**Chapter 1**

**Introduction: Relationships between Law and Morality**

It is not implausible to think that the project of conceptual jurisprudence was partly motivated by disputes concerning the conceptual relationships between law and morality. Jeremy Bentham’s and John Austin’s legal positivism was developed and articulated partly in response to William Blackstone’s view that law is essentially connected with morality in the following way: it is a conceptually necessary condition for a norm to count as law that its content not conflict with objective standards of justice.[[1]](#footnote-1) For their part, Bentham and Austin denied this claim, holding that the content of the law is fully determined by the commands of a sovereign willing and able to back up those commands with the threat of a sanction.[[2]](#footnote-2)

 In this Chapter, I distinguish three different types of inquiry about law in order to explicate the conceptual project with which this book is concerned. Then I articulate the two different conceptual views about morality and the nature of law that comprise the focus of this book. First, I explain positivist and anti-positivist views with respect to the question of whether it is a conceptual truth that the criteria of legal validity include moral constraints on the content of law. Second, I explain the dispute between inclusive and exclusive positivists with respect to whether it is conceptually possible for a legal system to have criteria of validity that include moral principles constraining the content of law or whether such criteria are conceptually limited to source-based considerations.

Finally, as the intellectual legitimacy of the project of conceptual jurisprudence has recently come under fire for not having practical consequences or being “interesting” and hence as not being worth doing, I say something brief in defense of the project.[[3]](#footnote-3) My defense, such as it is, will be somewhat modest.[[4]](#footnote-4) To begin, I will not dispute the claim that right answers to conceptual questions lack significant practical consequences. Further, I will not even attempt to give the reader a reason to think that she should find it interesting. I am no more able to do that than I am to explain why someone should enjoy Brussels sprouts; you either enjoy them or you do not. As for me, it is enough to justify spending the moments of *my* life on such theoretical pursuits that *I* find the pursuit interesting, intellectually challenging, and fulfilling.

What I will do is argue that the claim that conceptual jurisprudence should not be done is either unclear or patently false. On the one hand, if the claim that conceptual jurisprudence should not be done is a moral claim, it is a silly one. From the standpoint of morality – and this should be obvious – there are plenty of things any legal philosopher or academic lawyer can do that would make the world a much better place than writing articles for academic journals; whatever difference there is between the moral value of their respective theoretical contributions doesn’t amount to much of genuine significance. On the other hand, if it is not a moral claim, then it is just not clear exactly what either the claim or the arguments offered in support of it amount to. It should be clear from the influential achievements of leading legal theorists that doing conceptual jurisprudence can lead to fame and fortune and thus can conduce greatly to prudential interests.

1. **Three Types of Inquiry about Law**

A frequent area of interest to those who theorize about law concerns the various relationships between law and morality. To understand these relationships, it would be helpful to distinguish three different kinds of inquiry concerning morality and law. The first is *empirical* in the sense that it is concerned with identifying certain contingent relationships in the world that have to do with law and morality. One can ask, for example, whether officials of a particular legal system take into account what they believe are requirements of morality in making decisions about how to create, adjudicate, and enforce the laws in their jurisdiction. As this is a question concerning the actual motivations of officials, addressing it requires going out into the world and observing what officials say and how they behave in discharging their functions as officials.

 The second kind of inquiry is *normative* in the sense that it is concerned with determining, as a matter of critical or conventional political morality, how officials should behave in discharging their duties or what content the law should have. As a matter of political morality, laws should be just, and legal systems should be legitimate. Accordingly, normative inquiry is concerned with, among other issues, the issue of whether an existing law or legal system satisfies the relevant demands of morality. One can ask, for example, whether the death penalty is ever morally legitimate.

The third kind of inquiry is *conceptual* in the sense that it seeks to explicate the content of the relevant concept and hence to explicate the nature of the thing picked out by the concept. Conceptual claims are concerned with identifying the criteria that something must satisfy to count as being picked out by the relevant concept-term. For example, the term “bachelor” is generally thought to apply only to things that are (1) unmarried; (2) human; (3) adult; and (4) male. Each of these properties is a conceptually necessary property for being a bachelor in the following sense: if *p* is a conceptually necessary property for being an *A*, then it is conceptually impossible to be an *A* without instantiating *p*. One could not, for example, be a bachelor if one is married.[[5]](#footnote-5)

The traditional methodology for conceptual inquiry is purely descriptive. Thus conceived, the concern is to attempt to identify the content of the linguistic and other social practices regarding the use of the relevant concept-term in order to identify which properties a thing *must* have to fall within the reference class of the concept-term. That is, the object is to identify those properties that are necessary for something to count as a thing of the relevant kind. These properties constitute the nature of the thing that is picked out by the relevant concept.

As is evident from talk of necessary properties, the traditional methodology trades in the mathematically rigorous language of modal logic, utilizing the modalities of necessity and possibility, along with possible-worlds talk. For example, the conceptual truth that bachelors are unmarried entails that there are no conceptually possible worlds in which there is someone who is bothmarried and a bachelor. This latter claim is logically equivalent to the claim that in every conceptually possible world *x* is a bachelor only if *x* is unmarried. Accordingly, conceptual inquiry with respect to the nature of law will be concerned with determining what is true of law in every conceptually possible world. Since the claim that it is conceptually possible that law has *p* is logically equivalent to the claim that it is not conceptually necessary that law has not-*p* (or lacks *p*), claims about what is (or is not) conceptually possible of law are equivalent toclaims concerning what is not (or is) conceptually necessary about law.

It is important to note that modal claims about the nature of a thing presuppose a particular conceptual framework that is fully grounded in contingent linguistic practices. Such claims, then, cannot explicate the nature of the thing independent of these linguistic practices. Conceptual claims, for my purposes, should thus be understood as being necessarily true only relative to a particular conceptual framework that is grounded in the meanings of relevant concept-words, which can change over time. If, for example, the meaning of the term “law” changes over time to refer to some things that are not norms, it will no longer be a conceptually necessary truth that laws are norms – although it will arguably remain necessarily true that the things to which “law” formerly referred are norms. Accordingly, insofar as there is an undeniably empirical element to conceptual analysis, conceptual claims should be thought of as, so to speak, conditionally necessary – and not as “absolutely necessary.” [[6]](#footnote-6)

It is worth noting, as the character of conceptual jurisprudence is frequently misunderstood these days, that the account of it given above harmonizes with the notion of *a priori* justification or knowledge, properly understood. To say that a proposition can be justified or known *a priori* does not entail that it can be justified or known independently of *all* empirical experience; even knowledge that one exists requires that one have an empirical experience of some kind. To say that a proposition can be justified or known *a priori* is to say that it can be justified or known independently of any empirical experience that is *needed to understand the meaning of the relevant terms*. All propositional knowledge is mediated through a language that one must learn – including claims about the nature of law. Accordingly, on the assumption that conceptual jurisprudence is an *a priori* pursuit, its foundation in empirical inquiry that is focused on identifying the contingent social practices which determine the lexical meanings of words harmonizes with the character of *a priori* knowledge. Likewise, the claim that conceptual claims are conditionally necessary in the sense of being dependent on contingent linguistic practices harmonizes with the idea that they are *a priori* in the sense that they can be known or justified independently of any empirical experience not needed to understand the meaning of the relevant terms.

It is sometimes thought that conceptual analysis, traditionally conceived, involves little more than providing a dictionary definition.[[7]](#footnote-7) This is a mistake. Conceptual analysis begins from core intuitions about how to use a word which are conditioned by the relevant dictionary definition, but it goes much deeper than lexicography in that it attempts to identify and theorize the deeper philosophical commitments these intuitions imply or presuppose. While this might or might not be a distinctively philosophical enterprise, it goes well beyond the empirical task of merely identifying shared intuitions or core features of our linguistic practices, which is the job of lexicographers.

To see this, it would be helpful to compare what lexicographers have to say about the word “law” with what Hart has to say by way of explication of the concept of law. Oxford American Dictionary defines “law” as follows:

law | noun **1** (often **the law**) the system of rules that a particular country or community recognizes as regulating the actions of its members and may enforce by the imposition of penalties: *they were taken to court for* ***breaking the law*** | *a license is required* ***by law*** | [as adj.] *law enforcement.*

• an individual rule as part of such a system: *an initiative to tighten up the laws on pornography.*

• such systems as a subject of study or as the basis of the legal profession: *he was still practicing law* | [as adj.] *a law firm….*

• a thing regarded as having the binding force or effect of a formal system of rules: *what he said was law.*

By way of comparison, notice how much of what Hart’s theory addresses is omitted by the lexical definition. First, there is no mention here of many pieces central to Hart’s analysis: there is no mention of social practices; the rule of recognition; secondary and primary rules; legal validity; among many other omitted features of law of theoretical importance. Second, the lexicographer’s job is accomplished in a few lines whereas Hart took more than 200 pages to give an analysis of the concept of law in the aptly titled The Concept of Law. If Hart starts from the shared views about the meaning of “law,” it should be clear that he is also doing something radically different from what lexicographers are doing – and going much deeper into what law ultimately is.

