THE PURE THEORY OF LAW:

PROBLEMS AND PERSPECTIVES

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of

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Preface

Political philosophy has, until recently, been largely quiescent in the twentieth century. This quiescence has coincided with the emergence of what can loosely be described as Analytical Philosophy, initiated principally by Bertrand Russell. Paradoxically, outside political philosophy, philosophy as a whole has undergone a revolution and philosophical debate has been intense and thorough. However, political philosophy has been pronounced dead or meaningless. Recently a change has come about and Analytical Philosophy has been extended into political philosophy. Of particular importance in this respect has been the work of Rawls and Nozick. Accompanying this extension has been an orientation towards economics and economic models. Despite this understandable association with the most successful of the social sciences this should not be exclusive of other disciplines. One discipline that can provide an alternative or additional orientation is that of law and its associated philosophy: jurisprudence.

If the jurisprudence of the twentieth century is to be brought increasingly within the compass of political philosophy, as recent work by Dworkin suggests, it becomes essential to achieve an understanding of it in its own terms.

Of all contributions to twentieth century jurisprudence Kelsen's Pure Theory of Law stands out as arguably the most important and certainly the most systematic. So, if jurisprudence and the Pure

Theory in particular is to serve as a model or inspiration to political philosophy, it is important to have a thorough examination of its merits and defects and of the relation between the various types of jurisprudence as a whole. Such an examination, in spite of the generally acknowledged difficulty of the Pure Theory, is undertaken here.

I would like to thank the following people in connection with this thesis. Mr. Murray Forsyth as supervisor and Professors Spence and Hughes and other members of the Department of Politics, Leicester University, Mr. John Finch of the Faculty of Law, Leicester University and Mr. P.P. Nicholson of the Department of Politics, University College, Swansea. Finally I would also like to thank Mr. M. McCabe for first suggesting Kelsen's work as a fruitful subject of study.

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Introduction

This thesis is an examination of Hans Kelsen's Pure Theory of Law. No general statement of that theory is given here, although a considerable amount of exposition is undertaken in response to certain criticisms and in the discussion of various problems. There would, indeed, be certain dangers in the general summarizing of such a complex theory within the confines of this thesis. Fortunately the Pure Theory is remarkably consistent in its important respects throughout its numerous statements. Thus it is possible to gain the essentials of the theory by reading The Pure Theory of Law (1960) which must be regarded as, in nearly all respects, definitive.[1] In addition, the best possible short statement is provided by Kelsen himself in the article On the Pure Theory of Law (1966).

The substance of this thesis is reflected in its title. The examination of the Pure Theory of Law is carried out by means of its problems and perspectives. The perspectives offered are those of its historical genesis in the Kantian tradition and of its standing in the light of contemporary criticism. The problems examined are all concerned with the general status of the theory and its applicability. Hence the theory is discussed in relation to international law and to morality, in respect of the practical applications made of the theory and in respect of its logical status. It should,

1. The one exception to this is discussed at length in chapter 11, infra.

of course, be added that the loose categorization of problems and perspectives is not meant to be a mutually exclusive one - each problem provides a perspective and vice versa.

The theme of this thesis can be stated succinctly by a quotation from Laski: 'granted its postulates I believe the pure theory to be unanswerable.'[2] It is the general task of this thesis to substantiate this statement. The general strategy of this thesis is therefore defensive; a defence based, it will be seen, on certain postulates or presuppositions. These presuppositions form, as it were, a counterpoint to the main argument. Finally, some attempt will be made to assess the validity of these presuppositions, which are of a positivist character, in the conclusion of this thesis.[3]

The remainder of this introduction comprises a detailed outline of the structure of the argument of this thesis. This outline should demonstrate the overall coherence and continuity of the topics discussed within.

2. H. Laski, A Grammar of Politics, introductory chapter to 4th. edn., vi.

3. For a discussion of the meanings of 'positivism' see Hart, Positivism and the Separation of Law and Morals, 24, note 10. In this thesis the term is used to mean a concern solely with positive law by a jurisprudence that is descriptive, as opposed to evaluative, in character. Generally speaking, positivism is defined in opposition to natural law theory. Unless otherwise qualified the term positivism is taken to denote legal positivism rather than a wider sense. Natural law is generally taken to be a body of moral laws independent of positive law and by which positive law can be judged. More loosely it is taken here to mean the presentation of morality as law. Natural law jurisprudence is taken to be both descriptive and evaluative of positive law in terms of moral law. A detailed outline is given in the text of chapter 1.

Part One consists of 4 chapters which deal with the relationship between the Pure Theory and traditional natural law theory. This is accomplished by means of a detailed examination of Kant's legal theory and its ambiguous relationship to the Pure Theory.

Chapter 1, Kelsen's Critique of Natural Law , is a construction from Kelsen's writings of a general critique of natural law theory. This falls into two parts, both of which concentrate on the relationship of positive and natural law. Initially, natural law is seen as deficient in three respects; as a source of law, as a process of individuation and in terms of enforcement. From these deficiencies a dependence on positive law is seen to arise. The first relationship between natural law and positive law is therefore designated as that of 'actualization'. The actualization of natural law is seen to entail its destruction as a separate order so that it merely becomes a useful ideological adjunct to positive law. This second relationship is designated as that of 'legitimization'. The truth of Kelsen's critique in terms of the second relationship is tested by briefly examining the notion of revolution in Hobbes, Pufendorf and Locke. The reason for this is because if natural law theory is to be anything other than a mere legitimization of the positive order then it must provide a standard by which that order may be judged, unfavourably if necessary. The problem of revolution is thus seen as critical in this respect.

No general defence of natural law theory is undertaken. Instead, the dependence of Kelsen's critique on certain basic presuppositions, and above all the is/ought distinction, is pointed out. Also, the

role of natural law in providing, as it were, a negative foundation for the Pure Theory is indicated. In other words, it should become clear why the Pure Theory is insistent on the complete exclusion of natural law.

Chapter 2, Kant and Natural Law , consists of an application of the first part of Kelsen's critique to Kant's legal theory. This is done specifically in terms of Kant's theory of punishment, which incidentally is shown as the adversary of utilitarian theory and even perhaps also partially rehabilitated. The relationship of Kant's theory of punishment to the categorical imperative is pointed out. Finally, Kant's theory of natural law is seen to be vulnerable in respect of source, individuation and enforcement as Kelsen's critique would lead one to expect.

Chapter 3, Kant's Two Theories of Law consists of an application of the second part of Kelsen's critique to Kant's legal theory. This is done, as in the first chapter, by specifically concentrating on Kant's theory of revolution. This has the incidental benefit, as in the theory of punishment, of tackling an area of Kant's theory that has proved controversial. As a result of this examination, the reason for selecting Kant for particular study becomes apparent. Kant's work is seen as both a perfection and a dissolution of natural law theory. This is because not only does Kant have a natural law theory, as pointed out in chapter 2, but also a positivist theory of law. Kant's positivist theory is outlined by comparison with Austin - specifically by concentrating on the concept of sovereignty in the theory of revolution. The argument then returns to the critique of

natural law 'legitimization' and Kelsen's critique is shown to succeed in that respect as it did in terms of 'actualization' in chapter 2.

Having subjected the Kantian natural law theory to the critical acid of Kelsen's critique, it is washed away to reveal the Kantian positivist legal theory. This is shown to be the foundation of the Pure Theory which shows how Kelsen could draw on the Kantian intellectual tradition. The nature of the relationship of Kelsen to Kant's theory is examined in chapter 4. It should be added that, having demonstrated that Kant has two legal theories, the tension between them and the resultant well known contradictions in the Kantian theory of revolution can be explained.

Chapter 4, From Kant to Kelsen , takes up the argument of chapter 3 to show how Kelsen could regard his work as a completion of that of Kant. This is done partly by comparing the Kelsenian Grundnorm[4] to the Kantian Categorical Imperative as master concepts of the two theories. Also the Kantian legacy is pointed out in other respects, especially the Kantian epistemological basis adopted by the Pure Theory. The other intellectual source of the Pure Theory, contemporary Logical Positivism, is also shown briefly in its impact. This, once again, raises the crucial role of Kelsen's presuppositions.

4. Wherever possible I shall use the expression 'Grundnorm' rather than the translation of 'basic norm'.

In contrast to the positivist theory of Kant, the natural law theory is shown to have formed the basis of a separate tradition from that culminating in the Pure Theory. To show this tradition, the natural law theories of Stammler and Del Vecchio are outlined to show their Kantian bases.

Part Two consists of 4 chapters and is concerned with defending the Pure Theory against contemporary criticisms. Two general critical theories are singled out for special consideration and are shown to be incoherent. Finally, the criticism arising from within positivist legal philosophy is examined. The defence of the Pure Theory is made on the basis of Kelsen's presuppositions, especially the is/ought distinction, which are thus shown as fundamental.

Chapter 5, In Defence of the Pure Theory consists of a general defence of the Pure Theory against the most common criticisms levelled against it. The presuppositions of the Pure Theory and the is/ought distinction now become more explicit. The Pure Theory is initially distinguished from, on the one hand, Sociological Jurisprudence which is concerned with facts (is) as distinct from the Pure Theory's concern with norms (ought). On the other hand, the Pure Theory is distinguished from natural law theory as devoted to a separate normative order, such that the fact that a positive legal system exists (is) is distinct from its moral status (ought). The initial theoretical distinction provides the structure of argument of the first part of the chapter. The Pure Theory, in consequence, is defended against critics who claim that it is not pure of facts: forexample, in its reliance on efficacy to establish the existence

of a normative order. The Pure Theory is also defended against critics who claim that it is not pure of morals; so that it is claimed the Pure Theory is inevitably infused with natural law. These criticisms are also taken up in later chapters, efficacy in chapter 10 (in the discussion of Rhodesian decisions) and the morality of law in chapter 7 (in the discussion of Fuller's legal theory).

The chapter then discusses what can be called 'structural' problems supposedly encountered by the Pure Theory. Although this still involves the presupposition of the is/ought distinction, a second major presupposition, that of science as a paradigm - already hinted at in chapter 4, becomes apparent. In the discussion of structural problems, specific attention is devoted to Kelsen's concept of the Grundnorm. Problems encountered of a structural nature are also taken up in chapter 11 (in discussion of norm conflicts) and in chapter 6 (in discussion of Dworkin's legal theory).

Following the structural problems, an attempt is made to answer a less specific criticism, which is that the Pure Theory is ideologically biased or itself represents a certain legal ideology (a point taken up again in chapters 7 and 10). Finally, and in connection with the previous topic, some political implications of the Pure Theory are outlined.

The remainder of the thesis can be seen as developing points raised in chapter 5.

The following two chapters deal with two critics of legal positivism in general. Positivism, and the Pure Theory in particular, is defended against the criticisms made.

Chapter 6, Dworkin and Positivism looks at one contemporary critic in detail. In the light of chapter 5, the problems discussed could be termed 'structural'. The strategy adopted here and in chapter 7 is not merely to reply to criticism, but to attack the foundations upon which that criticism is made. A full statement is given of Dworkin's theory and Dworkin's thesis that legal positivism, with its model of rules cannot explain so called 'hard cases' and 'principles' is examined. Doubts are expressed about the status of these 'principles', about the alleged failure of positivism to accommodate them, about the nature of 'hard cases' and, finally, about Dworkin's suggested remedy. A short note on the ideological implications of rules is appended to this chapter.

Chapter 7, Fuller and Positivism , looks at another contemporary critic of positivism by examining Fuller's claim that law is necessarily moral. In terms of chapter 5 this is a renewed defence against natural law incursion into the Pure Theory. Fuller's theory is stated and his notion of 'purpose' is critically examined. The idea that there is a necessary connexion between law and morality is rejected (again using the is/ought distinction) and doubt is cast on the importance of Fuller's version of natural law. Finally, a recent defence of Fuller's position is discussed and rejected.

Whereas chapters 6 and 7 defend the Pure Theory by defending legal positivism as a whole, chapter 8 deals with criticisms made of the Pure Theory from within legal positivism, specifically by Hart.

Chapter 8, Kelsen and Hart , looks at the work of the two leading legal positivists together and reasons are advanced for prefering the Pure Theory where it differs from Hart's jurisprudence. An exception to this generally critical attitude to Hart's theory is given at the start. There Hart's idea of a 'minimum content' of natural law is outlined and seen as a valuable addition to positivist theory. Next, Hart's claim to have found 'the key to the science of jurisprudence' in the distinction between power-conferring and duty-imposing rules is examined. This distinction is not made by Kelsen and reasons are given for doubting the value of it. Hart's attack on the Kelsenian idea that law is necessarily coercive is rejected, as is the attack on the idea of legal norms as 'directives to judges', another characteristically Kelsenian view.

In the examination of Hart's criticism of Kelsen's theory, much attention will be given to Hart's rejection of the concept of 'Grund-norm' which he proposes replacing with a new master concept; the 'Rule of Recognition'. Hart's criticisms are seen to fail with the exception of one taken up in chapter 11. In addition, Hart's alternative solution is seen to fail for structural reasons, because it fails to account for the status of legal science and because it fails to account for the is/ought distinction. Here it is noted that once again the presuppositions of the Pure Theory figure in its defence.

Two smaller sections are appended to the main body of chapter 8. One deals with the underlying philosophical differences between Kelsen and Hart, where they are seen as representatives of two distinct phases in modern philosophy. The other deals with the criticisms of the Pure Theory's Grundnorm made by Raz. It is shown that the Pure Theory can meet these criticisms, which are both of a structural nature.

Having defended the Pure Theory in general terms and, more specifically, without and within positivism, certain problems within the theory itself, already touched upon, are raised for detailed discussion in the remaining chapters.

Part Three consists of 4 chapters, each of which deals at length with a particular problem within the Pure Theory.

Chapter 9, The Pure Theory of International Law , shows how the Pure Theory is extended beyond its application to municipal law dealt with in preceding chapters. In particular, it is shown that the Pure Theory can accept international law as law in the true sense despite the lack of institutionalized sanctions and the sovereignty of states. Thus, it is argued that international law is at a relatively primitive level of law and that a theory of 'just war' can provide the necessary legal sanctions. A discussion of sovereignty follows and it is shown that a theory of sovereignty is possible which allows the interpretation of international law as given by the Pure Theory. In addition, there is some discussion of

the theories of Morganthau and of Hart, both of whom hold theories of international law which have important similarities with that of the Pure Theory. Finally, in view of the historical connexions between international law and natural law, it is shown how the Pure Theory can accept the former whilst consistently rejecting the latter.

Chapter 10, The Pure Theory in the Courts , looks at the most important and controversial use of the Pure Theory in actual legal proceedings. This involves a detailed study of the so-called 'Constitutional Cases' arising in Rhodesia after U.D.I. In particular, attention is devoted to the misunderstanding by the courts of Kelsen's concept of Grundnorm. After an outline of the cases themselves, the effects of the misunderstanding are demonstrated. This in turn is shown to undermine the criticisms of the Pure Theory provoked by the cases. Once again, in answering criticisms, presuppositions about legal science and the is/ought distinction are demonstrated.

Chapter 11, The Pure Theory and the Logic of Law ,deals with the problem of how far logic is applicable to a normative science, such as the Pure Theory claims to be. In particular, attention is drawn to the difficult structural problem of conflicting norms. This problem is seen to generate a conflict between the Pure Theory's demands for a unified science and for one that is pure of evaluation, both entailed by the basic presuppositions already evident throughout. Kelsen's discussions of the problem are compared and are shown to form a distinct alteration in the Pure Theory. This takes the form of a move from the assimilation of logic, which threatens the purity

of the theory, to its expulsion. This development is shown to further entail the expulsion of the remnants of natural law theory from the Pure Theory (and the reaffirmation of the is/ought distinction), and the salvaging of a notion of unified science that is intrinsically legal. Finally, some observations on the problems of conflicting norms and on normative inference are offered.

Chapter 12, The Pure Theory of Ethics , asks if there can, indeed, be such a subject. Kelsen's theory of ethics is examined in respect of its two principle characteristics: its emotivism and its legalism. Although Kelsen's theory is distinguished from that of Ayer and Schlick, it is seen to suffer the normal defects of Logical Positivist ethics. Emotivism is rejected. Legalism is also examined in terms of the relation of law and morality. Kelsen's rejection of traditional distinctions between law and morality are expounded, but his own distinction - coercion - is shown as insufficient without implying that law is a system and that morality is not. This alone distinguishes the two normative orders. Kelsen's idea of a Pure Theory analysing morality as a law-like system is, therefore, rejected. As a result of the rejection of its chief characteristics, the Pure Theory of Ethics is shown to be untenable.

In the Conclusion, attention is drawn to the presuppositions that have underlain the Pure Theory and its defence in the main body of this thesis. As such, it returns to the quotation from Laski and asks whether the 'postulates' or presuppositions are 'unanswerable'.

Two main positivist presuppositions are given and these are taken as a notion of science and an insistence on the is/ought distinction (attention is focused particularly on the latter presupposition). Doubts are raised about the ultimate status of the presuppositions. Whilst it is claimed that they cannot be rejected, it is also claimed that they cannot be exclusively confirmed. As such, the thesis ends on the point of going beyond the Pure Theory and thus beyond the subject of the thesis itself.

A short biographical note on Hans Kelsen is appended to this introduction.

Hans Kelsen: A biographical note[5]

Hans Kelsen, described by Roscoe Pound as 'unquestionably the leading jurist of his time', was born in Prague on October 11th, 1881. His parents were members of the highly cultured Jewish community in Vienna which was to include Wittgenstein and Freud (who was a friend) and many prominent figures in the arts. Kelsen grew up in the intellectual atmosphere that pervaded Vienna at the turn of the century and obtained a doctorate in law at the University there in 1906. After studying at Heidelberg and Berlin, he returned to Vienna to become a Privatdozent, or tutor, in 1911. At this time, he published his first major work on law, the 'Hauptprobleme der Staatsrechtslehre'. Subsequently, Kelsen became an associate professor at the University in 1918 and a full professor in 1919 (serving as Dean of the Faculty in 1922-3). In 1920, Kelsen was invited to draft the Constitution of Austria, which remains in force today. From that time until 1929, Kelsen served as Permanent Counsellor of the Austrian Supreme Court. During this period he published the 'Allgemeine Staatslehre'(1925) and the 'Theorie Generale du Droit International Public'(1928). Kelsen became the leading member of the Vienna School of Law, a group of jurists who shared a neo-Kantian approach to law and which included Alfred Verdloss, Josef Kunz and Adolf Merkl. This school was contemporary with the more famous Vienna Circle, which included Carnap, Schlick and Waismann. Both groups shared an anti-metaphysical scientific, or positivist approach to theoretical problems. Kelsen's Vienna period ended in 1929 when he resigned from the Supreme Court in the wake of

5. This note is based on the various biographical writings listed in the bibliography.

serious controversy between the courts and government over the issue of Catholic marriages. The following ten years were to be unsettled by the rise of Nazism.

