Introduction

Toward Normative Jurisprudence

Lawyers, judges, legal scholars, and law students – collectively, the legal profession – all, at various times, criticize, pan, praise, or laud laws. Thus, lawyers are inclined to say, in any number of formal and informal contexts, "this law is a good law (or a bad law)," or "this regulation is a godsend (or a calamity)"; "that piece of legislation is a breach of trust (or an act of good faith)"; "that legal regime, even, is a boom (or a bust) for mankind." How do we do that? What is it that lawyers know, if anything, about law, society, or political morality that informs their nonadversarial critical work? Somehow, the scholar, judge, American Law Institute committee member, legislator, or student reaches a judgment that a strict liability rule with respect to automobile accidents or defective products is *better* than a negligence regime, that the holder of a promissory note *should* take that note free of defenses on the basis of fraud in the underlying transaction, that a sexually harassed worker *should* have a cause of action under Title VII of the Civil Rights Act, and that the First Amendment *should* protect purveyors of hate speech no less than advocates of evolution or creation science against state censure. Knowledge of the law that exists cannot alone generate the basis of our conclusions regarding the law that ought to be – although it is surely true, as countless scholars have pointed out for the past one hundred years, that our judgments regarding the law that ought to be influence our understanding of the law that is.

So what fills the gap from the legal is to the legal ought for the legal critic? Do lawyers have a sense, in any way different from that of nonlawyers, of the good that law, or a law, does, can do, or fails to do, or of the justice that a law ought to promote? Do lawyers have a better or a different moral sense than nonlawyers, perhaps of the attractions of the Rule of Law and the dangers of legalist dystopias? Do lawyers understand something about what justice requires of law? If lawyers don't have some distinctive moral knowledge, then against what base are they judging it, when they praise, laud, pan, or denounce law? If they do have some distinctive moral knowledge, then what is it? What is the human good, or goods, that lawyers,

distinctively, take to be law's goal, or a law's goal, or the Rule of Law's goal? What is the justice we rightly demand of law?

These questions – the demands of justice, the ideals we have or should have for law, or the nature of the "good" that a good law exhibits and that a bad law lacks – should be defining questions of jurisprudence. If there is a field of study that could profitably ask questions about our normative framework for evaluating, criticizing, praising or panning law, it should be jurisprudence – both analytic jurisprudence, which might ask what we mean by the justice, or the good, against which we evaluate law, and critical jurisprudence, which might ask how we should, and how we can, sufficiently distance ourselves from the profession in which we participate, so as to better criticize our deepest and most defining legal commitments. They are not, however. With only a few exceptions, the major practitioners of our dominant contemporary jurisprudential movements do not ask what justice requires of law, what makes a good law good or what makes a bad law bad, or what the good is that law can, or should, accomplish, against which we might judge particular laws or legal regimes. We do not ask how we know that a good law is good or a bad law bad, or what lawyers generally seem to assume to be the case about a good law or a bad law, or whether those assumptions are warranted or unwarranted. Even more clearly, we do not often ask what it is about social life that seemingly requires address by or recompense from the law, or how a good law might respond to a social ill in a desirable fashion, or how a bad law, or no law, might do so poorly. We do not often ask whether we have insufficient law to address ills of private or social life, or how we would know that, if it is true. We do not often ask, anymore, whether the legal regime in which we live and which we have constructed with law is promoting good lives for us and our neighbors. We do not ask whether our legal commitments, as well as our moral commitments about law – commitments to its generality, its rationality, its justice – are complicit in the moral calamities our nation, and our nations, face: a dangerously changing climate, implacable struggles over religious beliefs, a seemingly unbridgeable gap between rich and poor, both globally and nationally. We ask neither ethical questions about a legal regime's or a law's moral goodness nor meta-ethical questions about our own or our fellow lawyers' unexamined practices regarding the legal criticism in which we all nevertheless engage. Jurisprudence has largely turned its back on these normative questions about law's value.

