6

Utilitarianism

6.1 Introduction

The utilitarian ethic is based on the promotion of the greatest happiness for the greatest number. Not surprisingly, the utilitarians' belief is that the obligation to obey the law is based on the promotion of the collective good. Certain actions might be prohibited by the law, such as the sale of liquor in 1920s America. The evil that the law seeks to prevent might not be viewed in itself as being important. However, the consequences of disobedience might be wider than the perpetration of the offence. The infectious effects of lawbreaking are well illustrated by the effect of breaking prohibition. or of the narcotic trade, with the associated gangland activities. In the felicific calculus of the utilitarians, the benefit of the few who gain their happiness or make money from the sale and consumption of drugs and alcohol would be outweighed by the harm to the collective good.

However, such examples are perhaps *sui generis*. Moreover, to judge the obligation to obey the law in terms of potential consequences is difficult. Such a view seems to be a complex way of expressing the dictum: what would happen if everyone were to do that? Furthermore, there is an assumption implicit in this principle of act-utilitarianism that the individual believes that if he breaks the law others will too. There is little evidence of the imitative nature of lawbreaking, except where collective lawbreaking is used as a weapon against an unpopular law.

A subtly different utilitarian principle is based upon the consequences of observing a rule. Act-utilitarianism asks whether a particular person's disobedience or the hanging of one man is in the interests of the collective good. Rule-utilitarianism asks whether a particular practice required by a rule is, on the whole, more beneficial than harmful to the collective good. For example, if the law required the top 15 per cent of wage earners to be compelled to give half their salary to hospitals, more people would benefit than would lose.

However, as a representation of reasons why people obey the law the utilitarian

point of view seems unconvincing. Popular notions of the collective good are tempered by our feelings that certain things such as human rights are of fundamental importance. The utilitarian view has often been criticised on the basis that the greatest happiness for the greatest number could mean the greatest misery for the few. Not surprisingly, this brings us back to the problem of moral safeguards against the binding effect of an immoral law.

6.2 Utility as the sole criterion

Bentham insisted that the principle of utility be the sole valid criterion for the evaluation of a just measure. He also stated that to prove the rightness of the principle of utility is both unnecessary and impossible. There is much appeal in the idea that the sole valid criterion for the ascertainment of what is just is the application of the principle of utility. This principle that sees a measure as just if it has a tendency to increase happiness or to reduce pain is one that we apply in our daily lives. We undergo dental treatment in which pain is inflicted in order to alleviate a long-term toothache. That we therefore apply a utility calculus to the decision whether to undergo that dental treatment explains why the idea is attractive on the social level. A further advantage to utility is that it is secular and does not require any understanding of abstract principles. It is a simple way of telling the difference between what is right and what is wrong.

The concept of the principle of utility was developed out of a distaste for the use to which natural rights were put as the criterion for the evaluation of justice. In spite of certain clear appealing aspects whenever the principle of utility is put into practice, there are serious defects in the idea.

One difficulty is that there are two types of utility. The total utility looks at the total level of happiness and says nothing about the distribution of happiness among the population. As such it could allow for slavery in that it has the potential of increasing the total of happiness in the world. On the other hand, what is known as 'average utility' fares little better. With the same example of slavery, average utility would hold that slavery is just so long as on average happiness is increased. But this, too, could be achieved if the slave owners had greater happiness than the slaves had misery.

Mill made it clear that, regardless of the various pleasures and pains that would enter the equation, the only thing that the utilitarian would be interested in calculating would be the consequences. Thus the means always justifies the end so long as the end has the tendency to increase total or average happiness. From a deontological point of view this is unpalatable. As Lumb has observed, it can be used to justify the arbitrary deprivation of human rights. Indeed, Bentham regarded natural rights as nonsense on stilts. The criticism against the application of the utility principle is that it can lead to the most horrendous outcomes. Torture would be regarded as just so long as the victim divulged information that led to a greater happiness. With regard to terrorism, a suspected terrorist could justly be tortured if

that torture actually led to his disclosing the location of a bomb, providing he disclosed it in time for the location to be evacuated with no loss of life. Why? Because it is the actual consequence that matters and not the intention behind it. Thus it would not avail a utilitarian to plead that the terrorist died during interrogation but that the torturer had intended to get the relevant information from him. Good intentions do not count.

To take an example. Imagine my being in a position of being able through torture to attempt to extract information from a terrorist that related to, say, the fate of someone close to me. We might then torture in order to obtain the information. It would not follow that utilitarianism was right, because we might not regard what we were doing as just or right but as something like an 'unjust necessity'. Utilitarianism would require that the act be fully justified.

The problem arises because of the attention paid to the consequences. These consequences can only be ascertained as they happen. They will only happen if we do the act. If the consequences turn out to have a negative effect on the felicific calculus then what we have already done is unjust. The utility principle thus provides no guide to action but a mere *ex post facto* criterion for the evaluation of past events. This is a severe limitation on its applicability and appears most unsatisfactory. If we are to seek to do justice we must have a means of finding out what would be just before we do the act, and not only afterwards.

A deontological approach holds that there are criteria for the evaluation of what is just that have no connection to the consequences. An appeal to absolute values would be one such approach that would, from the point of view of the sanctity of the human being, probably hold that torture is unjust no matter what the circumstances. It would *degrade* not only the victim but the torturer and the entire society through guilt by omission to prevent. However, this is exactly the very notion that the utilitarians rejected. Bentham thought that the two sovereign masters of man were pain and pleasure and therefore designed his felicific calculus around his fourteen pleasures and twelve pains. Why should we be limited to these?

Other criticisms of the use of the felicific calculus in this way would address the issue of the impracticability of its application. In order to assess whether a measure is just or not, a mammoth task of calculation would be involved, taking into account everyone affected and the impact on their pain and pleasure. If this were actually adopted then there would be little to do other than continuously to ask everyone what are the effects etc. It would rather be like the painting of the Forth Bridge which, once completed, has to start all over again.

Note that all the arguments so far rest on the assumption that pains and pleasures are measurable. They clearly are not. How can one person's stomach pain be measured against another's pleasure gained from playing the violin? Even though Mill developed certain rules of thumb to guide the calculation, these are not real substitutes for the actual ascertainment of the result.

As Rawls has observed, utilitarianism fails to account for the separateness of persons. It regards persons as mere receptacles for the pain-pleasure calculation.

Thus Rawls writes in *A Theory of Justice* that the utilitarians assume just that as rationality requires the making of small sacrifices for longer term gains so it also requires a trade-off of the welfare of some against the welfare of others. This idea of trading off the welfare of some against the welfare of others conflicts with our moral intuition.

Rawls' second objection to utilitarianism is that it seeks to define the right in terms of the good. Utilitarianism begins with an account of good and defines as right that which brings about the good. Rawls here draws attention to the fact that utilitarianism takes account of unjustly obtained happiness. According to Rawls:

> 'Justice is the first virtue of a social institution in the same way as truth is the first virtue of thought. And like truth, justice is uncompromising.'

What is good must therefore be defined in terms of what is right hence utilitarianism is unable to satisfy this requirement of justice. I would therefore reject the application of the principle of utility as the sole valid criterion for the evaluation of justice.

6.3 Criticisms of utilitarianism

We have considered several of the criticisms that have been made of utilitarianism within the context of its use as the sole evaluative method for assessing justice. These are not the only criticisms that have been made of this very influential theory and it is proposed to discuss a few of the other criticisms in this section.

1. As has been demonstrated, the modern theories, particularly Rawls', can be seen as attacks on utilitarianism and attempts to remove it from its pre-eminent position.
2. The criticism mostly made of total utility is that it ignores the lot of the average person. If, by increasing the total population by a large number the total utility can be slightly increased, society should follow a programme of encouraging production of children, even though on average everyone's lot will be less happy. For this reason average utility is preferable, but this, too, appears unpalatable. For a start, how does one measure utility or happiness or welfare? Is it psychological, is it based on want, satisfaction or what? How does an unemotional man's quiet happiness measure against the super-sensitive person's ecstasy? How does our enjoyment of a plate of fish and chips relate to the satisfaction of a country walk, or a symphony, or solving a chess puzzle?

   Another way of putting this is to consider the following example. Someone offers a man £1000 with a request that the man hand over his wife for sex. The man refuses. £100,000 is then offered. And then £1,000,000 (the offerer is exceedingly rich and desires the man's wife very greatly). The point is that it is not the *amount* that is at stake. The values just simply are not interchangeable, or commensurable.

3. But let us assume 'commensurability' is possible. Three problems still remain:
   a) Some preferences or wants must be disregarded for reasons of consistency: for example, preferences for anti-utilitarian arrangements, such as a ban on alcohol for religious reasons, or, more fundamentally, desires for a state run according to the rules of a religion, even if that did not match happiness or want maximisation.
   b) Utility would offend our intuitions of justice, because it would countenance unacceptable inequality. We should test all possible conceptions of justice against our own convictions of what is right in particular situations (see paragraph 4.4). When we apply utility to one or two factual situations, we can see that it runs counter to these convictions. To take the simple case of a slave-owning society. Should we keep slavery? Assume that we are measuring utility in terms of satisfaction of wants or preferences. If 20 per cent of the population are slaves, they would have to feel four times as strongly about becoming free as the 80 per cent slave owners feel about life without slaves. It is not implausible to assume that slavery will be kept. Thus, utility will frequently accept situations where the majority benefit from the poverty or oppression of a minority.
   c) A more complex example can lead us to a further point. Should discrimination against blacks be illegal? A decision on this question, on any utility scale, will take into account the views (wants, happiness, preferences) of those who see blacks as unequal, and therefore less deserving of respect. The very decision will therefore be based on an unequal view of blacks. And yet, utilitarians would claim to be egalitarian in that each person is counted as the same weight. The discrimination decision clearly does not give them that weight.
4. Hart's criticisms to the extent that they are not already mentioned can be stated briefly as follows:
   a) Hart believes that while justice is an aspect of morality it is yet different from other aspects of morality such as right and wrong, good and bad. He gives the example of a father who maltreats his child and states that it would not be correct to describe this as unjust. It is bad or wrong but not unjust. Hart therefore observes a distinction between a bad law and an unjust law. This is a distinction which utilitarianism cannot recognise.
   b) Hart further observes that there can often be a conflict between justice and other values such as freedom. The unfettered freedom to compete, if not regulated by law, is bound to lead to injustice because all persons are not competing on equal terms. Hart observes that law resolves this conflict by means of anti-monopoly laws, so restoring some semblance of justice at the expense of freedom.
5. Julius Stone argues that even if it is accepted that each person deserves their happiness so that their happiness is a good to them, how does it follow that the general happiness is a good to the aggregate of all? He also argues that hedonism assumes that pleasure is found by being sought, but pleasure comes as an

incidental to the seeking of other things rather than as the intended result of the search. He says that pain and pleasure are nothing but the names for an infinitely perishing series of feelings, hence hedonistic morality seeks to realise an idea which can in itself never be realised. It is striving towards an impossible future.

6. Utilitarianism views the community as a mere aggregate of the individual members. This is seen in the discussions on the separateness of persons. It therefore places little emphasis, if any, on the relationship of community over the individual. Bentham's extreme individualism is thus open to objection. Maybe it is only in the context of his/her community that an individual is recognisable as such. Certainly, it seems to be only in this context that he/she can be spoken of as a moral being. Further, a person's identity is closely associated with his/her status as a member of the community so that his/her nationality, family background, education, career and so on, describe him/her as a person and must involve a reference to the context of the community in which he/she lives.

   This is an important point because the idea of a community implies a high degree of co-operation and mutual trust among its members who share certain common standards. This means that justice is based not on an individual utilitarianism but on the existence of a community where the machinery of distributive justice is dependent upon the degree of mutual co-operation among its members.

7. By way of an evaluation, we can see why utilitarianism was attractive as a secular philosophy in that it was not tied to any religion. Further, in interpreting a pluralistic society it demonstrated the possibility of taking account of different views. It represents a common currency we can all agree on, that is, that we use it with reference to our own decision-making process with regard to our own lives. That is to say that there is much that is intuitively attractive about utilitarianism. The theory looks good but on analysis proves defective. There are too few ideas in utility to meet the demands of our more complex intuitions. It must therefore be treated with care. It is now necessary, however, to look at a modern, fairly widely accepted version of utilitarianism, that of Richard Posner's justification of the economic analysis of legal decision-making.

7

The Economic Analysis of Law

7.1 Introduction

Economics and the law is an excellent topic, particularly for those students who have studied economics before. The position is that economic thinking is coming more and more into the law. There is a very large group of followers of the 'Chicago school'. This line of thinking might loosely be termed the 'cost-benefit' analysis of legal decisions. It is a good topic to ponder when considering the arguments for and against utilitarianism, since it seems that this analysis is fundamentally a version of utilitarianism, whereby money is substituted for utility. The theory of Ronald Dworkin is presented here, since it runs counter to Posner's utilitarianism, but still regards the *resources*, an idea that includes but is wider than money, as the fundamental agent of distribution. Students should take each theory in turn and compare them.

We first need some definitions. In many ways, it is best to start with the idea of the market. One reason is that, for many liberal philosophers, the abstract principle of equality finds its best expression in justifying questions of distribution. And for the Chicago school, and economists of many other hues, the market constitutes the central concept of their discipline.

To understand the idea of market we have to appreciate the directly practical aim of much of the thinking in economics. Economics is thought of as a practical subject, directed to decision-making and in this respect is like law. As a result, and to a greater degree than law, it must take short cuts. It does this by making certain psychological assumptions about people which are, in many respects, patently false, but which are nevertheless sufficiently appealing to be workable.

An important assumption, for example, is that people are 'rational self-

maximisers', that is, they always act so as to maximise the satisfaction of their preferences. We could call this the assumption of rationality. We can link this idea to that of the ideal market and say that people, ideally, will make decisions in the market place with the intention of satisfying the maximum number of their preferences.

Many of the working propositions of economics depend upon assumptions that exist in a strange category which is partly to do with ethical attractiveness (the autonomy of the market and its workability) and partly to do with untested empirical propositions (such as rational maximisation or the declining marginal utility of wealth). Models of economic activity, because they are models, cannot be directly tested against empirical data. On the other hand, economic models are intended to be workable, and so the major assumptions about human psychology and motivation have to have some empirical link with what is actually true.

We can trace the development of one or two of the ideas from preference utilitarianism. Economists can bypass, with relative ease, the problem of the measurement of what is of value in a person's life, by talking of the 'satisfaction of preferences'. People state what it is they want and are assumed to be the best judge of their own interests.

Using the idea of what people are prepared to give up, measured in currency, for what they want, interpersonal comparisons become possible. Further, making people the final judges about what is good for them, or what constitutes the best life for them, is a pleasantly liberal assumption which many people are inclined to accept.

The market place uses these two ideas. If a person is willing to forgo the satisfaction of one kind of preference in order to have another preference satisfied, we can measure what the value of the satisfaction he wants in a quantifiable way, namely, by the measure of what economists call 'lost opportunity'. Someone who trades his teddy bear for a book of poetry values the book of poetry more than the teddy bear. He has, in other words, increased his wealth. It does *not* follow, note, that he has increased his welfare.

Currency makes measurement of wealth easier. A and B swap a typewriter and a book. A would be willing to hand over the book and accept the typewriter, but B uses the typewriter and he feels that just having the book is not sufficient. He says that he will only trade for the book and £10. He calculates that he will have the book plus enough money to put a deposit down on a new typewriter. A accepts this, because he is willing to give up this sum of money as well as the book, because he wants the typewriter and he is willing to forgo both the book and the opportunity costs (say, a restaurant meal) in order to get it.

We achieve the commensurability of values here by just comparing the choices people are prepared to make. We see what they are prepared to give up in order to get something they value. Since generally people are willing to give up things for currency, and currency for things, the numerical count of the currency provides a guide to what is valued and by whom.

This is not to say we are free from difficulties but it is a start. Obvious

difficulties must arise from the separation of value, what people actually want and believe is worthwhile in their lives, and the idea of having the means to acquire it, known by economists as 'wealth'. Speaking loosely, a person's wealth is his stock of possessions which have a market value.

There is a useful chapter in Fletcher's *Basic Concepts of Legal Thought* (1996) on the economic analysis of law. It is entitled 'Efficiency' and in it Fletcher traces the development of the 'law-and-economic' movement describing in a clear but sufficiently detailed form the ideas of the voluntary market, Pareto-efficiency, the Kaldor-Hicks criterion, Pigouvian-efficiency and the Coase theorem. Fletcher is particularly strong on the idea that any theoretical intervention by economics in legal argument cannot make sense except by explicitly adopting a stance on 'controversial moral and political principles of individual rights and group interests'.

7.2 Paretonism

The idea of the market is best expressed, in many writers' view, through the economists' concept of 'paretonism', named after the Italian economist Vilfredo Pareto. Paretonism has great ethical appeal because it derives its force from the importance of both personal well-being and personal autonomy. It provides a criterion, combining these two aspects, for measuring increases in welfare or utility. Situation B is 'pareto-superior' to situation A if in situation B at least one of the parties is better off and neither of the parties is worse off. A 'pareto-*optimal*' situation envisages the end of a possible chain of pareto-superior changes whereby there is no further situation where one party would be better off without the other being worse off.

Paretonism provides a measure for marginal increases in utility or welfare. No one is worse off and at least one is better off. According to the theory that the greatest number should be better off, the criterion must measure some increases in utility. It does that at the same time as nodding in the direction of personal autonomy. Two people enter the market and leave with at least one of them better off and neither of them worse off. The appeal of paretonism is that the market appears to achieve a nice balance between overall utility and personal autonomy.

Of course, in the real world things are very different. But the ideal market does have a use. What, then, is the correct characterisation of that ideal? Generally, economists define a perfect market in the following way. A perfect market transaction is one where the parties bargain to mutual advantage, measured against the choices of the 'rational maximiser', or they bargain, at least, to the advantage of one and with no disadvantage to the other; the market is not 'distorted' by, for example, the existence of a monopoly; the parties have 'perfect knowledge'; and there are no 'transaction costs'.

Given this widely accepted definition, it is plain to see that the problem with paretonism is that in the real world, because of various market imperfections, pareto-

superior situations occur with relative infrequency, the more usual situation being that one party is left worse off after a transaction. Because of this fact about real markets, there will be a large number of pareto-optimal situations in the real world, because mostly no further market move can be made without some party becoming worse off. In short, in the real world, there will often be some loser, maybe a third party, in any market transaction.

7.3 The Kaldor-Hicks criterion

But the idea of paretonism, with its inborn ethical attractions, is not used by the Chicago school economic lawyers. They use an alternative criterion of *wealth* maximisation, as opposed to welfare maximisation which attempts to overcome the practical difficulties in real markets. Such a criterion was first proposed by Kaldor and Hicks and states that a decision, or policy, is wealth-maximising if the amount of wealth created by the decision is enough to compensate those who are left with less wealth after the decision. However, there is no requirement that those who lose wealth in the process should be compensated.

The criterion is a formal description of what we understand as cost-benefit or cost-effective analysis. A factory moves to another town to avail itself of the cheaper labour and land prices. The town it moves from suffers financial loss but the factory and businesses in the new town gain enough financially from the move for it to be possible, in principle, to compensate those who lost out in the move. The move is a cost-effective move.

The idea is an important one because it places emphasis on efficiency. It directs our attention very precisely to the fact that more wealth can be created by certain sorts of decisions even although those decisions place some people at a disadvantage. It is an important idea also because it is workable. That must be an argument in its favour. If we accept that it is, at least, one factor in favour of a decision that it produces more wealth, the cost-effective criterion is helpful. It is not a criterion which says what, ultimately, should be done. It just tells us what the cost-effective move is.

The criterion appears to assume that increases in wealth overall will bring about increases in welfare. Wealth replaces welfare on the assumption that wealth has the potential for increasing welfare although, of course, not necessarily the welfare of those who lose out in the wealth created by the Kaldor-Hicks move.

7.4 The Coase theorem

We need one more definition to understand the Chicago school. This is the 'Coase theorem', very commonly used by lawyer economists, and named after an economist from Chicago. The idea is that whatever legal rights the parties have before entering

a market they will bargain for the most economically efficient result. (In the perfect market, remember, they are 'rational maximisers'.) For example, A lives close to B's glue factory. Let us say that, according to the law of nuisance, B has the legal right to pollute the air. The theorem states that in the perfect market, independently of the initial assignment of legal rights, A and B will bargain to produce the most efficient result. A, if he is willing to forgo the lost opportunities, will pay B to reduce the pollution by the amount which will enable B to reduce the pollution and still make a profit. With a different assignment of initial rights, whereby B is entitled to pollute only to the extent to which he pays compensation to A, B will reduce his pollution to the extent to which his payment to A does not prevent him from making a profit. Either assignment of legal rights, in other words, does not affect the overall efficiency of the outcome.

This theorem has fundamental importance for decision-making in the real world where, of course, markets are imperfect. In particular, the lawyer economists focus on the imperfection of what they call 'transaction costs'. In the pollution case, for example, there will, in all probability, be many people in A's position and the costs of the negotiations leading to the separate bargains between these people and B and the costs of the creation of the contracts will be large. The initial assignment of the legal rights under the law of nuisance, in the real world of transaction costs, will affect the efficient outcome of bargaining because in many cases, as one can easily imagine, people in the same position as A will be deterred by such costs from even beginning to negotiate.

A famous judicial formulation of an economic test for working out liability, and one which has been seen by Posner and others as confirming the incidence of judicial decision-making in economic terms, was that by the United States judge Learned Hand. He devised a test of 'reasonableness' to govern the distribution of liability in tort cases. It is sometimes known as the 'least cost avoider' test. A litigant had acted 'unreasonably' when he had done something which caused loss to another and which would have cost less for him to avoid than it would have cost the victim to avoid. (See *United States* v *Carroll Towing Co*) Judge Learned Hand said that the defendant was negligent if the loss caused by the accident in question, multiplied by the probability of the accident's occurring, exceeded the burden of the precautions that the defendant might have taken to avert it.

What is striking about the concept is its application to judicial decisions. We do not find it particularly difficult to see the sense in market intervention by the legislature to reduce unnecessary expenses. But we may feel that courts should deal with altogether different sorts of decisions. We can attack it from the point of view that economic efficiency is one particular form of community goal and has nothing to do with litigants' rights to decisions based on the integrity of the law. The arguments are essentially those attacking what we could call 'undistributive' utilitarianism.

So, by using the idea of opportunity costs measured by units of currency the theory of wealth-maximisation purports to resolve, in a practical way, the problems

of incommensurability of welfare. But since wealth itself can be merely instrumental to welfare, and that must be 'an empirical question', the maximisation of wealth by the courts must be a false target. It may be a justifiable way of aiming towards welfare in the real world, although it appears to assume that the legislature will then redistribute court-created wealth to produce welfare. But, in any case, if a court has the choice between the false target, wealth, and utility, what on earth could the reason be for choosing wealth over utility?

7.5 Dworkin's equality of resources

Dworkin agrees with the Chicago school to the extent of thinking that it is resources, in the form of wealth, among other things, which govern fair dealings between people. His theory is idealistic. He posits a 'principle of correction' by which he means that imperfect decisions may be 'corrected' so as to bring them closer to the ideal. That principle must never compromise a person's freedom, however. In the real world, the idea, that of people having a right to 'equality of resources', albeit in a highly qualified sense, surfaces in the application of the law of tort.

Resources and freedom

The first general insight is this: resources are a major source of freedom. They are not the only one, but certainly a major one. Generally speaking, we are more free the more resources we have. But note the following, at least for the real world. We have more resources if we are talented and fewer resources if we are handicapped. In other words, the more talented and the less handicapped you are the more freedom you have.

Let us refine the idea of freedom. Is it an important idea? Yes, because if you are free to develop and shape your life in accordance with your own convictions and ambitions you live a better life. In fact, it may be that it does not make much sense to say that you can live a life, properly called *your* life, that has been shaped for you by, as it were, external forces.

There seems to be, then, a distinction, in the real world between those aspects of you which are part of your capacity to form ideas and convictions about how you would like to live your life, and those aspects which are a help or hindrance to living that life. The aspects will include access to physical resources as well as talents and handicaps.