In 1930, Kelsen accepted a chair at the University of Cologne but with the assumption of power by the Nazis in 1933, Kelsen, because of his Jewish background and liberal views, was forced to flee to Geneva (having been deprived of his university post). Whilst in Switzerland, Kelsen published the first edition of the 'Reine Rechtslehre' (1934). In 1936 Kelsen returned to his birthplace of Prague to take up the Chair of Public International Law at the German University there. This decision was mainly motivated by a desire to make a stand against the spread of Nazi views amongst the Germans in Czechoslovakia. This proved rather dangerous. Kelsen's inaugural lecture was the scene of Nazi-inspired violence and henceforth Kelsen's teaching was limited to a few students who braved the mounting pressures (his lectures were on the foundations of democracy). In the days preceding Munich, the situation grew intolerable and Kelsen returned to Switzerland where his family had remained throughout. With the outbreak of war, Kelsen crossed Europe,eventually arriving in the United States as a refugee in 1940. With Pound's support, he found employment at the Harvard Law School as a 'research associate' but the university refused to allow this arrangement to continue. Fortunately, Kelsen was offered a chair in the Department of Political Science at the University of California at Berkeley in 1943 where he remained until his retirement, aged 70, in 1951. During this fruitful and happy time, Kelsen reviewed his theory in the light of the common law tradition of English speaking

countries which was a new experience for him. Kelsen also took account of contemporary American Realism and the long established Austinian positivist tradition. (Kelsen's positivist theory was developed in ignorance of Austin and Bentham's seminal works.) This resulted in 1945 in the 'General Theory of Law and State,' which revised and summarized the earlier 'Allgemeine Staatslehre', 'Theorie Generale du Droit International Public' and 'Rheine Rechtslehre.' This statement of Kelsen's theory was supplemented by the definitive second edition of the 'Rheine Rechtslehre' which appeared in English in 1967. The publication of the 'General Theory' in 1945 coincided with Kelsen's adoption of American citizenship.

Kelsen remained active in debate after his retirement. Hart, visiting Kelsen in 1963, called him 'the most stimulating writer on analytical jurisprudence of our day', an assessment of some weight coming from someone who might lay claim to the same title. Apart from his publications in law, Kelsen also wrote widely on anthropology, politics, psychology and theology.

Kelsen died on April 19th, 1973, aged 92.

Chapter 1

Kelsen's Critique of Natural Law

Kelsen's remarks on natural law are scattered throughout his writings, where Kelsen firmly rejects that theory which he sees as quite opposed to his own. Indeed, the purity of the Pure Theory of Law consists in part of its firm rejection of any element tainted by natural law. In order to appreciate fully Kelsen's criticisms of natural law theory it is essential to construct a critique from his various remarks on the subject and from sources where he deals with the problem more fully. Although such a critique, once obtained, will be applied in detail to Kant's theory of law in the following chapters, it will become apparent that Kant cannot unreservedly be considered as a typical natural law theorist. Indeed, it will be argued that Kant represents at once a perfection and a dissolution of the tradition of natural law theory. Moreover, it will be shown how Kelsen's own theory builds on the heritage of Kant, representing the completion of the Critical Philosophy in the sphere of law.

Initially a general account of natural law theory will be given in terms of its central characteristics, which, despite the great diversity of natural law thinking, can be considered common to all its formulations. Kelsen's criticisms will then be assembled and addressed to these characteristics, thus presenting a general critique. In doing this, attention will be drawn to how Kelsen's criticisms presuppose central doctrines of the Pure Theory, thus showing how it was conceived to meet deficiencies in natural law. Discussion of these

doctrines will be postponed until the Pure Theory is considered in detail. The strategy adopted is thus less to defend natural law from a natural law standpoint as to show the importance of presuppositions made by the Pure Theory itself. However, from Kelsen's criticisms it will be shown how the deficiencies of natural law may be remedied.

Kelsen's critique of natural law theory will be considered in respect of the dual aspect of the relationship between natural law and positive law: that is, both how positive law serves natural law and also (not explicit in natural law theory) how natural law serves positive law. This consideration will demonstrate how natural law requires positive law to actualize it and in turn how positive law requires natural law to legitimize it. The dual relationship will be discussed specifically with reference to Kant's jurisprudence in the succeeding two chapters; here, discussion will be in general terms.

I

The diversity of natural law both explains and results from its persistence; the survival of ideas is not a result of their truth but of their ambiguity. Indeed, the survival of natural law theory is such that, historically, most thinking about law has borne a natural law complexion. It is only with the emergence of Austin's jurisprudence that a final break from natural law theory is effected.

Elements of natural law thinking can be found amongst the Greeks and thus amongst the first speculation on the subject of law. For example, Antigone's confrontation with Cleon in Sophocles' drama[1] appeals beyond positive law, 'I did not think your edicts strong enough to overrule the unwritten laws of god and heaven, you being only a man'. The 'Republic' describes a world of forms which ethically relies for its argument on a natural division of virtues in men's souls and in society. Aristotle also discusses in the 'Nicomachean Ethics'[2] certain natural rights distinguished from convention and also, in the 'Rhetoric',[3] he discusses an unchanging natural law. However, it is dangerous in retrospectively seeking sources for natural law, to build too much on these examples. More securely it can be said that natural law comes into its own in Roman times with the work of Cicero, the universal empire, the rational elements of Stoicism and the incorporation of a natural law theory into the Roman Codes. Even so, some suspicion must be roused by the rhetorical roots of natural law; that it is formulated by the greatest of all rhetor icians, Cicero, and by its partially rhetorical use in the Codes.[4] With the development of Christian theology, natural law flowered anew. There natural law comes to be related to divine law and implicit in rational creatures leading them to ends culminating in the knowledge of God. Christian natural law

1. Sophocles, Antigone, 138.
2. Aristotle, Nicomachean Ethics, 1134 b.
3. Aristotle, Rhetoric, 1373 b.
4. See the discussion in A.P. d'Entrèves, Natural Law, chapter 1.

reached a high point in the work of Aquinas and the assertion that positive law contrary to natural law was no longer true law [5] (a powerful weapon used by the Church against secular rulers). However, by the seventeenth century, natural law theory began to become increasingly secular. This is seen in Grotius who dispensed with the idea of a commander of natural law - asserting that natural law was valid even if God did not exist.[6] Despite this, it is Hobbes who represents a new departure which inaugurated a new type of theory based on the fundamental right of self preservation. Indeed, Hobbes's theory is, in retrospect, markedly positivist in tenor (which accompanies the rise of the modern state). A less conservative and more rationalist development came with Rousseau and the idea of natural rights or rights of man (becoming a doctrine for the transformation of society). More recently there has been a strong revival in natural law theory after a period of positivist ascendancy. This revival has come as a consequence of the alleged failure of positivism to deter the rise of Nazism. This created a desire to secure a standard by which Nazi law might be deprived of its status as law, thereby removing a legal obligation to obey it.

Each epoch of speculation has produced its own natural law deeply interfused with the ideas then prevalent. In this light it cannot be taken for granted that there is an essential continuity of

5. Aquinas, Summa Theologica, prima secundae, que. 95, art. 2. 'And if a human law is at variance in any particular with the natural law, it is no longer legal, but rather a corruption of law'. c.f. St. Augustine I, De Libero Arbitrio, 5, cited Hart, The Concept of Law, 8.

6. Supra, note 4, 51.

natural law theory from writer to writer, from epoch to epoch. Nevertheless, it seems possible to establish certain common formal characteristics which form the core of the theory despite reservations, (especially in regard to Hobbes).

Generally, natural law is held to be 'given' in that it is a source that is independent of positive law and, indeed, of human attitudes. It thus claims to be objectively true. Its validity rests on metaphysical or religious premises, whether having the allegiance of humanity or not. It is, however, ascertainable by men generally - by means of the faculty of reason common to all men. Reason is able to apprehend the natural law as 'self-evident' much as the American Declaration of Independence held certain 'truths' to be. Natural law can also, it is occasionally held, be apprehended by direct revelation (in Christian writers) or by introspection of human nature (Hobbes), although the latter is more the statement of a method than the statement of a system of laws.

The nature of natural law is generally held to consist of certain laws or truths, self-evident, simple and of the highest level of generality. (As Tolstoy said, 'all the great truths are simple'.) The absoluteness of this concept clearly has great emotional power meeting the desire for order and permanence amidst change. ('All things transitory, but as symbols are sent'.) Indeed, there is an obvious affinity with the laws of nature - the truth discovered by science. (Truth again being considered absolute and unchanging. As D'Entrèves[7] points out, nature in another sense as a metaphor

7. Ibid., 11.

suggests inevitability and finality). The application of these truths is supposedly a matter of reason, generally of a deductive kind, whereby lower maxims are deduced from axioms which, as in mathematics - a much favoured model - are considered self evident. Alternatively, it might be held that the deduction is unnecessary because the application might also be self evident and therefore immediate. In short, an agent may know that an act simply is or is not in accordance with natural law.

The validity of natural law is taken as resultant on its self-evidence, failures to comply being due to irrationality, ignorance or sin (presumably widespread conditions). Obligation tends to rest on the necessity of natural law to the fulfillment of human nature or true purpose, perhaps given by God. The ultimate form would be something like Kant's notion of the 'holy will' where to know the good is to will it.[8] Generally a view of human nature as flawed, following the fall, but perfectible, seeking salvation (or their secular counterparts) is indicated. This touches on an important difficulty which is: why, in the light of such overwhelming truth, men persist in perversely doing otherwise. The existence of this problem introduces the mark of man's sin - positive law.

Because of the self evidence of natural law it can serve as a standard by which positive law, in its poverty, may be judged. In fact, because the notion of legal validity is entirely absent, obligation rests solely on moral validity as supplied by natural law. Hence the validity of a positive law is seen as resting

8. See H.J. Paton, The Categorical Imperative, 46.

entirely on an extra-positive standard. If a law fails this standard then it may be necessary and sufficient to render it invalid or 'non-law'. If a law matches this standard, then this may be necessary and sufficient to render it as law. According to natural law theory, the relationship with positive law is not an index of the inadequacy of natural law, but of men. As such, positive law fulfills an important, but derivative, function under supervision of natural law. This relationship will be discussed shortly. Having outlined in the broadest terms, the essentials of natural law theory, it is now possible to consider Kelsen's critique of them.

II

According to the characterisation above, three major sets of characteristics are discernible. In Kelsen's view, each of these represents a problem for any consistent theory of natural law.[9] For the sake of clarity, these will be dealt with separately, although each involves the other and all demand a common solution. These problems may be stated as (1) problems of the source - how do we know natural law is valid? (2) problems of individuation - what is the relationship between natural laws? How are they concretized? (3) problems of efficacy - how is natural law made

9. Whilst I believe this classification is implicit in Kelsen, I should emphasise that I am using it here explicitly to provide the clearest structure to Kelsen's critique.

effective? The similarity to Hart's theory of the three deficiencies of a pre-legal system,[10] i.e. it is uncertain, it is static and it is inefficient, is not accidental. It will be seen in chapter 8 that in Hart's view, as a positivist, natural law may be considered as pre-legal. (There is also a loose resemblance to the traditional legislative-judicial-executive classification. This classification might prove misleading, stated in traditional terms as mutually exclusive institutions which represent specific solutions rather than terms of the problems themselves. For example, as will be seen, it is common to Kelsen and Hart that, e.g., judges have both a legislative and judicial function.) With reservation, the classification can now be employed to formulate Kelsen's critique of natural law.

1. The source of natural law

How are we to know what is natural law? The answer varies depending on which writer we choose. It may be immanent in nature, in human reason, in God's will and so on. This embarras de richesses, some mutually exclusive, is a result of something Kelsen repeatedly points to in natural law theory - its sheer diversity. It can be seen that despite a few characteristics of a formal nature, natural law is, taken in all, a diverse confusing phenomenon. Now, of course, it is easy to point to conflicting theories in a tradition as evidence

10. Hart, The Concept of Law, 89-91. It should be pointed out that, even if individuation and enforcement could be loosely included as the 'application' of law, they are distinct operations, e.g. a law could be individuated yet not be enforced. Individuation is taken to be a way of breaking up law into units to serve various functions; classification, practical application, to exhibit relationships, etc. Obviously the important individuation is done by the system itself. However, this does not rule out individuation by scientists to exhibit different aspects.

of its incoherence. Positivism itself could be rejected on the grounds that some adherents hold command theories of law whilst others hold rule theories. Ordinarily this would be a weak argument, but against natural law theory it has great force, for natural law claims to be absolute and self evident, claims absent from Positivism. We might reasonably feel entitled to general agreement on its nature, although this would hardly entail objectivity. But when we find none amongst theorists what hope is there for the rest of mankind? Such problems are increased when it becomes evident that not just the source but, even more so, the actual contents of natural law are subject to dispute.[11] This is fatal to a theory which claims to be objective. Taken against natural law as a whole, this criticism is devastating, using the theory's very fecundity to undermine its claims. However, this will obviously fail to refute an individual theory if it is internally consistent. Moreover, there may be strong reasons for preferring one theory rather than others with which it conflicts. This point would leave Kelsen with the task of refuting each natural law theory separately. In fact, Kelsen undertakes, at least in outline, such a step by step refutation,[12] including theories based on evolution and laws of history such as Marxism[13] in addition to the more traditional varieties. However, an alternative strategy emerges when it becomes clear that there is an incoherence even at the general level of characteristics common to the various

11. See e.g., the discussion of Hobbes, Pufendorf and Locke at the end of this chapter, infra.
12. Kelsen, What is Justice?, 1.
13. See e.g., ibid., 15-6.

theories. Before displaying this incoherence, it is worth outlining Kelsen's account of the underlying presuppositions of natural law.

Kelsen points out[14] that originally natural events were explained on the model of human laws and social behaviour projected onto the universe of nature. (A mode of thought still persisting in some societies as anthropologists attest.) Thus, trees, streams, rocks and so on are the abode of spirits which, as anthropomorphic agents, were responsible for natural events (and even according to Ovid, the result of human metamorphosis). However, with the development of the notion of causality, these 'explanations' became redundant. But, despite the development of the scientific world-view, a residual belief in a will or purpose in nature, or in fate or a divine will remained powerful. Somewhat paradoxically, the very success of natural science has maintained the desire to discover laws that are immanent in nature and obligatory on men. Such laws are then held to parallel the laws of nature discovered by science, although it is admitted that humans are free to obey or disobey them in a way that natural objects are not. The classic statement of this is Blackstone's. 'This will of his maker is called the law of nature. For as God, when He created matter, and endued it with a principle of mobility, established certain rules for the perpetual direction of that motion; so when He created man, and endued him with free will to conduct himself in all parts of life, He laid down

14. Kelsen, The Emergence of the Causal Law from the Principle of Retribution, passim. Here there are some echoes of Comte's division of religious-metaphysical-scientific stages to the growth of knowledge.

certain immutable laws of human nature, whereby that free will is in some degree regulated and restrained, and gave him also the faculty of reason to discover the purport of those laws . . . '[15]

Views such as Blackstone's are undoubtedly unscientific, but are they necessarily fallacious? Kelsen's answer is in the affirmative. There are several reasons for this which are all derived from basic positivist presuppositions.

Primarily natural law theory is fallacious because all its varieties contain illegitimate deductions of values from facts (or 'oughts' from 'is'). This distinction will play a crucial role in Kelsen's theory and discussions about it. Kelsen refers to it as an 'irremovable dualism' and it forms a central tenet of positivism in law and elsewhere.[16] As this distinction derives in its most devastating form from the celebrated passage in the 'Treatise of Human Nature', Hume's ironic remarks are worth yet another quotation.

> I cannot forbear adding to these reasonings an observation, which may, perhaps, be found of some importance. In every system of morality, which I have hitherto met with, I have always remark'd, that the author proceeds for some time in the ordinary way of reasoning, and establishes the being of a God, or makes observations concerning human affairs; when of a sudden I am surpriz'd to find, that instead of the usual copulations of proposition, is, and is not, I meet with no proposition that is not connected with an ought, or an ought not. This change is imperceptible;

15. Blackstone, Commentaries on the Laws of England, Introduction, ss.36-9.

16. Kelsen, The Foundation of the Theory of Natural Law, 116.

> but is, however, of the last consequence. For as this ought or ought not, expresses some new relation or affirmation, 'tis necessary that it shou'd be observ'd and explain'd; and at the same time that a reason should be given, for what seems altogether inconceivable, how this new relation can be a deduction from others, which are entirely different from it. But as authors do not commonly use this precaution, I shall presume to recommend it to the readers; and am persuaded, that this small attention wou'd subvert all the vulgar systems of morality . . . [17]

Now, despite the controversy about the interpretation of this passage and whether Hume himself observed the distinction made therein,[18] it cannot be doubted that it has been found of more than 'some importance'. Kelsen uses the distinction on the 'vulgar system' of natural law, although doubtless he adopted the principle not directly from Hume, but through Kant. For Kelsen, from the fact that nature <u>is</u> nothing follows whatever about how things <u>ought</u> to be. This is similarly true of human nature; for example, from the fact that man has reason it does not follow that he ought to live in accordance with it. This also applies to God's commands for, even were we assured of their existence, from that alone it would not follow that we ought to obey them. That this occurs in natural law theory is evident in the very usage of 'source' of law now under consideration. For source, or its synonyms, is taken ambiguously as historical origin and as reason for validity, that is - as both a fact and a value. Because natural law does not make this distinction, the establishment of a source in the former sense is also taken as a

17. Hume, <u>A Treatise of Human Nature</u>, 521.
18. See e.g. W.D. Hudson (ed.), <u>The Is-Ought Question</u>, part one.

source in the latter. In consequence of these considerations, Kelsen believes natural law flounders in the logical gulf: from facts only facts follow, from values only values.