This is a significant omission. These normative questions – the meaning of justice, the quality of the legal good that a good law possesses and a bad law lacks, the quality of life our legal regimes promote or frustrate, the complicity of our law and our legal consciousness in contemporary injustices – all ought to be jurisprudential questions. They ought to be pressing, urgent jurisprudential questions, I believe, but more minimally, they ought to be at least on par with what are today regarded as the central questions of jurisprudence: the meaning of law, the source of law's authority, the status of the unjust law, the relationship of law and positive morality. Yet they are not. Because they are not, an entire family of questions about the criteria that lawyers

use or should use in determining or debating the goodness or the justice of laws has been slighted, over the past half century or so, in the very field of legal studies to which those questions should be central. Jurisprudents do not ask themselves or one another or the rest of us particularly probing questions about the nature of justice or of what I will call for shorthand the "legal good" – by which I mean the quality or qualities of goodness that a good law possesses and a bad law lacks. In fact, we are in flight from these normative questions, and our jurisprudence as well as our critical practices are the worse for it.

It clearly was not always thus. At different times through the century just ended, both jurisprudents and legal philosophers routinely asked these questions. In our own time, however, although our three major contemporary jurisprudential traditions – natural law, legal positivism, and critical legal theory – ask jurisprudential questions that are surely related to these, they have nevertheless for the most part quite explicitly turned their backs on questions regarding the requirements of justice or the nature of the legal good. This has left a gap in each of these traditions, although in different ways.

The overriding purpose of this book is to explore the reasons that each of the three major jurisprudential traditions of North American legal theory – natural law, legal positivism, and critical legal theory – has abandoned normative inquiry and to urge that we change course. The purpose of this introduction is to summarize briefly some of the arguments I make in the chapters that follow. What is the goodness that a good law possesses? What does justice demand of law? These were once defining questions of jurisprudence, but they are no longer. Why?

Let me start with Natural Law. In *Natural Law and Natural Rights*,[1] John Finnis's great and greatly underappreciated 1980 jurisprudential work, Finnis developed what still stands as the most compelling twentieth-century Natural Law position that aims (partly) to answer precisely this question. The just law, Finnis argued, is the law that (in part) promotes the common good, which is itself nothing but the basic goods of the individuals affected by the law.[2] Those goods, in turn, include, in part, the value of play, of life itself, of friendship, of knowledge, of practical reason, and of autonomy. Both law itself, Finnis posited, and our basic legal institutions, such as contract, property, and marriage, are necessary conditions for the cooperation required among even benignly motivated citizens to secure these basic goods.[3] Thus, the just law promotes these basic goods of individuals, or the common good, whereas the unjust law does not. The good law likewise, then, is the law that promotes these goods. Criticism of law should reveal the relationship, or lack of relationship, between positive law and the human goods it ought to serve.

Finnis's decidedly substantive natural law theorizing, however, did not persuade late-twentieth-century American jurisprudents, including even those who embraced

[1] John Finnis, *Natural Law and Natural Rights* (New York: Oxford University Press, 1980).
[2] *Id.* at 154, 164.
[3] *Id.* at 231–33.

natural law, for several reasons, some internal to Finnis's work, some external. First, the method Finnis espoused was overly intuitionist – the basic goods were to be understood by people with experience, intelligence, and a capacity and taste for speculation – but against their grasp of the goodness of the basic goods, no arguments were germane. How do we know the content of the good, or the common good, that law ought to promote? The basic goods, Finnis argued, are simply understood as such by such good and intelligent people – they are good in themselves and need no further justification.[4] This is clearly unsatisfying, methodologically, for any who find Finnis's list incomplete or in some way wrongheaded. Second, by the 1970s, political liberalism itself, and eventually the constitutional jurisprudence built on it, had come to assume as axiomatic a theoretical structure that explicitly disavowed any reliance on any conception of the good life as the object of state action, politics, or certainly of law.[5] Finnis's work, and his approach, appeared to be illiberal when posited against a liberalism that claimed agnosticism toward all richly developed conceptions of the good life, and hence the basic goods. Third, Finnis's later writing and advocacy against same-sex marriage[6] seemingly validated the worry that his substantive natural law, targeted on a law that would advance a full conception of the good and the good life, would prove unduly conservative and moralistic. Finally, the secularized but loosely Thomistic approach he embraced in *Natural Law and Natural Rights* – the attempt to specify a universal account of human nature that would inform, although by no means define, the human good, and to place the value of law within that framework, came to embody, by century's end, an ambition that was unacceptable to a critical consciousness that worried not so much about parochialism and a good deal about imperialism. Any theory based on an account of human nature, even loosely understood, appears suspect. Finnis's early writing continues to influence, and heavily, the development of a Thomistic natural law tradition that views itself as decidedly outside the mainstream of the secular legal academy.[7] His writing on the moral duty to obey just law continues to attract attention from his positivist critics.[8] However, his developed substantive

[4] *Id*. at 92.

