THE CONCEPT OF LAW

SECOND EDITION

BY

H. L. A. HART

With a Postscript edited by
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PREFACE

MY aim in this book has been to further the understanding of law, coercion, and morality as different but related social phenomena. Though it is primarily designed for the student of jurisprudence, I hope it may also be of use to those whose chief interests are in moral or political philosophy, or in sociology, rather than in law. The lawyer will regard the book as an essay in analytical jurisprudence, for it is concerned with the clarification of the general framework of legal thought, rather than with the criticism of law or legal policy. Moreover, at many points, I have raised questions which may well be said to be about the meanings of words. Thus I have considered: how 'being obliged' differs from 'having an obligation'; how the statement that a rule is a valid rule of law differs from a prediction of the behaviour of officials; what is meant by the assertion that a social group observes a rule and how this differs from and resembles the assertion that its members habitually do certain things. Indeed, one of the central themes of the book is that neither law nor any other form of social structure can be understood without an appreciation of certain crucial distinctions between two different kinds of statement, which I have called 'internal' and 'external' and which can both be made whenever social rules are observed.

Notwithstanding its concern with analysis the book may also be regarded as an essay in descriptive sociology; for the suggestion that inquiries into the meanings of words merely throw light on words is false. Many important distinctions, which are not immediately obvious, between types of social situation or relationships may best be brought to light by an examination of the standard uses of the relevant expressions and of the way in which these depend on a social context, itself often left unstated. In this field of study it is particularly true that we may use, as Professor J. L. Austin said, 'a sharpened awareness of words to sharpen our perception of the phenomena'.

I am heavily and obviously indebted to other writers; indeed much of the book is concerned with the deficiencies of a simple model of a legal system, constructed along the lines of Austin's imperative theory. But in the text the reader will find very few references to other writers and very few footnotes. Instead, he will find at the end of the book extensive notes designed to be read after each chapter; here the views expressed in the text are related to those of my predecessors and contemporaries, and suggestions are made as to the way in which the argument may be further pursued in their writings. I have taken this course, partly because the argument of the book is a continuous one; which comparison with other theories would interrupt. But I have also had a pedagogic aim: I hope that this arrangement may discourage the belief that a book on legal theory is primarily a book from which one learns what other books contain. So long as this belief is held by those who write, little progress will be made in the subject; and so long as it is held by those who read, the educational value of the subject must remain very small.

I have been indebted for too long to too many friends to be capable now of identifying all my obligations. But I have a special debt to acknowledge to Mr A. M. Honoré whose detailed criticisms exposed many confusions of thought and infelicities of style. These I have tried to eliminate, but I fear that much is left of which he would disapprove. I owe to conversations with Mr G. A. Paul anything of value in the political philosophy of this book and in its reinterpretation of natural law, and I have to thank him for reading the proofs. I am also most grateful to Dr Rupert Cross and Mr P. F. Strawson, who read the text, for their beneficial advice and criticism.

H. L. A. HART

EDITORS' NOTE

WITHIN a few years of its publication *The Concept Of Law* transformed the way jurisprudence was understood and studied in the English-speaking world and beyond. Its enormous impact led to a multitude of publications discussing the book and its doctrines, and not only in the context of legal theory, but in political and moral philosophy too.

For many years Hart had it in mind to add a chapter to *The Concept of Law*. He did not wish to tinker with the text whose influence has been so great, and in accordance with his wishes it is here published unchanged, except for minor corrections. But he wanted to respond to the many discussions of the book, defending his position against those who misconstrued it, refuting unfounded criticism, and—of equal importance in his eyes—conceding the force of justified criticism and suggesting ways of adjusting the book's doctrines to meet those points. That the new chapter, first thought of as a preface, but finally as a postscript, was unfinished at the time of his death was due only in part to his meticulous perfectionism. It was also due to persisting doubts about the wisdom of the project, and a nagging uncertainty whether he could do justice to the vigour and insight of the theses of the book as originally conceived. Nevertheless, and with many interruptions, he persisted with work on the postscript and at the time of his death the first of the two intended sections was nearly complete.