Kelsen also employs a version of the is/ought distinction to make a further distinction in the active mode. This distinction is between cognition and volition or knowing and willing. These terms correspond respectively to facts and values. Unless they are kept distinct, Kelsen suggests, truth will become dependent on what we wish to be true and thereby cease to be true. This is taken in the obverse to mean that reason (taken as cognition) cannot create values. But if values are not a product of reason, they are a product of will, and this can only mean that they are relative to the will involved. Unlike cognition, which can give us objective knowledge, there are no completely objective values. Such a view presupposes Kelsen's relativist theory of ethics, a theory which is, in part, also Emotivist. These views will be discussed later in chapter 12. Here, only their effect is noted. It should also be remarked that the Kantian terminology is not accidental, but that cognition and volition are only held as logically separate categories of activity, and not taken to imply the existence of mental 'faculties'. Kelsen's relation to Kant in this respect will be discussed in chapter 4.

One form that the source of natural law takes is that of a will in nature. To this Kelsen objects:

> Nature as a system of facts, connected with one another according to the law of causality, has no will and hence cannot prescribe a definite behaviour of man. From facts, that is to say, from that which is, or actually

> done, no inference is possible to that which ought to be or ought to be done. So far as the natural-law doctrine tries to deduce from nature norms of human behaviour, it is based on a logical fallacy.[19]

This helps to bring out the previous point:

> The same holds true with respect to human reason. Norms prescribing human behaviour can emanate only from human will, not from human reason; hence the statement that man ought to behave in a certain way can be reached by human reason only under the condition that by human will a norm has been established prescribing this behaviour; human reason can understand and describe such behaviour but cannot prescribe it. To detect norms of human behaviour in human reason is the same illusion as to detect them from nature.[20]

Of course, the idea of reason and nature could be combined in the source of human nature. Much the same arguments would apply about that source. For if human nature is a fact, then no norm follows from it. More typically, human nature is taken as a metaphysical premise which may not even be examined, merely assumed.

The remaining option, that there is, as it were, a will behind nature - that is God's will, is also rejected:

> . . . to say that God in nature as a manifestation of his will commands men to behave in a certain way, is a metaphysical assumption, which cannot be accepted by science in general and by legal science in particular, because scientific cognition cannot have as its object a fact which is assumed to exist beyond all possible experience.[21]

19. Supra, note 12, 20.

20. Ibid. It would itself have to have a presupposed Grundnorm that 'Nature be obeyed', etc.. It should be added that natural law, if it is a system of norms, only postpones justification of positive law.

21. Kelsen, The Pure Theory of Law, 221. It is this which, presumably, led Austin to substitute the expression 'Divine Law' for 'Natural Law' throughout his work.

With this remark, Kelsen's assumption of science as a paradigm becomes more explicit. This is already apparent in the use of the is/ought distinction which isolates clearly defined 'facts'. Also apparent is the Kantian idea of knowledge being of empirical evidence organized by scientific categories. Indeed, there is a common Kantian and scientific aversion to objects beyond 'all possible experience' (with the possible exception of Kant's 'things in themselves'). More obviously, Kelsen relies on the Logical Positivist notion of verification in experience as the test of meaning. Kelsen is therefore not so much disproving natural law as showing its metaphysical assumptions as being distinct from science. Now, in itself, such an argument could be admitted by natural law theory, for any claim to be scientific could be dispensed with in favour of a more intuitionist approach. However, against that possibility it is possible to press a deeper objection. Speaking of such a possibility, Kelsen remarks, 'one can in fact prove anything and therefore nothing'.[22] Kelsen seems to be objecting to the most serious flaw in intuition which is its lack of criteria or public test. Put simply, there is no way of ruling out conflicting intuitions and, as shown above, they are readily apparent in natural law. Therefore it is impossible to determine which is correct without publically available tests or criteria. More seriously, in the absence of such criteria, it does not make sense to talk of correctness any longer.[23] On the other hand,

22. Kelsen, What is Justice?, ed. O. Weinberger, 22.

23. Such arguments apply to the Intuitionism of G.E. Moore in Principia Ethica, whose doctrine resembles natural law in respect of its source. The concept of a public test figures prominantly in Wittgenstein's rejection of the private language argument, see O.R. Jones (ed.), The Private Language Argument, passim.

science and much of ordinary discourse has public criteria. Kelsen's point may well be taken to be that natural law is not just unscientific but radically incoherent. Partly this is also responsible for the lack of explanatory value of what Kelsen calls 'metaphysical dualism' which, as 'realism', is the more sophisticated version of a will or wills in nature already discussed. The principle strategy of such realism is to seek explanation not in experience or its analysis but as the result of a realm beyond experience (i.e.'reality' as opposed to 'appearance'). The flaw with this concept is not so much the failure to explain because of reliance on explanations which themselves need explaining, but because such a realm is only accessible to intuition.

The alternative open to natural law is to accept that its claim to self evidence is really an 'explanation stopper' in other words by assertion alone it seeks to put the matter beyond argument. However, such an admission would be repugnant for it would entail the surrender of certainty.

In regard to natural law as a source, its basic weakness has been seen to be the failure of self-evidence and equivalent notions. Claims related to this can also be questioned for it is assumed to be immutable and objectively ascertainable by all rational men. The diversity of these claims has been pointed out and it must be added that these, in turn, are confined to speculation principally in Europe, which is surprising in view of its supposed objectivity. Moreover, the concept has, as seen, changed at least in content over

time. Finally not even the concepts of 'rationality' or 'man' are at all clear. Rationality depends on criteria derived from one's social and historical context and 'man' has been taken to exclude most men as biologically defined.

Finally, the introduction of a further realism (perhaps comprising the common features of natural law theory mentioned earlier) above all the diverse realisms which are then held as manifestations of it (i.e. an essence of natural law) would not only fail for the same reasons as the initial 'explanation', but would be a counsel of despair. (Being a postponement, and not a solution, of the original problem.)

2. The Individuation of natural law

The problem of individuation, the systematic relationship between norms and in their application, has, up until recently, been generally ignored. This situation is due largely to the prevalence of natural law theory which offers no real theory of individuation. Because of the nature of natural law, in particular its claim to universality and immutability, examples of natural law have been both highly general and quite static.[24]

To have a system of general laws alone is clearly insufficient for the existence of a legal system or effective law for, even assuming their meaning was perfectly clear, some operation would

24. But see Aquinas, supra, note 5, que. 94, art. 5.

still be required to render them applicable to concrete situations. Natural law theory has ignored this problem by generally taking the application of law as self evident, that is as somehow applying itself in an immediate fashion. So, it is taken as part of the accessibility of natural law that one may know its implications for every case in hand. Aquinas seemed to recognize this problem and so confined natural law to the most general principles application of which might be aided by revelation either in the Bible or by more spectacular means.[25] Alternatively, there has been some reliance on an assumed deductive model borrowed from geometry with self evident axioms generating sets of sub axioms. Granted the inherent problems of the crucial axioms this model has, at least, the virtue of being explicit. But this creates a new problem which is that even preliminary steps of individuation from generality imply more and more content. This makes the norms thus obtained more relative and hence more disputable. To avoid this consequence, natural law becomes increasingly abstract increasing the area to be left to an ill-defined individuation (or relying on positive law). This results in empty formulas. That this is the case can be seen by considering the central concept of natural law - Justice.

As with natural law as a whole, in considering justice, we encounter an array of different ideas as to its nature, some of which are quite contradictory. This is masked, however, by the common characteristic that these ideas have - their purely formal

25. Ibid., art. 2.

character. That is, their mutual inconsistency is masked by their remaining formal, for if no material is introduced, any conflict is not actualized. Kelsen takes the differing views of justice as proving his assertion that 'Absolute justice is an irrational idea',[26] that is, justice is both relative and emotive as a value. Again, this criticism does not disprove individual theories, but does show them to be near vacuuous. The Golden Mean, the Golden Rule, the Categorical Imperative, Aquinas's 'do good, avoid evil', communism's 'from each according to his ability, to each according to his needs', Christ's 'love thy neighbour as thyself', are all purely formal. The crucial point therefore becomes as the lawyer asked <u>who</u> is my neighbour?[26A] Doubtless it is quite

26. <u>Supra</u>, note 12, 21. Something of this is brought out in Kleist's <u>Michael Kohlhaas</u>.

26A. Luke 10.29. 'And who is my neighbour?'
It is not insignificant that this question should have been asked by a lawyer. Indeed the context (Luke 10. 28-37) illustrates Kelsen's point perfectly. For it seems clear that the command 'love thy neighbour as thyself' had a fairly restricted application, 'neighbour' being construed as only those who were Jewish. However, Christ obviously intended the application to be universal, hence the parable of the Good Samaritan that the question elicited. The point is therefore that who counts as my neighbour is capable of widely varying definition from which any applications will follow. According to which definition is chosen both the Samaritan and those who passed by on the other side could be 'just' according to the same formula. Therefore the formula, of itself justifies neither in particular. Given the arguments of this chapter on individuation, the provision of a criterial definition is the essential first move in individuating from a formula of justice. The lawyer, then, showed a commendable professional concern with individuation if nothing else.
Another example can be given, although it may not have been intended as a formula of justice. The American Declaration of Independence states that it is 'self-evident' that all men are created equal. Now the self-evidence cannot be taken seriously for it begs the question of what is to count as equal in practice - partially answered by the ensuing fundamental rights stated. More surprising is that 'self-evidently' '<u>men</u>' was defined to exclude large numbers of men biologically so defined (or rather human beings).

possible to attach some meaning to such utterances dependent on common usage - this however is really the first step in the process of individuation. What counts as the mean? What counts as needs? What counts as good? What counts as my duty? and so on. Hence, although such notions have great intuitive appeal, it is purchased at the cost of, in their own terms, near vac uity. When content is introduced, as it must be to be applicable, the problems start. As Aquinas saw, 'though there is a certain necessity in general principles, the further one departs from generality the more is the conclusion open to exception'.[27] The problem is thus a dilemma. Either hopelessly diverse contents are introduced or the form becomes empty. D'Entrèves attempts to defend natural law from such criticism with the observation that 'natural law has no cut and dried solution, no infallible cure for all our troubles'[28] but on this account, it does not provide, of itself, any cure at all. Even were everyone agreed on a single formula, there would be nothing to prevent completely contradictory contents being 'deduced' (or rather, smuggled in). In fact, this is precisely what happens, for any deduction comes from the criteria used to define the key concepts, not from the formula itself. To be told to do my duty is quite senseless unless I am told or can gather from the beliefs of my community or the legal system, what my duty is. Even amongst societies this may differ. Each society may demand that men do good, but in itself this does not mean the same (or rather the

27. Supra, note 5, art. 4.
28. Supra, note 4, 52.

meaning may be the same but the criteria of application differ radically), as a 'good' hammer would not have the same character as a 'good' television (although both are 'good'). Goodness is thus not self-evident.

Doubtless it may seem odd to expect natural law to deal with the mundane, everyday problems that legal systems deal with. It is quite unrealistic to expect profound truth on parking regulations. This is precisely the point. I am dealing with pure natural law and wish to establish that it is incapable of individuating entirely on its own terms. As will be seen, such criteria and individuation are provided by positive law.

The static nature of natural law is not readily apparent because it too tends to be masked by the formal character of general laws. Once a material element is included, rigidity enters the framework which increases the lower one moves in the chain of individuation. So, from the timeless truth 'love one another', it would be possible to deduce 'do not wrong one another' and thus 'do not harm one another'. The contents of these norms are thought of as being analytically 'contained' in the first norms. This becomes more precarious the closer one comes to application. However, it is not conspicuous because natural law theorists tend to discuss only very general issues. Even so, such concrete instances that are afforded tend to look like preferences of the writer concerned, rather than an objective truth. One might say that this problem is insoluble consisting, as it does, of the application of the immutable to the mutable.

Generally, Kelsen believes that natural law is aided in its avoidance of individuation by the 'traditional error' that all law is general. Against this, Kelsen states, 'The general (abstract) norm is only one, however, and not the manifestation of the normative order as such'.[29] This leads to Kelsen's doctrines of the hierarchy of norms and the dynamic nature of law; the positivist solution to the problems of generality and static nature of higher laws. This means that law creation is carried out at all levels by means of a dynamic, power-conferring, hierarchy of norms which is, at the same time, an application of the highest norm. In place of the traditional tripartite classification of legal functions, Kelsen substitutes a process of creation and application, each norm applying a higher and creating a lower norm. Thus the individual norm in an individual case is every bit as much a law as the constitution, although the latter is of course logically prior. (This also contains the possibility of derogation which in its nature must be positive law. This is so even in natural law where change can only occur in non-natural law.) It is readily apparent that this dispenses with the natural law notion that judges only discover law, a notion already disputed by Bentham and Austin.[30] Also, it will be noticed that the outcome is that law creates the 'facts' to which it is applied, in that it decides what is legally relevant at the end point of individuation.

29. Kelsen, The Idea of Natural Law, 40.

30. Austin referred to it as a 'childish fiction', Austin, Lectures on Jurisprudence, II, 634, adding that judges supposed judiciary law was thus 'a miraculous something made by nobody'.

> Another reason, perhaps, why natural law theory has taken no account of this process of individualizing, why it has stopped short at the general form of law and failed altogether to think out to the end the problem of realising natural law, is that at this end stands that inadequate creature, man, who threatens to bring the whole idea of natural law to grief.[31]

Here, Kelsen points out that ultimately the decision: has the relevant circumstance arisen? - is the law applicable? would rest on the individual's judgement. Moreover, he judges in his own case. The possibility of conflict between such a norm and the general norms of the natural law, hardly needs amplification. The general presumptions made seem quite contrary to empirical experience.

> Included more especially in this presupposition is the proviso that the interests of the participants do not obscure their judgment of facts, and that they are capable of recognising the whole "truth". In just such an assumption, and in nothing else whatever, lies the essence of all utopias![32]

3. natural law and effectiveness

Supposing that men were agreed on what natural law was and how it should be individuated, both highly dubious assumptions, there would still be a problem of making the law effective. This has not received much attention in natural law theory. Generally it is assumed that men do execute natural law even in their own case. The possibility of failure in this respect would be mere irrationality.

31. Supra, note 29, 48.
32. Ibid., 46.

But, were men so perfect, it might be wondered if such failure could occur, for the question would not even arise. It is assumed that to know the law is to will it, but quite clearly these are two different things (cognition and volition, as pointed out above). The ideal would presumably be a utopian anarchy, but one would be forgiven for thinking that the Hobbesian picture of war of all against all would be a more likely outcome on present experience. Unlike Hobbes, most natural law theorists do not, however, assume outright that human nature is corrupt but recognise the is/ought distinction sufficiently to enable them to talk in terms of human nature as it ought to be. The fact of corruption is admitted and this leads inevitably to a coercive order. The fault lies not in natural law theory but in man - who must be made to conform to that theory. And so natural law, so emphatic in its adherence to goodness and reason, ends in coercion when these aims become illusory. (This, as will be seen, underlies Kelsen's definition of law as necessarily coercive.)

An alternative would be to hold that there are in fact natural punishments which, in the face of contrary evidence, are usually postponed to a future world. Conversely, much the same could be held true of rewards; however the vision of hell is generally more specific and forceful. That natural law should require this hardly reinforces the plausibility of its 'self-evidence'. Moreover, what is offered is hardly rational, but coercive and emotive. It need hardly be added that such beliefs are hopelessly metaphysical and that not even the church, if it has the capacity, forgoes ordinary coercion for the more theological version. The same also applies to

punishment if it is construed as merely failing to attain one's natural ends. The outcome of the gradual corruption inherent in enforcing ideals is well portrayed by Dostoyevsky's Grand Inquisitor, who burns heretics in the name of God's love.[33]

III

In the foregoing discussion it has been admitted that only a 'pure' version of natural law has been dealt with. It has been suggested that Kelsen's criticisms not only presuppose positivist premises but also the need for natural law to become positive. Indeed, it becomes clear that a positive system of law can solve all the problems of natural law and it is to this solution that the discussion must now turn. This takes us to a postponed fourth characteristic of natural law - its relation to positive law as a standard. It will be argued that the relationship with positive law is both necessary to, but also destructive of, natural law for it ceases to be a real standard and becomes a mere servant of it - the exact reverse of the intended role.

How does the inclusion of positive law into natural law theory correct the deficiencies in it? The problem of the source is solved both in terms of origin and validity. The legal system can make laws to cover all eventualities by authoritative pronouncements. Such systems are quite clearly relative but, within their own jurisdictions,

33. Dostoyevsky, The Brothers Karamazov, Book 5, chapter 5.

retain a remnant of the absolute authority derived from natural law. A result of this is the distinction between legal and moral validity. This does not rule out moral justification, but only separates it from the law itself as a further step. In practice, however, moral validity is retained as an adjunct to law. The problem of divergent interpretations is solved by concentrating authoritative interpretation in the legal system or, as will be seen in Kelsen's view, the state. Although natural law is supposedly accessible to all men, one interpretation becomes positive and backed by force. Norms thus issued are the meaning of acts of will of a legislative organ, in Kelsen's terms - which is defined in terms of an ultimate source of legal validity. Validity is no longer held to be metaphysical but as a presupposition made of any effective legal order. Here it should be added that the idea of natural law can present an important reason for effectiveness. This aspect will be discussed in greater detail in chapter 3. Even a diversity of moral validities is compatible with the law for, failing clear moral support, it claims its own validity and ultimately enforces obedience whether accepted as morally valid or not. Moreover, it generates its own acts of will which create norms and which are publica ly ascertainable.