Although this essay is a piece of conceptual analysis that employs the traditional descriptive methodology described briefly above, nothing in it should be construed as disparaging the other types of inquiry concerning law or other methodological principles that have been deployed in the service of conceptual analysis.[[8]](#footnote-8) The most that I would say by way of justifying the adoption of the traditional methodology is that it is the one that has been most frequently employed by conceptual jurisprudents – and, for that matter, is the one that was employed by Bentham, Austin, and Hart. Given that I want to engage as many theorists in conceptual jurisprudence as possible, the most appropriate methodology to employ is the traditional one.

As the concern of this book is to explicate certain relationships between the concepts of law and morality, I begin by describing in the next sections the two positions I engage in this book: (1) the position that it is a conceptual truth about law that the criteria of validity include moral constraints on the content of law (i.e. natural law theory); and (2) the position that it is a conceptual truth that the criteria of validity are exhausted by source-based criteria (i.e. exclusive positivism) and its negation, namely that it is conceptually possible for a rule of recognition to incorporate moral criteria of validity (i.e. inclusive positivism).

2. **Natural Law Theories**

By way of introduction, it would be helpful to partition conceptual theories of law into two mutually exclusive and jointly exhaustive categories: positivist and anti-positivist theories (or natural law theories).[[9]](#footnote-9) Positivists hold the Separability Thesis, according to which it is not a conceptually necessary feature of law that the criteria of validity include moral principles constraining the content of law. The Separability Thesis asserts, then, that there is at least one conceptually possible world in which there exists a legal system without moral criteria of validity.

Accordingly, positivism implies that the content of law is an artifact that is wholly manufactured by human beings. Both the norms that regulate the behavior of citizens and those that regulate the behavior of officials acting in their official capacities as legislators, judges, and executives are social artifacts in this sense.[[10]](#footnote-10) For example, the criteria of validity in the U.S. are partly defined by the provisions of the U.S. Constitution that stipulate that a norm is a valid federal law if and only if it is passed in accordance with the procedural requirements defined by the Articles of the Constitution and is consistent with the substantive protections of rights articulated in the Amendments.[[11]](#footnote-11)

 In contrast, anti-positivist theories are traditionally interpreted to deny that the content of law is wholly manufactured by human beings. Thus construed, natural law theories hold that it is a conceptual truth that the criteria of validity include conformity to some set of moral principles.[[12]](#footnote-12) On this view, it is a conceptually necessary condition for any norm to count as a law that it conforms to some set of objective moral standards. Accordingly, the social processes through which people manufacture law do not fully determine the content of the validity criteria; no matter what people do by way of making or adjudicating law, there will nonetheless be moral standards that constrain what counts as law in a legal system. The content of law, according to this view, is mostly – but not fully – manufactured by what human beings do.

The strongest forms of natural law theory are traditionally interpreted as asserting the stronger position that it is a conceptually *impossible* for there to be an unjust law. As the claim has famously been put, “an unjust law is no law at all” (*lex iniusta non est lex*). While natural law theory goes back at least as far as Cicero, the most influential early advocate of this view is Aquinas, who appears to endorse the position as follows:

As Augustine says, “that which is not just seems to be no law at all”; wherefore the force of a law depends on the extent of its justice. Now, in human affairs a thing is said to be just from being right according to the rule of reason. But the first rule of reason is the law of nature, as is clear from what has been stated above. Consequently, every human law has just so much of the nature of law is it is derived from the law of nature. But if, in any point, it deflects from the law of nature, it is no longer a law but a perversion of law.[[13]](#footnote-13)

Aquinas’s view is subsequently picked up by Blackstone, who expresses it in language quite similar to Aquinas’s:

Thislaw of nature, being coeval with mankind and dicta­ted by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.[[14]](#footnote-14)

Both theorists are clear in asserting some kind of conceptual relationship between the conditions that determine what counts as law and the “natural” (i.e. objective) moral law.

While the traditional natural law view has been largely construed to consist in the claim that it is conceptually impossible for there to be an unjust law, the passages above are somewhat ambiguous. For example, Blackstone’s references to validity and authority are plausibly construed as referring to *moral* validity and *moral* authority. The idea here would be that an unjust norm posited as law would not generate a moral obligation to obey and, indeed, might be such that morality obligates us to disobey it. On this interpretation, the claim would be that an unjust posited norm is not *morally* binding, and not that an unjust posited norm is not *legally* binding. Whatever else he might be doing, Blackstone is clearly concerned with determining what morality requires of us and what weight the claims of morality have relative to other normative claims.

 As it turns out, there are plausible reasons to think that Blackstone is making only claims about moral validity and moral authority. The discussion that precedes the passage quoted above is unambiguously concerned with what we are morally obligated to do, and not with what we are legally obligated to do. Consider, for example, the following statement, which precedes the last quoted remark of Blackstone’s by four paragraphs:

Man, considered as a creature, must necessarily be subject to the laws of his creator, for he is entirely a dependent being. A being, independent of any other, has no rule to pursue, but such as he prescribes to himself; but a state of dependence will in­evitably oblige the inferior to take the will of him, on whom, he depends, as the rule of his conduct: not indeed in every particular, but in all those points wherein his dependence consists. This principle therefore has more or less extent and effect, in proportion as the superiority of the one and the dependence of the other is greater or less, absolute or limited. And consequently as man depends absolutely upon his maker for everything, it is necessary that he should in all points conform to his maker's will.[[15]](#footnote-15)

The deontic terms and phrases used in this passage (such as “must necessarily be subject,” “obliged,” and “should in all points conform”) are unquestionably moral in character. It seems clear that Blackstone is not concerned with what is prudentially or legally normative – although one certainly has prudential reasons to obey God’s will if eternal torment is the consequence of disobedience.

 Blackstone does not begin to discuss “human law” for several paragraphs after the last two quotes:

Upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, *no human laws should be suffered to contradict these*. There is, it is true, a great number of indifferent points, in which both the divine law and the natural leave a man at his own liberty; but which are found necessary for the benefit of society to be restrained within certain limits. And herein it is that human laws have their greatest force and efficacy for, with regard to such points as are not indifferent, human laws are only declaratory of, and act in subordination to, the former. To instance in the case of murder: this is expressly forbidden by the divine, and demonstrably by the natural law; and from these prohibitions arises the true unlawfulness of this crime. Those human laws, that annex a punishment to it, do not at all increase its moral guilt, or super-add any fresh obligation *in foro conscientiae* to abstain from its perpetration. Nay, *if any human law should allow or enjoin us to commit it, we are bound to transgress that human law, or else we must offend both the natural and the divine.* *But with re­gard to matters that are in themselves indifferent, and are not com­manded or forbidden by those superior laws; such, for instance, as exporting of wool into foreign countries; here the inferior legislature has scope and opportunity to interpose, and to make that action unlawful which before was not so.*[[16]](#footnote-16)

The italicized phrases suggest that Blackstone is concerned with what is morally binding, rather than with what is legally binding in virtue of being human-made law. The claim is that what we are obligated to do all things considered is what morality obligates us to do; if a legal and moral obligation come into conflict, we must do what the moral obligation requires us to do.

 Accordingly, the traditional interpretation of Blackstone as claiming that an unjust norm cannot be a positive law seems implausible. The most reasonable interpretation of Blackstone’s view construes him as being concerned with what is morally (or, as the matter is sometimes put, “really”) binding and authoritative – and not with the project of conceptual jurisprudence as defined by the work of Austin and Bentham. On this construction, the natural law view asserts only that it is in the nature of law that it should be just; an unjust norm might be legally valid, but it is defective *qua* law insofar as it fails to exhibit the justice to which it aspires.

 Indeed, Brian Bix has persuasively argued for this interpretation of classical natural law theory and explicates it elegantly as follows:

A more reasonable interpretation of statements like “an unjust law is no law at all” is that unjust laws are not laws “in the fullest sense.” As we might say of some professional, who had the necessary degrees and credentials, but seemed nonetheless to lack the necessary ability or judgment: “she’s no lawyer” or “he’s no doctor.” This only indicates that we do not think that the title in this case carries with it all the laudatory implications that it usually carries. It may well be that for our purposes, knowing that this doctor is not competent is the most important fact; however, the fact that he does have the required certification is not thereby negated or made entirely irrelevant. Similarly, to say that unjust laws are “not really laws” may only be to point out that they do not carry the same moral force or offer the same reasons for action that come from laws consistent with “higher law.”[[17]](#footnote-17)

Bix convincingly argues that Aquinas held no stronger view about the nature of positive law than this and that this view is the most “probable interpretation for nearly all proponents of the position.”[[18]](#footnote-18)

 Although it is difficult to make sense of the fact that both positivists and natural law theorists have taken themselves to hold inconsistent views on the nature of law if they are not really inconsistent, prominent contemporary natural law theorists have denied the “unjust laws are no laws at all” formulation of their position. For example, John Finnis, the most influential contemporary natural law theorist, accepts the Separability Thesis and hence denies the view that it is conceptually impossible for there to be an unjust legal norm – indeed, on exactly the grounds that a positivist would deny that view – and rejects the attribution of that view to Aquinas. As he puts the matter:

‘There is no necessary or conceptual connection between positive law and morality.’ True, for there are immoral positive laws; ‘there are two broad categories (with many sub-classes) of unjust laws…’. And a conceptual distinction or disconnection is effortlessly established by the move made in the *Summa*, of taking human positive law as a subject for consideration in its own right (and its own name), a topic readily identifiable and identified *prior* to any question about its relation to morality…. ‘The identification of the existence and content of law does not require resort to any moral argument.’ True, for how else could one identify wicked laws such as Israel’s prophet denounced in words so often quoted by Aquinas: ‘Woe to those who make unfair laws [*leges iniquas*] who draw up instruments imposing injustice [*iniustitiam*], and who give judgments oppressing the poor’?[[19]](#footnote-19)

Insofar as there are wicked laws, on Finnis’s view, it clearly follows that it is conceptually possible for a legal system to exist with criteria of validity that do not include moral norms of justice.