Let us now apply the principle, absolutely fundamental to Dworkin, that people are equal as human beings. We do not distinguish between people on any basis other than our concern for their humanity. Are talented or handicapped or rich or poor people any better or worse *as human beings*? Are people of different castes, or of different coloured skins, or of different sex or of different heights better or worse

because of these attributes? If we endorse the principle that we must treat people as equals, clearly the answer is no.

Let us now turn to the twin ideas of equality and freedom. If the government must treat its citizens as equals, what should it do in the absolutely ideal world? Dworkin says that it should, crudely, make them equal in their freedoms, as far as that is possible. Treating a person as an equal means treating him in such a way as to give him maximum freedom to develop his life in accordance with his convictions. But it must follow that the freedom of each person is to be limited to the extent that that person's exercise of freedom reduces the amount of freedom of another. That *must* follow from Dworkin's initial abstract injunction that people be treated as equals (which you might, or might not, be inclined to accept).

Here we should connect freedom with the question of distribution of resources. No person or group of persons should be granted disproportionate freedom in the use of resources, says Dworkin, because the effect would be to *take away* freedom in the use of those same resources from other persons. At first sight, then, any justification for allowing unequal use of resources compromises equality.

Handicaps

But equality also requires us to make up for the potential freedoms lost by a handicapped person. Think about it. If he is as much a *person* as someone who has average potential, he loses out. Treating him equally as a person must mean distributing to him sufficient resources to bring him, as nearly as possible, to the level of potential freedom of the average person.

Talents

Further, someone who is talented has potentially more freedom. He can move through the real world more easily and will find it easier to acquire more resources, say, by the skilful use of the resources he already has. But if it is true that he is just as much a person as a handicapped or averagely competent person, then he gains, just by virtue of his talent, an unequal share of resources. That means that when he uses his talents (because, of course, he might choose not to) the freedoms gained which are attributable to talent alone (remember, we are in the absolutely ideal world) represent an unequal share of the total freedoms available.

Equality and freedom

Dworkin's key idea here is that equality demands that each person's freedoms, measured over his life, should be quantified against what their having that freedom costs other people in relation to *their* freedoms. How, though, can we make real sense of this measurement of relative freedoms? Dworkin suggests that the idea of the economic market provides an answer in the idea of relative cost. We distribute

freedoms so that no person 'envies' (in the economic sense in which we assume that each person wishes to maximise the freedoms open to him) any other person's freedom. And we then allow bargaining to occur through the market place in order to reflect the different choices that people make over their lifetimes.

The presuppositions of the market

A problem arises in the setting up of the circumstances of bargaining. This is that the idea of the market presupposes the existence of a number of things, such as – the most obvious one – *people* to bargain. To get the idea of the cost of each person's life to other people, the concept of 'a market' is not in itself enough. We have to specify the conditions under which market transactions are properly conducted.

What does this mean? It means that the idea of a person is 'prior' to the market and the market does not allocate rights but is itself determined by them. What is important to the person must be specified in the conditions (the baseline) under which the market operates (remember that we are talking about the absolutely ideal world). What is important to the person? One thing is personal security. You cannot enter the market if you are prevented by physical coercion. Further, the market must consistently obey the injunction that people should be treated as equals. This means that market transactions that, for example, resulted in a *racially prejudiced* distribution, would be inconsistent with the baseline. And further, if the market cannot ensure bargaining that is consistent with that baseline because of technical reasons ('externalities' in economists' terms) then it must be corrected so as to produce a result consistent with equality that would have come about but for the technical difficulties (remember the Coase theorem).

The nature of 'resources'

These include wealth, namely, all those tangible and intangible assets with which a person may trade. But they also include talents, so, conversely, we must say that handicaps represent a lack of resources. This is not such a difficult or strange idea. Our talents are part of our potential freedoms, as much as are our bank balances. So, we make people equal in resources, with the appropriate adjustments in relation to handicaps (by giving handicapped people what they would have obtained had they not been handicapped) and talents (by taking from talented people all they acquired solely through talent). We then arrange the market so that it works in accordance with the principle of equality which includes the principle that the market transactions assume maximum freedom.

What are advantages of this – obviously ideal – way of looking at things? Dworkin intends there to be two main ones. First, the theory combines the insights of socialism, that men are inherently human beings, independent of their particular circumstances, with the insights of a popularly understood libertarianism, that men

are best when they are free to make their own lives according to their own lights. It achieves this without falling into the obvious pitfalls of both socialism and libertarianism, namely, that socialism supports an unwarranted restriction of freedoms, a 'levelling downwards', and libertarianism supports the unjustifiable promotion of the liberty of a select few.

The second insight is that it provides an ethical basis for market mechanisms, and suggests ways in which the market should be corrected in accordance with that ethical basis.

The application to the law of tort

If we can assume rough equality of resources, in those areas of accident involving damage to property, equality of resources is the engine to providing the best resolution to hard cases in tort, by awarding damages to the party whose equilibrium of resources under a just distribution has been upset by his neighbour. Dworkin says that 'we do have sufficient general knowledge ... to make the principle of comparative financial harm workable enough in most cases'. The practical elaboration may require legislation (of the market-mimicking, Coasian sort) but Dworkin thinks that his thesis explains such ideas as reasonableness, contributory negligence and 'the other baggage of the law of tort'.

The intuitive idea is this. The torts of nuisance and negligence limit the impact of inequality when people's projects – their exercise of autonomy – intersect. Here we can see a more appealing interpretation of the Learned Hand formula. If you are required by the courts to pay damages on the least cost avoider test, it is not that you are being made to fulfil a utilitarian duty towards the whole community, but that you are, so to speak, being made to repair the cost to your neighbour's equality of resources. You are, in accordance with a sensible requirement to treat your neighbour as an equal, being made to restore his resource equilibrium.

8

Early Legal Positivism: the Command Theory

8.1 What is positivism?

Legal positivism declares that morality is irrelevant to the identification of what is valid law. Hart provides a useful definition of legal positivism on p181 of his *The Concept of Law*:

> 'Here we shall take legal positivism to mean the simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so.'

The most famous positivists are Bentham, Austin, Kelsen and Hart, although there are many others. It is important that you don't get misled by approaching just one of these theorists. Each theory has its own special insights. In particular, there is a problem with how to approach both Bentham and Austin. It is generally accepted that Bentham's theory is much more subtle than Austin's. On the other hand, Austin's is vastly more accessible. However, the important point is that Bentham and Austin are agreed on several things. They are both positivists and both thought that the key to law lay in the idea of the command of a sovereign. Readers should concentrate on the command theory, which is common to both authors' theories.

Long before legal positivism, Aristotle and Aquinas, to name only the most distinguished, asked practical questions and supplied answers about the way we should view law. But the legal positivists were unclear about the matter. There is a distinct ambiguity present in Bentham which continues through other thinkers to Hart. That ambiguity hovers between the following two strands of thought:

First, there is a sense in which some legal positivists intended simply to describe what law is. Law is simply a complex of social facts. That may have been the

opinion of Jeremy Bentham. It certainly was that of John Austin, his disciple, and, albeit in a highly qualified sense, that of the German legal philosopher Hans Kelsen. Hart's brilliant work *The Concept of Law* certainly begins in that way, with its well-known affirmation in the Preface that, among other aims, he intends a 'descriptive sociology' of the law.

That is one strand of legal positivism. It is this idea of law that would lie behind, say, a comparative account of repressive legal systems. Such an account can, of course, serve practical purposes, such as those of historians, or dictators, or anthropologists in search of differences between legal systems.

The other strand is practical in a more obvious and appealing sense. It is the idea that positivism is a *liberal* doctrine. It is not a coincidence that the growth of positivism paralleled the growth of liberalism in the early nineteenth century. In what way was it liberal? The positivists emphasised the point in different ways. Essentially it is that the law must be identifiable by means of clearly identifiable and public criteria to enable the citizen to keep distinct the demands of his conscience and the demands of the state. Hart spoke for this strand of positivism when he said in *The Concept of Law*:

> '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, and that, however great the aura of majesty or authority which the official system may have, its demands must in the end be submitted to a moral scrutiny.'

The idea is explicit in Bentham's distinction between 'expository' and 'censorial' jurisprudence, Austin's claim 'The existence of law is one thing; its merit or demerit is another', and Kelsen's promotion of law as 'science' to counteract tyranny.

Note, too, that the chief modern opponent of legal positivism, Ronald Dworkin, has a theory of law that is a liberal theory, too. This theory is imbued with the liberal idea that the state must protect personal autonomy. But the theory allows the idea of 'the right to be treated with equal concern and respect' to be debated, in the form of different and controversial conceptions of that idea, as a matter of *law*. It is at this point, obviously, that Dworkin's theory parts company with positivism. But notice that he nevertheless insists upon the requirement of what he calls the 'articulate consistency' of public officials (see his *Taking Rights Seriously* (1978) p162). This is in part what he means by decisions being made in accordance with principle. And to this extent, his theory shares the public criterion requirement of the positivists. (See Chapters 10 and 22.)

Whether legal positivism 'works' depends on the type of community in which it has sufficiently widespread acceptance. Its strong point is its declaration of the limits of state requirements. It tells us where the law 'stops' and 'ideology' starts. So, in a culture where there is little homogeneity of political opinion and where there are irreconcilable ideological or fundamentalist conflicts of view, legal positivism will be attractive because of its liberalism. According to positivism, since there can be little controversy about

what the state requires, ideology cannot be covertly introduced under the guise of law (see the German idea of 'real' law embodying the idea of the will of the German peoples in von Savigny's legal theory in Chapter 15). In parts of continental Europe, and in Latin America, this feature of positivism is thought to be its virtue.

But, at least in the UK, in one straightforward and practical sense, legal positivism, as defined here, is valid. Even without the training of a lawyer, we can easily think of examples of laws where our ability to identify a rule as a rule of law does not, at first blush, require us to make a moral judgment.

Take as an example a homosexual act between two twenty-year-old consenting men in private. Such an act constitutes a criminal offence. There is no doubt that if it complies with the description of the prohibited act in the English Sexual Offences Act 1956, it is legally prohibited. No reason other than *being in accordance* with the statute is necessary in order for us to say that these acts are unlawful. Yet there are many (perhaps you are one) who think that the existence of those provisions is morally wrong because they legally prohibit what ought not to be prohibited. But these critics will nevertheless usually agree these rules have a status of law.

Another example. Before the Sexual Offences Act 1967 repealed the English statutory provision which made sexual acts between men punishable by 14 years in prison, there were those who, while affirming the validity of the law, thought also that the law was morally wrong. In fact, a little reflection should make us realize that it is because of this perceived distinction between law and morality that it makes sense to campaign to bring about *change* in the law. The idea of being able to change the law so as to make its provisions morally acceptable was, in the history of legal positivism, thought to be one of its major virtues.

8.2 Bentham

The definition of law

Reading the expository jurisprudence of Jeremy Bentham gives all the thrills of perusing a statutory instrument. Hart, in his understated style, says that he lacks the technical expertise to unravel much of Bentham's work. Yet it is the invented language ('international law' is his invention, but there are many others) and seemingly pedantic definitions in Bentham's work that make his writing so informative. It is fair to say that he anticipated many of the insights of later jurists. However, much of his expository work, aimed at defining the nature of law, was unpublished and is currently being sifted through for publication. The manuscripts were discovered at University College London, where Austin, the first purveyor of jurisprudence to law undergraduates, lectured. Austin's theory of law is a simplified version of Bentham's, perhaps because his lectures were directed at first year students. Thus, the teacher, Bentham, is often tarred with the same brush as the disciple, Austin.

Interestingly for law students, Austin's tradition has left a legacy that cannot be ignored. Much of our constitutional theory stems from Austinian perceptions. We will, however, need to examine Bentham first, since his insights are illuminating and more subtle than Austin's. Following the empirical tradition, he rejected the notion of natural law (see Chapter 11) and any idea of an 'internal' moral quality of law. When addressing the natural law fathers of the French Revolution, he described its written constitution as nonsense on stilts and bawling on paper. We shall analyse some of his definitions to give a little introduction into his expository theory as well as to arm the student with some knowledge that might help him cope with Bentham.

In his *Of Laws in General* Bentham seeks by demarcation to distinguish law from other activities. His method relies on the linguistic associations of the word law, while appreciating that language can be misleading. Bentham has a little in common with the natural law tradition of thinkers such as Aquinas. Aquinas' concept of law is any rule or measure of action in virtue of which one is led to perform certain actions and refrain from the performance of others. This is, of course, assuming that it accords with the eternal law, the will of God. Thus, laws are not only the prescriptions of those who are employed specifically for legal purposes, but any prescription that accords with God's sovereign will.

Bentham substitutes the will of the sovereign for the Divine will. The form that law is defined to take has the following elements:

Law is:

1. an assemblage of signs;
2. expressive of subjective will;
3. that which is directly or indirectly attributable to the sovereign in one of the following three ways;
   a) the author of the law is the sovereign himself;
   b) the sovereign has allowed a previous sovereign's law to continue in existence; and
   c) the law has been made by a person on behalf of the sovereign who is authorised to so do;
4. that which relates to conduct in a given situation;
5. that which is directed to persons who are supposed to be subject to the sovereign's power.

This sort of definition is typical of Bentham. The student should acquaint herself with Bentham's writing. In some ways it is amusing, because he seems to go to such pains to be exact. But shouldn't we all be exact? He attempts to bring the same precision to legal philosophy as a statutory draftsman attempts to bring to writing a statute. (And you will discover it is a quality of British philosophers, not shared to the same degree by their counterparts on the Continent.) It is absolutely impossible to accuse Bentham of waffle. You can accuse him of many other things, but not waffle!

It is important at this point to mention that Bentham's concept of a sovereign does not carry with it any 'natural law baggage'. It is simply the people or person to

whom a political community are supposed to be in disposition to obey. This itself requires further elucidation!

Bentham talks of a political community as being one in which the members are supposed to be in the habit of obedience to a person or body of persons of known and certain description. A community is a fictitious body composed of individual persons who are considered to be its members.

Thus, to quote Bentham, we can use the word sovereignty in two different senses: 'at one time in its strict and proper sense; at another in its popular and improper sense ... Till men are sufficiently aware of the ambiguity of words, political discussions may be carried out without profit and without end'. To Bentham, therefore, the term does not carry with it any associations with concepts such as 'king by divine right' or even 'personal supremacy'. Nor is it a factual statement that the sovereign is the person who is habitually obeyed. It is the habit of obedience together with the feeling of collective identity that earmarks a political community. With Bentham's careful expression we should not ignore the words 'supposed' and 'disposition'.

The sovereign is the person whom, it is presumed, a society has the inclination to obey. The presumptive or suppositive element of the definition emphasises that sovereignty is not quite a matter of *fact*, you will notice (and this serves to distinguish Bentham from Austin). The sovereign is supposed to be the person to whom people have a disposition to obey, rather than who, in fact, is habitually obeyed. The distinction is a fine, but important one. If one is disposed to do something, it is not just the doing of the action, but the willing inclination to do it that must be appreciated. The supposition is that society, which Bentham says is a fictional body, is disposed to obey the sovereign. Or one might say that it is supposed that a fictive will deems that the ascertainable sovereign should be obeyed.

The eight different aspects of law

Bentham is useful to the student at least insofar as he points out several material focuses for enquiry into the nature of law:

1. *Source.* As has already been mentioned, the source of law, ultimately, is a sovereign. However, Bentham is aware that power is delegated in the name of the sovereign and exercised in the sovereign's name by subsidiary law-makers.
2. *Subjects.* Obviously, a law applies either to a person, or, in the case of, for example, English property law, to a thing.
3. *Objects.* The object of a law is the act, in the appropriate circumstances, which it seeks to regulate.
4. *Extent.* Obviously, a law must specify how widely it is to be applied, as well as to whom. The extent of the criminal law is its applicability to all but the legally immune, for example.
5. *Aspects.* Laws may take various forms such as commanding, permitting etc, in order to achieve a given purpose.

6. *Force.* Laws usually rely on motives, in the form of sanctions or rewards, to give force to them. Additional laws may be required to bring these motives into play, which Bentham terms 'corroborative appendages'.
7. *Expression.* There is a variety of ways in which laws can be expressed. We only need to think of the variety of English law forms.
8. *'Remedial appendages'.* If a principal law outlaws an act, a corroborative law directs someone to punish that act. But there still might need to be a requirement for another law to remedy the effect of that act. For example, the law says that an employee must be paid in accordance with his contract and it will enforce that contract if he is not so paid. This is the principal law and the motive for obeying it is the threat that payment will be forced by the law. However, someone has to judge whether the employer has not paid his employee and if so, that person must order payment. That person might be a judge, but he has to be empowered by law to perform this. Therefore, a corroborative law directs the judge to judge and enforce. However, imagine that payment has not been made for a period of time. In such a case, the value of the money owed under the contract to the employer might have decreased in real terms. There should then be the remedial effect of interest payments, ordered by a Supreme Court master. This would be an example of a remedial appendage.

The source of law

Bentham employs the concept of sovereign will to distinguish legal mandates from illegal ones such as those of a mafia boss. The unifying feature that lies behind all laws is, for him, that they accord with the will of the sovereign. However, not all laws emanate from the sovereign. Bentham accounts for this as follows. He regards all commands that accord with the will of the sovereign as legal mandates. Thus, a parent's order to a child, an employer's order to a servant, a magisterial, military or judicial order, are all legal mandates, providing they accord with the will of the sovereign. Bentham concedes that we are not accustomed to viewing such things as acts of legislation.

There is appeal in this idea. The fact that, by convention, lawyers look to limited sources and enforce and recognise only those sources does not mean that law does not have a force outside them. Bentham succeeds in emphasising that law is enforced and reiterated outside the purely formal context of legal practice.

The problem with such a wide definition is that the responsibility for making law is spread, while the authority for law stems from the sovereign. How, then, do we relate the source of a law to the authority that gives it its legal character? Bentham says that we have to consider how *any* person can have a mandate attributed to him. First, he says, a person decides, himself, that something is to be done, making the mandate his by conception. Secondly, someone else thinks something should be done and a person adopts that other person's thought, so that the mandate is his by adoption. This process is clearly more complex than the former one, and since the

bulk of law-making in modern systems is not directly the conception of the sovereign, Bentham investigates it further.

If we imagine a simple idea of King Rex and his two advisers, his wife and his Prime Minister. Rex is not intelligent, but his wife suggests ideas for laws to him, which he subsequently declares to be his own. The mandate has already been conceived, but he endorses it and it becomes his, in Bentham's terms, by 'susception'. Rex is not greatly interested in the business of government, so he declares that everyone should do whatever the Prime Minister tells them to do until further notice. Thus, he *pre-adopts* the mandates that the Prime Minister is going to make in the future. He has thus invested in the Prime Minister a power to make law in his own right, and this is a power of 'imperation'.

Susception may equally apply to the adoption by a new monarch of the laws of his predecessor and pre-adoption to the mandates of all those who are authorised to issue mandates on behalf of the sovereign.

An interesting view of Bentham is that if a person issues a mandate and has no authority to do so, it is illegal and the issuing of it is an offence. Hart criticises Bentham for failing to take into account the concept of invalid, but not illegal, mandates. This appears a valid enough criticism, but note how it stems from the (reasonable and liberal) attitude that the Englishman is born free and may do anything that he is not prevented from doing. It is quite possible that Bentham, himself very conservative in many ways, did not conceive of things in this way. Bentham clearly envisages that the sovereign will is seamless: 'Take any mandate whatsoever, either it is of the number of those which he allows or it is not; there is no medium: if it is, it is his; by adoption at least, if not by original conception: if not, it is illegal, and the issuing of it is an offence.' Thus, an invalid command is one that is permitted to be made, but which the lawyer is not permitted to enforce or act upon. This quotation serves to emphasise the curious nature of Bentham's view, that the sovereign needs to know all mandates that are issued, and either permits them or prevents them.

The logic of the law

It is clear in Bentham's work that expressions of will can be imperative, such as commands or prohibitions which require adherence, or permissive, such as a non-command or non-prohibition, which allows action. Laws can therefore be expressed in any of these ways, but only as logical combinations of these expressions. Thus, expressions of legal will can have a variety of effects. But it is also clear that Bentham's is an imperative, a 'command', theory. How, then, can the law can be permissive?

We should remember that a legal permission is one that is guaranteed by the sovereign and, as such, may be equally expressed as a prohibition against people forcing someone to do what he does not legally need to do or a command to people to allow him to do what he legally can do. Thus, with respect to a court, if a person has a legal permission to act in a certain way this has the effect of prohibiting it

from enforcing any previous law that would interfere with this action. With respect to other subjects of the law, if a person is given legal permission to graze his sheep on the common, it might equally be expressed as, let no man stop him!

The different parts of law

Although all law may be ultimately attributed to a sovereign, as we have seen, not all law-making is that of the sovereign. Bentham thus explains how such power is shared. A legislator may make a law requiring that an act be done or be abstained from. This element is the 'directive' element of law. Normally this will be accompanied by the motive for obeying. This is the 'predictive' part. However, it is unlikely that the legislator can verify that the law has been broken and order that the particular law-breaker be punished. This general law is the primary law. In order that breaches of law be verified and punished the legislator will have issued a law directing that someone such as a judge should do so. This is termed a 'subsidiary' law.

Equally, the judge might need to have the help of the police for verification, or the prison service for punishment, thereby requiring further subsidiary laws. These are 'remote laws' as distinct from more 'proximate' laws. In fact, these 'remote' laws are themselves backed with even more 'remote' subsidiary laws such as those regulating the call and conduct of witnesses, and so on, to contribute their part to the aim of the principal law.

With all these laws flying about it is not surprising that Bentham's view of laws is a complex one. However, he does have an idea of a 'complete' law. A complete law is the sum of all the subsidiary and principal laws needed to give complete meaning to a more general principle. Bentham's example is the general prohibition against meddling with another's property. This is characterised as follows: (1) a prohibition against occupying property, which is imperative; and (2) a permission for anyone who has good title to that property, allowing her to occupy it. However, this simple concept requires that there be procedures for the transfer of property, form for valid title and all the verifications, mandates and penalties in order to achieve the enforcement of this complete law. Bentham concedes that such laws are not written down in this complete form.

Bentham said that the title-holder of land in English law has two different types of power. He has the legal permission to use his land, which others may not without his permission. This power to do that which other people may not is, he said, a power of 'contrectation'. Such powers stem primarily from permissive laws. However, the title-holder may also rent his land to another, who, if he agrees, must accept duties and obligations. This power to confer on others duties and obligations is, as we have already mentioned, a power of 'imperation'.

The motives for compliance with law

Remember that Bentham is a legal positivist and thought morality irrelevant to the identification of law. Therefore, the reason people obey laws is that there are some

motives provided *by the law* that encourage the subject to obey. In Bentham's psychology these are primarily the coercion of punishment and the allurement of reward. He admits that such motives may be provided by politics, religion or morality, although normally the legal system relies on rewards and punishments of its own creation.

'Praemary' or 'invitative' laws rely on the motive of reward, but as Bentham observes these are not often used. It is a lot easier and more economical for the legal system to inflict pain and more likely to have the desired effect, in his view. As such 'sanctional' or 'comminative' laws are far more popular.

The critical problem with this view of the force of law is that, as Summers remarks, there are other educative, supervisory and controlling factors that may be applied to law. We saw earlier that such motives are not necessarily attached to particular laws that permit or prohibit a particular act and thus there may be a mandate without an obvious sanction being attached. For example, an agent may have a power of imperation to impose obligations on another under a contract, but the power to sanction a breach of contract may lie with another body, such as a court. Power, including the power to sanction, is, in Bentham's model, frequently broken into shares. One reason for this is that frequently a law is directed at someone; for example, do not steal, but it can hardly be expected that the mandate should say also if you do steal, punish yourself. Likewise, with a contract, although the parties are permitted to mandate each other to do certain things, both are under the broader obligation of not breaking the legal obligations the other party has put on them, so that neither can be expected to punish himself at the mandate of the other, although there might be penalty clauses in the contract.

The idea of sovereignty

In Bentham's words: 'Now by a sovereign I mean any person or assemblage of persons to whose will a whole political community are (no matter on what account) supposed to be in disposition to pay obedience: and that in preference to the will of any other person.'