The problem of <u>individuation</u> is solved by the hierarchical system of norms which characterises all positive systems of law. In terms of justice, this is initiated by the mere provision of criteria. Again, this solution is in terms of a special organ which states authoritatively what the law is in a given instance. Its power to do so generally relies not on the alleged content of

higher laws, although this is important in some constitutional matters, but rather on delegation of power. The problem of source of law is also partially resolved by this means, for any doubts about law are resolved by interpretation or creation of law. Natural law ideas persist in the notion that such organs, the judiciary and increasingly, the administration, discover the law. This perpetuates the illusion of permanence and certainty. Quite clearly, the process becomes specialized and the idea of justice comes to be vaguely synonymous with what the courts do.

Effectiveness is solved by coercion which is applied by a valid legal order - the state, 'which is the perfected form of positive law'.[34] As has been mentioned, the validity depends ultimately on efficacy and so natural law can create a justification beyond legal validity by providing a moral title to apply coercion. Natural law ideas persist also in the notion that there is a pre-existing wrong which the law punishes - a 'natural wrong'. In reality, the legal system itself defines what is to count as wrong but the presumption persists that this has some natural basis. Kelsen also believes that this idea is responsible for the notion that a law consists of a duty to which a sanction is attached - creating the impression that there might be non-coercive laws or duties. Such a notion is clearly a remnant of pure natural law and for Kelsen, duty is a merely anciliary construct which interprets the system of norms which are directions to judges to apply sanctions. Kelsen quite bluntly accepts the idea that a law which does not in

34. Supra, note 29, 33.

some way rely on coercion cannot be a law. (Generally speaking, seemingly unsanctioned laws do rely on a sanction even if it is remote.) These and other consequent ideas of the Pure Theory will be discussed in ensu ing chapters. The dominance in practice of positive law is illustrated by the possibility of punishment of an innocent party, for what the legal system finds 'wrong' may not in all cases coincide with what is in fact otherwise so. Such a punishment is not rendered invalid merely because there is no such coincidence, any invalidity can only come by derogation by the system itself. In conclusion, Kelsen may be said to claim that everything that we know of law can be explained without the hypothesis of natural law. In explanation, therefore, it falls to Occam's Razor. However, as justification it fulfills another function.

In the foregoing, it has been suggested that although natural law theory accepts the necessity of positive law, this tends to supplant natural law 'the process of realizing natural law destroys the idea of it'.[35] Historically speaking, although one might think that positive law would be equivalent to providing artificial light in the sunshine, natural law theorists are all agreed on its necessity, which tends to reduce natural law to a standard. I have suggested that its deficiencies may prevent it from fulfilling this role and this would seem to be borne out by experience. Kelsen provides analytical reasons why this should be so.

35. Ibid., 59.

Even in general terms, one might suspect that natural law would be a victim of its own dualistic presuppositions for, having removed law to the realm of another world, the problem arises of how to realise it in this one. Such compromise is necessary for any provision of positive law, its counterpart is seen as quite opposite, artificial not natural, ontological not deontological and so on. One might suspect as the story of Melville's Billy Budd shows that the mundane laws of this world prove more capable of dealing with men as they are in general.

Kelsen's analytical reasons for the reduction of natural law to mere ideology can be given by a lengthy quote:

> Take in particular the attempt repeated often and in all possible variations, to found positive law upon a natural law delegation (for instance, public authority has been instituted by God). Closer scrutiny reveals that the order of natural law cannot provide such a delegation without contradicting the fundamental principle of its own validity, without actually dissolving itself and giving way to the order of positive law. This is a cardinal point of the historical doctrine of natural law; a theoretically sound grasp of it is a basic assumption for understanding the entire doctrine, as it has been represented for over two thousand years. Here it may suffice to state that a delegation of positive law by natural law can only mean one thing: the latter system must contain a norm whereby a supreme authority is empowered to make positive law, and whose norms are to have validity, not because of the justice of their content, but because they have been issued by this natural-law-made authority. The norms of natural law, on the other hand, in keeping with their basic idea, derive their validity from the objective "justice" of their content. That the norm of delegation is not in harmony with this idea is evident. To assume it, nevertheless, represents the logically impossible attempt to establish the positive law principle of validity with the natural law principle of validity, although the two principles are incompatible. In view of the fact that

> positive law is not, on principle, subject to limitations of at least its material and temporal validity, the norm of natural law, which delegates the creation of positive law, cannot be allowed to have such a restriction either. If it be assumed that there are, beside this delegating norm, other material norms of natural law, the delegation of positive by natural law must mean that natural law empowers positive law to replace it. This actually is the consciously or unconsciously desired result of the theory of delegation, much as it may seek to conceal it by assurances to the contrary. Of all the norms of natural law, only the one remains which delegates positive law (and which in reality is no natural-law norm at all). A thus denatured natural law has no other function than that of legitimizing positive law. The idea of natural law has been transformed into an ideology of positive law.[36]

As Parker comments:

> . . . the precept that man must, in any event, obey authority, be it good or bad . . . immediately reduces natural law to the legally superfluous command that law - any law - must be obeyed, coupled with the desire that law ought to be "good". But of course, a desire is not law.[37]

If a legal system is denied the validity of natural law on what does its validity rest? The answer is it rests on the presupposed Grundnorm. As this is the central doctrine of Kelsen's theory, it will be discussed in detail later. Here it need only be said that this norm is at the top of the hierarchy of validity, but is only presupposed, i.e. has hypothetical validity if the system is assumed to be valid. It therefore cannot provide an absolute source of validity (any norm that did so would be non-positive and above the

36. Kelsen, Natural Law Doctrine and Legal Positivism, 412-3.
37. R. Parker, Natural Law and Kelsenism, 165.

Grundnorm) and indeed, although required in a normative analysis, a non-normative analysis is possible (i.e. law as power). The Grundnorm does not, of itself, answer the question why the system is valid other than representing the logical consequence of assumptions made by those within the legal system.

One may also draw attention to another doctrine of Kelsen's which is assumed here. This is Kelsen's identification of law and state.[38] The idea that the state is simply a power which is outside but enforces an independently existing law is seen by Kelsen as a typical remnant of natural law thinking and is the dualism of coercion and duty writ large. This has a twofold ideological use in that seemingly the state is subject to law, and hence justified, yet also can be used to express the notion that the law is dependent on the existence of the state and that therefore the latter must be accorded special respect. Against this, Kelsen writes that the power of the state is no mystical force concealed behind the state or its law: 'it is only the effectiveness of the national legal order'.[39]

Given the mutual reliance of natural law and positive law - the relation of actualizing, on the one hand, of natural law and on the other of legitimizing positive law, it is not surprising that, in spite of manifest difficulties, the theory has persisted for so long. In addition, Kelsen remarks that psychologically

38. Kelsen, General Theory of Law and State, 181.
39. Ibid., 189-191, c.f. supra, note 21, 284-319.

speaking the theory is useful in that it 'solves' the moral problem - should I obey the law? The relativism which is the opposite of natural law,

> imposes upon the individual the difficult tasks of deciding for himself what is right and what is wrong . . . the most serious moral responsibility a man can assume. If men are too weak to bear this responsibility they shift it to an authority above them. The fear of personal responsibility is one of the strongest motives of the passionate resistance against relativism.[40]

(In Erich Fromm's words, there is a fear of freedom in this rejection of responsibility.)[41] Clearly, this will be even truer if the authority is given a more concrete manifestation. A parallel may yet again be drawn to the Grand Inquisitor's speech to the returned Christ in Dostoyevsky's 'Brothers Karamazov',[42] for these men are seen as incapable of freedom, and of perfection, and so nothing is left but authority, that is: coercion. There the noblest ideals come to serve the basest institutions, when men themselves are all too human.

Generally, it has been shown that natural law tends to serve the role of justifying positive law. This is in consequence of the necessity for positive law in natural law theory. However, because of the status of natural law as a standard, it is difficult to preclude its use to criticise positive law (although it is not clear what is natural law and therefore whether it is broken). The tendency

40. Supra, note 12, 22.
41. Erich Fromm, Fear of Freedom, passim.
42. Supra, note 33.

noted for natural law to serve as a justification of positive law leads to a general tendency in natural law theory to play down the contrary implications of the theory. Because of this, Kelsen believes, natural law is inherently conservative as illustrated by its emphasis, for example, on property rights, but more importantly, in its ambivalent attitude to a right of rebellion. This proves something of an embarrassment unless the heroic step is taken of simply equating natural and positive law. This is exactly the step taken by Hobbes:

> The law of nature and the civil law, contain each other, and are of equal extent . . . The law of nature therefore is a part of the civil law in all commonwealths of the world. Reciprocally also, the civil law is a part of the dictates of nature . . . every subject in a commonwealth has covenanted to obey the civil law . . . and therefore obedience to the civil law is part also of the law of nature.[43]

Yet in Hobbes emerges the central role of positive law, so that the content of natural law is what Leviathan says it is. '"Good" and "evil" are names that signify our appetites, and aversions; which in different tempers, customs, and doctrines of men are different . . . From whence arise disputes, controversies and at last war',[44] a state of affairs that includes (as Kelsen also points out) writers of natural law, 'what it is we call the law of nature, is not agreed upon, by those that have hitherto written'.[45] Hobbes therefore hopes to secure peace not justice (as Kelsen says positive law inevitably chooses).

43. Hobbes, Leviathan, part II, chapter 26, 4. (174).
44. Ibid., part I, chapter 15. (104).
45. Hobbes, The Elements of Law, 57.

> The interpretation of the laws of nature, in a commonwealth, dependeth not on the books of moral philosophy. The authority of writers, without the authority of the commonwealth, maketh not their opinions law, be they never so true.[46]

This is essential in view of the 'many volumes published, and in them so many contradictions of one another, and of themselves!'[47] (In addition, revelation as a source is dismissed as being rare and unreliable).

In Hobbes we see clear elements of positivism in the recognition of the defects of natural law, yet because natural law is taken as given, or even at the least a useful ideal, care is taken to ensure that it is identified with the positive legal system, coming to be an admitted ideology of justification. For it seems that even were a breach of natural law by the sovereign established, he still ought to be obeyed for fear of the consequences of doing otherwise.

Pufendorf doesn't go as far as Hobbes, but even so the possibility of a conflict of natural law with positive law is rendered practically unlikely.

> a civil law could, of course, be passed which is opposed to natural law . . . yet none but an insane man, and one who had in mind the destruction of the state, would wish to pass legislation of this kind.[48]

46. Supra, note 43, part II, chapter 26, 8. (180).
47. Ibid.
48. Pufendorf, De Jure Naturae et Gentium Libri Octo, Book VIII, chapter 1, s.2. (1133).

Indeed, Pufendorf regards such a conflict as out of the question:

> And indeed, in all commonwealths most features of the law of nature, are at all events such as those without which peace in the society itself cannot stand,have the force of civil law, or have been included in the body of civil laws.[49]

> All civil laws, indeed, presuppose or incorporate the general principles at least of natural law, whereby the safety of the human race is maintained; and these latter are by no means done away with by the former, which are merely added to them as the distinct advantage of each state has required.[50]

Yet Pufendorf is faced with the same relativity and possibility of disorder as Hobbes,

> since the greatest diversity of judgements and desires is to be observed among men, because of which an infinite number of disputes can arise, the interests of peace also require that it be publicly defined what each man should consider his own . . . [51]

Again the admission that natural law fails in its aspiration to self evidence is taken as requiring positive law, but this is not pressed to its conclusion by dispensing with natural law altogether. This is so, despite the fact that natural law has clearly ceased to be an independent standard by which positive law is judged - its original function. Even when not absolutely identified, positive law and natural law are seen in such a way that as Pufendorf puts it, 'the presumption of justice stands always on the side of the prince'.[52]

49. Pufendorf, Elementorum Jurisprudentiae Universalis Libri Duo, Book I, definition XIII, s. 18 (160).
50. Supra, note 48, Book II, chapter III, s. 11 (199).
51. Ibid., Book VII, chapter IV, s. 2 (1011).
52. Supra, note 49, Book II, observation V, s. 21 (292).

Kant's views on this subject will be considered later, but it is important to realize that this line of reasoning is not inevitable.

Despite the difficulties of natural law as a standard, the possibility still arises that it might be capable of definition by other than the positive law. One might in this context point to Milton, but the outstanding example of the radical version of natural law is, of course, Locke. Indeed, Locke may make qualifications and urge caution but at the crucial point his theory is quite clear.

> May the commands, then, of a prince be opposed? May he be resisted as any one shall find himself aggrieved . . . This will unhinge and overturn all politics, and instead of government and order, leave nothing but anarchy and confusion - To this I answer that force is to be opposed to nothing but to unjust and unlawful force . . . and no such danger or confusion will follow, as is often suggested.[53]
>
> Who shall be judge whether the prince or legislature act contrary to their trust? . . . To this I reply: The people shall be judge.[54]

Locke was very well aware of the way natural law theory was used to support positive law of various complexions. In particular, he pointed to the work of Barclay as being guilty in that respect.[55] Although Barclay admitted a right of resistance, he believed that it should be done with 'reverence' and not as a punishment. Yet Barclay was reluctant to admit even that; an attitude shared by Kant as will

53. Locke, Second Treatise of Civil Government, chapter 18, s. 203-4.
54. Ibid., chapter 19, s. 240.
55. Ibid., chapter 19, s. 232-9.

be seen in chapter 3.

Locke's version of natural law is also unusual in that he finds a limited , not absolutist, government as the outcome. One reason may well be the coherence Locke allows to the majority as interpreter of natural law (not to mention his own allegiance to the 1688 Revolution). Also important is Locke's emphasis on natural rights.

Kelsen does not consider natural rights as a separate topic in any detail, but it is clear that he would consider that notion as incoherent as natural law and for the same reasons. The major difference would be that natural rights are less likely to be a justification of a legal system rather than of dissent.[56]

IV

Kelsen's critique of natural law can now be seen to fall into two related strategies. Firstly, he doubts the meaningfulness of the notion and secondly he casts doubt on the motives for holding the theory. (It should be added that this strategy mirrors very clearly the basic cognition/volition distinction.) The rejection of natural law theory on grounds of meaningfulness are seen to be

56. Kelsen is not insisting that natural rights are any more correct, but rather that a consistent natural law theory ought to allow an objective standard to be used by state and citizen. In this sketch natural rights must be somewhat cavalierly dismissed as suffering mutatis mutandis the defects of the more common natural law theory.

built on Kelsen's positivist presuppositions which will form a continuing theme in succeeding chapters. In addition, in tackling the problems encountered by natural law, it was possible to see why Kelsen should concentrate on positive law and why the Pure Theory adopts certain doctrines. Kelsen's suspicion of the 'ideology' of natural law is principally the obverse of his insistence on a legal science. Because of this concern, Kelsen, as will be seen, is insistent on excluding anything 'ideological' from the Pure Theory. Because of this antipathy to ideology, Kelsen would undoubtedly subscribe to the words of Ross, 'Like a harlot, natural law is at the disposal of everyone. The ideology does not exist that cannot be defended by an appeal to the law of nature.'[57] As Kelsen himself puts it:

> That natural law doctrine, as it pretends, is able to determine in an objective way what is just, is a lie; but those who consider it useful may make use of it as a useful lie.[58]

(And it might be added, as J.S. Mill pointed out, that the 'usefulness of an opinion is itself a matter of opinion.')[59]

Having established Kelsen's rejection of natural law, it will now be possible to apply it to Kant's jurisprudence. The selection of Kant will be seen to be justified for Kelsen regarded Kant's jurisprudence as a high point of natural law theory. This will thus

57. A. Ross, cited by Hart, Scandinavian Realism, 235.
58. Kelsen, The Natural-law Doctrine before the Tribunal of Science, 173.
59. J.S. Mill, On Liberty, 148.

enable the validity of Kelsen's critique to be established. There is a more important reason for concentrating on Kant, however, for Kelsen saw his own work as being in the tradition of Kant and in law, at least, something of a completion of it. Thus, by examining Kant as a natural law theorist, it will be possible to isolate the Kantian heritage that Kelsen drew upon for the intellectual foundations of the Pure Theory. As a result of this, it will therefore become possible to see Kant as crucial in terms of the dissolution of natural law theory and offer a new perspective on Kantian jurisprudence as well as on the Pure Theory.

The following chapter will discuss the natural law theory in Kant's jurisprudence with reference to Kelsen's critique. Chapter 3 will then discuss the relation of natural law and positive law with particular emphasis on the 'ideological' aspects of natural law established by Kelsen. Chapter 4 will then turn and discuss the relationship of the jurisprudence of Kant and Kelsen and how the latter can be seen, in one sense, as the culmination of Kantian jurisprudence. In addition, having pointed out the duality of the Kantian heritage, a tradition of jurisprudence drawing on natural law in Kant and opposed to the Pure Theory will be indicated. This will then complete the first section of the thesis.

Chapter 2

Kant and Natural Law

In the previous chapter, Kelsen's critique of natural law was explicated in terms of the dual relationship of positive and natural law. In this chapter a brief sketch will be given of the first relationship - how positive law serves natural law - in the jurisprudence of Kant. The following chapter will examine the relationship in much greater detail and at length, with emphasis on how natural law serves positive law. In respect of the relationship discussed in this chapter, Kant will be considered solely as a natural law theorist, although the following chapter will modify this characterisation.

Firstly, some indication will be given of how Kant construes the relationship of positive and natural law (particularly with reference to punishment). Then the concept of the categorical imperative will be considered as an example of natural law theory. Finally, Kelsen's critique will be applied in the three respects already mentioned: source, individuation and enforcement (again with some reference to punishment). This will show how far Kant, as a natural law theorist, relies on positive law.

I

The central concept of Kant's moral and legal philosophy is the categorical imperative. This has several formulations but for

the moment it will be sufficient to talk in terms of the first formulation which is, 'Act only on that maxim through which you can at the same time will that it should become a universal law'.[1] From this, Kant is able to derive the following formulation of justice taken in respect of positive coercive law:

> Every action is just that in itself or in its maxim is such that the freedom of the will of each can coexist together with the freedom of everyone in accordance with a universal law. Coercion, however, is a hindrance or opposition to freedom. Consequently, if a certain use of freedom is itself a hindrance to freedom according to universal laws (that is, is unjust), then the use of coercion to counteract it, inasmuch as it is the prevention of a hindrance to freedom, is consistent with freedom according to universal laws; in other words, this use of coercion is just.[2]

This clearly implies the possibility of a legal order employing coercion unjustly. Kant indeed thinks that this is often the case for, in keeping with his general moral philosophy, he sees utilitarian theory as a widespread misconception in law, being neither moral nor just. (Happiness is an end but it is always open to question whether the end itself is moral, consequently morality should be identified with the form of will and not a particular content.) This gives the division between justice and positive law and an area where, if Kelsen is correct, natural law becomes dependent on positive law.