Notice that if Bix is correct that the natural law position should be interpreted as meaning only that an unjust law is not law *in the fullest sense*, then there is no inconsistency between natural law theory and positivism. Positivism does not so much as even purport to explain what it means to be law in the fullest sense of the word “law.” Positivism is concerned only to explicate the existence conditions for laws and legal systems, as those terms are used in the discourses of lawyers, officials, and other legal practitioners.

Even so, the fact that this confusion about the natural law view is so widespread and persistent – indeed, it is perpetuated in part by the statements of natural law theorists suggesting they are opposed to legal positivism – indicates a need to consider the view that it is a conceptual truth that an unjust norm cannot be law. A more rigorous examination and evaluation of this view will be undertaken in Chapter 2.

 For now, it suffices to note that one can hold that it is a conceptual truth that the criteria of validity include moral norms without taking the position that it is a conceptual truth that there are no unjust laws. To see this, it would be helpful to distinguish two theses concerning a conceptual relationship between law and morality:

**NL1**: It is a conceptual truth that the criteria of validity include at least some moral norms; and

**NL2**: It is a conceptual truth that the criteria of validity include all the norms of justice such that an unjust norm cannot be valid.

NL2 logically implies NL1. Given that the norms of justice are also norms of morality, if it is a conceptual truth that the criteria of validity include all the norms of justice, then it is also a conceptual truth that the criteria of validity include at least some moral norms.

But NL1 does not logically imply NL2. The claim that the criteria of validity include *some* moral norms does not imply that they contain all the norms of justice. Indeed, NL1 does not clearly imply that the criteria of legal validity include any norms of justice; if, as seems plausible, there are some norms of political morality that are not norms of justice, then NL1 is consistent with the criteria of validity including those norms – without including any norms of justice.

Consider, for example, the norms requiring democratic elections. It is not preposterous to think that the norms requiring procedural democracy are not properly characterized as norms of “justice.” If the notion of justice is properly construed as having to do with ensuring that one gets what one deserves economically and otherwise, then norms of democracy are not norms of justice insofar as it is not true that people “deserve” to elect the officials that govern them.[[20]](#footnote-20) It might be true that people have a moral right to elect their leaders, but having a moral right to some *X* is not logically equivalent to morally deserving *X*. I might have a moral right to inherit someone’s estate, for instance, but it seems false to claim, other things being equal, that I deserve that person’s estate.[[21]](#footnote-21) Accordingly, NL1 does not entail NL2.

Further, it is worth noting that NL1 expresses the negation of the Separability Thesis and, further, that NL1 and the Separability Thesis are both mutually exclusive and jointly exhaustive. Although NL2 and the Separability Thesis are inconsistent and hence mutually exclusive, they are not jointly exhaustive since NL2 leaves open the possibility of a legal system with moral criteria of validity that are not norms of justice. Thus, while the Separability Thesis and NL1 partition the logical space of relevant positions into mutually exclusive and jointly exhaustive categories, the Separability Thesis and NL2 do not.

Accordingly, holding NL2, the traditional natural law theory, is not the only way to hold NL1. Ronald Dworkin, for example, holds NL1 without holding NL2:

We need not deny that the Nazi system was an example of law … because there is an available sense in which it plainly was law. But we have no difficulty in understanding someone who does say that Nazi law was not really law, or was law in a degenerate sense, or was less than fully law. For he is not then using ‘law’ in that sense; he is not making that sort of preinterpretive judgment but a skeptical interpretive judgment that Nazi law lacked features crucial to flourishing legal systems whose rules and procedures do justify coercion.[[22]](#footnote-22)

As Dworkin describes his view, the claim that the Nazis did not have law because their norms were too wicked to count as law is false if it makes a “preinterpretive judgment,” which is the type of judgment he takes to be expressed by the Separability Thesis and the other core theses of positivism. It seems clear that Dworkin rejects NL2.

 Further, it also seems clear that Dworkin holds NL1. As Dworkin describes his interpretivist theory of law, it is “the theory that the law of a community consists not simply in the discrete statutes and rules that its officials enact but in the general principles of justice and fairness that these statutes and rules, taken together, presuppose by way of implicit justification.”[[23]](#footnote-23) Similarly, Dworkin states that “[t]he law of a community on this account is the scheme of rights and responsibilities that meet that complex standard: they license coercion because they flow from past decisions of the right sort … [and] are therefore ‘legal’ rights and responsibilities” (*LE* 93). His view, thus, seems to be that it is a conceptual truth that the criteria of validity includes those moral principles that morally justify the existing institutional history of the legal system – which would, if correct, entail that he accepts NL1.[[24]](#footnote-24)

Chapter 2 considers the plausibility of anti-positivist accounts of the relationship between law and morality, arguing that both the traditional interpretation of the natural law view, as I have described it, and Dworkin’s interpretivism are best interpreted as explicating a concept of law that has evaluative content and is hence distinct from the purely descriptive concept that positivism takes itself to explicate. Although there is reason to think that many natural law theorists have been misinterpreted as rejecting the Separability Thesis and holding NL2, I nonetheless evaluate this view. The rationale is not that I necessarily believe that any particular theorist holds that view. Rather, the rationale is that, since so many theorists and students of conceptual jurisprudence have historically interpreted the natural law view as denying the Separability Thesis, the view should be evaluated in any project that explores the conceptual relationships between morality and the criteria of validity.

3. **Inclusive Legal Positivism**

As will be discussed in more detail in Chapter 3, positivist theories are grounded in three core theses: The Separability Thesis, the Artifact Thesis, and the Conventionality Thesis. As discussed above, the Separability Thesis denies that it is a conceptual truth that the criteria of validity include moral norms of any kind and hence denies both NL1 and NL2 above. According to the Separability Thesis, then, there is a conceptually possible legal system in which the criteria of validity do not include moral principles constraining the content of law.

According to the Artifact Thesis, law is, by nature, an artifact in the sense that the existence and content of every norm that counts as law is wholly fixed by certain social activities. This entails that both the second-order norms that empower and constrain officials in their lawmaking and adjudicative functions thereby defining the criteria of validity and the first-order norms that are legally valid in any legal system are wholly invented or manufactured by human beings. This entails, in opposition to classical natural law theory, that there is no necessary legal content that is determined by something other than the activities of officials performing their function, such as objective morality. Law is thus a social artifact, according to the Artifact Thesis, all the way down.

As briefly discussed above, it might seem reasonable to think that the natural law positions defined by NL1 and NL2 entail that the content of the criteria of validity are not fully artifactual. Since the content of a non-artifactual objective morality necessarily constrains what content can successfully be promulgated as law, the content of law is not wholly manufactured and hence not fully artifactual. No matter what officials do with their lawmaking and adjudicative practices, they cannot succeed in making law that is inconsistent with the relevant moral norms.

Nevertheless, one can plausibly argue that the existence of conceptually necessary moral constraints on the content of law is consistent with law’s being a social artifact all the way down. One might think that the fact that there are natural (moral) limits on the content of what counts as law is no more a problem for the view that law is an artifact than is the fact that there are natural (material) limits on what can count as an automobile is for the view that an automobile is an artifact; an object without wheels *cannot*, given the function of an automobile, perform the function of an automobile because things without wheels cannot transport people from one place to another on a highway. On this view, there is no inconsistency between traditional natural law views and the claim that law is a social artifact all the way down.

But whether or not such reasoning is ultimately successful, this much is clear: one can reasonably doubt, as I do, that law is a social artifact all the way down on the traditional natural law view. Given that there is no doubt about whether law is a social artifact all the way down on a positivist view, it is clear that the Social Fact Thesis, as positivists intend that thesis, implies that law is a social artifact all the way down.[[25]](#footnote-25) On a positivist view, then, there is simply nothing about law that is not artifactual in character.

Finally, according to the Conventionality Thesis, it is a conceptual truth that the criteria of validity are determined by a rule of recognition that is conventional in the sense that the norms of the rule are fully determined by the convergent practices and attitudes of officials with respect to how they should discharge their duties and how they can exercise their powers in the normative system their activities help to create and sustain. The content of a social convention that governs members of a social group is determined by the fact that people in the group converge (1) in accepting that content as governing their behavior and (2) in complying with that content. Thus, the Conventionality Thesis expresses Hart’s view that the rule of recognition is a conventional rule of the system insofar as the officials take the internal point of view towards it (thereby satisfying condition (1) above) and generally conform their lawmaking and adjudicative acts to its requirements (thereby satisfying condition (2) above).

