11

Natural Law

11.1 Introduction

Despite a recent revival, natural law theories have been frequently scorned by jurists, for a mixture of methodological and philosophical reasons. There seem to be three major areas of criticism of natural law theories. First, the method used to derive rules of natural law appears to make an illogical jump from questions of fact (what is) to questions of obligation (what ought); secondly, natural law theories have frequently been employed to justify the status quo and to validate what would seem to us to be

unjust regimes; and third, natural lawyers have failed satisfactorily to explain what effect the difference between natural law and human law has. These three criticisms are not necessarily applicable to all natural law theories, as we shall see.

11.2 What is natural law?

Professor d'Entrèves, whose *Natural Law* contains a considerable survey on the subject, says that many of the ambiguities of the concept of natural law must be ascribed to the ambiguity of the concept of nature that underlies it. This is not surprising, because the search for a coherent set of natural law principles spans about two and a half thousand years. As a result, the content and the role of natural law are varied. However, the core assertion is that, rather than all moral rules being *created by* reason, there are some moral rules that exist independently of reason, but may be understood by it. The way in which man should live is locked up in his nature and the nature of his universe.

This may sound a little crazy to the non-religious student. Indeed, many natural law theories have relied on the will of God to justify the idea, but this is not necessary for the theory to work. There are essentially three questions that need to be satisfied by the natural lawyer in order to justify his position:

1. Are there pre-determined patterns of behaviour in nature and in human nature? For a while, under the influence of thinkers such as Condillac, the idea that humans were born with any pre-determined ends was denied. However, it is clear from, for example, genetic theory, as well as ecological theories, that human behaviour and the human race have certain innate characteristics. Thus, a human being is born with the urge for sexual reproduction, with social instincts such as the protection of offspring. This leads us on to the next question.
2. Why should a human being follow the pattern of behaviour with which he has seemingly been programmed? Since human beings have free choice, a person might easily decide to be celibate or not to have children. The fact that people usually do have children does not mean that an individual should. It is therefore a matter for his or her own choice and so self-interest or personal preference might constrain such a decision. The only justification above the rational, is the moral. We say a person should follow a pattern of behaviour, in moral terms, because it is good. This leads to the problem of whether (1) there is a difference between what is good and what is expedient in the light of desires or enlightened self-interest, and whether (2) we can ascertain a criterion for determining what is good that is of universal application.
3. How do we know that it is good to follow the natural patterns of behaviour and, even if it is, might it not sometimes be better to go against them? This is the hardest of the questions that natural law has to answer. An independent concept of good has to stem from some person's non-rational preference. There are two

alternatives. First, if we can show that all men think that a particular thing is good, then we might say that natural law is self-evidently good and needs no rational justification. Second, there is a superior entity who requires us to do what is good and has ordained these laws.

The latter proposition usually is not employed to stand by itself. We obey God, rather than the Devil, because God is good. Thus we are returned to the question of how we get to this proposition of good. The former proposition of the self-evidence of good denies that there is basis of the concept in normal reasoning. Finnis explains it as follows:

> 'When discerning what is good ... intelligence is operating in a different way, yielding to a different logic, from when it is discerning what is the case (historically, scientifically, or metaphysically); but there is no good reason for asserting that the latter operations of intelligence are more rational than the former ...'

The three questions, of what the content of natural law is, what the nature of the obligation is and why it is a moral obligation, are necessary to overcome the criticism of the empiricists. The empiricist criticisms of natural law follow the pattern of these problems.

The content of natural law

According to the different theories the content is varied and sometimes contradictory. Thus, while the Greeks thought that slavery was a naturally justified institution, we disagree. There is a continuous struggle to nail down the content of natural law. Most thinkers prefer to assert the existence of principles from which a variety of rules can be derived, rather than asserting the rules themselves. On this basis, thinkers such as Stammler can safely assert that while the principle of justice is universal, its application is varied. While this overcomes the problem of moral variance, it also limits the usefulness of the concept. Natural law thus becomes reduced to universal platitudes.

The obligation to obey natural law

Empiricists criticise the fact that even if universal patterns can be demonstrated, this does not show that there is an obligation to follow them. Just because people do something, does not mean they ought to do this. There are alternative answers to the question:

1. People and things have a purpose and are part of a definite order, established by a benevolent creator.
2. The universal principles are motivations, rather than patterns of behaviour and as such they are automatic preferences. This then requires that bad motivations be separated from good motivations.

3. The principles are only rather obvious facts which practical reason dictates we should obey. For example, when faced with the fact that a road is peppered with land mines we do not need to ask why we should not go over it. Similarly, Hart appears to assume that the fact of human vulnerability means that it is self-evident that we should not hurt or injure some human beings. However, this approach provides us with reasons for doing something on grounds of expedience, or self-interest only, rather than principles for action that are to be followed for moral reasons. Morality and self-interest do not, at first sight anyway, appear to coincide.

Is there a moral obligation to obey natural law?

Empiricists find it hard to understand why there is a need to subjugate individual morality to a universal morality, since in the absence of objectively provable moral norms one can only know one's own conscience. It would seem to be a moral contradiction if one were to ignore one's own conscience in order to obey some universal moral law.

11.3 Natural law and legal validity

The student of law might ask why she should be concerned with people's attempts to say what the law should be. Let us take Hart's concept of law, which describes what law is if it is effective. Such an attitude begs the question of why law should be effective. Alternatively, we might describe law, as Kelsen does, in terms of detached statements, which assume that law should be obeyed, because it is assumed to be valid. This leads to an uncritical formula which does not necessarily place law in any social context and leads to the mindless formalism that distances law from practical and moral considerations. Finally we might use *committed* statements which assert that law is valid, but obviously require good reasons, perhaps of the moral sort.

All three types of statements are descriptive, but uncritical. If a scientist were to describe scientific phenomena in terms of the accepted theories, without necessarily testing whether those theories are valid in the light of facts, science would not have progressed from the flat earth of the Middle Ages. Similarly, the advocate, judge and legislator are embarked on a practical course of controlling human behaviour. The lawyer is likely to be more successful in this pursuit if he can not only say what someone should do, but give reasons that will encourage a person to obey. Merely threatening the use of sanctions and employing bribery is not enough to ensure adherence to the law.

The natural lawyer is seeking to offer an authoritative guide to what human nature thinks it ought to do. Thus, although positivism insists on what lawyers actually do and say in order to define the concept of law, natural law seeks to understand what the unifying idea and ideal of law is.

11.4 The origins of natural law

Introduction

The origins of natural law are obscure. However, clearly the human concern to understand an apparently arbitrary world in terms of order would be a starting point. Although certain natural phenomena seemed to conform to definite patterns, human nature did not always, the difference being that humans seemed to have free choice. While natural things seemed to conform to a regularity, as if they were ordained to do so, man did not. Without the complex faith that we have in cause and effect, the idea of some inscrutable purpose of a mysterious creator seemed the obvious way in which things could be accounted for. However man, with her free choice, was not behaving in a clear and uncomplicated way. Man had obviously gone wrong somewhere, since she did not seem always to fit into the order of things.

This is mere speculation, but accords with the tenor of ancient theological theories that form the premise for some natural law theories. The appeal of such theories is an appeal to an order that is above the order that can be attained by individual human cognisance. Plato advocated that society should be ruled by contemplative philosopher-kings, whose inward reflection would allow them to comprehend the divine truths locked in their own hearts. But this did not mean that there was, for early Greek philosophers, a necessarily consistent truth for all people, or one that was for the common man, rather than merely the wise ruler. Natural law was an ideal.

The Romans

It was left to the practically minded Romans to utilise the concept of natural law. Greek stoic philosophers speculated that a man who lived naturally was a man who lived by reason. Since reason is common to all men, then there are universal laws that can be derived by reason by which man could live. The Romans employed this concept in implementing their laws within the empire, while Cicero employed natural law as a legal argument for striking down laws that did not favour his case. The dedication of the Romans to the idea of natural law was a matter of expediency, since it was an ideology that justified the homogeneity that Roman imperialism required. Thus, while some insist that the Romans were guilty of a naturalistic fallacy of confusing what they applied universally with what is universally valid it was, more probably, a shrewd use of a useful ideology.

Thomas Aquinas

Aquinas, a thirteenth-century theologian and philosopher, made probably the most rationally compelling justification of natural law. His followers in the Middle Ages are termed Scholastics or Thomists. Aquinas still influences modern natural law theories.

Aquinas sees law as being binding on people's actions. However, people act according to their reason therefore 'will, if it is to have the authority of law, must be regulated by reason when it commands'. The compulsion of law, though it might be backed by sanctions, relies on reason for it to have an effect on the will. What must compel humans reason is, for Aquinas, the promotion of the collective good. The power of the legislator therefore stems from a duty to promote the collective good. It is because the legislator is under such a duty that the subject has a duty to obey the law.

Aquinas' emphasis is on society subjugating individual interests to the good of the whole, the force of law being that it is a superior institution to other institutions where rules may be made. Thus, although the head of a family may lay down prescriptions for its members, for the good of the whole, this gives way to the good of a whole community. In conclusion, law 'is nothing else than the ordering of things which concern the common good; promulgated by whoever is charged with the care of the community'.

Aquinas divides law into four categories. Eternal law is the reason of the creator of all things and is revealed, in part, in the scriptures as Divine law. Natural law represents the attribute of humans that allows them to make choices and follow their inclinations towards good. As such, a man may use his reason to help himself progress. As a result of speculations about what is good, people seek to reason practically as to how to attain this. The sum of practical reasoning is human law.

Consequently, Aquinas sees temporal law consisting of a dual order. The precepts of natural law are speculations about the truth of how humans should behave. Primarily, there is an inclination towards the good, which, to Aquinas, is the fulfilment of the Divine purpose. However, the inclinations of man are towards the preservation of human life, and other instincts that he shares with other animals, such as sexual relationships and the rearing of offspring. However, there is a category of natural law that is specific to human beings alone, such as the social nature of man and her urge for truth, which Aquinas views as stemming from religion and God. The reason employed in coming to know the precepts of natural law is distinct from practical reason employed for the attaining of specific rules. While the former is the pursuit of absolute truth, the latter is concerned with the facts of human behaviour, but is subject to the perversions of human reason, motivated by the evil desires of some.

Human law is justified as providing order, which is itself simply justified in that 'man, unlike all animals, has the weapon of reason with which to exploit his base desires and cruelty'. In addition to human law that is inspired by precepts of natural law, such as the prohibition of murder, laws also contain practical derivations of how to enforce natural law. To take an example, natural law does not require the wearing of seat-belts but such a law serves as a way of protecting human life and so is a precept of natural law. Since human law is thus partly a question of how best to achieve the enforcement of natural law principles, the content of human laws may change from time to time and place to place.

Aquinas believed that human laws that do not correspond to the natural law are corruptions of law. These are human laws that lack the character of law that binds moral conscience. Because of the imperfections of individual reason and the need for order, disobedience to law is not however necessarily justified, even if human law contradicts natural law.

Note that the paradigm of Aquinas' theory is the existence of God's universal purpose as the foundation of all truth about how people should act. Thus, ultimately, Aquinas' view is that we must obey natural law because God so wills it. However, the major contribution of his theory is that Aquinas attributes to humans the ability to determine truth from falsehood by speculative reasoning. Furthermore he asserts that there are absolute moral values, but the fact that we do not always see them does not eliminate their truth. Moreover, natural law precepts are inclinations, rather than the result of practical reasoning. This final distinction is one that Finnis develops.

Grotius and others

Thomists and subsequent adherents of the natural law theory employed the concept as a justification for the barbaric practices of the Middle Ages. Efforts were made to distance the concept of absolute justice that natural law entailed from the dictates of monarchs and the stranglehold of the Catholic Church. Additionally, thinkers, such as the Dutch Protestant Grotius, advocated the logical independence of natural law from Divine will. Because man could reason, he could discover principles that are absolutely proper for all people. To this end, Grotius created a theory of a law of nations, built upon peaceful co-existence between sovereign states. Grotius viewed law as necessarily binding because subjects of the law surrender their freedom in return for security. Grotius thus advocates that obedience to the law is a natural facet of social organisation, validated by a social contract between the citizen and the ruler.

Once again the natural law element is the ideology that allows Grotius to universalise his concepts of international law, rather than the impetus for doing so. The importance attributed to Grotius, justly or unjustly, is the secularisation of natural law. The assertion that, irrespective of the existence of God, natural law held good.

Philosophers such as Locke, Rousseau and, to a lesser extent, Hobbes looked to the concept of natural law as a way of justifying minimum principles of rights in their social contract theories. The student should read about these theories. Their contribution to natural law thinking is relatively small.

11.5 Hume's attack on natural law

Hume's contribution to natural law theories may be likened to the contribution of Attila the Hun to Roman civilisation. Hume's empirical attack against natural law theories was two-fold:

1. Hume asserted that natural law theories were bedevilled with the cardinal sin of deriving normative statements (oughts) from factual ones (is statements). See his *A Treatise of Human Nature* (1739) Book III, Section I:

> 'In every system of morality, which I have hitherto met with, I have always remark'd, that the author proceeds for some time in the ordinary way of reasoning, and establishes the being of God, or makes observations concerning human affairs; when of a sudden I am surpriz'd to find, that instead of the usual copulations of propositions, *is* and *is not*, I meet with no proposition that is not connected with an *ought*, or an *ought not*. This change is imperceptible; but is, however, of the last consequence. For as this *ought*, or *ought not*, expresses some new relation or affirmation, 'tis necessary that it shoul'd be observ'd and explain'd; and at the same time that a reason should be given, for what seems altogether inconceivable, how this new relation can be deduction from others, which are entirely different from it.'

   Whether this criticism is justified, and Finnis asserts that it is not, the stigma has remained.
2. Hume secondly denies that there is any difference between moral judgments and other judgments.

> 'Having found that natural as well as civil justice derives from human conventions, we shall quickly perceive, how fruitless it is to resolve the one to the other, and seek, in the laws of nature, a stronger foundation for our political duties than interest, and human conventions; while the laws themselves are built on the very same foundation.'

   He does not deny the existence of natural law, but his view is a strongly empirical one. Natural law consists simply of the consistent values that are the spontaneous product of societal life and as such the invention of a naturally inventive species. This sociological and psychological approach, founded on an assumption about the nature in which human reason functions, signalled a change in the way law was to be considered.

The fruit of Hume's empiricism is the broad spread of theories labelled positivist. Most positivists are more concerned with the first of the criticisms of natural law, which has been labelled the naturalistic fallacy. However, perhaps due to the growing search for a foundation for justice and rights in the twentieth century, natural law has been revisited, not only by the idealists, but even by positivism.

11.6 Some conclusions

In most human activities the urge for the best leads to critical processes that seek to exclude the worst practices by theoretical justification, in order thereafter to eradicate the practice. For example, nineteenth century medicine sought to demonstrate with scientific theory that traditional herbal medicines lacked scientific basis. The concern was to demonstrate that doctors should use methods that could be scientifically explained. This was perhaps the best way of removing quackery

from medicine, although it did not mean that herbs did not have medicinal effects, as has been accepted in modern times. Equally, natural law seeks to find a coherent theory that will purge us of unjust legal systems. Just as quack medicine lacks scientific justification, unjust law lacks moral justification. This does not mean necessarily that neither works.

The problem with employing natural law theories is that they can denounce legal heresies in the same way as medicine denounced medical heresies. This confirms a tendency towards being conservative or even reactionary. If we had adhered to the Greek concept of natural law we would probably still retain slaves. Moreover, most moral reforms in law have stemmed from individuals acting against the contemporary societal mores.

The positivist assertion that you cannot derive what you ought to do from the way things are is to a great extent a philosophy that rejects conservatism and retains for each individual the sovereignty of his own conscience. This is not to say that the assertion is not independently without a logical foundation.

The value of natural law is, however, to remind us of two things. First, law cannot be conceived purely from the point of view of what lawyers say is law, but from the broader perspective of collective human endeavour. As a result Alf Ross dubs natural law as a harlot at the disposal of any political theory. Secondly, natural law reminds us that law is a social endeavour, rather than a static fact. Most law students take law to be simply posited legal statements, but what is also critical to law is that people act on legal norms. It is thus an insight to see that law seeks to do such and such rather than to say that the law is such and such. Positivism has always been concerned with the neutrality of the content of legal rules, but there seems to be something intrinsic in the nature of the legal enforcement of will that itself seems to be purposive.

Stalin demonstrated adequately that the employment of terror and punishment secures cheaper, quicker and more absolute compliance to will. Law actually pre-warns the subject, risking that a person will take measures so as to avoid being caught doing a wrongful act. Whereas a political regime could quite easily force people to comply, why should it endeavour that people should choose to behave in a certain way and accept the validity of a requirement? Natural law theory at least attempts to explain this problem. As we shall see this is not necessarily true of positivism.

11.7 Positivism as a reaction to the naturalistic fallacy

The term 'positivism' has acquired two features. First, it covers a multitude of various theories with a limited amount in common and, secondly, it carries with it almost the same pejorative sense as the naturalistic fallacy. Drawing upon Hart's famous article in the *Harvard Law Review* (1958), we might identify five different meanings to 'positivism'.

1. Positivists view valid laws as the expression of the wills of human people, as opposed to the manifestation of any greater purpose, such as Divine will.
2. There is, for positivists, no necessary link between law and morality. This does not mean that positivism denies that law should be moral.
3. The analysis of legal concepts is deemed by positivism as distinct from other disciplines such as sociology, anthropology and history. The identification of legally valid laws is thus perfectly possible without reference to morality.
4. As a result of the previous point, some writers have asserted that, to positivists, law is a 'closed' system of logic and therefore all legal decisions are deductible from posited legal rules and require no external justifications of a moral or social nature. It is doubtful if anyone, even Kelsen, claimed this sort of primacy for the discipline of legal reasoning.
5. Positivism, of a different sort, 'moral' positivism, claimed that moral judgments cannot be objectively verified by indicating demonstrable facts. Legal positivists, such as Kelsen, deny that there are objective moral values.

It is clear that the radical difference between positivism and natural law is that while positivism states that the concept of law is simply what the legal system in a given society recognises as law, naturalism considers law to be an ideal, commonly shared by human societies. The ideal of law is order, preferably good order, irrespective of the variance of moral values. Positivism cannot ignore the normative nature of law, but does not regard this as a moral premise. For many, it is regarded, rather, as a social technique.

There are two aspects, therefore, that emphasise the contrast between positivism in its caricatured form and natural law theories. First, law is exclusively the premise of the legal caste (including legislators). This deprives law of any spurious claims of intrinsic morality and ensures the individual's right to his own conscience, while reserving the legal system's right to punish him for transgressing. Secondly, it allows for precise statements about the nature of valid law which approximate to the lawyers' experience. This final point might, for the student, be the clinching factor.

11.8 The attributes of being a human being

Although Hart denies any implicit link between law and morality, he does recognise a broad category of legal rules of moral derivation, and recognises that the human condition requires certain protections. He posits the one indisputable goal of human society, that of survival. Social institutions must therefore accommodate a realisation of certain criteria which have an effect on survival. He cites the following sociological/psychological facts:

1. humans are vulnerable;
2. humans are approximately equal;
3. humans have limited altruism;

4. humans are subject to limited resources;
5. humans have limited understanding and strength of will.

Hart concedes that even if these facts were accepted by a legal system, they would not necessarily make it more just and fair. Moreover, he acknowledges that many legal systems do not necessarily even take cognisance of any of these. Nor are these themselves the rules of natural justice, but simply the considerations that must be taken into account as a basis of an ideal legal system. What Hart does is to posit an indisputable factual end to which most societies will aspire, namely, survival, and remind us of the obstacles to achieving that goal, in the form of his five human weaknesses.

He takes it as self-evident that in order to circumvent these weaknesses there is a necessity that there be some protection of property, persons and promises. Hart's starting point of the assumption of the validity of survival has been criticised by Fuller. That people need to survive in order to do any other thing seems right. But we may take issue. Take, for example, the Jonestown community which committed mass suicide on the basis of religious belief, or the Jewish community of Masada, which extinguished itself rather than submit to the Roman Empire. But these extreme cases are the exception rather than the rule (that is why we say they are 'extreme'). Survival thus becomes a generally understood common goal, rather than a necessary premise for a society.

Hart acknowledges that an overwhelming majority of men do wish to live, even at the cost of hideous misery. Fuller's criticism is that truths about man's desire to survive represent only a lowest common denominator of aspiration. He paraphrases Aquinas: if the highest aim of a captain were to preserve his ship, he would keep it in port for ever. The concern of natural law is to produce not only guarantees for individuals, but to find the morally correct balance for society. By ignoring this he ignores the collective aspect of the human condition. One could posit additional considerations that are necessary for the survival of society. The need to sacrifice or punish the individual for the good of the whole. The need to allow individuals to profit from their contribution to society as a recognition of their usefulness to society; the allocation of status to those with particular abilities.

D'Entrèves is more concerned with the extreme noncommittal nature of Hart's natural law principles. For all their evasive sociological premises they are practically useless, because Hart will not commit himself to any moral or factual interaction with law-making.

11.9 The Nazi informer case

Hart has another defence of positivism, this time against the criticism from a school of thought about law that sprang up in Germany after the Second World War. In particular, Hart takes on the criticism of a German jurist called Radbruch. The

history of Radbruch's thought about law was that he was originally a positivist. After experiencing Germany of the 1930s and during the war, his views radically changed and he became convinced that legal positivism was one of the factors that contributed to Nazi Germany's horrors. Among other things, he said, the German legal profession failed to protest against the enormity of certain laws they were expected to administer. In the light of this, Radbruch claimed that a law could not be legally valid until:

1. it had passed the tests contained in the formal criteria of legal validity of the system, and, more importantly;
2. it did not contravene basic principles of morality.

This doctrine meant that, according to Radbruch, every lawyer and judge should denounce statutes that contravened 'basic principles of morality' not just as immoral, but as *not having any legal character*, that is, being legally invalid, and therefore irrelevant in working out what the legal position of any particular plaintiff or defendant was.

Hart is critical of Radbruch's thesis. He thinks it is naïve to suppose that what occurred in Nazi Germany was to a degree caused by a general belief that law might be law even although it contravened basic principles of morality. At the very least, Hart says, it is necessary to ask why this general belief in other countries was accompanied by opposing liberal attitudes as, for example, in England with Bentham and Austin. More importantly, though, Hart thinks Radbruch's conception of law is confused. Hart refers to the use of Radbruch's conception of law by West German courts after the Second World War in which certain Nazi legislation was deemed to be void because it was contrary to morality.

A general argument was used in several West German criminal cases involving allegedly criminal acts of informing on other people during the war and thereby securing their punishment by the Nazis. The form of the defences to these alleged offences was that such actions were not illegal according to Nazi laws in force at the time they were done.

It is very important that students understand both the decision and the facts in this case, because it is often completely misunderstood. The facts were that in 1944 the defendant, who was getting bored with her husband, denounced him to the Gestapo for having said something insulting about Hitler while at home on leave from the German army. The man was arrested and sentenced to death in accordance with a Nazi statute that made it illegal to make statements detrimental to the German government. In 1949, the wife was charged, in a West German Court, with having committed the offence of 'unlawfully depriving a person of his freedom' a crime under the German Criminal Code of 1871, which had remained in force continuously since its enactment. The Nazi statute that had made it illegal to make disparaging statements about the German government was, of course, repealed by this stage.