[5] *See* Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977); Dworkin, *A Matter of Principle* (Cambridge: Harvard University Press, 1985) 191–92.

[6] *See* John Finnis, "Law, Morality, and 'Sexual Orientation,'" in *Same Sex: Debating the Ethics, Science, and Culture of Homosexuality*, John Corvino, ed. (Lanham, New York, London: Rowman and Littlefield, 1997) 31–43.

[7] *See*, e.g., Robert P. George and Beth Elshtain, eds., *The Meaning of Marriage: Family, State, Market, and Morals*, (Richard Vigilante Books, 2006); Robert P. George, ed., *Natural Law and Moral Inquiry: Ethics, Metaphysics, and Politics in the Work of Germain Grisez*, (Georgetown University Press, 1998); –, In Defense of Natural Law, (Oxford: Oxford University Press, 1999); – , ed., *The Autonomy of Law: Essays on Legal Positivism*, (Oxford: Oxford University Press, 1999); – and Christopher Wolfe, eds., *Natural Law and Public Reason*, (Georgetown University Press, 2000).

[8] *See generally*, S. Aiyer, "The Problem of Law's Authority: John Finnis and Joseph Raz on Legal Obligation," *Law and Philosophy* 19.4 (2000): 465–89; Leora Batnitzky, "A Seamless Web: John Finnis and Joseph Raz on Practical Reason and the Obligation to Obey the Law," *Oxford Journal of*

natural law jurisprudence failed to significantly change the direction of natural law theorizing within the American liberal legal academy of the late twentieth century. By 1970, natural law, at least in the United States, had taken a dramatically different, far less substantive, and only purportedly more liberal turn.

In the 1960s, Lon Fuller, midcentury's foremost American secular natural lawyer, asked much the same question as that which engaged Finnis and his Catholic natural law colleagues but answered it by developing, in essence, a nonsubstantive, procedural alternative to natural law theories to which Finnis contributed: the goodness of a morally good law, Fuller argued, is to be found not in any relationship it might have to any substantive conception of the human good, the basic goods, or the common good but rather in its regard for what we now call process, or procedural justice.[9] Although the legal process school of the 1960s embraced, partially, his response, Fuller's so-called procedural natural justice did not prove particularly regenerative within jurisprudence proper over the next half century. The procedural notice, generality, transparency, and related process goals that Fuller demanded of law for it to be good, seem, collectively, not quite good enough – plenty of very bad laws possess all of these process virtues and more so. On the other hand, the analytic and philosophical claim Fuller insisted on – that legal regimes that fail to meet procedural criteria of goodness are not and ought not to be regarded as law – seemed, to many, far too stringent: plenty of regimes that lack the requisite goodness, defined by his criterion, seem to all the world except Fuller, perhaps, to be law nevertheless. Thus, Fuller asked the right question – what is the good that a good law possesses? – but his answer, procedural purity, notably failed to convince.

Ten years later, Ronald Dworkin offered a very different, albeit equally secular, natural law understanding of the legal good: perhaps the good law, or at least the good judicial decision, Dworkin[10] argued, is the one that most logically and politically fits within a pattern of institutional arrangements established by a prior web of such decisions and is at the same time consistent with some defensible conception of political morality. A judicial declaration that meets this two-pronged test might be properly called both just and law, whereas one that fails either prong is neither. Although it has had a longer shelf life than Fuller's account, Dworkin's account of the goodness of a good law as well – that legal doctrine, articulated by judges, is both law and good when it is consistent with past legal practice and not dramatically at odds with a decent conception of political morality – also seems to be waning in influence. Dworkin's reliance on integrity with past legal practice as the test of both

Legal Studies 15.2 (1995): 153–75; Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979); Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal Systems*, 2nd ed. (Oxford: Clarendon Press, 1980); Kenneth Einar Himma, "Positivism, Naturalism, and the Obligation to Obey Law," *Southern Journal of Philosophy* 36.2 (1998): 145–61.

