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Essay 3

Problems of the Philosophy of Law

The existence of legal systems, even the most rudimentary, has afforded the opportunity for a variety of academic disciplines. Of these some are, or purport to be, empirical: they include the historical study of particular legal systems or specific legal doctrines and rules, and sociological studies of the ways in which the content and the efficacy of law and the forms and procedures of law-making and law-applying both influence and are influenced by their economic and social setting, and serve social needs or specific social functions. But since law in most societies soon reaches a very high degree of complexity, its administration requires the special training of judges and professional lawyers. This in turn has created the need for a specific form of legal science concerned with the systematic or dogmatic exposition of the law and its specific methods and procedures. For this purpose the law is divided into distinct branches (such as crime, tort, and contract), and general classifications and organizing concepts are introduced to collect common elements in the situations and relationships created by the law (such as rights, duties, obligations, legal personality, ownership, and possession) or elements common to many separate legal rules (such as act and intention).

No very firm boundaries divide the problems confronting these various disciplines from the problems of the philosophy of law. This is especially true of the conceptual schemes of classification, definition, and division introduced by the academic study of the law for the purpose of exposition and teaching; but even some historical and sociological statements about law are sufficiently general and abstract to need the attention of the philosophical critic. Little, however, is to be gained from elaborating the traditional distinctions between the philosophy of law, jurisprudence (general and particular), and legal theory, although importance has often been attributed to them. Instead, as with other branches of philosophy, it is more important to distinguish as belonging to the philosophy of law certain groups of questions which remain to be

answered even when a high degree of competence or mastery of particular legal systems of the empirical and dogmatic studies mentioned above has been gained. Three such groups may be distinguished: problems of definition and analysis, problems of legal reasoning, and problems of the criticism of law. This division is, however, not uncontroversial; and objections to it are considered in the last section of the article.

PROBLEMS OF DEFINITION AND ANALYSIS

The definition of law. All the obscurities and prejudices which in other areas of philosophy surround the notions of definition and of meaning have contributed to the endlessly debated problems of the definition of law. In early arguments the search for the definition of law was assumed to be the task of identifying and describing the 'essence' or 'nature' of law, and thus the uniquely correct definition of law by reference to which the propriety of the use, however well established, of the expressions 'law' and 'legal system' could be tested. It is frequently difficult to distinguish from this search for the essence of law a more modest conception of definition which, while treating the task as one of identifying and describing the standards actually accepted for the use of these expressions, assumes that there is only one 'true', 'strict', or 'proper' use of them and that this use can be described in terms of a single set of necessary and sufficient conditions. A wide range of different considerations has shown how unrealistic or how sterile this assumption is in the case of law, and has compelled its surrender. Among these considerations is the realization that although there are central clear instances to which the expressions 'law' and 'legal system' have undisputed application, there are also cases, such as international law and primitive law, which have certain features of the central case but lack others. Also, there is the realization that the justification for applying general expressions to a range of different cases often lies not in their conformity to a set of necessary and sufficient conditions but in the analogies that link them or their varying relationships to some single element.

The foregoing are difficulties of definition commonly met in many areas of philosophy, but the definition of law has peculiar difficulties of its own. Thus, the assumption that the

definition of law either has been or should be lexical, that is, concerned with the characterization or elucidation of *any* actual usage, has been challenged on several grounds. Thus it is often asserted that in the case of law, the area of indeterminacy of actual usage is too great and relates to too many important and disputed issues, and that what is needed is not a characterization or elucidation of usage but a reasoned case for the inclusion in or exclusion from the scope of the expressions 'law' and 'legal system' of various deviations from routine and undisputed examples. These deviant cases include not only international law and primitive law but also certain elements found in developed municipal legal systems, such as rules to which the usual sanctions are not attached and rules which run counter to fundamental principles of morality and justice.

In the above circumstances some theorists disclaim as necessarily deceptive any aim to provide an analysis or definition of law which is a neutral description or elucidation of usage; instead, they speak of the task of definition as 'stipulative', 'pragmatic', or 'constructive', that is, as designed to provide a scheme or model for the demarcation and classification of an area of study. The criterion of adequacy of such pragmatic definitions is not conformity to or the capacity to explain any actual usage but the capacity to advance the theorists' special aims, which may differ widely. Thus, a definition of law to be used for the instruction or assistance of lawyers concerned primarily with the outcome of litigation or court proceedings will differ from the definition used to demarcate and unify the fruitful area of historical study and will also differ from the definition to be used by the social critic concerned with identifying the extent to which human interests are advanced or frustrated by modes of social organization and control.

Neither the legitimacy of pragmatic definitions nor their utility for deliberately chosen objectives need be disputed. But it is clear that they avoid rather than resolve many of the long-standing perplexities which have motivated requests for the definition of law and have made it a philosophical problem. The factors which have generated these perplexities may be summarized as follows: Notwithstanding the considerable area of indeterminacy in their use, the expressions 'law', 'a

law', 'legal system', and a wide range of derivative and interrelated expressions ('legislation', 'courts of law', 'the application of law', 'legal adjudication') are sufficiently determinate to make possible general agreement in judgments about their application to particular instances. But reflection on what is thus identified by the common usage of such terms shows that the area they cover is one of great internal complexity; laws differ radically both in content and in the ways in which they are created, yet despite this heterogeneity they are interrelated in various complex ways so as to constitute a characteristic structure or system. Many requests for the definition of law have been stimulated by the desire to obtain a coherent view of this structure and an understanding of the ways in which elements apparently so diverse are unified. These are problems, therefore, of the structure of law.

Reflection on the operations of a legal system disclosed problems of another sort, for it is clear that law as a mode of influence on human behaviour is intimately related to and in many ways dependent upon the use or threat of force on the one hand and on morality and justice on the other. Yet law is also, at points, distinct from both, so no obvious account of these connections appears acceptable: they appear to be not merely contingent, and since they sometimes fail, the statement of these connections does not appear to be any easily comprehensible species of necessary truth. Such tensions create demands for some stable and coherent definition of the relationships between law, coercion, and morality; but definitions of law have only in part been designed to make these important areas of human experience more intelligible. Practical and indeed political issues have long been intertwined with theoretical ones; and as is evident from the long history of the doctrines of natural law and legal positivism, the advocacy of a submissive or a critical attitude to law, or even of obedience or disobedience, has often been presented in the form of persuasive definition of the relationship between law and morality on the one hand and between law and mere force on the other.