The wife pleaded in defence that what she had done was lawful in 1944 when she

did it. That is, she had not unlawfully deprived her husband of freedom, because it was made lawful by those Nazi statutes in force *then*. When the case came to the appeal court, although the woman was allowed her appeal on other grounds, the court accepted the argument that the Nazi statute would not have been valid if it were 'so contrary to the sound conscience and sense of justice of all decent human beings'. If so, it would have followed that this statute did not make it lawful to deprive people of their freedom when they denounced Hitler, so that, at the time the defendant informed the Gestapo about her husband's remarks, she could have committed an offence under the German Criminal Code of 1871.

This reasoning is, of course, along the lines proposed by Radbruch. The Nazi statute had met the formal tests laid down by the criteria of legal validity of the Nazi legal system, but was nevertheless not 'law' because it contravened 'fundamental principles of morality'. Hart is critical of the argument, which was apparently followed in a number of similar cases. His short criticism is that this is 'too crude a way with delicate and complex moral issues'. The better way, he says, to deal with the problem of punishing the Nazi informers under the law would have been by retrospective law declaring the Nazi statute to be invalid. Then the woman in this particular case would have been criminally liable *not* because *when* she did what she did it was illegal, but because a later statute made it illegal retrospectively.

This way of looking at the problem of legally justifying punishing the woman, Hart says, brings to view the full nature of the moral issues involved. His suggested way of dealing with the matter brings another element into the equation of justification. This is that, although we think it was wrong to do what the woman did, we also think it wrong to punish a person when what they did was permitted by the state, that is, was lawful. The moral principle here, and one endorsed by many legal systems, is that of *nulla poena sine lege* ('no punishment without law'). The rationale of this principle is that if you are acting within the law at any one time then it should not be later declared that what you were doing was against the law.

Hart is not saying that this principle can *never* be sacrificed to some other moral principle, but rather that a transgression of that principle is part of the equation, and must be taken into account in determining whether the woman should be punished. Hart says, for example,

> 'Odious as retrospective criminal legislation and punishment may be, to have pursued it openly in this case would at least have had the merits of candour. It would have made plain that in punishing the woman a choice had to be made between two evils ...'

The two 'evils' he refers to are first, letting the woman go unpunished and secondly, introducing retrospective legislation. The Radbruchean, natural law approach, just simply says: 'What the woman did was wrong and she should be punished, and it is irrelevant that she thought that she was doing what she was permitted to do, or that when she did it, it was permitted by the enacted law.'

11.10 Hartian positivism as a moral theory

So it does not follow that Radbruch and Hart have different views about the outcome of the case, but just that they would have approached it in different ways. Why, then, does it matter if the outcome is the same? Well, the argument is that the outcome could have been different. Hart's justification for punishing the woman by a retrospective law is a result of a better mixture of justification: it involves a weighing up between the rightness of punishing a Nazi informer and the wrongness of retroactively enforced decisions. Radbruch's approach cannot allow the wrongness of retroactively enforced decisions as relevant for, by definition, if the law is morally bad, then it is not a law at all and so cannot be extinguished by retroactive decision. It would be possible, therefore, by Hart's and Radbruch's methods to come to different decisions simply because the judgment Hart recommends is a more complex one than Radbruch's, having an extra ingredient in the argument, and merely having the extra ingredient in the argument *could* turn the decision in another way.

But Hart goes further than just saying that we should be candid about our approach to the problem of how to deal with the Nazi informer. He says also that to adopt Radbruch's approach would be to obscure a very powerful form of moral criticism, that of being able to criticise legislation. He says that to state plainly that something can be a law but too evil to be obeyed is to rivet people's attention. That is, such a statement makes, as he says, 'an immediate and obvious claim to our moral attention' for it raises the whole question of what our obligation to obey law generally is. On the other hand, it is obscure to say that immoral laws are *not* laws at all. In fact, many people would simply disbelieve that as a dubious proposition.

Note that here Hart appeals to the way *we actually think* about law. To repeat his point: we understand his viewpoint because we accept, in our thinking and the way we speak, that one can criticise laws in this sort of way. Now this point of Hart's is a little unfair to Radbruch. Hart just appeals to current thinking, that we do in fact draw the distinction. Radbruch could presumably just answer it by saying we do *but should not*. Remember that it was his belief that thinking in this sort of way contributed to the rise of Nazism. That is, Radbruch was not just describing the way we actually think but making a prescription for the way we ought to think. So it is Hart's *prescriptive* point that Radbruch's proposal blurs over the various moral issues involved that is the better one. It meets the morality of Radbruch's point head on.

Hart openly admits that the choice between Radbruch's natural law approach and his own is to be settled by choosing morally between them. He says that we could choose between two rival conceptions of law:

1. there is the wide, positivist conception of law that considers as law all rules which are valid by the *formal* tests of a legal system, even though some of them might offend against society's morality or our own morality, and;

2. there is a narrow, Radbruchean conception of law that considers as law only those rules, passed as formally valid, that are not morally offensive.

Hart prefers the first conception. The first reason he gives is that it is, as he says, descriptively better to think of law in this way. It is fairly clear that he means by this that it more accords with the way *we actually think* about law. He says:

> '... nothing is to be gained in the theoretical or scientific study of law as a social phenomenon by adopting the narrower concept: it would lead us to exclude certain rules even though they exhibit all the other complex characteristics of law'.

The second reason he gives is that the first conception 'grossly oversimplifies' the variety of moral issues.

It seems that Hart is right at least in pointing to three kinds of confusion that could be created by adopting the narrower conception:

1. First, if we train ourselves to think of laws as essentially moral then, since we have different views about morality, some laws will be valid for some people but not for others. For example, some people would consider that they did not have a legal obligation to pay taxes. If the narrower conception of law were adopted how would the courts decide whether people had legal obligations, say, to pay income tax? The narrower conception of law could only operate if there were not only one set of true moral standards, which is at least a debatable proposition (although not as strange as it might appear since we all talk that way!), but a set of true moral standards that was *objectively ascertainable*.
2. Secondly, if we train ourselves to view law in this narrow way, then we might become indifferent to the fact that Parliament passed legislation affecting us. That is, the narrower conception of law trains us to concentrate only on the particular action that we judge to be morally right and this sidesteps the major issue of whether we have some sort of obligation to obey (even if only *prima facie*) just on the ground that Parliament produced it. Surely, in any matter of civil disobedience, that Parliament has said something in a statute must be an *ingredient* in any judgment whether to obey it. But it would follow from Radbruch's narrow conception of the law that you could not commit civil disobedience against an immoral law because such a law does not exist, in fact, it cannot.
3. A third sort of confusion would be that thrown up by the Nazi informer case. We might, in short, ride rough shod over the important principle of *nulla poena sine lege* to which reference was made in paragraph 10.17 in relation to Ronald Dworkin's attack on legal positivism.

Hart's arguments can be summed up in his own words. What follows are his *moral* reasons for preferring the wider conception of law that separates law from morality by declaring all rules formally identifiable by reference to the factual test of the rule of recognition *ipso facto*.

> 'What surely is most needed in order to make men clear sighted in confronting the official

abuse of power, is that they should preserve the sense that the certification of something as legally valid is not conclusive of the question of obedience.
A concept of law which allows the invalidity of law to be distinguished from its immorality enables us to see the complexity and variety of these separate issues; whereas a narrow concept of law which denies legal validity to such rules may blind us to them.'

This section in *The Concept of Law* gives insights into Hart's approach, his 'methodology'. The title of his book, '*The*' *Concept of Law*, and his Preface (in which he claims he is writing an 'essay on *descriptive* sociology') suggest he aims to describe. But this section indicates that, whether he is aware of it or not, he has other than descriptive grounds for 'choosing' the wider conception of law over the narrow.

Clearly, Hart's theory has been constructed along moral lines. It is a highly sophisticated relationship *not* between the meaning of 'law' and 'morality', but between the meaning of 'theory of law' and 'morality'. That is, although Hart's conception of law is one that separates 'law' and 'morality', the strong suggestion is that he thinks that this conception – the wider conception – is *morally* better than the narrower one. We could argue, therefore, that he connects law and morality in the necessary sense that a theory of law must serve a moral purpose and that we must view as law only those rules that are law according to the morally best conception of law. This view is not far from Dworkin's, in Chapter 3 of *Law's Empire*, or Finnis' in Chapter 1 of *Natural Law and Natural Rights*.

11.11 Introduction to Fuller

Law and purpose

Fuller identifies a dichotomy of views as to the proper purpose of legal study. On the one hand, there is the positivist contention that law must be treated as a manifested fact of social authority to be studied for what it is and does. Such a position is certainly proper for the study of substantive law, for a law student would learn precious little unless she treated individual legal materials as categorical. However, this does not mean that the method is apt for the study of law as a general phenomenon.

On the other hand, Fuller's argument is that the theoretical concept of law cannot be understood without attributing to it the purpose of subjecting human conduct to the guidance and control of general rules. Such a view is clearly right. However, he goes on to assert that without this idea of purpose one cannot judge the degree to which a legal system has succeeded in meeting its goals. Fuller considers that one might term the goal of all legal systems the ideal of legality. When positivists like Kelsen set down a criterion such as efficaciousness as a required element in the definition of law, they are thus stating that if law fails to achieve its purpose then it is not law. There is a qualitative difference between Kelsen's view and Fuller's. Kelsen suggests an all or nothing view of law, begging

the question how many people need to disobey a legal system before it ceases to be efficacious and hence ceases to become law? On the other hand Fuller sees the legality of a system of rules as a question of degree. His criteria for legality we will explore in a moment.

A critique of positivism

Fuller claims, in his criticism of legal positivism, that some things taken as legal facts are merely achievements of legal aspirations. For example, we say Parliament is supreme, but this is not a datum of nature, it is a manifestation of a tradition of agreement that it legally should be so regarded. This 'should' is not in itself a moral evaluation, but a result of the success of a rule. To state the nature of a legal system in terms of 'is' statements is to endorse that a legal system is what it says it is, which creates a problem if a society rejects a legal system. For example, when Parliament passed the Southern Rhodesia Act 1965, it considered that it was the supreme legal authority for that country. However, the country declared independence and simply ignored Parliament.

According to Fuller, law can only be said to be binding if people believe or act as if it is. Some people certainly do not feel that law is binding upon them. They may disregard the rules, fail to observe them and many evade punishment for breaking them. If it can be said that the laws of a particular system are binding, that is an appraisal of the success or adherence to the rule. Fuller's contention is that when a person seeks to describe a legal system as it is, he is actually evaluating the degree of success it has achieved in pursuing its purpose. To summarise, law is not a binding set of rules, but something that aspires with some degree of success to be binding.

So Fuller's point is that a genuine *working* legal system cannot be understood merely by looking at the rules consciously created by lawmakers. He cites as an example the fact that the American Constitution, from which all American legal authority flows, never mentions a requirement to legislate. This has not stopped Americans from making laws, because this is an activity implicit in the pursuit of legality. Thus, a statute made in 1700 may still be enforceable in 1992. To Fuller, the judiciary are charged with an implicit duty to be the 'curators' of statutes, so that if those plants regarded as weeds change over the decades, the judge invests the Statute of Weeds with the new, more appropriate meaning. Such implicit rules of legality serve as a bridge between the legal world and the social world. This idea has great insight and provides the basis for his very original view of the relationship between law and morality.

11.12 Procedural morality

Moralities of aspiration

While this critique of positivist methodology is important, the student might find it remote from the issue of law and morality. But Fuller does not seek to prove that substantive morality is bound up with law. He is aware that there are perils in seeking to prove a relationship between a relativist, content-based concept of morality and a content-neutral, universal conception of law.

Fuller bases his view of the relationship on the following logic. If morality must be seen as being relative rather than absolute, then if we seek to relate morality to law, that morality must be one specific to the nature of law. Therefore legal morality is a particular type of morality to be found in the nature of law itself, rather than being abstracted from other moral norms.

Fuller's conception of law is that of a purposive activity which aspires towards the ideal of legality. As such it is not surprising that Fuller's concept of morality is founded on practical criteria which are goals to which the legal system should aspire. For example, one of his legal-moral criteria is legal clarity. This morality of aspiration is thus largely a question of degree. Obviously, things are usually more or less clear, although occasionally we may say something is incomprehensible. However, Fuller's morality is not a morality of duty, which is normally expressed in terms of the rules of a substantive morality. An example of a morality of duty is illustrated by the 'rule thou shalt not kill'.

The difference between moralities of aspiration and of duty is largely one of formulation. We might employ a rule 'do not kill', but this can be equally expressed as voicing respect for human life. The former gives us the ability to judge individual acts individually, whereas the latter allows us to give a judgment of degree. If a legal system does not completely prohibit killing then it has broken the spirit of the rule, but it may be shown that to a greater or lesser extent it accords with the principle.

The second aspect of moralities of aspiration is that they do allow for complete censure, if there is no satisfaction of the criteria. Rules of substantive morality carry with them absolute obligations, while Fuller's morality of aspiration is founded on the desire of the legal system to achieve an ideal of legality.

The internal morality of law

The only problem is that Fuller is concerned to relate a morality that is linked to his content-neutral concept of law rather than following the conventional approach of asserting that law respects certain substantive moral values. As such, the content of the internal morality of law looks remarkably like common-sense rules of good craftsmanship. Indeed, Fuller's contention is that there is an inherent logic to the subjugation of human conduct to legal rules, which if ignored will lead to failure.

Fuller asserts that the eight principles of the 'inner morality' of the law are as follows:

1. A legal system must be based on or reveal some kind of regular trends. As such law should be founded on generalisations of conduct such as rules, rather than simply allowing arbitrary adjudication.
2. Laws must be publicised so that subjects know how they are supposed to behave.
3. Rules will not have the desired effect if it is likely that your present actions will not be judged by them in future. As such, retrospective legislation should not be abused.
4. Laws should be comprehensible, even if it is only lawyers who understand them.
5. Laws should not be contradictory.
6. Law should not expect the subject to perform the impossible.
7. Law should not change so frequently that the subject cannot orient his action to it.
8. There should not be a significant difference between the actual administration of the law and what the written rule says.

These criteria are in the form of the moral rules of duty. Fuller expresses them as principles or goals; generality of laws; promulgation of laws; minimising the use of retrospective laws; clarity; lack of contradiction; possibility of obedience; constancy through time; consistency between the word and the practice of law.

Fuller's evaluation speaks for itself:

> 'Though these natural laws touch one of the most vital of human activities they obviously do not exhaust the whole of man's moral life. They have nothing to say on such topics as polygamy, the study of Marx, the worship of God, the progressive income tax, or the subjugation of women. If the question be raised whether any of these subjects, or others like them, should be taken as objects of legislation, that question relates to what I have called the external morality of the law.'

Fuller shows how the Nazi regime suffered a progressive decline in its adherence to these principles of legality. Furthermore, he concedes that even if these standards are adhered to, it would not *guarantee* that they will prevent law being the instrument of oppression. Even disregard of these principles does not necessarily make a system not law, *just further away from the ideal of legality.* In essence, Fuller states that the internal morality of law is neutral towards the law's substantive aims.

There are, however, aspects of the internal morality of law that he claims are not so neutral. The urge for legal clarity fights against laws that direct themselves against alleged evils that cannot be defined, such as discrimination on the basis of race. He cites the 1948 decision in *Perez* v *Sharp* (1948) where a statute preventing the marriage of a white person to any Negro, mulatto, Mongolian or member of the Malay race was held unconstitutional on the basis that the constitution requires clarity.

The legal approach to human nature

Interestingly, Fuller asserts that the purpose of law embodies an inalienable view of humanity:

> 'To embark on an enterprise of subjecting human conduct to the governance of rules involves of necessity a commitment to the view that man is, or can become, a responsible agent, capable of understanding and following rules, and answerable for his defaults.'

If we revisit Fuller's inner morality of law in this light we obtain a better perspective of why he considers it appropriate to term these criteria as being moral in nature.

By making laws general and predictable, a choice is given to the subject, the opportunity to predict when he will be punished, for example. By making laws known people may know on what basis they will be judged and how they must act so as not to fall foul. By this, Fuller is stressing that law is, to a certain extent, a partnership between the legislator and the subject. An illustration of this is the principle of taxation law that although a person may not evade his tax obligations, he has the right to act so that he can minimise the amount of tax that the law requires him to pay. So Fuller has some idea of 'fairness' or 'consistency in dealing' between government and citizens.

Hart's criticism

What Fuller succeeds in doing is setting up what amounts to an optional morality that has little to do with questions of right or wrong. Has he actually made any contribution to asserting that there is a link between law and morality? Certainly one has to view law itself as a morally acceptable thing, rather than a necessary evil, as Nozick might view it, or an instrument of class oppression, which is a Marxist attitude.

However, one of the more unfair criticisms of Fuller is based on his assertion that beyond the satisfaction of a very minimal standard, the legality of a system is a matter of degree. The criticism is put as follows. Who talks about a legal system existing more or less? A legal system either exists or it does not and it cannot 'half-exist'. The second element of the criticism is that if a legal system can exist to a lesser degree, how can we decide when we do or do not have an obligation to obey it?

This (frequently used) argument is nonsensical and ignores Fuller's chief insight. When we talk of the existence of a legal system it is not like talking about the existence of a piece of steel. It is either steel or not steel. A legal system is a social fact which depends on the degree of co-operation achieved between its members and its subjects. The advocates of the all-or-nothing point of view do not answer the question: how many people need to disobey a legal system for it to cease to be a legal system? The assertion that a legal system either exists or it does not stems from the lawyerly desire to have clear yes-or-no answers. This has to do with the human need to know when one must obey a legal system and when one no longer has a legal obligation.

Hart's well-known criticism of Fuller's equally well-known eight principles of the 'inner morality' of law must be understood. These principles, which loosely describe requirements of procedural justice, were claimed by Fuller to ensure that a legal system would satisfy the demands of morality, to the extent that a legal system which adhered to all of the principles would explain the all-important idea of 'fidelity to law'. In other words, such a legal system would command obedience with moral justification.

Fuller's key idea is that evil aims lack a 'logic' and 'coherence' that moral aims have. Thus, paying attention to the 'coherence' of the laws ensures their morality. The argument is unfortunate because it does, of course, claim too much. Hart's criticism is that we could, equally, have eight principles of the 'inner morality' of the poisoner's art ('use tasteless, odourless poison'; 'use poisons that are fully eliminated from the victim's body'; etc). Or we can improvise further. We can talk of the principles of the inner morality of Nazism, for example, or the principles of the inner morality of chess. The point is that the idea of principles in themselves with the attendant explanation at a general level of what is to be achieved (elimination of non-Aryan races) and consistency is insufficient to establish the moral nature of such practices.

What has been unfortunate about Hart's criticism is that it obscured Fuller's point. This was that there is an important sense of legal justification that claims made in the name of law are morally serious. At the least, the person who makes a genuine claim for legal justification of an immoral, Nazi-type legal system *must* believe that there is some moral force to his claim. At its best, we believe that when we make some claim about our law it carries some moral force. It is not enough simply to deny this. At least some explanation is required for our belief that this is so if, in fact, we are wrong.

General comment

A useful addition to the debate about the point of Fuller's theory of law is to be found in Brudney's article 'Two Links of Law and Morality' in *Ethics* (1993). The first part of this article, where Brudney discusses the famous Hartian criticism, is the most helpful, although there is a useful comparison drawn by Brudney between Fuller's theory and a similar one, that of Soper in his book *A Theory of Law* (1984). The article amounts to a limited defence of Fuller against the criticism that Fuller's eight principles are compatible, in Hart's terms, with legal systems of 'great iniquity'. The thrust of article makes a very practical point: when all is said and done about the 'conceptual' or 'logical' relationships between 'law' and 'morality', the application of the eight principles to actual, living rulers would be to make them be more careful about making immoral laws. Why? Because the rules would create a climate of 'transparency' in decision-making in the sense that laws could not be enacted in secret, had to be general in scope, non-retroactive, etc. Given that human beings are volitional creatures, of a particular kind of psychological make-up, then it seems

reasonable to assume that imposition of the eight principles would make human beings who are rulers behave in an acceptable manner.

There are, of course, difficulties with this idea, which Brudney acknowledges. These are, however, of an empirical sort; do human beings in fact 'knuckle under' to the pressures of having to make transparent decisions? Brudney is keen to point out that if it is not clear that human beings are that keen to make morally acceptable decisions it is also not clear that they are *not*. He therefore calls for an empirical investigation into what human beings are actually like:

> 'Such investigation could be of two kinds: inquiry into the law-constraining properties of human beings as such, or inquiry into the law-constraining properties of some restricted group of human beings. The former seems a doubtful enterprise. History exhibits too much legalised evil to think it likely that there are immutable human properties that constrain the moral content of law. The latter inquiry might seem too local to be of interest. The fact, for example, that a particular royal family always trains the next ruler in its line to be morally enlightened would hardly be an informative empirical link of law and morality. But suppose there are law-constraining properties which (i) are characteristic of members of our culture, and (ii) cannot be easily and quickly eradicated (as princely training could). Such links of law and morality might shed light on the nature of our institution of law.'

This passage suggests ways a student might consider the practical application of Fuller's theory; that has always posed a problem, not so much with the 'really evil' system, such as the Nazi legal system, as with the half-way house such as the South African legal system. The answer, Brudney suggests, lies in the correct empirical description of those responsible at the time for the production of the laws.

11.13 Finnis

Hart says of Finnis' restatement of natural law that it is of very great merit. By drawing upon the works of natural lawyers such as Aquinas and Aristotle, Finnis attempts to dispose of what he regards as two cardinal misconceptions about the theory:

1. Finnis denies that natural law derives from objectively determinable patterns of behaviour, but instead asserts it is ascertainable from inward knowledge of innate motivations.
2. Natural law does not entail the view that law is not law if it contradicts morality.

In *Natural Law and Natural Rights* (1980) Finnis seeks to distance his own position and that of his philosophical predecessors from these much-vaunted criticisms. Natural law may be the set of principles of practical reasonableness in ordering human life and human community, but he asserts that they are pre-moral. By this he means that they are not the product of logical deduction, nor are they merely passions verified with reference to something objectively regarded as good. The latter position represents the view of the empiricists such as Hume, and is that

all moral values are subjective whims that have the extra force of validity because others accept them as being good.

To the extent that the empiricist criticism of some natural lawyers might be right, he states that there is no inference from fact to value. Therefore the goods that Finnis speaks of are not moral goods, but they are necessary objects of human striving. The peculiar nature of this view is that these goods are subjective so far as they require no justification from the outside world, but are really objective since all humans must assent to their value. Finnis argues that these are the result of innate knowledge.

There is a strong affinity between Finnis' view of natural law and that of Aquinas. However, the major difference is that, for Finnis, the existence of God is only a possible explanation for the comparative order that he seeks to project on human values, not the necessary reason. Finnis instead states that his goods are self-evident. This is demonstrated by, though not inferred from, the consistency of values that are identified throughout all human societies, such as a respect for human life.

Finnis' process of reasoning is to address any individual with the question, 'X is good, don't you think?' He maintains that it is because of the consistency of these basic values of human nature that one gets one's ability sympathetically, though not uncritically, to see the point of actions, life-styles, characters and cultures that one would not choose for oneself. This argument about the consistency of human nature is a compelling one. We can read, with understanding, the recorded life of a tax-gatherer in ancient Egypt or a mediaeval monk with the freshness of a report in a modern magazine because in fundamental human strivings, in human nature there is an undoubted consistency. Often we refer to the writings of Shakespeare whose observations about humanity are as relevant today as they were when he was writing. Finnis can certainly say with justification, that, as a speculative truth, human nature seems remarkably constant.

