Bix, “Conceptual Jurisprudence and Socio-Legal Studies,” *Rutgers Law Journal* 32 (2000): 227.

⁵⁸ Tamanaha, *Realistic Socio-Legal Theory*, 8.

Philosophical work too severs the remaining connections between formal law and justice. As long as the possibility of a society of law without justice exists, Jules Coleman writes, legal positivism correctly denies, conceptually speaking, that there is a necessary connection between law and justice.⁵⁹ Frederick Schauer (see chapter 5) sets aside debates about both the normative desirability and the conceptual validity of legal positivism. He limits his descriptive account of law to a presumptive positivism in which law is one social system of rules among others.⁶⁰

The turn against metaphysics is not limited to philosophical legal positivism and positivist sociology. Joined by critical legal scholars, feminist jurisprudes, and critical race and postcolonial theorists, the soft social sciences also imply that what was formerly known as “justice” is a discredited carryover from an oppressive past. The turn to the study of everyday life and legal consciousness challenges the usefulness of universals to diverse or flourishing life today.⁶¹

What now? The free spirits of Nietzsche’s fifth moment *call for* the abolition of justice and the true world; in the sixth moment, justice and the true world *have been* abolished. For Nietzsche and his free spirits, this is cause for celebration, the end of the error of reason. With Zarathustra, Nietzsche hails a new world of becoming, in which metaphysical truth no longer holds sway.

6. We have abolished the true world: what world is left? The apparent world perhaps. . . . But no! *with the true world we have also abolished the apparent world!* (41)

The end of the nihilistic (in the sense of its negative judgment as to the world) metaphysical tradition, for Nietzsche, is an overcoming of nihilism. Insofar as reason invented the true world and produced distinctions between truth and appearance, the apparent world is abolished with the true world. Distinctions between truth and appearance, ideal and actual, ought and is, collapse. A revaluation of values accompanies the entrance of Zarathustra, who serves as the bridge to a new nonhuman species that has no human need for either the solace or judgments of metaphysics. *Amor fati*, or love of fate, for Nietzsche, means that one is neither ac-

⁵⁹ Jules Coleman, “Negative and Positive Positivism,” in *Markets, Morals and the Law* (Cambridge: Cambridge University Press, 1988).

⁶⁰ Schauer, *Playing by the Rules*.

⁶¹ In addition to work cited elsewhere in this chapter and in chapter 2, see for instance, Pheng Cheah, “The Law of/as Rape: Poststructuralism and the Framing of the Legal Text,” in *Legal Education and Legal Knowledge*, ed. Ian Duncanson (Bundoora, Victoria, Australia: La Trobe University Press, 1991–92), 117–29 (situating the legal discourse of rape within the social text of patriarchy); Vicki Schultz, “The Sanitized Workplace,” *Yale Law Journal* 112 (2003): 2061.

countable for oneself nor determined from outside of oneself. One is part of a whole, a piece of fate.⁶²

But Zarathustra's moment does not happen until the modern world has perished. At the beginning of the twenty-first century, the question of the future of the just law—and of the modern world—remains. It confronts us as the chasm between the fifth and sixth moments, in which we have already called for the abolition of metaphysical justice but a Zarathustrian revaluation has yet to come. It is the issue of what happens at the “end” of our tradition of jurisprudence.

Can calls for the abolition of metaphysical justice from law provide a bridge to a glorious new law and society in which former unjust ideals of “justice” give way? New values proliferate. Some do so in the name of reason, suggesting returns to earlier moments. Some valorize unreason; others emerge from unidentifiable places.⁶³ A few give us pause to think. Might the deviationist doctrines and solidarity rights of Roberto Unger's perpetually transformative “superliberalism,” for instance, fulfill the promise of modern society to be “made and not given”? Could social imagination remove the obstacles to justice by identifying justice with society's own creative powers?⁶⁴ Can empire, the “new global form of sovereignty” identified by Hardt and Negri that “creates the very world it inhabits,” be successfully resisted by the “creative forces” that also sustain it?⁶⁵ Can society constitute itself by determining its own law? Would unimpeded and infinite social self-constitution represent an overcoming of the nihilistic judgments of a former metaphysics?

