The Concept of Law

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I PERSISTENT QUESTIONS

1. PERPLEXITIES OF LEGAL THEORY

Few questions concerning human society have been asked with such persistence and answered by serious thinkers in so many diverse, strange, and even paradoxical ways as the question 'What is law?' Even if we confine our attention to the legal theory of the last 150 years and neglect classical and medieval speculation about the 'nature' of law, we shall find a situation not paralleled in any other subject systematically studied as a separate academic discipline. No vast literature is dedicated to answering the questions 'What is chemistry?' or 'What is medicine?', as it is to the question 'What is law?' A few lines on the opening page of an elementary textbook is all that the student of these sciences is asked to consider; and the answers he is given are of a very different kind from those tendered to the student of law. No one has thought it illuminating or important to insist that medicine is 'what doctors do about illnesses', or 'a prediction of what doctors will do', or to declare that what is ordinarily recognized as a characteristic, central part of chemistry, say the study of acids, is not really part of chemistry at all. Yet, in the case of law, things which at first sight look as strange as these have often been said, and not only said but urged with eloquence and passion, as if they were revelations of truths about law, long obscured by gross misrepresentations of its essential nature.

'What officials do about disputes is … the law itself';[1] 'The prophecies of what the courts will do … are what I mean by the law';[2] Statutes are 'sources of Law … not parts of the Law itself';[3] 'Constitutional law is positive morality merely';[4] 'One shall not steal; if somebody steals he shall be punished. **(p. 2)** … If at all existent, the first norm is contained in the second norm which is the only genuine norm… . Law is the primary norm which stipulates the sanction'. [5]

These are only a few of many assertions and denials concerning the nature of law which at first sight, at least, seem strange and paradoxical. Some of them seem to conflict with the most firmly rooted beliefs and to be easily refutable; so that we are tempted to reply, 'Surely statutes *are* law, at least one kind of law even if there are others': 'Surely law cannot just mean what officials do or courts will do, since it takes a law to make an official or a court'.

Yet these seemingly paradoxical utterances were not made by visionaries or philosophers professionally concerned to doubt the plainest deliverances of common sense. They are the outcome of prolonged reflection on law made by men who were primarily lawyers, concerned professionally either to teach or practise law, and in some cases to administer it as judges.

[1] Llewellyn, *The Bramble Bush* (2nd edn., 1951), p. 9.
[2] O. W. Holmes, 'The Path of the Law' in *Collected Papers* (1920), p. 173.
[3] J. C. Gray, *The Nature and Sources of the Law* (1902), s. 276.
[4] Austin, *The Province of Jurisprudence Determined* (1832), Lecture VI (1954 edn., p. 259).
[5] Kelsen, *General Theory of Law and State* (1949), p. 61.

Moreover, what they said about law actually did in their time and place increase our understanding of it. For, understood in their context, such statements are *both* illuminating and puzzling: they are more like great exaggerations of some truths about law unduly neglected, than cool definitions. They throw a light which makes us see much in law that lay hidden; but the light is so bright that it blinds us to the remainder and so leaves us still without a clear view of the whole.

To this unending theoretical debate in books we find a strange contrast in the ability of most men to cite, with ease and confidence, examples of law if they are asked to do so. Few Englishmen are unaware that there is a law forbidding murder, or requiring the payment of income tax, or specifying what must be done to make a valid will. Virtually everyone except the child or foreigner coming across the English word 'law' for the first time could easily multiply such examples, and most people could do more. They could describe, at least in outline, how to find out whether something is the law in England; they know that there are experts to consult and courts with a final authoritative voice on all such questions. **(p. 3)** Much more than this is quite generally known. Most educated people have the idea that the laws in England form some sort of system, and that in France or the United States or Soviet Russia and, indeed, in almost every part of the world which is thought of as a separate 'country' there are legal systems which are broadly similar in structure in spite of important differences. Indeed an education would have seriously failed if it left people in ignorance of these facts, and we would hardly think it a mark of great sophistication if those who knew this could also say what are the important points of similarity between different legal systems. Any educated man might be expected to be able to identify these salient features in some such skeleton way as follows. They comprise (i) rules forbidding or enjoining certain types of behaviour under penalty; (ii) rules requiring people to compensate those whom they injure in certain ways; (iii) rules specifying what must be done to make wills, contracts or other arrangements which confer rights and create obligations; (iv) courts to determine what the rules are and when they have been broken, and to fix the punishment or compensation to be paid; (v) a legislature to make new rules and abolish old ones.

If all this is common knowledge, how is it that the question 'What is law?' has persisted and so many various and extraordinary answers have been given to it? Is it because, besides the clear standard cases constituted by the legal systems of modern states, which no one in his senses doubts are legal systems, there exist also doubtful cases, and about their 'legal quality' not only ordinary educated men but even lawyers hesitate? Primitive law and international law are the foremost of such doubtful cases, and it is notorious that many find that there are reasons, though usually not conclusive ones, for denying the propriety of the now conventional use of the word 'law' in these cases. The existence of these questionable or challengeable cases has indeed given rise to a prolonged and somewhat sterile controversy, but surely they cannot account for the perplexities about the general nature of law expressed

by the persistent question 'What is law?' That these cannot be the root of the difficulty seems plain for two reasons.