When Jenifer Hart asked us to look at the drafts and decide whether there was anything publishable there our foremost thought was not to let anything be published that Hart would not have been happy with. We were, therefore, delighted to discover that for the most part the first section of the postscript was in such a finished state. We found only hand-written notes intended for the second section, and they were too fragmentary and inchoate to be publishable. In contrast the first section existed in several versions, having been typed, revised, retyped, and rerevised. Even the most recent version was obviously not thought by him to be in a final

state. There are numerous alterations in pencil and Biro. Moreover, Hart did not discard earlier versions, but seems to have continued to work on whichever version was to hand. While this made the editorial task more difficult, the changes introduced over the last two years were mostly changes of stylistic nuance, which itself indicated that he was essentially satisfied with the text as it was.

Our task was to compare the alternative versions, and where they did not match establish whether segments of text which appeared in only one of them were missing from the others because he discarded them, or because he never had one version incorporating all the emendations. The published text includes all the emendations which were not discarded by Hart, and which appear in versions of the text that he continued to revise. At times the text itself was incoherent. Often this must have been the result of a misreading of a manuscript by the typist, whose mistakes Hart did not always notice. At other times it was no doubt due to the natural way in which sentences get mangled in the course of composition, to be sorted out at the final drafting, which he did not live to do. In these cases we tried to restore the original text, or to recapture, with minimum intervention, Hart's thought. One special problem was presented by Section 6 (on discretion). We found two versions of its opening paragraph, one in a copy which ended at that point, and another in a copy containing the rest of the section. As the truncated version was in a copy incorporating many of his most recent revisions, and was never discarded by him, and as it is consonant with his general discussion in the postscript, we decided to allow both versions to be published, the one which was not continued appearing in an endnote.

Hart never had the notes, mostly references, typed. He had a hand-written version of the notes, the cues for which were most easily traced in the earliest typed copy of the main text. Later he occasionally added references in marginal comments, but for the most part these were incomplete, sometimes indicating no more than the need to trace the reference. Timothy Endicott has checked all the references, traced all that were incomplete, and added references where Hart quoted Dworkin or closely paraphrased him without indicating a source.

Endicott also corrected the text where the quotations were inaccurate. In the course of this work, which involved extensive research and resourcefulness, he has also suggested several corrections to the main text, in line with the editorial guidelines set out above, which we gratefully incorporated.

There is no doubt in our mind that given the opportunity Hart would have further polished and improved the text before publishing it. But we believe that the published postscript contains his considered response to many of Dworkin's arguments.

P.A.B.
J.R.

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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.

[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).

. . . 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'.[1]

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. 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.

[1] Kelsen, *General Theory of Law and State* (1949), p. 61.

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 are 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 counter-argument 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'.[1] This is

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

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 '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'[1] 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 make 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.'[2]

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.

[1] 'Non videtur esse lex quae justa non fuerit': St. Augustine I, *De Libero Arbitrio*, 5; Aquinas, *Summa Theologica*, Qu. xcv, Arts. 2, 4. [2] Holmes, loc. cit.

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 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 divergence 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[1] 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.'[2]

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 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

[1] J. D. March, 'Sociological Jurisprudence Revisited', 8 *Stanford Law Review* (1956), p. 518.

[2] Gray, loc. cit.

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[1] 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.'[2]

[1] *Confessiones*, xiv. 17.

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

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 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.

II

LAWS, COMMANDS, AND ORDERS

1. VARIETIES OF IMPERATIVES

THE clearest and the most thorough attempt to analyse the concept of law in terms of the apparently simple elements of commands and habits, was that made by Austin in the *Province of Jurisprudence Determined.* In this and the next two chapters we shall state and criticize a position which is, in substance, the same as Austin's doctrine but probably diverges from it at certain points. For our principal concern is not with Austin but with the credentials of a certain type of theory which has perennial attractions whatever its defects may be. So we have not hesitated where Austin's meaning is doubtful or where his views seem inconsistent to ignore this and to state a clear and consistent position. Moreover, where Austin merely gives hints as to ways in which criticisms might be met, we have developed these (in part along the lines followed by later theorists such as Kelsen) in order to secure that the doctrine we shall consider and criticize is stated in its strongest form.