9 Lon Fuller, *The Morality of Law* (New Haven: Yale University Press, 1965).

10 Ronald Dworkin, *Law's Empire* (Cambridge: Belknap Press, 1986) 119–51; Dworkin, *A Matter of Principle*; Dworkin, *Taking Rights Seriously*.

the legality and the moral goodness of judicially created law struck many as unduly Burkean or tradition bound at best and pandering at worst – plenty of very bad laws will meet his test of goodness, if the historical web of traditional legal and political decisions have themselves been bad or unjust. Furthermore, as was true of Fuller's, the analytical jurisprudential claim at the heart of Dworkin's jurisprudence – that law consists only of those actual and potential and idealized pronouncements that meet these moral tests – like Fuller's, seemed both over- and underinclusive: it contains principles that do not strike anyone but Dworkin as the stuff of law, and it excludes ordinary legal pronouncements that may not meet the moral test but nevertheless seem to be law.

Both Fuller and Dworkin, for all their differences, put forward accounts of the legal good, but in both cases, the claims seem, and have seemed to their readers, too thin. Neither procedural purity nor institutional fit with the past are sufficient to ensure the goodness of law, and neither, perhaps, is even necessary. Perhaps more to the point, their moral claims about the content of the good that a good law possesses in both cases were overshadowed by their analytic claim: that a law that lacks goodness is therefore not law. The latter claim, which for different reasons also failed to convince their critics, captured the legal academy's attention more than either theorist's account of the goodness that good law (or simply law) possesses. For whatever reason, however, with Finnis's substantive natural law contributions largely influential only within Thomistic traditions, Fuller's influence discernible only in occasional traces, and Dworkin's influence on the wane, there is simply no secular natural law movement active in the legal academy that is putting forward a serious claim regarding the nature of the goodness that a good law exhibits – or an account of how we know it when we see it. For those of us who take seriously the importance of the moral question Finnis, Fuller, and Dworkin asked and who have a high regard for those natural lawyers in our history who have tried to answer it, this is a profound lack indeed.

What of legal positivism, once again the reigning philosophical and jurisprudential framework of the legal academy? Here, as well, we find little inquiry into the nature of the good law, at least since H. L. A. Hart's attempt to spell out the minimal natural law content of positive law.[11] There is a profound historical irony here: nineteenth-century positivists, at least from Bentham forward, insisted on the separation of law and morality, in large part, to facilitate a clearer critical posture toward the law that is – only by separating the is and the ought, Bentham and his colleagues thought, could we see the injustice or possibly the evil of some of the law that is.[12] Bentham's embrace of legal positivism, then, was clearly motivated by a desire to facilitate clearheaded moral criticism of law – that law is the command of the sovereign, and nothing more, permits the critic to put the rose-colored glasses

[11] H. L. A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961) 189–95.
[12] Hart, *The Concept of Law* 270–71.

aside and adjudge its utility, and hence its value, or its goodness – apart from its claim to legality. Only by first seeing law as it is can we hope to evaluate its goodness. Understand clearly the law that is, so that one can better adjudge its utility – and then criticize it freely, and ultimately reform it.

H. L. A. Hart continued this Benthamic understanding of the critical root of legal positivism, although without the utilitarian overlay: Hart, too, developed legal positivism as a jurisprudence that would complement and facilitate liberal, and critical, political engagement with extant law. Post-Hartian contemporary positivists, however, have not followed through on the invitation to use legal positivism so as to clarify the basis of (and need for) the moral criticism of law – and hence pave the way for legal reform. Rather, contemporary legal positivists who inquire into various definitional accounts of law, including the relationship of law and a community's positive law or the relationship of law to true morality, do so, for the most part, to investigate the nature of the relationship of law to some moral standard, not to the content of the moral standard itself. The question for our contemporary legal positivist is how we determine whether some norm is a law and whether in answering that question we must first say something about its moral value. The question is not, however, the content of the moral good – or even how we determine that moral value or lack of it. Contemporary legal positivists, not unlike contemporary secular Dworkinians or Fullerians, have focused overwhelmingly on the analytic part of positivism – the claim that the content of law must be determined by a nonmoral metric – and have neglected the moral motive for doing so: to better subject the law that is to the light of critical reason.