11.14 The basic goods of human nature

Finnis' seven basic goods are:

Life

Finnis is well worth reading, if only because of the poet in him, which sets him above most other jurists because he writes as a human, rather than as a tired old machine. To Finnis, life is not bare material existence, but is a matter of quality, so that mental and physical health and comfort are necessary aspects of living. The striving and lust for life are brought out in his examples: 'the crafty struggle and prayer of a man overboard seeking to stay afloat until his ship turns back to him; the team-work of surgeons' and even 'watching out as one steps off the kerb'.

Allied to life as a basic good is its propagation. As most schoolboys know, life, like death, is a sexually transmitted disease. However, Finnis separates the good of procreation from the more complex sexual and paternal and maternal urges. Such urges can be diverted to other goods. Thus, sex can be a recreational activity (play) or a cementation of relationships (sociability, friendship). As Hume might put it, the diversion of the urge for copulation to these other ends may be another invention of a naturally inventive species.

Knowledge

Finnis sees curiosity and the quest for truth in itself as a manifest human good. He hastens to add that 'it is knowledge, considered as desirable for its own sake, not merely instrumentally'.

Play

Everyone, asserts Finnis, engages to a greater or lesser extent in activities that are pointless except for their own sake, from sports and games on the one hand, to mischiefs and diversions such as toying with one's pen as one writes. 'An element of play can enter into any human activity, even the drafting of enactments.'

Aesthetic experience

Although linked to play, and indeed to life and knowledge, the appreciation of forms and spirits of beauty is, Finnis asserts, equally a common and self-evident human good.

Sociability (friendship)

To be in a relationship of friendship with at least one other person is a fundamental form of good, is it not? The bonds of human community, even at the level of pure self-interest, are involved with this good, but Finnis obviously views friendship as its flourishing.

Practical reasonableness

The ability to reason provides a level of personal autonomy, since it is the measure of active choice and free will as well as providing the potential of self improvement by ordering one's thoughts. Through reason comes therefore, in Finnis' view, peace of mind as well as self-determination.

Religion

Finnis seems reluctant to use this word, but employs it 'summarily and lamely' for want of a better choice. Finnis suggests that all humans are concerned to know both

how things came to exist as they do and whether there is not something greater and more powerful than human intellect, to which humans are subject. Finnis' explanation is obviously imbued with his own faith, but these questions are also universal concerns and in the absence of explanations that are proof positive that God does not exist or that the Big Bang actually happened, we choose theories to cling to, or at least search for them, and our adherence to them is a matter of faith.

Finnis makes two further relevant points.

1. These are not the only goods but, simply, all other goods may be reduced to being means by which these basic goods are attained. Nor are they the only common urges or inclinations. He does not deny that some people, perhaps all, have an urge for gratuitous cruelty. However, this is not self-evidently good.
2. None of these goods can be reduced to a mere extract of another, since they are ultimate ends in themselves of equal value and importance when one focuses on them individually.

It may be seen that Finnis' list, although it has some peculiarity, is not radically different from the lists of others, such as Aquinas. The difference Finnis asserts is that these goods are not the result of speculative reason. They are not good *because* of anything, they are just good. The problem is that they are, according to Finnis, 'primary, indemonstrable and self-evident'.

The student may be tempted to view life as a necessary material pre-condition to all of the others. You cannot play cricket or study law if you are a corpse. However, Finnis, with his emphasis on life as being a good rather than an empirical necessity, forestalls this criticism. The value of life is nothing without the other goods *in some measure*. Simply, the student must ask herself: 'Do I believe that any one of the seven goods is intrinsically good?'

It is difficult to argue with Finnis' example of the seven goods and it would be foolish to do so, since he offers no logical proof concerning them and indeed says they are not demonstrable. Much fruitless pursuit of logical criticism has been expended on Finnis' goods, the most obvious being based on the principle that since Finnis offers a logical justification of knowledge, he is defective in not providing logical justifications for his other goods. Finnis states, quite rightly, that even a man who denies knowledge, relies on his knowledge to deny its value. As MacCormick puts it, 'Why should ... anyone ... care to know that knowledge is not worth having unless, after all, at least that knowledge is worth having?' It is a neat argument, but is divorced from the premise of Finnis' argument. Finnis may provide empirical explanations, say from anthropology, to illustrate the prevalence of these values, but he does not employ them as proof.

On these poetic foundations, Finnis seeks to rebuild the edifice of natural law. He argues that the concept of law has a focal content that is based upon the convergence of legal systems with the various facets of a central definition of law. These facets are concepts that law is the following: made, determinate, effective, communal, sanctioned, rule-guided, reasonable, non-discriminatory and reciprocal.

However, to Finnis, as to Hart, the concept of law is a common-sense category that is applied to varied institutions that have roughly, though by no means exactly, the same function in society. So a 'tight' definition of law is a fool's errand. It is rather like giving a substantive definition of weeds:

> '[T]he intention has been not to explain a concept, but to develop a concept which would explain the various phenomena referred to (in an unfocused way) by ordinary talk about law ... and explain them by showing how they answer (fully or partially) to the standing requirements of practical reasonableness relevant to the broad area of human concern and interaction.'

Finnis accepts that lawyers are concerned with categorical statements about what is valid law. This varies from society to society and from time to time. His theory:

> '... cannot be assumed to be applicable to the quite different problems of describing and explaining the role of legal process within the ordering of human life in society, and the place of legal thought in practical reasons effort to understand and effect real human good'.

What Finnis is suggesting is that the moral success or failure of a law is not the test of whether it is law. His concern is not to posit what he wants law to be, but rather to evaluate what expectations there are of law, in order critically to evaluate law itself. To Finnis, the focal meaning of his concept of law is not intended to explain what law is, but what moral expectations are made of it. So the purpose of law is to work for the common good. This does not, however, mean that laws that work against the common good are not laws and should be relegated to some other discipline. What such laws amount to is an imperfect or fringe meaning of law in its focal meaning.

An example of this is the man who walks into a restaurant and orders Bombay Duck (curiously, a fish dish). When the waiter brings his dinner he might say, 'I ordered the Bombay Duck, but this is not a duck.' The waiter is not deceiving him, but his own expectations are not satisfied. Similarly, Fuller would not deny the appellation of law to what a legal system claims to be law, but his focal meaning is concerned with expectations rather than classifications.

The legal system must thus, to some extent, satisfy the common requirements of human good, although there are no very precise yardsticks for assessing this.

Equipped with the knowledge that Finnis has shown us what he thinks the natural absolute values are, as well as his conception of law, we might seek to understand how these two relate to each other. The objects of human striving are the seven basic goods, but they are best and perhaps only achieved through communal enterprise. This is the result of the application of one of the goods themselves, practical reasonableness, to the question of how best to attain the others. However, it is not sufficient for life, play, and so on, that people act collectively. Rather they should do so in an organised manner. This requires that the individual works for the collective good. Now Finnis does not deny that there might be varying conceptions of what the collective good is. It is just that these are simply aspects of

the ongoing process of reasoning to find the best way to promote the collective good. Certainly, organised communal activity for the collective good can be furthered by the employment of law.

However, practical reasonableness must also be applied to ensure that the individuals within society can attain the basic goods that they seek. Finnis articulates nine methodological principles for practical reasoning. These include the need for a coherent plan in life, no arbitrary preferences amongst values or people, detachment and commitment, an evaluation of the relevance of consequences, the requirements of the common good, and following one's own conscience. This is the foundation of justice and rights. Justice and rights represent a tension between the common good and human goods.

However, our present concern is the link between positive law and natural law. Finnis cites the easy case of murder. The law of murder is derived from the general good of the value of human life, interpreted by another good, that of practical reason. The force of the law against murder thus doubly derives from natural law. The process of doing this is, however, a complex one. Finnis' explanation of the nine requirements of practical reasonableness and their interaction with legal reasoning is very sophisticated. It cannot be fully described here. But the application of practical reasonableness is the determinant factor of law. Obviously, reason allows the choice of a multitude of means to be thought up in order to achieve ends. But Finnis' conclusions are of interest to us:

1. Natural law is concerned to prove that the act of positing law is an act that can and should be guided by moral principles.
2. Moral principles are derived by practical reasonableness from objective principles, not from subjective whim or custom.
3. Law itself, its structure and the institutions that it creates, such as contract etc, is justified by moral norms.

Finnis is not satisfied merely to say that history shows that law normally reflects contemporary morality, but seeks to determine what the requirements of practical reasonableness really are in order to have coherent standards for legislation.

11.15 Evaluation of Finnis

By employing the principle that goods are self-evident, rather than derived from objectively observable facts, Finnis not only avoids being accused of deriving an 'ought' from an 'is', but also deprives us of any attack on his methodology. Since we cannot show precisely where values come from, we are reduced to attacking the paucity of analogous arguments. However, this reduces us to shadow-boxing and is in no way dispositive of his method. All we are able to do is face Finnis on his own grounds, answering the question as to whether we agree with him or not. However, we can ask whether we agree because of our learned instincts, our reason, rather

than because what he says is self-evident. The Humean criticism would be to grant that these goods are aspects of passions and urges we all recognise but that there is no more to them than just that.

Finnis' concept of play, for example, could cover any human activity from pulling wings off insects to watching a person being burnt to death. It is the direction of his methods of practical reasoning that essentially makes these goods seem good.

A controversial aspect to his theory is his inclusion of practical reasonableness as a good. Obviously, it is expedient and useful to reason, and it has beneficial side-effects that Finnis notes. However, the essence of practical reasoning is that it is concerned with moving to practical solutions from general inclinations or urges. His methods of practical reasoning are laden with value considerations, which unlike the broad propositions of the seven goods are not necessarily the self-evident methods of practical reasoning. He asserts that practical reasonableness dictates that the promotion of the common good and justice are necessary aspects of our existence. This leads him to focus on law from the point of view of practical reasonableness imbued with moral priorities. The criteria of practical reasonableness still allow a vast diversity of systems to be justified. However, Finnis' focus is on a concept of law that is assumed to be differentiated from other normative social orders because there is a *prima facie* moral obligation to obey it. The reason there is such an obligation is that legislators are assumed to be acting in the interests of the common good. And that they are so assumed to act is because it is a necessary dictate of Finnis' norms of practical reasonableness.

Finnis criticises Hart's focal concept of law, centred on the internal aspect of rules, on the basis that it does not focus on the main reason for the adherence to legal rules, namely, the promotion of the common good. Finnis is self-avowedly seeking to define what the requirements are for a practically reasonable legal system.

A criticism frequently advanced is that Finnis advocates what is essentially a materialist, capitalist society, which may have its virtues as a political institution, but which need not promote these ultimate goods. The by-product of this kind of society is the reliance on materialism for the achievement of goods. On the other hand, it is arguable that the wise man chooses not to be diverted by maximisation of material, but seeks these goods in a simple life. Indeed this is the assertion of many idealists, who regard political society as an aberration (Rousseau) and law as a diversion from the human achievement of good (Marx).

11.16 Dworkin's 'grounds' and 'force' of law

Dworkin does not like the idea of being branded a 'natural lawyer' because his view is that the term 'natural law' covers too many different theories. But his theory is often described as one of natural law, simply because of his integration of moral arguments into legal arguments. He does, too, like most natural lawyers, view evil

systems, such as the Nazi system, as not properly to be described as 'law'. He distinguishes between what he calls the 'grounds' of law and the 'force' of law. The grounds of law are obtained by looking interpretatively at the legal practices of some community from the point of view of a participator in those practices. It would be possible, from this standpoint, to work out how a judge in Nazi Germany might decide a case. We can call him Siegfried J. Imagine some horrific hard case under the Nuremberg Laws, say, to do with sexual relations between Jews and German nationals. We could take account of widely believed theories of racial superiority to provide detailed arguments about which way the case should be decided. We could learn how to argue a case by learning the 'ground rules', as it were, of an evil legal system.

Law as moral justification of the use of state coercive power

But to produce an argument from the 'grounds' of law is not thereby to endorse it. A full-blooded political theory, according to Dworkin, requires an explanation not only of grounds but of the moral 'force' of law. He adds that philosophies of law are usually unbalanced because they are usually only about the grounds of law. So, we can judge Nazi law from Siegfried J's point of view, in the sense that we can predict what he will do, in the same way as we might imagine how a magistrate, in Roman times, would decide a point of Roman law.

It is easy to fall into traps here. Some critics, Hart notably, have supposed that Dworkin has merely created an amended, and confused, form of positivism. By the addition of 'principles' and 'underlying theories' of law, perhaps to a positivist account such as Hart's, all that was necessary in order to understand and argue hard cases was to talk of 'Nazi principles' and 'underlying theories of racial superiority'. According to this understanding, because Dworkin unites both legal and moral rights, any rights arising should have a very weak *prima facie* moral force which would be overridden by a strong background morality. Thus, with some vehemence, Hart says:

> 'If all that can be said of the theory or set of principles underlying the system of explicit law is that it is morally the least odious of morally unacceptable principles that fit the explicit evil law this can provide no justification at all. To claim that it does would be like claiming that killing an innocent man without torturing him is morally justified to some degree because killing with torture would be morally worse.'

Dworkin's answer involves an appeal to the fact that a problem of law is that we do ascribe some moral force to laws which we believe to be morally bad:

> '... the central power of the community has been administered through an articulate constitutional structure the citizens have been encouraged to obey and treat as a source of rights and duties, and that the citizens as a whole have in fact done so'.

It must follow from this, says Dworkin, that the decision whether a statute gives rise to a moral right is a moral question. 'We need,' he says, 'the idea of a legal

right, which someone might have in virtue of a bad law, in order to express the conflict between two grounds of political rights that might sometimes conflict.'

The idea is much more easily understood in the later light of the development of Dworkin's theory of law as an interpretive concept. The interpretation of law is addressed to a set of legal practices in a particular culture. The essential point about the interpretation of evil legal systems is that the best moral sense that can be made of them is just that they have no moral force. In an important respect, it distorts this project to say simply that the laws are 'there' but should not be endorsed.

It is only when we introduce the history of 'natural' law that problems arise. The history of that idea is a long one. In recent times, it has become a debate about the 'conceptual' connection between different uses we make of language. At times, it centres on the structural nature of legal systems, at others, upon the validity of single rules. It mixes with requirements of the laws of the international community. At times, it reports necessary conditions of 'human flourishing', at others it claims that human attributes are merely accidental.

Nevertheless, there are people who want a clear line on the question whether Dworkin is a 'natural' lawyer. If the question is whether Dworkin believes that making moral judgments is part of the question of determining whether the community has a right or duty to use its coercive powers, then he is a natural lawyer. If the question is whether he believes immoral legal systems are not law, then he is *not* a natural lawyer. If it means whether he thinks that there is a 'natural' answer, 'out there', which supplies an 'objectivity' to moral and legal argument, he certainly is not a natural lawyer. The message should be clear by now. It is not at all helpful in this area to run together, under the one term 'natural law', so many different kinds of theory.

Ronald Dworkin and contemporary case law

The contribution of Ronald Dworkin to contemporary legal theory should not be underestimated. His views, like his predecessor Herbert Hart, may have an eventual effect on the English judges. He is widely taught in United Kingdom law schools and the freshness of his emphasis on the importance and value of understanding real live issues of a practical nature is of importance.

Let us compare, however, the decisions in the Court of Appeal and the House of Lords, of much topical interest, to allow medical treatment to be withdrawn from an irreversibly comatose patient who had been in that state for three-and-a-half years since the Hillsborough disaster. The Court of Appeal decision is *Airedale National Health Service Trust* v *Bland* (1993), and the most interesting judgment is that of Hoffman LJ who not only adopts an avowedly natural law approach (see Chapter 3, section 3.4) but also refers to Dworkin's book *Life's Dominion*, obviously the sister book to his *Law's Empire*. Here is a flavour of Lord Justice Hoffman's judgment:

> 'This is not an area in which any difference can be allowed to exist between what is legal and what is morally right. The decision of the court should be able to carry conviction with

> the ordinary person as being based not merely on legal precedent but also upon acceptable ethical values ... I tried to examine the underlying moral principles which have led me to the conclusion at which I have arrived. In doing so, I must acknowledge the assistance I have received from reading the manuscript of Professor Ronald Dworkin's forthcoming book *Life's Dominion* and from conversations with him and Professor Bernard Williams.'

Williams' book (along with Smart) entitled *Utilitarianism: For and Against* (1973) is recommended reading for the chapter on the moral theory of utilitarianism (see Chapter 6).

But let us compare that decision in the Court of Appeal with that in the House of Lords (immediately after the Court of Appeal decision). The most interesting from the point of view of testing jurisprudential theories is Lord Browne-Wilkinson's judgment. He says, first:

> 'Where a cases raises wholly new moral and social issues, in my judgment it is not for the judges to seek to develop new, all-embracing, principles of law in a way which reflects the individual judges' moral stance when society as a whole is substantially divided on the relevant moral issues ... For these reasons, it seems to me imperative that the moral, social and legal issues raised by this case should be considered by Parliament.'

Here are some questions. Is Lord Browne-Wilkinson making a judgment here of political morality about the doctrine of separation of powers? (It seems so.) Is he saying that judges should not decide general issues (policy?) on matters on which there are moral divisions? Is he saying that judges can never take a moral stance? (Presumably not, because he has just taken one on the proper relationship between the judiciary and the legislature.) One wonders what his Lordship would have said had he been on the consenting sado-masochistic acts case, recently decided in the House of Lords, of *R* v *Brown and Others* (1993). There, Lord Templeman is reported to have said:

> 'The slogan that every person had a right to deal with his body as he pleased did not provide a sufficient guide to the policy decision which must be made ... Society was entitled and bound to protect itself against a cult of violence ...'

Lord Browne-Wilkinson then went on to say that he thought that 'The answer to the [moral question as to whether feeding should be withdrawn] must of course depend on the circumstances of each case and there will be no single "right" answer.' It is not, however, possible to see any argument for that conclusion other than that doctors will disagree. It must, too, be a non sequitur to say that, just because people disagree therefore there is no right answer, since that would allow no possibility for people ever to be wrong. In any case, the right answer might simply be that, because people disagree, the right answer is something such as (and this was what Lord Browne-Wilkinson proposed): 'the court's only concern will be to be satisfied that the doctor's decision to discontinue (feeding) is in accordance with a respectable body of medical opinion and that is reasonable.' But this smacks of a fudge: what is 'respectable'?; what is 'reasonable'? A criticism of Lord Browne-Wilkinson's approach is that this is buck-passing the question of deciding right and

wrong issues of morality to doctors; one wonders whether he would have been prepared to do this had he been sitting in judgment in the sado-masochistic case of *Brown and Others*.

Dworkin's Life's Dominion

Dworkin's book, just referred to, is important in two respects. It introduces a new way of looking at the abortion debate, by denying that foetuses have rights albeit having a 'sacred' or 'inviolable' status; and it applies this moral understanding about abortion to the contemporary debates in American constitutional law about the future of the famous and controversial 1973 decision of the US Supreme Court in *Roe* v *Wade*.

The book's full title is *Life's Dominion: an Argument about Abortion and Euthanasia* (1993) and it divides into three parts. In the first, Dworkin argues that we misunderstand both sides of the abortion debate if we take it to be about whether the foetus is, from the very early stages of pregnancy, a creature with rights and interests that abortion would violate. In order to make sense of what most people on both sides of the debate actually believe, Dworkin says, we must see them as taking seriously a quite different moral idea, which he calls the sanctity of life. The second part of *Life's Dominion* is devoted to the constitutional jurisprudence of abortion, specifically to the argument that, given what the abortion debate is really about, something very close to the position taken in *Roe* v *Wade* is the correct constitutional standard for laws regulating abortion. Finally, in the last two chapters of the book, Dworkin applies the distinctions he has drawn between rights, interests, and the intrinsic sacredness of life to the difficult case of euthanasia.

Of great importance is his denial that foetuses have rights. He says that, until the third trimester of pregnancy anyway, they do not have sentience and so cannot sensibly be called persons or sensibly described as having interests. To characterise pre-third trimester foetuses in this way, he says, would be like saying that Frankenstein's monster had a right, or interest, in Frankenstein's throwing the switch which would bring the various body parts together. On the other hand, it is going too far to say that foetuses have no status whatsoever. Dworkin thinks that the status is sacred. Foetuses have an intrinsic, inviolable character akin to the importance and inviolability of the environment, or of about to become extinct species, or the great works of art. This idea of the sacred expresses better, he believes, the wrong that all, liberals as well as conservatives, feel is wrong with abortion, even to save the mother's life.

But if the foetus is not seen to have rights the differences between liberals and conservatives is smoothed out considerably. The liberals and conservatives differ only over the relative importance they accord the foetus. Conservatives place more emphasis on the 'natural investment' that has gone into the creation of something as unique as each individual foetus; liberals, on the other hand, place more weight on the 'human investment' that has gone into a life. Thus a liberal might compare the

wrongness of destroying an early term foetus against the wrongness of coercing a young women to go through a pregnancy that she – really – does not want to go through with. Here the 'human investment', by which Dworkin means the result of all those decisions and attitudes and intentions by which a person plans to live a certain kind of life, would be seriously frustrated.

The chapters (Chapter 4 – 'Abortion in Court: Part I'; Chapter 5 – 'The Constitutional Drama'; and Chapter 6 – 'Abortion in Court: Part II') which follow attack the idea propounded by many constitutional lawyers in the United States who are 'pro-lifers' that the US Constitution does not grant a right to abortion because the Constitution does not mention such a right. Here there is a clear and condensed version of the arguments in Chapters 9 and 10 of *Law's Empire* and it is a useful reworking of the ideas, familiar to readers of *Law's Empire*, of judicial interpretation of law according to the virtue of integrity and the imaginative application of the ideas of 'fit' and 'substance'.

Legal and Social Theory

12

Sociological Jurisprudence

12.1 Introduction

Although this section passes under the heading of sociological jurisprudence, there are several approaches, with differing labels that are subsumed under this heading. They encompass various schools of thought. All of them share the attribute of applying methods of social enquiry in order to elucidate the role of law in society. We can divide the ideas conceptually into three strands of approach.

Sociological jurisprudence (idealist)

In this area should be included those thinkers who either:

1. base their analysis of society on idealist historical information;
2. base their analysis of society on an economic or political theory.

Sociological jurisprudence (evaluative)

This section includes those thinkers who are primarily concerned with whether law is sufficiently reflective of societal needs.

The sociology of law

This section includes those thinkers who are concerned to apply social scientific methods to explain laws and the reasons for laws in their social context.

These groupings, particularly the first two, are necessarily arbitrary. There are numerous other ways to view the sociological approach, but these groupings are intended to marshal rather diverse subjects into manageable categories.

12.2 Sociological jurisprudence (idealist)

Auguste Comte is credited with inventing the term sociology, denoting the scientific analysis of society. The student will already be aware that the belief that scientific method was the one appropriate to the study of all phenomena flourishes to this day. However, the study of society did not necessarily start with Comte, although he represents a good starting point for our purposes.

