1

The Nature of Jurisprudence

1.1 What is studying jurisprudence all about?

The idea behind this textbook is to help students through the examination on jurisprudence and legal theory. It cannot be a substitute for either the primary sources or, indeed, other textbooks and students will go badly astray if they attempt to use it in this way. It is, however, intended to give students an overview of the main areas.

Jurisprudence is a different sort of subject to study from most aspects of the law which largely deal with case law and statutory materials. This is mainly because ideas, and not facts, are at a premium. Jurisprudence has facts, true, and case law subjects are not, of course, completely devoid of intellectual content. But it is clear that there is a greater proportion of abstract, theoretical material in jurisprudence, and students often fail to come to terms with it.

As we all know with a case law subject, it is possible to be very lucky in preparation the evening before an examination and to hit upon a topic that will be fresh to mind the following day and which is in the examination paper. That sort of possibility does not exist for jurisprudence. Instead, you have to show the examiners that you have developed a speculative cast of mind in your reading and study. You should, however, be aware of the following:

The relevance of legal practice

There is in the English tradition a scepticism for anything theoretical in connection with the law. This is in marked contrast to the position in Europe where theoretical perspectives are welcomed. In English law schools many of the lecturers are also practitioners in the law and have little time for what they often perceive to be abstract waffle. Despite this, lawyers often display in practice an approach to the subject of law that would legitimately be the scope of inquiry of a jurisprudence course. If law students were to avoid the study of jurisprudence they would fall into the trap of accepting without question the correctness of *other* people's views on the issues within the jurisprudence course without necessarily knowing why or how.

Jurisprudence will help you formulate what questions need to be asked and gives guidance on how others have sought to answer these questions. In the UK, most people accept as valid a theory of law known as legal positivism. That theory was the invention of only a few legal philosophers, the most notable of whom was Jeremy Bentham. Those who say that jurisprudence has no effect on the real practical world should contemplate what sorts of people influenced their beliefs. It is certainly true that Bentham (and Austin and, in turn, Hart) have had an enormous effect on the way we think about law in the UK today. Ronald Dworkin, too, is having an increasing effect on the way we think about law, particularly since the publication of his book *Law's Empire* in 1986. Note, for example, the following remark made by Sir Leonard Hoffman, a distinguished judge of the Chancery Division of the High Court, in an article in the *Law Quarterly Review* in 1989: 'Dworkin is one of the few writers on general jurisprudence who accepts and engages with the reality of what judges have to do'. (Hoffman ends by saying that 'Readers who want to know what judges are supposed to be doing [should] buy *Law's Empire.*')

Jurisprudence has relevance to the real world. It will not convey houses for you, or help you make a case for a company insolvency. But those are not the only matters of practical interest in the world. It will help you develop a sense of what law is about. To give examples: Austin and Bentham thought it was about power. Hart and Kelsen think it is, instead, imbued with 'authority' but not 'moral authority' as do Dworkin and Fuller. Austin thought judges were deputy legislators. Dworkin thinks that judges only 'create' law from what is already there. Marxists think that law only serves the interests of the powerful and the rich. Those in the American critical legal studies movement think law schools serve the insidious purpose of placing a veneer of respectability over what is essentially chaos and conflict. Some jurists believe that courts enforce moral *rights*, others, such as Bentham, think that idea is 'nonsense upon stilts'!

All these ideas are relevant in varying ways to the practice of law. Lenin once wrote that theory without practice is pointless and practice without theory is mindless. He was espousing a Marxist notion that the point was not so much to interpret the world as to change it. Without necessarily adopting a Marxist analysis in the context of jurisprudence, we can argue that *legal* practice outside of a theoretical context would be mindless, while acknowledging at the same time that a legal theory that did not refer to practice would be pointless. With this in mind, and in spite of the heavy emphasis upon practical training in English law schools and of the practitioners' scepticism about the subject, we shall emphasise the practical aspects of jurisprudence.

In any case, it is 'practical' to develop your intellectual skills. Try pitting your wits against any of the jurists mentioned in this textbook. Try, for example, to see whether you agree with what Hart says about the law. Then see whether you agree with what Dworkin says. You may find you agree with both of them. But you

cannot, for they give fundamentally contrary theories. You must try to develop a habit of analysing what it is you accept and, more importantly, why. It is extremely difficult, especially when you are first faced with these theories, to develop such a habit. It is just very difficult to say something new in jurisprudence. That is why we need to study the 'greats' of the subject, to get some clues as to what position we ourselves should hold.

The hope is that by orienting you towards the subject and encouraging you to approach the various materials in a sensible way, you will develop your own critical awareness of the issues, of what jurisprudence is about. This should place you in the best position to answer the examination questions and help you to organise your work and time efficiently.

It cannot be overemphasised that jurisprudence is not like the other topics that one studies for the LLB degree. It calls for and expects a student to develop a capacity for critical thought rather than the dogmatic acceptance of legal rules as part of the natural order and the learning by rote of the course material. It is essentially an interdisciplinary study.

How to read a jurisprudence text

You should therefore examine the criticisms that have been made of the theory, reflect on these and evaluate their validity in the light of your own legal knowledge. In this way you will (really!) develop your own understanding of law and the legal system. Essentially, you should enter into a dialogue with the texts being read. Imagine the person who wrote the text is beside you. One does not try to learn what the other person in a conversation is saying. Rather one engages them in conversation and either agrees or disagrees with what they are saying.

Professor Twining has identified three levels on which to read a jurisprudence text:

1. The *historical* level, where the reader places the text in its historical perspective and asks questions such as: what were the issues of the day on which the text was written? Today many of those issues may just be irrelevant. In examining a text on its historical level it should be borne in mind what was available to that author. To whom was he replying? What was the problem at that time? Whose work was available at that time?
2. The *analytical* level, where it would be appropriate to examine the questions raised, scrutinise the answers given and then evaluate the reasons provided for those answers. On this level it is important that the student clarifies the nature of the question before accepting the author's answer. Some questions do contain false assumptions and it would be necessary to identify these.
3. On the *applied* level, where the reader examines the implications of accepting the position outlined by the author. It is on this level that one can decide why the author wrote what he did when he did, particularly with regard to the political implications of the text.

This is what will be required from you. The technique for the study of jurisprudence is to engage in such a critical and evaluative discussion. This requires the student to develop his own understanding and to recognise that there may be a number of ways in which a text can be read, each one aspect as illuminating as any other.

1.2 The scope of jurisprudence

By its very nature this is a topic whose province has been redetermined from time to time. Why not start with what the nineteenth century legal philosopher John Austin, who made legal positivism famous, thought constituted the study of jurisprudence? You might be surprised to learn that John Austin, Bentham's distinguished pupil (see Chapter 8), was one of the first two professors appointed in the Faculty of Law of the University of London. This university was the first in England to open its doors to people from all walks of life. It was also the first in England to teach common law in a systematic way. It is fitting, especially since Austin and Bentham (largely through Austin's writings) had such a profound effect on the way lawyers in England even now reason and decide, to see what Austin himself said about the nature of jurisprudence.

In 1832 Austin published the first six lectures of the total of 57 he gave when first appointed professor. The best copy of these, published in 1954 under the title *The Province of Jurisprudence Determined*, is edited by H L A Hart. At the end of this edition, there is a short piece entitled 'On the Uses of the Study of Jurisprudence' with which Austin originally began his lectures. In it he sets out a number of reasons why jurisprudence should be regarded as an integral part of law teaching. He says that there are two ways of studying the subject. There is 'particular jurisprudence', which is the study of the positive law *of a particular legal system*, and there is 'general jurisprudence', which is the study of 'the principles, notions, and distinctions which are *common* to systems of law'. He says that he means by 'systems of law':

> '... the ampler and maturer systems which, by reason of their amplitude and maturity, are pre-eminently pregnant with instruction'.

As a comparative lawyer, Austin was well versed in the European legal systems. He thought it was blind of lawyers to be concerned only with their own particular systems. What was needed was a general overall view of the structure and content of law, a view of the *nature* of law. Only then, he thought, could lawyers fully appreciate in practice what they were doing. To give you a flavour of his views, note the following (you would benefit from reading the whole paper, but for present purposes you will find a suitable extract in Lloyd and Freeman pp23–5):

> '... a previous well-grounded knowledge of the principles of English jurisprudence, can scarcely incapacitate the student for the acquisition of practical knowledge in the chambers of a conveyancer, pleader, or draughtsman. Armed with that previous knowledge, he seizes

> the *rationale* of the practice which he there witnesses and partakes in, with comparative ease and rapidity; and his acquisition of practical knowledge, and practical dexterity and readiness, is much less irksome than it would be in case it were merely empirical. Insomuch, that the study of the general principles of jurisprudence, instead of having any of the tendency which the opinion in question imputes to it, has a tendency (by ultimate consequence) to qualify for practice, and to lessen the natural repugnance with which it is regarded by beginners.'

What does Austin mean in this passage by 'rationale' and 'empirical'? He means that a full education in the law requires more than just empirically pocketing bits of statutes, or bits and pieces of the common law. By studying the nature of law, a knowledge of how it is coherent becomes more apparent. If you do not agree with this view of Austin, you should consider why you disagree. You also might consider reasons why jurisprudence is taught as part of a *university* degree. You might consider what a university is for and what ought to encompassed by the idea of a university education.

The different classifications of jurisprudence

There are different classifications of jurisprudence. General jurisprudence is concerned with speculations about law as distinct from speculations about a specific law. There are many ways to arrange the questions that are posed in general jurisprudence. One will not find any agreed list from the literature. Questions such as the following seem to be common to most:

1. What is law?
2. What is *a* law?
3. What is a legal system?
4. Should law enforce morality?
5. How does the nature of society affect law?
6. What role does law play in society?
7. What is the purpose of law?
8. Is law necessarily just?
9. What are the appropriate criteria for assessing a legal *theory*? (This is a very difficult, but very important question.)

These are a few of the questions that are the concern of general jurisprudence. They demonstrate that general jurisprudence is the area where the work of the legal scientist overlaps with other disciplines such as the study of morality, anthropology, politics and economics. These questions make up a substantial portion of the course covered in this textbook. The student ought to be thinking about some of these questions throughout the course. Experience shows that the student's answers will undergo a substantial change towards the latter part of the course, when the questions may be asked again.