1. Kant, Groundwork of the Metaphysic of Morals, 88.
2. Kant, The Metaphysical Elements of Justice, 102.

II

How does Kant see his conception of justice being made operative in the practice of a positive legal system? Specifically, how does the conception of justice differ from what is actually the principle already in operation?

Consider the following passage from Kant's 'Metaphysic of Morals', often cited in discussions of retributivism:

> Even if a civil society were to dissolve itself by common agreement of all its members (for example, if the people inhabiting an island decided to separate and disperse themselves around the world), the last murderer remaining in prison must first be executed, so that everyone will duly receive what his actions are worth so that the bloodguilt thereof will not be forced on the people because they failed to insist on carrying out the punishment; for if they fail to do so, they may be regarded as accomplices in this public violation of legal justice.[3]

Admittedly, at first sight, this passage appears disturbing and no doubt it reinforces suspicions many may feel that there is a certain insensitivity in Kant's view of moral problems. Rashdall, in 'The Theory of Good and Evil',[4] for example, quotes it as needing little comment, for it seems to be demanding pain for pain's sake. To defend the pointless infliction of pain would be an unenviable task, to say the least. However, let us be quite clear why Kant feels it necessary to make such a statement.

3. Ibid.
4. Hastings Rashdall, The Theory of Good and Evil, Vol. 1, 285.

If we take the three traditional justifications of legal punishment as being retribution, deterrence and reform, it becomes clear that the example is constructed to implicitly rule out the latter two which are utilitarian considerations. Deterrence is ruled out because this will have no prospective use, as the society it might be taken to protect is in the process of dissolution, and because, therefore, there will be no-one left to deter.[5] Much the same applies to reform if it is reform to a standard obtaining in that society. Moreover, reform is ruled out by definition of the example; because it is of the death penalty.

Kant relies heavily on assuming the example to be of the death penalty; following as it does his pronouncement, 'If, however, he (the criminal) has committed murder, he must die. In this case there is no substitute that will satisfy the requirements of legal justice'.[6] Too much should not be made of the question-begging character of this, for it is deterrence that Kant takes as the main alternative to his own theory. Indeed, one might doubt whether reform is properly regarded as a justification of punishment, rather than treatment, when taken on its own. Moreover, for Kant's purposes both deterrence and reform are akin in falling under the same general principle.

What must be grasped is that in the example we are confronted with a conflict of principle. On one hand there is Kant's view of

5. A utilitarian, especially a rule-utilitarian, could doubtless provide an argument for punishment based on a need to deter members of other societies.

6. Supra, note 2, 102.

justice as the categorical imperative of Practical Reason and on the other is the empirical view of utilitarianism, which Kant identifies as the 'morality' of the positive system. As elsewhere in Kant's ethics, utilitarianism is a great opponent. In the theory of punishment this is not everywhere explicit. Nevertheless the positivist utilitarian view provides a constant counterpoint - more so because, as we shall see, Kant sees it as pervasive in practice. It is thus a threat to natural law in providing an alternative theory of morality. At his most explicit, Kant puts the conflict thus:

> The law concerning punishment is a categorical imperative, and woe to him who rummages around in the winding paths of a theory of happiness looking for some advantage to be gained by releasing the criminal or by reducing the amount of it - in keeping with the Pharisaic motto: "It is better that one man should die than that the whole people should perish". If legal justice perishes, then it is no longer worthwhile for men to remain alive on this earth.[7]

Here, not only do we glimpse what Kant regards as the evils of utilitarianism, discussed below, but more importantly the strength of Kant's conviction that the conflict is fundamental, (Justice although the heavens fall). Utilitarianism can, according to Kant, only provide a relative 'justification' by other 'goods', but this, Kant thinks, is ultimately an appeal to happiness and is hence non-moral. Thus reform may actually increase the total of happiness but this is only something we may hope for as a kind of benevolence.[8] What matters is not the use of punishment, or any

7. Ibid., 100.
8. For Kant, benevolence is something we can hope for but have no right to expect.

positive law that it enforces, but its morality. What Kant has done in the 'last murderer' example is to confront us with a situation where punishment is useless but still just. This explains why this example, and others, used by Kant are so extreme. This is not due to personal viciousness in Kant, but rather to what Paton calls Kant's 'method of isolation'. Speaking of Kant's use of this method, Paton says:

> He considers actions done solely from inclination without any motive of duty and says they have no moral worth. Similarly, he considers actions done solely for the sake of duty without any inclination and says they have moral worth.9

In Kant's discussion of punishment, this is paralleled by an example of useful punishment without justice as having no moral worth (the 'Pharisaic motto') and an example of just punishment without any use (the 'last murderer'). But if punishment is useless, how can it be just? The answer, according to Kant, is that punishment is an example, perhaps the example of justice in practice.

Punishment is thus coercion which brings home to the criminal the logical result of his action in which he has adopted a maxim which he could not will as a universal law. Punishment is thus a way of showing the consequence of attempting to adopt a wrong maxim as a categorical imperative and removes the exception in his own favour that the criminal would like to make to it. It thus represents the practical conclusion of the criminal's reasoning and demonstrates in a forcible way how the adoption of his maxim as a universal law would affect him.

9. H.J. Paton, The Categorical Imperative, 48-9.

This identification of punishment as a categorical imperative denies any further 'justification' for that would be external and in terms of something other than morality. That would be equivalent to demanding 'justification' of morality; a demand which already begs a non-moral answer. That is precisely the fallacy that utilitarianism commits according to Kant, which in punishment leads it to the non-moral consideration of society's happiness. Seen in this light, it is clear why Kant should set his 'last murderer' example in a dissolving society, for then a utilitarian justification is no longer available. Kant, by his 'method of isolation' has ruled out utilitarian considerations in the 'last murderer' case. Generally, however, this will not be typical of most cases where there will be clear and pressing utilitarian considerations. Kant does not deny this. He believes that punishment has prospective use which may benefit criminal and society apart from considerations of justice. Indeed, punishment may be carried out to produce such consequences, or to provide the opportunity to produce them. Kant's point is rather that such consequences do not justify the punishment which is something only the categorical imperative can do.[10] This may be compared to Paton's remarks in opposition to 'the illusion that for Kant a good man must take no account of consequences'.[11] Kant is not so foolish as to deny that an action done for the sake of duty will produce results. It always seeks to produce results, and normally succeeds in doing so. All Kant is saying

10. A particularly difficult example for Kant would be if the retributive punishment for a crime resulted in a greatly increased incidence.

11. Supra, note 9, 76.

is that its distinctively moral value does not depend on the results sought or the results attained , . . 'A good man aims at consequences because of the (moral) law: he does not obey the (moral) law merely because of the consequences'.[12] Unfortunately, Kant admits, it is precisely the exclusive concern with consequences that pervades actual systems of punishment and their 'justification'.

> Punishments, imposed by governments are always deterrent. But the punishments imposed by a being who is guided by moral standards are retributive. All punishments imposed by sovereigns and governments are pragmatic, they are designed to correct or make an example. Ruling authorities do not punish because a crime has been committed, but in order that crimes should not be committed. Punishments appertain either to a lawgiver's justice or his prudence.[13]

> Moral laws must never take human weakness into account . . . (but) . . . As a pragmatic lawgiver and judge man must give due consideration to the infirmity and fragility of his fellows and remember that they are only human.[14]

From these two passages it is possible to broaden out the discussion from punishment to the whole relation of natural law to positive law.

The passages from the 'Lectures on Ethics' (1775-81)[15] present the conflict of the justification provided by the categorical imperative's justice and that of the practical aim of utilitarian legislation as that between morality and the law. As such they connect Kant to the tradition of Natural Law, and illustrate Kelsen's characterisa-

12. Ibid., 58-9, 76.
13. Kant, Lectures on Ethics, 55.
14. Ibid., 66-7.
15. Ibid., the lectures, delivered from 1775-81 predate the Metaphysics of Morals of 1797 and do not contain the full retributive theory of the later work. Nevertheless, they do not contradict that work and illuminate important points. In their published form they comprise compilations of notes taken by students and follow the format of texts by Baumgarten which were prescribed for the ethics course at Königsberg.

tion of Kant's jurisprudence as 'the most perfect expression of the classical doctrine of natural law as it evolved in the seventeenth and eighteenth centuries on the basis of Protestant Christianity'.[16] Kant uses the term 'natural law' to express the need for law to embody justice.[17] Law in a positive sense is a hypothetical imperative (if you do x, then . . .), whereas justice is a categorical imperative (do not do x). The former provides an external motivation by coercion, the latter an internal motivation by duty alone. The subject matter of law are those acts capable of external enforcement, but this does not deny that people may obey laws from duty alone. It is important that the law should enforce only those acts which may be obeyed from duty (the hypothetical imperative thereby conforming to the categorical imperative in its range of application).

What then is the status of Kant's theory? This is made clear in a passage from the 'Critique of Pure Reason':

> A constitution allowing the greatest possible human freedom in accordance with laws by which the freedom of each is made to be consistent with that of all others - I do not speak of the greatest happiness, for this will follow of itself - is at any rate a necessary idea, which must be taken as fundamental not only in first projecting a constitution but in all its laws. For at the start we are required to abstract from the actually existing hindrances, which, it may be, do not arise unavoidably out of human nature, but rather are due to a quite remediable cause, the neglect of pure ideas in the making of laws. Nothing, indeed, can be more injurious, or more unworthy of a philosopher, than the vulgar appeal to so-called adverse experience. Such experience would never have existed at all, if at the proper

16. Kelsen, Natural-Law Doctrine and Legal Positivism, 445.

17. This is in keeping with the more recent emphasis on the teleological elements in Kant's ethics. See Paton, supra, note 9; M.J. Gregor, Laws of Freedom; and T.C. Williams, The Concept of the Categorical Imperative.

> time those institutions had been established in accordance with ideas, and if ideas had not been displaced by crude conceptions which, just because they have been derived from experience, have nullified all good intentions. The more legislation and government are brought into harmony with the above idea, the rarer would punishments become, and it is therefore quite rational to maintain, as Plato does, that in a perfect state no punishments whatsoever would be required. This perfect state may never, indeed, come into being; nonetheless this does not affect the rightfulness of the idea, which, in order to bring perfection, advances this maxim as an archetype. For what the highest degree may be at which mankind may have come to a stand, and how great a gulf may still have to be left between the idea and its realisation, are questions which no-one can, or ought to, answer. For the issue depends on freedom; and it is in the power of freedom to pass beyond any and every specified limit.[18]

Here the fundamental duality of the Kantian philosophy is clearly seen. Here it is expressed as the distinction between what is and what ought to be the case. It is the relation between these terms that is in question in the theory of punishment and in law as a whole; for it is there that the theory meets with examples that are necessarily of an empirical nature. Although the state of affairs dictated by the idea of justice seems unattainable in its totality this does not remove the moral duty to act <u>as if</u> it were.[19] The possibility of this is increased as a result of Kant's analysis of what constitutes the moral worth of action, an understanding of which would allow the adoption of the appropriate principle. Elsewhere Kant inclines to the view that there is evidence that the hopes for the perfect

18. Kant, <u>Critique of Pure Reason</u>, 312 (B 373, A 317).

19. The idea of acting 'as if' justice were realized recurs throughout Kant's discussion of justice. This is possible because his theory is descriptive of the implicit moral law and also prescriptive where it is absent. See Paton's discussion of this point in the role of the categorical imperative; H.J. Paton, <u>The Aim and Structure of Kant's 'Grundlegung'</u>, also H. Vaihinger, <u>The Philosophy of 'As-If'</u>.

state may eventually be realised. Kant believes that Providence has a 'secret plan of nature' to produce such a state, the evidence being provided by the aspirations expressed by observers of the French Revolution.[20]

III

Having said something of the natural law status of the categorical imperative as the standard of justice it can be compared with the characterisation (provided in the previous chapter) of natural law. Of course this characterisation is very general and for the moment omits the originality of Kant's conception. Nevertheless, a broad classification of the categorical imperative as a natural law concept is possible. In the following discussion, Kant's theory will therefore be examined in the light of Kelsen's critique of natural law in respect of its actualization. Once again the specific problems of source, individuation and enforcement will be used to provide a structure.

It was stated in chapter 1 that in respect of a source natural law claimed to be 'given' independent of human attitudes, resting on metaphysical premises, ascertainable by reason and comprising laws of the highest generality. In addition, an affinity with the laws of nature was indicated. All these characteristics can be found in a distinctive Kantian form in the categorical imperative.

20. Kant, Idea for a Universal History from a Cosmopolitan Point of View, 21.

One of the most important theses of the 'Critique of Pure Reason' was that of categories. Categories were provided by reason which gave form to the material derived empirically by the senses and thus gave knowledge. Reason was not simply a source of knowledge of a theoretical nature in this sense, for it also provided practical knowledge. Kant expressed it thus:

> I assume that there really exist pure moral laws which entirely a priori (without regard to empirical notions i.e. happiness) determine the acts and omissions i.e. the use of freedom of any rational being, and that these laws command absolutely (not only hypothetically, on the presupposition of other hypothetical ends) and are therefore absolutely necessary. I can justly assume this by appealing not only to the proofs of the most enlightened moralists, but also to the moral judgment of every man, if only he tries to think a law of that sort clearly.[21]

The 'moral laws', that is, the formulations of the categorical imperative, are seen as 'given' in the sense of being independent, a priori concepts which are not established by empirical means. They are independent of human attitudes in the sense that they are not dependent on the pursuit of this or that end, but are absolute. They are established by the Critical Philosophy which sought to purge the excesses of pure reason and this indeed may be taken to include much of the intuitions and revelations of natural law. They are thus transcendental as opposed to transcendent; that is, necessary to experience rather than beyond all experience. They are ascertainable by reason simply by being forms provided by reason itself, so that

21. Supra, note 18, 636-7 (A 807).

Kant feels able to appeal to the moral thought of every man. Finally they are of the highest generality being, indeed, purely formal. It might also be added that the very title 'moral law' is suggestive of natural law theory.

The suggested affinity of natural law to laws of nature also finds its Kantian counterpart in the famous dictum, 'the starry skies above me and the moral law within me'.[22] For the Newtonian laws govern the world of nature and the Kantian laws govern the world of morality. However, Kant is not in danger of confusing the two laws as Blackstone did. Although men are part of nature as 'phenomena' and equally governed by laws of nature they are also 'noumena'[23] and hence not determined, but free agents. Freedom, however, for Kant, means submitting one's will to laws that one can give oneself and these are in the form of the categorical imperative. In this sense, Kant regards men,as rational beings, as legislators of the moral law. Nevertheless, the realm of ought must be as lawful as the realm of is even if not identified with it. Hence, Kant offers an alternative formulation of the categorical imperative, 'Act as if the maxim of your action were to become through your will a universal law of nature'.[24]

The question may now be asked, how far can Kant, identified as a natural law theorist, be vulnerable to Kelsen's general critique. Initially it seems that Kant would avoid many problems of the more

22. Kant, Critique of Practical Reason, 166.
23. See e.g., supra, note 2, xxiv-xxv.
24. Supra, note 1, 84.

traditional theory for Kant does not rely on, and in fact rejects, the excesses of rationalism or pure reason. Nor is there any questionable assumption of a will in nature - at least in creating norms.[25] Indeed, Kant is clear that reason itself does not generate norms but gives form to the will which is their source. Kant therefore adheres to a distinction between cognition and volition later adopted by Kelsen, but not conspicuous in general natural law theory. This form of analytical dualism replaces the realist metaphysical dualism that Kelsen found so objectionable. The realm of noumena does not explain that of phenomena but is, in the sphere of human action, an alternate form of explanation. The point is not therefore to claim that things as they are are a manifestation of another realm, but indeed to insist on the separation of is and ought. Despite this, however, it will be shown in the next chapter that Kant attempts to reunify the realms he has separated. There it will be seen that Kant is equally guilty as traditional natural law in deducing ought from is, in that the mere existence of the categorical imperative is held as making it normatively binding. The discussion of this point and the consequence it has will be postponed for the present.

Kelsen's insistence on science would clearly not be met by any failure to establish clearly defined facts; but would Kant's jurisprudence fail in terms of a publicly available test? Kant's position is unusual in that he offers the test itself rather than any autonomous,

25. But see supra, note 20.

substantive natural law. Kant does this by giving a formal test reminiscent of science. His argument takes the form not that X is a principle of natural law, but that if X has the form of the moral law then it is 'possible' as natural law. Now, whilst it may be doubted that Kant's procedure is the accepted publical y available test, the principal difficulty arises when Kant attempts to arrive at certain definite principles; in other words, when he returns to traditional natural law theory. Because of this, it is important to give full consideration to the problem of individuation in Kant.

The problem of individuation in natural law theory was seen to be its failure to provide a theory because of its preoccupation with general laws alone. Kelsen's point was that in order to retain the pretence of universal validity, natural law, particularly in respect of the concept of justice, was forced to eschew individuation because of its controversial nature. On the other hand, Kelsen saw the result was a retreat into empty formalism. Kant, however, accepts both formalism and attempts to individuate. Because formalism is, of itself, not a criticism of Kant, it becomes necessary to assess his theory of individuation.

According to Kant, one first constructs a maxim from the proposed course of action. Then one considers whether this maxim can conform to the formulations of the categorical imperative (could one will it as a universal law?). This process applies to both moral reasoning and legal reasoning, so long as it is just. The categorical imperative provides a negative test; it shows that a maxim is possible

as a moral maxim, but does not of itself guarantee that it is such. It should be noted from this that Kant's individuation does not conform to the traditional deduction from axioms and does not establish a necessary validity (but only a possible one) of its result. Nonetheless, Kant wishes to exclude certain contents from justice. Moreover, it seems that Kant does want to take certain material as just simply by the moral law. Unfortunately Kant's examples of the applications of the categorical imperative are the subject of conflicting interpretations.[26] A major difficulty is that Kant is so cryptic in his discussion and it could be said that, as they stand, his arguments are unsatisfactory. Kant's problem is that in separating form and content he then has to overcome that very separation to render his theory practical. Consideration of Kant's theory will show that it maintains its formality at the cost of emptiness and by reliance on positive law. In other words, Kelsen's critique is upheld.