Comte's espoused theory was that the appropriate method for study of society was by observation, experimentation, comparison and historical method. This is not dissimilar to the broad principles of modern sociology, although it has been somewhat refined. A fundamental problem that plagued early sociology was the poor state of historical knowledge, based on official versions and broad and somewhat idealised views. This necessarily prejudiced the works of early sociologists.

Scientific theories, developed in the nineteenth century alongside crude economic ones, also influenced the views of sociologists, with Herbert Spencer espousing social Darwinism that contrasted with the historical idealism of other thinkers, but was based on little more truth. Equally, based on the idea that self-interest dictates social responsibility, the *laissez-faire* attitude that economic and social forces will necessarily order society for the better, was adopted by Adam Smith, Ricardo and, to a certain extent, Bentham. The followers of such theories were less interested in legal control as in deregulation of trade, which was viewed largely as the answer to most social evils.

Bentham, followed by von Jhering, adopted a utilitarian approach, based on the satisfaction of human wants. Law, by means of coercive methods, would be the instrument of order by which society could balance the needs of the individual with the needs of society.

Ehrlich placed considerable emphasis on the diversity of social institutions with coercive or normative force, directing attention towards institutional rules and practices that are parallel, but not part of the law. These almost constitute private legal systems. This insight is a useful one and its reflection is to be found in the growing interaction between legal institutions and social ones. For example, we might now find that professional rules and standards are widely reflected in judgments in the law of negligence. Equally government has begun to delegate legislative powers to agencies, even of a private nature. The Financial Services Act 1986 delegates the power to legislate and make rules on investment practices. The holders of these powers are private limited companies that are the evolutionary forms of independent professional investment bodies.

However, Ehrlich took his analysis further. Although he conceded that the law had its own professional approaches to social problems, he emphasised that true law was living law, that is, the interests and practices in society, and as such most legal reform was simply the accommodation of living law into these rules. Ehrlich urged the lawyer to gain his understanding and weight his judgments by the interests of society, thus moulding book law to the living law. But Ehrlich overlooked the fact

that legislation itself has an effect on practices and seeks itself to balance interests. However, we cannot be excessively critical of him, without taking into account the rapid progress and complexity that was a feature of his times.

All the above theorists share a fairly remote and instrumentalist view of law. Law was seen as subservient to greater social forces that would set the legal agenda. The concept of social progress and the rightness of the forces within society seem to reflect the economic and political changes in the nineteenth century. However, such approaches contribute little to our understanding of law's place in society. Indeed, it is possibly dispensable.

It may be noted that historical and empirical fallacies are not confined to this section. Durkheim, who will be considered a little later, based much of his argument about the role of law on assumptions and somewhat dubious historical data. His concept of society bears closer resemblance to an organism, with collective thoughts expressed through law. Equally, Weber, whose importance is significant, still, as Lloyd points out, remains bound to the *laissez-faire* ideal. It seems hard for a sociologist to approach the status of law in society without bringing with him unfounded preconceptions or quasi-empirical theory.

12.3 Sociological jurisprudence (evaluative)

The informal group of social scientists considered in this section are primarily, though not exclusively, concerned with the effectiveness of law. Principally their aim is to focus on the gap between law-in-theory and law-in-action. The reason for this concern was largely a reforming instinct. A second concern relates to the nature of society. Does society have a common interest expressed through law, or does it represent conflict within society?

There are three thinkers whose importance is predominant in this area: Pound, Weber and Durkheim. Pound is to be regarded as synonymous with the term sociological jurisprudence. Weber's contribution is indisputable, since his methodological improvements and refocusing seem to pave the way for a true sociology of law. However, Weber must be viewed in the context of responding to the legal sociology of Marx. For practical reasons, it is therefore necessary for the student to refer to Chapters 17 and 18, since Marx's concept of law and state, although properly a sociological and economic analysis, deserves special attention. Finally, Durkheim is an appropriate figure of focus. Marx, Weber and Durkheim should be categorised together as legal sociologists, marking the transition to a sociology of law, away from the traditions of sociological jurisprudence.

An introduction to Roscoe Pound's theory

The extensive writings of Roscoe Pound, which are spread over a long period of time, represent the culmination of the legal thinking of the past. Pound was an

academic lawyer and an advocate for socio-legal studies. His concern was to examine law in action as opposed to the topic of law in books. Again it should be emphasised that his primary concern was with law reform and his theory ought to be read with this in mind. He wished to develop a technology to redraft the law to take account of social reality. He saw law as a social phenomenon which translated into policy, and meant that in the making, interpretation and application of laws, due account should be taken of law as a social fact.

The following represents, in his view, the task of the purposes of the legal order:

1. Factual study of the social effects of legal administration.
2. Social investigations as preliminary to legislation.
3. Constant study of making laws more effective.
4. Study, both psychological and philosophical, of judicial method.
5. Sociological study of legal history.
6. Allowance for the possibility of a just and reasonable solution of individual cases.
7. A Ministry of Justice to undertake law reform.
8. The achievement of the purposes of the various laws.

In order to achieve these purposes of the legal order it would first be necessary to achieve the recognition of certain interests which operate on different levels. These levels are the individual, the public and the social.

Secondly, it would be necessary, Pound thought, to arrive at a definition of the limits within which such interests will be legally recognised and given effect to. And thirdly, the securing of those interests within the limits as defined was necessary.

What, according to Pound, would be required in order to achieve this? He listed (Pound was very fond of lists!) the following as necessary:

1. The preparation of an inventory of classified interests.
2. A selection of interests which should be legally recognised.
3. A demarcation of limits of securing the interests so selected.
4. Consideration of the means whereby laws might secure the interests when these have been acknowledged and delimited.
5. The evolution of the principles of valuation of the interests.

As stated above, in doing this rather protracted task Pound sought to harmonise law in books with law in action. It is not at all clear that he has succeeded in this aim or indeed that anyone could have succeeded. However, in order to give due regard to his attempt we shall examine his efforts further. In particular we shall examine his concept of social engineering and the balancing of conflicting interests and the use of his jural postulates in the achievement of the balancing act.

The models of conflict and consensus

In order to understand the working of Pound's theory it is necessary to discuss the broad distinction that runs through sociology of law and sociological jurisprudence.

This is whether society is essentially a reflection of the consensus or of the conflict model. Although this may appear rather a general discussion in the middle of Pound's theory, it is the first point in the text where we come across this matter and it is one to which we will regularly return.

A consensus model is one which sees society as having shared values and traditions, whereby law serves the interests which are to the ultimate benefit of society. Law is thus seen as a value consensus, representing the shared values of the society, and adjusting conflicts and reconciling interests to match with the consensus. Such a model may be seen, explicitly or implicitly, in the works of Pound and Durkheim.

It is also the basis of the framework provided by Parsons and developed by Bredemeier. Parsons views the legal system as having a function of integration, of preventing via the set of rules the disintegration of social interaction into conflict. He splits the legal from the political system. In the former, the courts hold centre stage with their work of interpretation; in the latter, the legislature formulates policy. Pound put it in this way: The success of any particular society will depend on the degree to which it is socially integrated and so accepts as common ground its basic postulates. Such a view postulates that law adjusts and reconciles conflicting interests according to the requirements of social order. The problem with this view of society is that it seems to represent society as more stable and homogenous than it really is. It seems a very cosy view.

A conflict model, on the other hand, suggests that society involves not a value consensus but a value conflict and that law, rather than reconciling conflict interests in a compromise, instead imposes one interest at the expense of the other. Such a model is expounded by Quinney and, of course, the Marxists.

Which is a correct reading of the English legal system? Both views can claim support from particular pieces of evidence; either showing a social consensus (major crimes, civil liberties protection?) or rules that are the product of conflict (rules of property and contract).

Is the conflict a simple one, with one ruling class of which judges are a part? (See, for example, Griffith's *The Politics of the Judiciary*.) Or is it more complicated, with competing interest groups possessing varying amounts of power? Writers differ on these points. It should be pointed out that if the latter position is accepted, the question arises as to how far different is the conflict/consensus position?

Social engineering

Following on the consensus model of society and in explaining the process of the balancing of conflicting interests, Pound has used an analogy with engineering. He sees the task as one to build as efficient a structure of society as possible, which requires the satisfaction of the maximum of wants with the minimum of friction and waste. Thus by identifying and protecting certain interests the law ensures social cohesion.

The idea of the balancing of conflicting interests was derived from Ihering and can be stated as the giving effect to as much as possible of conflicting claims which men assert *de facto* about which the law must do something if organised societies are to endure. It has been observed that Pound's theory is not a fully developed theory of justice. Harris, for example, has stated that Pound's theory equates justice with quietening those who are banging on the gates, in that achievement of one's interests depends on articulation of those interests. Those interests are subject to manipulation through advertising campaigns for example. Incidentally, the role that advertising plays in shaping desires is well discussed by Stone in Chapter 9 of his *Human Law and Human Justice.*

Balancing of conflicting interests

It would be appropriate to examine further the notion of the balancing of conflicting interests. In doing so Pound looks at actual assertion of claims in a particular society as manifested in legal proceedings and this of course includes rejected as well as accepted claims. Again there is more classification involved. It is worth learning the three different levels on which Pound identified interests operating. These are:

1. Individual interests. These are claims as seen from the standpoint of individual life. The following are examples:
   a) personality, such as interests in person, honour, privacy;
   b) domestic relations, as distinct from social interests in institutions, such as family or parent;
   c) interests of substance, such as property, freedom of association.
2. Public interests. These are claims asserted by individuals but viewed from the standpoint of political life. They are less important but would include:
   a) interests of the state as a juristic person; looking at the personality of the state; and
   b) interests of the state as guardian of social interests.
3. Social interests. These are the most general and, according to Pound, the preferred level on which to balance conflicting interests. They are claims as viewed in terms of social life or generalised as claims of the social group. This includes the social interests in:
   a) general security, that is, to be secure against threats to existence from disorder, and matters such as health;
   b) security of social institutions, which acknowledges the existence of tension and the need to protect religious institutions;
   c) general morals, including such matters as prostitution and gambling which are said to be offensive to moral sentiments;
   d) conservation of social resources. This is comparable to Rawls' just savings principle and is in conflict with the individual interest in one's own property;
   e) general progress, which would cover free speech and free trade (but nonetheless ignores the tendency towards resale price fixing); and

f) individual life, according to which one should be able to live life according to standards of society.

These are just examples. The important point according to Pound is that these must be balanced on the same level otherwise the decision would not be neutral. It would dictate the outcome of the supposedly scientific exercise in balancing out these interests. It is noteworthy that Ihering did not insist on this when he spoke of balancing conflicting interests. Are you convinced by Pound's insistence on balancing conflicting interests in a neutral fashion? But Pound has not paid much attention to ways in which one conflicting interest is to be compared with another. Lloyd summed it up thus: 'Unlike Ihering, who assumed that social and individual interests should always be directly compared, Pound insisted that a fair balancing of interests could only be achieved by examining a conflict on the same plane or level.'

The 'jural postulates'

In circumstances where an accommodation of interests is not possible there is, according to Pound, no objective way of resolving disputes. To meet this defect Pound developed the notion of jural postulates as the means of testing new interests. These jural postulates are the presuppositions of legal reasoning which embody the fundamental purposes of the legal system. They are in effect the basic assumptions upon which society is based. We can conclude that Pound was using a new term to describe something that was already well recognised.

Pound's methodology was that of incremental legal reasoning. This method of legal reasoning, which is well known to common law lawyers, would allow new claims only if claims of that sort are already recognised. The speech of Lord Buckmaster in *Donoghue* v *Stevenson* (1932) represents one of the most famous adoptions of incremental legal reasoning. In essence Lord Buckmaster was saying that unless Mrs Donoghue could show that in a previous case a claim such as that she was bringing to the court was admitted, then whatever the particular merits of her case her claim would have to be rejected.

According to Pound these jural postulates may conflict, although he insists that his do not. Furthermore they may change and would do so relative to the stages in social evolution. It is helpful to remember this before dealing with a criticism that was made by the Scandinavian realist Lundstedt to the effect that Pound's jural postulates were nothing more than natural law allowed in through the back door. Lundstedt is wrong in that these jural postulates do not possess the characteristics of natural law. They are not absolute, nor are they universal and indeed, as has been stated, nor are they unchanging.

Critical evaluation of Pound

There is much written by Pound and more written about him. It really is not possible to raise all the critical evaluations that have been made; here, however, is a selection:

1. Patterson, in *Jurisprudence: Men and Ideas of the Law* (1953), describes Pound's catalogue of interests as a rationalisation of the actual.
2. Lloyd and Freeman state that Pound's classification of interests reads rather like a political manifesto in favour of a liberal and capitalist society even though for Pound it were seen as objective. A socialist would insert other interests. They add that the classification of interests suffers from excessive vagueness.
3. With regard to the recognition of interests Dias has argued that there are graduated levels of recognition and cites the case of *Van Duyn* v *Home Office* (1975) which involved the denial of access to this country of a citizen of the EEC who was a member of the Church of Scientology. This would normally be a breach of the rules on freedom of movement within the EEC but, as Dias points out, while the Church of Scientology was not outlawed it was however officially condemned.
4. Dias raises further criticisms when he states that the whole idea of balancing is subordinate to the ideal that is in view. The march of society is gauged by changes in its ideals and standards for measuring interests. Dias is of the opinion that the listing of interests is less important than judicial attitudes towards particular activities. According to him weight will depend on ideal.
5. Note that the recognition of a new interest might be created as a matter of forward-looking policy as opposed to being a jural postulate that can be extrapolated from the matrix of the law.
6. Dias has criticised the engineering analogy as being false in that engineering projects are based on a plan, whereas the reality is that society changes and that the building must always be erected on shifting ground. Perhaps there are limits to which analogies can be taken. Dias does, however, argue with some force that law is not a planned enterprise and, rather, attempts, in an *ad hoc* way to cope with situations as and when they arise.
7. Pound asserts that claims pre-exist law, whereas often claims are based on law. An example would be with regard to welfare benefits where claimants base their claim on existing rules and regulations.
8. It is clear that Pound asserted that the nature of a society is one of consensus, yet it is not particularly clear whether or indeed how balancing of interests will produce a more cohesive society. Further, the process of using law as a tool of social engineering would depend on the credibility accorded to the law. This can be seen in the examples of political trials such as the trial of the Chicago Eight or the Oz obscenity trial where the aim of the defendants was to discredit the court. The experience of the trials of IRA suspects in Northern Ireland also makes the same point. There the defendants seek to deny all legitimacy to the proceedings. In such circumstances social engineering breaks down.
9. The law concerns considerations of people's needs as well as their interests. This is especially the case with regard to paternalistic laws such as the law on the compulsory wearing of seat belts in cars. The very idea of satisfying people's interests conflicts with a paternalist view of society. The laws forbidding the

display of pornography run counter to the satisfying of people's interests if interests are defined as desires, yet there exists powerful argument from a paternalistic point of view to the effect that such laws are necessary.

10. It has been shown, and this point is discussed above, that post-Pound socio-legal research doubts whether law is the result of value consensus. The findings of Quinney tend to confirm that society is better described as founded on a conflict model rather than any consensus.
11. Overall it can be stated that Pound exerted a considerable influence on jurisprudence in that he laid the foundation for post-traditionalism. However, according to Alan Hunt in *The Sociological Movement in Law*, Pound used sociology when he saw fit; he cannot be regarded as having developed a sociological theory of law.

Weber's response to Marx

The writings of Marx proposed a revolutionary theory that sent capitalism scurrying for cover. As with any revolutionary theory those at the focus of the revolutionary attack will seek to provide a response. This can clearly be seen with regard to von Savigny's response to the adoption of the French Code Napoleon in parts of Germany (see Chapter 15). In the more modern frame this is also exemplified by the response of the Gulf States to the revolution in Iran. Weber offered a response to the Marxist challenge to capitalism. In assessing the response of Weber it would be appropriate to discuss the nature of that challenge.

Marx thought that capitalism was in crisis. He saw the brutal exploitation of labour in the Lancashire cotton mills and drew a conclusion from this that capitalism was in its last stages. He developed his Marxist theory on the premise that capitalism would not survive for long and that it would inevitably be replaced eventually with a classless society. As part of his attack on capitalism he noticed that the greatest revolutionary potential was the working class and that in order to bring about that revolution and the arrival of the stage of socialism, what was needed was to raise the revolutionary consciousness of the working class. This would be done in Marxist terms by dispelling capitalist ideology which he saw as a false consciousness that mystified the working class and legitimated the capitalists' control of the means of production. Marx therefore saw everything in terms of economic determinism whereby the state and the law served the interests of the class that controlled the all-important means of production. This crude class instrumentalism was the focus of Weber's remark that authority strives for acceptance, not submission.

Marx thought that the state and the law which represents authority was a tool of oppression in the hands of the ruling class in seeking to dominate the working class. While this view has been reneged by more modern Marxists seeking to enter the political agenda of today, at the time Weber was writing he was dealing only with the original works of Marx and Engels. It would not therefore be a legitimate criticism to say that Weber did not take account of something that did not exist at

his time. In response to that class instrumentalism Weber observed that the search for a single primal cause was futile. He was thus critical of Marx for the view that economic factors were the sole determining cause of the nature of the society. While saying this, Weber recognised that economic factors are important. But the criticism was ill founded. Marx merely said that in the final analysis economic factors determine the nature of society. Thus Marx recognised that other factors were important also.

Marx's dialectical materialism viewed the history of all hitherto existing society as the history of class conflict. According to him, law was the instrument of those controlling the means of production in the maintenance of their domination over the relations of production. That control was effective by both appearing to accord legitimation to the state and by mystifying the oppressed class. The mystification operated through the exploitation of the surplus value of labour, and the legitimation was through simple power disguised by the state's ideological and repressive apparatus, such as the legitimate state use of force and the false consciousness that sought to preserve the status quo. One such form of false consciousness was religion which Marx saw as the opiate of the masses because it dulled their senses about the reality of their exploitation.

If there exists a single thread that runs through Weber's work, it is his response to Marx whom he regarded as fundamentally wrong. Weber thought Marx was dogmatic and vague and he rejected Marx's views about the false authority of the law. In response to the idea that the state was the tool of the dominant class, Weber sought to speak of legitimate authority. The legitimate authority would strive for acceptance, he said. This Weber attempted to prove by examining the question why people feel obliged to obey law.

Legitimacy and authority

Weber addressed himself to the problem of the nature of order. He saw society as a system of ordered action where almost invariably the particular order is claimed to be right or, as he put it, it was 'legitimised'. Weber believed that no society could exist for long on a set of static or unenforced norms and it would therefore be necessary to have power or command to change and enforce these norms. For Weber, power meant the possibility of 'imposing one's will on the behaviour of another person'. What is new in Weber is that he identified power as a reciprocal relationship and this is the crux of his debate with Marxism. The Marxist views power as the consequence of control of the means of production and the means of preserving that control.

Weber identified two types of power relation, both of which were reciprocal. These are monopoly power and power by authority. In monopoly power the seller fixes the price but the buyer wants to pay it. There is thus mutual self-interest, where power is based on a constellation of interests. In power by authority the parties, namely, the ruled and the rulers, accept the relationship as legitimate. Focus

is directed at the meaning that the ruler and the ruled place on the relationship between them, that is a relationship of legitimate authority. It would then be appropriate to examine the three types of legitimate authority identified by Weber. These are: the traditional, the charismatic, and the legal rational.

1. By 'traditional authority', Weber spoke of the according of legitimacy to that which has always been. This is characterised by a belief in the sanctity of age-old rules. An example would be the aristocracy.
2. By 'charismatic authority', Weber meant a revolutionary situation where the followers attribute special powers to the leader. It involves an automatic break with the past. Legitimacy is founded in the belief in the authenticity of the leader's mission. An example of this would be Mahatma Gandhi in India. He held no formal office and was certainly not a manifestation of traditional authority and yet he was widely obeyed. In that example the obedience was certainly not through any domination by naked power. There is a problem with the question of succession to authority in such a situation, although it could be observed that religious leaders have been more successful than their political counterparts in ensuring the succession, a problem faced by, among others, Napoleon Bonaparte. Having said that, it is recognised that there are some notable exceptions.
3. The third type of authority was the most important for capitalism, according to Weber. It is 'legal rational' authority. It was important for the development of capitalism because it provided certainty in the law of contract, for example. By this type of authority, the authority vests not in the person but in the office held. It corresponds to our conception of the rule of law in which all people are subject to a uniformly administered system of rules and in which all people are subject to the law. The quotation by Lord Denning, directed at the Attorney-General, of the words of Thomas Fuller: 'Be you ever so high the law is above you' in *Gouriet* v *UPW* (1977) illustrates the sentiment of this type of legitimate authority. It is the office which holds the authority, not the person, and obedience is given to norms not to the person. When Mrs Thatcher ceased being prime minister she lost her authority not because she was no longer Mrs Thatcher but because she was no longer prime minister. Simply, she no longer held the office to which authority attaches. According to Weber, in such a system the law serves to repress a conflict of wills by coercion and rationality.

Thus Weber thought that on occasion the ruling class could act in the national interest. That is certainly the language that the government uses. It never states that the measure is designed to serve the interests of the ruling class at the expense in terms of labour of the working class. Yet what of measures such as the welfare state, which so clearly are at the expense of those who control the means of production? Marxists today would explain this in terms of the 'relative autonomy of the state' and would view many laws that serve the interests of the working class as actually also serving the interests of the ruling class in ensuring a satisfied and healthy work force which will produce better products.

According to Weber, in order for capitalism to thrive, law has to be systemised so as to ensure the predictability of economic relations. In essence this is the point made by the new Marxists who stress the relative autonomy of the state. So long as the state protects economic relations it need not do anything else as far as the ruling class in Marxist terms is concerned. The problem with this idea is that it does not accord with the sequence of events in England where capitalism first took root. Weber acknowledged this and referred to it as an exception to his rule. There was no complete legal codified system in England then and there is not, of course, now.

Weber's typology of law

Weber was a trained lawyer who, as stated, was interested in explaining the development of capitalism in western society in terms of the growth of a rational legal order being required to facilitate such a development. He also thought that capitalism developed as a consequence of the practice of what he called the Protestant work ethic to the effect that people would work hard and save some of the proceeds of their labour. These proceeds would then be invested to build up capital and hence encourage the rise of capitalism.

We might take issue with that hypothesis by considering that, in all probability, much of the capital required came less from such savings and more from the profits of global trade. The point, though, is not central to the law aspect of Weber's work. The premise that underlies Weber's theory is what he called *verstehen*, by which he meant that a social action could only best be understood by reference to its meaning, purpose and intention for the individual. Hence the remark that, in Weberian terms, a wink is different from a blink because it is social. A blink is not interpreted to have any meaning, whereas a wink is so interpreted.

Weber offered a definition of his typology of law:

> '... an order will be called law if it is externally guaranteed by the probability that coercion, whether physical or psychological, to bring about conformity or avenge violation, will be applied by a staff of people holding themselves specially ready for that purpose.'

In pursuing this he developed a scheme of lawmaking and adjudication that can be represented in the diagram overleaf.

Note: The substantive/formal aspect relates to the extent to which the system possesses the rules and procedures required for decision making within the system. The rational/irrational aspect relates to the manner in which the rules/procedures are applied in the system.