The analysis of legal concepts. Although legal rules are of many different types and may be classified from many different points of view, they have many common constituents; and although the law creates for both individuals and groups

a great variety of different situations and relationships, some of these are constantly recurrent and of obvious importance for the conduct of social life. Both lawyers and laymen have frequent occasion to refer to these common elements and situations, and for this purpose they use classifications and organizing concepts expressed in a vocabulary which has bred many problems of analysis. These problems arise in part because this vocabulary has a more or less established use apart from law, and the points of convergence and divergence between legal and non-legal usage are not always immediately obvious or easily explicable. It is also the case that the ways in which common elements in law or legal situations are classified by different theorists in part reflect and derive from divergent conceptions of law in general. Therefore, although different writers use such expressions as 'rights' and 'duty' in referring to the same legal situations, they select different elements or aspects from these situations. A third factor calling for clarification is the fact that many of the commonest notions used in referring to legal phenomena can be explicated only when certain distinctive ways in which language functions in conjunction with practical rules have been understood. These problems of analysis are illustrated in the case of the concepts of (1) legal obligation or duty, (2) a legal transaction, and (3) intention. (Certain distinctions once made between the notions of a legal obligation and a legal duty are no longer of importance and will be disregarded.)

The situation in which an individual has a legal duty to do or to abstain from some action is the commonest and most fundamental of all legal phenomena; the reference to duty or its absence is involved in the definition of such other legal concepts as those of a right, power, a legal transaction, or a legal personality. Whenever the law of an effective legal system provides for the punishment of those who act or fail to act in certain ways, the word 'duty' applies. Thus, to take a simple example, if the law requires under penalty that persons of a certain age shall report for military service, then such persons have, or are 'under', a legal duty to do so. Thus much is undisputed, however much theorists may dispute over the analysis of 'duty' or its application to situations created not by the criminal law but by the law relating to torts or to contract.

However, even the above simple situation can be viewed

from two very different standpoints that give rise to apparently conflicting analyses of duty. From one of these (the predictive standpoint), reporting for military service is classified as a duty simply because failure to report renders likely certain forms of suffering at the hands of officials. From the other standpoint (the normative standpoint), reporting for military service is classified as a duty because, owing to the existence of the law, it is an action which may be rightly or justifiably demanded of those concerned; and failure to report is significant not merely because it renders future suffering likely but also because punishment is legally justified even if it does not always follow disobedience.

From Jeremy Bentham onward the predictive analysis of duty as a chance or likelihood of suffering in the event of disobedience to the law has been advocated by important writers for a variety of theoretical and practical reasons. On the one hand it has seemed to free the idea of legal duty from metaphysical obscurities and irrelevant associations with morals, and on the other to provide a realistic guide to life under law. It isolates what for some men is the only important fact about the operation of a legal system and what for all men is at least one important fact: the occasions and ways in which the law works adversely to their interests. This is of paramount importance not only to the malefactor but also to the critic and reformer of the law concerned to balance against the benefits which law brings its costs in terms of human suffering.

By contrast, the normative point of view, without identifying moral and legal duty or insisting on any common content, stresses certain common formal features that both moral and legal duty possess in virtue of their both being aspects of rule-guided conduct. This is the point of view of those who, although they may not regard the law as the final arbiter of conduct, nevertheless generally accept the existence of legal rules as guides to conduct and as legally justifying demands for conformity, punishment, enforced compensation, or other forms of coercion. Attention to these features of the idea of duty is essential for understanding the ways in which law is conceived of and operative in social life.

Although theorists have often attributed exclusive correctness to these different standpoints, there are various ways in which they may be illuminatingly combined. Thus, the

normative account might be said to give correctly the meaning of such statements as that a person has a legal duty to do a certain action, while the predictive account emphasizes that very frequently the point or purpose of making such statements is to warn that suffering is likely to follow disobedience. Such a distinction between the meaning of a statement and what is implied or intended by its assertion in different contexts is of considerable importance in many areas of legal philosophy.

The enactment of a law, the making of a contract, and the transfer by words, written or spoken, of ownership or other rights are examples of legal transactions which are made possible by the existence of certain types of legal rules and are definable in terms of such rules. To some thinkers, such transactions (acts in the law, or juristic acts) have appeared mysterious – some have even called them magical – because their effect is to change the legal position of individuals or to make or eliminate laws. Since, in most modern systems of law, such changes are usually effected by the use of words, written or spoken, there seems to be a species of legal alchemy. It is not obvious how the mere use of expressions like 'it is hereby enacted . . .', 'I hereby bequeath . . .', or 'the parties hereby agree . . .' can produce changes. In fact, the general form of this phenomenon is not exclusively legal, although it has only comparatively recently been clearly isolated and analysed. The words of an ordinary promise or those used in a christening ceremony in giving a name to a child are obvious analogues to the legal cases. Lawyers have sometimes marked off this distinctive function of language as the use of 'operative words', and under this category have distinguished, for example, the words used in a lease to create a tenancy from the merely descriptive language of the preliminary recital of the facts concerning the parties and their agreement.

For words (or in certain cases gestures, as in voting or other forms of behaviour) to have such operative effect, there must exist legal rules providing that if the words (or gestures) are used in appropriate circumstances by appropriately qualified persons, the general law or the legal position of individuals is to be taken as changed. Such rules may be conceived from one point of view as giving to the language used a certain kind of force or effect which is in a broad sense their meaning;

from another point of view they may be conceived as conferring on individuals the legal power to make such legal changes. In continental jurisprudence such rules are usually referred to as 'norms of competence' to distinguish them from simpler legal rules that merely impose duties with or without correlative rights.

As the expressions 'acts-in-the-law' and 'operative words' suggest, there are important resemblances between the execution of legal transactions and more obvious cases of human actions. These points of resemblance are of especial importance to understanding what has often seemed problematic – the relevance of the mental or psychological states of the parties concerned to the constitution or validity of such transactions. In many cases the relevant rules provide that a transaction shall be invalid or at least liable to be set aside at the option of various persons if the person purporting to effect it was insane, mistaken in regard to certain matters, or subjected to duress or undue influence. There is here an important analogy with the ways in which similar psychological facts (*mens rea*) may, in accordance with the principles of the criminal law, excuse a person from criminal responsibility for his action. In both spheres there are exceptions: in the criminal law there are certain cases of 'strict' liability where no element of knowledge or intention need be proved; and in certain types of legal transaction, proof that a person attached a special meaning to the words he used or was mistaken in some respect in using them would not invalidate the transaction, at least as against those who have relied upon it in good faith.