Kelsen's criticisms of natural law individuation can be pressed against Kant with the somewhat unexpected help of Dewey and Hegel. Dewey seizes on the formalism of the categorical imperative to observe 'The gospel of a duty devoid of content naturally lent itself to the consecration and idealization of such specific duties as the existing national order might provide'.[27] Now sweeping though this is, it contains an important point. A purely formal moral law must rely on the material in the maxims presented for testing. In the case of law

26. See e.g. R.P. Wolff (ed.), Kant, part two, esp. articles by Ebbinghaus, Harrison and Kemp.

27. J. Dewey, German Philosophy and Politics, 87.

these will come from the positive legal system. Now it would seem that this would be a genuine test in that it is possible for some proposed laws to fail. Indeed, Kant himself is often critical and for example rejects the notion of the legal establishment of an hereditary aristocracy on these grounds. However, against this, Hegel's criticisms can be advanced. Apart from insisting that the moral law can only tell us what not to do, Hegel believes Kant is guilty of a petitio principii. Hegel points out[28] that if Kant succeeds in showing that for example, making false promises and theft cannot conform to the categorical imperative without destroying the institution of property, this does not show that the lack of such an institution is morally undesirable. Thus Kant is merely begging the question by illicitly assuming the institution that he seeks to justify (or conversely the injustice of that unjustified). Kant does not establish independently the justice of the institutions or laws in question. It is thus quite open whether an hereditary aristocracy is justified, Kant merely assumes that it isn't. Whilst this shows that his test is properly indifferent between a critical or status quo view, it is obvious that the latter is in a favoured position. The legal system, especially, can provide authoritative support which the categorical imperative only reinforces, (the individual is thus left in the same position vis a vis the state as before). That Kant accepts this tendency will be argued in the following chapter. The moral law therefore fails in the same way as natural law traditionally conceived.

28. Hegel, Philosophy of Right, s. 135.

The problem of individuation in Kant can be shown in more detail by taking a specific example. By returning to punishment, it will be possible to do this and also tackle the third problem, that of enforcement. Initially it was seen that natural law theory usually provides an explanation for failure of enforcement in practice. This, in Kant, takes the form of blaming the pervasive influence of utilitarianism, as already pointed out earlier in this chapter.

How does Kant individuate and provide for enforcement of his notion of justice in the theory of punishment? (For the purposes of the following, Kant's notion of justice, rather than that of utilitarianism, is assumed). 'The law concerning punishment is a categorical imperative'.[29] It should come as no surprise that this should be so because, if punishment is to be seen as morally justified, and if justice is expressed as the categorical imperative, then that imperative should be exemplified in punishment. The clearest and most important instance of this should already be apparent.

If we take the first formulation of the categorical imperative, 'Act only on that maxim through which you can at the same time will that it should become a universal law',[30] with the above justification of coercion, it is not difficult to see how Kant should arrive at a reciprocating (or retributivist) system of punishment. This may help to clarify Kant's remarks.

29. Supra, note 2, 100.
30. Supra, note 1.

> What kind and what degree of punishment does public legal justice adopt as its principle and standard? None other than the principle of equality, that is, the principle of not treating one side more favourably than the other. Accordingly, any undeserved evil that you inflict on someone else among the people is one that you do to yourself. If you vilify him, you vilify yourself; if you steal from him, you steal from yourself; if you kill him, you kill yourself.[31]

(This should be interpreted as what ought to be the case rather than, as Kant's language may suggest, what actually occurs.)

How this relies on the first formulation of the categorical imperative is seen when Kant adds later:

> Inasmuch as someone steals, he makes the ownership of everyone else insecure, and hence he robs himself . . . of the security of any possible ownership.[32]

Accepting stealing as a crime, and thus as a hindrance to freedom according to universal law, coercion is justified as a hindrance of a hindrance.[33] This is interpreted as that the amount of coercion in punishment must match that in the crime. Against this standard, utilitarianism is arbitrary, according to Kant, 'All other standards fluctuate back and forth and, because extraneous considerations are mixed with them, they cannot be compatible with the principle of pure and strict legal justice'.[34] In other words, a fluctuating standard is really no standard at all, for the penalty for the same offence will

31. Supra, note 2, 101.
32. Ibid., 102.
33. B. Bosanquet, The Philosophical Theory of the State, 176-7, echoes this.
34. Supra, note 2, 101.

vary from case to case (with the changes in its incidence and the rate of detection, etc.). This arises because utilitarianism admits happiness as its principle and thus as a right, whereas for Kant we have no right to happiness.

Despite the claims for the stability of standards of Kant's theory, the notion of equivalence suggested by retributivist theory creates its own difficulties. As Hegel puts it:

> . . . it is easy enough . . . to exhibit the retributive character of punishment as an absurdity (. . . an eye for an eye, a tooth for a tooth - and then you can go on to suppose that the criminal has only one eye or no tooth).[35]

The solution for Hegel and Kant is that we should judge likeness from the point of view of value and not on empirical grounds. This is in keeping with Kant's reliance on reason, but this does seem to rely on the courts building up a precedent of accepted 'equivalence'. In other words, a reliance on the positive legal system. Kant partially elides this by concentrating on the death penalty for murder.

> There is no sameness of kind between death and remaining alive even under the most miserable conditions, and consequently there is also no equality between crime and retribution unless the criminal is judicially condemned and put to death.[36]

Whilst this might have some sort of intuitive equivalence this may be less so elsewhere. (Kant, for example, suggests castration as

35. Supra, note 28, s. 101.
36. Supra, note 2, 102.

the penalty for rape). Even in the case of the death penalty for murder, it is difficult to see how crime and punishment are to be regarded as equivalent in view of the difference in attendant circumstances. Moreover, the equivalence will be thwarted if, in less serious cases, for example, a fixed fine is applied to offenders of differing financial means. Here Kant suggests that for members of high class additional humiliations should be added. Whilst this may show retributivism is applicable to an imperfect state, if the operation is left to the positive legal system, it shows also how retribution derived from the categorical imperative remains equally formal and thus dependent on that system.[37] It must also be pointed out that not only will the court provide the definition of 'likeness' in equivalence, but also will determine whether a case has actually arisen, and will also direct the enforcement where necessary. In this sense Kant has merely assumed these points, and consequently has little to say about them, because they are obvious. However, this is only part of the general assumption made by natural law theory; the assumption of a positive legal system, without which natural law would be impotent.

37. Kant seems to remark about equivalence in suffering supra, note 2, 132 and his remarks about the motives of rebels and correspondence to 'inner viciousness' of punishment, supra, note 2, 103 suggest an odd intrusion of utilitarianism. Although Kant is at pains to distinguish his concept of justice from utilitarianism and to point to differences that would result in practice, an important reservation needs to be expressed. This is that although in practice the two theories may produce different results in punishment and elsewhere, this will rely on the definitional criteria supplied to actualize the formula of the moral law or 'greatest happiness'. In themselves, there is nothing to prevent a given case being equally justified on either formula given suitable definitions in practice. (Although it may be admitted that if the definitions are both determinate and consistent, there need be no isometry over a range of cases.)

The foregoing chapter has shown how it is possible from the standpoint of the Pure Theory to see Kant's jurisprudence as an example of natural law theory. In addition, the shortcomings of such a theory have been dealt with. However, it will become apparent in the following chapter, that Kelsen could draw upon Kant's theory. For, purged of its deficiencies as discovered by Kelsen's critique, the foundations of the Pure Theory are uncovered. Kant attacked the traditional metaphysics behind natural law, but established his own natural law theory. Kant distinguished between is and ought, yet sought to reunite them. Kant accepted the importance of science, yet in natural law abandoned it. Kant recognized the distinction between form and content, yet attempted to merge them. For Kelsen, each initial step would represent the correct extemsion of the Critical Philosophy and the foundation of a true legal science, whilst each second step would represent a tragic lapse into out-dated thought forms. The legacy of Kant will be discussed more fully in chapter 4 where a comparison of the theories of Kant and Kelsen will be made.

The following chapter will take up a theme already introduced in chapter 1. Kelsen, as has been seen, criticises natural law not only in terms of truth but also in terms of the motives that lie behind it. The 'ideological' use of natural law has already been briefly dealt with with reference to Hobbes, Pufendorf and Locke. A more thorough examination will now be given of this aspect in Kant's jurisprudence. This will again deal with some points mentioned in the foregoing chapter, but from a new perspective. In

adition, this will allow a reinterpretation of Kant's theory so that its role as foundation of the Pure Theory will become more apparent. This will in turn then lead on to an examination of that role in chapter 4.

Chapter 3

Kant's Two Theories of Law

In this chapter, the relationship of natural law to positive law is examined in its second aspect, that of the use of natural law to support positive law. Although this has already been done in a general way, with reference to Hobbes, Pufendorf and Locke, here the relationship is examined fully, specifically in reference to Kant. Using Kant's theory of revolution as a means of approaching this relationship is a strategy which highlights the role of natural law as a standard of justice by which positive law is judged. Initially, Kant's theory of positive law will be discussed and it will be suggested that Kant provides a theory with strong positivist elements (shown initially in reference to Austin and, in the following chapter, to Kelsen). The relation of positive law to natural law in Kant's theory will be examined and it will be further shown how Kant provides a version of natural law theory expressed in terms of the Critical Philosophy. As such, this version will be shown to exhibit the same tendency to justifying positive law as Kelsen's critique would suggest. The same concomitant tendency of reducing the radical nature of natural law will also be noted.

I

Kant was writing in an age of revolutions and of the French Revolution in particular, during whose span Kant wrote his major work

on law. The age was also one of individualism, echoed in the Kantian moral theory. In keeping with the times, Kant's Critical Philosophy was in intellectual terms itself revolutionary.

Kant has been called 'the first representative of liberalism in Germany'.[1] In English terms, Kant would, perhaps, hardly represent an unequivocal liberal, but his dislike of an hereditary aristocracy and 'republican' views, in the context of Prussian politics, would doubtless appear quite radical. It was Kant's sympathy with the ideals of the French Revolution which earned him the title 'the Old Jacobin', and aroused hostility amongst those that knew of him. Kant's sympathy survived the excesses of the Revolution which were soon to alienate Wordsworth and others. Kant, of course, did not support these excesses and, in particular, viewed the execution of Louis XVI with horror. Nevertheless, Kant, it will be seen, tended to blame Louis for creating the Revolution. Kant also pointed to the reaction of foreign sympathizers as evidence of the moral improvement of mankind. On the other hand, Kant, by inclination, was hardly a personal revolutionary. In his sole conflict with authority, when ordered not to publish certain work by the censor in 1794, Kant complied, albeit reluctantly. In the following discussion it will be shown that Kant's views, which have just been given, were quite consistent with his general theory. Whether, in turn, that theory was coherent will now be discussed.

1. R. Aris, History of Political Thought in Germany from 1789 to 1815, 104. Aris also says that Kant's political philosophy is that of 'a honest but narrow-minded bourgeois', ibid., 87.

II

Kant's theory of revolution (which can be taken to include disobedience generally, as will soon become clear) presents special problems, a fact attested by the amount of attention and controversy it has evoked. This is paradoxically because on the one hand Kant seems so absolute in his condemnation of revolution, yet on the other he seems to think it allowable. Hence the reader is faced by statements such as:

> . . . the people can never possess a right of coercion against the head of state, or be entitled to oppose him in word or deed.[2]

> . . . even if the power of the state or its agent, the head of state, has violated the original contract by authorizing the government to act tyrannically, and has thereby, in the eyes of the subject, forfeited the right to legislate, the subject is still not entitled to offer counter-resistance.[3]

> It is the people's duty to endure even the most intolerable abuse of supreme authority.[4]

> . . . there is no right of sedition, much less a right of rebellion.[5]

- all of which seems far from Locke and close to Hobbes. Yet Kant, not only in his personal opinion, seems to think these prohibitions need to be qualified:

> when statutory commands, regarding which men can be legislators and judges, come into conflict with duties which reason prescribes unconditionally, concerning whose observance or transgression God alone can be the judge, the former must yield precedence to the latter.[6]

2. Kant, On the Common Saying: 'This May be True in Theory, but it Does not Apply in Practice', 83.
3. Ibid., 81.
4. Kant, The Metaphysical Elements of Justice, 86 - the 'Rechtslehre'.
5. Ibid.
6. Kant, Religion Within the Limits of Reason Alone, 142, c.f. 90. commenting on Acts V, 29.

- and even in stating the prohibition, Kant makes an explicit qualification:

> Obey the suzerin (in everything that does not conflict with internal morality) who has authority over you.[7]

Finally, Kant refers to Hobbes' theory that the sovereign cannot act unjustly as 'quite terrifying'.[8]

In summary, therefore, it appears that Kant's theory is contradictory. Given Kelsen's critique, and its previous application to Hobbes, Pufendorf and Locke, this should come as no surprise. Once again the tension within natural law as a standard for, and as a legitimization of, positive law becomes apparent. As such, Kant's theory is, in Kelsen's terms, as ideological as that of Pufendorf and advances no further than it.

Having made these preliminary remarks about the background and interpretative problem of Kant's theory of revolution, it is now possible to proceed to an analysis of it in the context of Kant's theory of law as a whole.

III

There are two theories of law in Kant. There is a natural law theory, traditional in all respects save that it expressed in the new

7. Supra, note 4, 139. (My emphasis.)
8. Supra, note 2, 84.

language of the Critical Philosophy. There is also a positivist theory which resembles that of Austin in important respects and which also contains intimations of Kelsen's Pure Theory. The natural law theory disguises the positivist theory yet in fact they meet at only one point. In Kant they are held together at that point. In Bentham, Austin, Kelsen and all positivist theories they are sundered. Therefore, Kant's legal theory, as his philosophy as a whole, represents both a synthesis and a transition.

Kant's Positivist Theory of Law

Austin, the founder of modern jurisprudence, studied the Rechtslehre in the usual thorough way in which he studied all his material. Referring to it in the famous 'Lectures', he called the 'Rechtslehre', 'A treatise darkened by a philosophy, which, I own is my aversion, but abounding, I must needs admit, with traces of rare sagacity'. Speaking of Kant he added:

> He has seized a number of notions, complex and difficult in the extreme, with distinctness and precision which are marvellous, considering the scantiness of his means. For, of positive systems of law he had scarcely the slightest tincture; and the knowledge of the principles of jurisprudence which he borrowed from other writers, was drawn, for the most part, from the muddiest sources: from books about the fustian which is styled the Law of Nature.[9]

In the following, I will attempt to show that Austin's judgement is entirely accurate.

9. Austin, Lectures on Jurisprudence, vol. II, 940. For Austin's relation to Kant and other contemporary jurists, see A.B. Schwarz, John Austin and the German Jurisprudence of his time.

That Kant drew on 'muddy sources' of natural law is hardly surprising. Kant's legal thinking took place in the context of Roman Law and its general air of natural law theory. Kant generally took over the conceptual framework thus provided as largely unquestioned. In addition, being concerned only with general principles, Kant relied on those rather than evidence from contemporary legal systems. Kant also inherited the notion of a Social Contract and its associated natural law notions of pre-legal rights and so on. That Kant drew from books about the 'fustian' of natural law is not surprising as these were generally all that was available, excepting the positivism of Hobbes. Given this background, it is indeed 'marvellous' that Kant should produce anything other than a traditional law theory.

Kant's positivist theory of law emerges in an analysis of the concept of sovereignty, especially in connection with revolution. As this concept was central to Austin's theory, it is not surprising that this is a fruitful statring point. The problem of sovereignty occupied Kant's thoughts a great deal and recurs in his unpublished works frequently especially towards the end of his life,(suggesting perhaps, his dissatisfaction with his published conclusions, a point readily comprehensible if the argument of this chapter is accepted). In the '<u>Rechtslehre</u>' and elsewhere, the concept, despite the various appelations which Kant gives to its locus, occupies a central place in his legal theory. In the following I will analyse Kant's sovereign on Austinian lines, switching to a more complex Kelsenian view only to complete the picture, which in turn will be developed in chapter 4.

The Kantian sovereign seems at least initially to suffer from some of the same ambiguity as that of Austin,[10] because Kant claims, as did Austin, that it is both a legal organ and also the people. This ambiguity is resolved in Kant's natural law theory, but for the moment the identity of the sovereign will not be resolved. There is, however, a clear distinction between sovereign and ruler. The latter stands at the head of the executive, whereas the sovereign is at the head of the legislature, or is simply the legislator. This conforms to the general concept of the separation of powers which Kant employs throughout his theory as something of a logical distinction. (However, Kant resembles Hobbesian absolutism, rather than Lockean limitation that the separation of powers might entail.) The sovereign cannot punish the ruler because this would be an executive act, but he does have coercive powers over him in a broad sense and 'can take his authority . . . depose him, or reform his administration'.[11] Clearly the legal system as a system of coercion does culminate in the sovereign in the sense that the sovereign retains the ultimate power (the ruler being under the law). The ruler cannot coerce the sovereign because it is the sovereign who makes and determines what the law is, the ruler merely executing the sovereign's will. The sovereign is the source of legislation and coercion which is in keeping with Kant's definition of law as coercive (as opposed to moral laws which are a duty irrespective of coercion) even if they are enforcing a moral duty. There is therefore a specific

10. A point made by H. Sidgwick, Elements of Politics, 651.
11. Supra, note 4, 82.

system of legal validity represented by the coercion emanating from the sovereign. Kant also makes a distinction between the office of sovereign and who ever fills it. Hence, he holds that the sovereign is in an exceptional position as a person, alone being able to pardon for personal harm[12] and alone in not holding personal property.[13] The intention here seems to be that of preventing the person of the sovereign from dominating the office of sovereign and thus perverting the objectivity of sovereignty. Generally, Kant talks of the 'monarch' and so one must assume that Kant has in mind that one person will fill the office, even if representing the will of a republic.