The Conventionality Thesis, as should be evident, is closely related to both the Separability Thesis and Social Fact Thesis. Insofar as the content of the rule of recognition and of the criteria of validity it defines are fully fixed or determined by a convention among officials, the rule of recognition is itself a social artifact manufactured by certain social activities; hence the existence and content of the rule of recognition is fully explained by social facts. Further, insofar as the content of the rule and the criteria of validity are fully fixed or determined by a convention, it seems to follow that there are no conceptually necessary moral criteria of validity.

These theses, however, are agnostic with respect to the question of whether it is conceptually possible for a legal system to have moral criteria of validity. The Separability Thesis, for example, asserts only that it is conceptually possible for a legal system to have criteria of validity that do *not* include moral constraints on the content of law; that claim implies nothing with respect to whether it is conceptually possible for a legal system to have criteria of validity that include moral constraints on the content of law. Similarly, the claims that law is a social artifact and that the criteria of validity are conventional in character do not seem to imply anything about whether it is conceptually possible for a legal system to have moral criteria of validity.

Two positions have emerged on this issue. According to inclusive positivism, it is conceptually possible for a legal system to incorporate moral criteria of validity; that is to say, inclusive positivism implies that there exists a conceptually possible legal system with moral criteria of validity. In contrast, exclusive positivism denies that there are conceptually possible legal systems with moral criteria of validity. According to exclusive positivism, it is a conceptual truth that the criteria of validity are exhausted by source-based criteria of validity that have to do with the manner in which a norm is promulgated as law. That is to say, exclusive positivists hold that the criteria of legal validity in every conceptually possible legal system are exhausted by criteria having to do with the source of a norm, rather than with its content.

As it is doubtful whether any major legal theorist (with the exception of Dworkin) holds NL1, most of the book will be devoted to the dispute between inclusive and exclusive positivism. Chapter 3 begins with a more detailed explication of the core theses of positivism and of the characterizing theses of inclusive and exclusive positivism. It then goes on to provide a historical overview of the debate that led to Hart’s ostensible acceptance of inclusive positivism and a critical discussion of some of the early objections to it. In particular, Chapter 3 will describe the debate during the late 60s and 70s between Dworkin[[26]](#footnote-26) and Hart, as well as explain how Dworkin’s perceptive criticisms of Hart led to the development of Dworkin’s own positive theory of law and to a more precise specification of the distinguishing thesis of inclusive positivism.

The next chapters of the book are concerned with evaluating the most influential arguments against inclusive positivism. Chapters 4, 5, and 6 address Joseph Raz’s argument that the nature of law entails a claim of legitimate authority that is incompatible with the conceptual possibility of moral criteria of validity.[[27]](#footnote-27) Chapter 4 develops Raz’s challenging and nuanced analysis of the nature of authority and his argument that it is incompatible with moral criteria of validity.

Chapter 5 explains and evaluates Raz’s claim that it is part of the nature of law that it claims legitimate authority. I consider a number of different interpretations of this view and challenge each. To begin, for example, I question how an institutional abstract object like a legal system could make claims.[[28]](#footnote-28) The difficulty is analogous to the metaphysical difficulties associated with the idea that the framers of the Constitution have something that would count as a collective *intention*; as has frequently been observed, it is difficult to see how collective entities can have mental states. I go on to consider other interpretations in terms of what officials believe and do and argue that none of these other interpretations adequately support the idea that every conceptually possible legal system claims legitimate authority.

Chapter 6 endeavors to rebut Raz’s claim that it is part of *our* concept of authority that the content of an authoritative directive must be identifiable without recourse to the dependent reasons it is supposed to reflect, balance, and pre-empt – a claim that Raz takes to imply that moral criteria of validity cannot be authoritative. I argue that if, as Raz maintains, it is not possible for officials to be systematically mistaken about the legal concepts that are largely defined by their adopted practices, then there are empirical reasons for thinking that it is no part of *our* concept of law that moral criteria of validity are incompatible with the nature of authority. The problem is not just that many rival legal theorists reject this, including inclusive positivists, natural law theorists (as I have construed them), and Dworkin; it is also that legal practice in legal systems like that of the U.S. seems to presuppose the existence of moral criteria of validity. Insofar as *our* concept of law is constructed, as Raz believes, by *our* linguistic and legal practices, the best account of our concept of law includes the thesis that there can be moral criteria of validity.

Chapter 7 is concerned with the different ways in which law might be thought to guide behavior. It begins with an explication of Scott Shapiro’s distinction between being guided by a rule in the sense that one learns of one’s obligations under the rule and being guided by a rule in the sense that one is motivated to follow it because it is a rule. The Chapter goes on to evaluate Shapiro’s argument that inclusive positivism is inconsistent with the claim that the conceptual function of law is to guide behavior insofar as a judge, on his view, cannot be simultaneously guided by an moral criterion of validity and by the valid first-order norms she applies to decide a case.[[29]](#footnote-29) I argue that a judge need not be guided in either of the senses distinguished by Shapiro by the first-order legal norms she applies to resolve a legal dispute. In particular, I argue that judges are neither following those norms nor determining *their judicial* obligations under those norms, as those norms do not define any relevant obligations of judges. Instead, by applying those norms to a dispute, they are attempting to determine what those norms require of the parties to the dispute. Finally, this Chapter argues that Raz’s arguments from authority fail insofar as they presuppose that the rule of recognition must be capable of informing citizens of *their* obligations under the rule; since citizens are not the subjects of the rule of recognition, they have no obligations under the rule that could be discovered by consulting it.

The final section of the book is concerned with arguing for (1) the claim that inclusive legal systems (i.e. those with moral criteria of validity) are conceptually possible and (2) the claim that the U.S. legal system (and those resembling it in relevant respects) is not an inclusive system. Chapter 8 provides a positive argument for the thesis that moral criteria of validity are conceptually possible. Utilizing the semantics of modal logic, I explain how the logic of establishing possibility claims is different from the logic of establishing contingent descriptive claims or necessary claims. Once the structural framework is adequately developed, the argument for the conceptual possibility of moral criteria of validity will be grounded in a thought experiment that is inspired by the Razian argument for the possibility of a legal system without coercive enforcement machinery in a “society of angels.”

Having argued for the inclusivist thesis, I consider in Chapter 9 whether the U.S. legal system is an inclusive system incorporating moral criteria of validity. Chapter 9 attempts to identify the content of the rule of recognition in the U.S., taking into account a core feature of U.S. legal practice the importance of which seems commonly understated in such discussions – namely that the Supreme Court has final authority to bind officials with mistaken decisions involving the putatively moral language of the Constitution. I argue that this authority on the part of the Court entails that the U.S. legal system does not directly incorporate moral norms as criteria of legal validity. If it did, then the Court could not create legal obligations to obey holdings misinterpreting the moral language defining criteria of validity. If a law *L* is characteristically treated as law even though it is objectively inconsistent with some moral norm *M*, then *M* does not define a validity criterion in that system. This shows that inclusive systems, though conceptually possible, are quite unlikely and that legal systems according courts final authority to bind with moral mistakes are best characterized as not incorporating moral criteria of legal validity – at least not those moral norms over which the relevant court has final interpretive authority.

4. **Who Cares?**

One might question why an entire book should be devoted to debates about the concept of law. Many persons in the legal academy have developed a conspicuous aversion to the highly abstract concerns of conceptual jurisprudence. The sense among these theorists is that conceptual debates about the nature of law occur at such a high level of abstraction that they have no practical relevance whatsoever and are simply not worth pursuing. Otherwise put, there is no reason for lawyers, theorists, or philosophers to care about, much less to do, conceptual jurisprudence. Since conceptual jurisprudence has no practical implications for legal practice, as the complaint goes, it should not be done.

 This critique rests on a couple of different ideas. The first is that answers to conceptual questions do not have any practical implications with respect to what our laws and associated practices should be. The second is that a theory that is about the law, which need not be a *conceptual* theory of law, should not be pursued unless it makes a practical difference with respect to what our laws and associated practices should be. In the next subsection, I consider whether the first claim is true. In the following subsection, I consider whether the second is true.

*4.1 Does a Conceptual Theory of Law Have Any Practical Implications?*

Although it has recently come into vogue among philosophically minded legal theorists, the argument that conceptual jurisprudence should not be done is not a particularly new one. For what it is worth, I can remember the relevant issues being discussed in my first class in philosophy of law in 1986. But the first theorist I recall giving it any real discussion in print was Richard Posner. Since more recent formulations of the argument do not seem to add anything new, I will take Posner’s formulation of the argument as representative.

Posner devotes a substantial portion of the first of his Clarendon Law Lectures at Oxford to arguing that conceptual jurisprudence should not be done because it is “futile, distracting, and illustrative of the impoverishment of traditional legal theory.”[[30]](#footnote-30) He explains the problem as follows:

I have nothing against philosophical speculation. But one would like it to have some pay-off; *something* ought to turn on the answer to the question ‘What is law?’ if the question is to be worth asking by people who could use their time in other socially valuable ways. Nothing does turn on it (*LLT* 3).