You might note that Harris' view, expressed in his book *Legal Philosophies*, is that

general jurisprudence is of little value in instilling the technical skills of legal reasoning and argumentation. He believes that these skills come, as he puts it, from 'immersing oneself in substantive legal studies'. On the other hand, he sees some value in *particular* jurisprudence which involves speculations about particular legal concepts such as rights and duties.

We study the various theorists because they throw light on these rather difficult topics. The perception, of course, should remain that of the reader. In a study by King entitled *The Concept, the Idea and the Morality of Law* (1966) the author asks whether it is possible to define the object of inquiry without anticipating the result. Take the work of John Rawls (see Chapter 21). His theory of justice arrives at the conclusion that might be expected from a democratic liberal, viewing justice as fairness yet subjecting economic inequality to political equality. Did he arrive at that view only after writing his book or did he have in mind his conclusion before he set pen to paper? The argument that King makes is that our assumptions will find their way into our account of law, having a considerable influence on subsequent exposition. By reflecting on this point at an early stage the student will equip herself to deal with the plethora of literature. An easy way to test this concept is to check what assumptions an author makes in the Preface or Foreword to a work. Great insights into Hart's and Kelsen's work, for examples, can be made in this way.

2

Language and the Law: the Problem of Definition

2.1 The point of a definition

There are, of course, problems about what is meant by defining law. It is not as if you can just look the matter up in a dictionary. Try it and see for yourself what an unhelpful endeavour that is. More importantly, why bother to define it? Well, the examples of the Romanian regime and the Nuremberg trials show that such questions can be of very great importance. In a very important sense, for example, the theories of law of the jurists are themselves definitions of law. Get into the problem of definition by examining continuously the question of what the jurists are trying to do. Hart, for example, in Chapter 2 of *The Concept of Law*, sets out three major reasons why he wishes to define law: he wants to be able to answer the problems of the relationship between law and coercive orders, the difference between legal and moral obligation and the definition of what it means to say that a social rule exists. What are Hart's answers to these questions? What are different ways of defining things? Can we define ideas? What does a theory try to do? What is the relationship between theory and practice? What is the use of a model? Is there *anything* that is real? What is morality? Do important moral issues hinge on how we define law? Is it possible to choose one legal theory rather than another on moral grounds?

2.2 Jurisprudence, the law and words

What is the problem? What are we doing when we try to work out what law is? We can imagine all sorts of motivation. We have been asked to provide an hour-long talk to a women's institute entitled 'What law is'. Or we might have been asked to address a group of Marxist students on the same subject. We may just want to satisfy ourselves, from a purely self-interested point of view, on what we are permitted or required to do by law. Or we may want to know what law is with a view to considering how it fits in with, or could contribute to a more just society. There are all sorts of reason. Even just unanalysed 'interest' is enough.

We can, of course, make ourselves and other people *more* aware of the way we understand language which expresses the law. We could, therefore, use a dictionary as a start in this direction. We might follow up all the words that relate to law, like 'obligation' and 'police' and 'courts' and 'rule'. Then we could test all the possible uses of these words, trying them in different sentences and different contexts. We could also contrast law-related words such as 'morals', or 'custom' with other kinds of words that appear in the same sorts of contexts. In this project, we will be refining our sense of what amounts to correct and incorrect use of language.

However, take the Marxist. He appreciates the difference in our linguistic practices but he is unwilling to say that law is fundamentally different from naked coercion. He is not keen to affirm that it has any connection with the idea of obligation. He will produce the argument that law only *appears* to have legitimacy because a dominant class of people has encouraged such a view to further its own economic interest.

This sort of argument cannot be met by merely citing dictionary definitions. It makes a point beyond that of showing our agreement in linguistic practice. It is *most* significant that Hart, whose theory is central to some of the debates examined in this book, has recognised the serious limitations of this form of approach in an admission in the Preface to his book *Essays in Jurisprudence and Philosophy* (1983).

> 'The methods of linguistic philosophy which are neutral between moral and political principles and silent about different points of view which might endow one feature rather than another of legal phenomena with significance ... are not suitable for resolving or clarifying those controversies which arise, as many of the central problems of legal philosophy do, from the divergence between partly overlapping concepts reflecting a divergence of basic point of view or values or background theory, or which arise from conflict or incompleteness of legal rules. For such cases what is needed is first, the identification of the latent conflicting points of view which led to the choice of formation of divergent concepts, and secondly, reasoned argument directed to establishing the merits of conflicting theories, divergent concepts or rules, or to showing how these could be made compatible by some suitable restriction of their scope.'

The tools of the lawyers' trade are words. These tools are not expressible in terms of mathematical precision, yet they are the only tools available with which the lawyer will perform his function. This can be seen as the cause of many of the problems of the law. The majority of appellate court cases concern the construction

of words and phrases used in statutes. As Oliver Wendell Holmes observed, words are not crystals, they are not clear. They are capable of different meanings. Jurisprudence, according to Holmes, should be concerned with the reality of the legal experience. To that extent definitions are useful if they correspond to the way in which lawyers actually behave and think. Otherwise a definition is of no value.

Much in jurisprudence is concerned with definitions. Indeed one of the earlier writers on this subject, John Austin, in his *The Province of Jurisprudence Determined*, sought by definition to determine the limits of the course of study. The problems with definitions are that they may be derived from inadequate prior knowledge and involve misconceptions formed at the outset which further burden the definition, and thirdly that they impose artificial limits on the area of study. Professor Hart has attacked the practice of building a theory on the back of definition and shown that it is preferable to engage in an essay in descriptive sociology – descriptive at least of concepts.

Hart has identified in words a core of settled meanings around which there will be no dispute and a penumbral area of doubt in which disputes will arise. Say a hypothetical law provided that all vehicles were to be taxed at £100 per annum. Within that core meaning would come cars and lorries, but what about a skateboard? Or a spaceship? Or a chariot? The issue would become important when a person in control of a chariot was charged with failing to tax his vehicle. He would not argue that the law was unjust, rather he would argue that it did not apply to chariots. The whole issue will be determined on the basis of the interpretation given to the words.

The same difficulty is faced in jurisprudence where many problems can be reduced to questions of semantics. For example, Hohfeld (see Chapter 26) attempted to clarify some of the linguistic problems surrounding the use of the word right. Wittgenstein observed that the meaning of a word depends on the context in which it is used; the meaning of a word is its use in the language. The context will require an explanation for the whole sentence or phrase. Hence the phrase that X owns Y will require an explanation of the concept of ownership. Would it include the control over Y exercised by a thief? Would it include the right of a tenant to enjoy for the present exclusive possession of the property? In many instances this approach will be satisfactory; however, even then, it will not be sufficient in all cases.

Since language is dynamic the meaning of words can change. An example would be the use of the word gay which has changed in time to have a meaning not that which it originally held.

2.3 Refuting essentialism

Essentialism is a term employed to denote two ideas that are related, but distinct. On the one hand there is the view that behind every noun there is an actual reality that it denotes on a physical or metaphysical level. Thus, when we say box we can find a reality that is some sort of receptacle, so too behind the word right there is a real metaphysical entity, floating around on a metaphysical level. Obviously, if this is

so, then it might be possible, by reason and philosophy, to gain an understanding of what this reality is. There is a strong relationship between this notion and some early natural law theories (see Chapter 11) which saw an ideal legal system residing in some metaphysical supermarket.

A second strand of essentialism is less troublesome, and may be found reflected in some positivist thinkers, particularly Kelsen. This sees a word as denoting a common factor or essence intrinsic to a class of objects, things or practices. By a process of logic, this essence might be distilled out from other factors in order to express the real nature of the word. A commitment to the search for such logical unity need not entail a belief that concepts have a reality lurking in obscurity, but does commit one to the view that there is one right answer to the question: What is law? or: What is a legal system? This is a commitment to the view that one central idea can be and is shared by all people who use the word law. This idea might be expressed in the form of a definition.

We can, with relative ease, describe a material object such as my dog Frankie. When, though, does a description become a prescription? For example, if I seek to define what weeds are, at what point do I stop merely describing the features which are commonly regarded as characterising weeds, such as a tendency to stifle other plants and infest lawns? That it is a 'weed' means that it is a plant I do not wish to cultivate; in other words, a weed is a plant I should not grow. Similarly, by defining what law is, do I not tend to end up deciding what ought to be regarded as law? (See section 2.7.)

Hart prefers to concentrate on the focal usages. He does not posit a definition of what law is, which requires a linguistic recommendation, that is, suggesting what it is appropriate to call law. Hart engages in a description of legal discourse seeking to ask what certain key concepts are being used for. He describes his concept of law as an essay in descriptive sociology since he is attempting to view law as a form of linguistic behaviour from which we can infer certain attitudes (see Chapter 10 for an account of the critical reflexive attitude, which Hart regards as the focal area of law). Thus, for Hart, the nature of the jurisprudential enquiry is a search for the revelations of language use.

2.4 Hart's approach

In *Problems of the Philosophy of Law*, Hart says: 'Descriptions of methods [of deciding cases] actually used by courts must be distinguished from prescriptions of alternative methods and must be separately assessed.' The linguistic philosophy of Wittgenstein and of J L Austin seems to offer a method of determining meanings of concepts and words, rather than prescriptions of what that word should mean in the Marxist sense noted above. For example, why is the dictionary's meaning of the word law not a sufficient definition to work from? The answer is that the dictionary tries to provide us with a descriptive account of how people actually use the word.

For this reason, definitions in the dictionary are changed when they cease to be descriptively accurate statements of how people use the words.