Bentham's concept of sovereignty is not one that is greatly elaborated by him. But it is important to give it some consideration here, since it is often dismissed as being the same as Austin's concept of sovereignty and as such dismissed as simplistic.

The sovereign is simply the ultimate authority in a legal jurisdiction. Bentham does not necessarily mean a single undivided and powerful entity. But he also does not employ the common usage that tends to view the concept of sovereignty as the body that exercises ultimate governmental power in a given jurisdiction. Bentham allows that powers may be separated infinitely and distributed through the law to numerous persons or bodies. Each would be sovereign in exercise of a given power, so long as they are the highest and only power in their particular branch of government.

If we look at the United Kingdom constitution, it seems reasonable to say that the Crown, Parliament, courts (in matters of common and European law), the

European institutions and electorate all comprise the sovereign, for each in its own role in government has considerable legal powers. Parliament can no more create common law than the courts make a statute, nor can the government elect itself or the electorate make European law. Thus, with respect to Bentham's definition of sovereignty, the sovereign will is the will of this corporate venture, which involves much of the community. These bodies are sovereign because with respect to their particular branches of power it is *supposed* that society is in disposition to obey them.

Bentham does not require that the sovereign be determinate and does not stipulate that it cannot have a superior allegiance. His definition is not based on the empirical fact that people are in the habit of obedience to the sovereign, but on the supposition, for whatever reason, that society is disposed to obey one person or body of persons in preference to any other. Bentham's sovereign may bind himself in law and may be bound by predecessors.

Olivecrona says that Bentham ignores the fact that the concept of will is a fiction. Certainly, if Bentham allows for a divisible sovereign, how can two people have one will? Or indeed, does Parliament have a will? Parliament's will is seldom the will of all, but instead consists in the idea that a collection of people can speak as one. That Bentham would think this way is evident from the fact that he views a community as a fiction, a legal personality as a fiction. Therefore, how is a sovereign to be real, especially since it is merely something that is to be identified by its supposed authority? It may be, therefore, that Bentham is fully aware that the sovereign will is not an empirical fact in the same way as he is aware that a political community is a fiction. He can get around it by declaring that the sovereign will is only a fiction if we suppose there to be a mind and body possessed by the sovereign. There is no *nonsense*, no fiction, in the idea of Parliamentary intention, something to which lawyers refer every day of their working lives, just that it is a portmanteau word calling for a particular kind of argument.

Whether or not this is so, there is one considerable problem that Bentham avoids and which creates a trap for Austin. Austin's idea of legal obligation rests on the simple fact of power: there is a sovereign power *in fact*, that sovereign has commanded *in fact*, and that means that there is a likelihood of a sanction *in fact*. Therefore, the subject *ought* to obey the command. This looks like deriving an 'ought' from an 'is', as Kelsen was concerned to point out.

In contrast to Austin, Bentham does not say this. He defines the sovereign as the person whom 'the whole' of the political community are *supposed* to be in a disposition to obey. Now, the emphasis on 'the whole' would, in a factual test, mean that there would never be a sovereign, for a whole community would very seldom be disposed to obey the same person, but it is merely the 'supposition' of a disposition, an inclination or desire, to obey. Thus, he is saying that one supposes that everyone thinks they ought to or need to or must obey. A supposition is not a matter of fact, but an assumption. The validity of the law is based therefore on the existence of an assumption that everyone is either willing or feels they ought to or feels they must obey. Whose assumption this is, and on what basis this supposition is made, is not

Bentham's concern. The power, as opposed to the authority, of a sovereign or a law is, however, based on the actual obedience to that law.

8.3 John Austin

The command

It is important to notice that Austin has a fairly sophisticated method of theorising about law. He tries to show what he thinks describes law centrally, in the same way as Hart goes about elucidating the 'concept' of law, although he is not so clear as Hart about this form of description or definition. Although Hart is too sophisticated to say, as Austin says, that international law is not law, it is clear that Austin is well aware of both the similarities and dissimilarities that international law has in relation to his central case of law, which is that of the command of the sovereign. Be careful of being critical of the abrupt way Austin begins his famous lectures entitled *The Province of Jurisprudence Determined* (1832): 'Laws proper, or properly so called, are commands; laws which are not commands, are laws improper or improperly so called.' This gives the impression that he is merely stipulating what the law is so that he cannot be contradicted, and Austin has been criticised for 'postulating' the nature of law and then deducing conclusions from his own 'postulates'. But Austin does not do this. The beginning of his work is not in the form of postulated 'axioms' about law; they are, instead, the results of his thoughts about law, which have been placed at the beginning of his work for the purpose of clarity of exposition.

Essentially, Austin's theory of law is simple and concise. The subject of jurisprudence is positive law and positive law is the command of the sovereign. According to him, the idea of a command is the 'key to the sciences of jurisprudence and morals'. You could perhaps note here that Hart also claims to have found the 'key to the science of jurisprudence' in the union of what he calls primary and secondary rules in *The Concept of Law*. Let us proceed by using Austin's own definitions: Law, he says, in its most general sense, is 'a rule laid down for the guidance of an intelligent being by an intelligent being having power over him'. A command comprehends the following three 'notions':

1. 'A wish or desire conceived by a rational being, that another rational being shall do or forbear.'
2. 'An evil to proceed from the former, and to be incurred by the latter, in case the latter comply not with the wish.'
3. 'An expression or intimation of the wish by words or other signs.'

These three notions are, as Austin says, 'inseparably' bound up in the command. The first and third notions refer directly to the command because they express the wish of the person commanding. The second notion, he says, which *indirectly* refers to the command, has two aspects. When we refer to the evil that the commander

will 'visit upon' the person he is commanding we either refer (1) to the evil itself, in which case we are referring to the sanction; or (2) to the likelihood or chance of that person having an evil visited upon him, in which case we are referring to the obligation.

Note that Austin's explanation of obligation amounts to saying that a person has an obligation to do X just when and because the person is threatened with some unpleasant consequence. Note, too, Austin's explanation of the sanction. This is the 'evil which will probably be incurred in case a command be disobeyed or ... in case a duty be broken'. Austin says that the greater the chance of incurring an evil, and the greater the evil is, the greater is the obligation. Nevertheless, in order to establish whether there is an obligation, we have only to look at whether there is a chance of incurring evil. Even when there is the *smallest* chance of incurring the *smallest* evil, he says, the expression of the wish still amounts to a command and still, therefore, imposes a duty.

The sovereign

Thus far, we have untangled the various ideas involved in the idea of a command. The other part of Austin's theory of law as the command of the sovereign is the idea of sovereignty itself. This idea and that of the independent political society are fundamentally related notions, he says. He gives a definition:

> 'If a *determinate* human superior, *not* in a habit of obedience to a like superior, receive *habitual* obedience from the *bulk* of a given society, that determinate superior is sovereign in that society, and that society ... is a society political and independent.'

Austin allows that the sovereign can be constituted by either a particular person or a particular body of persons. You should note what Austin calls the two 'marks' of sovereignty: first, the sovereign must be 'habitually obeyed' by the bulk of the society, this being the 'positive' mark of sovereignty and, second, the sovereign must not be in a state of habitually obeying another body. He says that two consequences flow from this definition. The first is that the sovereign is incapable of being legally limited. That is, the sovereign cannot, as a matter of logic, bind itself by law. This follows from the theory that law is the command of the sovereign. His argument takes the form of a *reductio ad absurdum*. If the sovereign were bound by law, it would follow that *that* law was the command of a sovereign. But who could this sovereign be? There are two possible sovereigns, either another sovereign or the original sovereign.

Let us take the possibility of another sovereign. Two things follow. Either the first sovereign is not in a state of habitual obedience to the second sovereign, in which case he has no duty to comply with the second sovereign's commands, or the first sovereign is in a state of habitual obedience to the second sovereign, in which case he (or it) is not a true sovereign because he does not exist in an independent political society. In other words, the negative mark is missing.

Let us consider the second possibility that the sovereign commands himself. Austin abruptly dismisses this. A sovereign cannot legally limit himself because, as he asserts, 'we cannot speak of a law set by a man to himself'.

Is this such an absurd idea? What is wrong with the idea of a person setting a rule for herself? If there is any absurdity in it, it is that we know that the follower of the rule and the author of the rule are one and the same person, so that if it does not suit her to follow the rule she can change it. But it is perfectly *possible* for a person to lay down a rule of conduct for herself and this happens frequently in our own lives. Many of us would regard our moral convictions as rules laid down, let us say, in accordance with our consciences, which we consider ourselves bound to follow. It is not clear that in order to think in this way we must presuppose a standard of behaviour laid down by someone else. Is there something odd about the idea of applying sanctions to yourself? People do apply sanctions to themselves. Dorothy, in George Orwell's *A Clergyman's Daughter*, carried a pin with her and jabbed it into her arm whenever she had what she thought were uncharitable thoughts. The 'absurdity' of the notion of complying with one's own rules, and with punishing oneself, is an absurdity that arises not from logic, but from some general assumption that the human will is weak. This is not a strong enough argument for asserting that a sovereign logically cannot limit himself legally. And, also, it seems perfectly possible in Austinian terms to command someone else not to obey your commands if they are of a certain type. Why can't a man say to his wife before they both go out to dinner, 'All of my commands for extra wine after I have had two glasses are to be ignored'? Why, in other words, cannot the sovereign command his subjects to disobey him when he transgresses certain areas of competence that he marks out for himself. Why, indeed, cannot he draw up a constitution restricting his power and then command his subjects not to obey him when he steps outside that constitution?

This analysis has been dealt with at relative length and it is designed to give the student a taste of the way Austin's theory may be approached. You should try to think of the command theory as a real 'live' theory of how things actually are. Be fair to the theory or you may be accused of missing its point, but do not accept it hook, line and sinker. By attending to the small print, as it were, you will obtain insights and be in a good position to comment critically upon it.

A second point which flows logically from Austin's theory of law is that, according to Austin, sovereignty is indivisible. Because the sovereign exists in an independent political society, it is logically impossible, he says, to divide the powers of sovereignty amongst different bodies. The idea of sovereignty means habitual obedience to a determinate person or body of persons, and if there are several independent and determinate persons or bodies of persons, then there must be different sovereigns existing in different independent political societies.

We can try some more analysis. Think about the following, for example. Can we imagine situations where it is not absurd to suppose that, within one independent political society, there are two different sovereigns, each enjoying habitual obedience

from the bulk of that society *in respect of different subject-matter*? It is possible and is borne out by history. At one stage in Europe, people consistently obeyed the state on secular matters but the Church in Rome on religious matters. Does Austin have a defence to this example?

The province of jurisprudence: the different sorts of law

Having set up his basic theory of positive law, Austin proceeds to make observations about phenomena closely related to law. He says we must distinguish human law from divine laws issuing from God. Divine laws and human laws are both, to use his expression, laws that are 'properly so-called' because they are guiding rules laid down by intelligent beings for intelligent beings.

Divine law is revealed to us in different ways, says Austin, according to what our beliefs are. Thus, for some, it is revealed in the Bible and for others it is revealed in the form of inspiration or intuition. For others, and this includes Austin himself, the law of God is to be revealed through the principle of utility. This principle is that of utilitarianism which says, roughly, that the right act is the one which more than any other increases the total happiness or pleasure in the world. The command theory's separation of the Divine law from the human law is a significant step in legal theory. It is by use of this distinction that the distinction is drawn between our moral beliefs and what is moral law, and it lies at the heart of all positivist theories of law. Remember the definition of legal positivism at the beginning of this chapter. It is echoed in Kelsen's famous statement that 'Legal norms may have any kind of content. There is *no* kind of human behaviour that, because of its nature, could not be made into a legal duty corresponding to a legal right.' It is echoed in Bentham's famous distinction between 'censorial' and 'expositorial' jurisprudence, and Austin's famous claim that 'the existence of law is one thing; its merit or demerit is another'.

Austin now distinguishes between law 'properly so-called' and law 'improperly so-called'. Laws 'properly so-called' are commands, and they divide into God's commands (the Divine law) and human commands. But further subdivisions are possible. Austin distinguishes between two kinds of command that men give to one another. First, there are the commands of the sovereign to his subjects and he calls these laws those 'strictly so-called'. These commands form the *positive* law of an independent political society and it is these laws which form the subject-matter of jurisprudence.

Second, however, there are commands given by men to one another that are not from sovereigns to their subjects. These form three types:

1. those commands made in a state of anarchy and which are therefore not positive laws because there is no sovereign;
2. those commands made by sovereigns, not to their subjects but to other sovereigns (although not so frequently that the sovereign addressee now is in *habitual* obedience); and
3. those commands made within an independent political society which are not of these other sorts, such as the rules of clubs, rules made by parents to their children and so on.

At this point Austin begins to tighten up his definitions. He says that he prefers to call these types of law rules of 'positive morality' so as to distinguish them from the kind of law set by a sovereign to his subjects. He uses the term 'positive' to distinguish them from the law of God (that is, the law is ***posited***), and the term 'morality' to distinguish them from the commands of the sovereign to his subjects. They are laws 'properly so-called' because they are commands, but they are better termed rules of positive morality.

The laws 'improperly so-called' are divided by Austin into two types: laws 'by analogy' and laws 'by metaphor'. They are 'improperly' called law because neither of these two types of law are commands. Laws by analogy may also be called rules of positive morality and they are the laws which are those of 'mere opinion'. These laws arise not in the form of a person, or body of persons, commanding other persons but from popular sentiment or convention. The examples he gives are of 'the code of honour amongst gentlemen, and the law governing fashion'.

You should note that he famously places both international law and constitutional law under this heading. International law, because it exists between sovereigns but does not arise in the form of direct commands from one sovereign to another, is a matter of 'mere opinion', he says. Likewise, because of his view that sovereignty is illimitable by law, constitutional law, which purports to limit the legal powers of sovereignty, is not law but rules of positive morality. Putting it in a modern way, the sovereign is accountable *politically* but not legally.

Austin here makes an advance in legal thinking. This is that in having the groupings of two kinds of rules, non-sovereign law and laws by analogy, under the heading of 'positive morality', he distinguishes between 'critical' morality and 'positive' morality. Note what Austin says about this distinction:

> 'If you say that an act or omission violates morality, you speak ambiguously. You may mean that it violates the law which I style "positive morality", or that it violates the Divine law which is the measure or test of the former.'

It would be a very useful exercise to try to use the distinction in real life. Are there social conventions which we call 'moral' which fail a *critically* moral test? Does it mean anything to say that a slave-owning morality is an *immoral* morality, thus using the two Austinian distinctions in the one phrase? This example shows how significant the distinction is and you might note that Hart employs the distinction, as well as the exact terminology of 'critical' and 'positive', in his attack on Lord Devlin's thesis that the society was justified in using the criminal law to enforce its positive morality as discerned from the reaction of a juror. One of Hart's major points was that 'just what people happen to believe or accept' is not to be equated with what were the correct standards from a critical point of view. After all, what people happen to believe or accept might be based on prejudice. (See Devlin, *The Enforcement of Morals*, Chapters 1, 5 and 7; Hart, *Law, Liberty and Morality*; Dworkin, *Taking Rights Seriously*, Chapter 10.)

The second category of laws 'improperly so-called' are called 'laws by metaphor', which are scientific laws. The important thing about these laws is that they cannot be obeyed or disobeyed and hence the idea of a command in relation to them is 'improper'. If something like an atom or molecule fails to conform to a scientific law purporting to govern its behaviour, we just say that the law must be wrong, not that it has been disobeyed. We therefore change or modify our law (or, better, our hypothesis) about how the particle or matter should behave. We are now accustomed to this distinction between laws governing inanimate objects and laws governing the willed behaviour of animate objects. However, you should realise that there was no such distinction drawn for a very long time and it was thinkers such as Austin and Bentham and others who first drew it so clearly.

To sum up so far, Austin has introduced three very important and useful distinctions. First, there is a distinction between the divine law and human law, that is, the *is* and the moral *ought*. This distinction shows that Austin is not a natural lawyer. Secondly, there is a distinction between *critical* and *positive* morality, that is, those rules of conduct made by human beings but not in the form of commands by a sovereign to his subjects. Thirdly, there is a distinction between laws governing animate objects and scientific laws.

International and constitutional law

International law is not law because it arises, not through the assertion of commands but through 'popular sentiment' and 'mere opinion' amongst nations and is thus positive morality. Constitutional law is not law because it is not possible for a sovereign to be under a legal duty. So constitutional law, which appears to place legal shackles around the sovereign, is not really law but positive morality too.

Students can find this sort of theorising unhelpful. It sounds as though Austin were playing around with meanings, or just talking 'semantics'. But this is not a fair interpretation. He is saying that although we think of international and constitutional law as law, we should no longer do so because it is a loose description. He is telling us to look more closely at the legal phenomena and appreciate that international law and constitutional law are not really like other forms of law at all. And what law student has *not* found appeal in the idea that constitutional law is 'politics', not law, or the idea that international law is not 'really' law? We are led by Austin to notice that international law does not arise by means of an international sovereign legislative body, and that constitutional law meets some paradox at least in the idea that supreme legislatures cannot be 'supreme' over themselves.

Rights and powers

Students should be careful not to suppose that the command theory says that there cannot be legal rights and powers. Indeed, it is common to suppose that Hart's division of laws into duty and power-conferring rules is better than Austin's idea of a

command, because that division can account for more sorts of laws than the criminal law to which Austin's theory is often relegated. But this interpretation underrates Austin. The command theorists meant that the basic unit of law is the command. Hart meant that law is better understood as supposing that there were at least two basic units, the duty and the power-conferring rules. But legal rights and duties can be explained under the command theory. Austin's explanation is as follows:

> 'Every law, really conferring a right, imposes expressly or tacitly a *relative* duty, or a duty correlating with the right.'

His idea is that we must look upon laws that create rights, *really* as laws that impose duties upon people other than the right-holder. Note that he says that 'every law ... conferring a right imposes [either] expressly or tacitly' a relative duty. An express duty would be imposed where the law, or so-called law conferring a right, expressly provided for a remedy when that right was infringed. However, Austin says:

> 'If the remedy to be given be not specified, it refers *tacitly* to pre-existing law, and clothes the right which it purports to create with a remedy provided by that law.'

So Austin sees rights really only as correlatives of *duties*. His theory of law is a duty-based theory and, although in the legal phenomena we see things that we might prefer to call rights, these are in fact a different way of describing what are in essence duties or commands.

Austin explains delegated legislation in terms of rights. He says that such legislation is effected in pursuance of a right conferred upon the delegated legislator by the sovereign. In his own terms, when the delegated legislator, exercising that right, legislates by commanding, the duty to obey those commands comes directly from the sovereign, because the right has to read in the form of:

> 'I, the sovereign, command you to do what it is my delegated legislator commands within the area of competence I have determined for him.'

This approach has the advantage that it concentrates our attention on the fact that when we are obeying a delegated legislator, we are in fact obeying the sovereign. When we obey a local government decree, therefore, Austin's theory makes it crystal clear that we are obeying Crown in Parliament, because under that theory, the local government's right to legislate is properly described in legal terms as a command from the sovereign.

Sanctions

Note that Austin regard *punishment* as not synonymous with the evil which is possible or likely if the command is disobeyed. That is, Austin considers that punishments are only one kind of sanction. He says that the evil likely to be incurred by disobedience is frequently termed a 'punishment' but that is not strictly correct.

It seems reasonable to suppose from his broad view of sanction that Austin would claim that *nullity* is a sanction. There is some support for this view to be found, not in *The Province of Jurisprudence Determined*, but in his Lecture 23, where he says:

> 'Now, though physical compulsion or restraint is commonly the mean or instrument by which suffering is inflicted, suffering may be inflicted without it. For instance, certain obligations are sanctioned by nullities ...'

However, throughout his Lectures Austin barely develops this theme. Strongest emphasis is placed on the analysis of rights, or powers, as being protected by correlative commands, laying duties on *other* people. Therefore, it would seem that where a person transgresses a right, that is, steps outside his powers, or acts *ultra vires*, it is merely the case that other people do not have a duty to obey what he says.

Students should be prepared to dig deep at this sort of point. It is common for examination candidates simply to say that 'for Austin, nullity is a sanction' and that shows a misunderstanding of actually what that would mean for Austin's theory. Viewing nullity as a sanction would view a right, say, to pass delegated legislation, as a command backed by the sanction of nullity: thus a duty would be placed, not upon *other* people to do what the delegated legislator says, but upon the legislator *himself*. He must act in accordance with the right conferred upon him under the 'pain' of the possibility of a nullity being 'visited upon him'.

A more plausible interpretation of Austin (but you are allowed to disagree!) is:

1. A has a right (to legislate) = B has a duty to obey the sovereign when A exercises his right.

But, possibly, there is the alternative analysis of:

2. A has a right (to legislate) = A *has a duty* not to exceed his right by virtue of a sovereign command not to, backed by the sanction of nullity.

The argument for saying the second possibility is less plausible is that Austin does not discuss it much, or with his characteristic clarity.

Custom

The place of custom in the law has always bothered jurists. The difficulty with custom is that courts not infrequently declare to be law what are claimed to be customs, or customary ways of doing things, since 'time immemorial'. For example, ancient rights of fishermen to dry their nets in particular places, or the establishment of rights of way. And, further, widening the idea of custom, the common law seems in many parts to consist of the enforcement of practices which have just existed from an earlier time. Any theory, such as one of the most common forms of positivism, and one under discussion, that claims that law is to be identified only in terms of its origination from some definite, posited, source such as the sovereign, is faced with the difficulty of saying whether customary law is 'really' law.

Austin's answer is, simply, that when the judges make a decision that the custom is law, the custom becomes law *then*, although up to that point the custom is merely a rule of positive morality. So Austin says:

> 'Now when the judges transmute a custom into a legal rule ... the legal rule which they establish is established by the sovereign legislature.'

> 'Customary laws are positive laws fashioned by judicial legislation upon pre-existing customs. Now, till they become the grounds of judicial decisions upon cases ... the customs are merely rules set by opinions of the governed, and sanctioned or enforced morally ... '

Judge-made law

In Austin's view, we must think of the judge as a delegated legislator who, when he makes decisions, is commanding on behalf of the sovereign. Since the sovereign cannot know everything that is going on in his courts, Austin employs the idea of a tacit command here:

> 'Now when customs are turned into legal rules by decisions of subject judges, the legal rules which emerge from the customs are *tacit* commands of the sovereign legislature.'

Note that Austin is very much against the idea that judges merely 'find' the legal rules and do not legislate. Famously, he said that he 'cannot understand how any person who has considered the subject can suppose that society could possibly have gone on if judges had not legislated'. In his discussion of the place of custom, Austin clearly shows that judges are delegated legislators. He has often been taken to mean that judges should be creative innovators. Indeed, he thought that judge-made law was *better* than statute law (and differed sharply from Bentham in this respect). The passage just cited has been quoted many times in support of a claim that Austin is for great judicial activism.

You might consider whether you think that judicial activism is consistent with the rest of Austin's theory. Although he does not say so, Austinian judges are bound to create the law *within* the confines of what it is that the sovereign would have commanded had he known of the particular set of circumstances before the judge. That is, in saying that judges should openly legislate, we should not take Austin to mean that this is an unrestricted power. If the sovereign would not have tacitly commanded something that the judiciary declares, then presumably the judiciary has exceeded its powers. The idea of a 'tacit' command by which judges legislate, carries with it the modern idea of interpreting in accordance with the 'intentions' of the legislature. In the case of following precedents, presumably the judge is bound to make decisions that are as consistent as possible with the previous decisions of judges, since these, if not expressly overturned by legislation, are to be read as tacitly commanded by the sovereign.

Sovereignty in practice

How does Austin deal with the idea of legal illimitability? He does it simply by saying that the fetters that appear to bind the sovereign are in fact not *legal* fetters because constitutional law is not law. He sees the difficulties posed by the English sovereign but does not really face up to them. He admits that the Crown, the Lords and the Commons constitute the sovereign in terms of the language of writers on constitutional law. But then he says:

> 'But, speaking accurately, the members of the commons house are merely trustees for the body by which they are elected and appointed and, consequently, the sovereignty always resides in the king and the peers, with the *electoral* body of the commons.'

Austin seems to be saying here that everybody who votes ('the electoral body'), along with the House of Lords, and the Queen, form the sovereign, and that the House of Commons is merely a delegated legislator for the electors.