Indeed, Posner goes so far as to argue that “the central task of analytic jurisprudence is, or at least ought to be, not to answer the question ‘What is law?’ but to show that it should not be asked, because it only confuses matters” (*LLT* 3).[[31]](#footnote-31)

 Posner’s argument is straightforwardly problematic in one respect. On the one hand, Posner argues that conceptual jurisprudence has no practical implications with respect to what, as a matter of political morality, our laws and legal practices should be. On the other hand, he claims that answers to conceptual questions would only confuse matters. The problem is that if the only theoretical issues about law that matter are normative issues concerning what our laws and legal practices should be, then a theory that has no practical implications whatsoever simply could not create any confusion with respect to those issues. A theory with no practical implications whatsoever is utterly irrelevant with respect to the normative issues Posner believes are the only ones that matter and hence could not cause any confusion in someone who knows better.

That said, there certainly seems to be something to Posner’s claim that answers to conceptual questions have no practical implications whatsoever. Consider, for example, the conceptual question of whether the Pope is properly characterized as a bachelor. At first glance, the answer seems obvious: since the Pope is an unmarried adult male, he is, by definition, a bachelor. Yet many people feel somewhat uneasy with this response because the Pope has opted completely out of the marriage game. The thinking is that the term “bachelor” applies only to unmarried men who are institutionally or psychologically eligible for marriage; since the Pope is neither, it is misleading to characterize him as a bachelor. But notice that, either way, the answer to the question tells us nothing about how we should treat the Pope or how we should treat bachelors. Even if conceptual analysis goes beyond ordinary lexicography, it is still concerned ultimately with drawing out the implications of the social practices that define the relevant concept words. It is hard to see how conceptual claims could have any practical implications whatsoever beyond those concerned with how to use the relevant words.[[32]](#footnote-32)

One might think the situation is different with respect to the law. The idea is that whether, say, an unjust enacted norm, *L*, counts as “law” depends on which theory of law is correct. If, on the one hand, it is conceptually true, as NL2 asserts, that an unjust norm cannot count as law, then *L* is not a law. If, on the other, it is conceptually true, as positivists assert, that an unjust norm can count as law, then *L* could be a law despite being unjust. Surely, on this line of reasoning, it makes a practical difference whether positivism or NL2 is true.

The problem with this line of reasoning is that what matters as far as the moral legitimacy of our practices go is whether officials are treating an unjust enacted norm, *L*,as law in the sense of backing it up with coercive enforcement mechanisms – and not whether *L* is really law according to some abstract general theory. If NL2 turns out to be true, then the rule that the courts are applying might not be properly characterized as “law,” but that is no consolation to the unfortunate defendant who is being held liable under the rule. Whether the Fugitive Slave Act was really law simply does not change the fact that it was enforced as law by the courts to the detriment of many persons who were suspected of being “fugitive slaves.” As far as considerations of political morality are concerned, the legitimacy of our practices with respect to enforcement of the Fugitive Slave Act does not turn at all on whether it counts, on some conceptual theory, as being *law*. A characterization of a norm as law simply cannot carry that kind of normative weight.

Although conceptual jurisprudence goes much deeper than mere lexicography, it is still grounded in the lexical meanings of terms having to do with law. Insofar as a conceptual theory is purely descriptive and has no normative implications, the classification of something as being law or not being law, likewise, has no normative implications.[[33]](#footnote-33) Again, what matters, as a matter of political morality, with respect to the practices of our courts and legislatures has everything to do with the moral character of the practices and nothing to do with whether those practices are properly characterized as “law.” Moral problems simply cannot be solved by recasting them in different terms.

 Perhaps conceptual analysis produces epistemic benefits. One might argue that the pursuit of conceptual jurisprudence (and conceptual analysis, in general) can be justified on the ground that it enables us to think more clearly and rigorously about problems that have important normative dimensions – even if conceptual theories do not imply solutions to those problems. Proponents of conceptual analysis who feel the need to justify their interest by reference to socially useful consequences (and I feel no such need) typically do so by pointing to its epistemic benefits.

 The point of conceptual analysis, on this line of reasoning, is not that it entails solutions to important substantive problems of law, ethics, or politics or has immediate practical implications that conduce to the betterment of humanity by improving the moral quality of legal practice. Rather it is that conceptual analysis helps us to solve those problems by enabling us to see and formulate them more clearly. The benefit here is not morally instrumental; rather it is empirically instrumental.

 This line of reasoning is unconvincing. Perhaps this is true of some issues in conceptual analysis, but I would hypothesize that this is true of comparatively few at best. We do not, for example, need a successful philosophical account of the nature of a number to successfully address mathematical problems any more than we need a successful account of the nature of law to successfully address normative problems of law. In both cases, a pre-theoretical understanding of the relevant concept is enough for us to fruitfully address the relevant class of problems.[[34]](#footnote-34)

Nor do we need a theoretical understanding of the nature of law in order to do everything that we want to do with a legal system. It is true that we have to be able to do a lot of things in order to have a working institutional system of norm-governance of a sort that we typically characterize as “law.” Officials have to agree on a set of procedures for making, changing, and adjudicating law; citizens have to be able to ascertain what their obligations are under the law in order for law to be efficacious in guiding their behavior; and so on. But if our ability to characterize these norms as “law” matters with respect to ensuring that these norms can efficaciously regulate behavior, we do not need a conceptual theory of law to inform our use of the term. All we need, at most, to ensure this is that we agree on a pre-theoretic conception of what law is. Law is, on this shared conception, what is enacted by a body that efficaciously functions as a rule-making body (which we traditionally call a “legislature”) and applied by a body that efficaciously functions as an adjudicative agency (which we traditionally call a “court”). It does not matter what we call these functions or whether we are, as a matter of analytic philosophical rigor, correct under the right conceptual theory of law.[[35]](#footnote-35) A social group that handles the governance of its subjects in a certain way will succeed in creating an efficacious institutional system of norm-governance that is justifiably characterized as “law,” given the linguistic conventions that govern the use of the term “law.”

It seems clear, then, that a purely descriptive account of the content of a concept has neither practical implications with respect to how we should structure our legal practices nor epistemic implications with respect to how we should understand the practical problems that arise in connection with how we should structure those practices. This part of Posner’s argument that conceptual jurisprudence should not be done seems correct. The issue considered in the next section is whether this is a reason for thinking that conceptual jurisprudence should not be done.

*4.2 Should Conceptual Jurisprudence Not Be Done?*

Posner’s claim that conceptual jurisprudence should not be done because it squanders time that could be used in “socially valuable ways” seems to entail that it is wrong to spend that time on doing conceptual jurisprudence. To begin, wasting or squandering a socially valuable resource is commonly thought of as being wrong in some sense (whether prudentially or morally); if doing conceptual jurisprudence squanders or wastes a valuable resource, it would seem to be wrong in the same way. Further, as a general matter, to say that something should not be done according to some set of standards is to say that doing it violates those standards and is hence wrong according to those standards. Doing something that should not be done might not amount to a particularly egregious wrong, but doing something that should not be done, on any reasonable conception of the relevant notions, is wrong under whatever standards dictate that it should not be done. Posner’s complaint, then, is that it is wrong for theorists to do conceptual jurisprudence.

 This complaint strikes my sensibilities as problematic. To begin, the sense in which conceptual jurisprudence *should* not be done is not made clear. On the most natural interpretation, Posner is making a moral claim, but it seems straightforwardly implausible to think that it is morally wrong to work in conceptual jurisprudence. If conceptual jurisprudents were arguing for morally problematic conclusions (e.g., that people should commit immoral acts), that might be a reason to think that they should not do what they are doing. But the claim that law is a social artifact grounded in a conventional rule of recognition practiced by officials is clearly morally innocuous (which, of course, is partly explained by the fact that it is purely descriptive).

If Posner is properly construed as making a moral claim, perhaps a more plausible interpretation of the claim that conceptual jurisprudence should not be done is that it means no more than that it would be morally better for legal theorists to devote their energies to more practical issues. It should be noted how much weaker this claim is than the claim that it is wrong to do conceptual jurisprudence. The claim that one act is morally better than another does not entail that the latter act should not be done. As a general matter, one does not say that one act is better than another unless both acts are morally permissible. Someone who says giving to charity is morally better than committing murder is most plausibly construed as making a philosophically nuanced (but not very funny) joke that calls attention to vagueness with respect to the application conditions of the expression “morally better.” Indeed, as far as ordinary usage goes, we generally use that locution only to compare options that are morally permissible in the sense that neither option is either prohibited or required. On this use, to say that it is morally better, other things being equal, that I give $25 to charity than it is that I give $20 to charity neither asserts nor implies that I should not give $20 to charity.[[36]](#footnote-36)

But putting aside that concern, this construction of Posner’s claim remains problematic. It is surely true that conceptual jurisprudents could find morally better things to do with their time, but so can nearly anyone in the legal academy. Perhaps what other legal theorists do with their research interests is morally better than what conceptual jurisprudents do with theirs. But if so, the difference is not enough to make a focus on conceptual jurisprudence conspicuously problematic – or worth complaining about.