Attention to these analogies between valid legal transactions and responsible action and the mental conditions that in the one case invalidate and in the other excuse from responsibility illuminates many obscure theoretical disputes concerning the nature of legal transactions such as contract. Thus, according to one principal theory (the 'will' theory) a contract is essentially a complex psychological fact – something which comes into being when there is a meeting of minds (*consensus ad idem*) that jointly 'will' or 'intend' a certain set of mutual rights and duties to come into existence. The words used are, according to this theory, merely evidence of this consensus. The rival theory (the 'objective' theory) insists that what makes a contract is not a psychological

phenomenon but the actual use of words of offer and acceptance, and that except in special cases the law simply gives effect to the ordinary meaning of the language used by the parties and is not concerned with their actual states of mind. Plainly, each side to this dispute fastens on something important but exaggerates it. It is indeed true that, like an ordinary promise, a legal contract is not made by psychological facts. A contract, like a promise, is 'made' not by the existence of mental states but by words (or in some cases deeds). If it is verbally made, it is made by the operative use of language, and there are many legal rules inconsistent with the idea that a *consensus ad idem* is required. On the other hand, just because the operative use of language is a kind of action, the law may – and in most civilized legal systems does – extend to it a doctrine of responsibility or validity under which certain mental elements are made relevant. Thus a contract, although made by words, may be vitiated or made void or 'voidable' if a party is insane, mistaken in certain ways, or under duress. The truths latent among the errors of the 'will' theory and the 'objective' theory can therefore be brought together in an analysis which makes explicit the analogy between valid transactions made by the operative use of language and responsible actions.

The fact that the law often treats certain mental states or psychological conditions as essential elements both in the validity of legal transactions and in criminal responsibility has thrust upon lawyers the task of distinguishing between and analysing such notions as 'will', 'intention', and 'motive'. These are concepts which have long puzzled philosophers not primarily concerned with the law, and their application in the law creates further specific problems. These arise in various ways: there are divergencies between the legal and non-legal use of these notions which are not always obvious or easily understood; the law, because of difficulties of proof or as a matter of social policy, may often adopt what are called external or objective standards, which treat certain forms of outward behaviour as conclusive evidence of the existence of mental states or impute to an individual the mental state that the average man behaving in a given way would have had. Although statutes occasionally use expressions like 'maliciously', 'knowingly', or 'with intent', for the most part the

expressions 'intentionally' and 'voluntarily' are not the language of legal rules but are used in the exposition of such rules in summarizing the various ways in which either criminal charges or civil claims may fail if something is done – for instance, accidentally, by mistake, or under duress.

The problems that arise in these ways may be illustrated in the case of intention. Legal theorists have recognized intention as the mental element of central importance to the law. Thus, an intention to do the act forbidden by law is in Anglo-American law normally the sufficient mental element for criminal responsibility and also is normally, although not always, necessary for responsibility. So if a man intends to do the act forbidden by law, other factors having to do with his powers of self-control are usually irrelevant, although sometimes duress and sometimes provocation or deficient ability to control conduct, caused by mental disorder, may become relevant. In fact, three distinct applications of the notion of intention are important in the law, and it is necessary to distinguish in any analysis of this concept (1) the idea of intentionally doing something forbidden by law; (2) doing something with a further intention; and (3) the intention to do a future act. The first of these is in issue when, if a man is found to have wounded or killed another, the question is asked whether he did it intentionally or unintentionally. The second is raised when the law, as in the case of burglary defined as 'breaking into premises at night with the intention of committing a felony', attaches special importance or more severe penalties to an action if it is done for some further purpose, even though the latter is not executed. The third application of intention can be seen in those cases where an act is criminal if it is accompanied by a certain intention – for instance, incurring a debt with the intention never to pay.

Of these three applications the first is of chief importance in the law, but even here the law only approximates to the non-legal concept and disregards certain elements in its ordinary usage. For in the law the question whether a man did something intentionally or not is almost wholly a question concerning his knowledge or belief at the time of his action. Hence, in most cases when an action falling under a certain description (such as wounding a policeman) is made a crime, the law is satisfied, in so far as any matter of intention is concerned,

if the accused knew or believed that his action would cause injury to his victim and that his victim was in fact a policeman. This almost exclusively cognitive approach is one distinctive way in which the law diverges from the ordinary idea of intentionally doing something, for in ordinary thought not all the foreseen consequences of conduct are regarded as intended.

A rationale of this divergence can be provided, however. Although apart from the law a man will be held to have done something intentionally only if the outcome is something aimed at or for the sake of which he acted, this element which the law generally disregards is not relevant to the main question with which the law is concerned in determining a man's legal responsibility for bringing about a certain state of affairs. The crucial question at this stage in a criminal proceeding is whether a man whose outward conduct and its consequences fall within the definition of a crime had at the time he acted a choice whether these consequences were or were not to occur. If he did, and if he chose that in so far as he had influence over events they would occur, then for the law it is irrelevant that he merely foresaw that they would occur and that it was not his purpose to bring them about. The law at the stage of assessing a man's responsibility is interested only in his conscious control over the outcome, and discards those elements in the ordinary concept of intention which are irrelevant to the conception of control. But when the stage of conviction in a criminal proceeding is past, and the question becomes how severely the criminal is to be punished, the matter previously neglected often becomes relevant. Distinctions may be drawn at this stage between the man who acted for a certain purpose and one who acted merely foreseeing that certain consequences would come about.

The second and third applications of the notion of intention (doing something with a further intent and the intention to do a future action) are closer to non-legal usage, and in the law, as elsewhere, certain problems of distinguishing motive and intention arise in such cases.

PROBLEMS OF LEGAL REASONING

Since the early twentieth century, the critical study of the forms of reasoning by which courts decide cases has been a

principal concern of writers on jurisprudence, especially in America. From this study there has emerged a great variety of theories regarding the actual or proper place in the process of adjudication of what has been termed, often ambiguously, 'logic'. Most of these theories are sceptical and are designed to show that despite appearances, deductive and inductive reasoning play only a subordinate role. Contrasts are drawn between 'logic' and 'experience' (as in Holmes's famous dictum that 'the life of the law has not been logic; it has been experience') or between 'deductivism' or 'formalism' on the one hand and 'creative choice' or 'intuitions of fitness' on the other. In general, such theories tend to insist that the latter members of these contrasted sets of expression more adequately characterize the process of legal adjudication, despite its appearance of logical method and form. According to some variants of these theories, although logic in the sense of deductive and inductive reasoning plays little part, there are other processes of legal reasoning or rational criteria, which courts do and should follow in deciding cases. According to more extreme variants, the decisions of courts are essentially arbitrary.

Legislation and precedent. In Anglo-American jurisprudence the character of legal reasoning has been discussed chiefly with reference to the use by the courts of two 'sources' of law: (1) the general rules made by legislative bodies (or by other rule-making agencies to which legislative powers have been delegated) and (2) particular precedents or past decisions of courts which are treated as material from which legal rules may be extracted although, unlike legislative rules, there is no authoritative or uniquely correct formulation of the rules so extracted. Conventional accounts of the reasoning involved in the application of legislative rules to particular cases have often pictured it as exclusively a matter of deductive inference. The court's decision is represented as the conclusion of a syllogism in which the major premise consists of the rule and the minor premise consists of the statement of the facts which are agreed or established in the case. Similarly, conventional accounts of the use of precedents by courts speak of the courts' extraction of a rule from past cases as inductive reasoning and the application of that rule to the case in hand as deductive reasoning.