Finally, critical legal theorists, their self-appellation notwithstanding, have for the most part likewise not sought to elucidate the nature of the legal good. Rather, critical legal theorists, since the 1970s, have asked probing questions about the relationship of law to power: Is law nothing but the product of power? If so, is that something to bemoan, celebrate, or simply acknowledge? What is the relation of law, some critical theorists ask, to patriarchal power, or, others ask, to the power of capital, or, still others, to white hegemony, or, recently, to heteronormativity? Does law legitimate these sources of cultural or social power; does law further the false and pernicious perception that these and other hierarchical arrangements are necessary? These are all good questions, but their answers do not imply anything one way or the other about the goodness or badness of the law so unmasked, revealed as contingent rather than necessary, or delegitimated. Rather, the focus of the contemporary critical theorist is relentlessly limited to the relationship of law to the power that perverts, produces, or constrains it, or alternatively to the social, cultural, or political power that is legitimated and mystified by the hegemony that is law's product. The nature of the legal good – what makes a good law good and what virtues a good law ought to have – is decidedly not the object of study, beyond showing the relationship of such a question itself to deployments of social or cultural or legal power.

Here, as well, this stands in contrast to the work of earlier generations of critical theorists who influenced the philosophical orientation of our critically minded peers and selves, notably the early-twentieth-century legal realists and American pragmatists, for whom questions of the nature of the human good that might ideally be served by law, and against which existing law ought be criticized, were real and pressing.[13] Likewise, the realists were not averse to explicitly moral critique of existing law and debate over the nature of the human good that good law ought to serve. Morris Cohen, John Dewey, and the architects of the New Deal had contestable but nevertheless articulable understandings of our nature and what law might do to contribute to human well-being. Contemporary critical theorists have in essence retained the realists' and the early critical theorists' insistence on power's pervasiveness, but they have dropped their constructive moral ambition: the ambition, that is, to specify a speculative account of human nature, from which one might imply an account of the good that law might do and then criticize law accordingly. From our critical jurisprudential traditions, we get a powerful critique of law's sometimes-hidden political basis. We do not get the basis for a moral critique of power or of the law that is its product.

In the absence of a jurisprudence specifically focused on questions regarding the nature of the legal good, how, then, *do* lawyers criticize law? For the most part, lawyers and legal scholars moving from the legal is to the legal ought tend to use, and to assume, values drawn very loosely, and for the most part nonreflectively, from some version of these three traditions. Thus, for many traditional legal scholars and likely for most lawyers, the goodness and the justice of a legal decision is a matter of its fit with prior decisions, in a manner not dissimilar to what Dworkin described forty years ago for his idealized Judge Hercules. For these lawyers, that a judicial decision is in accordance with law – that it has integrity; that it fits with prior precedent; that it is, in short, legally just – is all that need be said on the question of its goodness: if the decision is just, meaning in accord with prior institutional arrangements, then it is good, and if it is unjust, meaning that it fails to fit, then it is bad. Whether a decision is just depends on its fidelity to preexisting law. Ergo, legal doctrine itself, read in its best light and over an expansive period of time, exhausts the normative basis on which at least legal decisions, if not new law in its entirety, can be judged. The good decision is the just decision, and the just decision is the decision that accords in some deep and perhaps indiscernible way with past law. For other lawyers, the source of the value that accounts for the move from the legal is to the legal ought is roughly a tally of costs and benefits: that a law or regulation is efficient or inefficient, likely to create more wealth than costs, is all that one need know to ascertain the goodness of a law. Particularly for lawyers influenced by the normative wing of the

[13] Morris R. Cohen, *Law and the Social Order: Essays in Legal Philosophy* (New York: Harcourt, Brace, and Company, 1933); John Dewey, *Human Nature and Conduct: An Introduction to Social Psychology* (New York: Henry Holt and Company, 1922); Dewey, *Individualism Old and New* (New York: Minton, Balch and Company, 1930).

law and economics movement, that a law or judicial decision promotes efficiency or increases wealth is sufficient to establish its goodness. The lawyer's expertise, if any, is simply to complement that of the legal economist, to add legal acumen to the economic calculation where need be. And to the rest of us, that either a law or legal decision – and it does not matter which – does or does not entrench established structures of power is basically all we seek or need to know. If a law can be shown to legitimate power, promote hegemonic values of various dominant political groups, mystify the nature of the contingent and socially constructed world we live in, or create an illusion of false necessity, it is therefore a bad law. If it delegitimizes power, complicates the hegemonic power of dominant groups, demystifies what appears to be necessary as contingent, then it is good.