Indeed, if it is true that we should all attempt to work on issues likely to maximize moral value, the vast majority of those who work on the kinds of issue that fill the pages of law reviews would have done something morally better had we studied medicine or biology instead of law. To be candid, I would be surprised if there are many legal theorists who can plausibly claim that their work has significantly improved the lives of many people. To begin, the vast majority of law review articles are never read by many people, much less by judges who might be influenced to do something that might improve the lives of people. Further, many, if not most, law review articles are concerned with abstract matters that are somewhat removed from the realities that occupy the efforts of courts and legislatures. It is true, of course, that most law review articles are concerned with empirical or normative matters that are capable of being used in ways that improve the lives of people. But the work on even these issues of practical relevance is expressed at a level of abstraction that puts it at some distance from the mundane normative matters involved in the practice of law.

None of this should be construed to disparage the efforts of those who work in these areas. Every theorist, on my view, is entitled to pursue those issues she finds most interesting. We are all entitled to considerable moral latitude to do what we think we need to do to make our lives meaningful and fulfilling to ourselves; each of us, after all, has to live our own lives. For this reason, in the absence of special circumstances, it is as misguided to claim that legal theorists should be doing something morally better with their lives as it is to claim that people in any other legitimate occupation should do so.

 But if the relevant sense of “should” is not moral, it is just not clear what class of norms would support Posner’s conclusion that conceptual jurisprudence should not be done. It makes little sense, as far as I can tell, to argue that the relevant class of norms are epistemic; the idea would have to be that pursuing conceptual jurisprudence is likely to result in our having false beliefs about something – a claim that is completely lacking in plausible support.[[37]](#footnote-37) Nor does it seem to make much sense to think that the relevant class of norms has anything to do with what is prudentially rational. As far as I can tell, Hart and Dworkin were made famous by their contributions to conceptual jurisprudence; if so, that work certainly conduced to their interests. If the norms of practical rationality encompass some other kind of normativity, that needs to be specified in order to begin to make out Posner’s claim. As it is, Posner’s criticism of conceptual jurisprudence seems a non-starter.

Even so, it is helpful to consider how implausible remarks like Posner’s would be if made about theoretical inquiries in other disciplines. Though a great deal of work in pure mathematics has been used to create technologies that improve our lives, one of the most celebrated mathematical accomplishments of recent years is not thought to have such applications. In 1995, Andrew Wiles of Princeton University published a successful proof of Fermat’s Last Theorem, which asserts that there are no positive integers *x, y, z,* and *n* > 2 such that the equation *xn+yn=zn* is true. I would be surprised if any of the mathematicians who devoted countless hours to the proof of this theorem were motivated by an expectation that it would have practical applications producing significant improvement in the human condition – or, for that matter, even believed it would have such applications.

Imagine the reaction in the mathematical community to someone whose stature in mathematics is comparable to Posner’s stature in law publishing the following remarks in response to the efforts to prove Fermat’s Last Theorem:

I have nothing against mathematical speculation. But one would like it to have some pay-off; *something* ought to turn on the answer to the question ‘Is Fermat’s Last Theorem true?’ if the question is to be worth asking by people who could use their time in other socially valuable ways. Nothing does turn on it.

In this connection, it is worth noting, for what it is worth, that Wiles’s proof has become one of the most celebrated mathematical achievements of the 20th Century – without any regard whatsoever for whether it has any beneficial practical applications.[[38]](#footnote-38)

 The point here is not to deny that the proof might turn out to have beneficial practical applications; highly abstract mathematical results sometimes have such applications. For example, Kurt Gödel proved the Incompleteness Theorem long before there were computers, but some of the mathematics he invented along the way wound up having many practical applications in the field of computer science. Seemingly purely theoretical advances in abstract mathematics have sometimes had unexpected technological applications.

Rather, the point is that there is no reason to think that the pursuit of knowledge, mathematical or otherwise, is justified (or justifiably motivated) only insofar as it has direct practical benefits apart from the joy of the endeavor and the knowledge it makes possible. Mathematicians recognize, as they should, that the pursuit of knowledge need not be justified by instrumental concerns and hence that a problem need not have instrumental value to be worth discussing. Pursuit of knowledge, mathematical and otherwise, can be justified by the value of knowing for its own sake.

 It is not surprising, as discussed above, that solutions to problems in conceptual jurisprudence lack practical applications. Concept-words are used to group acts, events, and entities into certain categories and hence do no more than pick out particular classes of acts, events, and entities. It seems clear that we cannot solve any interesting moral problems merely by altering our conceptual characterization of some act, event, or entity. Whether hitting someone in the face is morally wrong cannot turn on whether it is properly characterized as an assault or as a gift; if it is properly characterized as a gift, then we will have to rethink our moral views about the permissibility of gift-giving from the ground floor up. What substantive normative qualities any particular act or event has cannot turn on how it is grouped through our linguistic practices with other acts or events. To decide those questions, we need the help of propositions that express the relevant values.

But theoretical pursuits can be justified by other reasons than those having to do with their practical applications. As suggested above, if we think that knowledge is both intrinsically and instrumentally valuable, as we should, a theoretical pursuit can be justified by the intrinsic value of knowing the truth about the relevant questions. Even if it turns out that neither Fermat’s Last Theorem nor its proof have practical applications, we are surely made better off as a community (in some sense relevant with respect to human flourishing) in virtue of having a proof of the theorem because (1) we know now that the theorem is true and (2) knowing the truth about a matter, other things being equal, is valuable for its own sake. Likewise, getting a handle on the nature of law, one of our most important normative institutions – and one that contributes significantly to our collective self-understanding – is also valuable for its own sake.

Mathematics is not the only area of intellectual activity that is justified, at least in part, by the intrinsic value of pursuing it. No sensible person thinks that the pursuit of art must be justified by its practical applications; both the pursuit of artistic endeavors and its products are valuable for their own sakes. It seems reasonable to think that the same is true of philosophy, even if some areas of philosophical speculation, such as substantive moral theory, also have instrumental benefits. The pursuit of knowledge or truth on non-trivial matters (and law is certainly a non-trivial matter) is an intrinsically valuable activity. I see no reason to think more is needed to justify conceptual inquiry about law than this.

But if one needs more to justify conceptual inquiry than this, then it might help to note that a theoretical pursuit can also be justified on the ground that it presents exceptional intellectual difficulties. Part of the reason that Wiles’s achievement has been so widely celebrated is that finding a proof for Fermat’s Last Theorem was so difficult that it eluded mathematicians for hundreds of years. This, of course, is no less true of non-intellectual pursuits: one can justifiably feel proud of having scaled Mount Everest precisely because it presents daunting challenges that most persons are simply not up to.[[39]](#footnote-39)

Regardless of whether there is any practical payoff to the pursuit of conceptual jurisprudence, this much cannot plausibly be denied by anyone who understands the debates involving Hart, Dworkin, and the many other talented philosophical thinkers who have worked in the area: conceptual issues present intellectual difficulties that are unique among issues in law and legal theory precisely because they are so much more abstract than other sorts of issues.[[40]](#footnote-40) Since people generally have more intuitions about concrete issues than abstract ones, a theorist working on the latter must get far more mileage out of an intuition than a theorist working on the former because there are fewer of them; the dots are harder to connect between intuitions on abstract matters because there is more theoretical distance between them. To connect these dots, arguments for positions on more abstract issues must establish deeper connections between the intuitions than do arguments for positions on less abstract issues. Thus, conceptual issues at the foundation of any area of law present special intellectual difficulties that require a different kind of creativity and skill than are required by substantive issues of law – and *that* is another good reason to think philosophical work on issues in conceptual jurisprudence is justified in the only respect that any theoretical pursuit needs to be justified.

In this connection, it is worth considering how many topics of abiding interest in philosophy have no direct practical or technological applications. As far as I can tell, there are few topics in metaphysics, one of philosophy’s core areas of inquiry, that have direct practical or technological applications. It is hard to see any practical implications or technological applications associated with solving the philosophical problems associated with the nature of time, personal identity, universals and particulars, the ontology of the universe, the nature of modality, aesthetics (or the nature of beauty) and even the nature of the mind. Similarly, there are few topics in philosophy of language, another core area of philosophy, that have obvious practical or technological applications. As was true of central questions of metaphysics, it is hard to see any practical or technological applications associated with solving the philosophical puzzles associated with the nature of meaning, vagueness, reference, the variety of speech acts, and so on.

The justification for pursuing these highly abstract issues has to do with the intrinsic value of both the process and the results of such pursuits. Indeed, if one pursues philosophical research unconnected with normative issues in morality, the motivation and justification must have something to do with the intrinsic value of doing so.[[41]](#footnote-41) Given the fact that we are all entitled to considerable moral latitude with respect to deciding what pursuits we wish to devote the working hours of our lives to, it is misguided and somewhat arrogant (as though one has moral authority to decide what others should do with the moments of *their* lives) to single out conceptual jurisprudents for this kind of criticism.

None of this is to say that conceptual jurisprudence is interesting in a sense that implies that people should even care about this kind of theory – much less that they should pursue such theorizing. I can understand why an academic lawyer, philosopher, law student, philosophy student, or Hart’s man on the Clapham Omnibus would not find conceptual jurisprudence interesting or worth pursuing. It *is* dry. It *is* abstract. And if relevance is wholly a function of a theory’s normative implications, it *is* irrelevant.