In their attack on these conventional accounts of judicial reasoning, sceptical writers have revealed much that is of great importance both to the understanding and to the criticism of methods of legal adjudication. There are undoubtedly crucially important phases in the use of legal rules and precedents to decide cases which do not consist merely of logical operations and which have long been obscured by the traditional terminology adopted both by the courts themselves in deciding cases and by jurists in describing the activities of courts. Unfortunately, the general claim that logic has little or no part to play in the judicial process is, in spite of its simple and monolithic appearance, both obscure and ambiguous; it embraces a number of different and sometimes conflicting contentions which must be separately investigated. The most important of these issues are identified and discussed below. There are, however, two preliminary issues of peculiar concern to philosophers and logicians which demand attention in any serious attempt to characterize the forms of legal reasonings.

It has been contended that the application of legal rules to particular cases cannot be regarded as a syllogism or any other kind of deductive inference, on the grounds that neither general legal rules nor particular statements of law (such as those ascribing rights or duties to individuals) can be characterized as either true or false and thus cannot be logically related either among themselves or to statements of fact; hence, they cannot figure as premises or conclusions of a deductive argument. This view depends on a restrictive definition, in terms of truth and falsehood, of the notion of a valid deductive inference and of logical relations such as consistency and contradiction. This would exclude from the scope of deductive inference not only legal rules or statements of law but also commands and many other sentential forms which are commonly regarded as susceptible of logical relations and as constituents of valid deductive arguments. Although considerable technical complexities are involved, several more general definitions of the idea of valid deductive inference that render the notion applicable to inferences the constituents of which are not characterized as either true or false have now been worked out by logicians. In what follows, as in most of contemporary jurisprudential literature, the general acceptability of this more generalized definition of valid inference is assumed.

Considerable obscurity surrounds the claim made by more conventional jurisprudential writers that inductive reasoning is involved in the judicial use of precedents. Reference to induction is usually made in this connection to point a contrast with the allegedly deductive reasoning involved in the application of legislative rules to particular cases. 'Instead of starting with a general rule the judge must turn to the relevant cases, discover the general rule implicit in them. . . . The outstanding difference between the two methods is the source of the major premise — the deductive method assumes it whereas the inductive sets out to discover it from particular instances'.[1]

It is of course true that courts constantly refer to past cases both to discover rules and to justify their acceptance of them as valid. The past cases are said to be 'authority' for the rules 'extracted' from them. Plainly, one necessary condition must be satisfied if past cases are in this way to justify logically the acceptance of a rule: the past case must be an instance of the rule in the sense that the decision in the case could be deduced from a statement of the rule together with a statement of the facts of the case. The reasoning in so far as the satisfaction of this necessary condition is concerned is in fact an inverse application of deductive reasoning. But this condition is, of course, only one necessary condition and not a sufficient condition of the court's acceptance of a rule on the basis of past cases, since for any given precedent there are logically an indefinite number of alternative general rules which can satisfy the condition. The selection, therefore, of one rule from among these alternatives as the rule for which the precedent is taken to be authority must depend on the use of other criteria limiting the choice, and these other criteria are not matters of logic but substantive matters which may vary from system to system or from time to time in the same system. Thus, some theories of the judicial use of precedent insist that the rule for which a precedent is authority must be indicated either explicitly or implicitly by the court through its choice of facts to be treated as 'material' to a case. Other theories insist that the rule for which a precedent is authority is the rule which a later court considering the precedent would

[1] G. W. Paton, *A Textbook of Jurisprudence*, 2nd edn. (Oxford 1951), 171-2.

select from the logically possible alternatives after weighing the usual moral and social factors.

Although many legal writers still speak of the extraction of general rules from precedents, some would claim that the reasoning involved in their use of precedents is essentially reasoning from case to case 'by example': a court decides the present case in the same way as a past case if the latter 'sufficiently' resembles the former in 'relevant' respects, and thus makes use of the past case as a precedent without first extracting from it and formulating any general rule. Nevertheless, the more conventional accounts, according to which courts use past cases to discover and justify their acceptance of general rules, are sufficiently widespread and plausible to make the use of the term 'induction' in this connection worth discussing.

The use of 'induction' to refer to the inverse application of deduction involved in finding that a past case is the instance of a general rule may be misleading: it suggests stronger analogies than exist with the modes of probabilistic inference used in the sciences when general propositions of fact or statements about unobserved particulars are inferred from or regarded as confirmed by observed particulars. 'Induction' may also invite confusion with the form of deductive inference known as perfect induction, or with real or alleged methods of discovering generalizations sometimes referred to as intuitive induction.

It is, however, true that the inverse application of deduction involved in the use of precedents is also an important part of scientific procedure, where it is known as hypothetic inference or hypothetico-deductive reasoning. Hence, there are certain interesting analogies between the interplay of observation and theory involved in the progressive refining of a scientific hypothesis to avoid its falsification by contrary instances and the way in which a court may refine a general rule both to make it consistent with a wide range of different cases and to avoid a formulation which would have unjust or undesirable consequences.

Notwithstanding these analogies, the crucial difference remains between the search for general propositions of fact rendered probable by confirming instances but still falsifiable by future experience, and rules to be used in the decision of

cases. An empirical science of the judicial process is of course possible: it would consist of factual generalization about the decisions of courts and might be an important predictive tool. However, it is important to distinguish the general propositions of such an empirical science from the rules formulated and used by courts.

Descriptive and prescriptive theories. The claim that logic plays only a subordinate part in the decision of cases is sometimes intended as a corrective to misleading descriptions of the judicial process, but sometimes it is intended as a criticism of the methods used by courts, which are stigmatized as 'excessively logical', 'formal', 'mechanical', or 'automatic'. Descriptions of the methods actually used by courts may be distinguished from prescriptions of alternative methods and must be separately assessed. It is, however, notable that in many discussions of legal reasoning these two are often confused, perhaps because the effort to correct conventional misdescriptions of the judicial process and the effort to correct the process itself have been inspired by the realization of the same important but often neglected fact: the relative indeterminacy of legal rules and precedents. This indeterminacy springs from the fact that it is impossible in framing general rules to anticipate and provide for every possible combination of circumstances which the future may bring. For any rule, however precisely formulated, there will always be some factual situations in which the question whether the situations fall within the scope of the general classificatory terms of the rule cannot be settled by appeal to linguistic rules or conventions or to canons of statutory interpretation, or even by reference to the manifest or assumed purposes of the legislature. In such cases the rules may be found either vague or ambiguous. A similar indeterminacy may arise when two rules apply to a given factual situation and also where rules are expressly framed in such unspecific terms as 'reasonable' or 'material'. Such cases can be resolved only by methods whose rationality cannot lie in the logical relations of conclusions to premises. Similarly, because precedents can logically be subsumed under an indefinite number of general rules, the identification of *the* rule for which a precedent is an authority cannot be settled by an appeal to logic.