First, it is quite obvious why hesitation is felt in these cases. International law lacks a legislature, states cannot be brought before international courts without their prior consent, and there is no centrally organized effective system of sanctions. Certain types of primitive law, including those out of which some contemporary legal systems may have gradually evolved, similarly lack these features, and it is perfectly clear to everyone that it is their deviation in these respects from the standard case which makes their classification appear questionable. There is no mystery about this.

Secondly, it is not a peculiarity of complex terms like 'law' and 'legal system' that we are forced to recognize both clear standard cases and challengeable borderline cases. It is now a familiar fact (though once too little stressed) that this distinction must be made in the case of almost every general term which we use in classifying features of human life and of the world in which we live. Sometimes the difference between the clear, standard case or paradigm for the use of an expression and the questionable cases is only a matter of degree. A man with a shining smooth pate is clearly bald; another with a luxuriant mop clearly is not; but the question whether a third man, with a fringe of hair here and there, is bald might be indefinitely disputed, if it were thought worth while or any practical issue turned on it.

Sometimes the deviation from the standard case is not a mere matter of degree but arises when the standard case is in fact a complex of normally concomitant but distinct elements, some one or more of which may be lacking in the cases open to challenge. Is a flying boat a 'vessel'? Is it still 'chess' if the game is played without a queen? Such questions may be instructive because they force us to reflect on, and make explicit, our conception of the composition of the standard case; but it is plain that what may be called the borderline aspect of things is too common to account for the long debate about law. Moreover, only a relatively small and unimportant part of the most famous and controversial theories of law is concerned with the propriety of using the expressions 'primitive law' or 'international law' to describe the cases to which they are conventionally applied.

When we reflect on the quite general ability of people to recognize and cite examples of laws and on how much is generally known about the standard case of a legal system, it might seem that we could easily put an end to the persistent question, 'What is law?', simply by issuing a series of reminders of what is already familiar. Why should we not just repeat the skeleton account of the salient features of a municipal legal system which, perhaps optimistically, we put (on page 3) into the mouth of an educated man? We can then simply say, 'Such is the standard case of what is meant by "law" and "legal system"; remember that besides these standard cases you will also find arrangements in social life which, while sharing some of these salient features, also lack others of them. These are disputed cases where there can be no conclusive argument for or against their classification as law.'

Such a way with the question would be agreeably short. But it would have nothing else to recommend it. For, in the first place, it is clear that those who are most perplexed by the question 'What is law?' have not forgotten and need no reminder of the familiar facts which this skeleton answer offers them. The deep perplexity which has kept alive the question, is not ignorance or forgetfulness or inability to recognize the phenomena to which the word 'law' commonly refers. Moreover, if we consider the terms of our skeleton account of a legal system, it is plain that it does little more than assert that in the standard, normal case laws of various sorts go together. This is so because both a court and a legislature, which appear in this short account as typical elements of a standard legal system, are themselves creatures of law. Only when there are certain types of laws giving men jurisdiction to try cases and authority to make laws do they constitute a court or a legislature.

This short way with the question, which does little more than remind the questioner of the existing conventions governing the use of the words 'law' and 'legal system', is therefore useless. Plainly the best course is to defer giving any answer to the query 'What is law?' until we have found out what it is about law that has in fact puzzled those who have asked or attempted to answer it, even though their familiarity with the law and their ability to recognize examples are beyond question. What more do they want to know and why do they want to know it? To *this* question something like a general answer can be given. For there are certain recurrent main themes which have formed a constant focus of argument and counterargument about the nature of law, and provoked exaggerated and paradoxical assertions about law such as those we have already cited. Speculation about the nature of law has a long and complicated history; yet in retrospect it is apparent that it has centred almost continuously upon a few principal issues. These were not gratuitously chosen or invented for the pleasure of academic discussion; they concern aspects of law which seem naturally, at all times, to give rise to misunderstanding, so that confusion and a consequent need for greater clarity about them may coexist even in the minds of thoughtful men with a firm mastery and knowledge of the law.

2. THREE RECURRENT ISSUES

We shall distinguish here three such principal recurrent issues, and show later why they come together in the form of a request for a *definition* of law or an answer to the question 'What is law?', or in more obscurely framed questions such as 'What is the nature (or the essence) of law?'

Two of these issues arise in the following way. The most prominent general feature of law at all times and places is that its existence means that certain kinds of human conduct are no longer optional, but in *some* sense obligatory. Yet this apparently simple characteristic of law is not in fact a simple one; for within the sphere of non-optional obligatory conduct we can distinguish different forms. The first, simplest sense in which conduct is no longer optional, is

when one man is forced to do what another tells him, not because he is physically compelled in the sense that his body is pushed or pulled about, but because the other threatens him with unpleasant consequences if he refuses. The gunman orders his victim to hand over his purse and threatens to shoot if he refuses; if the victim complies we refer to the way in which he was forced to do so by saying that he was *obliged* to do so. To some it has seemed clear that in this situation where one person gives another an order backed by threats, and, in this sense of 'oblige', obliges him to comply, we have the essence of law, or at least 'the key to the science of jurisprudence'. [6] This is the starting-point of Austin's analysis by which so much English jurisprudence has been influenced.

There is of course no doubt that a legal system often presents this aspect among others. A penal statute declaring certain conduct to be an offence and specifying the punishment to which the offender is liable, may appear to be the gunman situation writ large; and the only difference to be the relatively minor one, that in the case of statutes, the orders are addressed generally to a group which customarily obeys such orders. But attractive as this reduction of the complex phenomena of law to this simple element may seem, it has been found, when examined closely, to be a distortion and a source of confusion even in the case of a penal statute where an analysis in these simple terms seems most plausible. How then do law and legal obligation differ from, and how are they related to, orders backed by threats? This at all times has been one cardinal issue latent in the question 'What is law?'.