Hart sees actual legal acts of speech as being properly legal in the context of their use. When one says, 'I have a right to silence' it presupposes rules, currently regarded as expressing a reason for action. Thus, isolated concepts are not essentially legal, but legal because they refer to other things that are legal. The distinctive feature of legal discourse is that it employs concepts that are not properly explicable in terms of everyday definitions. Therefore one should not seek to understand the word contract when used in legal discourse, in any other way than by reference to the rules that require performance of obligations embodied in the totality of legal discourse. Thus, for Hart, legal concepts are legal because they belong to legal discourse. Law concepts belong to a language game called law, rather in the same way as the meaning of 'Park Lane' on a Monopoly board is only explicable by reference to the rules of that game. While both contract and Park Lane have counterparts in ordinary discourse, they are separated by their usage in a different form of life. The relationship between a legal word and its ordinary counterpart might thus be merely that of analogy. If we look at the concept of reasonableness under the Wednesbury rules, we find that the analogy with the everyday usage of reasonableness is very slim. Similarly, if I have a piece of paper that I think is a contract, that says contract on it and looks like other contracts I have seen, it may still not be a contract, legally speaking. Ordinary reality is thus only the same as legal reality when ordinary reality accords with the rules of the game of law.

2.5 An evaluation of linguistic analysis

Hart's linguistic analysis does not explain the meaning of the legal game and its constituent concepts, but merely describes how to find out how the game is played. Hart is fond, as was Wittgenstein, of the games motif, yet games are often described in terms of their particular purpose. Even subtle games such as cricket can be described in terms other than their rules either by their purpose (a combination of athletic skill, tactical ability and chance pursued by competing groups of individuals for pleasure and/or profit) or analogy (the Englishman's version of baseball). These purposes are more elucidating than what Hart would postulate: primary rules interacting with secondary power conferring rules (if there is an umpire) in more developed contests, where there may be consideration of human vulnerability (such as is found in the bad light rule and others in cricket).

Hart's linguistic approach loses something of the spirit of the legal enterprise. Much criticism of Hart's linguistic approach comes from those with an orientation towards critical legal studies. However, others, such as MacCormick and Dworkin, who are not averse to a linguistic analysis of some kind, see Hart's views as descriptively inaccurate. Each critic of Hart has, however, his own agenda. The critical legal studies movement seeks to develop new ways of reading law so as to

evaluate it in the light of reforming goals. So too does Dworkin, who emphasises that judges search for political morality and principles in their decisions with the aim that judges continue law in a democratic and rights orientated genre, likening the process to literary analysis of a chain novel. MacCormick searches for narrative coherence to explain how laws interact, in pursuit of the key to legal reasoning.

2.6 Interpretation and 'interpretive' concepts

Dworkin developed the theory that the correct way to understand law, and law-related concepts, is through the idea of interpretation. The essential principle is that interpretation attempts to make 'the best' of something, and this very abstract principle is to be applied to the idea of law. A number of ways can be used to describe the idea of 'making the best' of something. One may consider the idea of a thing 'having point', for example, or the idea of 'placing a thing in its best light', whereby we assume that 'the thing' has some point and we examine it as thoroughly as we can to see what is the most sensible way of viewing it.

How does interpretation become an aspect of law? Dworkin says that we may understand a social practice in three analytical attitudes: the pre-interpretive, the interpretive and the post-interpretive. These important ideas can be described by the use of a simple example. Take the pre-interpretive attitude first. Imagine a society in which there is a social practice requiring that men doff their hats to women. In this society, no opinion is held about the value of the rule. No point is ascribed to it. Members of the society just accept it in an unquestioned way.

There will be two parts to the introduction of the 'interpretive' phase, one where there is an attitude of questioning, and giving of 'meaning', to the social rule of courtesy, and a second where the idea of what this meaning of the rule requires in *particular* cases is considered. We can test these distinctions by reference to games, such as cricket, in which a description of a rule is distinguishable from a discussion of its point (is it fun? does it test skill? is it competitive?), which in turn is distinguishable from the way particular rules are to be interpreted (does 'bowling' include throwing? or underarm bowling? and so on).

We now imagine that after a while people begin to ask questions about the practice of courtesy, about what the reasons are for conforming to it. It is easy to imagine, too, that people will differ about their understanding of it and will argue amongst themselves about what precisely the practice of hat-doffing entails. For example, some people might take the view that hat-doffing to women shows respect for the 'weaker' sex, while others believe that it shows a more genuine respect for the ability of women to bear children.

The second interpretive stage occurs when people extend their understandings of the meaning of the rule to unclear cases. Those who think that the rule embodies respect for the 'weaker' sex, may not think that hat-doffing by men is necessary when a woman is doing a 'man's job', or to lesbians, for example. Someone who

thinks that hat-doffing is a mark of respect for people who have the capacity to bear children may not think the rule extends to an elderly spinster or the wife of a childless couple.

Dworkin posits the existence of a third, a 'post-interpretive' phase. This will be where, as he says, interpretation 'folds back into itself' and has the effect of changing the original rule. So, in our example, some people, perhaps through argument and discussion, will come to have an altered perception of the original rule and this altered perception will lead them to modify it. Those who saw the rule as marking a respect for the 'weaker' sex, may now see it in terms of respect for those who have served society in some deferential but faithful way. They may now want to see a change to the rule so that it includes a smaller class of women (exclusion of lesbians, say), but a wider class of people (including old servants, say). Those who saw the rule as marking a respect for child-bearing ability, may now see it as one that should recognise certain other abilities, such as the ability to contribute to society in other ways, say, through leadership. These people might take the view that the rule requires hat-doffing not only to women who have actually borne children but that it should also extend to the more important political leaders, for example.

Making sense out of nonsense

The idea of interpretation put forward by Dworkin is that, in interpreting legal practices, judges (and lawyers, and so on, who advise, cajole and criticise judges) should 'make the best *moral* sense' of the practice. Dworkin says that that is what we are in fact doing whenever we make some judgment about the law (eg 'the defence of duress extends – or doesn't extend – to first degree murder'). But this idea has been fundamentally attacked by Howarth in his article 'Making Sense out of Nonsense' in *Jurisprudence: Cambridge Essays*, ed Gross and Harrison (1993) Oxford. Howarth's article relies heavily on a well-known study by an American social psychologist, Garfinkel, in which the following experiment was conducted. In an experiment to which they consented it was falsely represented to ten students that they were being given counselling for their problems. The counselling given was scrambled and the actual verbal counselling each student received was utterly unrelated to the personal psychological profile and personal problems of each student involved. That is to say, student A would receive the counselling (via a confidential telecommunication system) designed for student B, and so on. What happened was that the students 'made sense' of the counselling and thus, according to Howarth, made sense out of what was actually 'nonsense' counselling for the student concerned.

Howarth maintains that judges are in the same position as these students; they have to make sense out of a mass of conflicting and contradictory – ie nonsensical – principles. At first sight, Howarth concludes, there is a real problem for anybody, like Dworkin, who supposes that we live in a community of interlocking, coherent

principles and that judicial interpretation is a matter of applying legal principles to situations of fact in well-ordered decisions. If it is possible to 'make sense out of nonsense' then the argument that judges appear to base their decisions on an assumption that we live in a community of principle is no argument at all for showing that we do, in fact, live in such a community. There are serious costs in supposing that the judges are right, says Howarth:

> 'The first cost is that we give a false, and inflated, impression of the wisdom of judges. We imply that they are architects of some great cathedral of law, when in fact they may be throwing bricks in the dark. Secondly, by ignoring the possibility of randomness in previous decisions, we eventually force ourselves to elevate *ad hoc* distinctions into the status of principles, and thus to boost principles which, on any reasonable view of the subject, ought not to be boosted at all. And thirdly, to the extent that we believe that we are "seeing" sense in the material to be interpreted, rather than acknowledging that we may be creating sense out of nonsense, we are deceiving ourselves.'

The initial force of the argument is thought-provoking and important but there are some difficulties. First, a correct interpretation of the experiment requires understanding that the students have made a mistake, and thus a full interpretation can be given of the experiment which shows simply that the students did not have all knowledge to hand. Since that interpretation is always open to a judge, there is nothing particularly sinister in the idea – which is Howarth's main thrust – that a judge could be *fundamentally and irretrievably* mistaken. Actually, judges do make judgments which are novel and creative and which recognise conflicting lines of interest, authority, logic, moral judgement and so on. This is not to say Howarth is wrong but that his argument does not fully support the depth of the conclusion he wishes to reach.

Second, in any case, what, in the real world, would anybody want judges otherwise to do? It requires a larger argument than Howarth supplies to say that judges are wrong to act on the assumption that the law should be regarded as if it treats all people as equal human beings, entitled to the same 'payout' of justice before the law. The idea that law should 'work itself pure' makes sense and, indeed, is a noble enterprise (see Hart, *Essays in Jurisprudence and Philosophy*, Essay 4). Think of the alternatives: that we scrap having judges, or that judges only express to hapless litigants the 'true' conflicts and give up trying to come to a decision?

Marmor's Interpretation and Legal Theory

This work was published in Oxford in 1992 and its importance is gradually being recognised since it contains a lengthy criticism of Dworkin's theory of interpretation and a reaffirmation of the doctrines of legal positivism. Marmor argues that a proper theory of interpretation does not undermine positivism. He bases his own view of interpretation on a positivistic type model of communication, and his argument throughout the work puts forward the thesis that interpretation is an exception to the standard understanding of language and communication, as it relates only to

those aspects of understanding which are not clearly defined by rules or conventions of understanding. Chapter 3 is entitled 'Dworkin's Theory of Interpretation' and, while difficult, is a useful – deep – critical examination of Dworkin.