The legal rational form of legitimate domination is impersonal. Obedience in such a system is not owed to the person but is rather owed to the legal order. The legitimacy of the type of political domination is drawn from the existence of a system of rationally made laws which stipulate the circumstances under which power may be exercised. Because the system is rational it is supported. This is, according to Weber, the source of all state authority in modern societies where legal

domination is not dependent on the extent to which the law reflects the values of the people who accept the legitimacy of the system. Obedience does not depend on agreement with the content of the law but with the rationality that lies behind its creation and enforcement. This is an important point of much relevance to our study. A good question to consider is whether we would agree that it is an accurate reflection of the nature of the relationship between the subject and the government in Britain today.

	Rational	Irrational
Substantive	**Substantively rational** There is no separation between law and morals	**Substantively irrational** Cases are decided on their own merits without reference to general principles
Formal	**Formally rational** The legal system contains answers to all legal problems	**Formally irrational** Decisions are made on the basis of tests beyond the control of human intellect, eg trial by ordeal

Evaluation of Weber

Although Weber's writings are almost a hundred years old there is much that is still very informative as regards modern capitalist society. Weber's distinction between power and authority and his emphasis on the reciprocal relationship acting as a constraint is most illuminating. Further he can be seen as an early advocate of the value-free social sciences, a tradition that is widely accepted in this country. The Marxist would, however, dispute that such is a possibility. What Weber was saying was that it is possible for the sociologist to carry out value-free sociology while at the same time realising that the sociologist has his own value judgments. The sociologist is entitled to exercise his own value judgments in selecting the area of research but having done so the research must be carried out in a neutral way. This is a further manifestation of the separation of the 'is' from the 'ought'.

Nonetheless there are some aspects that are difficult to piece together in Weber's theory. Perhaps Weber took too restricted a view of the relationship between law and domination. He appears to have reduced the relationship to one of a personal nature as between the ruler and the ruled. It is suggested that the process of domination is much more complex than is clear from its formal legal manifestation.

Weber appears to have a good answer to Marx's point on naked domination but more recent responses have been to suggest that Marx is largely irrelevant in modern Britain. While Weber's views on authority as legitimate, not seeking to oppress but ruling by agreement, are applicable it is suggested that in modern Britain with a share-owning population owning their own homes and so on, the Marxist analysis is no longer relevant. Weber should therefore be seen in his historical perspective as an early but effective response to the challenge of Marxism.

When Weber stated that the search for a single primal cause was futile he was, of course, criticising the Marxist reliance on the relations of production, yet the criticism is somewhat misapplied. As we shall see in Chapter 17, Marx did not actually say that the relations of production were the only causal factor. What he did say was that economic determinism operates in the last instance and as such he clearly recognised that other factors are of some importance.

Weber's attack on the Marxist use of models also provides us with a valuable insight. Weber believed that models are heuristic devices against which we might test reality. To the extent that reality does not accord with the model the task of the social scientist is to change the model (if you take the view that there is an 'unalterable brute reality' 'out there'). Marx took the opposite view. According to Marx, if reality did not correspond with the model then the task was to change reality. Hence we have the revolutionary nature of Marxism. This point is developed in more detail in Chapter 17.

In his concept of *verstehen* Weber may have placed too much emphasis on the individual mind in an attempt to understand social action.

In his legal rational domination he speaks of the norms being impersonal. But since they are perceived as impersonal that might be due to factors such as social conditioning and blind acceptance. If so, these factors should be examined. An interesting thought is whether the media, advertising and so on, play a role in 'impersonally' but non-legally fashioning the norms in society.

His view of the rationality of the bureaucracy probably ignores the role of senior civil servants. They have considerable influence even to the extent of persuading government ministers on the content and timing of legislation. If this is so because these discussions are not open and thus not subject to proper debate and the public check of truth, that aspect of rationality is lost. If one is to give credence to the television series 'Yes, Prime Minister', wherein in a humorous manner the civil service are seen as manipulating their ministers to pursue civil service policy rather than the policy on which the government may have been elected, the argument gains even more force. Bureaucracy also has a tendency to create inertia and as such cannot be regarded as always efficient.

Emile Durkheim's social solidarity

Emile Durkheim drew much inspiration from the work of Charles Darwin. He was one of the first to insist on studying law in both its social and historical context. He subscribed to a consensus model of society and developed his theory that there exists a connection between law and the forms of social relations. Durkheim was not primarily concerned with law *per se* but was more interested in the study of society. His relevance is that he attributed a central importance to law in the developing of an understanding of social life in general. Durkheim has been labelled an anti-individualist. He spoke of the primacy of the social and of the collective conscience. He meant by this that thoughts have an existence separate from the person thinking them. His concept of the collective conscience is important to an understanding of his theory and to what he said about law.

Durkheim engaged in primitivist reductionism using anthropology to assist understanding. He attempted to reduce matters to their most primitive form and in his important study entitled *The Division of Labour in Society* (1893) he joined issue with the Marxist contention on the conflict society, stipulating that the social bond is not one of domination but of cohesion. Throughout his writings it is clear that he adopts the consensus model which presumes value consensus in the society.

In his study on the division of labour he identified the extent of the division of labour as the way to classify society and in so doing stated that the type of law prevalent can be used as an indicator of the type of social organisation. Hence, law is to be seen as the external index which symbolises the type of social solidarity. To study society's solidarity, he said, we study its law. Something needs to be said about his use of the term 'social solidarity'. According to Durkheim, social solidarity is a completely moral phenomenon and law plays a central role in the transition from mechanical to organic solidarity. These are the two polar forms of social solidarity and are identified by the degree of the division of labour. In the 'archaic' society, which he also called the mechanical solidarity society, there is no division of labour. In these circumstances the people have shared life experiences. Everyone lives a life almost the same as everyone else. In these circumstances Durkheim thought that since people were self-reliant they would not depend on each other to a great extent and that therefore there would be no problem in carrying out severe punishments on those who violated the code of conduct. Law would be repressive and because everyone shared the same life experiences their reaction to deviation from the accepted code would be passionate and knee-jerk. In a mechanical solidarity society, Durkheim maintained, the collective conscience would be both strong and uniform.

On the other hand, in a more advanced society which Durkheim labelled one of 'organic solidarity' there would be a clear division of labour with a high degree of job specialisation. In such a society the people would have different life experiences. There would be considerable social interdependence as the plumber would need the electrician, the lawyer, the taxi driver, and so on. In order to preserve cohesion the

law would need to maintain an equilibrium. The collective conscience would be noticeably narrower and possibly considerably weakened when compared with a mechanical type solidarity. The type of law would be predominantly restitutive. That is not to say that there would not still be repressive laws. These would however be purely functional, designed not as a passionate reaction because that would be meaningless where beliefs were not commonly shared, but rather simply and functionally to preserve social cohesion.

In his study Durkheim stated that every precept of law can be defined as a rule of sanctioned conduct. Within that he identified sanctions as being of two kinds. These are:

1. Repressive sanctions, whereby there is suffering or loss inflicted.
2. Restitutive sanctions, whereby there would be a re-establishment of troubled relations to their normal state.

This process with regard to law is an indicator of the change and development of society. As stated, reference is made to the division of labour and in particular to the degree of specialisation in the economy. This is not, however, the only change in which Durkheim was interested. He also showed that there would be a corresponding shift from religion to secularism, from collectivism to individualism, and from penal sanctions to restitutive sanctions. It is this last shift that is of primary interest to our study.

With regard to the connection between law and morality Durkheim concluded that these were virtually synonymous. He maintained that law is derived from and is an expression of society's morality and that this explains how punishment may be seen as the expression of collective sentiments by which social cohesion is maintained. Again, this reflects his consensus model of society.

In an important passage Durkheim declared that: 'An action does not shock the common conscience because it is criminal: rather it is criminal because it shocks the common conscience.' On a practical level, this leads to interesting conclusions. As society progresses the form of punishment becomes less violent because the basic function of the state is to legalise norms. The state is the central focus of attention and is therefore influenced both by public opinion and by occupational groups. The method of enforced compliance engaged in by occupational groups is a further interesting area of Durkheim's study and one that has inspired more recent research into the role of the occupational group as a substitute for the socialising function of the family.

A question arises as to why there is still a predominance of repressive law in an organic society such as modern Britain. By a predominance it is meant that there is more than is necessary to preserve social cohesion. The answer which Durkheim would provide is that the division of labour has deviated from its original course. There has been a breakdown of 'socialisation', meaning that the occupational groups are not performing their socialising tasks effectively enough. This is explained by Durkheim in a study on suicide as being made up of a series of different factors:

1. Egoism, whereby the individual is isolated and the bonds which hold the group together are loosened.
2. Altruism, whereby the individual relates to goals above those of the society and therefore becomes too heavily institutionalised.
3. Anomie, which is a state wherein the individual feels his life lacks meaning and guidance. In his explanation of this Durkheim focuses on man's activity as governed by norms. These norms ought to be integrated and non-conflicting in order that the individual can be properly adjusted to his society. Where these norms are not integrated or where they conflict with one another, the individual will lose his moral guidance because there will be no norms against wrongdoing which make sense to the individual. In this state the individual is said to be in a condition of anomie; he has no identity.
4. Alienation, where the individual who feels that the society is not there for him and indeed is there to exploit him will not identify with the aims of that society. Recent happenings in inner city areas in England may illustrate this point.
5. Inequality. This is self-evident and reinforces the above.

The view exists that it is not the individual but rather society which is at fault with regard to crime. It is a failing of us all if an individual is not sufficiently socialised and has to resort to crime. Not surprisingly this point leads to some strongly critical evaluation of Durkheim's thesis. What of individual opportunity and propensity? Are all people in a state of anomie potential or actual criminals? How does one explain crime committed by those who are most certainly fully integrated, such as stockbrokers found guilty of insider dealing? Such people would never consider robbing a bank even though there remains no clear loser when a bank vault is rifled. It is difficult to explain why we still do not regard insider dealing with the same opprobrium as we do burglary.

Durkheim has a point about punishment that has perhaps been taken too far. He observes that punishment performs a useful integrating function in society by providing a scapegoat through which the public can identify with the norms. The criminal broke the norms and therefore ought to be punished because that will act as a cohesive factor with regard to the other citizens. Hence Durkheim is able to argue that if we didn't have crime we would have to invent it to keep society together.

Evaluation of Durkheim

Durkheim's work is important in many respects in spite of what will be suggested are some rather fundamental flaws. He has identified the importance of punishment as a socialising force. He has emphasised the importance of viewing law in a sociological perspective rather than in terms of a pure analytical enquiry. However his treatment of law as a completely moral phenomenon does, it seems, neglect the extent to which law and morality often conflict. There are other points which can be made about his thesis. Empirical evidence tends to refute the assumption that in a

primitive society there is no division of labour. Even as between the sexes there was a division of labour whereby women tended the home and men hunted. Their life experiences were therefore quite different. It is therefore disputable whether there ever was a true mechanical solidarity society as Durkheim understands the phrase.

Even without this point it would appear that Durkheim has provided no adequate account of how law becomes increasingly restitutive. He has given no description of the intermediate stages between primitive and industrialised societies and has assumed that the change was swift. This is misleading. As we shall see, anthropological studies show that repressive law is less important in primitive society. A good example is Gulliver's study of the Ndendeuli in Tanzania, in which he demonstrated that a group in which each individual relied on his fellows extensively, and had a widely shared life experience, developed a sort of bargain model as their dispute resolution mechanism. Leon Sheleff has demonstrated in *From Restitutive Law to Repressive Law – Durkheim's The Division of Labour in Society Revisited* (1973) that while Durkheim relied on Maine to say that primitive law is repressive, actually Maine said the reverse.

This view of punishment and the role of the law regards the state as the expression of the collectivity, that is to say an instrumental organ being the means by which offenders are punished. This is not the only view of the role of the state in these matters. The difficulty with such a consensus model is the contention discussed in the previous chapter that the state may not be neutral. If one were to accept the conflict model, then a different view of the role of the state would emerge. Durkheim assumes that everyone will identify with occupational professional values, which is simply not the case. He takes insufficient account of power, conflict and change, preferring to presume a value consensus without proving its existence.

More narrowly, his view of punishment as retributive ignores the deterrent, rehabilitative and reformist aspects of sentencing and also ignores the punitive aspect of the civil law in the form of exemplary damages. As has been stated above, Durkheim's view of crime negates the element of individual choice in crime.

Taking a Marxist perspective, Karl Renner has demonstrated the need to distinguish between the form and function of law, a distinction which Durkheim blurred.

12.4 Socio-legal studies

It may be seen that the approaches of Pound, Weber and Durkheim differ radically. Sociological jurisprudence in the manner of Pound has had certain adherents who are worthy of mention. Pound's jurisprudence finds certain resonances in the writings of the early American Realists. But his reformist approach was to be taken up in the writings of Lasswell and McDougal, who espoused the virtues of social progress and enunciated aims and social expectations that should be adopted by lawyers. Once again their thoughts are more like a manifesto of social policy than a

lawyers. Once again their thoughts are more like a manifesto of social policy than a concrete and applicable formula.

However, the empirical approach that emphasises questions of effectiveness and the law-in-action thesis, has been subsumed into the broader category of socio-legal studies. These empiricist studies, mainly centred on the idea of achieving social justice, are often based upon positivist sociology, which largely denies any intrinsic normative consistency to law. Law is thus defined as a procedure whose content and effectiveness may be critically evaluated. There is little in the way of a theory of law, but rather it is concerned with need and effect. It is clear that the instrumentalist view of law implicit in the work of those engaged in socio-legal studies is positivist in nature.

Lloyd is particularly critical of experiments such as the Chicago jury project that contrasted lawyers' predictions with jury acquittals. Particularly, the project is criticised as giving insufficient appreciation to the complex role of juries. Ultimately, the approach is the legacy of sociological jurisprudence that is concerned with law as a tool that may be employed for harm or good.

The fruits of the socio-legal pursuit have been noticeable, though, including the Bail Act 1976 and considerable concentration on the provision of legal advice. However, the jurisprudential theory that underpins it is largely an assertion that all that legislators need to know is what the subjects of the law respond to. Law is seen as an instrument, as a catalyst for change, but not an independent phenomenon to which much theoretical attention need by paid.

12.5 Sociology of law

Selznick marks out three stages in the application of social sciences to law:

1. 'The primitive, or missionary, stage is that of communicating a perspective, bringing to a hitherto isolated area an appreciation of basic and quite general sociological truths ...' He quickly points out that lawyers have been quite capable of doing this without the help of sociologists.
2. 'The second stage belongs to the sociological craftsman ... He wants to explore the area in depth, to help to solve its problems ...' This probably amounts to the socio-legal studies movement.
3. The third stage should be categorised as the stage of the sociologist of law when he 'addresses himself to the larger objectives and guiding principles of the particular human enterprise he has elected to study'.

He concludes by saying that the sociologist can not only give advice to the lawyer, as the socio-legal studies movement has sought to do, but can learn from law and legal systems in a search for an understanding of the broader context of society. Stone observes that the early reformist drive of sociological jurisprudence was a phenomenon of its time, when legal reform was most needed. The new approach

might be more reflective of law as an institutional part of society rather than as a panacea for societal ills. He points out that a more coherent, less ad hoc, approach may improve the methods of societal control through law.

Thinkers such as Black, who advocates a sociological positivism that is not interested in lawyers' reasons, but is more interested in lawyers' behaviour, may be seen as complementary to the positivism that, for example, Austin and his disciples advocate. However, there is a dichotomy of views on whether there can be a sociology of law that can accommodate such notions. Nonet insists that sociology must be informed by jurisprudence, observing further that jurisprudence itself is informed by policy. Disputing the mutual ignorance of the two disciplines, Nonet exhorts:

> 'We need a jurisprudential sociology, a social science of law that speaks to the problems, and is informed by the ideas of jurisprudence. Such a sociology recognises the continuities of analytical descriptive and evaluative theory ...'

This seems to be the tenor of a new approach to legal theory through sociology. However, its fruits are, as yet, not as substantial as its rhetoric and methodological argument.

13

American Realism

13.1 Introduction

As with many new attitudes and schools of thought, the American brand of realism was a reaction to an earlier school. In its case that earlier school was formalism, which concentrated on logic and *a priori* reasoning, and was thus thought to be only theoretical and not practical or pragmatic. Formalism, so the realists thought, had no regard to the facts of life experience. Realism attempted to be both practical and pragmatic, rejecting theoretical and analytical approaches to jurisprudential questions, and attempting to look at what it perceived to be the reality in the question: how does law work in practice? One of the factors that may have contributed to this approach in the United States is the rather different traditions of their judiciary. Indeed one of the pioneering realists in jurisprudence was Mr Justice Holmes, a Justice of the US Supreme Court (who was not approved of by President Roosevelt: 'I could carve out of a banana a judge with more backbone'). Holmes' famous statements include: 'The life of the law is experience' and 'The prophecies of what the courts will do ... are what I mean by law'.

This concentration on the courts is, of course, partly a reflection of their more important role in the United States, where they have the power to declare legislation unconstitutional and therefore invalid, and are not as strictly bound by rules of precedent as in the United Kingdom. Much more of the law is open to judicial alteration, and even momentous issues of great political significance can be decided on by the court (for example, the case of *Brown* v *Board of Education* in 1954,

declaring that the provision of separate but equal educational facilities for negroes violated the Equal Protection of the Laws amendment to the Constitution, and thus outlawed segregation).

Here we shall discuss the two main approaches of the American realists, namely, that of the rule sceptics and that of the experimentalists or fact sceptics. This chapter will also consider the schools that have emerged from American realism (jurimetrics and judicial behaviouralism) and finally will note the many criticisms of the realists' work and attempt to disentangle the extent of the contribution, if any, that they make to modern legal theory. A comparative evaluation of the Scandanavian realists is made in the following chapter.

13.2 The realist approach

Briefly, the realist approach was to attempt to look at the facts of the legal experience, and not at those things, such as the legal rules and doctrines, which were in theory held to be important. The two most important facets of the realists' writing seem to be their rule scepticism and their concentration on the courts' role in settling disputes. The essence of their approach was that there is more to law than the mere logically deductive application of rules. They are not saying that there is no value in the logical application of legal rules to fact situations, merely that if a more accurate prediction of the likely outcome of the case is desired, as the practitioner ought so to aspire to provide, then the mere logical application of rules will not provide a sufficiently accurate prediction.

The technique in which most students are trained in law schools in this country is logical application of legal rules to fact situations. The student learns the legal rules during the year (although, paradoxically, in the examination is given the hypothetical fact situation to which the rules do not clearly apply). What the American realists are saying is that the process is too simply understood. Their approach prefers rule analysis plus a sociological approach. It takes the law as it is posited and addresses the question of the factors that will influence those engaged in the application of the law. This is a feature of their approach, namely that they place lawyers centre stage in that they are primarily concerned with the role and behaviour of officials in difficult, court-centred cases. It is proposed to examine the two approaches of rule scepticism and fact scepticism.

It is useful always to compare the American realist approach to law with the approach to law in the United Kingdom. In a recent article (*Current Legal Problems* (1996)), the main part of the 1996 Bentham Club Presidential Address, Lord Steyn, recently elevated to the House of Lords, considers the question of the degree to which law is now considered to be merely a set of formal rules. He rightly identifies the origins of formalism on this side of the Atlantic in Bentham, who doggedly insisted that judges were mere judicial 'functionaries' who could only act within a severely limited role and that the way to a happier state, via social progress, was through legislation.

Lord Steyn distinguishes two senses of formalism. One is the use of the 'inner logic' in the process of legal reasoning and a tendency to assimilate all types of such reasoning to that form (although he recognises that lawyers do not use 'logic' either precisely or to refer solely to deductive reasoning). The other is the use of judicial language by which conclusions of law are expressed. This is an interesting idea. He means by the latter 'the unconscious tendency to express judgments is in purely formal language although consequentialist arguments and policy factors also play a part in the decision'. The former, and narrower, type of reasoning he dubs 'substantive' reasoning. Lord Steyn concludes that in the last 25 years there has been a shift away from using formalist techniques, particularly as a result of the two great contributors to non-formalism: Lords Denning and Reid. Interestingly, he says that the House of Lords judgment in *Pepper* v *Hart* (1992) (see Chapter 24) was, while admittedly bold, yet 'simply a culmination of a more realistic approach to the interpretation of statutes'.

Introduction to rule scepticism

By way of a brief introduction it can be stated that the rule sceptics acknowledged that it was not possible to deny that lawyers, judges and onlookers described the legal system and the substantive laws in terms of rules. About one minute spent looking at a legal textbook or a judgment would show this to be the case. What the rule sceptics denied was that rules were, in fact, the main operative factor in legal decisions. Other factors, for example, the background and prejudices of the judge, were important. Hence, because most judges are conservative, judgments in the political field will follow the conservative viewpoint; and so on for decisions on trade unions, students, etc. And, of course, each judge will have his own individual beliefs which will, consciously or not, influence his decisions.

As a consequence, rules cannot be viewed in the normal way (as reasons for decision, authoritatively laid down, or as binding commands of a sovereign, for example). Instead, they should be seen merely as predictions of what the courts will do. The rule that theft is dishonest appropriation of another's property and so on, is, in reality, a prediction that in the given circumstances the court will punish an offender for theft.

Gray

Perhaps the rule sceptics went overboard in their concentration on the courts and what they will do. If a descriptive formulation of a rule in a textbook does not accord with court practice, it is not a rule at all. In fact, Gray in *The Nature and Sources of the Law* went as far as to suggest that until a statute had been enforced by a court, it was not law at all, but only a source of law. This approach denies the facilitative function of certain statutes, such as, for example, the Companies Act 1985. One does not go to a court in order to incorporate a company, yet the

procedure and requirements for doing that are prescribed in statute. Cardozo J, a critic of realism, has observed that if Gray's thesis is carried to its logical conclusion then 'law never is, but is always about to be'.

Oliver Wendell Holmes J

Holmes, in his *The Path of the Law*, took the concept of 'our friend the bad man' who 'does not care two straws for the axioms and deductions', but 'does want to know what the Massachusetts or English courts are likely to do in fact' and what he predicts will happen if he does certain things. However, it may be asked why Holmes takes no account of 'our other friend, the good man'. According to Holmes, then, the law *is* the rules which the courts lay down for the determination of legal rights and duties.

Fact sceptics

Jerome Frank went further than other realists in suggesting that it was not in fact possible to predict what courts would do. In each case, everything depended on how the court decided the facts.

It is not only the actual writings of the realists that are important. The encouragement of systematic and detailed study of the areas they concentrate on has produced much research, and many results. The realists themselves did not, on the whole, engage in such research (Llewellyn's main research, for example, was anthropological), but two new directions, judicial behaviouralism and jurimetrics, can be seen as the outcome of stressing empirical research and predictions of what the court will do.

13.3 Karl Llewellyn's rule scepticism

Llewellyn was a mainstream realist, a rule sceptic. It was he who suggested that rules, apart from being predictions of what the courts will do, are merely 'pretty playthings'. Alongside this general approach, we can place his more detailed analysis of the functions and techniques of law. Many of his ideas seem rather more theoretical than scientifically or empirically researched, and the conclusion that he reaches, that appellate decisions can be predicted accurately in 80 per cent of cases, seems surprising, but much of what he says is significant.

According to Llewellyn, the basic functions of law are, first, to aid the survival of the community and, second, to engage in the quest for justice, efficacy and a richer life.