A second such issue arises from a second way in which conduct may be not optional but obligatory. Moral rules impose obligations and withdraw certain areas of conduct from the free option of the individual to do as he likes. Just as a legal system obviously contains elements closely connected with the simple cases of orders backed by threats, so equally obviously it contains elements closely connected with certain aspects of morality. In both cases alike there is a difficulty in identifying precisely the relationship and a temptation to see in the obviously close connection an identity. Not only do law and morals share a vocabulary so that there are both legal and moral obligations, duties, and rights; but all municipal legal systems reproduce the substance of certain fundamental moral requirements. Killing and the wanton use of violence are only the most obvious examples of the coincidence between the prohibitions of law and morals. Further, there is one idea, that of justice, which seems to unite both fields: it is both a virtue specially appropriate to law and the most legal of the virtues. We think and talk of 'justice *according to* law' and yet also of the justice or injustice *of* the laws.

These facts suggest the view that law is best understood as a 'branch' of morality or justice and that its congruence with the principles of morality or justice rather than its incorporation of orders and threats is of its 'essence'. This is the doctrine characteristic not only of scholastic theories of natural law but of some contemporary legal theory which is critical of the legal

[6] Austin, op. cit., Lecture I, p. 13. He adds 'and morals'.

'positivism' inherited from Austin. Yet here again theories that make this close assimilation of law to morality seem, in the end, often to confuse one kind of obligatory conduct with another, and to leave insufficient room for differences in kind between legal and moral rules and for divergences in their requirements. These are at least as important as the similarity and convergence which we may also find. So the assertion that 'an unjust law is not a law'[7] has the same ring of exaggeration and paradox, if not falsity, as 'statutes are not laws' or 'constitutional law is not law'. It is characteristic of the oscillation between extremes which makes up the history of legal theory, that those who have seen in the close assimilation of law and morals nothing more than a mistaken inference from the fact that law and morals share a common vocabulary of rights and duties, should have protested against it in terms equally exaggerated and paradoxical. 'The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.' [8]

The third main issue perennially prompting the question 'What is law?' is a more general one. At first sight it might seem that the statement that a legal system consists, in general at any rate, of *rules* could hardly be doubted or found difficult to understand. Both those who have found the key to the understanding of law in the notion of orders backed by threats, and those who have found it in its relation to morality or justice, alike speak of law as containing, if not consisting largely of, rules. Yet dissatisfaction, confusion, and uncertainty concerning this seemingly unproblematic notion underlies much of the perplexity about the nature of law. What *are* rules? What does it mean to say that a rule *exists?* Do courts really apply rules or merely pretend to do so? Once the notion is queried, as it has been especially in the jurisprudence of this century, major divergencies in opinion appear. These we shall merely outline here.

It is of course true that there are rules of many different types, not only in the obvious sense that besides legal rules there are rules of etiquette and of language, rules of games and clubs, but in the less obvious sense that even within any one of these spheres, what are called rules may originate in different ways and may have very different relationships to the conduct with which they are concerned. Thus even within the law some rules are made by legislation; others are not made by any such deliberate act. More important, some rules are mandatory in the sense that they require people to behave in certain ways, e.g. abstain from violence or pay taxes, whether they wish to or not; other rules such as those prescribing the procedures, formalities, and conditions for the making of marriages, wills, or contracts indicate what people should do to give effect to the wishes they have. The same contrast between these two types of rule is also to be seen between those rules of a game which veto certain types of conduct under penalty (foul play or abuse of the referee) and those which specify what must be done to score or to win. But even if we neglect for the moment this

[7] 'Nam mihi lex esse non videtur quae justa non fuerit': St. Augustine I, *De Libero Arbitrio*; Aquinas, *Summa Theologica*, 1–11, Qu. 95 Art. 2; Qu. 96 Art. 4.

[8] Holmes, loc. cit.

complexity and consider only the first sort of rule (which is typical of the criminal law) we shall find, even among contemporary writers, the widest diver gence of view as to the meaning of the assertion that a rule of this simple mandatory type exists. Some indeed find the notion utterly mysterious. The account which we are at first perhaps naturally tempted to give of the apparently simple idea of a mandatory rule has soon to be abandoned. It is that to say that a rule exists means only that a group of people, or most of them, behave 'as a rule' i.e. *generally*, in a specified similar way in certain kinds of circumstances. So to say that in England there is a rule that a man must not wear a hat in church or that one must stand up when 'God Save the Queen' is played means, on this account of the matter, only that most people generally do these things. Plainly this is not enough, even though it conveys part of what is meant. Mere convergence in behaviour between members of a social group may exist (all may regularly drink tea at breakfast or go weekly to the cinema) and yet there may be no rule *requiring* it. The difference between the two social situations of mere convergent behaviour and the existence of a social rule shows itself often linguistically. In describing the latter we may, though we need not, make use of certain words which would be misleading if we meant only to assert the former. These are the words 'must', 'should', and 'ought to', which in spite of differences share certain common functions in indicating the presence of a rule requiring certain conduct. There is in England no rule, nor is it true, that everyone must or ought to or should go to the cinema each week: it is only true that there is regular resort to the cinema each week. But there *is* a rule that a man must bare his head in church.