Stavropoulos's defence of Dworkin

Nicos Stavropoulos's book *Objectivity in Law* (1996) is an excellent but difficult book which exhaustively examines the arguments for and against objectivity ('one right answer': see Chapter 25) in the law. It is very technical and beyond the requirements for an undergraduate law degree. Nevertheless, he usefully and clearly discusses, in a short passage, what Dworkin means by 'the thing to be interpreted'. The relevant section is entitled 'Dworkin's pre-interpretive agreement: some misunderstandings' at (pp137–143), which consists of a defence of Dworkin against attacks on the idea of interpretation made by Raz (see Chapter 10, section 10.12). Raz's major mistake was to have ignored the fact that the pre-interpretive judgment is itself an interpretive judgment. It was highly unfortunate that Dworkin used the pre-prefix, since that suggests that there is a *thing* there to be interpreted:

> 'Calling those judgments "pre-interpretive", therefore, is to some extent misleading, for it suggests that they are essentially unrevisable ... but this is to mistake their role – their not being doubted, in the context of some dispute – for their being indubitable.' (at p139)

In the light of this, Stavropoulos (who was a doctoral student of Dworkin) then goes on to discuss what he calls 'extravagant' cases, which are cases of the sort where a seemingly ridiculous interpretation is argued before the court, as where, for example, a lawyer might argue that under the US Constitution the provision for minimum age for presidential candidacy should read '50' rather than '35' as appears in the text of the Constitution. Here he says that there is no 'flat contradiction'. There is no semantic rule that, independently of context, says that '35' does not mean '50'. Rather, it is that the absurdity of the proposed interpretation arises from the proposed variation from what best carries conviction. All students have come across this sort of interpretation before. A good example is *Fisher* v *Bell* (1961) (see Chapter 3) which is the famous flick-knife case. It is absurd, but not semantically so in the sense that there is a 'flat contradiction', to say that a man who places an article in a shop window with a price tag on it is not 'offering it for sale'. Context, argument or otherwise, denies that, but not the logic of contradiction.

Stavropoulos also discusses, in contrast, the 'easy cases', repeating the point made so often by Dworkin, that the clarity of the easy cases arises by virtue of an interpretation. The mere fact that many, if not most, lawyers agree on a single interpretation makes the interpretation no more or less correct:

> 'That there are cases on whose resolution we are confident is beyond dispute; the point is to explain the source and nature of our confidence ... Once substantive theories about what the law requires are admitted, there is no way back to positivist simplicity. For this reason it is a serious error to believe that Dworkinian theories are innocuous complements

to positivist accounts of settled law. Yet that is exactly what is being claimed by many critics.' (at pp140–141)

2.7 Jackson's *Law, Fact and Narrative Coherence*

While Wittgenstein concluded that philosophical discourse should best take place in poetry (leading to suggestions that he was mad) and Iain Stewart and Peter Rush see Kafka's novel *The Trial* as a significant contribution to jurisprudence, John Jackson sees a humble but significant role for analysis of legal discourse. He sees social sciences and social psychology as a means of describing the way in which lawyers seem to reason, but he does not see them as explaining how lawyers actually make decisions. This combination of linguistic and other enquiries into signs and narrative meanings of behaviour is termed semiotics.

Jackson sees legal discourse as a form of story telling. Law students, when they learn to think like lawyers, are actually being encouraged to 'internalise a set of frameworks of understanding which represent the conventions of that particular profession or semiotic group ... a set of narrative frameworks regarding the legal recognition of typical behaviour patterns'. He adds that these stories are related with accompanying judgments of institutional approval or disapproval. Thus, the student who has a vast resource of legal stories with happy endings in terms of a judgment in favour, as well as horror stories, may learn to expect in analogous stories, analogous endings. Amongst other things, Jackson concludes that legal statements are encoded messages that call upon the listener to bring into play his prior knowledge of other legal stories. Furthermore they have a purpose relating to practical action. He also sees legal adjudication as a series of interlocking narratives. The book is primarily an attempt to reconstruct the common law trial process, although it concentrates on the adjudication process, which is the point at which a judge seeks to justify his position logically.

Semiotics claims to be a multi-disciplinary approach to legal analysis, but one which concentrates on the language element of law, simply because language is so great a part of the law. It does not exclude other disciplines such as history and social psychology. However, it does not sacrifice reasons given in legal statements for valuations from those disciplines. This is probably why the critical legal theorists are disapproving of Jackson, even though there is a shared resource of information for both lines of enquiry. The analogy with stories is a strong one, especially considering the common law orientation towards case law. Stories are constructed on the basis of credible (or incredible) events that seem coherent if they conform to the genre. Furthermore, this approach advances our understanding of the quality of law that refers to previous cases (stories) and statutes (new story lines) in a way that is natural and elucidating. The semiotic approach or, more broadly, the literary approach, seems to be an interesting direction for jurisprudence to take, since law is the result of human creativity. Certainly, this approach has certain similarities to

Dworkin's idea of 'making the best sense' of law: make the best sense of all the legal materials so far as they inculcate a story-telling approach.

2.8 Descriptive and normative statements

Description

There are a number of important distinctions that run right through all jurisprudence courses. Let us first contrast the ideas of description and 'normativity'. The question is whether we can *describe* things. It is clear that we can. The description of occurrences that are known by observation – 'empirically' known – is the most obvious sort. We can describe the chairs or blackboards in the lecture theatre or the style and colour of the lawyer's gown, or the latest model Ford car, or the weather, or the shape and colour of a person's face.

Normative statements have a different purpose, which is to ask us to do something. They tell us what we should have done, or what we ought to do. A normative statement may, for example, tell us about a possible utopia, not existing in present society, but one which we should, perhaps, attempt to bring about. Or it may be a statement of law or morality, expressed as a conclusion about our own, or others', acts. Normative statements would include exhortations to universal vegetarianism, or the abolition of personal property and so on.

But descriptive statements do not apply only to the present and past, or only include empirical concepts, and normative statements do not apply only to the future or the past. We can describe things that will exist or that do not exist, such as cars that run by nuclear fusion, or colonies on Mars, without exhortation or approval or disapproval. And, of course, we can make normative statements about existing things, for example, when we condemn or support the current arrangements for private health care, or the political system of apartheid.

Normativity and interpretation

We should now turn to the question of the relationship between *interpretation* and normativity. They are alike in the following way. If we interpret something, we recommend or endorse a particular understanding of that thing. We do not merely record some observation we have made. We are 'offering an interpretation', one that we are prepared to encourage others to accept. On the other hand, a 'purely' normative statement may be made which does not refer to an understanding of a 'thing'.

The best example may be drawn from law. It is possible to make an interpretation of the law but at the same time say that the law is not as it should be. An anti-abortionist may interpret the law so as to agree that it provides for legal abortions in a certain category of case and, at the same time, urge that the law 'ought to be changed'. Or a judge may decide that the best interpretation of the

common law he can produce is one which does not produce the 'best' result. He may reluctantly conclude that nevertheless this is what the law is, but that the law ought to be changed.

It is the idea of a 'thing' or activity to be interpreted that is important. Consider, for example, Hart's theory of law. It is sometimes taken as providing both a description of a modern municipal legal system ('an essay in descriptive sociology') as well as a *normative* account of how law should be. It is thought to provide, in other words, a justification of the way things actually are, by way of an endorsement of its description of law as centrally the union of primary and secondary rules.

According to this theory, the primary rules are rules of obligation and the secondary rules are those rules concerned with the primary rules, chiefly through their conferring various kinds of *powers*. What Hart really gives, in *Law's Empire*'s terms, is an exhaustive account of the pre-interpretive model for law. He *then* considers whether it is preferable to restrict that model to cases of morally acceptable rules (what he calls the 'narrow conception' of law, in *The Concept of Law*, Chapter 9) and he concludes, on normative grounds, that it is not.

Note that one of the aims of Hart's theory is to preserve the distinction between a person's moral conscience and the demands made on him in the name of law. It is wrong to suppose that Hart's aim here is normative and not interpretive. Let us imagine that his theory of law in which, in his words, the 'key to jurisprudence' lay in the 'union of primary and secondary rules', is a special set of measures, a package, invented to enable men to live in a civilised way in society. Perhaps we could think of this package of measures, as we might regard the creation of an inventor who makes something entirely new which makes life easier or more pleasant. It would then make sense to encourage members of other societies, say, societies composed of extreme religious fundamentalists, to adopt the social device, for the supposed civilising reasons contained in the device (in Hart's case, the preservation of individual moral judgment against the incursions of the state).

But the inventor and the jurist are different. The inventor is not selling a version, as it were, of something. The 'thing' is new. But Hart recommends a version of *law*. He does this by investing that idea with a particular point, located in the generic ideas of clarity and objectivity. His endorsement of this version has a strongly moral quality, but this is the result of his *interpretation* of law.

3

Law as an Argumentative Attitude

3.1 Introduction

One way of looking at law, recently given added impetus by Ronald Dworkin, is not to think of it as a set of rules to be 'learned', but to think of it as an 'argumentative attitude'. Think of law as an attitude of mind. In the final Chapter of his important work on legal philosophy, *Law's Empire* (1986), Dworkin says:

> 'Law is not exhausted by any catalogue of rules or principles, each with its own dominion over some discrete theater of behaviour. Nor by any roster of officials and their powers each over part of our lives. Law's empire is defined by attitude, not territory or power or process.'

This idea, that law is primarily about an argumentative attitude towards our legal institutions, understood in the broadest sense, is particularly well understood by lawyers used to court practice. Observe some lawyers at work. Arguments are what make or break their day. The invention of a new argument that 'makes sense', that works, is what an advocate thrives on, what a judge understands and, very importantly, what a law student studies.

3.2 Legal education

The idea has significance for understanding the point of legal education. It is interesting to note that English lawyers are more suspicious of 'theory' than lawyers in the United States. Although in England there has been an increase in the theoretical content of some academic law courses over the past decade, much of this has been marked by a lack of rigour in thinking about what 'theory' means. To some it means economics and to others just a critical attitude. Some law teachers think,

quite wrongly, that our knowledge of theoretical issues is so far developed that we need now *only* have separate 'theories' of, for example, contract, tort, labour law and so on.

In law, landmark judgments have been provided with later and widely accepted theoretical explanations. Examples are the 'High Trees' principle, now understood as reasonable reliance, and Lord Denning's famous dissenting judgment in *Candler* v *Crane, Christmas & Co*, now seen as an important early statement of the principles of liability for negligently induced economic loss. And, in the United States, not only are judges more generally aware of the different theories of constitutional interpretation but theoretical issues actually enter the domain of public discussion.

One reason is clearly the role of legal education. The differences here between the United States and the United Kingdom are famous. Teaching law students legal argument beyond the citing of relevant statutes and precedents is impossible without some sort of theoretical structure within which, or against which, arguments can be compared, weighed, criticised, adopted or dropped.