And if so, would such ostensible overcoming of metaphysics—the erasure of the judgmental divide between truth and appearance, the disappearance of the split between objective truth and subjective experience—be cause for celebration? Would unceasing recognition of the successful untruth of truth and of the abysmal ground of justice become our heaviest burden or our greatest liberation? Nietzsche himself asks this.

Heidegger goes further. The very posing of the nihilism of metaphysics as a problem we must solve, he writes, points not to its overcoming, but to the threat of its completion. The arrogance of Nietzschean will to power to determine experience is matched only by that of the society

⁶² Nietzsche, *Twilight of the Idols*, “The Four Great Errors,” sec. 8.

⁶³ See Mariana Valverde, *Law's Dream of a Common Knowledge* (Princeton: Princeton University Press, 2003), arguing that the popular and hybrid knowledges on which law draws are not properly grasped as either science or counterscience.

⁶⁴ Unger, *Critical Legal Studies Movement*, chap. 2.

⁶⁵ Michael Hardt and Tony Negri, *Empire* (Cambridge: Harvard University Press, 2001), xv.

of sociological positivism, which arrogates to itself the voice of law and justice.⁶⁶

For Heidegger, truth is not a variation on a theme of higher worlds that judge this one. Metaphysics is not a choice between human or world as controlling subject. Rather, truth is an opening or clearing in which human and world—only today conceived strictly on the order of subject and object—give rise to one another. Reason has indeed tried and failed to secure a true world of being, Heidegger claims. But the will to power in the name of which Nietzsche judges life and truth, according to Heidegger, is even more extreme. Will to power, he argues, forgets the impossibility of mastering being and ultimately recognizes no limit to its own powers to determine (and to having determined) the world. With Nietzsche, according to Heidegger, the nihilistic quest to secure truth again manifests itself, this time in the absolute mastery asserted in the will to power's inability to let the problem of nihilism be.⁶⁷

Could the new sociological law be another manifestation—like the just law of earlier moments—of continuing human attachments to values and judgments antithetical not only to flourishing life but to being? Could social policy become a social mastery grown forgetful of all value that is not of society's own making? Could the law of sociolegal positivism be absolute will to power, a refusal to accept any bounds on its power that come from outside of itself?

To wonder about law this way is to wonder about the limits and possibilities of sociolegal positivism and of the skepticism about justice that characterizes the current age. Justice no longer instantiates itself in the virtuous way of life of a Socrates, nor in the natural law of Christianity, nor even in the moral law of Kant, nor simply in the utility of social policy and the norms of society. It lies in silences of positive law.

The chapters that follow constitute neither apologia nor condemnation of existing positive law and current scholarship. They suggest that modern law is silent about justice in a new way. They seek to talk about contemporary law and justice in ways other than those of social and sociological evaluation. They aim neither to justify nor to dismiss particular laws or legal systems, but to think of law on the (ungrounded) ground of what it (already) is. To the extent that readers feel that the chapters more directly on law (3, 4, 7) minimize issues of power, readers are reminded that

⁶⁶ For arrogation of voice in another (yet related) context, see Stanley Cavell, *A Pitch of Philosophy: Autobiographical Exercises* (Cambridge: Harvard University Press, 1994).

⁶⁷ Martin Heidegger, *Nietzsche*, vol. 3, *Will to Power*, trans. Joan Stambaugh et al. (New York: Harper and Row, 1987).

part of the point of the other chapters (2, 5, 6) is to show how completely embedded in power is current thinking about law. To the extent that readers feel that the chapters on sociolegal and philosophical texts are overly pessimistic, they are reminded that the point has been precisely to speak of what that work—as sophisticated articulations of our modern ways of understanding law—overlooks or is strangely (if not always literally) silent about: justice. Finding what has been overlooked may offer new—paradoxically preexisting—possibilities for thought. The justice that many contemporary legal texts overlook may offer possibilities not only of thought, but also of law.