What then is the crucial difference between merely convergent habitual behaviour in a social group and the existence of a rule of which the words 'must', 'should', and 'ought to' are often a sign? Here indeed legal theorists have been divided, especially in our own day when several things have forced this issue to the front. In the case of legal rules it is very often held that the crucial difference (the element of 'must' or 'ought') consists in the fact that deviations from certain types of behaviour will probably meet with hostile reaction, and in the case of legal rules be punished by officials. In the case of what may be called mere group habits, like that of going weekly to the cinema, deviations are not met with punishment or even reproof; but wherever there are rules requiring certain conduct, even non-legal rules like that requiring men to bare their heads in church, something of this sort is likely to result from deviation. In the case of legal rules this predictable consequence is definite and officially organized, whereas in the non-legal case, though a similar hostile reaction to deviation is probable, this is not organized or definite in character.

It is obvious that predictability of punishment is one important aspect of legal rules; but it is not possible to accept this as an exhaustive account of what is meant by the statement that a social rule exists or of the element of 'must' or 'ought' involved in rules. To such a predictive account there are many objections, but one in particular, which characterizes a whole school of legal theory in Scandinavia, deserves careful consideration. It is that if we

look closely at the activity of the judge or official who punishes deviations from legal rules (or those private persons who reprove or criticize deviations from non-legal rules), we see that rules are involved in this activity in a way which this predictive account leaves quite unexplained. For the judge, in punishing, takes the rule as his *guide* and the breach of the rule as his *reason* and *justification* for punishing the offender. He does not look upon the rule as a statement that he and others are likely to punish deviations, though a spectator might look upon the rule in just this way. The predictive aspect of the rule (though real enough) is irrelevant to his purposes, whereas its status as a guide and justification is essential. The same is true of informal reproofs administered for the breach of non-legal rules. These too are not merely predictable reactions to deviations, but something which existence of the rule guides and is held to justify. So we say that we reprove or punish a man *because* he has broken the rule: and not merely that it was probable that we would reprove or punish him.

Yet among critics who have pressed these objections to the predictive account some confess that there is something obscure here; something which resists analysis in clear, hard, factual terms. What *can* there be in a rule apart from regular and hence predictable punishment or reproof of those who deviate from the usual patterns of conduct, which distinguishes it from a mere group habit? Can there really be something over and above these clear ascertainable facts, some extra element, which guides the judge and justifies or gives him a reason for punishing? The difficulty of saying what exactly this extra element is has led these critics of the predictive theory to insist at this point that all talk of rules, and the corresponding use of words like 'must', 'ought', and 'should', is fraught with a confusion which perhaps enhances their importance in men's eyes but has no rational basis. We merely *think*, so such critics claim, that there is something in the rule which binds us to do certain things and guides or justifies us in doing them, but this is an illusion even if it is a useful one. All that there is, over and above the clear ascertainable facts of group behaviour and predictable reaction to deviation, are our own powerful 'feelings' of compulsion to behave in accordance with the rule and to act against those who do not. We do not recognize these feelings for what they are but imagine that there is something external, some invisible part of the fabric of the universe guiding and controlling us in these activities. We are here in the realm of fiction, with which it is said the law has always been connected. It is only because we adopt this fiction that we can talk solemnly of the government 'of laws not men'. This type of criticism, whatever the merits of its positive contentions, at least calls for further elucidation of the distinction between social rules and mere convergent habits of behaviour. This distinction is crucial for the understanding of law, and much of the early chapters of this book is concerned with it.

Scepticism about the character of legal rules has not, however, always taken the extreme form of condemning the very notion of a binding rule as confused or fictitious. Instead, the most prevalent form of scepticism in England and the United States invites us to reconsider the view that a legal system *wholly*, or even *primarily*, consists of rules. No doubt the courts

so frame their judgments as to give the impression that their decisions are the necessary consequence of predetermined rules whose meaning is fixed and clear. In very simple cases this may be so; but in the vast majority of cases that trouble the courts, neither statutes nor precedents in which the rules are allegedly contained allow of only one result. In most important cases there is always a choice. The judge has to choose between alternative meanings to be given to the words of a statute or between rival interpretations of what a precedent 'amounts to'. It is only the tradition that judges 'find' and do not 'make' law that conceals this, and presents their decisions as if they were deductions smoothly made from clear pre-existing rules without intrusion of the judge's choice. Legal rules may have a central core of undisputed meaning, and in some cases it may be difficult to imagine a dispute as to the meaning of a rule breaking out. The provision of s. 9 of the Wills Act, 1837, that there must be two witnesses to a will may not seem likely to raise problems of interpretation. Yet all rules have a penumbra of uncertainty where the judge must choose between alternatives. Even the meaning of the innocent-seeming provision of the Wills Act that the testator must *sign* the will may prove doubtful in certain circumstances. What if the testator used a pseudonym? Or if his hand was guided by another? Or if he wrote his initials only? Or if he put his full, correct, name unaided, but at the top of the first page instead of at the bottom of the last? Would all these cases be 'signing' within the meaning of the legal rule?