An important and recent work on the present state of legal education takes this point up. William Twining, in his set of Hamlyn Lectures for 1995 published as a book, *Blackstone's Tower: the English Law School* (1994), is strongly opposed to the idea that law should be seen centrally as an argumentative attitude since that is to 'privilege' only the barrister's point of view (or the judge, or the intending practical lawyer). In fact, he prefers to link jurists like Hart and Dworkin together claiming they both place too much emphasis on viewing law as only a practising lawyer does, when there are many other profitable ways in which it may be viewed. Twining's views arise primarily out of a discussion of the contemporary state of legal education in England and Wales in which, in his view, there is an unhealthy fixation with the vocational element.

This book contains many helpful and clear analyses of the role of critical legal studies, feminist jurisprudence, legal philosophy, sociological and psychological studies of the law, and the status of law reform, and its general theme is that between Blackstone's time (mid-eighteenth century) and the present there has been a dominance of rule-centred, narrow vocation-mindedness in the law schools. His analogy (borrowing from the post-modernist Roland Barthes) is that of the Eiffel Tower: a pointless but arresting monument which has had a great effect on the view people take of Paris. The narrow but towering vocational orientation of the modern law school is similarly pointless, although Twining is optimistically of the view that legal scholarship is on the road to becoming reinstated as part of 'our general intellectual culture', as it was in Blackstone's time.

This general line of attack on traditional forms of legal scholarship is becoming increasingly common. Part of the popularity of the view arises from the fact that legal argument is just so narrow. Why, for example, should the psychology of judges (the judge's 'state of indigestion' – see later on in Chapter 13 'American Realism') not be part of legal study? Or the study of the jury (see also in Chapter 13 the discussion of 'Jurimetrics'), or the study of the economic forces behind decision-

making (see Chapter 7 'The Economic Analysis of Law' and Chapters 17 and 18 on Marxism)? It is interesting that Twining runs both Hart and Dworkin together on this point since one popular way of distinguishing the two jurists (as it is done, for example, by John Finnis) was to say that Dworkin was interested in the *justification* of judicial decision-making, and was thus open to the charge that he was too 'judge (or practising lawyer)-centred', and that Hart was, rather, concerned with providing a universal *description* of law. So Dworkin's model (Hercules) was a judge; Hart's model was, in the union of primary and secondary rules, that of a modern municipal legal system in its entirety.

But it is not so clear that this general line of argument can be maintained. There are two main points to bear in mind. First, it is very reasonable to suppose that a universal theory of law should, in order to achieve universality, be able to account for how it is that judges reason and so a simple distinction between 'justification' and 'description' is insufficient to perform that task. It *is* reasonable, surely, to suppose that a theory of law can account in some way for why we think that lawyers deal in legal argument involving the justification of court decisions. Secondly, it is also reasonable to say that the focus of even psychological studies on judicial behaviour (the famous example is on the state of the judge's indigestion) are parasitic on the idea of what it is a judge is supposed to do. Why is it that we are, or should be, interested in the psychology of judges? Simply because judges play a unique role in our legal system; the uniqueness of that role has, therefore, to be made clear, through a legal theory which focuses upon the judicial role.

Another way of putting the point is to ask whether it would be possible to give a full account of mathematics (a theory of mathematics) without having to refer at all to any ability at numeracy. We could describe the social antics of mathematicians, or their typical states of digestion, or the size of the books they write, or the average salary they earn. We could, in the style of the critical theorists and post-modernists, say that mathematicians strive to place unity and consistency upon the world when there is in 'reality' no unity and consistency 'out there'. But all this endeavour would seem peripheral – odd, even – without any account at all of what mathematicians conceive of themselves to be doing.

3.3 The logic of legal reasoning

If adjudication is something more than the telling of stories, we would expect that legal reasoning has a foundation in deductive logic. Thus, we might ask the question: Is legal reasoning logical?

In Professor Griffith's view, as expressed in *The Politics of the Judiciary*, legal reasoning is nothing more than a smokescreen for a political decision. However, most writers concentrate on examining the form rather than the content of the reasoning and it is here that consideration can be given to the question as to whether legal reasoning is logical. As to form then, legal reasoning can take either a deductive or an

inductive form. By deductive is meant that a logical necessary conclusion is drawn from major and minor premises. By inductive is meant that propositions are arrived at after collection and sorting of data. The former, deductive reasoning, may well be valid when dealing with factual propositions but is not available in normative terms. This was demonstrated by David Hume in his *A Treatise of Human Nature* in which he denied to the natural lawyer the use of the deductive syllogism. As for the inductive form, this would closely resemble the type of reasoning used in the common law with reference to the reliance and emphasis placed on precedent as authority.

The observation that legal reasoning is not logical stems from the premise that as the tools of the law are words and that as these words are not instruments of mathematical precision, then it would not be useful to apply logical reasoning to the resolution of legal problems. Words possess an open texture. There is, as Hart has said, a penumbral area of doubt as to their meaning. It is in these penumbral areas that legal problems arise, for if the matter fell within the core of meaning of the word(s) then there would hardly be more than a trivial dispute involved. Where the matter falls within the penumbral meaning, then it is said that logical reasoning is less useful than the employment of legal rules which act as a means for deciding disputes.

This is not to say that the method of resolving disputes on the basis of legal rules is arbitrary. Lloyd and Freeman see legal reasoning as essentially a justification for a value judgment. Rules of law are not linguistic or logical rules. They point out that the choice of which rule to apply is not logical in the sense of being deductively inferred from given premises, but it has a kind of logic of its own, being based on rational considerations which differentiate it sharply from mere arbitrary assertion. Hence the logic is that these considerations are not arbitrary, but rather that in law reasoning is done by analogy and that there is a certain logic to that process.

MacCormick in *Legal Reasoning and Legal Theory* takes the view that in the litigation of a question of law deductive reasoning is not possible. An example would be the case of *Donoghue* v *Stevenson* (1932). Here no amount of logical reasoning would have produced Lord Atkin's formulation of the neighbour principle. Lord Atkin gave the game away when he said:

> 'I do not think so ill of our jurisprudence as to suppose that its principles are so remote from the ordinary needs of civilised society and the ordinary claims it makes upon its members as to deny a legal remedy where there is so obviously a social wrong.'

The essence of his technique, now widely used in duty of care cases, is to use previous cases as examples rather than as authorities. This allows the court to find new duty of care situations in circumstances where these are not contradicted by previous authority. The speech of Lord Buckmaster, dissenting, adopts an alternative view, being one of incremental legal reasoning by which any new proposition must find support in an already existing authority. This can be illustrated in the passage where he said:

> 'The law applicable is the common law, and though its principles are capable of application to meet new conditions not contemplated when the law was laid down, these

principles cannot be changed nor can additions be made to them because any particular meritorious case seems outside their ambit.'

The attack on the proposition that legal reasoning can be logical in any but trivial cases finds further support in the area of statutory interpretation. The golden rule of statutory interpretation (see, for example, *R* v *Allen* (1872)) illustrates the way the application of a literal meaning of a word can lead to absurdity. The circumstances under which the court would consider the consequence to be absurd are not found in any logic. A comparison of the case of *R* v *Allen* and *Fisher* v *Bell* (1961) illustrates this point. In the former case the court was concerned that the legislature might have enacted an absurdity in that according to the literal meaning of the words the offence of bigamy could not have been committed and so they applied a varied meaning to give effect to the intention of Parliament as they perceived it. Yet in *Fisher* v *Bell* the court did not concern itself that the offence of offering for sale of a certain type of knife could not be committed as the statute was worded. That merely led to the amendment of the law by a further Act of Parliament. The point being made here is that the circumstances where the courts will follow one meaning in preference to another cannot be logically determined.

MacCormick sees legal reasoning as consequentialist. In this way he seeks to explain the difficulty identified above. Nonetheless, even within the consequentialist school no matter how desirable the consequences may be, no reasoning is legally permissible unless it is either authorised by a legal principle or is analogous to an existing legal rule.

Harris in *Law and Legal Science* suggested that legal science constructs the law according to four logical principles. These he identifies as (1) exclusion, by which he means that the law is identified by a finite set of sources; (2) subsumption, meaning that rules originating in an inferior source must be subsumed under rules originating in a superior source; (3) derogation, which stipulates a priority amongst rules depending on a ranking of sources; and (4) non-contradiction, which insists that any contradiction must be eliminated.

We can therefore see that both Harris and MacCormick argue that it is part of legal reasoning to eliminate logical conflicts between legal rules. Nonetheless, it has been argued that logical reasoning need not be coherent. Even so, the system of precedent is intended to be coherent in that it attributes a rational purpose to the law. What is clear is that these coherence and consequentialist arguments are not dictated by logic. As Holmes J said: '[Because] the life of the law has been not logic but experience, we can conclude that if a matter has come to litigation, it would tend to indicate that it could not be resolved by logical reasoning.'

3.4 The case of the Speluncean Explorers

As a way of seeing how, if 'argumentative attitude' is the correct focus for law, we should judge which arguments are good, and which are bad, it is extremely useful to

examine Professor Lon Fuller's famous article in which he compared some radically different ways judges might argue.

As an introduction to jurisprudence and the idea of legal argument, Fuller used among others the hypothetical example of a case involving a situation very similar to the facts of the case of *R* v *Dudley and Stephens* (1884) in which survivors have to cannibalise one of their number in order to survive. One should notice how the judgments are a product of their own time. They are influenced by the theories of Marxism and feminism and so there are limits to the value of this as an introductory text. Students can find an extract in Lloyd and Freeman's *Introduction to Jurisprudence* and are strongly recommended to read this in detail.

Fuller was attempting to examine the relationship between law and morality and the use of moral and legal excuses and justifications in a particularly hard case. He also examines the role of the judge in a hard case, the technique of legal reasoning and the perennial question of the fidelity to law: under what circumstances if any may the citizen disobey the law? Professor Twining thinks that the introduction is fair as far as it goes but it does not tackle enough questions and he has cited as an example the failure to take account of Marxism.