Having sketched the identity of the sovereign, it is now possible to define it in terms of its necessary characteristics. These are inferred from Kant's arguments to show that there is no legal right of revolution. Such arguments would initially seem redundant, merely asserting a boring platitude. However, it will be seen that these arguments actually presuppose a theory of sovereignty and involve an exploration of its logical entailments. Although the characteristics of the sovereign are discussed separately, it readily appears that they are mutually dependent.

The Austinian sovereign is a commander and his commands are expressed as laws. Kant also refers to the sovereign as the 'Supreme Commander'[14] and to his laws as 'commands', but Kant tends to take

12. Ibid., 107. Kant ignores this in relation to a deposed sovereign, see note 26, infra.
13. Ibid., 90.
14. e.g., ibid.

these notions for granted and does not analyse them with the same thoroughness as Austin. However, it is clear that, as in Austin, these commands are general and coercive and issue from the head of a system of coercion (as seen above). This gives us the first characteristic of the sovereign - it is supreme. This is taken in two senses in that the sovereign has authority over all others, but is not subject to higher authority itself. This position, Kant marks by speaking of the sovereign as 'outside' yet at the 'head' of the legal system.[15] This duality is merely the result of the dual relation of members of the legal system. Like them, the sovereign exercises coercion on a lower level, but unlike them, he is not coerced. Depending on the criteria of membership of a legal system, the sovereign is in, or out, of the system. There is an obvious parallel to the status of the Grundnorm in Kelsen's theory which, as will be seen later, is inside the system as giving validity to lower norms, but outside as having its own validity presupposed. The sovereign

> is not a member of the commonwealth, but its creator or preserver, and he alone is authorised to coerce others without being subject to any coercive law himself. But all who are subject to laws are the subjects of a state, and are thus subject to the right of coercion along with other members of the commonwealth; the only exception is a single person (in either the physical or the moral sense of the word) the head of state, through whom alone the rightful coercion of all others can be exercised. For if he too could be coerced, he would not be the head of state, and the hierarchy of subordination would ascend infinitely.[16]

15. Ibid.
16. Supra, note 2, 75.

From these remarks of Kant, it is clear that the possibility of a 'hierarchy of subordination' terminating at the highest level with the sovereign, is suggested. Kant, as we have seen earlier, says very little about the structure of a legal system, and the associated concept of individuation, but it seems permissible to infer that he has the normal hierarchical structure in mind (where the criterion of membership of a legal system is given by the common source of the sovereign).

Logically implied by the notion of supremacy is the second characteristic of the sovereign - that it is single. This follows simply because, as supreme coercive organ, the sovereign cannot be subject to coercion within the same system or even more simply, because supremacy is a necessarily singular concept (there can only be one 'highest' in a given class). This provides Kant with an argument that he repeats often against revolution; that revolution entails a competing sovereignty. That is, if there is a supreme coercive organ, any coercion not derived from it represents logically an attempt to subordinate the sovereign and thereby create a new sovereign or merely, 'to put violence as the supreme prescriptive act of legislation in the place of every right and Law'.[17] Because every legal system can have only one sovereign, any attempt to create another sovereign tends to the dissolution of the legal system in as far as it succeeds. Kant states the argument as follows:

17. Supra, note 4, 140.

> . . . all resistance against the supreme legislative power . . . is the greatest and most punishable crime in a commonwealth, for it destroys its very foundations. This prohibition is absolute. And even if the power of the state or its agent, the head of state, has violated the original contract by authorizing the government to act tyrannically, and has thereby, in the eyes of the subject, forfeited the right to legislate, the subject is still not entitled to offer counter resistance. The reason for this is that the people under an existing civil constitution, has no longer any right to judge how the constitution should be administered. For if we suppose that it does have this right to judge and that it disagrees with the judgement of the actual head of state, who is to decide which side is right? Neither can act as judge of his own cause. Thus there would have to be another head above the head of the state to mediate between the latter and the people, which is self-contradictory . . . The decision must rest with whoever controls the ultimate enforcement of the public law i.e. the head of state himself.[18]

The similarity of these remarks to Kelsen's arguments for a (single) Grundnorm in any legal system is striking.[19] This takes the form that in a given system of norms two norms must either be in a relation of subordination (in which case only one can be a higher norm) or in a relation of coordination (in which case neither is the higher norm but both are mutually defined in relation to each other by delegation from a third, higher, norm). At this point, however, it should be emphasised that this argument makes assumptions about the logical status of norms which are not indisputable. In particular, it assumes a logical coherence that is only an aim in the practice of legal systems, where to avoid the problems of conflicting laws a principle of resolution is adopted (e.g. lex posterior derogat priori). It also assumes that conflicting norms are contradictory and hence

18. Supra, note 2, 81.
19. See chapter 9, infra, for a discussion of this point in international law.

cannot both be valid, an assumption that will be examined in detail in a later chapter (chapter 11). These are assumptions shared by Kelsen, as will be seen, and Kant. Kant, because of his insistence on categorical consistency, believed that there could be no genuine conflict of duties (and therefore norms) because it was contradictory to believe that both could be valid yet inconsistent.[20] The outcome of this argument is that if there are two sovereigns, one is not genuine or that both are really united. It is the latter resolution that Kant uses when claiming that both the people and the head of state are sovereign. This identification, however, depends on Kant's natural law theory discussed below. The logical point is that legally there can only be one sovereign and only one source of legal coercion; without which coercion (violence) becomes entirely arbitrary.

Kant applies the argument

> To permit any opposition to the absolute power (the sovereign), an opposition that might limit the supreme authority, would be to contradict oneself, in as much as in that case the power which may be opposed would not be the lawful supreme authority that determines what is or is not to be publicly just [21]

to the constitution

> . . . even the constitution itself cannot contain any article that would allow for some authority in the state that could resist or restrain the chief magistrate . . . [22]

Where a constitution might, in Kelsen's terms, contain a norm providing

20. Kant, On a Supposed Right to Tell Lies from Benevolent Motives.
21. Supra, note 4, 140.
22. Ibid., 85.

for its own derogation (e.g. after a set date or in certain circumstances) it cannot do so by illegitimate means because, by definition, it cannot recognize anything as having such validity by non-constitutional means, resort is made to the fiction that such a derogating norm was contained in the old constitution. Talking of the 1688 Glorious Revolution, Kant says

> And it would be an obvious contradiction if the constitution included a law for such eventualities, entitling the people to overthrow the existing constitution from which all particular laws are derived, if the contract were violated. For there would then have to be a publical y constituted opposing power, hence a second head of state to protect the rights of the people against the first ruler and then yet a third to decide which of the other two had right on his side. In fact, the leaders (or guardians - call them what you will) of the British people, fearing some such accusation if their plans did not succeed, invented the notion of a voluntary abdication by the monarch they forced out, rather than claim a right to depose him (which would have made the constitution self-contradictory).[23]

However, this is the argument which Kant uses to show that Louis XVI was responsible for the French Revolution, by attempting to share sovereignty without ensuring that another sovereign was not thereby created.[24] In that instance any attempt to establish sovereignty again - even by revolution, would be justified. In this context it should be noted that Kant viewed the execution of the monarch with particular horror implying, as it did

> a complete subversion of the principles governing the relationship between a sovereign and his people (that

23. Supra, note 2, 84. Yet in Reflexionen 8043 and 8044, cited by L.W. Beck, Kant and the Right of Revolution, 412, Kant appears to think some right of resistance was part of the British Constitution.

24. Supra, note 4, 87, 113-4.

> is, it makes the people the master over the former, to whose legislation alone they owe their existence).[25]

There is one exception which Kant makes to the indivisibility of sovereignty. This is in respect of the position of a deposed monarch.

> The dethroned monarch (who survives such a revolution) cannot be held accountable for, much less be punished for, his past administration, provided that he has retired to the private life of a citizen of the state and prefers peace and quiet for himself and the state to the foolhardy act of running away in order, as a pretender, to attempt the adventure of recovering his kingdom, whether it be through a secretly instigated counter-revolution or through the help of outside powers. If, however he prefers the latter course of action, his right to do so remains unchallengable, because the insurrection that deprived him of his possession was unjust. But whether other powers have the right to join an alliance in favour of this dethroned monarch . . . and whether they are therefore justified and called upon to use their authority and power to restore the old constitution in every state where a new constitution has been set up as a result of a revolution - these are questions that come under the Law of nations.[26]

Thus, if the sovereign divests himself of his office, then the legal system remains intact because of the existence of the new sovereign. The latter possibility however creates the problem of a 'government in exile', and this will be discussed in a later chapter (chapter 9).

If, as Kant's arguments assert, the sovereign is undivided, this means there can be no legal challenge to him and so the possibility of a legal check on the sovereign is excluded. Hence, the sovereign is illimitable. As the sovereign is the supreme authority in law, any

25. Ibid., 88.
26. Ibid., 89.

constitutional checks on its authority would also ultimately depend on the sovereign. Kant seems opposed to such checks as endangering the integrity of sovereignty and because they tend to disguise the reality of the situation. Hence Kant denounces the 'hocus-pocus' of elected deputies who, he believes, are prone to corruption and mask despotism. Also objectionable, is the 'so-called moderate political constitution' which is a

> clever principle devised to make the arbitrary influence on the government of a powerful transgressor of the people's rights as little onerous as possible by cloaking it in the appearance of conceding to the people (the right of) opposition.[27]

(Although Kant uses the notion of a separation of powers, especially between sovereign legislator and executive, as has already been seen, this also does not provide a check on the sovereign.)

In consequence of the lack of any check on the sovereign power there is legally no limit on the sovereign who can <u>legally</u> do no wrong. Kant is not averse to drawing out the full consequences of this. The connection to the indivisibility of the sovereign is also made clear:

> It is the people's duty to endure even the most intolerable abuse of supreme authority. The reason for this is that resistance to the supreme legislation can itself only be unlawful; indeed it must be conceived as destroying the entire lawful constitution, because in order for it to be authorized, there would have to be a public law that would permit the resistance. That is, the supreme legislation would have to contain a stipulation that it is not supreme and that in one and

27. <u>Ibid</u>., 86.

> the same judgment the people as subjects should be made sovereign over him to whom they are subject; this is self-contradictory.[28]

And the remark already cited above:

> . . . even if the power of the state or its agent, the head of state, has violated the original contract by authorizing the government to act tyrannically and has thereby, in the eyes of the subject, forfeited the right to legislate, the subject is still not entitled to offer counter-resistance.[29]

> . . . even the constitution itself cannot contain any article that would allow for some authority in the state that could resist or restore the chief magistrate in cases in which he violates the constitutional laws.[30]

For Austin,

> sovereignty is neither derived from nor explained by reference to morality or moral principles. It is based exclusively on the social fact of the habit of obedience.[31]

In short, legal validity is dependent on efficacy. Kelsen's discussion of this problem will be dealt with in a later chapter (where his important distinction between efficacy as a condition of, and as a reason for, validity is examined). Kant also appears to accept that validity is somehow dependent on efficacy. This may be inferred from his notion of law as coercive perhaps, but is more apparent in his discussion of a successful revolution. This parallels Kelsen's

28. Ibid., 86.
29. Supra, note 2, 81.
30. Supra, note 4, 85.
31. J. Raz, The Concept of a Legal System, 6-7. I follow Raz partially in the interpretation of Austin.

discussion of revolution as a law creating fact which will be dealt with in a later chapter with reference to Rhodesia (chapter 10). Kant states:

> if a revolution has succeeded and a new constitution has been established, the illegitimacy of its beginning and of its success cannot free the subjects from being bound to accept the new order of things as good citizens, and they cannot refuse to honour and obey the suzerain who now possesses the authority.[32]

Coupled with Kant's prohibition on enquiry into the historical origins of sovereignty ('The command, "Obey the suzerain who has authority over you", does not ruminate on how the suzerain acquired this authority.')[33] This might be taken to be equivalent to equating validity and efficacy. However, Kant clearly regards a deposed sovereign as in some sense valid even though he has ceased to be efficacious. In this respect Kant is closer to Kelsen than Austin for, unlike the latter, he does not rest validity on a fact (of obedience) but rather, on a norm. Moreover, Kant does not rest validity on sovereignty but on a norm which delegates it. In this sense, although the Kantian sovereign is the supreme source of law and coercion it is not the ultimate source of validity, which must come from a yet higher source: this is the Original Contract.

IV

The Original Contract

It soon becomes apparent that Kant's version of the Contract

32. Supra, note 4, 89.
33. Ibid., 140.

is only tenuously related to traditional contract theory and resembles Rousseau's version in some ways, not least in that it contains ideas ill-suited to that mode of expression. It is certainly not an historical fact.

> But we need by no means assume that this contract, based on a coalition of wills of all private individuals in a nation to form a common, public will for the purposes of rightful legislation, actually exists as a fact, for it cannot possibly be so. Such an assumption would mean that we would first have to prove from history that some nation, whose rights and obligations have been passed down to us, did in fact perform such an act, and handed down some authentic record or legal instrument, orally or in writing, before we could regard ourselves as bound by a pre-existing civil constitution. It is in fact merely an idea of reason, which nonetheless has undoubted practical reality.[34]

It is this non-factual status that is partly responsible for Kant's cautioning against

> pointless questions that threaten the state with danger if they are asked with too much sophistication by a people who are already subject to civil law.[35]

The obvious danger being that people, basing validity on a fact, could refuse to accept validity if the fact is in doubt. The Original Contract therefore gives validity to the origin of the legal system in force and to the continuing use of coercion.

The Original Contract delegates the constitution which, rather than containing general provisions, resembles, in Kant's sense, the notion of the constitution as the form of government. In other words

34. Supra, note 2, 79.
35. Supra, note 4, 84.

the constitution designates who is the sovereign and whether this organ consists of one or many persons. As has been seen, the sovereign must be single, otherwise the constitution would contain a contradiction by recognizing two supreme powers. The validity of the sovereign is derived from the Original Contract and, 'it is the Idea of that act that alone enables us to conceive of the legitimacy of the state'.[36] The Contract is thought of as being an expression of the will of the people, in the sense that the people, at least implicitly, accept it. (A more Rousseau-like interpretation will be given shortly). Hence, validity depends not on a fact but the result of an act of will (or in Kelsen's terminology - a norm). Kant has therefore maintained a clear separation of fact and value at this point. As Kant has said, the Original Contract is not a fact but an Idea. Given the relation of delegation to the sovereign, this has an uncomfortable conclusion as a 'reviewer' pointed out.

> To our knowledge, no philosopher has admitted the most paradoxical of all paradoxes, namely, the proposition that the mere Idea of sovereignty should necessitate me to obey as my lord anyone who has imposed himself upon me as a lord, without my asking who has given him the right to issue commands to me. Is there to be no difference between saying that one ought to recognize sovereignty and a chief of state and that one ought to hold a priori that this or that person, whose existence is not even given a priori, is one's lord?[37]

There are two replies to this question. The Idea of the Original Contract is the Grundnorm of the Kantian positivist legal

36. Ibid., 80.
37. Ibid., 138.

theory, ' . . . a categorical imperative says; "Obey the suzerein . . . who has authority over you!"[38] That is, in a positivist analysis of a legal system, we presuppose that if the system is generally efficacious then a norm exists which says, 'obey the highest positive legal norm', whether this is a constitution or a sovereign. In Kelsen the example is given 'One ought to obey the prescriptions of the historically first constitution'.[39] This allows the interpretation of an effective coercive order as having objective validity. In this sense, the Original Contract is necessary only for interpretation and it does not mean that it is actually cited. Rather, if one asks why the sovereign, as a fact, is obeyed, the answer is that there is a norm presupposed, empowering him to command, by all those within the effective legal system. Thus, the Kantian Idea (as also the categorical imperative) is logically necessary in interpreting experience. To give unity to appearances given in experience we have the Idea of 'things in themselves' which organize experience. Similarly, to give unity to various coercive acts, we have the Idea of an Original Contract which organized certain behaviour. It is a transcendental-logical construction. Kelsen draws an analogy between the concept of Grundnorm and Kant's epistemology.

> Kant asks: "How is it possible to interpret without metaphysical hypothesis, the facts perceived by our senses, in the laws of nature formulated by natural science?" In the same way the Pure Theory of Law asks: "How is it possible to interpret without recourse to meta-legal authorities, like God or nature, the subjective meaning of certain facts as a system of objectively valid legal norms describable in terms of law?"[40]

38. Ibid., 139.
39. Kelsen, The Pure Theory of Law, 204.
40. Ibid., 202.

The answer in both cases is by means of a transcendental-logical construction, in the latter case specifically the Grundnorm.

This completes the Kantian positivist legal theory with 'the basic law . . . called the original contract',[41] the Kantian Grundnorm. As such, this concludes the analytical part of Kant's theory, for the interpretation of law as a system of coercion is now possible. However, it is at this point that justification begins: with Kant's natural law theory.

Although Austin held that the sovereign was morally bound, although of course not legally bound, this was a distinct question from the analysis of law. In his famous statement, 'The existence of law is one thing; its merit or demerit is another'.[42] Kelsen too brings the legal system to a culmination in a Grundnorm and separates justification from analysis. As noted above, in chapter 1, Kelsen claims that natural law theory must contain a norm that delegates the positive legal system in order to resolve the dilemmas of pure natural law. In Kant's theory, this is the Original Contract, or rather the Idea of it. Thus Kant goes beyond the positive legal system -

> it is possible to conceive of an external legislation which contains only positive laws; but then it would have to be preceded by a natural law providing the ground of the authority of the legislator (that is, his authorization to obligate others through his mere will).[43]

41. Supra, note 2, 77.
42. Austin, Lectures, vol. I, 214 note.
43. Supra, note 4, 26.

The Idea of the Original Contract is thus a norm of positive law, but also of natural law and thus combines legal and moral validity. As an Idea it shares the function of a logical presupposition and also of an ideal; it is analytically necessary but also morally binding. It is, like the categorical imperative - both descriptive of our practical reasoning and prescriptive upon it. It answers the 'reviewer' with a moral as well as legal ought because it contains, within itself, two theories.