Note that this is a long way from his initially attractive, because simple, idea of identifying the sovereign by looking to habitual obedience. Now the position seems to be that the sovereign consists of the House of Lords, the Queen and all the electors.

Immediately after the passage just quoted, Austin appears to do a complete turn around. He says that the mistaken view that the House of Commons has an absolute power and not a delegated power from the electoral body, probably arises, first, because the trust or power vested in the House of Commons is 'tacit rather than express', and secondly, that the trust or power is 'enforced by moral sanctions'. The turn around is that if the body of electors cannot really command, and therefore enforce the trust or power by *legal* sanctions, then in Austin's terms they cannot 'speaking accurately' be called the sovereign. He is involved in a contradiction. He wants to say that sovereignty ultimately rests with the electors but he seems unconsciously to know that this would involve saying that the body of electors issues commands to themselves. That is why he backpedals and says the body of electors enforce the trust of power vested in the Commons, by *moral* sanction alone.

Austin will always get into these sorts of difficulties, as Hart has famously pointed out, if he does not use the idea of a rule in his definition of sovereignty. It is very difficult to describe the United Kingdom Crown-in-Parliament in terms of a 'body of persons'. Does the United Kingdom sovereign change every time a Member of Parliament dies, and every time a new MP or member of the House of Lords is either elected or appointed? Austin's theory cannot even explain why we can use the term 'Crown-in-Parliament' to refer to the changing mass of people that make legislation under the name of 'Crown-in-Parliament' because 'Crown-in-Parliament' just does not refer to anything concrete that we can point to. It is an institution defined in terms of complex constitutional rules and is as independent of persons as a company is an institution independent of persons.

It is the fact that sovereigns and companies are not composed solely of persons that means they cannot physically die, and it is only by virtue of these *non-physical*

attributes of sovereigns and companies that we can say they 'continue' despite their changing membership. So, again it is because Austin's theory lacks the notion of a *rule* that it fails.

You might note the difficulties Austin gets into with the idea of continuity of sovereignty which flows from this point. Remember that his sovereign is a person or a body of persons. He affirms that this person or body of persons must be determinate and certain:

> 'If the sovereign one or number were not determinate or certain, it could not command expressly or tacitly, and could not be an object of obedience to the subject members of the community.'

It seems fairly clear, then, that he does not have in mind any 'corporate' idea of sovereignty. But then, on the following page, he says:

> 'The persons who take the sovereignty in the way of succession, must take or acquire by a given generic mode ... Or (changing the expression) they must take by reason of their answering to a given generic description ...'

Here he seems to be suggesting that sovereignty continues by virtue not of the subjects' or citizens' acquiring a new habit of obedience, but by virtue of their having a continuous habit of obedience to some 'generic description'. That is, Austin is hinting here at the idea of a corporate idea of sovereignty, the idea that sovereigns succeed each other by virtue of coming within some rule-defined description. This hints of persons being *entitled* to succeed to the position of sovereign by the very fact, not that they are habitually obeyed, but that they are to be described in a particular way. Later on, Austin actually uses the word 'title'. In discussing the Roman Empire (Austin's lectures are full of interesting observations, incidentally), he says that sometimes after the demise of an emperor, there would be a period of dissolution of central government, because there was no person to succeed the emperor by, in his term, 'generic title':

> 'Since no one could claim to succeed by a given generic title ... a contest for the prostrate sovereignty almost inevitably arose.'

Of course, Austin could claim that 'title' here was that as defined by constitutional law and therefore that of mere 'positive morality' and that positive morality determines who should succeed. But he is not clear on the matter and there are problems buried here which he does not bring out. After all, a hallmark of his theory and, indeed, a hallmark of the command theory, is the identification of the sovereign through the idea of brute power. There are many difficulties with the idea of identification of the sovereign in terms of entitlement by virtue of positive morality. (See Chapter 5.)

How does Austin deal with the idea of the indivisibility of sovereignty? There are great difficulties with applying the idea both to the United States and to the United Kingdom. For the US he says that all the states' governments, together with the common federal government are 'jointly sovereign' in each of the states and in the

larger society of which the states form a part. He says this is so because if the federal government were the sovereign then there would not be a society composed of several *united* societies; and if any one of the united societies was sovereign, then it would not be a member of a *united* society. His conclusion for the US is that the federal government, consisting of the President, and the Congress, is a delegated legislator of the governments of the individual states. So he says:

> 'The sovereignty of each of the states, and also of the larger state arising from the federal union, resides in the state's governments *as forming one aggregate body*.'

This alone has the appearance of fiction, but he really gets into deep water in what he says next:

> '... meaning by a state's government, not its ordinary legislature, but the body of its citizens which appoints its ordinary legislature, and which the union apart, is *properly* sovereign therein.'

This use of 'properly' in the last sentence echoes his phrase 'speaking accurately', when he was talking about sovereignty residing in the body of electors in *England*.

That is, if it is 'proper and accurate' to describe the body of electors or the body of citizens as sovereign, then it must also, in consistency, be 'proper and accurate' to describe the body of electors or body of citizens as issuing commands, ultimately to themselves, and to describe them as habitually obeying themselves.

8.4 Evaluation of the command theory

Law as a command

The undeniable contribution of the command theory is the view that law is a result not just of a vague collective undertaking, but must be ascribed to a will. But the recognition of the normative and rule-creating aspects of law does not justify the requirement of a determinable author.

Bentham's appreciation that human laws are imperatives that are interwoven and broken into shares is a more realistic format than that of Austin. The complexities of deontic logic reveal that laws may be permissive as well as commanding.

The underlying view that law is based upon a will is less easy to justify. Certainly, Austin's sovereign is a real person or body. However, the legislative will is not something that is that easily understood. One may only determine what the law is, by reference to the interpretation that we put on expressions of will. These need not coincide with what the author actually intended us to understand. Thus, while the Magna Carta is regarded as the original authority for habeas corpus, there is palpable historical evidence that this was only intended to accord rights to a privileged feudal caste. On the other hand, the idea of a person's will being simply a mental state, a psychological event, is simple-minded, and we do not have to impute that idea of a 'will' to the sovereign.

Both Bentham and Austin fail, Austin more seriously than Bentham, to go far enough in their consideration of law as rules. A rule stands independently of the identity of its particular author, providing that it is in the acknowledged form that a legal system prescribes. Furthermore, at least Austin, if not Bentham as well, has no room to accommodate principles, which clearly are a necessary aspect of the legal enterprise (see Chapter 10, on Dworkin's criticism of positivism).

The notion of command also makes it logically difficult for rules to bind the sovereign. A man may lay down a rule by which he lives. Although Bentham accepts that a sovereign may bind himself, he still relies on the backing of a sanction or reward. However, the duty to obey a rule may not only be self-imposed, but that duty or responsibility may personally arise even though it cannot be properly framed or defined in an imperative.

Bentham supposes that the whole of the political community is disposed to obey it. Austin sees the will of the sovereign as a real feature. Both beg the question of how such a will may be attributable to mandates issued under it, which the sovereign cannot know. This emphasises that the concept of will presupposes knowledge on the part of a person doing the willing. Hence Raz finds it hard to understand how various responsibilities within a legal system are actually interlinked in the context of imperative theories.

A further problem must be noted in the limitation of which wills count as law. Austin requires that a law be an aggregate of commands formed to command the performance or forbearance of acts. This idea of generality, although convenient for a legal system, is not necessary for laws, since they may address a specific person and a specific act (for example, the Abdication Act). Moreover, the demarcation of laws on the basis of superior political wills, in Austin, limits the application of the term 'law'. This works in some respects, but we do not see the edicts of Conservative Central Office to the various constitutuency associations as law. Bentham does not bother with demarcations, which has the advantage that his theory is not fettered by law-school conventions, but leads also to a lack of distinction between mandates with legal effect and mandates that are coincidental to the law.

Sovereignty

The fact that Austin requires an indivisible, determinate, unfettered sovereign that is continuous through time seems to be more a matter of convenience for the superimposition of a utilitarian system than fact. The criticisms of Austin are so numerous on this account that the student must be referred to another text, of which there are many, for a detailed evaluation. Suffice it to say that the United States has a divided, perhaps indeterminate sovereign that is bound by a constitution, where sovereignty has been succeeded from and extended over its history. The Austinian concept of sovereignty would certainly be unable clearly to account for the development and effect of the European community.

Both Bentham and Austin rely entirely on motives external to the subject of laws

in order that laws may be enforced. Bentham does not limit himself to sanctions alone and it is evident in Austin's *Lectures* that he does accept that some laws do not in themselves require the direct backing of coercion. Both are agreed that, ultimately, all complete laws require some kind of external motivation.

However, education and persuasive argument, or indeed indoctrinated sympathy for a law, have similar, if not equal, effects. Milgram has sought to prove in some notorious experiments that people will go to extraordinary lengths to obey what they conceive to be authority commands. (See his *Obedience to Authority*.) In the complex modern society, the assumption that people in authority should be obeyed and indeed usually have good reasons for being obeyed, is a necessary one. We may well be employed in a complex undertaking, such as a production process, where the relevance of our actions as an employee is obscure. However, we perform to our function without necessarily having the fear of sanction.

The obscurity in Bentham's account of illegality and the insistence of coercion may partially be rescued if we substitute the question 'what is law?' with 'what is illegal behaviour?', as Foley suggests. Illegal behaviour might be termed behaviour that we are disposed to punish. This would lead to an easier recognition of rules, while giving a real understanding of what the law is seeking to do, which the rules alone do not reveal.

When Austin says, as he occasionally does, that the force of the power to enter into a contract is the threat of the nullity of the contract as a sanction, this is not only logically inadequate, but contradicts the whole purpose of encouraging people to engage in formal contractual relations.

Bentham may be criticised, too, for saying that there may be an exercise of legal powers by someone not explicitly authorised. That a law may be adopted by a sovereign without his knowing of it is only sustainable if that will is fictional. In such a case attribution of a law to a sovereign is merely an artificiality designed to add consistency to legal theory (Hart's 'theory on the back of definition'). Nevertheless, as it has been pointed out, law is often attributed with a will of its own in the courts and in common parlance. In this respect law becomes a system of independent imperatives, as Olivecrona terms them, which do not need to be ascribable to any mental state type will, fictional or not.

Anyone who listens to the outbursts of the Bruges group or notes the United Nations' reluctance to intervene in national issues will be well aware that the question of sovereignty has not left the legal or political arena. Rees and others have concerned themselves with the question of what sovereignty is and what the authority of sovereign laws might be.

In a very influential article, Rees identifies six possible ways in which to envisage sovereignty which are helpful in the context of the command theory.

1. Sovereignty in its *legal sense* is not concerned with the influence or power of the sovereign, other than in its legal sense. In a *political sense*, on the other hand, a body may be sovereign by conquest, resulting in the eradication of the previous

sovereign. This aspect of political sovereignty is not the concern of the lawyer. Instead the lawyer is concerned to determine what the ultimate authority of the law is, rather than what power lies behind the ultimate authority of the law.

2. Early concepts of sovereignty, as well as the idealist concept of sovereignty, determine that the sovereign had supreme legal authority only insofar as it also had moral authority. This is sovereignty in its *moral sense* in that the requirement of sovereign authority can only be satisfied by moral authority.
3. A sovereign may instead be the person or body that holds the monopoly of coercive power in a state. The sovereign is the person who may guarantee or enforce any law, irrespective of whether it be made by the sovereign or some other body. Thus, in England the sovereign power would be that of the Crown in the form of the courts, police and military, among others. Rees terms this *sovereignty in the institutionally coercive sense.*
4. In strict contrast there may be envisaged the sovereignty of the majority or all of the people in the society, which could be viewed as the *sovereignty of social coercion.* Such a concept of sovereignty is obviously of limited application and must be viewed in terms that pre-date government. Such a sovereignty of collective coercion would be applicable to a tribal or primitive society where law is in the form of custom and is enforced communally. Alternatively, if sovereign power is based on a social contract theory, such a view of sovereignty may be applicable.
5. It seems clear that in a given society more than one of these criteria may apply, so that logically another definition of sovereignty is the body with the *strongest political influence.* Such a view creates a political rather than legal judgment.
6. A final category of sovereignty is that which differentiates between a body that has authority purely on the basis of force and the permanence of a sovereign that rules by authority. Sovereignty in the *permanent sense* differentiates between the ruler who is constantly mobilised in a quasi-military sense, and the sovereign who has stamped his authority on a society and can rule by law as opposed to force.

Rees employs these differing concepts of sovereign power in order to seek answers to four important questions. The first of these needs to be answered in the affirmative if the imperative theories considered here are to be considered as logically sustainable. The imperative theory is built on the assumption that law is the will of the sovereign. If it can be shown that there need be no sovereign in a state, then this definition is logically defective. Therefore the first question must be is sovereignty a necessary feature of a state? Rees analyses this question in some considerable depth, but for the present purposes a more simple analysis must suffice.

1. A sovereign in the legal sense is causally necessary in any given state, though not necessary by definition. In order to govern properly, laws are desirable, though perhaps not logically necessary. In order for laws to be of any effect there must be some ultimate authority: in the absence of such a final legal authority no legal issue could ever be certainly decided, and government would be impossible.

2. Equally, it is causally necessary that there should exist a sovereign in the coercive sense, though not logically necessary. Laws can only be enforced either by a supreme coercive power or by social solidarity which punishes transgressions. It would be unreasonable to assume that law can exist without social or institutional coercion.
3. It is not logically or causally necessary that (as in the fifth definition) there should be one body that can be said to be more supreme than any other body that could be described as sovereign. For example, the electorate is sovereign in the sense of its social coercion, Parliament is sovereign in the legal sense and the executive is sovereign in an ultimate coercive sense. They are, in England, mutually dependent and it would be impossible to ascribe to one more supreme power than the others, since they hold their power by virtue of the others.

Therefore, according to Rees, while it is not logically necessary for a state to have a sovereign, it seems causally necessary for a legal system to work well. What makes sovereignty of logical necessity is when there is a requirement to define ultimate legal authority. Without ultimate legal authority, there can be no ultimate determination of legal decisions, nor can rules be married to the coercive force that is necessary to enforce law. Rees concludes that the authority of law lies in the danger of sanction by a supreme coercive authority. However, if law is to be regarded as more than simply conventions of the exercise of power, then law must have some logical independence from power. Rules must in themselves be valid. Such a question is a question of validity.

Lawyers are ever concerned to differentiate law from other orders, such as that of the robber gang. Suppose a powerful gangster were to take over an island. Whatever the gangster says cannot be contradicted and there are standing rules, requiring the sort of things that a gangster might require. He is therefore the supreme coercive authority. Is he making law? The answer surely must be contingent on whether the rules that he makes have some features that differentiate them from any other mandate that he might give. It would surely be a perversion of the word law if it could apply equally to 'bring me another beer!' and 'only kill those people whom I say you can!' Both might be mandates of a gangster, but only the latter accords more naturally with the way *we ordinarily think about the law.*

Austin seems to escape from this problem by limiting the legal mandates of a sovereign to those that he makes by virtue of being a political superior. However, this is a mere disguise for the fact that Austin is seeking to limit the term law to things that have a specific purpose, termed as political, as opposed to domestic. It is this element that demarcates law from the dictates of a robber leader. However, as an exclusionary criterion, difficulties arise because of the ambiguity of the concept of political. The sovereign in Austin's theory provides the power and in the sense that he is the political superior, provides the exclusionary criterion. To this extent it is logically necessary to Austin's concept of law.

9

Continental Legal Positivism: Kelsen's Theory

9.1 The background to Kelsen

The 'pure' theory of law is more or less exclusively associated with the Austrian philosopher Hans Kelsen. Adherents of this theory are numerous, including Ebenstein, Merkl and, formerly, Radbruch, However, the strength of Kelsen's innovative approach has meant that little has been added by others and consequently most discussion and criticism has been aimed at Kelsen himself.

Misconceptions often arise from Kelsen's use of Kantian language and methodology. This should not concern the student too much. Kelsen's theory is marked by several propositions, some appropriate to Kant, but all appropriate to Hume:

1. There is a fundamental gap between 'is', which denotes *factual* statements, and 'ought', which concerns *normative* statements. *An understanding of the importance which Kelsen attached to this distinction is the clue to understanding the whole of Kelsen's work, in particular, the basic norm, and its misapplication in the early revolution cases.*
2. As a consequence the validity of normative statements can only derive from other normative statements.
3. Normative statements are made by human beings and thus are an aspect of subjective human will.
4. The only law is positive law, in other words that which is the product of the will of people. There are no natural laws therefore.
5. Objective facts may have an effect on each other in terms of causality. There is a law of gravity that causes apples to fall. Kelsen asserts there is an equivalent but

different relationship between norms. Thus, if X circumstance occurs, then you ought to do Y is a grammatical expression of what he calls 'imputation'.

6. The object of legal science is to understand the way in which law works, irrespective of content. The attempt is to explain law in terms of the laws of imputation and, as such, jurisprudence should be a *normative science*, as contrasted with the descriptive sciences that are used to explain facts, such as the disciplines of chemistry, biology and so on.

9.2 The Pure Theory

According to Kelsen:

> 'The Pure Theory of law is a theory of positive law. As a theory it is exclusively concerned with the accurate definition of its subject-matter. It endeavours to answer the question what is law? but not the question what ought it to be? It is a science ...'

It is crucial not to get too hung up on the idea that the theory is supposed to be 'pure'. It is mostly the same requirement for his theory as for any other theory of positivism, namely, that moral and other factors are irrelevant *as far as determining legal validity goes*. The objective of the theory is not to describe the way in which legal systems work, or what institutions normally are to be associated with law. Kelsen is not concerned with what considerations a judge takes into account when he decides a case, in determining questions of legal validity. He is solely concerned with legally valid reasons for action. Kelsen seeks to reconstruct rationally the way in which legal authority is transmitted in legal systems. In order to achieve an understanding of the way in which law itself works, Kelsen seeks to escape from any fallacies and judgments that might obscure the truth.

Kelsen's main works on legal theory are *The Pure Theory of Law* which was first published in German in 1934, and was published in English in 1960, and *General Theory of Law and State*, published in 1945. Kelsen's aim in producing what he called his 'pure' theory was to rid law of any kind of ideology. He had a motive for producing his theory of positivism, which was to distinguish questions of what the law is from ideological questions concerning what the law ought to be. This is clear from Kelsen's preface to his *General Theory*. Note that he is writing just after the experience of the Nazis.

> 'In social and especially in legal science, there is still no influence to counteract the overwhelming interest that those residing in power have in a theory pleasing to their wishes, that is, in a political ideology ...
>
> [I publish this] with the belief that in the Anglo-American word, where freedom of science continues to be respected and where political power is better stabilized than elsewhere, ideas are in greater esteem than power; and also with the hope that even on the European continent, after its liberation from political tyranny, the younger generation will be won over to *the ideal of an independent science of law*; for the fruits of such a science can never be lost.'

It is important for understanding Kelsen to draw the following two distinctions. First, separate the 'is' and the 'ought' of law. Since Kelsen is a positivist, the 'pure' theory of law is to be *descriptive* of law. But, second, it is important to note that the 'is' of law consists of the description of 'oughts', although not moral oughts. So when we describe the law we are describing a set of 'ought' propositions.

Kelsen is very careful about explaining this. He says the great mistake in Austin's theory was that Austin had tried to derive legal 'oughts' from 'is's', namely, the evidence of discovering the person, or body of persons, who was habitually obeyed and who habitually obeyed no one. The sovereign was identified as a matter of fact and the positive laws – 'oughts' – were supposed to exist simply by virtue of this. This was Austin's account of 'legal duty'. Kelsen is here saying much the same as Hart when Hart says that being obliged to do something is not the same as being under an obligation to do it.

Students should note that Kelsen says that the description of law, even although it is a set of ought-propositions, is something different from saying what the law *ought* to be, that is, is something different from *prescribing* the content of law. Most important, for his theory, saying that a description of the law is a description of ought-propositions is certainly not to say what the *moral* content of the law ought to be. Thus, Kelsen famously said:

> 'Legal norms may have any kind of content. There is *no* kind of human behaviour that, because of its nature, could not be made into a legal duty corresponding to a legal right.'

Before going on to describe what Kelsen means by a legal norm, you should note that he describes all ought-propositions as *norms*. This reference to the action-directing, or 'normative', character of rules governing behaviour is an advance on Austin's idea of rule-governed behaviour as acting according to habit. In a roundabout way, Kelsen has introduced a superior idea, that of rule-following, to Austin's (and Bentham's) idea of habitual obedience. Two points are important for understanding Kelsen here. First, for Kelsen, a norm is in essence *action*-directing, and should not by thought of only as imposing a duty, but also as including the idea of a *permission* or *power*. Secondly, Kelsen distinguishes between legal, moral and other norms. Moral norms are merely, in his view, propositions describing our subjective preferences for behaviour and he is critical of natural lawyers who think that morality is something objective. Kelsen in fact thinks that all moral judgments are essentially irrational because they are no more than expressions of our feelings or intuitions. Since all moral judgments are relative to the human being who makes them, he says that he is a moral relativist.

The legal norm

We should now look at the character of the legal norm and it is necessary first to look at how Kelsen views the legal phenomena that he sets out to describe. His views are clearly laid out in the first chapter of *General Theory*. His first sentence

states: 'Law is an order of human behaviour', and, he says, that it 'designates a specific technique of social organisation'. Kelsen has views about the form this 'specific technique of social organization' takes. It is that the technique is essentially one of coercion, by the systematic use of sanctions, and is applied by 'agents' or officials authorised by the legal order to apply sanctions. He says that these two conditions mark out what is unique about law and is what is common to all uses of the word 'law', and 'enables', as he says, 'the word "law" to appear as the expression of a concept with a socially highly significant meaning'.

Kelsen develops the concept that law is essentially the idea of sanctions and officials. As a result he gives us a very specific description of the *legal* norm. This is that a legal norm is an 'ought-proposition' directed at the officials to apply a sanction in certain circumstances.

The key to the whole of Kelsen's theory is to understand that law consists of directions to officials to apply sanctions. An immediate objection to Kelsen's characterisation of a legal norm would be that we do not ordinarily think of laws as directed to the officials of a system. For example, we think of the criminal law as imposing duties upon *citizens* to do, or forbear from doing, certain kinds of things. Or we think of laws, say, governing the creation of wills, as conferring powers upon *citizens* to make wills. Kelsen's answer to this is simply that he is bringing to light something in the legal phenomena of which we are not normally aware, namely, that law is essentially a form of social control that proceeds by way of either imposing duties or conferring powers upon officials to apply sanctions.

The delict

In fact, a citizen, strictly speaking, according to Kelsen, does not have a norm directed at him at all. If a citizen does something which gives rise to the circumstances under which an official ought (or may) apply a sanction, then, according to Kelsen, that citizen has not done anything contrary to that norm, just because it is directed at the officials. The citizen has instead committed what Kelsen calls, borrowing from the Roman law, a 'delict'. Kelsen say that if we take a law such as 'one shall not steal' then everything contained in the meaning of that law is contained in the meaning of 'if somebody steals, he shall be punished'. It is thus not necessary to refer to the first norm 'one shall not steal' at all. However, Kelsen nevertheless says that it greatly facilitates matters if we allow ourselves to assume the existence of the first norm which, he emphasises, is not a genuine legal norm. He says that he prefers to express the first norm rather as the secondary norm, and the second norm, the genuine *legal* norm, as the primary norm. Thus, he says, only officials can genuinely break the law, because when we are speaking of the citizen we are only talking of his committing a delict, which is fulfilling the condition for the application of a sanction by an official. So, in one of the most famous statements of jurisprudence in the twentieth century, he says:

> 'Law is the primary norm, which stipulates the sanction, and this norm is not contradicted by the delict of the subject, which, on the contrary, is the specific condition of the sanction.'

If this does not look like law to you, be careful about criticising Kelsen here. He is, he claims, *describing* the law as it really is, in the same way as a scientist describes, or attempts to describe, the *reality* of matter. It would be useless to go about taking issue with a scientific theory that said that all matter was alike in consisting chiefly of certain basic substances by saying that it is not immediately apparent to us that all matter is alike. Kelsen is trying to find a uniform deep structure that underlies all law, and his claim is that law is a set of norms that take the form of directions to officials to apply sanctions in certain circumstances.