In the judgments Fuller focuses on certain divergent philosophies of law and government. Handy J examines the question in terms of practical wisdom. He wants to know what should be done with the defendants and expresses concern that the judiciary will lose touch with reality. He seems less concerned with the letter of the law and more concerned with public perception. He states that public opinion is relevant in the criminal law. The judges may take account of public opinion in the sentencing of offenders, yet in this case the sentence is mandatory. Given that the sentence is mandatory, Handy J seeks to take account of the personality of the chief executive, the elected official in whose hands the question of clemency would constitutionally rest. This approach appears to be an abdication of the role of the judge although it does look at factors that might well influence a real-life judge. Handy J states that he is becoming more perplexed at the refusal of the judiciary to apply a common sense approach to problems. Quite what the connection between common sense and the letter of the law is remains the unanswered question in this judgment.

Staying true to the literal interpretation tradition that was prevalent in the common law, Truepenny CJ approaches the problem from the point of the strict letter application of the law, regardless of the potential injustice of the outcome. He demarcates the role of the judge in the application of the law as separate from the role of the legislature in the making of law. According to the constitutional arrangements in this hypothetical country the executive branch have the power to grant clemency. Truepenny CJ says that it is no part of the role of the judge in the case and indeed in doing so the judge would be usurping the role of the executive branch if he granted what would in effect be clemency.

Foster J outlines two alternative approaches to the answer to the problem. It is not difficult to detect that Fuller himself identifies with and supports the second of

these approaches. Foster firstly postulates that the premise on which the positive law is based is that of the possibility of men's coexistence. He maintains that where that coexistence is impossible then the condition that underlies all positive law ceases to exist. Therefore what the defendants did was not a crime because the law which said it was a crime did not exist. Foster J then continued that if that line of reasoning was not acceptable then he suggested the line favoured by Fuller himself, namely that positive law should be interpreted reasonably in the light of its evident purpose, and gives as an example the law on self defence. He states that the correction of obvious error is not to supplant the legislative will, but to make that will effective. This is the purposive approach to the role of the judges in the interpretation of statutes.

We now turn to a rather unusual judge. Tatting J approaches the case and becomes confused. He is worried about the implications of his decision but is also mindful of the strict letter of the law. He asks by what authority do we resolve ourselves into a court of nature? He is unable to resolve the doubts that so trouble his mind about this case and therefore seeks to withdraw from the decision. Tatting is not fulfilling his duty by withdrawing. He seeks to shift blame on to the prosecuting authority who he suggests ought to have exercised their discretion and not prosecuted these defendants. Had they done so that would have absolved the court, including Tatting, from having to reach a decision. Tatting insists on withdrawal even when it is made clear to him that his failure to participate will lead in the end to the death penalty being imposed on the defendants. He seems simply to wash his hands of the whole affair. Can a judge actually do this?

Finally, Keen J states that it is not the proper role of the court to instruct the executive on the exercise of clemency. He maintains that the court is not in session in order to apply conceptions of morality, rather it should apply the law. He cannot take the speech of Foster seriously since in his opinion Foster J has failed to distinguish the legal from the moral aspects of the case. As to the purpose of the argument, Keen maintains that due to the supremacy of the legislature it is not always possible to know what purpose it had in mind and it would not therefore be possible to fill the gaps. He would affirm the convictions of the defendants on the grounds that judicial dispensation does more harm in the long run than hard decisions. Nonetheless he seems to go on to say how the matter should be approached from the point of view of an ordinary citizen.

Are Moral Judgments Part of the Law?

4

The Nature of Morality

4.1 Introduction

There has been a long association between morality and law. Traditionally, law has been associated with religions, customs and divinity. In the West, the revealed laws of God in the form of the Bible have dominated legal concepts. Similar relationships with other religions have attributed the origin of law to the spiritual rather than the rational.

Most legal systems appropriate to themselves the enforcement of contemporary moral and ethical values. The purpose of law can therefore sometimes be confused with morality. Olivecrona suggests that morality is the product of law and certainly developed social morality would probably be impossible if it were not for legal enforcement. However, there are moral elements which appear primarily to stem from human nature such as love and consideration. On the other hand, there are certain legal rules that are morally indifferent such as those concerning which side of the road to drive on. To this extent there is quite evidently a difference in content between law and morality. Morality may inform the legislator but the question must be raised as to whether law has to be morally valid in order to be legally valid.

4.2 What is morality?

Before we try to address some of the issues raised here it might be helpful to define some closely related concepts of morality. If we say something is moral or immoral,

we might mean a variety of things, but issues of morality are normally decided by conscience or instinct. It is not our place at this moment to ask whether conscience and instinct are learned responses or pre-programmed. It suffices to say that there is no requirement to look to outside information or reason in order to find an answer to some moral dilemmas. Often moral feelings run against the grain of other people's views and even our own reasoning. As such, morals defined in this way are capable of producing infinite disagreement, since different people's consciences dictate different things.

Positive and critical morality

A useful distinction to be drawn is that between 'positive' and 'critical' morality. The distinction and terminology is present in Bentham and Austin and surfaces in contemporary times in Hart's work attacking Lord Devlin, *Law, Liberty and Morality*. In Austin, the distinction arose in connection with the distinction between the 'Divine law', which was the law of God, as laid down in the Ten Commandments, for example, or, for the utilitarians, as revealed in the index of utility.

The difference between these two possible bases for morality is important. That people in general agree that something should morally be done or is morally permissible, cannot be a sufficient justification for doing that thing, otherwise slavery would have been right once. What people believe, namely, what is a *positive* set of beliefs, is not a ground for saying that what they believe is true, and so constitutes morality. Or, another way of putting exactly the same point, is to say that morality is not explained merely by reference to conventional morality.

Of course, the existence of certain conventions may provide a reason for behaving in a particular way as, for example, the convention that you take your hat off in church should be followed in order to avoid offending people. But that is not the same as saying that the convention creates the moral rule, except in the misleading and unimportant sense in which we might say 'theirs was a morality of slavery'. The unimportance (and danger) of the use of the word 'morality' in that phrase becomes crystal clear when we use phrases such as 'the morality of the Nazi party was an *immoral* morality'. The relevant distinction here was drawn neatly by Bentham and Austin, who talked of the distinction between 'positive' and 'critical' morality, positive morality being those social conventions created by man, and critical morality being the standards *by which those social conventions could be judged.*

Where, however, a society shares certain moral values on such matters as adultery, prostitution or abortion, we might say that these are social mores. This could also be termed morality. But social mores are to a certain extent a matter of faith. Even in the age of opinion polls we cannot be sure whether contemporary people actually feel prostitution is morally wrong, since they might have been persuaded by arguments rather than conscience or conviction. Propaganda and indoctrination have a powerful effect on so-called shared morality. Not just in Nazi Germany, but in thirties America and many other societies, public morality has been

manipulated by subtle propaganda about racial hygiene. In Germany the desire for healthy beautiful babies led rapidly to the sterilisation of the disabled and the eradication of undesirable populations.

Thus, relying on what people's 'revealed preferences' are may succeed in producing moral norms that offend against many people's consciences. This problem has plagued moralists and lawyers for centuries. The obvious response was to find a way in which moral imperatives could be translated into practical imperatives, without perverting the original moral intentions. This is the task that ethics has set itself.

Ethics and practical reason

The language of ethics and the language of law are similar and centre upon questions of obligation, duty and so forth. Much jurisprudence such as that of Finnis is inspired by ethical studies; however the differences between these disciplines are wide. If an ethical scholar says I should follow a certain code, I may ask why, and I will obey only if I am convinced by his reasoning. But I cannot avoid the binding effect of a law simply because I do not agree with the reasoning behind it. Ethics change according to improvements in practical reasoning. But although jurists, such as Raz, concede that practical reasoning is not entirely excluded from the law, they also insist that part of the process of law becoming law is the exclusion of further debate.

This may be illustrated by simple analogy. Parliament may debate a Bill on the basis of practical reasoning, ethics, social mores or individual consciences. However, once the Bill is made into law such debate is largely excluded. Cases such as *Cheney* v *Conn* illustrate the finality of debate, even when norms of international morality are invoked. The law to this extent differs from ethics. This closed-minded system of legal reasoning often leads people to say that law is formalistic, pedantic or simply unjust.

We have seen, however, that social mores are difficult to ascertain and not necessarily related to personal morality. Law is shy of taking account of personal conscience simply because one cannot necessarily look into a person's mind to tell whether it is a genuinely held conviction and because of the vast differences between people's attitudes.

4.3 Morality and objectivity

The objectivity of morality does not depend on an external world of moral reality or on the existence of conventions. It is not, on the other hand, 'totally subjective' because its coherence must be testable in the public domain.. It must, too, as we shall see, be subject to the stringent requirements of rationality.

The idea of the public accountability of the moral assertions one makes is apparent in the famous Hart-Devlin debate. Lord Devlin propounded this thesis in his famous lecture delivered in 1958. He argued with the case in mind of the

legalisation of homosexual acts between consenting adult males proposed by the Wolfenden Committee of the United Kingdom which had produced a report in the previous year. Devlin's position was that we have to understand that a society like the United Kingdom is made up of various ties and traditions such as, for example, a common morality based upon the Christian religion. Appealing to our conviction that the state has the right to protect itself by using the criminal law to punish treasonable acts, Devlin argued that the state could, in principle, outlaw acts that threatened to undermine the state's moral existence (although he did not himself regard the prohibition of private homosexuality as falling within this ambit). Those acts would be those determined by a jurybox 'litmus paper' test of what the public opinion was at the particular time.

There are famous problems with these ideas. One is that many object to the idea that the state somehow has a right to protect itself from moral change. But the strongest one is that 'the public morality' is vastly more complex than a description of what the public 'feels' at a particular time, and allows for the holding of sincerely held views of a different and contrary nature. Since this is what 'public morality' means, and not what the man in the 'Clapham omnibus' feels a real sense of 'intolerance, indignation and disgust' about, the idea of the state enforcing 'public morality' is not so simple as to allow the crude expression of public feeling.

We may come to this conclusion by way of analysis of the idea of a 'moral position'. It is initially an argument about the way we in fact speak in moral discourse, but it is intended, too, to make moral sense. The idea of a consensus in which public morality allows for a variation of moral views is one that lies squarely on the idea of a democratic community in which each individual enjoys an equality of respect. That idea itself is the engine for Dworkin's criticism and it is an idea that is not easily to be extricated from Devlin's position that it is society or community that is important. Implicit at least in the Clapham man's vision is an egalitarian premise that the ordinary man's view, about the kind of moral environment in which he wishes to live, be given voice.