But it is somewhat petulantly self-absorbed to claim that conceptual theorizing should not be pursued. There are plenty of topics in law and philosophy other people find interesting that do not interest me in the least, including many problems pursued by academic lawyers that do have normative implications. I have, for example, no interest whatsoever in normative theories of administrative law. I am glad, I suppose, that there are people who pursue these areas, but I am also glad that there are people who pursue research in those areas of metaphysics and philosophy of language that do not have practical implications. In any event, it would never occur to me to try to persuade someone doing research in any area of law or philosophy that they should not pursue the relevant agenda – unless it is likely to breach some sort of moral obligation not to do harm to others.[[42]](#footnote-42) If someone happen to find this kind of theorizing uninteresting, I am willing to concede, though it hurts a bit to admit, that it would be a waste of her time to pursue it. But it strikes my sensibilities as a bit egocentric for someone to think that the fact that *she* does not find these issues interesting means that *other people* should not spend the moments of *their lives* pursuing it. This sort of claim might be worth considering if we had a shared objective conception of what people should find interesting, but we don’t have such a conception. Live and let live.

In any event, I hope that even readers who think it somewhat extravagant to expend the kind of time I have squandered exploring these issues find something in what follows that would engage their interest. I find much of interest and beauty in the work of my colleagues in the area and believe that I have learned much from reading their work that transcends the admittedly narrow concerns of conceptual jurisprudence. I hope that I have produced something in the Chapters that follow that reflects both the value of what I have learned from them and the skill with which they have imparted that value.

1. Of course, they did not use the contemporary language of conceptual jurisprudence to express their view. But while they did not use the term “conceptually necessary” to express what they took to be an essential connection between law and morality, the term is accurately applied to their view. [↑](#footnote-ref-1)
2. See, generally, Jeremy Bentham, (1782). Of Laws in General. Ed. H.L.A. Hart (London: Athlone Press, 1970); and John Austin (1832). The Province of Jurisprudence Determined. Ed. Wilfred E. Rumble (Cambridge: Cambridge University Press, 1995). For an outstanding discussion of the history of these views, see Brian H. Bix, Jurisprudence: Theory and Context, 7th Ed. (Durham, NC: Carolina Academic Press, 2015), Chapter 5. [↑](#footnote-ref-2)
3. A more sustained and substantial defense of the project will be undertaken in a third volume in this series, a book-length defense tentatively entitled Methodology and the Nature of Law. [↑](#footnote-ref-3)
4. So much so that the reader tempted by this view might not consider it a defense at all. [↑](#footnote-ref-4)
5. It might be thought that conceptual analysis is impossible because we do not know exactly what concepts are; the idea would be that we cannot begin to give a sensible analysis of a concept if we do not know what it is. This line of reasoning is problematic. It might be true, as W.O. Quine pointed out, we do not know what kinds of things meanings are. But that does not preclude the possibility of analyzing the meanings of words; lexicographers are nonetheless able to compile a catalogue of the meanings of words in the form of a dictionary. There is no more reason to think that we cannot give an account of the content of a concept than there is to think we cannot give an account of the meaning of a word. Indeed, if the underlying general premise is correct, then it would seem to preclude the possibility not only of lexicography, but also of most mathematical theorizing inasmuch as we have no better understanding of what foundational mathematical objects, like sets and numbers are, than we do of what meanings and concepts are. If having a rigorous understanding of what things like this are is a necessary prerequisite for being able to theorize about them in other respects, then there is a great deal of valuable theorizing that, all appearances to the contrary, is impossible to do. It should be clear that conceptual jurisprudence is possible. Whether it is worth doing is another question, but it is, quite clearly, possible. [↑](#footnote-ref-5)
6. It is sometimes thought that the traditional methodology incorrectly presupposes that law is the kind of institution that is changeless in the sense that it has features that are absolutely essential; the idea here is that the traditional methodology presupposes an “essentialist” view of law that is inconsistent with the fact our conception of law can change over time. See, e.g., Brian Tamanaha, A Realistic Theory of Law (Cambridge: Cambridge University Press, 2017). This criticism is grounded in a mistaken conception of the traditional methodology of conceptual analysis. The traditional methodology, as noted above, is grounded in identifying the social practices that determine the lexicalmeanings of words – which obviously can and frequently *do* change over time. The idea that conceptual jurisprudents are unaware of these obvious facts about the contingent social practices that fix the referents of conceptual study is both strikingly implausible and uncharitable in the extreme. [↑](#footnote-ref-6)
7. See, e.g., Brian Leiter, “Naturalism and Naturalized Jurisprudence,” in Brian Bix (ed.), Analyzing Law (Oxford University Press, 1999). For a response, see Kenneth Einar Himma, “Reconsidering a Dogma: Conceptual Analysis, the Naturalistic Turn, and Legal Philosophy,” in Ross Harrison (ed.), Law and Philosophy: Current Legal Issues (Oxford: Oxford University Press, 2008). Leiter has since modified this view. See Leiter, “Naturalized Jurisprudence and American Legal Realism Revisited,” *Law and Philosophy*, vol. 30 (2011). [↑](#footnote-ref-7)
8. It is worth saying something about one of the methodologies that has been proposed as an “alternative” to the traditional methodology described above. Prototype analysis of a category focuses on distinguishing properties that are central (or paradigmatic) to members of the relevant category from those that are less central (or peripheral) to members of the category. As Frederick Schauer describes the motivation for such a project: “[I]t may … often be …. valuable to focus on the typical rather than the necessary features or properties of some category or social phenomenon. Just as we can learn a great deal about birds from the typical but not necessary fact that birds fly and can understand important aspects of the history and chemistry of wine by focusing on the fact that wine is typically but not necessarily made from grapes, so too might we learn a great deal about law in general, and not just the law in this or that legal system at this or that time from law’s typical but not necessary features.” Frederick Schauer, The Force of Law (Cambridge, MA: Harvard University Press, 2015). It is indisputable that the study of such central, or prototypical, features of law might be quite valuable – perhaps, depending on the criterion of value, more so than the conceptual focus on necessary features of law.

 But it should be clear that prototype theory is not properly characterized as an alternative methodology to the traditional methodology. Insofar as a prototype inquiry of a category results in the identification of properties that are typically, but not necessarily, instantiated by things belonging to the category, then it is not plausibly characterized as the analysis of a concept because it is not *wholly* grounded in the linguistic meanings of the relevant category word. Prototype analysis presupposes that we understand the meaning of the relevant category-word and focuses on a different kind of empirical analysis than the one on which conceptual analysis rests. As discussed above, conceptual analysis is wholly grounded in the meaning of the relevant concept-term, which is determined by contingent social practices. In contrast, prototype theory assumes a pre-theoretic account of the meaning and then seeks to identify features of theoretical interest that most, but not all, things of the relevant kind have. That is, by its own terms, a purely sociological endeavor that relies on the methods of the social sciences; in essence, it relies on roughly the same empirical methodology that is involved in studying human behavior.

 Prototype theory of law is, of course, as valuable a pursuit as any other sociological study of the law is, but it is crucial to understand that it tells us nothing about the nature of a thing as defined by its conceptually necessary properties – or, for that matter, about the nature of a thing on any reasonable conception of what constitutes the nature of a thing. It is a conceptually necessary property of being a bachelor that one is unmarried; thus, being unmarried is part of the very nature of bachelorhood. In contrast, since most people are married by the age of thirty, bachelors are typically under 35 years of age. But it should be clear that being under 35 years of age is no part of the nature of bachelorhood. Whatever else prototype analysis might be, it is not an alternative methodology to conceptual analysis.