Rules of law in the 'descriptive' sense

It is for this reason he distinguishes between what he calls 'rules of law in the descriptive sense' such as, for example, the various sections of the Law of Property Act 1925, or the various rules that are obtained from case law. But these, he says, only partially describe what are the real laws, the legal norms which are ought-propositions directed at officials. In fact, he says that it is the task of 'legal science' to transcribe all the material produced by legal authorities into the form of statements describing what the legal norms are. In other words, a proper description of the law requires everything that we know of as law to be converted into statements of the form: 'if a person does X, then an official Y ought to apply a sanction Z'. Even then this is not the norm itself. Rather, it is a form of words that *describes* the norm. A prisoner, interpreting the orders of the commander of a prison camp, for example, when relaying the orders to his fellow inmates, only describes the norm that issues from the commander. This, of course, is the simplest way of describing the task of the legal scientist, because X, Y and Z will often require further complicated descriptions.

The idea of legal validity

Kelsen does not think that law is just a simple set of legal norms. He has a specific, and well-known, theory of legal validity. Students will find it useful to distinguish, not just for Kelsen but for jurisprudential thinking generally, the ways in which we use the terms 'legality' and 'validity'. Although we often use the terms together, there is a useful distinction. When we use the idea of 'lawfulness' or 'legality' we are referring to something as having the general character of law, for example, that it is a direction to officials, or that it imposes sanctions, or takes the form of a rule, and so on. But when we use the term 'validity' in relation to legal rules we are being more specific; in fact, we are most often being *professional*, because we are referring to the fact that the rule in question has come within the criteria of validity of a particular legal system.

Kelsen claims that he does not distinguish between the existence of norms and their validity:

> 'By "validity" we mean the specific existence of norms. To say that a norm is valid, is to say that we assume its existence.'

Thus a rule's having the character of law and its being *valid* are one and the same thing. He says at one point:

> 'The usual saying that an "unconstitutional statute" is invalid (void) is a meaningless statement, since an invalid statute is no statute at all. A non-valid norm is a non-existing norm, is legally a nonentity.'

This view of Kelsen is based on his theory that only norms can validate other norms. This is because as he says norms 'exist' in a different category of thought from that of propositions about the natural world.

How do norms validate other norms? What Kelsen has in mind is a 'root-of-title' theory of validity whereby one norm is validated by a more general norm which is validated by an even more general norm. Thus the validity of a norm is established by locating the norm within a hierarchy of norms. The ordinary way to think of this is to test, say, the legal validity of some official action such as imposing a fine. A person is fined a sum of money. We look into the decision and discover that he has been fined in accordance with a local bylaw that (say) requires him to park only in certain places. We examine the bylaw, but find that it has been made in accordance with a local government Act. We examine the local government Act, but find that it has been passed in accordance with the procedures that make it an Act of Crown-in-Parliament.

In each stage of this process, in searching for the root of title, we are looking for a more general norm that encompasses the more specific one. There is, therefore, a relationship of logical entailment between the more general norms and the more specific norms. All Acts of Parliament are valid; the Wills Act 1837 is an Act of Parliament; therefore, the Wills Act 1837 is valid. All instruments effected in accordance with the Wills Act 1837 are valid. Therefore, this instrument effected in accordance with the Wills Act 1837 is valid, and so on.

The basic norm

Going up the chain of validity, or hierarchy, of law in order to find its root of title, we must come to a finishing point, says Kelsen. If we were to continue the process, then we would never be able to establish the validity of any norm, because we would have to go to infinity. But, since we *can in fact* establish the validity of legal norms, then we must be able to get back to some ultimate norm that confers validity upon all other norms. This *norm*, for it *must* be a norm of course (because only norms can confer validity on norms), Kelsen calls the *Grundnorm*, or the 'basic norm'. How do we come across it in practice? We get to it, says Kelsen, when we cannot, in

principle, trace our chain of validity back any further. Thus we find in tracing the root of title of the bylaw that we get back to the point beyond which we cannot go, namely, to the point where we find that the bylaw was ultimately validated by Crown-in-Parliament. When we ask ourselves what the reason is for the validity of the enactments of Crown-in-Parliament, the answer is that this is *just what we assume*.

Kelsen says that there is one such *Grundnorm* for every legal system. We might, in fact, for some legal orders have to go back to a constitution and find that it has been made in accordance with a previous constitution, and even there we might perhaps find *that* constitution has been made in accordance with a previous constitution. But ultimately, he says, we will get back to a point beyond which we cannot go:

> 'Ultimately we reach some constitution that is the first historically and that was laid down by an individual usurper or by some kind of assembly. The validity of this first constitution is the last presupposition, the final postulate, upon which the validity of all the norms of our legal order depends. It is postulated that one ought to behave as the individual, or the individuals, who laid down the first constitution have ordained.'

Now, students should note the following general principle as crucial to a proper understanding of Kelsen's theory of the basic norm. This general principle follows from the fact that only *norms* can validate other *norms*:

> 'The basic norm is that (coercive) acts ought to be done (by officials) in accordance with the historically first constitution and is not the *fact* of the first constitution.'

Thus, we should never say that the constitution itself is the basic norm, just because the constitution is a fact, not a norm. Rather, the basic norm is: 'acts ought to do in accordance with the constitution'.

To summarise so far: Kelsen's theory of validity is a hierarchical, or root-of-title type theory. Laws receive their validity from higher, more general laws, until a point is reached at which we stop. Here we come across the basic norm which imparts validity to the whole legal order. Now you will remember that the particular form of the *legal* norm, in order to capture Kelsen's perception of the legal phenomena, consists essentially of *first*, the systematic application of sanctions and, *second*, of officialdom, so that laws are in essence directions to officials to apply sanctions in certain circumstances. Thus, the hierarchy of norms should be thought of as a *hierarchy* of directions to officials to apply sanctions.

These sanctions range from, as Kelsen says, the 'concretised sanction' which take the form of a particular direction to a particular person to apply a particular sanction, such as a judge telling a bailiff to remove goods after a warrant of execution has been issued, through to the most general form, in the form of a basic norm, which says: 'coercive acts ought to be applied in accordance with the historically first constitution'.

Kelsen says that in legal systems where there is no written constitution, the constitution arises through custom. Therefore, the basic norm of such legal systems takes the following form:

'Coercive acts ought to be applied in accordance with the customary ways of making law in that particular country.'

Since the United Kingdom has no written constitution, we have to suppose that the basic norm of the United Kingdom is one of these. Now, one of the ultimate constitutional norms authorised or validated by *that* basic norm is:

'Coercive acts ought to be applied in accordance with what Crown in Parliament enacts.'

Another 'ultimate' constitutional norm would be:

'Coercive acts ought to be applied in accordance with what the common law courts decide.'

And so on. Students should read, for further elaboration, Harris, 'When and Why Does the *Grundnorm* Change?' [1971] *Cambridge Law Journal.*

The identification of the basic norm is the most difficult and obscure part of Kelsen's work. For this reason, this textbook will concentrate on getting that concept as clear as possible. Five important things must be noted about the basic norm:

1. If norms can only get their validity from other norms, how is it that the basic norm gets its validity? Kelsen says that it is simply assumed to be valid. In order to be able to talk about validity at all, he says, we must assume the system to be valid by reference to such a norm, even though we might not consciously think of it. The basic norm is not created by any legal procedure such as the enactment of a statute, so it is different from all other norms in that respect. It has, instead, the function of making sense of what we mean when we talk of legal acts as being valid. And since its function is to make clear *what we mean* when we talk of valid laws, it does not have the political, or ethical, or professional function of telling us *what* legal norms are valid or not. Since its function is only to make clear what we mean it has, to use a philosophical term, only a cognitive or an epistemological function. Thus, Kelsen says:

   '[The basic norm] is not – as a positive legal norm is – valid because it is created in a certain way by a legal act, but ... is valid because it is presupposed to be valid because without this presupposition no human act could be interpreted as a legal ... act.'

   and in *The Pure Theory* he says:

   'Since the basic norm ... is only the transcendental-logical condition of this normative interpretation, it does not perform an ethical-political but an epistemological function.'

2. A second question that has to be asked about the basic norm is: *who* assumes it? Kelsen sometimes says that it is anybody at all who talks of certain laws being valid, because it is the basic norm that gives *meaning* to such statements. Thus he says:

   'The basic norm is only the necessary presupposition of any positivistic interpretation of the legal material.'

   This statement follows from the quotations that I mentioned earlier about the basic norm not itself being a positive law, but a 'transcendental-logical condition'.

But at times Kelsen talks of it being assumed by 'jurists':

> 'By formulating the basic norm ... we merely make explicit what all jurists, usually unconsciously, assume when they consider positive law as a system of valid norms and not only as a complex of facts.'

At other times, he talks of it being assumed by what he calls the 'legal scientist'. And it is clear that it is the task of 'legal scientists' to describe the law. But two things are claimed: the first is that whoever interprets the laws as *valid*, and therefore, according to Kelsen, either consciously or unconsciously assumes a basic norm importing validity to all the laws, does not thereby accept that the laws are *morally valid*; and secondly, it is not *necessary* for anyone to assume the validity of a legal order: this is stated very clearly by Kelsen. (See Kelsen's 'Professor Stone and the Pure Theory of Law' (1965) 17 *Stanford Law Review*: 'An essential part of my theory of the basic norm is that it is not necessary to presuppose the basic norm.')

3. A third point about the basic norm is that it is a necessary condition of the presupposition or assumption of the basic norm that the system of norms to which it refers, and thereby validates, is *effective* over a particular territory or, as Kelsen says, is 'efficacious'.

Students should be very clear, especially when interpreting the so-called 'revolution cases', that this requirement is a *necessary* condition only and not a *sufficient* one. Thus Kelsen says:

> 'The efficacy of the entire legal order is a necessary condition for the validity of every single norm of the order, a *conditio sine qua non*, but not a *conditio per quam*. The efficacy of the total legal order is a condition, not a reason for the validity of its constituent norms.'

Two points should be noted about this:

a) The fact that there is an effective set of norms in a particular society which are in the form of directions to officials to apply sanctions in certain circumstances does not mean that there is a set of valid laws in that society (and therefore it does not mean, according to Kelsen, that there is a legal system operating in that territory). This follows, obviously, from his basic distinction between the 'is' and the 'ought'. That is, we cannot say that there are valid legal norms or a valid legal order *because of the facts of effectiveness* (or, putting it another way, the facts of cause/effect relationships between the application of sanctions by officials and non-delictual behaviour by the citizens). In other words, facts of effectiveness do not mean validity. *That* requires a *presupposition* that the norms of the system are valid.

b) But, secondly, since effectiveness is a *necessary* condition of the validity of a legal order, it means that we can *only* assume effective orders of norms as valid and it follows from this that as soon as a legal system loses its efficacy, then however much we want to assume that it is valid, we cannot.

What *practical* import does all this have? Let us say that I, personally, do

not think of the laws of the Soviet Union as valid laws at all. This, it seems reasonably clear in Kelsen, I am able to do. I just do not presuppose any basic norm authorising the clearly effective sanction-applying acts of the Soviet officials. Now I might refuse to talk of the validity of the laws of the Soviet Union because I consider that the Communist revolution was illegitimate because it was not in accordance with the laws existing in Russia before 1917. If I take this view, says Kelsen, it is not open to me to consider the pre-1917 Russian laws as valid. This is simply because these laws are no longer effective. Thus I could not make a *legal* claim in the Soviet Union now to some property or title that would have been vested in me were the pre-1917 laws still valid. I am merely in the position of being able to say that, as far as I am concerned, there is no law in the Soviet Union; although, of course, I might say that *other* people assume a basic norm authorising the present legal acts of the Soviet authorities.

This is not, of course, to say that a single legal norm loses its validity because it is no longer effective; that is, that people are no longer acting in accordance with it. It is that in order for a legal norm to lose its validity, the whole legal order to which it belongs must lose its effectiveness. That is why, according to Kelsen, we can say that the pre-1917 laws in Russia, or the Roman legal system, are no longer *valid* law; we can only talk about them *as if* they were valid.

Summing up, you cannot have validity without efficacy, but you can have efficacy without validity. And to put this point of interpretation of Kelsen, which is so important for the understanding of the way his theory applies (or does not apply) to the 'revolution cases' as follows:

> 'Effectiveness is *not* a sufficient condition for the validity of a legal order, but it is a necessary condition.'

4. A fourth point about the basic norm is that it is axiomatic in Kelsen's system that there is only one, unique, basic norm for each legal system, and it is this basic norm that gives the system its *unity*.

> 'That a norm belongs to a certain system of norms, to a certain normative order, can be tested only by ascertaining that it derives its validity from *the* basic norm constituting the order.'

5. The fifth and final point about the basic norm is that Kelsen claims that it ensures, in some unclear sense, that all the norms that it validates do not *contradict* each other, and he talks of the basic norm unifying and giving 'meaning' to a set of non-contradictory norms. Thus, for example, he says:

> '... the principle of non-contradiction must be posited in the idea of law, since without it the notion of legality would be destroyed. This presupposition alone, which is contained in the basic norm, allows legal cognition to supply a meaningful interpretation of the legal material.'

What happens, therefore, if two norms contradict each other? He explains this sort of case by saying that one of the norms *must* by invalid, and he states the

principle that the *later* law in time is valid, as the first one loses in validity. This happens, he says, according to the principle of 'derogation' or the principle of *lex posterior derogat priori*. And it is through this principle that he explains the operation of repealing laws. Thus he says:

> 'When the norms whose contents contradict one another are separated by the time of their origin ... the principle of *lex posterior derogat priori* applies. This principle, while it is not ordinarily stated as a positive rule of law, is taken for granted whenever a constitution provides for the possibility of legislative change.'

In the case where there are contradictory legal norms referred to in the same statute, so they are not separated in time, he says that it is a matter of interpretation of the statute only: so that either one of them is valid, or perhaps *neither* of them are.

9.3 A comparison of Kelsen and Austin

It is useful to compare Kelsen and Austin. In general, Kelsen's theory fares much better than Austin's simply because the notion of a norm is much more like that of a rule than that of a command. Because of this, we might consider whether the following two advances are made on the command theory. First, the idea of a norm, imposing duties or conferring powers upon officials, replaces Austin's crude idea of a *predictable* sanction with the psychological element of fear, which cannot distinguish the social phenomenon of *being obliged* with that of *being under an obligation* (see Chapter 5). Secondly, the source of validity of the norm rests, for Kelsen, not on the fact of its issuance from a habitually obeyed and determinate person or group of persons, but upon *another norm*.

9.4 An evaluation of Kelsen

Kelsen seeks to explain not the reason why a judge gave a certain verdict in a case, but the reason why, in legal terms, he has the authority to do so. In legal terms, the reason why a judge may decide a murder case is because the law requires him to do so, irrespective of whether he does or does not actually so act.

In view of Kelsen's claim that he is only engaged in the normative science of jurisprudence, it is remarkable that he is criticised by people on descriptive sociological terms. Perhaps the greatest example of this is documented in Hart's essay 'Kelsen Visited' in *Essays in Jurisprudence and Philosophy* (1983). Hart observed that Kelsen agreed with everything that Hart was saying, yet Hart could not understand Kelsen. We only need to look at the aims of their two theories to see how this arises. Hart claims to be engaged in descriptive sociology following an analytical and linguistic train of thought. Hart asserts that one understands the

meaning of legal statements only in the context of their use. This binds him to understanding legal theory in terms of the way people do behave and the reasons that they exhibit for their actions.

On the other hand, Kelsen is committed to understanding the conceptual meaning of legal reasons for action, divorced from the effect of those reasons on human behaviour. It is the difference between the computer programmer and the computer manufacturer. Both are essential to computer science, but are engaged in understanding how to make a computer work from different perspectives. One looks at the internal logic, presupposing that a machine exists that is capable of running the programme, the other looks at the problems of building the machine, supposing that someone has written a programme to run on it. However, that people are aware of the distinction allows them to work more effectively.

In the light of this proposition, it will be clear that those people who do not share Kelsen's philosophical point of view and who view legal norms as effects on behaviour as well as reasons for behaviour, are bound to get muddled over the theory. Hart points out that he fell off his chair when Kelsen vehemently reminded him norm is norm! However, as the rest of the essay illustrates, Hart still did not appreciate the distinction between a rule of law in the descriptive sense (the expression of a normative reason) and a rule of law in the descriptive sociological sense (the expression of a normative reason that has an effect).

Wilson described the criticisms of Kelsen as a log-jam. Ebenstein suggests that the Pure Theory has created a storm all over the world. That Kelsen is important is beyond dispute. However, there remains considerable dispute as to what Kelsen is actually saying. One of the problems with Kelsen is that he gradually refined and added to his theory so much so that criticism of Kelsen has been described as stamping on quicksilver. The issue has frequently been not, 'What is Kelsen saying that is wrong?' but 'What is Kelsen saying?'. As a result there is a considerable difference between criticising the Pure Theory and criticising what one thinks it is.

Sanctions

There is much criticism of Kelsen's view of law as resting on sanctions. Kelsen assumes that law is not a voluntary order. The purpose of law is to make all people behave in a way in which they do not already behave. However, it does not seek to achieve this by convincing people that the content of law is right and binding on the conscience, as moral systems do. Instead law indicates some objective reason why people should act, rather than a subjective reason, such as the dictates of conscience or an independent desire to act in accordance with the law. Kelsen is not saying that people do obey law for this reason, but that the reason law gives is the threat of coercion.

Thus, Lloyd is critical of Kelsen on the basis that he says that sanctions of some kind (or rewards) are a necessary feature of law. This seems wrong, since we do not consider that people obey law solely because of fear of sanctions. However, this is an

evaluation of the effect of law, not the reasons that the law gives. Take, for example, a statute that says simply 'Thou shalt not kill'. Why should I obey it, unless I agree with it? The logic of the legislator is that persons should obey, even if they do not agree with it, so that some motive for obedience needs to be present. This is the result of the fact that people cannot be assumed to do what they ought to, which is the basic assumption of all law.

The delict

There is, however, a stronger criticism of Kelsen's concept of a delict as being any act that is the condition of the visitation of coercion. The question of the imposition of duties on the officials creates problems. Does a judge have a legal duty to apply a sanction? This thorny question is postulated by Woozley, who suggests that if the answer is yes then there must be a legal norm, accompanied by a sanction, which itself presupposes an official with a legal duty, stemming from a sanction-based norm. This would be a vicious regress back to an ultimate permissive norm with no sanction attached.

The question can only be answered if we address Kelsen's view of legal duty. Kelsen is only concerned with legal norms and not with the factual existence of people's beliefs. The mistake is to view the existence of sanction as creating a norm. According to Kelsen, the imposition of a sanction is a specific category of action that the law requires.

For Kelsen, an obligation cannot stem from a fact, but simply from a norm. The sanction does not create legal obligation, but is the intended effect of a norm. Woozley is surely viewing norms as predictive, that is, likely to be acted on. He is talking about the reason why people are psychologically likely to act in a certain way. If we ask, 'Does the judge have a legal duty to apply a sanction?', the answer in a normative sense is yes, since there is in existence a legal norm saying that he should. The difference between Kelsen and Woozley is the difference between someone saying that you have a duty, and you believing that you have the duty that a person says you have.

A further criticism of the concept of delict is that it does not differentiate between administrative acts of coercion, such as a compulsory purchase order, and a punishment. Lloyd finds it difficult to understand, however, why things such as the compulsory evacuation of a building in the case of fire are not regarded by Kelsen as delicts.

International law

One problem that has perplexed critics of Kelsen is his assertion in later writings that all legal systems could be seen to be subsumed under one basic norm. Kelsen suggests that in the modern world jurists must perhaps look at national law as being validated by international law. Take the following example. An English legal theorist

may be asked, 'Why is the law in England valid?' His probable answer is that it is made in accordance with the procedural requirements of a valid constitution. He is here presupposing the basic norm of national law, that the authors of the constitution were vested with the authority from a fictive norm, to make a valid constitution.

If this is so he is presupposing that international law is valid. Why should he take the second course, to the exclusion of the first? Certainly, the modern jurist is aware of the validity of other legal systems. French law is valid in France and is recognised by the English legal system as being valid in France. How then can the English law recognise the validity of French law?

Kelsen offers two approaches. Firstly, we might see French law as being valid in France because the English legal system has recognised it as such. In this case the validity of French law is dependent on the validity of the English legal system as being empowered to recognise the validity of other legal systems. This is itself dependent on the validity of the English legal system generally, which stems from the basic norm. Thus, the English jurist would regard French law as being valid under the English basic norm.

Kelsen and morality

Hart is much perplexed by Kelsen's assertion that law and morality do not conflict as normative systems. Kelsen returns to the is/ought distinction to explain this. Norms and duties have a dual existence:

> I might say, 'You must stand up!' That is a norm, whether or not it is heard or acted upon. Conceptually and grammatically, it is not a factual, but a normative statement. Equally, a law that says, 'Kill your brother!' is conceptually a norm and if made pursuant to the normative requirements of the legal system it is legally valid. However, most moral codes would say, 'Do not kill your brother!' If we ask what the law requires us to do, it is clear; I must kill my brother. In deciding what to do I am aware that the law says I have a duty to kill my brother. I am aware that morality also says I have a duty not to. I can know and accommodate both norms as reasons for acting. All this is on the normative level.
>
> Whether I believe I have a duty to obey them is a question of my state of mind, a factual rather than normative issue. I can believe that I have a duty to the law and an opposite moral duty. A duty exists on two levels: as the meaning of a statement that says you have a duty, or alternatively as a belief in the mind of a person. The former is the content of a norm, the latter is the sociological/psychological effect of a norm. Kelsen is only concerned with the former kind. The law does not recognise that a moral duty is appropriate to deciding whether someone has a legal duty. For this reason Kelsen views the conflict between moral and legal duties as the coincidence of normative forces acting on the same person.

Other legal systems

Just as legal normative reasoning does not presuppose moral obligations, so an individual legal system does not take into account other foreign legal duties as a matter of legal consideration. For example, in the law of evidence, relevant foreign law is a question of fact, rather than law. What one ought to do legally in England is what English law says one should do.

The student will be aware that in England European law is treated as having primacy. This aspect relates to the change in the constitution that regards Europe as an authoritative law-making body and as such it is subsumed under the basic norm. It indicates, however, a tendency of jurists to see law as part of a worldwide phenomenon. Kelsen thus moves towards a juristic description of a legal world, where legal reasons are unified under the basic norm of international law. We will consider this further a little later.

Private and public law

Kelsen disputes that there is a natural legal distinction between private and public law obligations. He simply sees this as the law reflecting the political and social ideology of the distinction between law and state.

Public legal relationships tend to impose norms on citizens without the citizens having significant say in the content of those norms, for example, a tax demand. On the other hand private law obligations tend to have a mutuality, whereby both parties have a say in what their obligations will be. Kelsen is clearly thinking of contracts here.

Private and public law obligations consist of norm-creating acts. However, public law indicates an inequality in the status of parties, that is a reflection of the political order.

The basic norm

It is proposed only to deal in depth with one sophisticated criticism of Kelsen's idea of the basic norm, that of Raz. It is sophisticated because it focuses on the various obscurities surrounding the basic norm and makes suggestions. Students have already been warned against 'easy' criticisms of Kelsen. Use the following as a guide to how careful you must be.

Perhaps the idea of the basic norm is meant to explain for us, unlike the command theory, what it means to follow a rule. Remember that Kelsen thought that Austin's theory wrongly derived 'oughts' of law from the 'is's' of the facts of habitual obedience to a sovereign. His answer is to invent the concept of a norm and to say that, since norms only exist in the world of norms, they must therefore only be validated by norms. This, of course, led him to postulate a hierarchy of norms which led him, in turn, in order to avoid an infinite regression, to postulate a basic norm. Thus the whole idea of the *oughtness* or *normativity* of law is bound up in the idea of the basic norm.

Simply, does the basic norm help us to understand how following rules is more than a matter of habitual obedience? The major distinction between habitual behaviour and rule-governed behaviour is that, to borrow Hart's phrase, a rule has an 'internal aspect', that is, that some members of the group at least have a 'critical reflective attitude' (see Chapter 5) to the behaviour and this attitude justifies criticism of those who deviate from the standard pattern. That is, in addition to regularity, there has to be a *reason* justifying criticism of deviation.