In many different situations in social life one person may express a wish that another person should do or abstain from doing something. When this wish is expressed not merely as a piece of interesting information or deliberate self-revelation but with the intention that the person addressed should conform to the wish expressed, it is customary in English and many other languages, though not necessary, to use a special linguistic form called the *imperative mood*, 'Go home!' 'Come here!' 'Stop!' 'Do not kill him!' The social situations in which we thus address others in imperative form are extremely diverse; yet they include some recurrent main types, the importance of which is marked by certain familiar classifications. 'Pass the salt, please', is usually a mere *request*, since normally it is addressed by the speaker to one who is able to render him a service, and there is no suggestion either of any great urgency or any hint of what may follow on failure to comply. 'Do not

kill me', would normally be uttered as a *plea* where the speaker is at the mercy of the person addressed or in a predicament from which the latter has the power to release him. 'Don't move', on the other hand, may be a *warning* if the speaker knows of some impending danger to the person addressed (a snake in the grass) which his keeping still may avert.

The varieties of social situation in which use is characteristically, though not invariably, made of imperative forms of language are not only numerous but shade into each other; and terms like 'plea', 'request', or 'warning', serve only to make a few rough discriminations. The most important of these situations is one to which the word 'imperative' seems specially appropriate. It is that illustrated by the case of the gunman who says to the bank clerk, 'Hand over the money or I will shoot.' Its distinctive feature which leads us to speak of the gunman *ordering* not merely *asking*, still less *pleading with* the clerk to hand over the money, is that, to secure compliance with his expressed wishes, the speaker threatens to do something which a normal man would regard as harmful or unpleasant, and renders keeping the money a substantially less eligible course of conduct for the clerk. If the gunman succeeds, we would describe him as having *coerced* the clerk, and the clerk as in that sense being in the gunman's power. Many nice linguistic questions may arise over such cases: we might properly say that the gunman *ordered* the clerk to hand over the money and the clerk obeyed, but it would be somewhat misleading to say that the gunman *gave an order* to the clerk to hand it over, since this rather military-sounding phrase suggests some right or authority to give orders not present in our case. It would, however, be quite natural to say that the gunman gave an order to his henchman to guard the door.

We need not here concern ourselves with these subtleties. Although a suggestion of authority and deference to authority may often attach to the words 'order' and 'obedience', we shall use the expressions 'orders backed by threats' and 'coercive orders' to refer to orders which, like the gunman's, are supported only by threats, and we shall use the words 'obedience' and 'obey' to include compliance with such orders. It is, however, important to notice, if only because of the great influence on jurists of Austin's definition of the notion of a

command, that the simple situation, where threats of harm and nothing else is used to force obedience, is *not* the situation where we naturally speak of 'commands'. This word, which is not very common outside military contexts, carries with it very strong implications that there is a relatively stable hierarchical organization of men, such as an army or a body of disciples in which the commander occupies a position of pre-eminence. Typically it is the general (not the sergeant) who is the commander and gives commands, though other forms of special pre-eminence are spoken of in these terms, as when Christ in the New Testament is said to command his disciples. More important—for this is a crucial distinction between different forms of 'imperative'—is the point that it need not be the case, where a command is given, that there should be a latent threat of harm in the event of disobedience. To command is characteristically to exercise authority over men, not power to inflict harm, and though it may be combined with threats of harm a command is primarily an appeal not to fear but to respect for authority.

It is obvious that the idea of a command with its very strong connection with authority is much closer to that of law than our gunman's order backed by threats, though the latter is an instance of what Austin, ignoring the distinctions noticed in the last paragraph, misleadingly calls a command. A command is, however, too close to law for our purpose; for the element of authority involved in law has always been one of the obstacles in the path of any easy explanation of what law is. We cannot therefore profitably use, in the elucidation of law, the notion of a command which also involves it. Indeed it is a virtue of Austin's analysis, whatever its defects, that the elements of the gunman situation are, unlike the element of authority, not themselves obscure or in need of much explanation; and hence we shall follow Austin in an attempt to build up from it the idea of law. We shall not, however, hope, as Austin did, for success, but rather to learn from our failure.