We can examine more closely the place of reason in morality. Are *prejudiced* views permitted as genuinely moral views? Clearly not. The admission of prejudice by someone disqualifies him in our eyes from speaking sensibly on the matter. The man who says, 'I just hate queers' is not someone who we feel is expressing a genuinely moral view.

Let us now consider the place of the following reason: 'That action just makes me sick'. Is it sufficient to offer a mere emotional reaction to something to establish one's moral position? We often criticise some forms of moral argument as being 'emotive', meaning that the appeal they make bypasses reason. If it is a legitimate way of criticising a person's moral stance, then it supports the view that reasons, rather than emotions, are an essential ingredient of having a moral view.

But that way of putting it can be misleading, for having a particular emotion may be a way of stating at least part of a reason, as when we say we feel angry about something. And having emotional reactions to some sorts of thing – say, seeing a cat

being tortured – is, we feel, right and proper. Nevertheless, a statement of 'feeling' alone is not enough because we always want to know the reason for the feeling or the anger or whatever. In other words, it is the reason that comes first.

If someone claimed that he morally disapproved of blacks and, in response to the question why, said: 'They just make me angry, that's all,' we would not think that this was sufficient. In fact, the absence of a proffered reason, or any reason at all that we can think makes sense of the remark, would in all probability make us conclude that this person had a phobia, or an obsession.

What about mistakes of fact? What if a person says that he morally disapproves of the Clinton administration because it started the First World War? Rationality requires that some minimum standard of evidence be complied with in any view put forward based on a proposition of fact. What sort of view would it be if it did not need to pass through that sieve of rationality? The Emperor Justinian was said to have disapproved of homosexuality because it caused earthquakes (presumably, an act springing from the wrath of the Gods).

Just repeating what another says, too, is insufficient. Imagine someone says that he disapproves of abortion and, when asked for a reason, replies, 'because my mother disapproves'. We expect a person's views to be his or her *own*.

These are four sorts of reasons that have the result of disqualifying a person's expressed attitudes from counting as a moral position. But there are others we can imagine once we get the idea. We cannot have moral views about inanimate objects, say, earthquakes ('earthquakes are irresponsible, or frivolous') for example, and our moral conclusions must follow logically from the premises we claim to hold.

4.4 The method of 'reflective equilibrium'

'Reflective equilibrium' is the name that the contemporary political philosopher John Rawls gives, in his *A Theory of Justice* (1970), to what he regards as the correct method of moral reasoning. It envisages an equilibrium being attained between moral intuitions, or convictions, and abstract positions on general questions of morality (moral theories) that we hold. The 'equilibrium' between the two should be reached by our comparing our intuitions with our structured moral beliefs.

Sometimes our intuitions embarrass our theories, as when our intuition that just wars are morally permissible embarrasses our theory that innocent life must never be taken. The process of reflective equilibrium justifies the moral psychology whereby either the theory is modified or developed in a way that can explain the intuition (say, innocent life must not intentionally be taken, with some attendant theories about what constitutes innocent life and what intention means), or the intuition begins to lose its impact and finally disappears given the coherence of the theory.

Of course, the abstract positions on general moral questions that we hold will make sense of the particular intuitions we have. So the process is ongoing. We modify, or even eventually abandon, intuitions in the light of our generalisations and

acquire new intuitions both in the light of theory and new experiences. Arguments we have with others about moral issues should develop in the same way. We test intuitions we hold against general positions we hold. We embarrass others by pointing to inconsistencies between their intuitions and their general positions.

4.5 Cultural relativity

One of the most common arguments used to establish that morality is 'subjective' only is the argument from cultural relativity. Other cultures have different values so, crudely, it follows that there is no one 'essential' morality and all values are 'relative'. Advocates of this kind of thinking are fond of saying such things as that slavery in the southern states of the United States in the nineteenth century was 'morally permissible' *for them*, or cannibalism in certain primitive tribes was 'moral' *for them*, and so on.

Someone who holds the sceptical view that values are 'subjective' because of cultural relativity, must hold the view that values *can* be objective because, in order to be so, they *must* be cross-cultural. Why else would he argue that values are subjective *because* they are intra-cultural only? One kind of argument for cultural relativity can be dismissed here, although it is very common indeed. This is the 'who are we to judge?' sort and it may be useful to label it the 'cultural arrogance' argument. It says that cultural differences are just so great that it is simply arrogant to suppose that anyone can transplant the values of one culture to another. This kind of argument relies on the strength of our dislike, for example, of Victorian missionaries being shocked by African tribal morality and the insensitivity with which judgments were made and carried out, often with appalling consequences. But does it make a difference that slavery occurs, or occurred, in another culture? Usually where arrogance is not a factor, people are willing to accept that 'trans-cultural' moral judgments can be made.

4.6 Law and morality in history

It is difficult for the law student to gain an objective perspective of the debate on law and morality since issues of morality are largely excluded from the study of substantive English law. This may be as a direct result of the tradition of classical English positivism in legal studies. Duncan Kennedy in *The Ideological Content of Legal Education* (cited Chapter 8, Lloyd and Freeman) posits an interesting insight into this situation. Discussing the education techniques employed in law schools, which he views as liberal in their ideological approach, rather than being pluralistic, he states:

> 'If one thinks about law in this way, one is inescapably dependent on the very techniques of legal reasoning that are being marshalled in defense of the status quo.'

To begin with, let us consider the understanding of the nature of law in times past when such a view was perhaps less prevalent. The case of John Lilburne, though it might be taken as exceptional, illustrates the wide gulf between the law's own definition of itself in the mid-seventeenth century and the modern view. During the English Commonwealth, Lilburne was subject to an Act of Parliament banishing him on pain of death. Lilburne fought the case on the authority of Coke's *Institutes* which stated:

> 'Where reason ceaseth, the law ceaseth ... All customs and prescriptions (Acts of Parliament, laws and judgments) that be against reason are void and null in themselves.'

The court was persuaded by this argument even to the extent of deciding that the jury was the judge of law as well as fact. That such arguments were entertained and indeed prevailed was no mere anomaly of the Commonwealth. Coke's laws and cases are taken to be accurate statements of the law to the present day, even though it has been shown persuasively that at least in *Slade's* case Coke's reports contain more of his opinions than those of the judges.

This seems strange to the modern English eye, but very much in keeping with the legacy of early English jurisprudence. Perhaps the most positivist and modern of sixteenth century juristic writings was Smith's *De Republica Anglorum*, in which, while conceding the absolute power of the king in Parliament, Smith takes a very non-committal position on the question of immoral laws. To Smith the question of whether a law's validity is linked to morality depends, in hindsight, on whether civil disobedience results in political success.

If, on the one hand, there was an assertion that reason and common sense governed the application of new law, there was also a deep-seated belief that law was a heritage stronger than governments or kings, a guarantee of rights in itself. The Elizabethan lawyer, Maynard, contends that the king is subject to law because the law doth make him king. Therefore, if he sought to change the law to something immoral or irrational he could not.

The view that law was immutable and fixed was implicit in the common usage of the word law itself and adherence to law was partly due to the wisdom of antiquity which had been tried and tested over the ages. Moreover, in the early sixteenth century, law enforcement was scarcely in the hands of the government, being more dependent on the practice and teachings of the Church.

The Church contributed two great factors to the law and morality issue.

Firstly, until the English Reformation, it represented a supra-national entity with real political and theological sanctions at its disposal, in an age when, although its power was on the decline, the fear of excommunication could still keep an unruly prince in check. In theory the Church was itself accountable, not politically, but morally to God.

Secondly, it had a monopoly on the truth of moral determinations. If the Church said something was wrong, it was wrong! There was therefore no problem in the law determining what moral standards it must conform to. In essence England was a

place where there was the Church's law, the people's law and the king's law in Parliament.

The Enlightenment

Across Europe similar situations prevailed, but also the same problems arose. Kings and Parliaments became wealthier and consequently more efficient at government. Science was eroding superstition and religion. The moral and religious authority of the Church was being challenged, because of the growing feeling that the Church was a mere number cipher for national powers and riddled with moral corruption.

With apologies to historians, these factors may be seen as accounting for some of the jurisprudential developments that urged law and morality to part company in the minds of lawyers, legislators and jurists alike.

Absolutism

With the increasing strength of national kings and the declining fortune of the Church, James I, Richelieu and Louis XIV among others denied any legal or religious fetters on monarchic authority. Law became simply what the sovereign willed law to be and matters such as morality or religion were solely in their keeping. England had an edge on the rest of Europe, since the English Reformation had unified Church and state in the person of the monarch.

Not surprisingly, since the absolute monarch was no longer necessarily king by virtue of the law and custom of the land, another reason was needed. Conveniently, therefore, the monarch became the monarch by Divine Right, requiring moral and religious obedience, and the link with morality was thereby maintained. In this also the seeds of the imperative theory are to be found, law is the will of the sovereign, irrespective of subjective moral or other considerations.

Europe was rapidly realising that the rest of the world had moralities of a different kind: every nation has its own type of wisdom – Mahomet symbolises the wisdom of the Arabs, for example. Moral truths did not seem to be so certainly the exclusive monopoly of any particular Church, wrote one Elizabethan jurist.

Secular morality

The secularisation of morality and its application to law at the hands of Grotius and others is largely relevant to the natural law issues of the next chapter. Instead of relying on religion, the secular natural lawyers sought to superimpose moral standards on law by the application of reason. Bayle philosophically separated religion from morality, but in doing so contributed to the theoretical separation of the law from morality, which was quite opposite to his desire.

The eighteenth century saw scientific development, which engendered an absolute faith in observation and reasoning to solve all problems. If Newton could

make a law true for all falling objects, then Locke could find the key to law that would explain the science of legislation. His *Essay Concerning Human Understanding* was widely read and influential, especially his emphasis on observable facts and inductive knowledge as the preferred methodology for jurisprudence. As to the question of morality, that was simply a matter of human sensations of pleasure and pain, backed by the power of desire. Others of his conclusions, although influential, are manifestly contradictory to his espoused methodology, being more the result of his political opinions rather than empirical observation. However, his influence is very evident in the writing of Hume and others, in the American Constitution, the Glorious Revolution, while his account of morality is to be found in the writings of Bentham, among others.