How does the basic norm help us with this idea? Does it supply us with this idea of reasons for criticism for deviation from a pattern of behaviour? Well, the idea is contained in any case in the notion of a *norm*, so what help is the basic norm? Perhaps the basic norm is the *ultimate*, or somesuch, justification. Certainly, Kelsen is led towards this by the 'root-of-title' nature of his theory. That is, at the very end of any process of justifying criticism of someone's deviation from a norm, according to Kelsen, you can point to an ultimate or basic norm that says: 'You ought to do this (ie apply coercive acts) in accordance with ...'

There is a very useful (although very difficult) article by Raz on this point in his collected essays *The Authority of Law* (1979). Raz says that Kelsen's theory of the basic norm is a theory of 'justified' normativity, meaning that, according to it, any statement that any person makes about law must be in his own terms ultimately justified in accordance with an assumption made by him that, legally, this thing ought to be done.

However, Raz says that he sees no reason why we should accept this theory. Why cannot we say simply that laws are normative because they consist of rules and the existence of these rules does not have any *ultimate* justification but is merely identified by the fact that some people, say judges and lawyers, identify them as laws? Here we do not have to find an ultimate justification for the laws; rather, all we have to do in order to identify what the laws are is look to the 'social facts' of what judges and lawyers do to identify them. This bridges the gap between the 'is' and the 'ought' for Kelsen, so *he* could not accept it. On the other hand, what is so important about this gap?

Raz calls such a better theory one of 'social normativity' and he says that Hart has such a theory. What this means in simple terms is that we need not look beyond the social fact of acceptance of certain rules as defining what other rules are. Thus, in the United Kingdom, all we need do is look to see what judges and lawyers regard as constituting valid law-making. We find it is, for example, among other things, issuance of a rule in accordance with the procedures and rules that constitute Crown-in-Parliament. It is unnecessary to go further and, for example, say that we 'assume' that issuance from Crown-in-Parliament is a *valid* means of making law. We just simply say that *this* is valid law because Crown-in-Parliament has issued it and issuance by Crown-in-Parliament is one of the *tests* by which we tell whether certain laws are valid.

Hart makes the same point in *The Concept of Law* where he compares the basic norm with his rule of recognition. He says that no question of validity can arise

about his rule of recognition because it is the *test* of what is valid. All that is necessary to do is to point to the fact that it exists. According to his theory, that means to point to the factual existence of a social rule among the officials of a system which identifies what the valid rules of the system are. As Hart says:

> 'To express this simple fact by saying darkly that its validity is "assumed but cannot be demonstrated", is like saying that we assume, but can never demonstrate, that the standard metre bar in Paris which is the ultimate test of the correctness of all measurement of metres, is itself correct.'

10

Modern Positivism

10.1 The concept of law

A very important statement about how Hart intends going about things is contained in the Preface to his classic work *The Concept of Law* (1961). In his own words, he intends to produce 'an essay of descriptive sociology' of the law. He is going to pay attention to the language of the law although only to find out more about the social phenomenon itself. He places great importance on the idea of the distinction between the internal and external points of view. In *Utilities* (1993) an article on Hart, who died in 1992, by Raz gives an excellent nutshell view of Hart. It places special emphasis on Hart's views about definition and the purpose of the study of legal language.

Hart begins by identifying three questions of great importance, namely, what the difference is between law and coercion, what the relationship is between legal and moral obligation, and the question of what a rule is. He also gives a clue to his method: to set up a 'central case' of law by looking, linguistically, at the way we use law-related terms, and regard phenomena such as primitive and international law as 'fringe' or 'penumbral' to the central case (which turns out to be a modern municipal legal system'.

In Chapters 2, 3 and 4, Hart considers linguistically differences between orders and laws and it is in this chapter that it becomes clear that he is not attacking Austin's theory of law but a stronger variant purged of the inbuilt idea in Austin's (and Bentham's) theory of the command. That idea, says Hart, begs the question of the authority of law.

Taking the 'orders backed by threats' model 'writ large' he points out the difficulties with it in terms of its inability to distinguish duty-imposing from power-conferring rules, its inability to accommodate laws that apply to lawmakers, and its inability to identify laws that do not issue from a central source.

Hart criticises the idea of legal sovereignty as being identifiable only by factual identification of a source of power. Such an idea, he says, cannot cope with the problems of the continuity of sovereignty because it overlooks the part played by *rules* in this context. A 'habit of obedience' is fundamentally different from the important concept of 'rule following' which includes the idea of standards against which conduct may be appraised. Further, law both persists and can apply to the sovereign who made it. Indeed, he says that the sovereign itself is constituted by the rules. In sum, the 'orders backed by threats' model where those orders issue from a determinate body of people must fail because it ignores the corporate nature of the legal sovereign.

The crux of the whole book comes in Chapter 5. Here Hart sets up his own model of law. Law includes the idea of obligation and that idea implies the existence of strongly supported social rules. But law also includes the idea of permissions, or power-conferring rules, and Hart thinks that a society which had obligations, or duty-imposing rules alone (what he calls the 'primary rules'), would be 'pre-legal'. Why? Because such a society would be 'defective' because it would be uncertain,

inefficient and static. To 'cure these defects' he proposes for his concept the introduction of three power-conferring type rules, which he calls the 'secondary rules'. The rule of recognition *identifies* the law for certain, and thus cures the defect of uncertainty. Now people know what is and what is not law. The rules of adjudication cure the defect of inefficiency by introducing the courts. Now administration of law is efficient. The rules of change introduce private and public powers of legislation and repeal and cure the defect of lack of progress. In this union of primary and secondary rules, Hart claims to have found the 'key to the science of jurisprudence'.

Hart's main thesis is thus that the central set of elements constituting law is the 'union of primary and secondary rules'. So, he says:

> '... we shall make the general claim that in the combination of these two types of rule there lies what Austin wrongly claimed to have found in the notion of coercive orders, namely, 'the key to the science of jurisprudence.'

and, a little further on the same page:

> 'We accord this union of elements a central place because of their explanatory power in elucidating the concepts that constitute the framework of legal thought.'

In general, the primary rules are rules of obligation, or *duty*-imposing rules, and the secondary rules are *power*-conferring rules.

Now it is important to see the method by which Hart analyses the law into this union of primary and secondary rules. He does so by imagining, for analytical purposes, a society that lives by primary rules alone. This would be a society where the rules would restrict acts of violence, acts against property, and so on. Hart says that such a society would suffer certain sorts of 'defects'.

First, there would be *uncertainty* as to what the rules were, or the proper scope of the rules once they were identified. In order to remedy this defect, he says that we must analyse law so as to include a rule or rules of 'recognition' that would identify with certainty what the rules of obligation are. His definition of the rule of recognition is as follows:

> 'This will specify some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts.'

Secondly, he says, in a simple regime of only primary rules of obligation, there would be another defect. This would be that the community would remain *static*, because the only way the primary rules of obligation could change would be by decay or by a very slow process of growth. Furthermore, there would be no means by which individuals could release other people, or themselves, from the rules of obligation.

This defect would be cured, he says, by the introduction of secondary rules of 'change', which would enable legislators to repeal or enact new laws, or private citizens to create rights and obligations in the form of wills, contracts and so on.

Thirdly, he says, a simple regime of only primary rules would be an *inefficient* system, because there would be no means by which disputes could be settled. In order to cure this defect, he says that we must introduce secondary rules of 'adjudication', which would confer power on certain people to adjudicate and would also define the procedures in accordance with which adjudication would take place.

Hart then says:

> 'The remedy for each of [the] three main defects in this simplest form of social structure consists in supplementing the *primary* rules of adjudication with *secondary* rules which are rules of a different kind. The introduction of the remedy for each defect might, in itself, be considered a step from the pre-legal into the legal world.'

This, then, is Hart's characterisation of the central set of elements that make up his answer to the question 'What is law?'. It describes a modern municipal legal system, with its rules of obligation, and various other rules relating to the identification of the rules of the system, the system of law-making and repeal by both private citizens and by a legislature, and the system of courts.

10.2 The rule of recognition

Hart next examines in Chapter 6 in greater detail the rule of recognition, pointing out its very great importance in matters of constitutional law. The rule of recognition is identified as a matter of empirical fact and this proposition is one of the most important in the whole book for it is by his special means of identifying law that Hart establishes the positivistic (ie separated from morality) nature of his thesis. The important distinction between the 'internal point of view' and the 'external point of view' is analysed. The internal point of view is that of the officials who accept the rule. Hart also defines the existence conditions of a legal system. A legal system exists when it is effective and at least the officials accept certain standards (the rule of recognition) as constituting the criteria of recognition of the law.

It is useful when studying Hart to distinguish a narrower, 'professional' question from the general question that Hart sets himself at the beginning of *The Concept of Law* which is, 'What is law?'. The narrower question is, 'What is *the* law?'. It can immediately be seen that this question is a professional one because it needs a more precise specification of the issue on which knowledge of the law is required, and (very important) a specification of the legal system to which the question relates. Someone might ask, for example, 'What is the law concerning mortgages in England?', and be put off by the reply that it is the 'union of primary and secondary rules', considering it, of course, to have no relevance.

However, there is a reply to this sort of question in Hart. It consists of his theory of legal validity. Briefly, his answer is that the law on a particular topic in a particular legal system is that which it is according to the rule of recognition in that system. We need, therefore, to examine more closely what Hart means by his rule, or rules, of recognition.

Incidentally, if you are bothered by the question whether there is only one rule of recognition, or whether there are several, the writer can confirm that he has asked Hart this very question. Hart's reply was that there is 'no importance' in the issue. We can loosely refer to several rules, such as, in the United Kingdom, 'What Crown-in-Parliament enacts is law', or 'What the common law courts decide is law' and so on, or we can simply bundle them all together in one more complicated rule such as 'What Crown-in-Parliament enacts *and* what the common law courts decide *and* ... is law'

Hart defines the rule of recognition as:

> 'This will specify some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts.'

A rule of recognition, therefore, is simply a rule whose function is to identify whether or not *another* rule is part of the legal system. Now Hart distinguishes between what he calls a *supreme* criterion and an *ultimate* rule of recognition. The supreme criterion is part of the rule of recognition and is the part which dominates the rest. So the supreme criterion in the United Kingdom legal system is Parliamentary enactment, and if the common law, or local or general custom conflict with Parliamentary enactment, that enactment prevails. The ultimate rule of the system is the rule of recognition *itself* because you cannot go back further than it. It is ultimate in the sense that Kelsen's basic norm is because we cannot trace validity back any further. So we can trace back the root of title or validity of a bylaw to an Act of Parliament but here, says Hart, 'we are brought to a stop in inquiries concerning validity'.

Hart uses this distinction between a supreme criterion of validity and the ultimate rule of recognition to criticise Austin's attempt to say that all law is the result of legislation (remember Austin's theory of the 'tacit consent' of the sovereign). This sort of confusion, Hart says, is caused by supposing that the supreme criterion of validity within the rule of recognition is the rule of recognition itself, that is, in the case of the United Kingdom, supposing that the only rule of recognition is 'What Crown-in-Parliament enacts is law'.

The existence of the rule of recognition is a matter of *fact*, to be determined by looking to the actual practice of the *officials* of the system. But Hart says that this is not to say that the rule of recognition is explicitly declared. In fact he says that 'in the day-to-day life of a legal system its rule of recognition is very seldom expressly formulated as a rule' and that 'for the most part the rule of recognition is not stated, but its existence is *shown* in the way in which particular rules are identified'.

10.3 Hart's and Kelsen's theories of validity

Nevertheless, the existence of the rule of recognition is a matter of fact, and it is important to appreciate this when Kelsen's basic norm and Hart's rule of recognition are compared. There are four main distinctions drawn by Hart.

First, Kelsen's basic norm is not identified as a matter of fact but is, rather, a 'presupposition' that certain rules are valid. Kelsen explains the ultimate test of validity by saying that we, or possibly the legal scientist or 'jurist', presuppose laws to be valid. This leaves open the possibility of not presupposing the validity, say, of a revolutionary regime. We can simply decide not to interpret the laws of the new revolutionary regime as legally valid whether or not they are effective. This cannot happen with Hart. If the officials of a legal system use a rule of recognition to identify valid law, then that *is* the test of validity of that particular system. So that, for example, if there is a revolution, we do not have to decide whether to interpret the laws of the new regime as legally valid by presupposing a new basic norm as Kelsen would have us do, we simply look to the practice of the officials of the system. If they use new criteria such as compliance with the new constitution, to judge what is legally valid or not, we say simply that the rule of recognition has changed. And the question of whether it has changed or not is again entirely a matter of fact.

It is necessary to emphasise that the rule of recognition is, for Hart, a matter of *fact* and was introduced to 'cure the defect' of *uncertainty*. If the rule of recognition is a matter of fact, then the validity of all the other rules of the system can be identified only as a matter of fact. So Hart says:

> 'To say that a given rule is valid is to recognise it as passing all the tests provided by the rule of recognition and so as a rule of the system ... The rule of recognition exists only as a complex, but normally concordant, practice of the courts, officials, and private persons in identifying the law by reference to certain criteria. Its existence is a matter of fact.'

So the first major point of difference between Hart's rule of recognition and Kelsen's basic norm is that Hart's rule of recognition is a fact, and Kelsen's basic norm is a presupposition, existing, as Kelsen says, in the 'juristic consciousness' that something is valid.

Secondly, the rule of recognition need not be 'presupposed' to be valid. Hart thinks that is a waste of time. All we need do is point to the rule of recognition's factual existence as a test of validity. It is a waste of time or pointless to talk about its being 'presupposed as valid' because questions about its validity are identical to questions about whether it exists or not. It is not necessary to ask ourselves whether the rule of recognition 'What Crown-in-Parliament enacts is law' is *itself* valid or not. All we need do is say that it is in fact *accepted* as the test of validity by the officials of the United Kingdom legal system. Hart means that this is how we normally think of validity. We think of it as a quality imparted *by something else*, some form of standard or test, and not as a quality existing in itself.

Usually, we think of validity as something imparted by *rules*, so we would say that something was a valid argument because it was in accordance with the rules of logic, or we would say something was a valid move in chess because it was in accordance with the rules of chess, and so on.

Hart's point is that it is an odd question to ask whether, say, the rules of logic or the rules of chess were themselves valid, although we could ask ourselves other questions about them. For example, we could ask whether the rules of chess resulted in an interesting or difficult game, or whether the rules of logic were based on experience or intuition.

The basic norm has, in a sense, always the same content. It is that the constitution should be obeyed or, in the Kelsenian way of expressing it, 'coercive acts ought to be applied in accordance with the constitution'. On the other hand, Hart's rule of recognition sets out the factual test of legal validity in any particular system, so it will differ in content from legal system to legal system.

The fourth point is a rather minor one. This is that Hart says that he does not ascribe at all to Kelsen's theory that the basic norm, as Kelsen says obscurely, 'contains within it the principle of non-contradiction'. In other words, Hart is not of the view, as Kelsen *is*, that the ultimate test of validity of a legal system in some way prevents laws of the system from conflicting with one another.

10.4 Judicial positivism

The following chapter in *The Concept of Law* is relatively little read but is a very important chapter in relation to Hart's view of legal reasoning. In it we come across the idea of *judicial positivism*. He stresses the open-ended character of many legal rules and discusses his famous distinction between the core and penumbra of settled rules of the legal system. He attacks the view that law can be reduced to a set of propositions about what judges will do (his attack on American legal realism) and points to the fact that, at times, the identification of the rule of recognition itself can lead to very great difficulties.

This different version of positivism focuses specifically upon the judge and is a theory of judicial reasoning. In Ronald Dworkin's terms, this version is a theory of 'strong' discretion, according to which a judge is not bound by law to come to any decision when the question of law is genuinely controversial.

No positivist has clearly enunciated this theory, although it is implicit, and occasionally explicit in Hart. It could be a doctrine that happens to be associated with the central core of legal positivism. Or, it might be a necessary consequence of regarding law as identified only through its sources. While Hart notably drew attention to the distinction between the 'core' and 'penumbra' of the expressions of legal rules, he did not deal directly with the question of what the judge was bound to do in the area of his discretion.

Both Austin and Kelsen thought that judges had legislative powers but both, too,

saw these as confined within wider, legal, principles of constraint. Austin thought that the judges were only empowered in accordance with sovereign intention. Kelsen appears to be dogmatic about the question for he asserts that there are no 'gaps' at all. If a judge is authorised to decide a given dispute where there is no 'general norm' covering the matter, he is acting validly in adding to the existing law an 'individual norm'. But this occurs, not because there is a gap, but because the judge considers the present law to be 'legally-politically inadequate'.

But it may follow, as Dworkin says it does, that a theory of strong discretion is entailed by these influential theories of positivism, whether the theorists realise it or not. He thinks that judicial positivism is a consequence of at least the Hartian type of positivism. In short, according to Dworkin, positivism says that the law ends at the beginning of uncertainty about shared meanings or understandings about the identification of law. For Dworkin, judicial positivism identifies law with the ascertainable clear practice of the law to the extent that rules and so on that are not identifiable as a matter of the empirical facts of official practice cannot, under the theory, properly be called 'law'.

An important book by Waluchow, *Inclusive Legal Positivism* (1994), takes issue with any idea (see particularly Fuller and Dworkin) that positivism has a theory of judicial reasoning that is unconvincing. He propounds the view that not only can positivism accommodate the invocation of moral principles by judges, as Hart can allow, by explicit or implicit incorporation in terms of a master rule or rule of recognition, but also that the *master rule itself* can include moral values (thus 'inclusive' positivism can include moral judgments as the title of his book declares).

Let us first get clear what legal positivism means for Hart. In Chapter 9 of *The Concept of Law* he says that 'it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality ...'. This thesis is, of course, in the same tradition as Bentham (the distinction between 'expository' and 'censorial' jurisprudence) and Austin's well-known statement that the existence of law is one thing but its merit or 'demerit' is another. This traditional form of positivism is a form which Waluchow dubs 'exclusive' positivism and he thinks it is wrong. Instead, 'inclusive' positivism is right and this thesis declares that moral reasons can be included as part of the formal criteria of validity. An example of this occurs when a written constitution explicitly states that moral reasons will be determinative of legal validity. Mostly the argument for this supposed halfway house between Hartian positivism and natural law is by empirical example, particularly by way of reference to the new Canadian constitution.

Waluchow captures quite neatly the feeling that natural law never quite grapples with the reality of law, namely, that we have no difficulty in day-to-day life in seeing that law is made up, for the most part, of the intentional acts of legislators and judges and can be identified using reasons of the non-moral kind (eg 'it was *in* a statute' or 'the Court decided'). Waluchow says that the Canadian constitution can be identified in a positivistic way since it is empirically discernible as the master

rule; nevertheless, there are explicit moral factors identified within that constitution which the courts are permitted or required to apply. Then, the application of these moral standards *determines the legal validity* of regulations made under the constitution:

> '... the conditions for legal validity accepted within the Canadian legal system include moral conditions. That such moral conditions count as conditions of validity can be determined independently of moral reflection. But the conditions themselves require moral reflection for their understanding, interpretation, and application.'

My view is that Waluchow draws attention towards the reality of the moral reasons that pervade the courts in determining questions of legal validity (go into any court, in any legal system, to observe this) but does not quite establish that positivism is still consistent with this way of looking at things. A reference to the Nazi-style 'wicked' legal system is useful here. Imagine that we have an utterly immoral constitution which states categorically that no person of a particular race shall enjoy equal rights of citizenship with other races (cf the Nuremberg laws) and that, in determining whether any contracts, corporations, regulations, bye-laws, etc, contravene this constitution, the judges 'shall take into account any such circumstances the court considers appropriate and just in the circumstances' (a phrase in the Canadian constitution to which Waluchow refers). Clearly the meaning of 'appropriate and just' here is coloured by the overall wording *pedigree-defined*. A judge cannot say: 'I may now apply morality to these acts in the law and I find that this discriminatory bye-law is therefore invalid' because it is clear that 'the morality' she must apply is that supplied by the social aims and policies of the constitution and that, to quote Hart whose theory of law Waluchow is at pains to support, 'is compatible with very great iniquity'. (See *The Concept of Law* Chapter 9.)

10.5 Morality and law

Chapter 8, too, is relatively little read. Both it and the following chapter deal with the questions of morality that arise in relation to law. Hart is really explaining why law and morality have so much to do with each other but nevertheless can be distinguished in the way his positivism requires. His general excursus into the idea of justice, so importantly related to law, is one of the best introductions to this difficult area. In particular, Hart distinguishes between that sort of justice that attaches to law, 'procedural' justice, or 'justice according to law', and that justice that attaches to 'substantive' law, or 'justice *of* the law', saying that it is the latter concept that is more important from the moral point of view.

The next most important chapter for understanding his theory is Chapter 9 on natural law. Here Hart defines legal positivism as the theory that says there is 'no necessary connection' between law and morality. He then discusses the origins of 'natural' law, which says that there is such a connection. In defence of his own theory of positivism he asserts that the fact that law and morality share a common

vocabulary ('ought', 'must', 'duty', etc) and a common content (rules against murder, rape, theft, etc), is only a 'contingent' fact or a matter of 'natural necessity'. Given that men want to survive, are vulnerable, approximately equal in power, vulnerability and so on, are reasonably altruistic, have limited understanding and strength of will, and that there are limited resources, it is not surprising, he says, that any set of social rules that men set up will reflect these characteristics. From these facts about people we can say that there is a 'minimum content' common to both law and morality, but not enough above this minimum (because of men's many and conflicting other purposes) to make much sense of the grander claims of natural law. In any case, there are good moral reasons, those of clarifying complex moral issues such as the Nazi informer cases, why we should accept a wider conception of law that *can* include immoral laws over a narrow one that excludes them.

In the last chapter of *The Concept of Law*, Hart returns to the definitional themes of his first chapter by showing how the problems of international law should be treated in the light of his thesis. International law is neither law nor not law: it is to be assessed in so far as it is dissimilar from and similar to the central case of law as he has set it up describing the modern municipal legal system. He applies his idea of the union of primary and secondary rules to the phenomenon of international law and thus this chapter gives him the chance to review the whole of his theory as it applies to a special case.

10.6 The internal and external points of view

As you should know, Hart's criticism of the command theory focuses upon the idea of rule-following. Hart says that there are vital differences between merely habitual behaviour, that is, doing things *as a rule*, and rule-following, *making it a rule* to do something. He says that it is wrong to describe rule-governed behaviour as merely regular and habitual behaviour. Instead, there must be some kind of acceptance of that regular behaviour as being a *reason* or *standard* for behaving in that regular way. So, he says there must be 'a reflective critical attitude to this pattern of behaviour'. And he describes the way courts and so on, in identifying various legal rules, accept rules of recognition. He says that they:

> '... manifest their own acceptance of them as guiding rules and with this attitude goes a characteristic vocabulary different from the natural expressions of the external point of view. Perhaps the simplest of these is the expression, "it is the law that ..."'

These sorts of statement, which we all make, are to be contrasted with *external* statements about the law, which do not signify that the speaker himself accepts them. In these cases, we say, not that 'It is the law that ...' but such things as, 'In the United Kingdom, *they recognise* as law ...' and so on. Thus Hart says that this is an external statement:

> '... because it is the natural language of an external observer of the system who, without himself accepting its rule of recognition, states the fact that others accept it'.

Students should bear in mind the above analysis when considering the rule of recognition because, of course, it is itself subject to the same analysis. The analysis is important for understanding the relationship between effectiveness and validity in Hart's theory. Hart says that it is 'pointless' to talk of legal validity unless the legal system referred to is generally effective. He says that sometimes it might have a point, say, when teaching a subject like Roman law. The Roman legal system is no longer effective, yet, he says, a vivid way of teaching it is to discuss the validity of the particular rules in that system *as if* the system were still effective.

But this sort of example aside, he says that generally when we talk of legal validity in a particular legal system we presuppose that the system is generally effective. So he says:

> 'One who makes an internal statement concerning the validity of a particular rule of a system may be said to *presuppose* the truth of the external statement of fact that the system is generally efficacious.'