To fulfil these two functions, there are a number of 'law jobs' which the institution of law has to do. Llewellyn saw an institution in terms of an organised activity which is built around doing a job. The important aim is to ensure that these jobs are well performed. These law jobs are then the basic functions which the law

jobs are well performed. These law jobs are then the basic functions which the law has to perform. He lists these law jobs in *My Philosophy of Law* as:

1. The disposition of trouble cases, which he likened to garage repair work. The continuous effect was to be the remaking of the order of society.
2. The preventative channelling of conduct and expectations so as to avoid trouble and looks at the purpose of new legislation.
3. The allocation of authority and the arrangement of procedures which mark action as being authoritative.
4. The net organisation of society as a whole so as to provide integration, direction and incentive.
5. Juristic method as used in law and the settlement of disputes.

His analysis of these is found in his book *The Normative, The Legal and The Law Jobs: The Problem of Juristic Method* (1940) in which he identifies the basic aspects of law jobs and claims that these law jobs are implicit in the concept of any group activity. The first of these he sees as the most important yet he does not tell us about their interrelationship. He says that these law jobs are universal, and the emphasis upon universality leads to his arguing on a high level of abstraction.

Llewellyn was concerned to find the best way to handle 'legal tools to law job ends'. Although he suggests that his framework provides a general framework for the functional analysis of law, his theory suffers from a defect common to other examples of functionalism by under-emphasising the dimensions and structure of power.

According to him, the institution of law consists of rules, principles, concepts, as well as an overall underlying ideology, and of various techniques of argument, such as precedent, and practices. Within the set-up of the institution is the body of specialists who carry on the law jobs, and who pass down the skills or 'crafts' necessary to the working of the institutions.

In his concept of juristic method developed in his *Common Law Tradition* he outlines his theory of craft. Here he identifies his period style of judicial reasoning. He identifies two polar positions within this period style and says that judges will fall within that spectrum. This idea was based on empirical research that he and his students engaged in by looking at the performance of the courts at different times, hence his 'period' style. He claimed that courts could be classified according to the different ways in which they used or 'manipulated' precedent. At the one pole is his 'grand style' in which judges are less strictly self-constrained by the rules of precedent and in his 'formal style' the judge considers himself bound by the rules of precedent entirely.

In the grand style the judge will follow what Llewellyn calls a 'situation sense' in order to ensure that a reasonable result is achieved. By identifying a judge's propensity it may be possible to achieve the aim of the American realists, namely, the prediction of the outcome of the case. If we know what approach a judge takes we may be able to predict how he will handle a particular dispute.

The most relevant of these crafts, in view of the realist concentration on the courts, is the juristic method of decision-making. As has been pointed out, 'reckonability' in case law is high. This, according to Llewellyn, is the consequence of various attributes of the system which tend to provide stability.

Llewellyn has made the important point that law is not just about rules, and that the prediction of the outline of cases is an important and useful function. However, law is not solely concerned with the prediction of what the court will decide about a particular dispute. It is also about giving guidance to individuals. Lloyd and Freeman observe that Llewellyn's law jobs overlook the dimensions of structure and power in society. Further Twining, generally favourable, observes that Llewellyn's period style is 'a relatively simple theoretical model'.

As is clear from a brief summary, Llewellyn realised that judges do use rules, and also realises that dispute settlement is not the sole function of laws. In adjusting to meet possible criticisms in these areas (the general realist approach ignores any function but dispute settlement in the courts, and derides the use of rules; both of these points can be effectively criticised) the impact of the realist attack is weakened. Law is only partly about predictions of what the court will do (dispute-settlement), for it is also about giving guidance to individuals. Rules may be predictions; but they are also used by judges. One of the surest ways of predicting what a judge might do, after all, is to look at the rules and principles of the law to which he will refer. The lawyers recognise this because they put a lot of effort into producing arguments, *to persuade judges*, in a court of law. It is true, however, that a really good lawyer will do a little homework on the particular personal predilections of the judge who will hear a trial. If he is known to be 'down on drink' or bad tempered, it might be wise not to allow certain emphases to be made.

A fellow American realist, although from the fact sceptic faction, Judge Jerome Frank, took the view that Llewellyn's work was focused on the appeal courts and took no real account of the work of the trial courts in which it was not the application of the rule that was important in predicting the outcome, but where the uncertainty about the fact finding process was the key.

A strong criticism levelled at both the rule sceptics and the fact sceptics is that they engage in over-generalisations in order to make a valid point. Furthermore, as pointed out, the judges do use rules to explain their decisions and the judge is judge by virtue of a rule that says he will decide disputes. These points are considered unimportant in Llewellyn's law jobs theory. To this extent his analysis is defective.

13.4 Frank and the experimentalist approach

Jerome Frank expounded a theory more extreme than the general approach we saw in section 13.2. He termed the views of Llewellyn *et al* 'rule scepticism'. They were concerned to show that the enunciated formal or paper rules did not prove reliable as guides to judicial behaviour, so that uniformities of such behaviour should be

studied to achieve certainty of prediction. Frank considered that such certainty was impossible in relation to trial courts and that the writings of the rule sceptics concentrated on the upper courts, not the 'sharp end'. In the lower courts, prediction of the outcome of litigation was not possible. The major cause of uncertainty is not the legal rule (either the proper or the real version), but the uncertainty of the fact finding process. Much depends on witnesses, who can be mistaken as to their recollections; and on judges and juries, who bring their own beliefs, prejudices and so on, into their decisions about witnesses, parties, etc.

These prejudices are idiosyncratic to the particular judge and jury, and cannot be standardised or predicted. Take, for example, the trial of Clive Ponting, the senior civil servant charged under the Official Secrets Act 1911 for disclosing to an unauthorised person (an MP) official secrets connected with the sinking of an Argentine ship by British forces during a conflict in the South Atlantic. It was not in dispute that he had so leaked the information. His own defence counsel, according to a book the defendant himself wrote afterwards, advised him on the day the jury were due to return their verdict that he should bring a new toothbrush as he would need one in prison. As we know the jury returned a verdict of not guilty. We do not know the reasons for this (it would be an offence to attempt to elicit from the jury their reasoning or their deliberations) but it may be speculated that they did not wish the matter of sentence to be left to the judge and so removed that function from the bench by returning a verdict which, in view of the evidence and interpretations of the law brought out at trial, was quite unexpected.

Further uncertainty can also be found in the process by which a judge determines a particular fact to be a *material* fact. On the basis of the determination of material facts the legal rule will self-apply. This extreme version of realism does make an important point. The decision in any specific case does depend on findings of fact which can be affected by the preconceptions and prejudices of the judge and jury members. Recent controversies over jury vetting (checking by the security services of the prospective members of a jury, to see if a challenge should be made against individual members), the common opinion that a jury is better than a judge for trials involving motoring offences, and challenges to certain types of jurors (for example, challenging women jurors in rape cases) are all evidence that practitioners are aware of influences on decisions.

Frank does, however, seem to go too far. Many of the objections to realism set out in paragraph 13.6 below apply with added force to the Frank version, particularly the concentration on the courts, and the denial of any place to the relevance of formal rules.

Moreover, it simply is not the case that all questions of fact are unpredictable as Frank describes. Within the bounds of the rules of evidence, a professional adviser can make a fairly firm prediction in most cases of what facts the court will accept as proved, and what rules of law are to be applied to them. Could a thief caught red-handed by two independent witnesses really be told that all depended on what facts a judge or jury found? Further, many cases never really get to the stage of disputed

facts. How is fact scepticism then relevant to a defendant pleading guilty in a criminal case or only contesting quantum not liability in a civil case? And what of the many cases which go to judges on a basis of agreed fact, to see what the legal rule is? A famous example would be *Donoghue* v *Stevenson* (1932). As perhaps with mainstream rule sceptical realism, an interesting and important point about the legal process is spoiled by over-generalisation.

13.5 Jurimetrics and judicial behaviouralism

Jurimetrics

The term 'jurimetrics' was coined by Loevinger in an article in 1949 to mean the scientific investigation of legal problems through the use of symbolic logic and computers. The latter play a significant part in the legal world. Many law firms and chambers now rely on computer retrieval systems to discover relevant precedents (several systems, including Lexis, are available). Key words are typed in ('company' 'director' 'fiduciary duty') and the computer finds the cases where these words occur within a set number of words of each other.

Computers can aid some complicated legal processes, such as tax planning, where the relevant information is fed into a programme designed to ascertain the most efficient tax plan. This can save many man hours of calculations.

Computers can also take part in investigations, the proper field of jurimetrics, where the data can be quantatively analysed. For example, research on the true realist concern, whether there are regularities of judicial behaviour which could give us patterns to help make predictions.

Computers can deal very quickly and effectively with logical patterns. When used as an aid to prediction of the likely outcome of a case, the computer is fed with a plethora of information about the court and behavioural models on which to base its prediction. The behavioural models will look at the group approach of a multi-judge court and identify the task leader, whose self perception is as the efficient solver of a given problem, and the social leader, who provides the friendly atmosphere conducive to solving the problem. This group approach, however, looking as it does on the inner workings of the group, requires a consistency in the membership of the tribunal. That is not provided by the court. Further, in order for the computer to detect a logical pattern, a precondition would be the existence of consistency in decisions and attitude of the court. Here lies the central flaw. Judges are not logical machines; indeed that is the essence of what the realists are saying. Judges have moods, they change their mind and are subject to all the other weaknesses, or strengths, of the human condition.

What realism has done is lead to a systematic gathering and processing of data about the court which in Britain remains only at the level of gossip and rumour. The purpose behind this approach is clear. It is to aid the advocate. He will

ascertain the preferences of the judge and tailor his argument to meet those preferences. This is, of course, done by better advocates on an *ad hoc* basis. What the jurimetrics application seeks to do is to make this approach more organised.

These developments have led to criticism, and fear of machine justice. Such fears are exaggerated. Computers are useful tools of memory and research, and cannot at present be conceived of as replacing human roles in the judicial process. Probably the real danger from computers now is the threat to privacy posed by computer data-banks. Lawyers have a part to play in controlling this development, but should not be hindered from using computers.

Judicial behaviouralism

This can be seen as the logical follow-up to realist theory. It involves actually carrying out research into how judges behave. A mixture of realist encouragement for such studies and social research techniques is regarded by judicial behaviouralists as necessary. The research is patchy, and on appellate court decisions alone, some obvious results, notably those predicting decisions after the cases themselves have been decided, and more surprising ones. Schundhauser, for example, found that judges who had sat on lower courts before getting to US Supreme Court level were more likely to overrule than those who had not.

An interesting English writer's work on judicial decisions adopting a judicial behaviouralist approach is John Griffith's *The Politics of the Judiciary*. He takes the view that judges are too conservative and 'pro-government' to be capable of giving fair decisions. Lon Fuller has observed that a defect in this kind of approach is that the behaviouralists put consistency at a premium which leads to the judicial process being seen as a formalised game of 'snap'.

13.6 Contributions and evaluations

Returning to the general approach of the American Realists, we must evaluate it and determine what, if any, contributions this brand of realism has made to legal theory.

To recap briefly, the approach we are examining is as follows. Legal rules are not the mainly operative factor in legal decisions. Because of other factors playing a part it is important to look behind these paper rules for the real rules, namely, the uniformities and regularities of judicial behaviour. The formal paper rules are now only useful insofar as they are predictions of what the court will do.

Is this picture of rules, predictions, judicial process right? The most obvious general point is that it involves a change in the way we talk and think about law. Textbook writers, judges, practising lawyers and students all view law in terms of rules and exceptions applicable to fact situations. While this is not in itself a damning criticism of the realists, it is clearly a strong indication that there are faults in the realist theory. Is everyone engaged in the law perpetrating, or the subject of, a

in the realist theory. Is everyone engaged in the law perpetrating, or the subject of, a mass delusion?

Imagine, first, that you are an individual approaching a solicitor on a non-contentious matter. You want to form a company, perhaps, or carry out properly your duties as executor of a will. If, when you ask what law is relevant to your case, the solicitor talks in terms of predictions of court behaviour, you might be surprised. After all, you intend to fulfil your legal obligations and not end up in court at all (failing to form the company properly will merely result in invalidity, not illegality or an offence). Surely the law and its rules are as much about these non-contentious matters as about cases that go to court? Non-contentious questions of obligations (as with a trusteeship) and the facilitative power-conferring rules both public and private seem to be obscured by the realist dismissal of rules. This is the first specific criticism.

Much of the law, and much of the importance of legal rules, relates to guiding people's behaviour by allowing them to avoid a failure, to live up to their obligations and duties, and to take advantage of the various facilitative devices, such as wills, contracts and company formation, that the law provides.

Next, place yourself as a litigant in a contentious matter. Let us say as a plaintiff in a road accident case. Again, if advice was given as prediction of judicial behaviour, something would seem to be missing. Of course, especially in a case involving disputed facts, an element of prediction is involved in any complete advice. Considering the evidence that the court is likely to hear, is it likely to find the defendant liable? What level of risk can be expected? But this is not the complete picture. We assume that, given that certain facts can be proved to the court's satisfaction, the defendant is liable and not just that the court will *probably* find him to have been so. In fact, the reason why the court is likely to find him liable is because he is liable, because he was under an obligation to drive non-negligently, which he has breached.

To take another example, we think it perfectly correct to say, in an appropriate case, 'I'm sure X is guilty of theft, but the police cannot prove it and so he will be found not guilty', or 'he was negligent, but there were no witnesses', and so on.

Rules impose obligations and duties upon people. They have a normative aspect in that they guide behaviour. When they are breached, the question of whether or not a court will enforce the rule is a separate question from whether or not it has, in fact, been breached. Law is then not only about dispute settlement but about behavioural guidance as well.

A further minor point could also be made here. If our contentious litigant was told that there was no rule imposing liability on the defendant, because rules were only predictions, and in his case the defendant would probably not be liable, he might turn his mind to other questions. All is said to depend on the courts and the judges. But *who* are they? It seems that they are only official because the legal rules and principles give them their authority.

Since the emphasis is on the courts, we should next try to look at things from

the viewpoint of a judge. The cases cited to him in argument do not bind him, they are merely predictions of what he will do. This ascribes too restrictive a view to the nature of legal rules. Rules bestow authority on judges. They are judges by virtue of a rule that says they are. They are to decide cases by virtue of a rule that says they are to do so. Their decisions are to be carried out by virtue of a rule that says so.

Frank, who was a judge himself, suggests that a judge must be conscientious, but this is not helpful. How is he to decide in which way his duty lies? With regard to fact scepticism in general the approach is of no application when there is no dispute as to facts. Take, for example, the interlocutory proceedings in *Donoghue* v *Stevenson* where the court assumed the facts as alleged by the plaintiff and addressed the legal question as to whether those facts disclosed a cause of action.

Again we must move back to our criticism that the predictive explanation has missed out the normative aspect of rules, the obligation imposed by them. Furthermore, judges are not only bound by the rules, they have the Hartian internal aspect: they accept the rules as a standard and a guide to their decisions. They will decide in a way following the rules, because they accept those rules as a standard to be followed. As Hood Philips has stated, habits enable external prediction whereas rules provide a justification for acting in conformity and grounds for criticising those who deviate.

Hart has said that the fact that the judge has the last word does not imply that there is no rule. He uses an analogy with a soccer game and states that where a player who gets the ball into the net is offside a referee may still award a goal. This does not negate the offside rule but merely means that it was not applied in that case.

There are cases that do not have a settled rule covering them, and in those cases the judges must make new decisions: almost inevitably, personal viewpoint as well as institutional material will enter the new decision. These are the exceptions for, in general, a judge will apply a settled rule, and this brings us to a closely related point.

Although there is a degree of uncertainty about the law, there is also a large area which is certain, in which rules are the heavily operative factor in a judge's decision. If a judge circumvents a rule, on the rare occasions that it is possible, he may be able to do so in a manner that conceals the fact of his doing so, and furthermore legal rules act as a brake on capricious or whimsical decision-making.

Next, it has been said with much justification that realism is less a philosophy than a technology. The realists sought to approximate the methodology of the natural sciences to an examination of the workings of the law. However as Glendon Schubert, a judicial behaviouralist, has argued, the realists failed to achieve their objective in that they lacked both theory and method. Of course, as a behaviouralist Schubert was concerned with motivations and attitudes behind judicial decisions.

There are some more minor points that can be mentioned here drawing on the critical literature. Stone, who is quite critical of the American realists, says that they offered nothing more than a mere gloss on the sociological approach. From a Marxist perspective, Ackerman in *Reconstructing American Law* (1984) writes that realism was a culturally conservative theory designed to insulate the common law

discourse from the New Deal, thus viewing the theory as a response to the economic crisis of the time.

So what of the contribution of the realists? The points made above seem to destroy the realist approach. In view of some of the points and criticisms made, the realists towards the end of the movement became less extreme and distanced themselves from their earlier views. Llewellyn, for example, talks about the behaviour-guidance function, and discusses the normative aspect of rules: while situation sense is one operative factor in judicial decisions, the legal rules are another.

Without getting bogged down in too much detail, it is probable that the intention was never to get rid of rules altogether, but only to show that there was more to the use of the law than the mere deductive application of legal rules. They have not rejected technical legal analysis but have merely emphasised that it is not enough if we wish to understand how the law works or how to improve the law. From that point of view, many of the realists' ideas are now commonplace. Empirical and scientific studies of law in action and particularly judges in action, scepticism about fact-finding processes by judge and jury, realisation that the prejudices and personal predelictions of judges do play a part in litigation and decisions, and that judges do have a degree of discretion in some cases. Further, behaviouralism and jurimetrics are two positive off-shoots.

The idea of rules as predictions, the concentration on dispute settlement and the neglect of normative aspects of legal rules, may have been rejected. But in lots of other ways, however, the American realists have influenced and made contributions to our grasp of legal theory: perhaps to such an extent that Alan Hunt in *The Sociological Movement in Law* wrote that: 'In a very real sense we *are* all Realists now if only in the most general context of recognising the need to view law in its social context ...'.

13.7 Patterns of American jurisprudence

Duxbury's *Patterns of American Jurisprudence* (1995) is an intelligent and remarkable new study of the development of American jurisprudence since the middle of the nineteenth century to the present day. Not surprisingly, his view is that the developments in America, as distinguished from jurisprudential development in the United Kingdom, were largely influenced by the Realists. Duxbury thinks that American jurisprudence is much more coherent than commonly supposed and does not consist of a collection of disparate, unconnected schools of thought about law. One of the reasons is, of course, the background of the United States constitution which supplies explicitly moral reasons for lawyers to engage with in the courts. So it is not odd, or embarrassing, for a lawyer there to advance his or her convictions about what is required by the idea of *moral equality* in a case concerned with a citizen's equal protection under the laws. The great landmark case of *Brown* v *Board of Education*, decided in 1954, was one such case; the lawyers disputed at great

length over the obviously moral question of whether respect for this requirement of the US constitution of 'equality' allowed or forbade equality by 'separate but equal' treatment (ie black schools and white schools co-existing). This kind of Socratic dialogue in which lawyers debate moral issues was brought to the fore in the case-law method specifically instituted by Dean Langdell of the Harvard Law School, mainly as a reaction to a perceived wrongful formalism of more formal teaching methods which tended towards law students thinking of law as a set of doctrinally fixed rules. Duxbury, in his chapter entitled 'The Challenge of Formalism' early on in his work, goes into some depth in picking out what precisely was the 'animal' of formalism which Dean Langdell attacked.

There are obvious connections between this sort of way of approaching law – by seeing it as an 'argumentative attitude' (see Chapter 2 above) and the way espoused by Dworkin's model judge Hercules: the judge looks to the requirements of the constitution in a way which gives the constitution 'best sense' in terms of abstract and background moral rights. Naturally, since propositions about such rights are controversial there is room for the Socratic dialogue to take place. Not only that, there is room for a healthy scepticism about the proposed extension of purported propositions of law and that scepticism, not often recognised in jurists such as Dworkin, is similar to the scepticism displayed within the Critical Legal Studies movement. In a chapter entitled 'Uses of Critique', Duxbury both takes the Critical Legal Studies movement to task for its frequent self-conscious and self-indulgent stances and attacks those who would see nothing whatsoever in the movement. Like the Chicago Law-and-Economics school, which he says combines the American desire for promoting individualism with a distinctively modern form of rationalism, the Critical Legal Studies movement has been part of the American jurisprudential movement of modernisation, or practical problem-solving and for recognising 'reality' when it sees it; nevertheless, he also takes the view that much of the 'crit-bashing' has been an idle sport:

> 'Exposing the myriad vices of "the crits" – the fuzzy reasoning, the abstruse jargon, the moral impoverishment, the double standards, the political naivety, the unworldly ideals, the legal incompetence, and so on – has become a popular pastime among clever-dicks, reactionaries and attention-seekers.'

The interesting thing about Duxbury's book is his optimistic conviction, well-supported in his argument, that American jurisprudence forms a distinctive, rational pattern of overall coherence, although very surprisingly, given this conclusion, he devotes almost no attention to the great American jurist of our time, Ronald Dworkin!

14

Scandinavian Realism

14.1 Introduction

The other movement of realists consisted of a group of Scandinavian philosophers and jurists. As with the Americans, an overall similarity of approach conceals a difference in detail and emphasis in the writings of the various theorists.

We shall look at the identifying characteristics of the movement's approach, and then concentrate on the three major figures: Hagerstrom (1868–1939), and more recently Olivecrona and Ross. A consideration of the contribution made by the Scandinavians will be followed by a section comparing them with the Americans: do the realists form one movement, or two?

14.2 General approach

It would not be true to say that all the Scandinavians talked about, or even agreed with, the following points, but they are the characteristic ideas we can associate with the movement as a whole.

Empirical realism

In a more philosophical way than the Americans, the Scandinavians considered themselves to be realist. They were interested in the legal system as a whole rather than the narrow area of interest of the courts adopted by the Americans. In essence, they were talking about law as observable fact, which makes them similar to positivists such as Austin (although not Kelsen, of course) as part of the world of cause and effect, and therefore legal science as a science of 'causality'. They rejected formalism because, in their view, it had no regard to the empirical world. In their rejection of *a priori* reasoning they declared that the method for the enlargement of knowledge was through empirical observation. This is what they meant by viewing law as an observable fact. As we shall see discussed in more detail below, the proof of the existence of law was ascertained through the psychological effect.

Against metaphysics and confirmed the 'verifiability principle'

This realism led them to reject as metaphysical anything which did not exist on the level of cause and effect, of empirical reality. They subscribed to the verifiability principle of the logical positivists (nothing to do with the *legal* positivists) whereby if a statement cannot be proved by empirical evidence, it is meaningless.

The importance of this principle to an understanding of law is obvious and fundamental. In talking about law, we continually use statements and concepts which do not seem to be 'verifiable' in this way. Many legal rules are based on views of what is 'good', 'bad', 'just', and 'right', and so on. The rules themselves are phrased normatively, in terms of 'ought', and not 'is' and we think of legal concepts such as 'right', 'duty', 'ownership', arising from these rules. All of these ideas are non-verifiable, it seems, referring to a different realm of thought from empirical reality, a realm or science of 'ought', not 'is'. Simply they are not rooted in the actual sense experiences.

Such a realm of thought is rejected as being metaphysical. We should here contrast the Scandinavian realist position with that of many natural lawyers, for whom such a realm of thought does exist and in fact controls our moral and legal rules. Unless all legal thought and experience is to be rejected as metaphysical, some other explanation of the concepts and rules which constitute it must be given. This is the task that the Scandinavians have set for themselves.