If so much uncertainty may break out in humble spheres of private law, how much more shall we find in the magniloquent phrases of a constitution such as the Fifth and Fourteenth Amendments to the Constitution of the United States, providing that no person shall be 'deprived of life liberty or property without due process of law'? Of this one writer [9] has said that the true meaning of this phrase is really quite clear. It means 'no *w* shall be *x* or *y* without *z* where *w, x, y*, and *z* can assume any values within a wide range'. To cap the tale sceptics remind us that not only are the rules uncertain, but the court's interpretation of them may be not only authoritative but final. In view of all this, is not the conception of law as essentially a matter of rules a gross exaggeration if not a mistake? Such thoughts lead to the paradoxical denial which we have already cited: 'Statutes are sources of law, not part of the law itself.'[10]

3. DEFINITION

Here then are the three recurrent issues: How does law differ from and how is it related to orders backed by threats? How does legal obligation differ from, and how is it related to, moral obligation? What are rules and to what extent is law an affair of rules? To dispel doubt and perplexity on these three issues has been the chief aim of most speculation about the 'nature' of law. It is possible now to see why this speculation has usually been conceived as a search for the definition of law, and also why at least the familiar forms of definition

[9] J. D. March, 'Sociological Jurisprudence Revisited', 8 *Stanford Law Review* (1956), p. 518.
[10] Gray, loc. cit.

have done so little to resolve the persistent difficulties and doubts. Definition, as the word suggests, is primarily a matter of drawing lines or distinguishing between one kind of thing and another, which language marks off by a separate word. The need for such a drawing of lines is often felt by those who are perfectly at home with the day-to-day use of the word in question, but cannot state or explain the distinctions which, they sense, divide one kind of thing from another. All of us are sometimes in this predicament: it is fundamentally that of the man who says, 'I can recognize an elephant when I see one but I cannot define it.' The same predicament was expressed by some famous words of St Augustine [11] about the notion of time. 'What then is time? If no one asks me I know: if I wish to explain it to one that asks I know not.' It is in this way that even skilled lawyers have felt that, though they know the law, there is much about law and its relations to other things that they cannot explain and do not fully understand. Like a man who can get from one point to another in a familiar town but cannot explain or show others how to do it, those who press for a definition need a map exhibiting clearly the relationships dimly felt to exist between the law they know and other things.

Sometimes in such cases a definition of a word can supply such a map: at one and the same time it may make explicit the latent principle which guides our use of a word, and may exhibit relationships between the type of phenomena to which we apply the word and other phenomena. It is sometimes said that definition is 'merely verbal' or 'just about words'; but this may be most misleading where the expression defined is one in current use. Even the definition of a triangle as a 'three-sided rectilinear figure', or the definition of an elephant as a 'quadruped distinguished from others by its possession of a thick skin, tusks, and trunk', instructs us in a humble way both as to the standard use of these words and about the things to which the words apply. A definition of this familiar type does two things at once. It simultaneously provides a code or formula translating the word into other well-understood terms and locates for us the kind of thing to which the word is used to refer, by indicating the features which it shares in common with a wider family of things and those which mark it off from others of that same family. In searching for and finding such definitions we 'are looking not merely at words … but also at the realities we use words to talk about. We are using a sharpened awareness of words to sharpen our perception of the phenomena.' [12]

This form of definition (*per genus et differentiam*) which we see in the simple case of the triangle or elephant is the simplest and to some the most satisfying, because it gives us a form of words which can always be substituted for the word defined. But it is not always available nor, when it is available, always illuminating. Its success depends on conditions which are often not satisfied. Chief among these is that there should be a wider family of things or *genus*, about the character of which we are clear, and within which the definition locates what it defines; for plainly a definition which tells us that something is a member of

[11] *Confessiones*, xiv. 17.

[12] J. L. Austin, 'A Plea for Excuses', *Proceedings of the Aristotelian Society*, vol. 57 (1956–7), p. 8.

a family cannot help us if we have only vague or confused ideas as to the character of the family. It is this requirement that in the case of law renders this form of definition useless, for here there is no familiar well-understood general category of which law is a member. The most obvious candidate for use in this way in a definition of law is the general family of *rules of behaviour*; yet the concept of a rule as we have seen is as perplexing as that of law itself, so that definitions of law that start by identifying laws as a species of rule usually advance our understanding of law no further. For this, something more fundamental is required than a form of definition which is successfully used to locate some special, subordinate, kind within some familiar, well-understood, general kind of thing.

There are, however, further formidable obstacles to the profitable use of this simple form of definition in the case of law. The supposition that a general expression can be defined in this way rests on the tacit assumption that all the instances of what is to be defined as triangles and elephants have common characteristics which are signified by the expression defined. Of course, even at a relatively elementary stage, the existence of borderline cases is forced upon our attention, and this shows that the assumption that the several instances of a general term must have the same characteristics may be dogmatic. Very often the ordinary, or even the technical, usage of a term is quite 'open' in that it does not *forbid* the extension of the term to cases where only some of the normally concomitant characteristics are present. This, as we have already observed, is true of international law and of certain forms of primitive law, so that it is always possible to argue with plausibility for and against such an extension. What is more important is that, apart from such borderline cases, the several instances of a general term are often linked together in quite different ways from that postulated by the simple form of definition. They may be linked by analogy as when we speak of the 'foot' of a man and also of the 'foot' of a mountain. They may be linked by *different* relationships to a central element. Such a unifying principle is seen in the application of the word 'healthy' not only to a man but to his complexion and to his morning exercise; the second being a *sign* and the third a *cause* of the first central characteristic. Or again—and here perhaps we have a principle similar to that which unifies the different types of rules which make up a legal system—the several instances may be different constituents of some complex activity. The use of the adjectival expression 'railway' not only of a train but also of the lines, of a station, of a porter, and of a limited company, is governed by this type of unifying principle.