If we combine Locke's psychology with Hobbes' pessimism, for the latter thought that men's desires were naturally brutish, we not only come to Hobbes' conclusion that all power should reside in an absolute sovereign, but may also come to feel that popular morality is not necessarily a good thing. Thus Voltaire, although advocating a humane legal system, dismissed ordinary people as the rabble, following Lockean logic.

Locke's infectious ideas reached even the priesthood in the shape of Condillac. He viewed man as being born morally neutral with the capacity to develop morally only by learning. It was, for Condillac, the environment and education that made man good or bad and he rejected determinism altogether. Thus, by improving the environment, man could become perfect. Following in this mould, Helvetius concluded that man was simply sensitive matter to be motivated simply by pleasure and pain. On this account, morality was simply what is good, that is, pleasure, so that the object of morality could simply be seen to be obtaining the greatest pleasure for the greatest amount of sensitive matter.

It is following this, admittedly short, history that the stage is set for understanding the philosophical developments that lead to the contemporary debates, which are set in the context of utilitarian theories of morality (see Chapter 6). And it is utilitarianism which is at the foundation of legal positivism. First, however, we need to turn to the important moral question of when citizens have a duty, if they have, to obey the law.

5

The Obligation to Obey the Law

5.1 A claim to moral authority

If law is distinct from morality, we need to establish whether the obligation to obey the law is to any extent a moral one. It is a manifest fact of legal systems that they claim moral authority for themselves. Even the most reprehensible of laws made by the most reprehensible regimes are couched in moral terms. In South Africa the illegality of inter-racial marriages was based on the premise that it would be immoral for a white to be in union with a lesser species. Even where there is obvious brutality that cannot itself be justified, the moral rectitude of the political order may be invoked. If a government in England were to pass a law that was regarded as immoral, it could still point to the moral legitimation of being electorally accountable.

The tradition of moral marketing in England is well illustrated in Douglas Hay's account of the ideology of force, justice and mercy in *Albion's Fatal Tree*. It is hard to understand the genuine paternalism of generations past that enshrined the belief that the ruling classes had a moral duty to rule. Still harder to understand is the widespread acceptance, by the ruled, of the repressive legal system as being not only naturally but morally right.

Speaking of the arbitrary nature of eighteenth century criminal law, Hay says:

> 'Englishmen ... tended to think of justice in personal terms, and were more struck by understanding of individual cases than by the delights of abstract schemes. Where authority is embodied in direct personal relationships, men will often accept power, even enormous despotic power, when it comes to the good King, the father of his people, who tempers justice with mercy. A form of this powerful psychic configuration was the law's greatest strength as an ideological system, especially amongst the poor, and in the countryside.'

Certainly, in the static and personal world of the eighteenth century, patterns of authority and obligation had more in common with the feudal morality of loyalty to one's lord than to an allegiance to a social idea such as law. However, the same cannot be said of the modern situation in England, leading to a particular mystique about the nature of legal obligation.

The fact that law is still thought of as being in the interest of society can be seen in the judgments of most criminal cases. To this extent, Detmold in *The Unity of Morality and Law* claims that all legal judgments seek to refer themselves to corresponding moral norms. This may well be an insincere attempt on the part of the law giver to gain moral approval.

Even if it seems that a law does not accord with the consensus on individual morality, it does not mean that there is no appeal to morality. In dramatic terms, the judge who regrets having to apply a law, because it seems to be unfair, but stresses that it is nonetheless his duty to do so, reinforces the feeling that there is a higher moral duty binding the judge.

There is considerable evidence to suggest that moral reasoning is learned, rather than innate (see Kohlberg's *Moral Development and Behaviour*). It may be that our response to legal obligations is learned in a related way. When we are children we are told that certain things are wrong because they are not 'nice' and others are wrong because they are against the law. The difference between the obligation to obey the law and the obligation to obey moral laws is obscure, but the difference is defined by the differences between practical and legal solutions to moral problems. If faced with the choice of breaking the law and betraying moral principles, the language of legal marketing often encourages us to see it as a moral dilemma. When a judge criticises a person for seeking to set himself above the law, this implies a moral argument: everyone else surrenders their problems to the law because it is socially right and prevents anarchy, so why should the individual be the exception?

To suggest that there is no moral element to legal obligation would be to contradict this marketing approach, but then who believes packaging? However, this brings us no nearer to understanding the nature of legal obligation. Asserting that law is to be obeyed because it is binding is a tautology. It is simply to repeat that it should be obeyed. We might take the Kelsenite view that law should be obeyed because it is validated by an unwritten rule or *Grundnorm*. This is an ultimate rule or norm that requires the legal system to be obeyed. Such a norm in Kelsen's eyes is a presupposition of juristic thinking which amounts to a lawyerly assumption.

Morally, this is the least satisfactory solution. It amounts to a suggestion that the obligation to obey law stems from lawyers saying that it should be obeyed. This appears unsatisfactory, because it provides us with no firm rationale. It is rather like a child asking his parent why he must go to bed at bedtime and being answered 'because I say so'.

However, there is still truth contained in the idea. In modern civilisation, few aspects of life are not impinged upon or dependent on the legal system. So the citizen might feel he has little alternative but to play along with the rules of the

game. However, this passive attitude would not seem completely to explain what ethical scholars would term the pro-attitude towards law that is manifest among the ordinary population.

Harris, in *Legal Philosophies*, notes that although most people will participate in law-breaking activities themselves, they are still critical of others' illegal activities. This can be explained. Certainly, some legal prohibitions accord with the common view of what is morally unacceptable, while other minor laws seem simply an administrative nuisance. Thus, one could easily envisage even a petty thief criticising a rapist. This is not necessarily a moral endorsement of the obligation to obey law, but an endorsement of the obligation to obey what are subjectively felt to be morally correct laws.

5.2 The positivist view

That one need not obey an immoral law has always been conceded by positivists, although their tones are resonant of Anglicanism. One need not obey an immoral law, but one cannot evade the legal consequences of so doing. For this reason, it is the consequences of disobedience to the law to which its binding effect is largely credited. For many positivists law should be obeyed, to a certain extent, because some benefit may be accrued from doing so, and to a greater extent because of the apprehension that a sanction might be imposed.

However, the nature of benefits anticipated by the upright citizen is viewed by writers such as Bentham as being more in the nature of a bribe. If part of the recognition of an obligation to obey is the acceptance that a law might be of benefit to oneself or to others, then this might explain some of the moral element of legal obligation. This explanation is not difficult to accept when we consider that living in society requires a submission of freedom as well as a corresponding acceptance of obligations. This explanation remains conditional on a law being *seen* to be morally justified by the common good. The law in question need not actually be advanced for moral reasons by the legislator, but it needs only to have the appearance of being morally right. Thus, social security reforms in the 1980s which made life significantly harder for many people at the poorer end of society, were seen by many as being morally right because such people were often represented as less worthwhile, or lazy.

5.3 Social contractarian theories

A particular version of the theory that law is obligatory because it satisfies social needs is to be found in the so-called social contract theories. We have already noted that Hobbes viewed humans, in their natural state, as nasty and brutish. To Hobbes the legal system is the instrument by which order is achieved and, in fact, he

considered it the only means of maintaining social cohesion. Law should therefore be obeyed in return for the maintenance of order.

In contrast, Locke considered that although humans had certain inalienable rights, they surrendered their freedom for the purpose of channelling their efforts in the collective enterprise of society. As such, the law-maker holds their interests on trust, directing society through the agency of the law. However, if this trust is betrayed, then the law-maker cannot command obedience.

These theories are dubbed social contract theories because they see the relationship between legal authority and civil obedience resting on unspoken mutual promises. To Hobbes, the brutes obey, but in return the law-maker must maintain order. Locke's premise is that the partial surrender of freedom is in return for good order. It is thus as if the parties had entered into a contract. The major difficulty with these theories is that they fail adequately to explain how such promises were obtained. Do I, by being born into a society, automatically consent to be ruled? It may be argued that by my presence within the territory I have given my consent, but there is hardly an inch of the world now where law does not claim to exist. Alternatively, it might be said that by being born, I have already taken the benefit of society and as such have accepted my obligation to obey. This would seem very unsatisfactory as an explanation.

The broad, political morality of the social contract theory is, thus, not very convincing. When we consider justice we will consider Rawls, who postulates a theory not dissimilar to the social contract theory, which proposes a calculus of fairness suggesting what laws should be obeyed and when there is no longer an obligation to do so.

5.4 Finnis

In response, Finnis postulates a view of legal obligation based upon natural and self-evident principles of what is good and principles of what he calls, borrowing from Aristotle, 'practical reasonableness'. While law is whatever is legally valid, the obligation that accrues to law is obviously greater, the more respect a legal system has for these principles. Legal systems are seen as carrying with them a general moral obligation if they carry with them moral approval. Without such approval Finnis would not dispute that a law is a law, but would assert that there is no obligation to obey it. Such a conclusion has great attractions and, it should be noted, the strength of Finnis' argument is based on his derivation of objective moral values.

5.5 Conclusion

That there is the possibility and even likelihood of a link between the strength of the obligation to obey the law and general moral obligations cannot be denied. Raz's

views are useful here. He offers a marriage of practical and moral reasoning with positivism in a way that has gained him widespread respect. When addressing the question as to whether law is value-free, he identifies the process of law creation as being a process of gradual purification. The debates that precede the creation of statutes are ultimately based on practical and political reasoning, including moral consideration. Once a Bill becomes law, part of the broader debate is excluded. However, there may remain executive decisions. It may be necessary for executive action to be taken in the form of delegated legislation. Even when a court is faced with a complete statute, there are clearly still issues to be addressed in the form of the correct principles to apply. Court decisions are influenced by the participants, and to this extent even those subject to the law can affect legal values by pursuing legal arguments. However, law is for Raz a matter concerned with the executive stage of institutional decisions and, as such, what has been decided by Parliament or a Ministry or a court excludes further discussion. However, the deliberative stages that continue until the final decision of the final court of appeal of a particular case reflect our moral and intellectual interests and concerns.