The argument was that it is to be found in the mind of the individual, in psychology. There is no objective criterion of good or bad or just, only different subjective views. The normative effect of rules of law comes from their effect in psychological terms; and notions such as right and duty can be explained only as psychological feelings. A right as a sensation of power, and a duty as a sense of constraint or compulsion. The exact explanations differed from theorist to theorist. Lundstedt, in particular, was extreme in condemning as metaphysical even the idea of normativity. Ross and Olivecrona were less extreme in this respect. For them,

normative statements are clearly a form of language with an important function, which need to be re-evaluated in the light of verifiability.

Normativity: psychological occurrences

The meaning of a normative statement according to the Scandinavian view, then, is psychological: X ought to do something because he feels bound to, or he has a right because he has a feeling of power, and so on.

The concepts of normativity, of the binding quality of law, of the validity of law, are all explained with reference to psychological occurrences. Law takes place through the psychology of individuals. People who have rights feel they have power and people who are under an obligation feel they have to act in a certain way. These concepts are considered in detail by both Olivecrona and Ross, below.

Other points

The points set out above are the main tenets characterising this school. There are other points made in the theories, not perhaps as important, which we should mention before considering the individual writers:

Law as rules about force

A recurrent theme is that the legal system has a monopoly of force, and that all laws are ultimately backed by the threat of force. We must not confuse this with the view that a sanction is a necessary condition for a valid law: Ross, for example, expressly rejects that. Nevertheless, sanctions and force are central to an understanding of how law works. Without the monopolisation of the use of legitimate force psychology would not be effective.

Legal rules as predictions of officials' behaviour

This, of course, is a strong element of American realism rule scepticism. In the present context, the point is subtly different. While it seems that rules will not be valid unless they are effective predictions of how officials will behave, unless they are followed in practice, another aspect must not be forgotten. To be valid, a rule must also be felt to be binding, and therefore be the motivation for obedience. This latter point is not to be found in the American theory.

Magic words, legal ritual

Both Hagerstrom and Olivecrona are concerned with the effect of legal formulae in changing the legal position.

14.3 Hagerstrom

Hagerstrom has been referred to as the spiritual father of the Scandinavian realist movement. The others in the movement took up his ideas and built upon them. It is therefore by way of background information that a brief outline of his views is here discussed.

Hagerstrom rejected the idea of a non-natural sense in which things could exist. So goodness and badness are subjective notions, and similarly there is no reality to the concepts of rights and duties, beyond their actual effect in the real world.

An insight into his thought can be gained by looking at his explanation of the rights created by imperative laws. When a legislator, for example, declares that a person has a right, he has in mind the likely consequences of that declaration, based on his knowledge of the effectiveness of the legal system. Those consequences are two-fold. First, that when certain facts exist, the person with the right will generally enjoy certain advantages against another and, second, that legal proof of relevant facts in court will enable the person with the right to get at least an equivalent of those advantages.

A legislator will generally also consider that his declaration has the effect of producing a right in a supernatural sense, providing an obligation which exists in some way even if neither of the two consequences above occur. For example, if the person with a contractual right gets neither the advantages (the other side does not perform) nor the equivalent in court (since he cannot prove the relevant facts, such as the formation of an oral contract). We think it perfectly coherent to say that there is a contract, and therefore contractual rights, but I am unable to prove it. Hagerstrom rejects this analysis because it does not reflect reality in the empirical world.

Another interesting aspect of Hagerstrom's work emerged from his study of Greek and Roman law, and concerns the legal use of magic words. He suggests that formal words, such as those in the *mancipatio* ceremony in Roman law for the acquisition of property and those of livery of seisin in a medieval feoffment were taken to have a magical effect in the real world. Perhaps there is something to this view in modern law. Provided the appropriate formula of words is uttered in the appropriate ritual a magical or legal consequence flows. The marriage ceremony is one such example. Uttering the words 'I do' in a marriage ceremony has the effect in the real world of changing your legal status. No actual change takes place. The change is not real but is a change in attitudes. The parties, namely, the bride and the groom, will treat each other differently. More importantly, from this point of view, other people will treat them differently and all because they uttered these magic words in a ritual.

The law too will treat them differently. For example, the husband will be responsible for paying his wife's poll tax, so there can occur the rather ridiculous situation at the moment that where a married woman writes to her local authority the reply is addressed to her husband. That this law dates back to a previous era (1806) when the status of a woman was quite different must be obvious. Another

example is the incorporation of a company. Where the appropriate procedure is correctly adhered to (the ritual) the Registrar will incorporate the company (the magic words). The legal effect of this is to create a new legal person. Perhaps Hagerstrom has something to tell us about the importance of psychology in this regard.

This view has been questioned in relation to the ancient laws, and is not obviously the case today. One cannot deny the importance of form and language in law as, for example, using a seal instead of consideration for a contract, or the words of the marriage ceremony, but we no longer believe in any magical effect. The forms of language fulfil an important function, which is discussed by Olivecrona (on performatives, below). There is a suggestion that there is a middle ground in the use of language where the language of rights and duties is a separate and legitimate use of language. The argument goes as follows. There is a body of rules which establishes standards. Statements made with reference to these standards are an explanation of rights and duties. These statements take their validity from the sense that they are part of an acceptable body of standards. This is not metaphysics because it is not being said that the body of standards exists. This has been described as a possible middle ground. The extremes are firstly where rights exist in an objective fashion. A view that there are objective human rights, for example, and at the other extreme where a right is a feeling of power. The popular view today is that rights exist irrespective of whether they are accepted. The Scandinavians did, perhaps, 'throw out the baby with the bathwater'!

14.4 Olivecrona

Olivecrona was concerned with how laws played a part in the world of cause and effect. He also, as did Hagerstrom, rejected metaphysical ideas surrounding the laws. Instead he considered the factual circumstances of the law. These circumstances were that a state, which was not a metaphysical entity in any way but *just* a group of people, and which has a monopoly of force, passes legislation which results in psychological pressure being felt by individuals, who because of that pressure obey the law. The reality is how legal concepts work in relation to constellations of facts, so that a right would have no objective existence but would merely describe the relationship between a set of facts.

According to Olivecrona, a legal rule has two elements, the ideatum and the imperatum. The ideatum is the imagined pattern of conduct, which the rule is meant to bring about. Traffic regulations, for instance, are intended to produce a smooth and safe flow of traffic. To supply a motive, sanctions are directed for non-compliance. The rules relating to these sanctions contain a pattern of conduct for others such as the police, judges, and so on, who will enforce the original rule.

The imperatum is the form of expression of the ideatum, namely, the imperative. The addressee is told to follow the particular pattern required. These imperatives are independent imperatives. They are like commands, but no one actually

commands them, because Olivecrona rejects the idea of the will of the state is rejected as a metaphysical concept. They merely issue forth from the accepted procedures for lawmaking.

Even power-conferring rules on the Hartian model are imperative, according to Olivecrona. They are 'performatory imperatives' or 'performatives' because they require that something should happen. The imperative form is used. 'If so and so happens, a contract shall be formed ... property shall pass...the parties shall be married.'

The above exposition of a legal rules content comes from the 1971 edition of Olivecrona's *Law as Fact* and is particularly interesting because Olivecrona clearly identifies the individual citizen as the addressee of the independent imperatives. This contrasts with his own earlier view that laws were addressed to officials, and were chiefly about the exercise of force. It may be concluded that he drew heavily for his inspiration on the writings of Hans Kelsen (see Chapter 9). Although force is often kept in the background, all laws are ultimately executed by force. Criminal laws by imprisonment, civil laws by execution of judgments through seizure of goods and imprisonment and so on. The relationship of force and law is that the law consists chiefly of rules about force, rules which contain patterns of conduct for the exercise of force. Hagerstrom argued that a duty arises out of an individual's psychological response to coercion. By this he meant, clearly, those laws addressed to officials, to ensure that they enforce the patterns of conduct expected of individuals. In this version, these latter patterns of conduct are only aspects of the rules about force, which are for Olivecrona primary. In this way Olivecrona sought to explain the attitudes and responses of those to whom the law is directed.

The later shift from officials to individuals as the addressees of laws should not obscure the importance of force to law. A necessary condition of effective legislation is an organisation to execute laws by force if necessary, and laws are about the exercise of that force.

As we have seen already, the Scandinavian view of normativity is a psychological one. A valid rule is one that is binding and a rule is binding in terms of the compulsion felt by individuals. Olivecrona considered the psychological processes involved in the legal experience. It is instructive to take account of three such processes:

Legislation and judge-made rules

Both legislation and judge-made rules are effective because officials and individuals feel bound by them, although the effect of judge-made rules, because of the uncertainty inherent in them, is less formalised and certain. For statutes, the fulcrum is the act of promulgation. Since officials accept the constitution, rules which are passed according to the proper procedure are automatically accepted as binding. In fact, officials will generally rely on the conscientious collection of official copies of statutes and so will not in fact check to see if they have been properly

passed. In English law, judges must rely on the correctness and validity of an Act of Parliament which expresses the correct passage and is kept in the correct places, *BRB* v *Pickin* (1974), and individuals will simply accept the appellation of law.

Judge-made rules, which must be seen as legislation and not as inferences of what law is, depend for their effectiveness on whether, because of the judge's renown and reasoning, courts and writers are prepared to accept them as law.

The law and fear of sovereigns

The law and the fear of sovereigns, which is the force which ultimately enforces the law, are the main source of our moral standards. Rather than in each instance making a calculation about whether or not obedience to the law is worthwhile, the independent imperative form of law is absorbed into our minds as we grow up. The situations then enter our minds with an imperative symbol stamped on them of the form: you shall not steal! This is wrong! This process is internalisation.

Performatives

The performatives, or power conferring rules, seem to work in the same way as legislation. The expression of the words of marriage, according to the proper procedure and in the proper place, change the status of the couple by producing psychological effects in them and other people. In short, people treat them and think of them as married, and that is the reality of the married state.

14.5 Evaluation of Olivecrona

It is not possible fully to evaluate Olivecrona without critically considering the overall Scandinavian position, and that consideration is left to paragraph 14.8. However, some specific criticisms must be made. Most importantly, Olivecrona's generalisations were the result not of research but of guesswork. Do we really have our moral standards formed in that way, as a result of legal rules? Most of us would think of the process in reverse. It is because murder is thought immoral that it is a crime, and *not* because it is a crime that it is thought immoral. Also, if we all live in the same legal system with the same laws, how do people's views come to differ? Hard core pornography is banned in this country, yet some people consider it morally acceptable to be permitted to read it.

Another criticism relates to the importance of force in the theory. Saying that all views are about force seems to be a misleading exaggeration. Laws are about providing a standard of conduct for the people in society, and the rules of enforcement are to uphold that standard. Perhaps this explains Olivecrona's later shift to considering individuals as the addressees of law when he said that rules to individuals are not secondary, but primary. A similar criticism has been made of Bentham and Kelsen and will be made of Ross shortly.

Finally, it does not seem to be correct to treat performatives as just another form of imperative. This criticism is similar to one concerning the flaws in Austin's theory whereby he thought that all laws could be reduced to the status of commands or duty-imposing rules. It under-emphasises, in Hart's words, the 'facilitative aspect' of the power-conferring rules of law.

Olivecrona spoke of the internalisation of norms which leads to the development of moral standards. According to him, law is valid because it is felt to be and the binding force of law is a reality only in the minds of the subjects. This places great emphasis on the importance of psychology without an accompanying account of that discipline. It does not seem, at first blush, that psychological study really could uncover the effect that 'right', 'duty' and so on have in the legal system, and provide us with a full understanding of these important terms in the law.

14.6 Ross

Ross has provided what is generally regarded as a better developed explanation of law than that of his colleagues in the Scandinavian school, and one that is strikingly similar to that of Hart. Much influenced by logical positivism and therefore rejecting metaphysics and attempting to explain law as a social fact in a positivist way, Ross again attempts to explain the normative quality of law in psychological terms. Ross' work can be read in *Towards a Realistic Jurisprudence* (1946).

Scheme of interpretation

Using the analogy of a chess game, Ross sees the rules of both chess and law as explaining behaviour which is otherwise inexplicable. Ross takes this from the viewpoint of a third person, namely, a spectator. There is no reality apart from the experiences of the two players. The moves themselves mean nothing. Ross sees the primary rules as directives which are accepted by both players as socially binding. It is important to distinguish between the rules of the game and the rules of skill. A bad move may still be a permitted move within the rules. The effectiveness of these rules of the game are established by observation. However, like Hart, Ross is also interested in the extent to which the rules are regarded as binding. Here Ross would adopt the introspective method which is, to him, concerned with the psychological state of mind of *feeling* bound. In Hart's *The Concept of Law*, the internal aspect may coincidentally involve feeling bound or compelled, but it is coincidental and not necessary. The internal aspect performs an altogether different function that is providing both a reason for following the rule and for criticising those who deviate from the rule. Why should a particular move in chess cause the removal of a piece from the board, and, applying the analogy, why should a particular document, plus certain factual circumstances, cause a judge to order compensation?

The explanation is in terms of law as a scheme of interpretation. Valid law is that set of normative ideas which can be used to interpret law in practice. So, the judge orders compensation (law in practice) because of a particular normative idea (for example, a breach of contract followed by damages, an ought). All such normative ideas together constitute valid law. This interpretative scheme enables us to explain the behaviour of judges, and to predict their decisions. Thus, like the game of chess where one knows the rules, one can comprehend the actions. What had previous to comprehension appeared to the external observer to be mere regularities of conduct.

Valid norm

A specific norm exists if it is both followed and felt to be binding, and followed *because* it is felt to be binding. Logically, this obedience is obedience by judges. As with Olivecrona, Ross sees laws as concerned primarily with the exercise of force, and therefore as primarily addressed to officials to order the application of that force. In his later work, *Directives and Norms*, he does accept that psychologically, as against logically, there are norms addressed to individuals which are grounds for the reactions of the authorities. On the other hand, the secondary norms addressed to officials to give legal effect to the primary norms addressed to individuals, contain all that is contained in those primary norms, and as such are the ones strictly necessary.

Not behaviouralist

The notion of predicting in terms of the system, and exercise of force in terms of an individual law could lead to a misunderstanding, namely, that Ross holds the American realist line that rules are, if anything, the predictions of what a judge will do in the particular case. Such a behaviouralist approach is rejected by Ross. He gives the traditional but strong argument that it cannot cope with the difference between a punishment and a tax demand. The important point to emphasise is that valid law enables predictions of the judge's behaviour to be made because the judge feels the rule to be binding. This element is lacking in American realist explanations.

Why are rules felt to be binding?

The reason that judges feel the rules to be binding is their allegiance to the constitution and the accepted sources of law. Individual citizens obey the primary norms addressed to them from a mixture of motives, fear of the sanctions to be imposed and belief that they should obey the law.

Norms of competence

Ross does distinguish some norms, those of competence, divided into private and social, or public, which do not purport to obligate the subject, and instead give him

the competence to do something. These are what we have so far identified as power-conferring laws. However, these norms as well are seen as directives to the courts, and therefore as fragments of laws imposing duties as in Kelsen's and Bentham's theories.

14.7 Evaluation of Ross

There is much more in Ross that could be explained, but we have concentrated on the main lines of argument. We can note how strongly in some respects his theory resembles Hart's. Hart has identified as the necessary characteristics of a legal system, the general obedience to the rules by individuals, and the internal acceptance of the secondary rules by officials. Ross also sees a distinction between individuals, who will obey for mixed reasons, and officials, particularly judges, who obey out of allegiance to the constitution and the accepted sources of law. Hart identifies laws which do not impose obligations, as does Ross. Ross thus makes a notable advance on Olivecrona, who refers even to performatives as imperatives. Hart also identifies and emphasises the internal aspect of rules, the clear outline of which can be seen in Ross. The rule for Ross is felt to be binding. For Hart, the internal aspect of a rule involves it being taken as a standard for conduct, an internal statement being one from that point of view.

Several criticisms can be made. Ross takes no account of law that has never been applied by the courts because it is universally obeyed. A major flaw in Ross as well as the other Scandinavian theorists is that they seem dogmatically to follow the tenets of early logical positivism which has been demonstrated to be defective. The idea that there are only two forms of meaningful statement, namely the logical (analytical) and the empirical, must be too restrictive. The heavy reliance on the verifiability principle which has been stated by Schlick as, '(the) meaning of a proposition is the method of its verification' failed to produce a logical criteria for verifiability. The verification principle is neither analytical nor empirical and therefore, as it exists in the realm of metaphysics, by their own standard the Scandinavian realists must reject it.

Ross' theory can further be criticised. As with Olivecrona, law is seen as rules about force, which ignores its function of setting standards of behaviour. The misrepresentation inherent in the rules about force view is reinforced by seeing laws as norms addressed to officials, and a similar misrepresentation of power-conferring laws as part of the same pattern ignores their different function.

A further aspect of his theory and approach can be seen in Ross' claim that jurisprudence should be rooted in empirical study of official behaviour, not norms that ought to be obeyed but those norms likely to be applied by the court. In this way he was similar to the American realists, although this aspect is discussed in more depth below.

Yet another criticism of Ross' theory is that his approach does not take account of how courts justify their decisions which, according to Hart, is explicable in terms of the rule. Ross merely states that an understanding of the rule is necessary in order to comprehend the judicial process and to predict the likely outcome of the case. If we know the rules we know what the judge will apply. As Hart has amply pointed out, the concept of a rule involves it being taken as a standard of conduct and not just that it is felt to be binding. Lloyd and Freeman point out a further difficulty with regard to the place of the judge in Ross' theory. The observer will not know if the judge is applying the rule because of the experience of validity or simply through fear or indifference. The theory itself is of no assistance to the judge. When judges read their own decisions they are not predicting their own behaviour.

Ross attempts to pre-empt this criticism by drawing a distinction between statements *about* the law and statements *of* law. His discussion about validity relates only to statements about the law. In response to criticism which he felt to be misdirected Ross asserted that the use of the term valid in his account was really a mistranslation of in force or existing law. If this is so, then Ross has weakened rather than strengthened his argument, as he is now in danger of using a tautological definition which goes something like, 'a rule of law is in force if it is applied by the courts' Ross went in search of the impossible. He sought a norm that was not normative. He sought to derive validity from application. This was doomed from the start.

It is impossible fully to assess the Scandinavians' contribution, as their works are referred to relatively infrequently in the rest of Europe, and then they are often dismissed briefly. Their main point, that law produces psychological feelings and compulsion and that this is its place in the world of cause and effect, seemed at first to be new and extreme, denying, as Lundstedt did, even the possibility of normativity. Despite their detailed faults, Olivecrona and Ross are to our eyes more acceptable. Their interpretation is still a psychological one, but an explanation of normativity within the system is provided, with results that, in Ross, mirror closely the most mature results of Anglo-American positivist analysis. The psychological point is made, watered down, and becomes a useful and acceptable insight.

In other specific ways, there are contributions and speculations that give support to other positivists, by saying the same thing.

The parallels between Olivecrona and Kelsen, for example, are worth noticing, too. Both see law as imperatives issuing from the system rather than an individual, both see law as rules about force, with laws addressed to officials, and both see the acceptance and validity of laws within the system as resulting from acceptance of a constitution. The emphasis on reality as against metaphysics finds echoes throughout positivism, and the support for empirical study obviously echoes American realism and other sociologists. It has a breath of fresh air about it.

The Scandinavians may now be silent and not generally accepted. But in various ways their ideas and contributions remain in our legal theory. In an illuminating c

chapter on their theory, Finch has appreciated that they engaged in a radical and iconoclastic approach to the traditional problems of legal theory This description would also apply to the American realists and therefore a brief comparison is discussed in the next section.

14.8 Comparison with American realism

The student can be expected to make detailed comparisons of his own after reading the last two Chapters, to answer the question whether there is one school of realism, or two schools accidentally joined by a common name. Two main strands can be identified as an opening to this comparison. First, in their different ways the Americans and Scandinavians were realists in trying to reject metaphysical, or 'theoretical' explanations of law like natural law, and trying to explain the law in terms of observable behaviour, in terms of cause and effect. For this reason, research is important and encouraged, although the Americans must be regarded as having the stronger hand on that.

Second, to different extents, there is a concentration on judges. Both Llewellyn's rule scepticism and Frank's fact scepticism result in a closer look at what the courts do. On the Scandinavian side, Olivecrona and Ross both suggest that rules are addressed to officials. This similarity must not be allowed to mask the fundamental difference. For Ross, judges follow rules because they are binding and cover the case in question determining its results. For the Americans, seeing rules as determining cases in this way is incorrect.

Finch has stated that: 'Both the American and the Scandanavian Realist movements are radical and iconoclastic in their purpose, and this attitude is reflected primarily in their respective attitudes to legal rules.' This is an interesting statement, an examination of which would enable a comparison between the two to be made. By way of a summary this comparison could be made as follows.

Both the American and the Scandinavian realists can be seen as a reaction to the rule formalism that preceded and to a certain extent has succeeded them. Their point was that too much emphasis was placed on the rules and not enough on the reality of the legal experience.

Thus the Americans thought that there was more to the legal experience than the mere logical application of legal rules. Placing the lawyer at centre stage the Americans indeed did smash some widely accepted models of legal reasoning. The rule sceptics denied that rules were the main operative factor in legal decisions. Indeed, one of their number, Gray, went so far in his *The Nature and Sources of the Law* to argue that a statute is not law but is merely a source of law. When it is applied by a court it is law but then thereafter it reverts to being a source of law for another court. This led Benjamin Cardozo to observe that for Gray law never is but is always about to be. What cannot be denied is that the approach of Gray is certainly radical and iconoclastic. His fellow travellers in the rule sceptics did not go quite as

far along that road as he did. Gray ignored the facilitative function of law, yet Oliver Wendell Holmes, considered by most to be the grand old man of the American realists, thought that the law is what the bad man thinks will happen if he does certain things. The law for Holmes was the rules which the courts lay down in the determination of legal rights and duties. Similarly Karl Llewellyn thought that rules are mere pretty playthings in the hands of the lawyers, although in his later work he moderated this stance. He thought that the law is what officials do about disputes.

From an entirely different perspective but no less radical and iconoclastic was the experimentalist approach of the major fact sceptic Jerome Frank. In his volume *The Courts on Trial* he argued that the rule sceptics suffered from a craving for certainty. He emphasised the need to look at the work of the trial courts as opposed to the appellate courts on which Llewellyn concentrated so much of his attention. Whereas the rule sceptics saw the rule as of assistance in the prediction of the outcome of the case, Frank thought that the rule was of no use in the predictive process. The rules according to Frank are fixed. What leads to uncertainty are the difficulties in the fact finding process both with regard to witnesses and the juries and also with regard to the process by which the judge determines particular facts to be material. Thus there would be no point in examining the rules as this would not give any indication as to how the matter would be decided if it came before a court.

Our own law schools have failed to take this into account. In substantive law topics the examination calls for the logical application of legal rules to a hypothetical factual situation in order to advise the parties to the dispute. The American realist in answering that type of question would want to introduce matters such as the background of the judge and other personal factors which he would say would also contribute to a decision.

The American realists' approach to rules while not universal is certainly very radical and iconoclastic. It is a major departure from anything that went before. It has also given rise to jurimetrics and to studies involving judicial behaviouralism. It has emphasised an important matter, namely the emphasis that a potential litigant will place on the prediction of the likely outcome of the case. Unlike the rule formalist, the American realist will not arrive at that prediction solely through the mere logical application of legal rules.