The criteria, in Hart's opinion, for the existence of a legal system are as follows:

First, the *officials* of the legal system must have the internal attitude towards the rule of recognition of the system, and it *not* necessary (although it might be so) that private citizens have the internal attitude towards the rules. (They might obey simply out of fear, as in the command model.) So Hart says:

> 'What is crucial is that there should be a unified or shared official acceptance of the rule of recognition containing the system's criteria of validity.'

Secondly, the valid legal rules of the system must generally be obeyed by both officials and the private citizens. So Hart says:

> 'So long as the laws which are valid by the system's tests of validity are obeyed by the bulk of the population this surely is all the evidence we need in order to establish that a given legal system exists.'

There are a number of criticisms of Hart's theory of the rule of recognition and the secondary sources adequately provide reference to them. But two important criticisms should be noted by candidates. One is Finnis' criticism in *Natural Law and Natural Rights* (1980), Chapter 1. A shorter version is to be found in his 'Revolutions and Continuity of Law' in *Oxford Essays in Jurisprudence, Second Series.* His criticism is that Hart leaves insufficiently specified the sort of attitude towards the rule of recognition that the officials have. Finnis says that there are a number of attitudes that could be described by this phrase and that – and here he employs Hart's own definitional technique – there must be a 'central set of elements' that constitute an official's acceptance of the rule of recognition. Finnis' own view, which is a complex variant of natural law, is that the central set of elements constituting an official's acceptance of a rule of recognition is a *moral* acceptance of the rule. In this way, Finnis claims to have found a conceptual, logical link between validity and morality. A similar sort of criticism of the rule of recognition is to be found in the final Appendix to MacCormick's *Legal Reasoning and Legal Theory* (1978). Students

might note, too, that there is a strong connection between Finnis' thesis and Dworkin's thesis that a proper legal theory must explain the 'moral force' of law and that a proper interpretation of law requires us to 'make the best moral sense' of our legal practices.

10.7 Raz's theory

Raz goes a long way to answering Hart's critics. He identifies three main features of analytical jurisprudence. One concerns the special features of the judicial process and of judicial reasoning. The second encompasses the discussion of legal concepts such as rights, duties, ownership, legal persons, and so on, and of types of legal standards such as rules and principles, duty imposing standards and power conferring standards. The third range of problems revolves round the idea of a legal system and the features which distinguish such systems from other normative systems.

10.8 The demarcation of law

In *The Problem about the Nature of Law* (1982) Raz draws a useful distinction between moral and legal rules. This centres on the difference between the legislator's duty and the judge's duty. When we are deciding what rule to adopt, we are concerned to ask what general reasons there are for adopting it. This is a purely deliberative phase, characteristic of the legislator's job, although judges are equally faced with it at times.

However, there is a transition from deliberative to executive behaviour. Once it has been resolved to adopt a decision in a legal system, then it becomes regarded as settled or decided. An appeal to law is thus an appeal to something that has been settled or laid down. Practical reasoning of the deliberative kind is then excluded. We no longer ask what are the reasons for this rule, we simply ask, 'what is the meaning of the rule?'. The fact that a rule has been decided excludes or overrides any further general consideration of the reasons for the rule, whether they be of a moral or practical nature.

Raz employs the concept of a rule of recognition and, like Hart, his view is that a rule of recognition is a question of fact. If people actually recognise and apply the rule of recognition in that they adopt only rules made in a certain way, then it exists. The rule of recognition represents a legal rule by which it can be determined, first, what sources of law are and, secondly, what the hierarchy of legal sources is.

Raz also quite sensibly asserts that for a legal system to exist, it must be effective. Therefore, we look to social facts to verify whether a legal system exists. Thus, he says:

> 'Whether a legal system is in force depends on its impact on the behaviour of people in the society ... [N]ormative systems are existing legal systems because of their impact on the behaviour of individuals, because of their role in the organisation of social life.

> Consequently, when we look at legal systems as systems of laws ... we should look for those features which enable them to fulfil a distinctive role in society. These will be the features which distinguish legal systems from other normative systems.'

Raz concedes that this is an assumption, and a not uncontroversial one at that. However, the institutional approach, coupled with a sense that law has a distinct purpose, is one that avoids requiring that legal systems be identified by their content or by their morality. It is thus a clearly positivist approach. However, as already noted, 'those features which legal systems must possess to fulfil their unique social function entail that they also have certain moral characteristics'.

As a consequence of this second criterion of function, which is determinable by reference to the institutions required to achieve it, Raz asserts that one of the defining features of law is its institutional system. He determines that the institution that most readily indicates the existence of a legal system is a 'primary institution'. A primary institution is recognised by the way that it performs its function, which can be divided into four categories:

1. those which are concerned with authoritative determinations or decisions;
2. those making these decisions about normative situations, namely, those situations where the question may be 'ought he have done it?', or 'should he do it?';
3. those that apply pre-existing rules or norms; and,
4. those in which the determinations are binding.

The most obvious example of a primary institution is a court, though this is not the only thing that a court does. Yet these features are critical, says Raz, for it to be said that a legal system exists, rather than any particular form of institution, such as a court.

Simply speaking, law must actually provide a method for settling disputes, but also provide guidance, because institutions must decide on the basis of pre-existing rules. This means that their decisions will be regular and therefore predictable. Thus, legal systems are not systems where officials can settle problems in whatever way they think is fit. Law is distinguished from absolute discretion.

It is possible that two sets of rules may contend for the title of legal system in one society. In such a situation, reference must be made to purely societal facts and attitudes, as well as to the effectiveness of constitutional law, that is, whether it is obeyed, in order to decide which one is the prevailing system.

In conclusion, efficacy and demarcation are very strongly linked because what demarcates law from other things is that it achieves its unique social role. In other words, it is effective in carrying out its purpose. In many ways, therefore, Raz is approaching the formulation suggested by Fuller that the existence of a legal system is a question of achievement of purpose, although Raz emphasises the issue of societal effect.

10.9 The 'uniqueness' of law

As we have seen, Raz asserts that law has a unique social function to perform. He employs the following criteria that amount to exclusive and necessary characteristics of law:

Legal systems are comprehensive

Most normative systems do not claim authority to regulate every aspect of life; however, law does. Morality has nothing to say about what colour to paint my house, yet a legal system could so decree. Cricket rules apply only to cricket, not to tennis or driving. A legal system, however, claims to have the authority to determine what we say, what we do in bed and, in terms of *mens rea* in criminal cases, even judges us by our thoughts and intentions.

Raz makes two critical points, however:

1. A legal system need not actually regulate all aspects of social life, but simply claims authority to do so.
2. Not all systems that claim authority to be comprehensive are legal systems; it is simply one necessary feature of a legal system.

Legal systems claim to be supreme

As a logical *sequitur* of the above, a legal system must also claim to be supreme. All legal systems are mutually incompatible at least to a certain extent. Legal systems may adopt the norms of other legal systems, may co-exist with other normative systems, but must, if they are to be comprehensive, reserve the right to exclude the binding application of any other rule.

Legal systems are open systems

A feature of legal systems is that they can, to a certain degree, be open. What this entails is the adoption of norms, already present in society, to which the legal system gives binding force. An example might be the societal institution of the promise which is a normative convention that most legal systems adopt and enforce, under given circumstances. The more of such societal and other norms that a legal system adopts, the more open it is.

From this analysis, Raz concludes that: 'law claims to provide the general framework for the conduct of all aspects of social life and sets itself as the supreme guardian of society'.

10.10 Raz's formulation of validity

As we have observed, there seems to be a concern, particularly among lawyers, to have a vision of what makes law valid. Raz's formulation of validity is a complex one to be found in detail in *The Concept of a Legal System*. He sees three levels at which we can view legal validity.

1. At one level, a legal system is valid if it is effective. This makes more sense if we remember that, for Raz, effectiveness is the achievement of law's unique social purpose. The achievement of that purpose depends on primary law-applying institutions determining cases on the basis of the rules.
2. This requires that there be an acceptance of these rules as valid on the part of the primary institutions. This may be for three reasons:
   a) The members of the institution morally endorse the value of the rule, that is, it is valid because it has moral authority. Obviously, it would be factually unrealistic to suggest this applies to all rules.
   b) There may be a rule of recognition which states that all rules made in a certain way are to be treated as valid. Therefore, although a rule might not have moral authority in itself, it may be valid because it is of a class of norms recognised as being valid. It is therefore valid because it belongs to a valid legal system.
   c) A rule may be alien to the legal system, but in an open legal system, as defined above, this will be a valid rule, even though it does not belong to the system, if it is enforced by the legal system. Therefore, although private international law is not part of the English legal system, its rules are nonetheless treated as valid.

   (b) and (c) have, according to Raz, 'systemic' validity because they either belong to or are enforced by the system. A type (1) rule may also be valid because it belongs to the system, but it has the additional authority of a moral endorsement.

The question therefore becomes: 'What is validity, if it is not a moral endorsement?' Raz then asks, 'What does it mean to say that a legal system is valid?' To explain his complex reasoning we might contrast the following reasons why a woman refuses to marry a man:

a) 'People do not get married these days!' Now, this is not a valid argument. Just because other people do not do something is not (at least in the usual case), in itself, a reason for not doing something. The statement is not a valid argument because the question is a normative one: 'Why should we not get married?'
b) 'I am already married. If I married you as well I would be a bigamist!' This does not mean that the woman does not want to get married, but there is an exclusionary reason, a particular rule, which prevents further action. The argument is a valid argument and gives a reason why she cannot get married. However, it is not necessarily a reason that she morally endorses. She might

believe that having more than one husband is perfectly moral, but she accepts that there is a rule that prevents her from having two husbands.

c) 'I am a radical feminist and believe that marriage is an instrument of sexual oppression!' This is a valid argument because it is based on a moral belief. It is also an exclusionary reason.

All of these are answers to the normative question: 'Why should we not get married?' The first statement is only a valid argument if there is a further reason why she should behave like other people. As such it is a statement that is *conditional on the existence on a valid reason.* The second statement gives a valid reason that is based on an exclusionary rule against bigamy, but does not commit the speaker to a moral acceptance that the rule is a correct one. The rule is valid in the sense that the person feels bound by it, but not necessarily because of moral endorsement. It is therefore *morally detached.* The third answer is a *committed statement* in that it morally endorses a reason that the speaker not only feels bound by, but also agrees with.

How does this help us understand validity? To state that law is valid is tantamount to saying that there is a good reason why it should be obeyed. This is to be differentiated from saying that law is effective, which is tantamount to saying that law is obeyed. The former statement is normative, in that it says that it should be obeyed. The latter is descriptive in that it says that law is obeyed.

Raz concludes that to say law is valid is a normative statement, either of a detached or committed kind. However, as we have already seen, for rules to amount to a legal system, they must be effective. So to say that law is valid is a normative statement, implying that there is a good reason for obeying it. It is also a statement dependent on the existence of social facts, namely, the adoption of rules by primary institutions. And, finally, to say that law is valid does not necessarily mean that the speaker is morally endorsing the law, but simply that there is an exclusionary reason for obeying it.

10.11 The position of rules

Raz sees problems in Hart's adoption of rules. Most significantly, the requirement for criticism and support of rules that is central to Hart's theory leads to an ambiguity, according to Raz, between moral and non-moral reasons for action. Usually, language employed to criticise other people's behaviour is on the basis of moral claims (whether genuinely felt by the speaker or not).

As we have just seen, Raz seeks to distinguish between morally committed normative statements and morally detached statements. To explain people's response to law, we can only really talk in terms of the reasons upon which they act. These reasons are not always spoken, so Raz formulates a theory of reasoning to explain this fact. This speculation about what people think, as opposed to what they say or do, is termed a 'heuristic approach'.

Practical reasoning and norms

'[I]ntuitively, it is always the case that one ought to do whatever one ought to do on the balance of reasons.' This is the core of Raz's theory of practical reasoning. For Raz, reasons can be separated into first and second order reasons. An example of the way in which these things work is the following:

1. 'I have bought some 1934 champagne. Because I like champagne I have a first order reason for drinking it. However, there is a second order reason why I should not, in that I promised my friend I would buy it for him to drink.'
2. 'People have an obligation to keep their promises. This entails that they are not at liberty to break their promises whenever they find, all things considered, it will be the best thing to do so. But this does not mean that they ought to keep promises come what may. The presence of reasons of another kind will justify breaking the promise.'

Thus, although a promise might be a second order reason that excludes further deliberation as to whether I want to drink the champagne (I should not, since I promised it to my friend), it may be that there is another obligation involved. For example, the doctor has ordered my friend not to drink, so that keeping my promise would result in harm to him.

For Raz, the existence of a legal rule gives us a second order reason that tips the balance of reasons why I should or should not do something. Second order reasons are weightier than first order reasons and fundamentally affect the way in which we decide what to do. However, laws are not the only second order reasons, for moral rules are equally to be regarded as second order rules. Thus, Raz comes to an interesting conclusion for a positivist. Courts, when they adopt valid rules in order to decide a case, apply legal rules because of the rule of recognition, which is a second order reason to exclude other non-legal rules. However, the rule of recognition is not the only second order reason that the court considers. Ultimately, a judge may be faced with a law that he should apply because it is validated by the rule of recognition, yet he considers that it is too immoral to apply. This is tantamount to saying that there is a stronger second order reason of a moral nature.

In consequence, Raz contends that the acceptance of rules of recognition is a moral decision, not just a matter of fact as Hart asserts. It must be made clear that obviously people do not always act in accordance with the rules that they should obey and as such this acceptance need not be morally right, it simply has a moral dimension.

Reasons and rules

Raz contends that normative statements are statements that imply or express the existence of second order reasons. By reducing statements to this, Raz is able to unravel some critical questions.

1. Not all normative statements are expressed as rules: there are also principles, imperatives and permissions.
2. Not all reasons for action are expressed, yet they are commonly obeyed because the reasons are self-evident. For example, we need not be told to avoid pain.
3. The fact that people do behave in a certain way is not in itself a reason why people should behave in a certain way.
4. A good reason may exist for someone not to do something, notwithstanding that he always does it. A reason is a concept and does not require that it be acted upon for it to exist.

Thus, Raz rejects Hart's narrow concept that law is a system of rules and instead employs the concept of the norm, which is essentially a second order reason for action. Principles, rules, imperatives, permissions and even personal maxims are norms. Second order reasons are reasons in themselves. As such we do not ask, 'Is there a good reason why the law imposes a duty of care?' We simply think, 'I have a legal duty to be careful.' When a rule passes to the executive stage it becomes fixed and there is no point considering the deliberative reasons for which it was made when deciding whether to obey it.

Although norms are the product of practical reasoning, such as the laws of negligence, they are in themselves to be regarded as secondary reasons, because they have been determined or fixed when the norm passes from the deliberative to the executive stage. Raz goes on to elucidate and individuate the various kinds of legal norms.

Mandatory norms, which include rules

These are norms that provide exclusionary reasons for behaving or not behaving in a certain way. They often are expressed as conclusive reasons for behaviour as in the example of the girl who will not marry, because she is already married. She might have equally said because the law prevents me.

Permissions, consisting of:

Weak permissions. If there is no legal norm that either permits, forbids or empowers a person to act, the person may be said to have a weak permission to do something. There is thus no positive reason for doing something entailed by a weak permission.

Strong permissions. If there are second order reasons, such as rules that prohibit an action, a strong permissive norm allows one to ignore the rules against doing something. Thus, there is a positive norm that allows one to do something.

Power conferring norms

Raz indicates that there are powers to create and abolish norms and also powers to change the way in which norms apply to individuals. For people to have power, that is, for them to be able to do things that alter the nature or application of norms, there must be a second order reason why they, as opposed to other people, can do

this. These second order reasons for the power to change existing norms are therefore termed power conferring norms. These include the power to legislate and the power to make contracts.

10.12 Raz and Dworkin

Raz has recently come out with an important attack on the Dworkinian position in his 'The Relevance of Coherence', Chapter 12 of *Ethics in the Public Domain* (1994). This is very carefully and fully argued and represents Raz's current thinking on the nature of adjudication. The basic criticism goes as follows. Raz draws a fundamental distinction between coherence and integrity. He says there is nothing in *Law's Empire* which supports the idea of interpretation and integrity to require anything in favour of coherence. Instead, the arguments only support one aspect of integrity, which is that judges should act on principles which may never have been considered or approved, either explicitly or implicitly, by any legal authority and which are not up to the 'best standards' of morality or justice. Raz has in mind decisions which have to be made in accordance with well-established lines of authority and which meet the Dworkinian tests of 'fit'.

The objection Raz raises to this approach, which does accurately portray what Dworkin requires of integrity, is that not only is it not grounded in any moral view but it derives:

> 'from a desire to see the law, and judicial activities, as based to a larger degree than they are in fact or should be in morality, on an inner legal logic which is separate from ordinary moral and political considerations of the kind that govern normal government, in all its branches.'

Raz's point is that first, Dworkin's idea of integrity is not a 'morally coherent' one because of the reliance on 'fit' and, secondly, that the appeal of the law's 'speaking with one voice', which is on what Dworkin purports to base the 'morally best' interpretation, is really an appeal to blind faith in an 'inner logic' of the law 'working itself pure'.

You might care to link this criticism to Fuller's position on the 'inner morality' of law. Fuller believed that, as he said, evil aims 'lacked logic' and that if evil rulers were required, by his eight principles, to be open and consistent in their dealings with those they governed, then evil aims would gradually become less evil and the law would 'work itself pure'. But Fuller nowhere defended this claim in great detail and it is reasonable to suppose his belief was founded on belief alone (eg 'Professor Hart seems to assume that evil aims may have as much coherence and inner logic as good ones. I, for one, *refuse* to accept that assumption ... I shall have to rest on the assertion of a belief that may seem naive, namely, that coherence and goodness have more affinity than coherence and evil.' 'A Reply to Professor Hart' (1958) *Harvard Law Review*.

10.13 Evaluation of Raz

Even this fairly involved account of Raz does not adequately give a picture of the complexity or sophistication he has brought to Hart's approach. Raz's concept of practical reasoning is not derived from linguistic philosophy, but actually contributes new ideas to it. MacCormick views Raz's theory as unquestionably the best defence yet for the positivist thesis. Some observations might be offered.

Raz allows that a legal system can co-exist with another legal system, but at the same time suggests that there is a potential that these may be mutually exclusive. He does not provide the jurist with a formula by which he might determine which legal system he must obey. Instead Raz suggests that the choice of which rules to recognise is a question of political morality.

Raz asserts that lawyers make a moral choice to accept the rule of recognition (this is a simplification of his position). This may be falsified by the existence of coercive forces that are external to the legal system. Take, for example, a country controlled by secret police and clandestine coercion. Superficially, the judiciary may be applying the law through choice, but fear may be their motivation for doing so. Social and political coercion is very real in certain countries. Does this affect the validity of law? Just as moral and legal rules might be second order reasons for acting, might not duress also be so?

Although he goes a long way towards differentiating legal from other normative systems, a certain element of his differentiation is an assumption that legal rules are unique. But none of his criteria of comprehensiveness, supremacy and openness clearly differentiates law from all other normative systems. Even when we apply the matter of authoritative determinations and look for effects on behaviour, the same could have been said of the Catholic Church a few centuries ago. Perhaps Raz would regard the rules of the Catholic Church as a legal system but it seems doubtful. However, to be fair, there are not that many other normative systems with the features that Raz identifies.

A related question is whether legal norms are generally to be regarded as weightier second order reasons that moral norms. This is a critical question. By a legal system's claim to be supreme, it would seem that legal norms should be viewed as superior second order reasons. Raz is not particularly clear on this issue, since he suggests that the judiciary is still able to take account of other second order reasons.

Raz's book *Ethics in the Public Domain* (1994), consisting of a set of essays which cover both his normative theory of justice as freedom and his theory of positive law, is given a helpfully clear review in *Modern Law Review* (1995) by Richard Lucy. Particularly useful is the overall description which Lucy provides of Raz's liberalism (the main theses of which were first published in his widely admired work in 1986 on normative jurisprudence entitled *The Morality of Freedom*). The view which is now becoming generally accepted amongst jurists is that Raz's legal positivism – as opposed to his liberalism – suffers from its location in historical facts of power. To understand this idea, which has its roots in Austin, we need to appreciate that

physical power, for Raz, is the source of law's authority (and, indeed, all authority). Raz's analysis is in many ways compelling; 'authoritative' statements are those which have a 'peremptory force' (see Hart *Essays on Bentham* Chapter 10, 'Commands and Authoritative Legal Reasons') which means that they require obedience (or conformity) without the need for giving reasons other than that these statements are issued *from a particular source*. An easy way to this source idea is through the authority of an expert; for example, we have no intuitive difficulties, as laypeople, in saying that something is so and that we must comply, simply because it was said with the authority of, say, a clinical medical consultant ('doctor knows best'). In the case of law, the authority arises from the historical location of power; the law of theft is 'law' by virtue of the authority of 'the sovereign's having made it so' and its authority arises from no other reason.

But, as Lucy points out, Raz does not really answer the question, posed by so many jurists (Duff, Simmonds, Finnis and Shiner for example) as to why judges would recognise the authority of a particular sovereign. Raz is not an Austin, or Bentham, and he takes the Hartian line that rules of recognition must be accepted by judges. These specify the criteria of legal validity (and thus explain the normative quality of law in its efforts to match human behaviour with commonly accepted standards). These, in turn, locate the source of law in the sovereign. But why should a judge accept the rule of recognition? Fear? Self-interest? Humanity? A full theory of law would specify the criteria of acceptance and the short list I have drawn up suggests that humanity would/should be ranked earlier than fear and self-interest. If that is the case, the road to the anti-positivist, natural law camp is clear and Lucy rightly points out that Raz, in this latest set of essays, has failed to confront his critics on this crucial point.

Christopher Morris has written a long and thoughtful review of Raz's *Ethics in the Public Domain* (1994) in *Ethics* (1996). It is a difficult read in some ways but it has the advantage of explaining clearly what Raz's theories of law and morality are basically about, in particular, in very useful summaries of Raz's main positions. Morris expresses the view, shared by a number of philosophers, that Raz's positions are powerful intuitively but stand in many instances in need of further justification: 'Raz articulates well what I tend to believe, but I do not, after a certain point, know what to say in defence of some of the central theses.'

10.14 The idea of a 'hard case'

Dworkin has popularised the idea of a 'hard case'. In general, his use of the term refers to those issues faced by a judge or a lawyer which are contentious and potentially litigable. Specifically, a hard case is a situation in the law that gives rise to genuine argument about the truth of a proposition of law that cannot be resolved by recourse to a set of plain facts *determinative* of the issue.

Let us take Hart's famous example of the statutory provision prohibiting vehicles

from the park, where there are no statutory definitions and no judicial decisions that guide interpretation. Does it include roller skates? His answer is that the rule about vehicles is just inherently unspecific about whether roller skates are included and that a judge could settle matters by declaring a result one way or another, thus making the rule in relation to the roller skates a 'plain fact' for the future. Every rule, he says, has a 'penumbra' where its meaning is uncertain. Nevertheless, we would not have an idea of what the penumbra was unless we first had a firm grasp of the idea of the core.

It is useful, first of all, to consider whether there can be 'plain facts' of linguistic practice. There clearly are. But this fact does not entail a view that there are 'acontextual' meanings. For example, we can dispense with a sceptical response to my assertion, by saying that, in ordinary circumstances, the word 'vehicle' includes a 20 ton lorry. That is so, by virtue of our linguistic practices, meaning simply that an empirical observation of the way in which 'vehicle' is used shows that it is consistently applied to 20 ton lorries. *It is not an odd idea.* Dictionaries record current usage in precisely this way, and dictionary definitions are right or wrong measured against, speaking widely, empirically observable practice.

According to Dworkin, therefore, legal positivism is the appealing theory that law is identifiable with the clear empirically identifiable facts of legal practice. The law is expressed in language and must rely on plain – clear – meanings. It must, therefore, rely on clear dictionary meanings in the large part. It follows that these penumbral meanings do not come within the law. Why? It is that since, by hypothesis, they are not defined either in statute or in a subsequent judgment, they are not *plainly* vehicles within the dictionary definition. And so, according to the plain fact account, they are not vehicles for the purposes of the statute. In other words, if the law is not clearly identifiable it is clearly *not* law. This is so, if we take the central characterising feature of positivism to be its insistence upon clarity.