These criticisms of traditional descriptions of the judicial

process are in general well taken. It is true that both jurists and judges, particularly in jurisdictions in which the separation of powers is respected, have frequently suppressed or minimized the indeterminacy of legal rules or precedents when giving an account of the use of them in the process of decision. On the other hand, another complaint often made by the same writers, that there is an excess of logic or formalism in the judicial process, is less easy to understand and to substantiate. What the critics intend to stigmatize by these terms is the failure of courts, when applying legal rules or precedents, to take advantage of the relative indeterminacy of the rules or precedents to give effect to social aims, policies, and values. Courts, according to these critics, instead of exploiting the fact that the meaning of a statutory rule is indeterminate at certain points, have taken the meaning to be determinate simply because in some different legal context similar wording has been interpreted in a certain way or because a given interpretation is the 'ordinary' meaning of the words used.

This failure to recognize the indeterminacy of legal rule (often wrongly ascribed to analytical jurisprudence and stigmatized as conceptualism) has sometimes been defended on the ground that it maximizes certainty and the predictability of decisions. It has also sometimes been welcomed as furthering an ideal of a legal system in which there are a minimum number of independent rules and categories of classification.

The vice of such methods of applying rules is that their adoption prejudges what is to be done in ranges of different cases whose composition cannot be exhaustively known beforehand: rigid classification and divisions are set up which ignore differences and similarities of social and moral importance. This is the burden of the complaint that there is an excessive use of logic in the judicial process. But the expression 'an excessive use of logic' is unhappy, for when social values and distinctions of importance are ignored in the interpretation of legal rules and the classification of particulars, the decision reached is not more logical than decisions which give due recognition to these factors: logic does not determine the interpretation of words or the scope of classifications. What is true is that in a system in which such rigid modes of interpretation are common, there will be more occasions when

a judge can treat himself as confronted with a rule whose meaning has been predetermined.

Methods of discovery and standards of appraisal. In considering both descriptive and prescriptive theories of judicial reasoning, it is important to distinguish (1) assertions made concerning the usual processes or habits of thought by which judges actually reach their decisions, (2) recommendations concerning the processes to be followed, and (3) the standards by which judicial decisions are to be appraised. The first of these concerns matters of descriptive psychology, and to the extent that assertions in this field go beyond the descriptions of examined instances, they are empirical generalizations or laws of psychology; the second concerns the art or craft of legal judgment, and generalizations in this field are principles of judicial technology; the third relates to the assessment or justification of decisions.

These distinctions are important because it has sometimes been argued that since judges frequently arrive at decisions without going through any process of calculation or inference in which legal rules or precedents figure, the claim that deduction from legal rules plays any part in decision is mistaken. This argument is confused, for in general the issue is not one regarding the manner in which judges do, or should, come to their decisions; rather, it concerns the standards they respect in justifying decisions, however reached. The presence or absence of logic in the appraisal of decisions may be a reality whether the decisions are reached by calculation or by an intuitive leap.

Clear cases and indeterminate rules. When the various issues identified above are distinguished, two sets of questions emerge. The first of these concerns the decisions of courts in 'clear' cases where no doubts are felt about the meaning and applicability of a single legal rule, and the second concerns decisions where the indeterminacy of the relevant legal rules and precedents is acknowledged.

Even where courts acknowledge that an antecedent legal rule uniquely determines a particular result, some theorists have claimed that this cannot be the case, that courts always 'have a choice', and that assertions to the contrary can only be *ex post facto* rationalizations. Often this scepticism springs from the confusion of questions of methods of discovery with

standards of appraisal noted above. Sometimes, however, it is supported by references to the facts that even if courts fail to apply a clearly applicable rule yielding a determinate result, this is not a punishable offence, and that the decision given is still authoritative and, if made by a supreme tribunal, final. Hence, it is argued that although courts may show a certain degree of regularity in decision, they are never bound to do so; they always are free to decide otherwise than they do. These last arguments rest on a confusion of finality with infallibility in decisions and on a disputable interpretation of the notion of 'being bound' to respect legal rules.

Yet scepticism of this character, however unacceptable, does serve to emphasize that it is a matter of some difficulty to give any exhaustive account of what makes a 'clear case' clear or makes a general rule obviously and uniquely applicable to a particular case. Rules cannot claim their own instances, and fact situations do not await the judge neatly labelled with the rule applicable to them. Rules cannot provide for their own application, and even in the clearest case a human being must apply them. The clear cases are those in which there is general agreement that they fall within the scope of a rule, and it is tempting to ascribe such agreements simply to the fact that there are necessarily such agreements in the use of the shared conventions of language. But this would be an oversimplification because it does not allow for the special conventions of the legal use of words, which may diverge from their common use, or for the way in which the meanings of words may be clearly controlled by reference to the purpose of a statutory enactment which itself may be either explicitly stated or generally agreed. A full exploration of these questions is the subject-matter of the study of the interpretation of statute.

The decisions of cases which cannot be exhibited as deductions from determinate legal rules have often been described as arbitrary. Although much empirical study of the judicial process remains to be done, it is obvious that this description and the dichotomy of logical deduction and arbitrary decision, if taken as exhaustive, is misleading. Judges do not generally, when legal rules fail to determine a unique result, intrude their personal preferences or blindly choose among alternatives; and when words like 'choice' and 'discretion',

or phrases such as 'creative activity' and 'interstitial legislation' are used to describe decisions, these do not mean that courts do decide arbitrarily without elaborating reasons for their decisions – and still less that any legal system authorizes decisions of this kind.

It is of crucial importance that cases for decision do not arise in a vacuum but in the course of the operation of a working body of rules, an operation in which a multiplicity of diverse considerations are continuously recognized as good reasons for a decision. These include a wide variety of individual and social interests, social and political aims, and standards of morality and justice; and they may be formulated in general terms as principles, policies and standards. In some cases only one such consideration may be relevant, and it may determine decision as unambiguously as a determinate legal rule. But in many cases this is not so, and judges marshal in support of their decisions a plurality of such considerations which they regard as jointly sufficient to support their decision, although each separately would not be. Frequently these considerations conflict, and courts are forced to balance or weigh them and to determine priorities among them. The same considerations (and the same need for weighing them when they conflict) enter into the use of precedents when courts must choose between alternative rules which can be extracted from them, or when courts consider whether a present case sufficiently resembles a past case in relevant respects.

Perhaps most modern writers would agree up to this point with this account of judicial decision where legal rules are indeterminate, but beyond this point there is a divergence. Some theorists claim that notwithstanding the heterogeneous and often conflicting character of the factors which are relevant to decision, it is still meaningful to speak of a decision as *the* uniquely correct decision in any case and of the duty of the judge to discover it. They would claim that a judicial choice or preference does not become rational because it is deferred until after the judge has considered the factors that weigh for and against it.