2. LAW AS COERCIVE ORDERS

Even in a complex large society, like that of a modern state, there are occasions when an official, face to face with an individual, orders him to do something. A policeman orders

a particular motorist to stop or a particular beggar to move on. But these simple situations are not, and could not be, the standard way in which law functions, if only because no society could support the number of officials necessary to secure that every member of the society was officially and separately informed of every act which he was required to do. Instead such particularized forms of control are either exceptional or are ancillary accompaniments or reinforcements of general forms of directions which do not name, and are not addressed to, particular individuals, and do not indicate a particular act to be done. Hence the *standard* form even of a criminal statute (which of all the varieties of law has the closest resemblance to an order backed by threats) is general in two ways; it indicates a general type of conduct and applies to a general class of persons who are expected to see that it applies to them and to comply with it. Official individuated face-to-face directions here have a secondary place: if the primary general directions are not obeyed by a particular individual, officials may draw his attention to them and demand compliance, as a tax inspector does, or the disobedience may be officially identified and recorded and the threatened punishment imposed by a court.

Legal control is therefore primarily, though not exclusively, control by directions which are in this double sense *general.* This is the first feature which we must add to the simple model of the gunman if it is to reproduce for us the characteristics of law. The range of persons affected and the manner in which the range is indicated may vary with different legal systems and even different laws. In a modern state it is normally understood that, in the absence of special indications widening or narrowing the class, its general laws extend to all persons within its territorial boundaries. In canon law there is a similar understanding that normally all the members of the church are within the range of its law except when a narrower class is indicated. In all cases the range of application of a law is a question of interpretation of the particular law aided by such general understandings. It is here worth noticing that though jurists, Austin among them, sometimes speak of laws being *addressed*[1] to classes of persons this is misleading in

[1] 'Addressed to the community at large', Austin, above, p. 1 n. 4 at p. 22.

suggesting a parallel to the face-to-face situation which really does not exist and is not intended by those who use this expression. Ordering people to do things is a form of communication and does entail actually 'addressing' them, i.e. attracting their attention or taking steps to attract it, but making laws for people does not. Thus the gunman by one and the same utterance, 'Hand over those notes', expresses his wish that the clerk should do something and actually *addresses* the clerk, i.e. he does what is normally sufficient to bring this expression to the clerk's attention. If he did not do the latter but merely said the same words in an empty room, he would not have addressed the clerk at all and would not have *ordered* him to do anything: we might describe the situation as one where the gunman merely said the words, 'Hand over those notes'. In this respect making laws differs from ordering people to do things, and we must allow for this difference in using this simple idea as a model for law. It may indeed be desirable that laws should as soon as may be after they are made, be brought to the attention of those to whom they apply. The legislator's purpose in making laws would be defeated unless this were generally done, and legal systems often provide, by special rules concerning promulgation, that this shall be done. But laws may be complete as laws before this is done, and even if it is not done at all. In the absence of special rules to the contrary, laws are validly made even if those affected are left to find out for themselves what laws have been made and who are affected thereby. What is usually intended by those who speak of laws being 'addressed' to certain persons, is that these are the persons to whom the particular law applies, i.e. whom it requires to behave in certain ways. If we use the word 'addressed' here we may both fail to notice an important difference between the making of a law and giving a face-to-face order, and we may confuse the two distinct questions: 'To whom does the law apply?' and 'To whom has it been published?'

Besides the introduction of the feature of generality a more fundamental change must be made in the gunman situation if we are to have a plausible model of the situation where there is law. It is true there is a sense in which the gunman has an ascendancy or superiority over the bank clerk; it lies

in his temporary ability to make a threat, which might well be sufficient to make the bank clerk do the particular thing he is told to do. There is no other form of relationship of superiority and inferiority between the two men except this short-lived coercive one. But for the gunman's purposes this may be enough; for the simple face-to-face order 'Hand over those notes or I'll shoot' dies with the occasion. The gunman does not issue to the bank clerk (though he may to his gang of followers) *standing orders* to be followed time after time by classes of persons. Yet laws pre-eminently have this 'standing' or persistent characteristic. Hence if we are to use the notion of orders backed by threats as explaining what laws are, we must endeavour to reproduce this enduring character which laws have.