Many critics do not like this conclusion. Neil MacCormick, for example, says that it is simply not true. Law, he says, is identifiable by criteria of recognition and these may use predicates like 'honest' or 'reasonable' or 'fair' and so forth. Further, rules of adjudication may require or permit judges to 'take account of' moral values in their interpretations. None of this, says MacCormick, is excluded from Hart's definition.

On penumbral issues, there is no uniform practice amongst the officials. In Hart's terms, there is no 'concordant' practice, no concordant acceptance of rules of recognition. Is there law there nevertheless? At first sight, on Hart's own terms, there is not. What if there was a split in official practice? That could mean two things. There might simply be *no* practice here, because judges have such widely different views, say, on the question of the extent to which, in the United Kingdom, arguments drawn from the European Convention of Human Rights are relevant in identifying rules of law of the United Kingdom.

But there may be differing *practices* where, say, judges and other officials are equally divided on the question of whether the United Kingdom Parliament could bind itself in law. According to the view of positivism here discussed, what is the law? Either it is both the law that Parliament can bind itself and the law that it cannot, or it is not law at all. On a weakened view of official practice, ignoring Hart's reference to the 'concordance' of the practice, we obtain a virtually nonsensical result for law. In a nutshell, neither rule follows from the rule of recognition.

10.15 The implications for judicial reasoning

What implications, in Dworkin's view, does legal positivism have for judicial reasoning? He says that when judges are faced with a case in which there is no empirically identifiable law, no law determines the issue. It follows that, in exercise of his clear legal duty to come to a decision one way or the other, the judge must make his decision on grounds other than legal ones. The phrase so often used in this context is that 'the judge must exercise his discretion' in order to come to a decision.

What are the consequences for adjudication on this account? The positivist has two possibilities: he can either deny that there is any law in these unclear cases, or he can say that there is law there but it requires a different method for its identification. These two possibilities may be considered in turn.

Is Dworkin correct in saying that the judge either legislates or he does not? Let us focus in on this claim. The point about these difficult sorts of cases is that it really is unclear what the law is or should be. If the plain fact view of law is the correct one, then it follows that there is no law at all where there are no plain facts of the matter which tell us what the law is. Therefore, a judge who comes to a decision in one of these penumbral type cases is not applying law in the predetermined plain fact sense. The judge is not applying law, because the only law that exists is that of the empirically identifiable sort.

It may further be objected that it is not correct to call the judge a 'legislator' since this goes the further step of saying that positivism speaks to the role of the judges. This is an important objection. If the judge is not applying law in the penumbral cases what is he doing? Is he bound by law? The answer, it seems, is that he is not. If the statute is not clear on the question whether a person has committed a criminal offence by taking a skateboard through the park, then there is no law on the matter. What is the law that binds the judge? There is plain fact law on the question whether a person has committed a criminal offence if he takes a bicycle through the park. Does this have any bearing on the question whether a skateboarder has committed an offence? The answer, for positivism, taken to be the theory that the law is plain fact law only, must be that it has none at all. The idea of 'bearing on the question' is insufficiently clear as to determine the question whether our skateboarder has broken the law.

10.16 The doctrine of the separation of powers

If this account is right, the judge must act in a similar role to the legislature, because he must make new law. There is none on the skateboarder question, so he creates new law on the matter. It is 'new' law because there was nothing in the previous law that guided, or constrained, or impelled him to his decision. This conclusion must, then, speak to the judicial role. It means that every time a judge decides one of these cases, which, of course, are the characteristic sorts of case in the appellate courts, he is as unconstrained as the legislature is in creating new law.

But is Dworkin right in concluding that judges should be controlled in their decision-making? The obvious and most general answer is that a judge has a unique constitutional role. This role centrally concerns adjudication. The judge has therefore great power by virtue of his access to initiating acts of state coercion. He is characteristically unelected and he is not, at least directly, responsible to an electorate. Indeed, it is often thought to be a virtue of the judicial office that the judge should not be swayed in his decision-making by popular demand. Rather, it is thought, the judge should be swayed solely by his sense of justice as to the merits of the case before him. In Lord Scarman's words:

> 'The judge, however wise, creative, and imaginative he may be, is "cabin'd, cribb'd, confin'd, bound in" not, as was Macbeth, to his "saucy doubts and fears" but by the evidence and arguments of the litigants. It is this limitation, inherent in the forensic process, which sets bounds to the scope of judicial law reform.'

Further, the judge has a special role *vis-à-vis* the legislature. The legislature is the institution in a democracy through which the will of the electorate (to use a popular metaphor) is expressed. The judge, not being elected, must not substitute his own will as against the legislature. To do so would be to 'usurp the function of the legislature'. The judge is, instead, concerned with matters which are subsidiary to the legislature's role, such as adjudicating on the precise merits of disputes in individual cases.

So Dworkin's criticism here points us to a dilemma. He says that it is supposed to be a virtue of positivism that it clearly shows us when a judge is out on his own, as it were, independent of the constraints of law. On the other hand, in the explicit recognition that as a result the judge is making new law, like the legislature, we are forced to the conclusion that the judge's characteristic form of adjudicating is directly counter to what we consider an important feature of our democratic procedures – the doctrine of the separation of powers.

10.17 The way lawyers and judges talk

There is another problem, according to Dworkin, in the idea that the judge acts as legislator. Judges (and lawyers whose role is parasitic on the judicial role) do not talk

as though they were performing the same function as legislators and, further, if they are legislating, this means that their legislative decisions are being applied retrospectively. Let us consider both these ideas in turn.

Certainly, judges speak judicially of their being 'bound by law'. This is apparent from courtroom language and the reports of judgments, even in the most innovative of cases. Take, for instance, Lord Atkin's introduction to his famous statement of the neighbour principle in the law of tort: 'Who in law is my neighbour?' It would have sounded odd had he asked: 'Who in law *ought* to be my neighbour?' Lawyers make submissions in court about what the law is. The judges come to decisions about what the law is. Always there is the background matrix of law from which both judges and lawyers draw their arguments. At times, when a judge decides that there is no argument that he can extrapolate from this background matrix, he will make a pronouncement about the appropriateness of his judicial role to decide such a matter.

An idea to consider is why it is that judges and lawyers talk in this characteristic way. One reason could be that judges, certainly in the United States, and probably in the United Kingdom, although admittedly that is not so clear, have been or are conscious of the doctrine of the separation of powers. They endeavoured, at one time, anyway, to express their judgments in terms appropriate to that doctrine: they did not make the law, they only declared what it was.

This explanation, according to Dworkin, forces us to reconsider the difficulty which we came across when we considered the role of the judge as a legislator. The obvious response is that if we do not think judges should legislate and they do not talk as if they legislate, this is a very good reason for supposing that not only do they not legislate but the doctrine of the separation of powers is alive and kicking in our legal system.

10.18 Retrospective legislation

According to Dworkin, yet another problem remains. If judges make up the law and apply it to the parties before them, it must follow that the law is being made after the events occurred and that the parties are made subject to law that was, by hypothesis, not in force when the events occurred. The law is thus applied retrospectively. Strong positivism acknowledges this consequence as an unfortunate but unavoidable consequence of the indeterminate nature of rules. When a state of affairs occurs where there is no rule in the clear sense required for the plain fact theory, the judge simply has to legislate and thus create a clear rule.

But is this fair to the party who loses out? He can say, very plausibly, that he did not break the law because there was no law at the time. That is a powerful argument. There is only one counter to him, an argument which, in my view, is specious. This is to say that, since this was an unclear, penumbral case, and it was by virtue of this fact that there was no law governing the matter, he had no reason to be surprised by a decision either way.

So what has he to complain about? Assuming that he wanted to conform to the law regarding the skateboard, he could not know with certainty whether taking the skateboard through the park was in conformity with law or not. All he can do is take the risk. What difference does it make to his position that he was subsequently fined? The risk was one of which he was or should have been aware.

There is more to the principle of *nulla poena sine lege* than the protection of reasonable expectations. A citizen has a complaint that even though he was not surprised by later retrospective legislation there was no liability at the time he did the act. The principle connects significantly with the idea of the rule of law, which requires that official acts be in accordance with law. This latter principle speaks to accountability, not clarity. If the citizen is being made retrospectively liable, it is because there was no law at the time that made him liable that places the special duty upon the legislature to justify retrospective legislation.

10.19 Conclusion on Dworkin

Dworkin's view is that positivism wrongly omits to characterise as part of its model, the role of moral principles in legal argument. Since, as he observes, such principles appear to be a significant and important part of legal argument, especially as it is carried on by lawyers and judges in the day to day practices of the courts, legal positivism should provide and adequate characterisation of it. With the idea of principles of law (moral in content though they be) inherently involved in the hard cases, the above three dilemmas faced by the positivist account are solved: there *is* law there, albeit in the form of principles. So, the judges are *judging*, not legislating; they are not retrospectively legislating, and they are not cynically 'covering up' what they are, in fact, doing quite legitimately. But more about this in Chapter 24!

10.20 Hart's posthumous postscript to the second edition of *The Concept of Law*

Posthumously, a second edition of *The Concept of Law* by Hart was published in 1994. It is predominantly the same but for a 'Postscript' that has been added. In this postscript Hart shows that he is not really prepared to shift his ground in spite of the attacks particularly of Ronald Dworkin; in particular, he defends himself against Dworkin's attack on his version of legal positivism and his perceived attack on Hart's method of legal theory.

1. Hart thinks Dworkin is wrong to suppose that there is such a sharp distinction between rules and principles. There is a difference since principles are less specific and embody non-conclusive reasons for decision-making, and also perhaps involve reasons which are of a particularly important kind. But he thinks

Dworkin exaggerates the differences and refers to the *Riggs* v *Palmer* (1889) decision which Dworkin famously uses to show how principles decide cases (see *Taking Rights Seriously* Chapter 2). Hart thinks this decision shows clearly not a clash between two principles but between a rule and a principle. Hart just asserts that there was a clear rule of succession that a murderer could inherit from the estate of the person he murdered; Dworkin denies that there was any such rule but that there was a general principle, outweighed by another in that case ('no man should profit from his own wrong'), that the clear words of a valid will should be closely adhered to.

2. Hart rejects any kind of view which says that moral judgments about what people's rights are are part of the identification of their legal rights. He says that the reason simply is that legal rights and duties are the point at which the law protects or restricts individual freedom by allowing individuals the power 'to avail themselves of the law's coercive machinery'. Thus they are independent of the 'moral merits' of the law; presumably because they are only expressive of your 'right to take the matter to court'.
3. Hart maintains his belief that the Nazi-type legal system, while undeniably of moral wickedness, is nevertheless law since the various features it shares with other modern municipal legal systems are too great for a 'universal-descriptive' legal theory, such as he claims his theory to be, to ignore. He points to Dworkin's suggestion that such a legal system might be described in a 'pre-interpretive sense' but then says that Dworkin's concession there about the flexibility of legal language strengthens rather than weakens the positivist's case because it allows the positivist's assertion here to make use of the flexibility of language too:

> '... it does little more than convey the message that while he insists that in a descriptive jurisprudence the law may be identified without reference to morality, things are otherwise for a justificatory interpretive jurisprudence according to which the identification of the law always involves a moral judgment as to what best justifies the settled law.'

Hart's conclusion here that, in characterising the Nazi legal system, he and Dworkin are really talking at cross purposes seems very reasonable.

4. On the perennial questions raised by the existence of judicial discretion, Hart addresses the question of how such cases might best be resolved. He thinks that there clearly are cases where judges exercise their judicial discretion by acting as 'judicial law-makers' and he does not think that this poses a great threat to democracy. Nevertheless, it seems to me that it is difficult to agree with Hart's following statement:

> '... the delegation of limited legislative powers to the executive is a familiar feature of modern democracies and such delegation to the judiciary seems a no greater menace to democracy.'

This remark draws insufficient attention to the very great differences of role and function between the executive and the judiciary. The executive must govern the community as a whole but we do not think that judges are like that at all. *We think* that they should concern themselves with the merits of the dispute relating to the respective rights and duties of the parties before them.

Hart also disagrees with Dworkin that it is a defect of legal positivism that judicial discretion in hard cases is retrospective in effect, something it seems, Hart must concede if he allows for judicial law-*making*. Hart simply says that if there were law *there*, in the cases, or the arguments, or whatever, as Dworkin supposes, it would not be retrospective but it would be as equally surprising to the defendant what decision the judge came to, as in the positivist position whereby the law is 'made' by the judge. Can't Dworkin be defended here? If we are to choose between two theories about what happens in hard cases, we are bound to choose the one that says that, characteristically, the judge is punishing acts which *at the time that they were done* were against or within the law. The defendant who is surprised by a decision that is the result of retrospective legislation is worse off in this sense than the defendant who is surprised at a decision about the law existing at the time he did the act. It is a simple matter of the rule of law: no one should be punished, or whatever, unless there is a law which prohibited (or whatever) the act at the time that it was done. This principle is frequently referred to as the *nulla poena sine lege* principle ('no punishment without law'). We could remember in this connection that it was this principle which Hart so effectively invoked in the important Chapter 9 of his *The Concept of Law*!

5. It appears that Hart sticks to his view that his theory was intended to be both descriptive and general (cf 'an essay in descriptive sociology'), in the sense that it is not tied to any one particular legal system. By 'descriptive' he says that he intended it to be 'morally neutral' and with no 'justificatory aims' and further he says that this is 'a radically different enterprise' from that envisaged by Dworkin. Dworkin's theory, he says, is 'in part evaluative and justificatory and "addressed to a particular legal culture" '. Then he says that because of these differences, he and Dworkin are not in conflict; it is just simply that they are each writing with different aims in mind. But he does take issue with Dworkin's claim that positivist legal theory can be restated as an interpretative theory. Hart thinks that view is 'mistaken'.

Hart's view here is unfortunately not as clear as it could be. It amounts to saying that we can understand legal systems from the moderate external point of view, namely, the point of view of someone who understands that some people accept certain rules (ie adopt the internal point of view) *who does not himself accept* those rules. Hart concedes that such a person must understand what the internal point of view is:

> 'It is true that for this purpose the descriptive theorist must *understand* what it is to adopt the internal point of view and in that limited sense he must be able to put himself

in the place of an insider; but that is not to endorse the insider's internal point of view or in any other way to surrender his descriptive stance.'

6. Hart vigorously denies that he is guilty, as Dworkin says, of having committed the cardinal sin of the 'semantic sting'. That criticism, which Dworkin makes in Chapter 1 of *Law's Empire*, is that no adequate account of law can be based on a description solely of how people speak and what the linguistic practices are which they share when talking about law. Hart denies that he ever had such a theory and says that the charge 'confuses the *meaning* of a concept with the criteria for its *application*'. He appears to refer by this phrase to the distinction, current in much contemporary political philosophy and made much use of by Dworkin, between a 'concept' and a 'conception'. Hart clearly thinks that his theory allows for the elaboration of a conception of law. This is interesting in the light of the way the first four chapters of *The Concept of Law* develop for there one would certainly be led to believe that Hart's aim *was* in fact to capture 'linguistic practices' that are a 'plain fact' about the world. However, it becomes clear by the end of the book, especially in the very important Chapter 9, that Hart is *choosing* between concepts.
7. Hart just denies Dworkin's claim that the point or purpose of law or legal practice is to justify coercion:

> '... it certainly is not and never has been my view that law has this as its point or purpose.'

Hart refers, for example, to his invocation of the 'pre-legal' world and says that the proposed introduction of the secondary rules, of adjudication, of recognition and of change, was not intended to answer any question about the justification of the application of the coercive powers of the state.

This is an interesting assertion for it raises the question of what Chapter 9 is about. There, it will be remembered, Hart justified his legal positivism on the grounds that it made clear that (to quote his oft-quoted remark):

> '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 ...'

The rule of recognition's point is to *make certain* what is law and what is a matter for personal conscience. This was to place constraints on the power of the state. For example, the 'evil' that had to be balanced against the 'evil' of letting the Nazi grudge informer go free of punishment was the 'evil' of the use of retrospective law-making. Hart's interests are therefore in some way (perhaps more subtle than Dworkin's) connected with the abuse of state power. Actually, in the construction of his theory that laws can be identified independently of personal moral judgment, Hart is very concerned to justify this on the ground that it shows – for good moral reasons – why we should think of legal justifications *having no moral content*. Although this argument requires further

elaboration, it seems reasonable to suppose that Hart's concerns are logically dependent upon concerns about the way we should view the justifications that are advanced for applying law.

8. Hart thinks that Dworkin's arguments that not all legal rules can be identified by referring to a social practice (see *Taking Rights Seriously* Chapter 3) shows a serious misunderstanding of what the rule of recognition was intended to be about. Hart claims that Dworkin assumes that the rule is supposed to determine completely the legal result in every case. Not so, he says:

> '... the function of the rule is to determine only the general conditions which correct legal decisions must satisfy in modern systems of law.'

This is the argument to which reference has been made earlier that the rule of recognition is designed to cure the defect of uncertainty. Hart is simply saying that the uncertainty is cured by seeing that the law identified can be incurably ambiguous. After all, under his theory the law is 'vehicles are prohibited, etc ...' and it is asking too much to expect that there should be determination of the ambiguity inherent in the word 'vehicle'.

Understanding this point requires looking closely at Dworkin's criticism in *Taking Rights Seriously* of the idea of the existence of social rules being necessary to identify judicial duties. He argues that they are not necessary since it is possible for us to assert the existence of duties, in general, without it being necessary to point to a social rule to that effect. A good example is that of slavery abolitionists who asserted that we all had duties to release our slaves, even though there was no social rule saying that we ought to so free our slaves (and, in fact, there was a clear social rule saying that we *may* keep slaves – and for the more fundamentalist of the slave-owners, a Bible-sanctioned duty that we do keep slaves).

Dworkin then moves to saying that there is therefore nothing wrong with asserting that, in hard cases, judges are bound by duties *which cannot be identified by reference to social rules* (viz the social rule of recognition). One possible objection he considers to this is the idea that the social rule theory of duty only applies to law for, after all, the slavery abolitionist only invoked a moral duty in us all not to keep slaves. But Dworkin dismisses that argument, which is a common one, by saying that it is equivalent only to the following bad argument:

> 'In general, duties can exist either as the result of a social rule, or as existing in some other way independently of social rules; but in the case of law a social rule is required; that social rule is a rule of recognition which declares affirmatively whether a rule is a valid rule of law imposing a legal duty.'

That is a bad argument, Dworkin says, because it is just an assertion of positivism and that theory cannot refer to itself in support.

The answer given by Hart is two-fold. First he concedes that Dworkin is right to maintain a distinction between rules accepted socially as a matter of convention and rules which have the appearance of being conventionally accepted

but, instead, only represent a consensus of independently held convictions. This distinction is crucial for understanding Dworkin's position. The distinction can be illustrated as follows. In Britain, everyone accepts a moral rule prohibiting physical assault; there is a coincidence of our views. Each view, however, is supported by independent reasons each of us has for our conviction that physical assault is morally wrong. So, if asked, you would say 'invades physical integrity; causes pain; etc, etc'. They are your independent reasons for saying why physical assault is wrong. Compare murder with the rule that men must take their hats off in church. There we might well say that the rule is there just because everyone accepts that rule ('it is the accepted convention'). The difference is striking when we consider what a conventional justification would sound like for physical assault. It sounds wrong to give as the reason for thinking physical assault wrong that 'it is the convention' or 'everybody thinks it's wrong' because these sorts of justification aren't strong enough. The fact that other people think that something is wrong is insufficient justification for why you should think it wrong. You have to make up your own mind. This distinction is, incidentally, very similar to the distinction that both Bentham and Austin draw between positive and critical morality. (See above Chapter 8, the part of section 8.3 headed The province of jurisprudence: the different sorts of law.)

Secondly, Hart says that Dworkin's account of social rules is too strong for:

> '... it seems to require not only that the participants who appeal to rules as establishing duties or providing reasons for action must believe that there are good moral grounds or justification for conforming to the rules, but also that there must actually be such good grounds.'

But Dworkin's reply could simply be that it amounts to positivism citing itself in its own support. If judges and lawyers argue as if there were good legal grounds that are at the same time good moral grounds then that fact must be one in support of a legal theory that accounts for it (as Dworkin's theory purports to account for how judges and lawyers argue then it must be a better theory). However, Hart continues to maintain that, despite the controversial nature of law in hard cases, it is wrong to suppose that the rule of recognition can answer 'completely' any question of law, saying that:

> '... the function of the rule is to determine only the general conditions which correct legal decisions must satisfy in modern systems of law.'

9. Hart thinks that his theory is one which Dworkin would term 'soft positivism', although this is contrary to at least one generally understood interpretation of his theory, which relies heavily on the idea of the rule of recognition supplying certainty in hard cases (ie the certainty that the judges are not applying law but are, instead, law-making). 'Soft' positivism is the view that there are controversial – uncertain – rules of law; so, for example, soft conventionalism allows for the following two rules to be captured by a rule of recognition which recognises the

rule 'Vehicles are prohibited in the park': 'skateboards are prohibited' and its contradictory 'skateboards are permitted'. This is the area of the penumbra. Dworkin's view is that (a) since a decision has to be made between these rules, and (b) because in legal practice there clearly is use made of non-rule standards (he calls them 'principles' – see below Chapter 25), there is much more sophistication to legal argument than even soft positivism could allow.

It has never been quite clear (until his Postscript) what Hart's view was since in Chapter 7 of *The Concept of Law* he endorses a much more sophisticated account of legal reasoning in hard cases than appears to be implied by his rigid criteria of what counts as law. Remember: the rule of recognition 'cures the defect' of uncertainty.

10. Hart thinks that while 'large theoretical differences' exist between Dworkin and himself on the question of the relationship of law to morality, nevertheless, they both share the view that there are certain basic facts of legislative history which each of them thinks limit the application of law by judges:

> '... his explanation of the judicial identification of the sources of law is substantially the same as mine.'

But the main difference, he says, lies in the fact that there are few legal systems outside the United States and the United Kingdom in which legal reasoning takes the form of the all-embracing kind ('holistic') that Dworkin says is involved in the idea of constructive interpretation.

10.21 Hart and post-modernism

There is an interesting and, in some ways, extraordinary article by Allan Hutchison in the *Modern Law Review* (1995). Hutchison has been prominent in the critical legal studies and post-modernist movements for well over a decade now (and a prominent protagonist of the theory of Ronald Dworkin). A consistent feature of these movements has been their denigration of liberalism and of Anglo-American legal philosophy, particularly that kind espoused by Hart, Dworkin, Finnis, and so, on the (very spurious) ground that it is narrow, male-focused, individualistic, ignorant of important developments on the Continent, unsceptical, uncritical and so on (perhaps even because it has a centre in Oxford). But in this article, without appearing to realise it, Hutchison gives the game away. He concludes, as if it were an insight for everyone, not just him, that law is not just a set of rules, but that it is open to all sorts of imaginative possibilities. In elaborating his criticsm, he says it is wrong to suppose that jurisprudence is just about analysing language and that exploring legal discourse is about reflecting on social activity. Thus he says:

> 'Understanding language, therefore, is not about abstract reflection, but it is about social activity. The key relation is between speakers rather than between words and things.'

But, for goodness sake, most philosophers abandoned these ideas as late as the 1960s. Indeed, Wittgenstein was saying these things in the late 1940s and it is wrong to suppose that strands of these ideas are not in Hart. This insight into a prominent 'critical' thinker is most illuminating since it corroborates a growing sense amongst many jurists that the critical legal studies movement is energetic, yes, and is mostly well-meaning, but founders miserably when it comes to sustained intellectual rigour or commitment to proper legal scholarship (had Hutchison not read Wittgenstein's *Philosophical Investigations*, nor read those bits in Hart's *The Concept of Law* where Hart says that certain crucial questions are not to be determined as 'matters of linguistic propriety'?). Not convinced? Compare the following in Hutchison with what you know about Dworkin's analogy between the superhuman intellectual ruminations of the ideal and superintelligent and hard-working judge Hercules, and the construction by a group of authors of a chain novel, an analogy which has been the object of great derision amongst critical legal thinkers:

> '... political players are capable of imagining and opening themselves up to possibilities other than those presently available. They are not actors in another story, but they are committed to be "joyful poets of the story that continues to originate what they cannot find".'