Other theorists would repudiate the idea that in such cases there is always a decision which is uniquely correct, although they of course agree that many decisions can be clearly ruled

out as incorrect. They would claim that all that courts do and can do at the end of the process of coolly and impartially considering the relevant considerations is to choose one alternative which they find the most strongly supported, and that it is perfectly proper for them to concede that another equally skilled and impartial judge might choose the other alternative. The theoretical issues are not different from those which arise at many points in the philosophical discussions of moral argument. It may well be that terms like 'choice', 'discretion', and 'judicial legislation' fail to do justice to the phenomenology of considered decision: its felt involuntary or even inevitable character which often marks the termination of deliberation on conflicting considerations. Very often the decision to include a new case in the scope of a rule or to exclude it is guided by the sense that this is the 'natural' continuation of a line of decisions or carries out the 'spirit' of a rule. It is also true that if there were not also considerable agreement in judgment among lawyers who approach decisions in these ways, we should not attach significance and value to them or think of such decisions as reached through a rational process. Yet however it may be in moral argument, in the law it seems difficult to substantiate the claim that a judge confronted with a set of conflicting considerations must always assume that there is a single uniquely correct resolution of the conflict and attempt to demonstrate that he has discovered it.

Rules of evidence. Courts receive and evaluate testimony of witnesses, infer statements of fact from other statements, and accept some statements as probable or more probable than others or as 'beyond reasonable doubt'. When it is said that in these activities special modes of legal reasoning are exhibited and that legal proof is different from ordinary proof, reference is usually intended to the exclusionary rules of the law of evidence (which frequently require courts, in determining questions of fact, to disregard matters which are logically relevant), or to various presumptions which assign greater or lesser weight to logically relevant considerations than ordinary standards of reasoning do.

The most famous examples of exclusionary rules are those against 'hearsay', which (subject to certain exceptions) make inadmissible, as evidence of the facts stated, reports tendered by a witness, however credible, of statements made by another

person. Another example is the rule that when a person is charged with a crime, evidence of his past convictions and disposition to commit similar crimes is not admissible as evidence to show that he committed the crime charged. An example of a rule which may give certain facts greater or less probative weight than ordinary standards do is the presumption that unless the contrary is proved beyond reasonable doubt, a child born to a woman during wedlock is the child of both parties to the marriage.

The application of such rules and their exceptions gives rise to results which may seem paradoxical, even though they are justifiable in terms of the many different social needs which the courts must satisfy in adjudicating cases. Thus, one consequence of the well-known exception to the hearsay rule that a report of a statement is admissible as evidence of a fact stated if it is made against the interest of the person who stated it, is that a court may find that a man committed adultery with a particular woman but be unable to draw a conclusion that she committed adultery with him. A logician might express the resolution of the paradox by saying that from the fact that p entails q it does not follow that 'it is legally proved that p' entails 'it is legally proved that q'.

Apart from such paradoxes, the application of the rules of evidence involves the drawing of distinctions of considerable philosophical importance. Thus, although in general the law excludes reports of statements as evidence of the facts stated, it may admit such reports for other purposes, and in fact draws a distinction between statements of fact and what J. L. Austin called performatory utterances. Hence, if the issue is whether a given person made a promise or placed a bet, reports that he uttered words which in the context amounted to a promise or a bet are admissible. So, too, reports of a person's statement of his contemporary mental states or sensations are admissible, and some theorists justify this on the ground that such first-person statements are to be assimilated to behaviour manifesting the mental state or sensation in question.

PROBLEMS OF THE CRITICISM OF LAW

Analysis and evaluation. A division between inquiries concerned with the analysis of law and legal concepts and those

concerned with the criticism or evaluation of law prima facie seems not only possible but necessary, yet the conception of an evaluatively neutral or autonomous analytical study of the law has not only been contested but also has been taken by some modern critics to be the hallmark of a shallow and useless legal positivism allegedly unconcerned with the values or ends which men pursue through law.

Many different objections to a purely analytical jurisprudence have been made. By some it has been identified with, or thought to entail commitment to, the view that a legal system is a closed logical structure in which decisions in particular cases are 'mechanically' deduced from clear antecedent rules whose identification or interpretation presents no problem of choice and involves no judgment of value. Other critics have contended that any serious demand for the definition of a legal concept must at least include a request for guidance as to the manner in which, when the relevant legal rules are unclear or indeterminate, particular cases involving the concept in question should best be determined. It is assumed by these critics that any question concerning the meaning of expressions such as 'a right' or 'a duty', as distinct from the question of what rights or duties should be legally recognized, are trivial questions to be settled by reference to a dictionary. Still others have urged that since the maintenance of a legal system and the typical operations of the law (legislation, adjudication, and the making of legal transactions) are purposive activities, any study which isolates law or legal phenomena for study without considering their adequacy or inadequacy for human purposes makes a vicious abstraction which is bound to lead to misunderstanding.

None of the above seem to constitute serious objections. The difficulties of decision in particular cases arising from the relative indeterminacy of legal rules are of great importance, but they are distinct from analytical questions such as those illustrated earlier, which remain to be answered even when legal rules are clear. Thus the isolation and characterization of the normative and predictive standpoints from which law may be viewed and the precise manner of interplay between subjective and objective factors in legal transactions are not things that can be discovered from dictionaries. But attention to them is indispensable in the analysis of the notion of a legal

obligation, a legal right, or a contract. There is of course much justice in the claim that in order to understand certain features of legal institutions or legal rules, the aims and purposes they are designed to fulfil must be understood. Thus, a tax cannot be distinguished from a fine except by reference to the purpose for which it is imposed; but to recognize this is not to abandon an analytical study of the law for an evaluative one. The identification of something as an instrument for certain purposes leaves open the question whether it is good or bad, although such identification may indicate the standards by reference to which this question is to be answered. In any case, there are many features of legal rules which may profitably be studied in abstraction from the purposes which such rules may be designed to achieve.

Criteria of evaluation. None the less, protests against the severance of analytical from critical or evaluative inquiries, even if misdirected in their ostensible aim, often serve to emphasize something important. These protests are usually accompanied by and sometimes confused with a general thesis concerning the standards and principles of criticism specifically appropriate to law. This is the thesis (which has appeared in many different forms in the history of the philosophy of law) that, whatever may be the case with value judgments in other fields or with moral judgments concerning the activities of individuals, the criteria which distinguish good law from bad do not merely reflect human preferences, tastes, or conventions, which may vary from society to society or from time to time; rather, they are determined by certain constant features of human nature and the natural environment with which men must contend.