There are of course many other kinds of definition besides the very simple traditional form which we have discussed, but it seems clear, when we recall the character of the three main issues which we have identified as underlying the recurrent question 'What is law?', that nothing concise enough to be recognized as a definition could provide a satisfactory answer to it. The underlying issues are too different from each other and too fundamental to be capable of this sort of resolution. This the history of attempts to provide concise definitions has shown. Yet the instinct which has often brought these three questions together under

a single question or request for definition has not been misguided; for, as we shall show in the course of this book, it is possible to isolate and characterize a central set of elements which form a common part of the answer to all three. What these elements are and why they deserve the important place assigned to them in this book will best emerge, if we first consider, in detail, the deficiencies of the theory which has dominated so much English jurisprudence since Austin expounded it. This is the claim that the key to the understanding of law is to be found in the simple notion of an order backed by threats, which Austin himself termed a 'command'. The investigation of the deficiencies of this theory occupies the next three chapters. In criticizing it first and deferring to the later chapters of this book consideration of its main rival, we have consciously disregarded the historical order in which modern legal theory has developed; for the rival claim that law is best understood through its 'necessary' connection with morality is an older doctrine which Austin, like Bentham before him, took as a principal object of attack. Our excuse, if one is needed, for this unhistorical treatment, is that the errors of the simple imperative theory are a better pointer to the truth than those of its more complex rivals.

At various points in this book the reader will find discussions of the borderline cases where legal theorists have felt doubts about the application of the expression 'law' or 'legal system', but the suggested resolution of these doubts, which he will also find here, is only a secondary concern of the book. For its purpose is not to provide a definition of law, in the sense of a rule by reference to which the correctness of the use of the word can be tested; it is to advance legal theory by providing an improved analysis of the distinctive structure of a municipal legal system and a better understanding of the resemblances and differences between law, coercion, and morality, as types of social phenomena. The set of elements identified in the course of the critical discussion of the next three chapters and described in detail in Chapters V and VI serve this purpose in ways which are demonstrated in the rest of the book. It is for this reason that they are treated as the central elements in the concept of law and of prime importance in its elucidation.

NOTES

The text of this book is self-contained, and the reader may find it best to read each chapter through before turning to these notes. The footnotes in the text give only the sources of quotations, and references to cases or statutes cited. The following notes are designed to bring to the reader's attention matters of three different kinds, viz.:

(i) Further illustrations or examples of general statements made in the text;

(ii) Writings in which the views adopted or referred to in the text are further expounded or criticized;

(iii) Suggestions for the further investigation of questions raised in the text.

All references to this book are indicated simply by chapter and section numbers, e.g. Chapter 1, s. 1. The following abbreviations are used:

Austin, The Province	*Austin, The Province of Jurisprudence Determined* (ed. Hart, London, 1954)
Austin, The Lectures	*Austin, Lectures on the Philosophy of Positive Law*
Kelsen, General Theory	*Kelsen, General Theory of Law and State*
BYBIL	*British Year Book of International Law*
HLR	*Harvard Law Review*
LQR	*Law Quarterly Review*
MLR	*Modern Law Review*
PAS	*Proceedings of the Aristotelian Society*

CHAPTER I NOTES

Pages 1–2. Each of the quotations on these pages from Llewellyn, Holmes, Gray, Austin, and Kelsen, are paradoxical or exaggerated ways of emphasizing some aspect of law which, in the author's view, is either obscured by ordinary legal terminology, or has been unduly neglected by previous theorists. In the case of any important jurist, it is frequently profitable to defer consideration of the question whether his statements about law are literally true or false, and to examine first, the detailed reasons given by him in support of his statements and secondly, the conception or theory of law which his statement is designed to displace.

A similar use of paradoxical or exaggerated assertions, as a method of emphasizing neglected truths is familiar in philosophy. See J. Wisdom, 'Metaphysics and Verification' in *Philosophy and Psychoanalysis* (1953); Frank, *Law and the Modern Mind* (London, 1949), Appendix VII ('Notes on Fictions').

The doctrines asserted or implied in each of the five quotations on these pages are examined in Chapter VII, ss. 2 and 3 (Holmes, Gray, and Llewellyn); Chapter IV, ss. 3 and 4 (Austin); and Chapter III, s. 1, pp. 35–42 (Kelsen).

Page 4. *Standard cases and borderline cases.* The feature of language referred to here is generally discussed under the heading of 'The Open Texture of Law' in Chapter VII, s. 1. It is something to be kept in mind not only when a definition is expressly sought for general terms like 'law', 'state', 'crime', &c., but also when attempts are made to characterize the reasoning involved in the application of rules, framed in general terms, to particular cases. Among legal writers who have stressed the importance of this feature of language are: Austin, *The Province*, Lecture VI, pp. 202–7, and *Lectures in Jurisprudence* (5th edn., 1885), p. 997 ('Note on Interpretation'); Glanville Williams, 'International Law and the Controversy Concerning the Word "Law" ', *22 BYBIL* (1945), and 'Language in the Law' (five articles), *61* and *62 LQR* (1945–6). On the latter, however, see comments by J. Wisdom in 'Gods' and in 'Philosophy, Metaphysics and Psycho-Analysis', both in *Philosophy and Psycho-Analysis* (1953).