We must therefore suppose that there is a general belief on the part of those to whom the general orders apply that disobedience is likely to be followed by the execution of the threat not only on the first promulgation of the order, but continuously until the order is withdrawn or cancelled. This continuing belief in the consequences of disobedience may be said to keep the original orders alive or 'standing', though as we shall see later there is difficulty in analysing the persistent quality of laws in these simple terms. Of course the concurrence of many factors which could not be reproduced in the gunman situation may, in fact, be required if such a general belief in the continuing likelihood of the execution of the threat is to exist: it may be that the power to carry out threats attached to such standing orders affecting large numbers of persons could only in fact exist, and would only be thought to exist, if it was known that some considerable number of the population were prepared both themselves to obey voluntarily, i.e. independently of fear of the threat, and to co-operate in the execution of the threats on those who disobeyed.

Whatever the basis of this general belief in the likelihood of the execution of the threats, we must distinguish from it a further necessary feature which we must add to the gunman situation if it is to approximate to the settled situation in which there is law. We must suppose that, whatever the motive, most of the orders are more often obeyed than disobeyed by most of those affected. We shall call this here, following Austin,

'a general habit of obedience' and note, with him, that like many other aspects of law it is an essentially vague or imprecise notion. The question how many people must obey how many such general orders, and for how long, if there is to be law, no more admits of definite answers than the question how few hairs must a man have to be bald. Yet in this fact of general obedience lies a crucial distinction between laws and the original simple case of the gunman's order. Mere temporary ascendancy of one person over another is naturally thought of as the polar opposite of law, with its relatively enduring and settled character, and, indeed, in most legal systems to exercise such short-term coercive power as the gunman has would constitute a criminal offence. It remains indeed to be seen whether this simple, though admittedly vague, notion of general habitual obedience to general orders backed by threats is really enough to reproduce the settled character and continuity which legal systems possess.

The concept of general orders backed by threats given by one generally obeyed, which we have constructed by successive additions to the simple situation of the gunman case, plainly approximates closer to a penal statute enacted by the legislature of a modern state than to any other variety of law. For there are types of law which seem prima facie very unlike such penal statutes, and we shall have later to consider the claim that these other varieties of law also, in spite of appearances to the contrary, are really just complicated or disguised versions of this same form. But if we are to reproduce the features of even a penal statute in our constructed model of general orders generally obeyed, something more must be said about the person who gives the orders. The legal system of a modern state is characterized by a certain kind of *supremacy* within its territory and *independence* of other systems which we have not yet reproduced in our simple model. These two notions are not as simple as they may appear, but what, on a common-sense view (which may not prove adequate) is essential to them, may be expressed as follows. English law, French law, and the law of any modern country regulates the conduct of populations inhabiting territories with fairly well-defined geographical limits. Within the territory of each country there may be many different persons or bodies of

persons giving general orders backed by threats and receiving habitual obedience. But we should distinguish some of these persons or bodies (e.g. the LCC or a minister exercising what we term powers of delegated legislation) as *subordinate* lawmakers in contrast to the Queen in Parliament who is supreme. We can express this relationship in the simple terminology of habits by saying that whereas the Queen in Parliament in making laws obeys no one habitually, the subordinate lawmakers keep within limits statutorily prescribed and so may be said in making law to be agents of the Queen in Parliament. If they did not do so we should not have one system of law in England but a plurality of systems; whereas in fact just because the Queen in Parliament is supreme in relation to all within the territory in this sense and the other bodies are not, we have in England a single system in which we can distinguish a hierarchy of supreme and subordinate elements.

The same negative characterization of the Queen in Parliament, as *not* habitually obeying the orders of others, roughly defines the notion of *independence* which we use in speaking of the separate legal systems of different countries. The supreme legislature of the Soviet Union is not in the habit of obeying the Queen in Parliament, and whatever the latter enacted about Soviet affairs (though it would constitute part of the law of England) would not form part of the law of the USSR. It would do so only if the Queen in Parliament were habitually obeyed by the legislature of the USSR.

On this simple account of the matter, which we shall later have to examine critically, there must, wherever there is a legal system, be some persons or body of persons issuing general orders backed by threats which are generally obeyed, and it must be generally believed that these threats are likely to be implemented in the event of disobedience. This person or body must be internally supreme and externally independent. If, following Austin, we call such a supreme and independent person or body of persons the sovereign, the laws of any country will be the general orders backed by threats which are issued either by the sovereign or subordinates in obedience to the sovereign.