The doctrine of natural law in its various traditional forms embodies this thesis. There are, however, obscurities and metaphysical assumptions involved in the use by natural-law theorists of the notions of nature and reason which makes their formulations unacceptable to most modern secular thought; and they often confuse their important arguments concerning the principles by which law and social institutions should be judged with arguments designed to show that a reference to morality or justice must be introduced into the definition of law or legal validity. None the less, it is possible to segregate these tangled issues, and some important modern

philosophical arguments concern the possibility of restating in an acceptable form the claim that there are certain objective and rationally determined criteria for the evaluation and criticism of law. These arguments will be sketched here in relation to substantive law, procedural law, and the ideas of justice and utility.

Substantive law. The purposes which human beings pursue in society and for the realization of which they employ law as an instrument are infinitely various, and men may differ in the importance they attach to them and in their moral judgments about them. But the simplest form of the argument that there are certain constant criteria for the evaluation of a legal system consists in the elaboration of the truth that if law is to be of any value as an instrument for the realization of human purposes, it must contain certain rules concerning the basic conditions of social life. Thus it is not only true that the legal system of any modern state and any legal system which has succeeded in enduring have contained rules restricting the use of violence, protecting certain forms of property, and enforcing certain forms of contract; it is also clear that without the protections and advantages that such rules supply, men would be grossly hampered in the pursuit of any aims. Legal rules providing for these things are therefore basic in the sense that without them other legal rules would be pointless or at least would operate only fitfully or inefficiently. Criticism of a legal system on the grounds that it omitted such rules could be rebutted only by the demonstration that in the particular case they were unnecessary because the human beings to which the system applied or their natural surroundings were in some way quite extraordinary, that is, that they lacked certain of the salient characteristics which men and things normally have. This is so because the need for such rules derives from such familiar natural facts as that men are both vulnerable to violence and tempted to use it against each other; that the food, clothes, and shelter necessary to existence do not exist naturally in limitless abundance but must be grown or manufactured by human effort and need legal protection from interference during growth and manufacture and safe custody pending consumption; and that to secure the mutual co-operation required for the profitable development of natural resources, men need legal

rules enabling them to bind themselves to future courses of conduct.

Argument along these lines may be viewed as a modest empirical counterpart to the more ambitious teleological doctrine of natural law, according to which there are certain rules for the government of human conduct that can be seen by men endowed with reason as necessary to enable men to attain the specifically human optimum state or end (*finis*, *telos*) appointed for men by Nature or (in Christian doctrine) by God. The empirical version of this theory assumes only that, whatever other purposes laws may serve, they must, to be acceptable to any rational person, enable men to live and organize their lives for the more efficient pursuit of their aims. It is, of course, possible to challenge this assumption and to deny that the fact that there are certain rules necessary if fundamental human needs are to be satisfied has any relevance to the criticism of law. But this denial seems intelligible only as a specifically religious doctrine which regards law as the expression of a divine will. It may then be argued that men's lives should be regulated by the law not in order to further any secular human purposes but because conformity to God's will is in itself meritorious or obligatory.

A more serious objection to the empirical argument conducted in terms of human needs for protection from violence to the person and property and for co-operation is the contention that although these are fundamental human needs, the coercive rules of a legal system need not provide for them. It may be said that the accepted morality of all societies provides a system of restraint which provides adequately for these needs, and that the vast majority of men abstain from murder, theft, and dishonesty not from fear of legal sanctions but for other, usually moral, reasons. In these circumstances it may be no defect in a legal system that it confines itself to other matters in relation to which the accepted morality is silent.

It seems clear, however, that social morality left to itself could not provide adequately for the fundamental needs of social life, save in the simplest forms of society. It may well be that most men, when they believe themselves to be protected from malefactors by the punishments, threats of punishment, and physical restraints of the law, will themselves voluntarily submit to the restraints necessary for peaceful and

profitable coexistence. But it does not follow that without the law's protections, voluntary submission to these restraints would be either reasonable or likely. In any case, the rules and principles of social morality leave open to dispute too many questions concerning the precise scope and form of its restraints. Legal rules are needed to supply the detail required to distinguish murder and assault from excusable homicide and injury, to define the forms of property to be protected, and to specify the forms of contract to be enforced. Hence, the omission of such things from the legal system could not be excused on the ground that the existence of a social morality made them unnecessary.

Procedural law. Laws, however impeccable their content, may be of little service to human beings and may cause both injustice and misery unless they generally conform to certain requirements which may be broadly termed procedural (in contrast with the substantive requirements discussed above). These procedural requirements relate to such matters as the generality of rules of law, the clarity with which they are phrased, the publicity given to them, the time of their enactment, and the manner in which they are judicially applied to particular cases. The requirements that the law, except in special circumstances, should be general (should refer to classes of persons, things, and circumstances, not to individuals or to particular actions); should be free from contradictions, ambiguities, and obscurities; should be publicly promulgated and easily accessible; and should not be retrospective in operation are usually referred to as the principles of legality. The principles which require courts, in applying general rules to particular cases, to be without personal interest in the outcome or other bias and to hear arguments on matters of law and proofs of matters of fact from both sides of a dispute are often referred to as rules of natural justice. These two sets of principles together define the concept of the rule of law to which most modern states pay at least lip service.

These requirements and the specific value which conformity with them imparts to laws may be regarded from two different points of view. On the one hand, they maximize the probability that the conduct required by the law will be forthcoming, and on the other hand, they provide individuals whose freedom is limited by the law with certain information

and assurances which assist them in planning their lives within the coercive framework of the law. This combination of values may be easily seen in the case of the requirements of generality, clarity, publicity, and prospective operation. For the alternative to control by general rules of law is orders addressed by officials to particular individuals to do or to abstain from particular actions; and although in all legal systems there are occasions for such particular official orders, no society could efficiently provide the number of officials required to make them a main form of social control.

Thus, general rules clearly framed and publicly promulgated are the most efficient form of social control. But from the point of view of the individual citizen, they are more than that: they are required if he is to have the advantage of knowing in advance the ways in which his liberty will be restricted in the various situations in which he may find himself, and he needs this knowledge if he is to plan his life. This is an argument for laws which are general in the sense of requiring courses of action and not particular actions. The argument for generality in the sense of applicability to classes of persons is different: it is that such rules confer upon the individual the advantage of knowing the restrictions to which the conduct of others besides himself will be subject. Such knowledge in the case of legal restrictions which protect or benefit the individual increases the confidence with which he can predict and plan his future.

The value of the principles of natural justice which concern the process of adjudication are closely linked to the principles of legality. The requirement that a court should be impartial and hear arguments and proofs from both sides of a dispute are guarantees of objectivity which increase the probability that the enacted law will be applied according to its tenor. It is necessary to ensure by such means that there will be this congruence between judicial decisions and the enacted law if the commitment to general rules as a method of government is taken seriously.