Page 6. *Austin on obligation.* See *The Province,* Lecture I, pp. 14–18; *The Lectures*, Lectures 22 and 23. The idea of obligation and the differences between 'having an obligation' and 'being obliged' by coercion are examined in detail in Chapter V, s. 2. On Austin's analysis see notes to Chapter II, below, p. 282.

Page 8. *Legal and moral obligation.* The claim that law is best understood through its connection with morality is examined in Chapters VIII and IX. It has taken very many different forms. Sometimes, as in the classical and scholastic theories of Natural Law, this claim is associated with the assertion that fundamental moral distinctions are 'objective truths' discoverable by human reason; but many other jurists, equally concerned to stress the interdependence of law and morals, are not committed to this view of the nature of morality. See notes to Chapter IX, below, p. 302.

Page 10. *Scandinavian legal theory and the idea of a binding rule.* The most important works of this school, for English readers, are Hägerström (1868–1939), *Inquiries into the Nature of Law and Morals* (trans. Broad, 1953), and Olivecrona, *Law as Fact* (1939). The clearest statement of their views on the character of legal rules is to be found in Olivecrona, op. cit. His criticism of the predictive analysis of legal rules favoured by many American jurists (see op. cit., pp. 85–8, 213–15) should be compared with the similar criticisms in Kelsen, *General Theory* (pp. 165 ff., 'The Prediction of the Legal Function'). It is worth inquiring why such different conclusions as to the character of legal rules are drawn by these two jurists in spite of their agreement on many points. For criticisms of the Scandinavian School, see Hart, review of Hägerström, op. cit. in 30 *Philosophy* (1955); 'Scandinavian Realism', *Cambridge Law Journal* (1959); Marshall, 'Law in a Cold Climate', *Juridical Review* (1956).

Page 12. *Rule-scepticism in American legal theory.* See Chapter VII, ss. 1 and 2 on 'Formalism and Rule-scepticism', where some of the principal doctrines which have come to be known as 'Legal Realism' are examined.

Pages 12–13. *Doubt as to meaning of common words.* For cases on the meaning of 'sign' or 'signature' see 34 Halsbury, *Laws of England* (2nd edn.), paras. 165–9 and In the Estate of

Cook (1960), 1 AER 689 and cases there cited.

Page 13. *Definition.* For a general modern view of the forms and functions of definition see Robinson, *Definition* (Oxford, 1952). The inadequacy of the traditional definition *per genus et differentiam* as a method of elucidating legal terms is discussed by Bentham, *Fragment on Government* (notes to Chapter V, s. 6), and Ogden, *Bentham's Theory of Fictions* (pp. 75–104). See also Hart, 'Definition and Theory in Jurisprudence', *70 LQR* (1954), and Cohen and Hart, 'Theory and Definition in Jurisprudence,' *PAS* Suppl. vol. xxix (1955).

For the definition of the term 'law' see Glanville Williams, op. cit.; R. Wollheim, 'The Nature of Law' in *2 Political Studies* (1954); and Kantorowicz, *The Definition of Law* (1958), esp. Chapter 1. On the general need for, and clarificatory function of, a definition of terms, though no doubts are felt about their day-to-day use in particular cases, see Ryle, *Philosophical Arguments* (1945); Austin, 'A Plea for Excuses', *57 PAS* (1956–7), pp. 15 ff.

Page 15. *General terms and common qualities.* The uncritical belief that if a general term (e.g. 'law', 'state', 'nation', 'crime', 'good', 'just') is correctly used, then the range of instances to which it is applied must all share 'common qualities' has been the source of much confusion. Much time and ingenuity has been wasted in jurisprudence in the vain attempt to discover, for the purposes of definition, the common qualities which are, on this view, held to be the *only* respectable reason for using the same word of many different things (see Glanville Williams, op. cit. It is however important to notice that this mistaken view of the character of general words does not always involve the further confusion of 'verbal questions' with questions of fact which this author suggests).

Understanding of the different ways in which the several instances of a general term may be related is of particular importance in the case of legal, moral, and political terms. For analogy: see Aristotle, *Nicomachean Ethics*, i, ch. 6 (where it is suggested that the different instances of 'good' may be so related), Austin, *The Province*, Lecture V, pp. 119–24. For different relationships to a central case, e.g. healthy: see Aristotle, *Categories*, chap. 1 and examples in *Topics*, 1, chap. 15, ii, chap. 9, of 'paronyms'. For the notion of 'family resemblance': see Wittgenstein, *Philosophical Investigations*, i, paras. 66–76. Cf. Chapter VIII, s. 1 on the structure of the term 'just'. Wittgenstein's advice (op. cit., para. 66) is peculiarly relevant to the analysis of legal and political terms. Considering the definition of 'game' he said, 'Don't say there *must* be something common or they would not be called 'games', but *look* and *see* whether there is anything common to all. For if you look at them you will not see anything common to *all* but similarities, relationships, and a whole series at that.'