Such an approach is not without its critics. A prediction of the court's behaviour would not be appropriate in non-contentious matters. Furthermore, rules have a normative aspect in that they guide conduct. Thus law is not only about dispute settlement but is also about behavioural guidance. This side of the law's function is ignored by the American realists. Hart has observed that the fact that a judge has the last word does not imply that there is no rule. He draws an analogy with a soccer match in which in spite of the fact that a player is offside the referee may not see it and still award a goal. The award of the goal does not negate the offside rule. The point was made by Hood Philips that habits enable external prediction yet rules provide a justification for acting in conformity and grounds for criticising those that deviate. This is similar to Hart's observation of the presence in a rule of a critical

reflexive attitude. Within the limits of the courtroom I would concur with Hunt who observed that we are all realists now.

The approach of the Scandinavian realists while quite different from their American namesakes is nonetheless radical and iconoclastic. The Scandinavians had a deep mistrust of the metaphysical and insisted on verification of any metaphysical notion in the real world of cause and effect. Lundstedt in his *Legal Thinking Revised* argued that legal rules are mere labels and become meaningless if taken out of context. He argued that it was not possible to stipulate that because of a rule a duty arises, because this would be to support a metaphysical relationship that cannot be proved in the world of cause and effect.

Olivecrona saw two parts of the rule, namely the ideatum and the imperatum. By the ideatum he identified the imagined pattern of behaviour that the legislature wants to bring about and by the imperatum he identified the expression of the ideatum. His was essentially an imperative approach although he did not see imperatives in terms of the wish of any person, as Austin so required. For Olivecrona the imperative was independent of the wish of anyone. He viewed his performatory imperatives as a type of power conferring rule, yet it is submitted that this is wrong. Power-conferring rules are not just another form of imperative. In essence what Olivecrona was writing about was that law is valid because it is felt to be. The binding force of law is a reality only in the minds of the subjects and this is its manifestation in the real world, through psychology. For this reason, Olivecrona had to change his idea of who were the addressees of law. In his book *Law as Fact* he was similar to Kelsen in saying that laws were addressed to officials. But this did not enable him to explain how individuals had feelings of power and of obligation as a consequence of a rule. This would mean that the rule was meaningless. Therefore, Olivecrona altered his position and spoke of laws being addressed to officials in the primary sense and to the public in the secondary sense.

By use of an analogy with a game of chess Alf Ross shows in his work *On Law and Justice* that there is no reality apart from the experience of the players. He approaches the question of verification in a sophisticated psychological way. He distinguishes legal rules from rules of skill and maintains that the effectiveness of a rule can be established by observation. He then addresses the question of why rules are felt to be binding and concludes that the normative quality of law can be understood in psychological terms. Thus for Ross, rules act as schemes of interpretation for particular actions and it is this that enables the explanation and prediction of judicial behaviour. On the basis of the paper rules it is possible to predict what the judge will do. This is because the judge feels the rules to be binding upon him as he has accepted the sources of law and has allegiance to the constitution. The general public feel bound by a variety of reasons.

Law, for Ross, produces psychological feelings of compulsion and this is its place in the world of cause and effect. Thus a valid law for Ross would be that set of normative ideas that enable us to interpret the actions of officials in applying sanctions. Hence a realistic jurisprudence ought to be rooted in the empirical study

of official behaviour and not in norms that ought to be obeyed but rather in those norms that are likely to be applied in a court. In one important respect Ross is similar to Hart and that is that he regards law as a social fact. For him a norm is a directive that stands in a relation of correspondence to social facts. We need to know the rules before we can understand what is happening.

15

Historical Jurisprudence

15.1 Introduction

The so-called historical school of the nineteenth century, led by the very different theories of von Savigny and Maine, shows us that law cannot be fully understood until its historical and social context is studied and appreciated. The natural law emphasis on universality and reason, and the positivist emphasis on law as it is, might blind us to this fact.

In its historical perspective there were two main reactions against the natural rights doctrine that arose during the age of enlightenment. We have already examined in detail the reaction that was positivism and the reasons for that reaction. In this chapter we shall examine the other main reaction which may be called romanticism.

It is possible to identify several pressing reasons that lay behind the romanticist reaction against the natural rights doctrine, as follows:

1. a reaction against the unhistorical assumptions of natural law which it will be recalled asserted the supremacy of unchanging principles;
2. a reaction against nationalism which promoted the excesses of the French Revolution and the wars that followed that event;
3. a rejection of the idea that the legal system is founded on the basis of reason;
4. a xenophobic reaction against anything French, which was particularly true of von Savigny; and
5. a desire to re-emphasise tradition as emerged from a leading anti-French Revolutionary work by Edmund Burke entitled *Reflections on the Revolution in France* (1790).

For the purposes of this Chapter, we shall take the theories of von Savigny and of Maine together. They represent two very different approaches to an understanding of law and the legal process. They have in common the reaction against the natural rights doctrine and a desire to emphasise the historical perspective, although that is as far as their similarity goes. Very generally, we may identify these theories as 'organic' for Maine and 'mystical' for von Savigny, following fairly widespread use.

15.2 Maine

Background

In the second half of the nineteenth century, Henry Maine's writings concentrated on law in a historical context, stripped of the mysticism of von Savigny's *volksgeist*. The early positivists, while rejecting natural law, still sought a universal analytic definition. Political philosophers considered present-day political obligation, and any references to history to bolster their arguments tended to be history read backwards. For example, they would read the later developed idea of a contract into the state of nature, and they would suggest laws as the commands of a supreme law-giver while ignoring the historical priority of custom over legislation. Maine pioneered a new approach, studying the history of different legal systems and the legal set-up of primitive societies, to enable a full understanding of law.

A great influence on his work was Darwin's *Origin of Species*, the theory of evolution, which dominated thought in every field in the late nineteenth century. In Professor J H Morgan's view, Darwin demonstrated that our legal organisms are as much the product of historical development as biological organisms are the outcome of evolution. This connection with Darwin is most clearly seen in the evolutionary stage model of development.

Theory

Studying the early law of Greece, Rome, and the Old Testament, and Indian law and using as well his commanding knowledge of English law, Maine said that the development of legal systems followed a pattern of six stages. Static societies passed through the first three stages; progressive societies then moved through at least some of the latter three. Maine stated that the origins of legal development can be traced to religion and ritual. This can be seen in societies that never developed literacy, at least so far as the majority of their population are concerned. There ritual is used as a means of education in circumstances where it would be futile to reduce instructions to writing. Examples of ritual washing may demonstrate this point. From this initial pool of ritual and religion flowed the stream of the development of the law. The pattern of development that Maine was so concerned to identify, along the same lines as Darwin identified for the development of species, was as follows:

Royal judgments

Royal judgments, divinely inspired, were the first stage. This has also been described as the stage of Themistes, after the Greek goddess. This should not be confused with the command of a sovereign idea as it was not deliberate law-making, merely dispute settlement. In fact, Maine suggests that Bentham's and Austin's description tallies exactly with the facts of mature jurisprudence, but more primitive law is more difficult to fit into the Bentham picture. An example is the story of King Solomon and the two mothers, proposing to divide the live baby in two as the mothers could not agree on who was the real mother. There was no principle or rule that King Solomon was applying. Within the context of Maine's theory it can be observed firstly that it was to King Solomon that the parties turned for a resolution of the dispute and secondly that the decision was divinely inspired in order to draw out the real mother who would rather have her child live but away from her than dead. While this is a good example to illustrate the concept of divinely inspired judgments, it can also be used to defeat the historical and chronological aspect of Maine's thesis. The point is that King Solomon existed after the law had been codified and not before, as Maine's developmental process would have maintained.

Custom

Custom and the dominion of aristocracies follow royal judgments; the prerogative of the kings passes to different types of aristocracies (in the East, religious; in the West, civil or political), which were universally the depositaries and administrators of law. What the juristical oligarchy now claims is to monopolise the knowledge of the laws, to have exclusive possession of the principles by which quarrels are decided. Customs or observances now exist as a substantive aggregate, and are assumed to be precisely known to an aristocratic order or caste. This is the stage of unwritten law; knowledge of the principles is retained by being kept by a limited number.

Interestingly, it appears that the aristocratic order or caste in England was the judges. It is quite true that there was once a period at which the English common law might reasonably have been termed unwritten. The elder English judges did really pretend to knowledge of rules, principles, and distinctions which were not entirely revealed to the bar and to the lay public.

Codes

Next we arrive at the period of the codes. This is when written and published laws replace usages deposited with the recollection of a privileged oligarchy. This is not an era of change, but rather a period at which, because of the invention of writing, the usages are written down as a better method of storage. In Roman law, the Twelve Tables, and in England the gradual move to written law reports, represent the codes stage.

Static societies stop there, and only progressive societies move on. The major difference of the next three stages from the first three is that they are stages of

deliberate change. Most of the changes in the content of law in those first stages were the result of spontaneous development. In that time, and to Maine's possibly paternal eye, very few progressive societies made deliberate attempts to alter the law. Social necessities and social opinion are always in advance of the law. To attempt to close the gap there are three instrumentalities. While one or other may be omitted, their historical order, according to Maine, is always as follows.

As stated, it is at this stage that static societies cease their legal development. Further, according to Maine, the progression through the foregoing three stages will be spontaneous. Any further development will require definite acts. Maine identified three further stages, taking account of the development of law to the stage at which he was writing. These are:

Legal fictions

That is any assumption which conceals, or affects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified. Examples would be false allegations in writs to give a court jurisdiction (for example, the growth of contract actions from assumpsit pleas) and the Roman fiction (a false averment by the plaintiff which the defendant may not traverse). This device is now not needed, according to Maine, since its day is long since gone by.

Equity

The development of a separate body of rules, existing alongside the original law and claiming superiority over it by virtue of an inherent sanctity, is a second mode of progress and change. Such a body grew up under the Roman praetors, and the English chancellors.

Legislation

The final stage of the development sequence. It is the enactments of a legislature in the form of either an autocratic prince, or a sovereign assembly. These enactments are authoritative because of the authority of the body and not, as with equity, because of something inherent in the content of the principles. In modern terminology, the authority of the enactments is content independent.

This six-stage development is of the form of law. Maine saw a parallel movement in the context of law in progressive societies from status to contract, thus his statement that:

> 'The movement of the progressive societies has been uniform in one respect. Through all the course, it has been distinguished by the gradual dissolution of family dependency, and the growth of individual obligation in its place. The individual is steadily substituted for the family.'

In his view, slavery had been replaced by the contractual servant-master relationship. Women and sons were no longer subject to the authority of their husbands or parents, but could enter contracts themselves. Of course, minors and lunatics could

not for they were still subject to their status, but only because they lacked the judgment to make contracts.

In his most famous passage, Maine says we may say that the movement of the progressive societies has hitherto been a movement from status to contract.

15.3 Evaluation of Maine

In a single sentence, we may evaluate Maine's contribution to jurisprudence by saying that while his conclusions have not proved, on further examination and evidence, to be correct or to have stood the test of time, his scientific and empirical method was the forerunner of much modern jurisprudence and sociology.

Some doubt the sequential development of a legal system of which Maine wrote. Malinowski in *Crime and Custom in Savage Society* argues that considerable latitude is inherent in the content of primitive people's customary practices. It is not clear that primitive societies move through the first three stages, nor that they are static. Some studies of primitive tribes show use of legislation, for example. Nor is it clear that the Anglo-Roman experience of fictions and equity as the first two progressive stages is universally experienced. An evolution along the six-stage pattern should not be expected for every legal system. Anthropological studies tend to suggest that Maine's conclusions were incorrect, although also Maine's account has suggested that the anthropological accounts need reappraising.

Perhaps the problem was that Maine sought to identify a pattern, a law of the historical development of law, and that he sought such a pattern of legal development through a comparative examination of a few different systems. Of necessity, like much historical research, some of his work had to be second-hand. His study of the Old Testament is an example. However, while some doubt of his conclusions exist, his method provided the framework for the early anthropological studies, many of which set out specifically to prove or disprove his findings. He was an inspiration for anthropology which only really developed into a separate branch of learning after his work pointed the way.

On the status to contract thesis, criticism has centred on modern developments in the law. The rise of the welfare state, employment protection, statutory implied terms in contracts, and so on, are all relatively recent developments. Their existence provides evidence that we have moved back to status. This is not an argument which strikes at the heart of Maine's thesis, of course, because he was talking of developments up to that date. In any case, this growth of legislation in some ways makes people more, rather than less free. If I am contracting with a monopoly and must use their written terms, am I really contracting at all? Was a nineteenth century factory hand really free to bargain with the factory owner? Clearly there has been a change since the *laissez-faire* of the nineteenth century. It does not seem to be too difficult to argue that modern development furthers the movement Maine saw, rather than reverses it.

Finally, we must emphasise that Maine was the start of anthropological and sociological studies of law. His particular conclusions have been criticised but his influence was immense. His view of history was more balanced than that of others of his time. This is particularly so with von Savigny whose 'mystical' theory we shall now consider.

15.4 Von Savigny

Von Savigny was a Prussian aristocrat, writing in the first half of the nineteenth century in reaction to what any aristocrat in Europe would have regarded as the excesses of the French revolutionaries, in particular their method of dealing with the French aristocracy. Von Savigny was therefore a man of his time, influenced by, and absorbing, many current ideas and feelings. This perspective ought not to be lost on those reading his work. (And we might bear in mind that Bentham, too, was radically affected by the same events of the French Revolution.)

Intellectually, the eighteenth century had been dominated by the Age of Reason, and the natural rights doctrine. The reaction against reason took two forms. One, Benthamic positivism, we have already considered. The other was the romantic movement, based on feeling and imagination in the arts, literature and learning.

One writer who particularly foreshadowed von Savigny's thought was Herder, who stressed that each nation and era had its own unique character. This character and the national spirit (*volksgeist*) should not have a universal natural law imposed on it, since this would affect its free development. The idea of a unique national spirit which must be respected is the basis of much of what von Savigny says.

One reason for the reaction against the new Age of Reason was its part as an origin of the French Revolution. Antipathy to all things French was also important in von Savigny's rejection of the idea of imposing the French Code Napoleon on German law. It was to stop this development that von Savigny wrote.

Finally, the long-drawn-out Napoleonic Wars had increased nationalism throughout Europe, and particularly in Germany where anti-French feeling was strong. His *On the Vocation of Our Age for Legislation and Jurisprudence* contains a powerful argument against codification and in particular the proposal by Thibaut to adopt the Code Napoleon in Prussia. Briefly, his argument was that the character and national spirit, or *Volksgeist*, should not have a universal natural law imposed upon it. Von Savigny's central idea was that law is an expression of the will of the people. It does not, he said, come from deliberate legislation but arises as a gradual development of the common consciousness of the nation. He expressed it as follows: The spirit of the people gives birth to positive law. In another passage, he says: The nature of any particular system of law was a reflection of the spirit of the people who evolved it.

Von Savigny saw the historical development of law as follows:

1. Law originates in custom which expresses national uniqueness. The principles of law derive from the beliefs of the people.
2. At the next stage, juristic skills are added, including codification which does no more than articulate the *Volksgeist* but adds technical and detailed expression to it.
3. Decay then sets in.

More important than his idea of this historical development are the underlying implications of his theory. These are that law is a matter of the subconscious; that law-making should follow the course of historical development; that custom is superior to law; and, importantly and significantly, that the *Volksgeist* cannot be criticised for what it is, namely the standard by which laws are to be judged; and, finally, if law was a reflection of the *Volksgeist*, law could *only* be understood by tracing its history.

It would be appropriate to examine his theory in more depth. Since von Savigny was opposing codification, a good starting point is his attitude to reform and codification. He was not opposed to either reform or codification, but for them to be successful the strands of development and continuity in the country's laws had to be understood.

A major feature of his theory was that the law was the expression of the spirit of the people, the *Volksgeist*. Law did not come from deliberate acts of legislation, but from a gradual development of the common consciousness of the nation, which is reflected in judicial decisions, and should be reflected in legislation. The time for codification is when the legal system has added the technical skill of specialist lawyers to the nation's convictions.

Such views are strange to the English reader, schooled at the forepangs of positivism, and it may therefore be appropriate to include here a few extracts from von Savigny in order that, as it were, he may speak for himself. Thus he wrote:

> 'In the general consciousness of a people lives positive law and hence we have to call it people's law. It was by no means to be thought that it was the particular members of the people by whose arbitrary will, law was brought forth ... Rather it is the spirit of a people living and working in common in all the individuals, which gives birth to positive law, which is therefore to the consciousness of each individual not accidentally but necessarily one and the same ...
>
> When we regard "the people" as a natural unity and not merely as the subject of positive law, we ought not to think only of individuals comprised in that people at any particular time; that unity rather runs through generations constantly replacing one another, and thus it unites the present with the past and the future. This constant preservation of law is conditioned by, and based upon, the not sudden but ever gradual change of generations ...'

From his study of Roman law and its history, von Savigny concluded that law originates in custom, with the work of lawyers a later step. In fact, for both law and nations he saw a three-stage developmental process. First, principles of law deriving from the convictions of the people; second, law reaches its pinnacle, with juristic skills added to these convictions. It is at this stage that codification is desirable, to retain the perfection of the system. The third stage is one of decay.

The juristic skills in the second stage do not, according to von Savigny, pull law away from its customary roots. The jurists are an actual part of the people, and represent the whole:

> 'The law is in the particular consciousness of this order, merely a continuation and special unfolding of the people's law. In outline it continues to live in the common consciousness of the people, the more minute cultivation and handling of it, is the special calling of the order of jurists.'

As has been noted, legislation does not play an important role. It is in fact inferior to custom, and often is just a speeding up of the gradual process of assimilation of real norms and institutions into the legal framework.

15.5 Evaluation of von Savigny

We should not doubt the important point inherent in von Savigny's version of historicism. The particular history, situation and values of a country do manifest themselves in that country's laws in many ways. In the UK, for example, one thinks of rules about the monarchy, the House of Lords, the Privy Council. In fact, for many countries, their constitutional laws and conventions will have been shaped by history and political values. Many other examples could be found.

However, it is clear that this truth is obscured by the flaws in von Savigny's discussion of the *Volksgeist*. The whole concept of the *Volksgeist*, the spirit of the people, is difficult to accept for any less than homogenous, or pluralistic, society. Nineteenth century Germany may have fitted the concept, but it is relatively rare to find societies of which the same can be said. Some fundamentalist Muslim societies might fit his model. One can see how positivism accommodates the pluralistic society and this fact serves to emphasise the close connection between the growth of early positivism and liberal doctrines.

Many countries have groups of different races and different cultures, different religions or totally different political persuasions. Differing spirits exist even in countries with strongly totalitarian governments such as in Poland. While von Savigny allowed for inner circles of groups and localities within a country, his theory cannot accommodate these many countries where a choice of spirits exists.

To be more specific with examples. When Jim Crow legislation discriminating against negroes in the United States flourished, was that part of the *Volksgeist*? Is the apartheid legislation in South Africa part of the *Volksgeist* too? The strongest churches in Europe seem to exist in Eastern Europe. Is the legally imposed atheistic communism part of the spirit of the people? What would von Savigny have made of the laws of Nazi Germany?

Further points of criticism may also be mentioned. According to von Savigny, the technical law which is the result of the juristic skills is as much part of the *Volksgeist* as the common convictions of the first stage of development. It might be

easy to fit laws against murder into the mould of common consciousness, and other types of laws, such as family laws, for example, which permit divorce but not abortion. Note, however, that some of these laws appear to be universal and so not unique to one *Volksgeist*. Only the details differ from society to society. Can the same really be said for technical institutions, such as the fee simple, the secret trust, promissory estoppel, bills of lading? And tax legislation? Also, and many laws seem, at times, to be contrary to the common consciousness, such as the abolition of capital punishment, the decriminalisation of homosexuality, those setting up the UK's entry to the EEC.

Of course, von Savigny's reply might simply be to say that they corrupt the proper historical process, as deliberate lawmaking out of tune with the common spirit is a mistake. But deliberate lawmaking by both legislature and courts can lead public opinion in new directions *and* introduce technical laws about which the common consciousness is unconcerned. This is an aspect of our legal experience, particularly of modern systems, which von Savigny's theory underplays. For example, the abolition of capital punishment can be seen as an attempt to educate people, and change the customary way of thought. Similarly, the legislative introduction of the welfare state changed people's attitudes, their *volksgeist*.

Perhaps there are laws which reflect the constitution and which represent a political development. Take the example of the personal status laws in the Republic of Ireland. There that country has a strong Catholic tradition and the vast majority of its citizens are observant Catholics. Its laws forbid divorce, abortion and contraception. Is this a particular manifestation of that country's *Volksgeist*? Perhaps the concept of the *Volksgeist* identifies a continuity in tradition in any society.

However, it suffers from very serious consequences. It assumes that 'people' is an identifiable entity possessing a separate metaphysical personality. From the practical point of view, this conception could have disastrous consequences for humanity. It allows for those who would argue that the involvement of those *outside* the *volk* leads to a corruption of the sacred *Volksgeist* and enables those people so arguing to call for the exclusion or worse of those perceived of as corrupters. The examples of Nazi Germany's treatment of the Jews and of South Africa's treatment of non-whites demonstrates this point. It is not here argued that von Savigny was a racist in the modern sense of the word but it can be attributed to his writings that they laid the intellectual groundwork for racial purity theorists that were to follow him.

Several more specific points in critical evaluation of von Savigny's mystical theory should be mentioned. One could identify many universal laws, such as the laws against murder which are not unique to a given *Volksgeist*. Further, to explain certain technical laws as being developed by juristic skills from a revelation of the *Volksgeist* is too mystical an idea. Does it really describe the functions of a modern legislative drafting department?

Von Savigny extrapolated his *Volksgeist* notion into a sweeping universal but then treated it as discoverable. There exists some evidence which shows that codes have been transposed without difficulty such as, for example, Egypt's adoption of French

codes which seem to work well there, yet the two peoples cannot be more different in background and culture. Relevant here is Lipstein's study of the reception into Turkey of Western laws under Kemal Ataturk. These points do not, however, entirely defeat the argument that von Savigny was making. He is making more than just a descriptive point about actual legal systems. He is, after all, trying to make sense of history. The political sense of that history was a deeply conservative one. He stated that reforms that went against the stream of the *Volksgeist* would be bound to fail. In the same way, following the analogy that a body will reject an organ that is transplanted but which is incompatible with the body system. He was not engaged in a rejection of all reform. Indeed, he allowed reform if it was based on historical research that showed that it would be compatible with the *Volksgeist*.

It is not clear who the *volk* are whose *geist* determines the law nor is it clear whether the *Volksgeist* may have been shaped by the law rather than vice versa. This theory ignores the point that law has an educative function such as the Sexual Offences Act 1967 among other measures of the first two Wilson governments that were designed to change perceptions and attitudes, as in the example cited towards homosexuality. In pluralistic societies such as exist in most parts of the world today it really seems somewhat irrelevant to use the concept of the *Volksgeist* as the test of validity.

Von Savigny venerated the past without regard to its suitability to the present. To take an example. In Roman law the notion of privity of contract would not admit negotiable instruments. Generally, although Romanticists look to history their concern is with the present. Perhaps the essence of their point is that the national character influences some types of laws more than others and in particular those concerned with personal status.