The two types of analysis are, by their own terms, concerned to answer complementary, but different, questions. It is true that some proponents of prototype analysis question both the possibility and desirability of the traditional methodology’s focus on linguistic meanings, but that just goes to show that they are doing something that is not plausibly characterized as conceptual analysis. If one wants nonetheless to characterize it as “analytic jurisprudence,” then one is redefining that term. I have no problem with that, but it is important to be clear that prototype analysis falls under that category only insofar as the term “analytic jurisprudence” is redefined. But calling it “conceptual analysis,” however, is simply confused: insofar as prototype analysis is not concerned with identifying the social practices that determine linguistic meanings, it has nothing to do with explicating the content of concepts. [↑](#footnote-ref-8)
9. The distinguishing claims of natural law theory, positivism, and inclusive positivism will be developed in more rigor and detail in Chapters 2 and 3. [↑](#footnote-ref-9)
10. For a collection of essays on law’s artifactuality, see Kenneth Einar Himma, Luke Burazin, and Corrado Roversi (eds.), Law as an Artifact (Oxford: Oxford University Press, 2018). [↑](#footnote-ref-10)
11. See, below, Chapter 9. [↑](#footnote-ref-11)
12. It is important to note that a natural law theory of (positive) law can hold that the correct account of the underlying moral principles is a natural law theory of *morality* but, strictly speaking, a natural law theory of municipal law is not committed to any particular theory of morality. [↑](#footnote-ref-12)
13. St. Thomas Aquinas, Summa Theologiae, Prima Secundae Partis Q. 95, Art. 2; available at: http://www.newadvent.org/summa/2095.htm. [↑](#footnote-ref-13)
14. Sir William Blackstone, “Of the Nature of Laws in General,” Commentaries on the Laws of England -- Book I: Of the Rights of Persons (Oxford: Oxford University Press, 2016), 35. [↑](#footnote-ref-14)
15. Blackstone, Commentaries, Note 14 above, 33-34 [↑](#footnote-ref-15)
16. Blackstone, Commentaries, Note 14 above, 35-36. Emphasis added. [↑](#footnote-ref-16)
17. Bix, Jurisprudence: Theory and Context pp. 73-4. [↑](#footnote-ref-17)
18. Bix, Jurisprudence, Note 17 above, 74. [↑](#footnote-ref-18)
19. John Finnis, “The Truth in Legal Positivism,” in Robert P. George (ed.), The Autonomy of Law (Oxford: Clarendon Press, 1996) at 203, 204. [↑](#footnote-ref-19)
20. To say that it is not true that people deserve to elect the officials that govern them is not to say that people *do not deserve* to elect the officials that govern them. When people claim that someone does not deserve some benefit, they usually intend to say that someone is undeserving of some benefit conferred upon them and hence should not have received the benefit. That is not what I intend by the claim that it is not true that people deserve to elect the officials that govern them. What I intend to assert by that claim is that the concept of desert is not relevant with respect to explaining why people should be allowed to elect those officials. People neither deserve nor do not deserve to elect those officials. [↑](#footnote-ref-20)
21. Other things, of course, might not be equal. If I went out of my way to take care of the decedent without asking for compensation, then perhaps I deserve the gift. But it is not in virtue of having a right to the gift (say, because it is willed to me) that I deserve it. If I deserve it, I deserve it in virtue of what I did for the testator while alive. [↑](#footnote-ref-21)
22. Ronald Dworkin, Law’s Empire (Cambridge, MA: Harvard University Press, 1986), pp.103-104. Hereinafter LE. [↑](#footnote-ref-22)
23. Ronald Dworkin, “The Law of the Slave Catchers,” *The Times Literary Supplement*, December 5, 1975, 1437. [↑](#footnote-ref-23)
24. There is nonetheless some question here as to whether Dworkin’s view directly engages the positivist view. If positivism seeks to explicate a pre-interpretive sense of “law” while Dworkin explicates an interpretive sense of “law,” then it would appear that the two views are concerned to answer different questions about law as such. As will be seen below in Chapter 2, I reach this conclusion on different grounds. [↑](#footnote-ref-24)
25. If the claim that law is an artifact all the way down is consistent with NL1, then the claim that law is wholly artifactual in character does not imply the Social Fact Thesis. If NL1 is true, then the existence and content of the criteria of validity are not determined *entirely* by the relevant kind of social facts. [↑](#footnote-ref-25)
26. See, e.g., Ronald Dworkin, Taking Rights Seriously (Cambridge: Harvard University Press, 1977). [↑](#footnote-ref-26)
27. Joseph Raz, Ethics in the Public Domain (Oxford: Oxford University Press, 1996). [↑](#footnote-ref-27)
28. This argument was first made in Kenneth Einar Himma, “Law’s Claim of Legitimate Authority,” in Jules L. Coleman (ed.), The Postscript: Essays on the Postscript to the Concept of Law (Oxford: Oxford University Press 2001). Ronald Dworkin made a similar argument a year later in Dworkin, “Thirty Years On,” 115 *Harvard Law Review* 1655 (2002), reviewing Jules Coleman’s The Practice of Principle (Oxford: Clarendon Press, 2001). [↑](#footnote-ref-28)
29. Scott Shapiro, “On Hart’s Way Out,” *Legal Theory*, vol. 4, no. 4 (December 1998), 469-507. [↑](#footnote-ref-29)
30. Richard Posner, Law and Legal Theory(Oxford: Clarendon Press, 1996). Hereinafter *LLT*. [↑](#footnote-ref-30)
31. Posner’s skepticism about the value of philosophy is not limited to his views about conceptual analysis. Consider, for example, his curious views on the point and value of moral philosophizing: “I have become profoundly skeptical of efforts to construct coherent moral systems.… So when Bruce Ackerman, starting from first principles, ends up advising his readers that ‘[t]he rights of the talking ape are more secure than those of the human vegetable,’ or that a fetus has fewer rights than a dolphin, or that the only reason parents should be forbidden to kill their day-old infant is that they could give the infant to someone else, the proper objection is not that Ackerman is ‘wrong’ but that he is quixotic in supposing that *argument* can or should alter people’s beliefs about such things. It is unrealistic … to suppose that you can argue a person out of a position that he had not been argued into; and it is weak-minded to abandon a deep-seated moral belief just because you cannot think up a good retort to a clever argument” (*WMT* 101-102). Not seeing the inconsistency with his just stated view, Posner goes on to make to a *moral* argument for his view that tort law ought to promote economic efficiency. [↑](#footnote-ref-31)
32. Dictionary definitions are simply empirical reports of convergent patterns of usage and are, as such, purely descriptive. But speakers of a language are generally committed to a normative standard that requires using words in accordance with their meanings as reported in a dictionary. It is in virtue of that shared commitment that purely descriptive dictionary definitions are adopted as a normative standard of correctness. [↑](#footnote-ref-32)
33. This, of course, is not true of morally evaluative language, such as the term “good.” Whether or not some act is properly characterized as “good” makes a practical difference, as good things ought to be done. Of course, we need to be warranted in believing that an act ought to be done in order to be warranted in calling it “good.” [↑](#footnote-ref-33)
34. As Posner puts the point, “though unable to define ‘law’ the students have no trouble using the word correctly, any more than I did before I became reflective in these matters, any more than other judges, and practicing lawyers, do” (*LLT* 1). [↑](#footnote-ref-34)
35. Whether we are correct in such characterizations depends on certain assumptions about the nature of the relevant concepts. If the relevant concepts are defined by our practices, then our use of the relevant concept-terms will be largely correct. If, in contrast, the relevant concepts are defined in mind-independent terms and hence in terms that are independent of our practices (i.e. what law “really” is), then we can be systematically mistaken about the use of the relevant concept-terms. See Chapter 2 for more discussion of these possibilities. [↑](#footnote-ref-35)
36. The situation changes if one adds the word “just.” It seems true that under the circumstances described above that I shouldn’t give *just* $20 to charity. [↑](#footnote-ref-36)
37. As discussed above, Posner suggests that conceptual analysis just “confuses matters.” See Note 31, at p. 18, and the associated text. [↑](#footnote-ref-37)
38. Indeed, in 2016, Wiles received the Abel Prize, which is regarded as the most prestigious award in mathematics, for his achievement. “Fermat’s Last Theorem proof secures top mathematical prize for Sir Andrew Wiles,” *University of Oxford News and Events* (15 March 2016); available athttp://www.ox.ac.uk/news/2016-03-15-fermats-last-theorem-proof-secures-mathematics-top-prize-sir-andrew-wiles. [↑](#footnote-ref-38)
39. Indeed, the oddness of Posner’s complaint is highlighted by the fact that no sensible person would think, other things being equal, that a mountain climber is doing wrong by spending time training to climb, and climbing, a mountain. But it seems far more self-centered to spend so much time on a pursuit that does no more than bring glory to the person who succeeds than it does to spend time on articulating the nature of an institution that is as central to our ability to live and cooperate in society as law. [↑](#footnote-ref-39)
40. To say that these difficulties are unique is not, I should emphasize, to say that they are *greater* or more demanding than difficulties faced in other areas – though I believe that, other things being equal, the more abstract the issue, the greater the difficulty. But there is no need to argue for that claim here. [↑](#footnote-ref-40)
41. It is worth noting that Posner is not a philosopher; he is a legal theorist who has exhibited hostility to philosophical pursuits. In addition to disparaging the value of moral philosophy (see Note 32, above), Posner has disparaged metaphysical speculation. For example, Posner demeans efforts to understand the notion of time as appealing to “only the sort of person who wants to square the circle” (*LLT* 1). But it is also worth noting that there are philosophers who have argued that conceptual jurisprudence is not “interesting” and should not be done. See, e.g., David Enoch, “Is General Jurisprudence Interesting?,” forthcoming in D Plunkett, S Shapiro, K Toh (eds.), Ethical Norms, Legal Norms: New Essays on Metaethics and Jurisprudence (forthcoming, Oxford University Press, New York); available at https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2601537. Enoch’s argument is articulated in terms that are considerably more sophisticated and nuanced than Posner’s, but ultimately seems to rest on the same idea that speculation on the nature of law yields nothing by way of any practical benefits. For a more detailed and persuasive response to his concerns, see Julie Dickson, “Why General Jurisprudence is Interesting”; available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2921820>. [↑](#footnote-ref-41)
42. This raises the issue of whether the claim that conceptual jurisprudence should not be done is morally normative or whether it is normative in some other sense. Proponents of this claim have not, to my knowledge, specified its character. [↑](#footnote-ref-42)