CHAPTER I 3rd ed. NOTES

Hart's own notes have been left unaltered in this edition. They remain useful for understanding nuances in his argument, thoughts not elaborated in the main text, and some comparisons between his own views and those of others. As a scholarly resource, however, they are often

superseded. What follows are pointers to more recent work in English that elaborates or criticizes his arguments. No attempt is made to be comprehensive—the literature is enormous—but only to suggest some items that will be of particular use to students. Where possible I have chosen works by Hart's most persistent interlocutors and by others who directly engage or develop his writings. There are many general works on Hart's legal philosophy. Two good book-length treatments are Neil MacCormick, *H. L. A. Hart* (2nd edn., Stanford University Press, 2008; all page references in these notes are to 1st edn., 1981) and Michael D. Bayles, *Hart's Legal Philosophy: An Examination* (Kluwer Academic, 1992). A brief overview is Joseph Raz's obituary 'H. L. A. Hart (1907–1992)' (1993) 5 *Utilitas* 145. For Hart's life and influences, see Nicola Lacey, *A Life of H. L. A. Hart: The Nightmare and the Noble Dream* (Oxford University Press, 2004).

Pages 3–4. *Common knowledge about the law.* For discussion of the importance of ordinary understandings, and self-understanding, to legal theory see Joseph Raz, *Between Authority and Interpretation* (Oxford University Press, 2009), chap. 2.

Page 4. *Borderline cases of legal systems.* Hart's point is that philosophic controversy about law does not usually result from the existence of borderline cases. Ronald Dworkin agrees: see *Law's Empire* (Harvard University Press, 1986) 40–3. For doubts about whether domestic legal systems *are* the central case of law see John Griffiths, 'What is Legal Pluralism?' (1986) 24 *Journal of Legal Pluralism & Unofficial Law* 1; William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge University Press, 2009), chap. 4; and Keith Culver and Michael Giudice, *Legality's Borders* (Oxford University Press, 2010).

Pages 6–13. *Recurrent issues.* Hart later thought of the agenda for legal philosophy somewhat differently. In 1967 he added to the issues treated in this book problems of legal reasoning and problems in the criticism of law, including the appropriate standards to judge law by, and the basis for law's moral authority. See 'Problems of the Philosophy of Law', chap. 3 of his *Essays in Jurisprudence and Philosophy* (Oxford University Press, 1983).

For contrasting views of the agenda for legal theory see Ronald Dworkin, *Taking Rights Seriously* (rev. edn., Harvard University Press, 1978) 14–16; Ronald Dworkin, *Law's Empire* 1–6; John Finnis, *Natural Law and Natural Rights* (2nd edn., Oxford University Press, 2011), chap. 1; and Hugh Collins, *Marxism and Law* (Oxford University Press, 1984) chap. 1. For an assessment of progress on Hart's agenda see Leslie Green, 'General Jurisprudence: A 25th Anniversary Essay' (2005) 25 *Oxford Journal of Legal Studies* 565.

Page 14. *The relationship between word and object.* See P. M. S. Hacker, 'Hart's Philosophy of Law' in P. M. S. Hacker and J. Raz eds., *Law, Morality, and Society: Essays in Honour of H. L. A. Hart* (Oxford University Press, 1977) esp. 2–12; and Neil MacCormick, *H. L. A. Hart* 12–19. Dworkin interprets Hart as holding 'that lawyers all follow certain linguistic criteria for judging propositions of law'—this is the basis of the 'semantic sting' argument, *Law's Empire* 45–6. Criticism of this aspect of Hart's methodology can also be found in Nicos Stavropoulos,

'Hart's Semantics' in Jules Coleman ed., *Hart's Postscript* (Oxford University Press, 2001) and, on different grounds, in Brian Leiter, 'Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence'; (2003) 48 *American Journal of Jurisprudence* 17, esp. 43–51.

On the semantics of 'law' see Jules Coleman and Ori Simchen, 'Law' (2003) 9 *Legal Theory* 1. For doubts about whether jurisprudence has any stake in semantics see Joseph Raz, *Ethics in the Public Domain* (rev. edn., Oxford University Press, 1995, chap. 9, esp. 195–8) and Joseph Raz, *Between Authority and Interpretation*, 49–59. For general doubts about the linguistic approach to political theory see David Miller, 'Linguistic Philosophy and Political Theory', in David Miller and Larry Siedentop eds., *The Nature of Political Theory* (Oxford University Press, 1983).

Pages 15–16. *Definition per genus et differentiam.* For a critique of Hart's position see P. M. S. Hacker, 'Definition in Jurisprudence' (1969) 19 *Philosophical Quarterly* 343.

Page 16. *A central set of elements which form a common part of the answer.* They are presented at 91–9. Whether or not these amount to a 'conceptual analysis' of 'law' or 'legal system' depends on what one takes such an analysis to require. Compare Frank Jackson, *From Metaphysics to Ethics: A Defense of Conceptual Analysis* (Oxford University Press, 1998) and Colin McGinn, *Truth by Analysis*: *Games, Names, and Philosophy* (Oxford University Press, 2012), esp. chap. 2. On the relationship between a theory of Hart's sort and sociological theory see H. L. A. Hart, 'Analytical Jurisprudence in Mid-Twentieth Century: A Reply to Professor Bodenheimer' (1956) 105 *University of Pennsylvania Law Review* 953; M. Krygier, ' "The Concept of Law" and Social Theory' (1982) 2 *Oxford Journal of Legal Studies* 155; B. Z. Tamanaha, 'Socio-Legal Positivism and a General Jurisprudence' (2001) 21 *Oxford Journal of Legal Studies* 1; and Denis Galligan, 'Legal Theory and Empirical Research' in Peter Cane and Herbert Kritzer eds., *Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010).

FOOTNOTES CHAPTER I