One can easily see the influence of natural law, positivism, and critical theory, respectively, in these common ways of evaluating law: the traditional doctrinalist echoes the Dworkinian natural lawyer's understanding that the good decision is the just decision that accords with the past; the legal economist echoes the classical legal positivist's insistence that welfare or utility, and not tradition or past decisions, ought to be the metric against which new law is judged, and the egalitarian echoes the critical legal scholar's focus on uncovering the politics behind both law and mainstream criticism. The legal community quite generally has embraced these three criteria – integrity, efficiency, and equality – for the moral evaluation of law and legalism. Jurisprudence proper, however, has eschewed the careful and dialogic consideration of precisely the questions that generated them.

Yet these criteria – criteria pertaining to the institutional fit, efficiency, or politics of law – and the possible answers they suggest do not exhaust the criteria we do or should use in debating or pondering law's goodness. That a decision is just – perhaps because it fits well with prior rules or decisions raising comparable facts – neither implies nor disproves the goodness of the rule with which the decision comports. As truly countless scholars have pointed out, that a law is efficient, maximizes wealth, or leads to a net increase of benefits over costs does not make it, therefore, a good law. Many of us can imagine or point to laws that are efficient, wealth maximizing, or conducive to more benefits than costs that we would nevertheless regard as travesties, and those who cannot so readily imagine nevertheless tend to concede the validity of the exercise. There is a gap between the goodness of a law and its efficiency, just as there is a gap between human welfare and wealth. Finally, that a law or decision or body of law, legitimates, mystifies, reifies, or reflects social power does not imply that it is therefore a bad law; its value depends entirely on the value of the use to which that power is put. Likewise, a law that furthers hegemony or that legitimates the power of patriarchy or capital or the state or corporations may or may not be bad – or good – by virtue of those facts.

There are reasons, internal to each strand of jurisprudence, for the diminishment in importance of the inquiry into the legal good. Both Dworkin and Fuller, our secular natural lawyers, invited an identification of constitutional with moral criteria

of evaluation, thus conflating the legal is and the moral good, thereby conflating as well the determination of law with the determination of its merits. This has the effect, desired by both Dworkin and Fuller, of morally enriching the legal craft, but it also had the effect of subjecting the law only to internal legal – albeit higher or constitutional – critique, but legal all the same, thus muting both the purely moral criticism of law and jurisprudential inquiry into law's potential goodness. Within legal positivism, some (not all) utilitarians, many economists, and like-minded legal theorists have tended to embrace uncritically an identification of the good with the desired, and hence of human welfare with the product of choice and preference, thus conflating the moral inquiry into law's goodness with various empirical questions regarding the relation of legal constraints with market and democratic outcomes. Within critical theory, legal critical theorists tend to identify the project of critique with the project of unmasking power and to equate goodness with egalitarian outcomes, thus neglecting the work of identifying and promoting the human good. All of these intramovement trends have occurred over the past half century or so, and all have left our jurisprudence remarkably hollow. The nature of the good, and hence the good law, has been equated within secular natural law with constitutional norms (both procedural and substantive); within positivism with desire, preference, and choice; and within our critical jurisprudential movements with either the celebration or the eradication of power. Although other interdisciplinary movements – law and economics, law and humanities – have to some degree filled the gap, we have no sustained jurisprudential inquiry, within natural law, legal positivism, or critical jurisprudence, into the nature of the human good that law, a law, or the rule of law might do.

This book argues that we need a rejuvenated normative jurisprudence that centralizes, rather than marginalizes, the concept of the individual, common, social, and legal good and the varying accounts of human nature that might inform such understandings. Why? First, we need to be able to ask what social or private or political injustices might prompt us to desire new law, where such law is absent, and when we should create law rather than simply how we should interpret the law we have. We need to be able to ask whether a law might improve a less regulated or unregulated social environment. We cannot do this with a jurisprudence that is court-centered and focused on the virtue of maintaining continuity with the past rather than on legislative creativity and the virtue of meeting social need. Second, we need to be able to ask whether our most basic legal institutions are good or bad and why. We cannot do this with a normative jurisprudence that looks at most for integrity with past legal practice, tabulates cost and benefit that assumes current preferences as given, or asks too minimally whether a legal institution furthers or promotes social hierarchy. Third, we need to be able to ask whether the conceptions of human nature that current critical practices implicitly assume, or that implicitly inform our conception of the good and the good human life, are true or false, under-inclusive of our human community, or denying of aspects of our nature – whether,