Care must be taken not to ascribe to these arguments more than they actually prove. Together they amount to the demonstration that all men who have aims to pursue need the various protections and benefits which only laws conforming to the above requirements of substance and procedure can

effectively confer. For any rational man, laws conferring these protections and benefits must be valuable, and the price to be paid for them in the form of limitations imposed by the law on his own freedom will usually be worth paying. But these arguments do not show, and are not intended to show, that it will always be reasonable or morally obligatory for a man to obey the law when the legal system provides him with these benefits, for in other ways the system may be iniquitous: it may deny even the essential protections of the law to a minority or slave class or in other ways cause misery or injustice.

Justice and utility. The equal extension to all of the fundamental legal protections of person and property is now generally regarded as an elementary requirement of the morality of political institutions, and the denial of these protections to innocent persons, as a flagrant injustice. Even when these protections are denied, lip service is often paid to the principle of equal distribution by the pretence that the persons discriminated against are either criminal in intention, if not in deed, or are like children who are incapable of benefiting from the freedom which laws confer and are in need of some more paternalistic regime.

Different moral philosophies offer different vindications of the principle of equality. The matter is considered here in order to illustrate the philosophical problems which arise in the criticism of law concerning the relative place of the notions of utility and justice. The central principle of utilitarianism, in so far as it supplies a moral critique of law, may be stated as the doctrine that there is only one vice in legal arrangements, namely, that they fail to produce the greatest possible total of happiness in the population within their scope. The concept of a total of happiness or pleasure or satisfaction is of course open to well-known objections. But on any interpretation, utilitarian principles, if unrestricted, must endorse legal or social arrangements if the advantages they give to some persons outweigh the disadvantages imposed on others. For a consistent utilitarian there can be no necessary commitment to any principles requiring an equal distribution. However, in some cases, if allowance is made for principles of diminishing marginal utility, it may be shown that an equal distribution is the most efficient, in the sense of producing the greatest total of happiness. But for the utilitarian this is a

contingent matter to be established in each case, not a matter of moral principle or justice; and where the question concerns the distribution of the fundamental legal protections of person and property, there seems no compelling utilitarian argument in favour of an equal distribution. Thus, a slave-owning class might derive from the system of slavery benefits outweighing the misery of the slaves. Bentham urged that this was not the case, owing to the inefficiency of slave labour, and therefore he rejected slavery; but he rejected it as inefficient rather than as unjust. Plainly, this form of argument is a very insecure foundation for the principle that all men are morally entitled to the equal protection of the laws, and it seems clear that utilitarian principles alone cannot give any account of the moral importance attached to equality and in general to the notion of the just, as distinguished from an efficient, distribution as a means of happiness.

The simplest moral argument in support of the equal distribution of the law's fundamental protections is one that combines the idea that no rational person could wish himself to be denied these fundamental legal protections with the principle of the universalizability of moral judgment: moral judgments concerning social and legal arrangements must conform to the requirement that no man could regard as morally acceptable the withholding from others, with needs and in circumstances similar to his own, of those benefits which he would not wish to be withheld from himself. If this principle is admitted, it follows that it cannot be a sufficient moral ground for accepting legal arrangements that the advantages they give to some outweigh the disadvantages for others. The equal extension to all of the law's protections satisfies both the principle of utility, which requires that the law should advance human happiness, and the independent principle of justice, that the gain in happiness should be distributed fairly. According to this qualified form of utilitarianism, the best legal and social arrangements realize the most efficient of just distributions.

More ambitious arguments have been advanced to show that in spheres other than the distribution of the fundamental protections of the law, utilitarianism is acceptable only if qualified by independent principles of just distribution, and also to demonstrate that the distribution required by justice

is in all spheres prima facie that of equality, unless inequalities can be shown to work ultimately for the equal benefit of all. Whatever the strength of these more general arguments may be, it is true that in relation to many legal institutions, utilitarianism unrestricted by other principles of justice yields results which would not be regarded as morally tolerable. This is particularly true of punishment. In all civilized legal systems it is recognized that no man should be punished except for his own conduct, and (with certain exceptions in the case of minor offences) only then for such of his actions as were voluntary or within his power to control. Such limitations on the scope of punishment seem obvious requirements of justice to the individuals punished, but it is at least doubtful whether they can be adequately supported on purely utilitarian grounds.

The obligation to obey the law. The philosophical investigation of the obligation to obey the law requires a distinction between the utilitarian and other moral aspects of this subject similar to that outlined in the case of justice. It seems clear that the mere existence of a legal system, irrespective of the character of its laws, is not sufficient in any intelligible theory of morality to establish that a person ought morally to do what its laws require him to do. Yet there are also powerful arguments against a purely utilitarian theory of the obligation to obey law which would regard this obligation as simply a special case of the obligation to promote happiness, with the corollary that disobedience to bad laws is justified if the consequences of disobedience (including any harm done to others through the weakening of the authority of the legal system) are better in utilitarian terms than the consequences of obedience. Among features of the moral situation for which this utilitarian theory fails to account there are two of peculiar importance. The first is that the obligation to obey law is one which is considered as owed by the citizen specifically to the members of his own society in virtue of their relationship as fellow members, and is not conceived merely as an instance of an obligation to men in general not to cause harm, injury, or suffering. Second, men are often held to be subject to an obligation to obey the law even though it is clear that little or no harm will be done to the authority of the legal system by their disobedience, as in cases (like that of the conscientious

objector) where those who disobey the law willingly submit to punishment.

The theory of a social contract focused on these two aspects of the obligation of obedience to law, and it is possible to detach from what is mythical or otherwise objectionable in contract theory certain considerations which show that the obligation to obey the law may be regarded as the obligation of fairness to others, which is independent of and may conflict with utility. The principle involved, stated in its simplest form, is that when a number of persons restrict their liberty by certain rules in order to obtain benefits which could not otherwise be obtained, those who have gained by the submission of others to the rules are under an obligation to submit in their turn. Conflicts between this principle and the principle of utility are possible because often the benefits secured by such restrictions would arise even if considerable numbers failed to co-operate and submit to the rules in their turn. For the utilitarian, there could be no reason for anyone to submit to rules if his co-operation was not necessary to secure the benefits of the system. Indeed, if a person did co-operate, he would be guilty of failing to maximize the total happiness, for this would be greatest if he took the benefits of the system without submitting to its restraints. The consideration that the system would fail to produce the desired benefits or would collapse if all were to refuse their co-operation is irrelevant in a utilitarian calculation if, as is often the case, it is known that there will be no such general refusal.

POSTSCRIPT

See for criticisms and comments:

1. R. Nozick, *Anarchy, State, and Utopia* (Oxford, 1974), 90–5.
2. A. J. Simmons, *Moral Principles and Political Obligations* (Princeton, 1979), 101–42.
3. D. Lyons, *Forms and Limits of Utilitarianism* (Oxford, 1965), 190, 195.
4. R. J. Arneson, 'The Principle of Fairness and Free-Rider Problems' *Ethics*, xcii (1982), 616–33.