Kant's theory of natural law will now be examined and it will be suggested that it is open to Kelsen's critique of having an ideological function.

V

Kant's Theory of Natural Law

Given the nature of the categorical imperative as a test purportedly implicit in moral reasoning and accessible to every individual, the possibility of natural law as a standard of judgement for the citizen would prove highly radical. Rehberg, a disciple of Kant, drew such a conclusion:

> If a system of <u>a priori</u> demonstrated positive specifications of natural law is applied to the world of men, nothing less than a complete dissolution of present civil constitutions would follow. For according to such a system, only that constitution is valid which accords with the ideal of reason. In this case, no one of the existing constitutions could stand . . . If these constitutions contradict . . . the first requirements of a rational constitution, the human race

> is not only permitted, it is required to destroy these constitutions which are opposed to the original moral law.[44]

Thus, on the grounds of Kant's positivist theory at least, although there is clearly no legal right of revolution, there would be no moral prohibition and indeed the way would be open for the citizen to make a moral decision about obedience untainted by positive legal considerations. This would then resemble the Austinian separation of problems of the existence of legal systems from problems of their merit. To avoid such a conclusion it would be necessary to show that positive and natural law are linked in such a way as to deny the radical implications of the categorical imperative as a standard.

Kant's view that the Grundnorm of positive law - the Original Contract - is also a natural law norm has already been stated. In particular it should be noted that the Original Contract contains a categorical imperative - 'Obey the suzerain who has authority over you!'[45] But in the natural law use this categorical imperative would not have a merely descriptive use, but would also be prescriptive. Indeed, it is doubtful if Kant would recognise such an analytical distinction in practice, so that the possibility of a Kelsenian 'descriptive ought' would not arise. To call this 'Grundnorm' a categorical imperative, as Kant does, is accurate only in the sense that it is a maxim that can consistently be adopted according to the

44. Cited by Beck, Kant and the Right of Revolution, 412.
45. Supra, note 4, 139.

form of the categorical imperative. It is in the latter sense that the categorical imperative serves a natural law function. In this case, therefore, Kant's theory does not follow the type of natural law theory which Kelsen criticises, for the categorical imperative is deliberately of a formal nature as a 'test' of the 'possibility' of any norm as shown in chapter 2. Even so, it will be noted that norms presented for such validation are positivist and dependent on positivist criteria as already seen.

It has also been noted that Kant's concept of Idea contains the notion of an ideal so that the Original Contract is not only analytically necessary but morally binding.[46] Why Kant insists on this is seen in the quotation from the Critique of Pure Reason given above in chapter 2. Basically Kant believes that if the Idea of an original contract is lacking, then the perfect constitution would be reached only as a matter of chance. Thus, by making the ideal implicit in every actual instance, Kant can make its attainment a duty on citizen and sovereign. The ideal is the Kingdom of Ends[47] where a republic is perfect, as each member is an equal co-legislator willing according to the categorical imperative. The link between the actual and ideal aspects of the Idea is not just contained within the concept, for it may be that the actual constitution falls far short of the perfect one. However, its very imperfection shows that, even in a debased form, the perfect constitution is

46. J. Ladd, Kant's View of the Relation of Law to Morality, 762.

47. As in the formulation of the categorical imperative, "So act as if you were always through your maxims a law-making member in a universal kingdom of ends', Groundwork of the Metaphysic of Morals, 99-100, c.f. H.J. Paton, The Categorical Imperative, 185-188.

'possible'. Kant therefore can hold that we have a duty to bring it about - a duty of acting as if it were actually present.

Kant's concept of acting as if statically connects the two terms of the is-ought dichotomy. By acting as if the ought were actually the case then it would be the case. This is a duty on both sovereign and citizen.

The sovereign in Kant's positivist analysis cannot be in breach of the Original Contract in the legal sense, but clearly this could be so in the moral sense. Nevertheless, the sovereign has a moral duty to conform to the Contract, a duty strengthened by its a priori nature.

> The legislator may indeed err in judging whether or not the measures he adopts are prudent, but not in deciding whether or not the law harmonises with the principle of right. For he has ready to hand as an infallible a priori standard the idea of an original contract, and he need not wait for experience to show whether the means are suitable, as would be necessary if they were based on the principle of happiness.[48]

In one sense this differs little from Austin who held that the sovereign was morally bound, but not legally. However, in Kant, the morality is implicit in the sovereign's acts, even where they actually breach the Contract. In this case it is, in a sense, impossible for the sovereign to breach the Contract, for the categorical imperative that it contains still orders obedience for

48. Supra, note 2, 80. Kant also remarks that there is obligation to the spirit as well as the letter of the Contract, supra, note 4, 112.

the Idea so that the citizen must act as if the sovereign conformed to the Contract. Kant, therefore, turns to argue that the citizen has neither a legal nor moral right to revolution that is, to argue that there is no natural law right of revolution.

Kant's natural law as an ideology of quietism

The Idea of the Original Contract is a product of the Idea of a General Will of all citizens.[49] This Rousseauesque idea is given a Kantian complexion by the distinction Kant makes between the will of choice (Willkür) and duty (Wille). In the latter sense, everyone wills the Idea of the Original Contract and thus it is a duty so to do upon their actual choice. Just as the actual will may fall short of this duty, the Contract may fall short of the ideal - but this does not alter the fact that it is a duty. The General Will seems likely to remain an Idea, for Kant thinks that empirically it would be rent by factions and presumably be a Kantian 'Will of All'.[50] However, it is possible to formulate a test for the morality of law from the concept of the citizens' willing which produces the Original Contract. For, although a citizen may not actually will the Original Contract, it is possible that he might (it being his duty and 'ought' implying 'can'); but if it is impossible that he should will something allegedly derived from the Original Contract, then it cannot be part of the Contract or a duty. The Original Contract

49. As a public will it is supposedly incapable of doing injustice to anyone, supra, note 2, 77.

50. Kant admits that unanimity may be impossible, thus becoming majority decisions, supra, note 2, 79. This would be particularly noticeable in a revolutionary situation where each would, 'thrust upon each other a constitution which would have been far more oppressive than the one they abandoned', ibid., 83.

> is in fact merely an idea of reason, which nonetheless has undoubted practical reality; for it can oblige every legislator to frame his laws in such a way that they could have been produced by the united will of a whole nation, and to regard each subject, in so far as he can claim citizenship, as if he had consented within the general will. This is the test of the rightfulness of every public law. For if the law is such that a whole people could not possibly agree to it (for example, if it stated that a certain class of subjects must be privileged as a hereditary ruling class), it is unjust; but if it is atleast possible that a people could agree to it, it is our duty to consider the law as just, even if the people is at present in such a position or attitude of mind that it would probably refuse its consent if it were consulted.[51]

However, Kant does not unreservedly make this test available to the people:

> But this restriction obviously applies only to the judgement of the legislator not to that of the subject. Thus if a people under some existing legislation, were asked to make a judgment which in all probability would prejudice its happiness, what should it do? Should the people not oppose the measure? The only possible answer is that they can do nothing but obey.[52]

Kant assumes that the people will, if judging other than as if the sovereign were just, tend to be swayed by utilitarian motives. Judgements made on utilitarian principles could not conform to the categorical imperative[53] according to Kant, and therefore mere arbitrariness would result from the differing views of happiness.

51. Ibid., 79.
52. Ibid., 80. The abrupt introduction of a utilitarian consideration attributed to the people should be noted; for, in Kant's eyes it discredits their aims.
53. Ibid., 73-4.

> No generally valid principle of legislation can be based on happiness. For both the current circumstances and the highly conflicting and variable illusions as to what happiness is (and no-one can prescribe to others how they should attain it) make all fixed principles impossible . . .[54]

Kant therefore talks of the people in this context as an 'arbitrary association'[55] or 'riotous mob'.[56] The reason why Kant is anxious that the people should act as if the sovereign were just, even if he is not actually doing so or himself acting as if according to the Original Contract, is that otherwise the state is endangered. Kant's theory has the tendency, common in natural law theory, to support any state, no matter how imperfect, because it at least makes legal justice possible. If the state is destroyed then a state of nature results in which all hope of justice is abandoned.

In answer to Locke's observation that a state of nature or anarchy does not result in practice from revolution,[57] Kant's point is that even if no violence occurs, there is no longer a means of checking it. Kant's argument is a priori that each man would become judge in his own case and thus justice would occur only as a matter of chance. That is, it would cease to be truly just. In other words, each could will unjust behaviour when it was to his own advantage. Such a will

> cannot be brought under any common principle nor thus under any external law harmonizing with the freedom of everyone . . . such procedures, if made into a maxim, make all lawful constitutions insecure

54. Ibid., c.f. Kant's remarks on utilitarianism in punishment, chapter 2, note 34, infra.

55. Supra, note 4, 88.

56. Ibid., 111, this is contrasted to the preferred change by the sovereign.

57. See chapter 1, note 53, infra. Kant states 'the people cannot reply immediately as a commonwealth, but only in forming factions', supra, note 2, 83.

> and produce a state of complete lawlessness where all rights cease at least to be effectual.[58]

The state therefore is an institution assumed as any other discussed in chapter 2. There seems to be an analogy with lying, for if we were to lie when it was to our advantage, this would contradict our will that truthtelling continue so that we may profit from our own deceit. Thus, although as pointed out in chapter 2, Kant assumes the justice of that which he justifies, he can at least point out that the immoral agent does too.

Because, even the worst state contains at least the possibility of justice, it is better than no state at all. Its 'betterness' consists in justice and not in the greater happiness there may be in a state of nature. Kant's seemingly ambivalent remarks to the contrary merely show that a revolution that results in an improved state is only excusable, never justified. Also, there must be a phase when a break-down has occurred when force is justified in compelling anyone to accept legal justice, according to Kant.[59] This, however, is not a justification available from the initial phase of revolution because the outcome, depending on utilitarian motives, is subject to mere chance. 'For the result usually affects our judgement of the rightfulness of an action, although the result is uncertain whereas the principles of right are constant'.[60]

58. Supra, note 2, 82.
59. An argument expressed by L.W. Beck, supra, note 44.
60. Supra, note 2, 82.

Generally these arguments do not apply to the sovereign, possibly because his duty and interest coincide with maintaining the state, but would do so if the sovereign were to begin the revolution. Kant thinks that this is actually what Louis XVI in fact did.[61] In summary, given that the Original Contract and constitution are held obligatory as if perfectly just, then any resistance must necessarily by definition be unjust and because not based on duty, necessarily utilitarian. Thus,'peoples have done the greatest degree of wrong in seeking their rights in this way'.[62]

There is a further argument which Kant introduces against a moral right of revolution. This is the argument of 'openness'.[63] Kant suggests that a test of the injustice of a maxim is that publicity would defeat it. If I openly admit telling lies, then the whole point of my lying is undermined. Kant intends this argument to show the injustice of revolutionary conspiracy. As it stands, such an argument is not convincing, for there have been 'open conspiracies' (and active suppression by government). Moreover, the assumption of the justice of this or that state, is less convincing than that of the practice of truth-telling. Indeed, this points out that whilst the liar can be said to assume the justice of truthtelling, the revolutionary might be able consistently to reject the justice of the state. Kant's point, however, should be taken to be that revolutionaries if wishing to change the state, rather than

61. Supra, note 24.
62. Supra, note 2, 82.
63. Ibid., 85-7, c.f. Kant, Perpetual Peace, 134-5.

simply abolish it altogether, do assume the state as an institution. They could not consistently will _their_ state, when established, should be opposed by conspiracies.

The argument for openness is also valid for the government. This is for two reasons: the first has to do with the concept of _as if_, the second with Kant's idea of enlightenment.

If the citizen assumes that the sovereign is acting _as if_ the constitution was perfect: that is, acting morally, any injustice is error. Thus speaking of the ruler Kant says:

> The non-resisting subject must be able to assume that his ruler has no _wish_ to do him injustice . . . if he assumes that the ruler's attitude is one of good will, any injustice which he believes he has suffered can only have resulted through error, or through ignorance of certain possible consequences of the laws which the supreme authority has made. Thus the citizen must, with the approval of the ruler, be entitled to make public his opinion on whatever of the ruler's measures seem to him to constitute an injustice against the commonwealth. For to assume that the head of state can neither make mistakes nor be ignorant of anything would be to imply that he receives divine inspiration and is more than a human being. Thus _freedom of the pen_ is the only safeguard of the rights of the people, although it must not transcend the bounds of respect and devotion towards the existing constitution, which should itself create a liberal attitude of mind among the subjects. To try to deny the citizen this freedom does not only mean, as Hobbes maintains, that the subject can claim no rights against the supreme ruler. It also means withholding from the ruler all knowledge of those matters which, if he knew about them, he would himself rectify, so that he is thereby put into a self-stultifying position. For his will issues commands to his subjects (as citizens) only in so far as he represents the general will of the people. But to encourage the head of state to fear that independent

> and public thought might cause political unrest is tantamount to making him distrust his own power and feel hatred towards his people.[64]

As regards the ruler, the citizen may complain to the sovereign, but in respect of the sovereign himself, the problem would be that of how far one could go without effectively challenging sovereignty. In Kant's opinion, this would not be very far. Kant himself, consistent with these views, acquiesced with the censorship of his own work. Generally Kant thinks that openness provides a test 'Whatever a people cannot impose upon itself cannot be imposed upon it by the legislator either',[65] but adds,

> In all cases, however, where the supreme legislation did nevertheless adopt such measures, it would be permissible to pass general and public judgements upon them, but never to offer any verbal or active resistance.[66]

The effect of this test is therefore minimal. Kant, however, appears to be in a dilemma here for, whilst warning about the dangers of criticism, he regards it as essential. Possibly, Kant would prefer an arrangement somewhat like the Secret Article for Perpetual Peace where philosophers are consulted as a special group 'by nature incapable of plotting and lobbying'.[67] Yet Kant seems to leave such judgement to all individuals as the logic of the categorical imperative might lead one to expect. He demands a 'spirit of freedom' where 'each

64. Ibid., 84-5, c.f. Hobbes at chapter 1, note 46, infra.
65. Ibid., 85, c.f. Kant, What is Enlightenment?, 8.
66. For a discussion of a possible Kantian theory of passive disobedience, see R. Hancock, Kant and Civil Disobedience. Throughout this chapter I have talked in terms of revolution as the strongest case of disobedience.
67. Kant, Perpetual Peace, 115-6.

individual requires to be convinced by reason that the coercion which prevails is lawful, otherwise he would be in contradiction with himself.'[68]

Given that improvement is ruled out if by revolution, the people are involved as a means of helping the sovereign to fulfil his moral duty of acting as if the original contract were realised; that is, in pursuing the Kingdom of Ends. This pursuit of a state where all are equal colegislators entails both in its ends and in its means, the enlightenment of the people. This brings us to the central thesis of Kant's natural law theory, the role of History.

History is the great reconciling force in Kant's theory in that it dynamically unites the realm of the is with that of the ought, and thus unites nature and morality. This not only shows how morality is reconcilable with our natures as pleasure seeking, but introduces a teleological thesis which shows the justification of acting as if the perfect state were possible.[69] The ought is therefore put at the end of an historical process but, given Kant's theory, it is also immanent, as instanced by Ideas, in the is. Thus, the Kingdom of Ends is immanent within every constitution by the same argument.

If history is moving towards the perfect constitution, this means that revolutions, even those based on the idea of bringing that constitution nearer, are rendered unnecessary and, given their

68. Supra, note 2, 85.
69. C.f. L. Krieger, Kant and the Crisis of Natural Law, 203.

uncertainty, positively harmful (at least potentially). In order to show this, Kant introduces the notion that nature has a will that a perfect constitution be brought about. Indeed, Kant even speaks of when 'nature herself produces revolutions' towards that goal.[70] Thus, nature as a will has only been postponed from the traditional natural law setting as statically binding, to a new dynamic theory of history. That nature wills this is evinced by the 'unsociable sociability' of men ('Nature wills discord')[71], which ensures that the creative abilities of unsociability are harnessed to development only within a social context. However, Nature's 'secret purpose' must also be shown by historical events to prove that such a notion is possible. It is in this context that Kant points to the sympathy with the aims of the French Revolution as showing the necessary moral improvement of mankind (even amidst the greatest injustice). Thus Kant is quite consistent in supporting the ideas of the Revolution, yet deploring the means to attain them. It is not aspiration but action that is wrong. That such 'faint indications' are sufficient, Kant believes, because in the 'great revolution' of nature's plan, humanity is only beginning to progress.[72]

> Perhaps a fall of personal despotism or of avaricious or tyrannical oppression may be accomplished by revolution, but never a true reform in ways of thinking. Rather, new prejudices will serve as well as old ones to harness the great unthinking masses.[73]

70. Supra, note 67, 120.
71. Kant, Idea for a Universal History from a Cosmopolitan Point of View.
72. Ibid., esp. the Eighth thesis.
73. Kant, What is Enlightenment?, 4.

The true enlightenment, as a consequence of freedom, is in the use of reason and Kant can consistently support Frederick's 'Argue as much as you will, and about what you will, but obey!'[74] It is particularly to the sovereign that Kant looks for reform which, unlike revolutions, can be carried out according to fixed principles.[75] Kant uses the argument for openness at this point because he believes that the people could not possibly renounce enlightenment and so the sovereign has no right to do so in their name. This means not only is Kant against restorations of old regimes when a constitutional advance has been made (as Beck points out)[76] but that he is against any paternal government, by which he means a government that keeps the people in a position of tutelage. Kant connects this, in an anti-utilitarian move, with states founded on principles of the happiness of their subjects

> as immature children who cannot distinguish what is truely useful or harmful to themselves, would be obliged to behave purely passively and to rely upon the judgment of the head of state as to how they ought to be happy, and upon his kindness in willing their happiness at all.

Such a paternalism is the 'greatest conceivable despotism'.[77]

74. Ibid., 5, 10. About Frederick, Kant adds that he 'deserves to be esteemed by the grateful world and posterity as the first, at least from the side of government, who divested the human race of its tutelage and left each man free to make use of his reason in matters of conscience', ibid., 9.

75. As Kant says of the Idea of Perpetual Peace', the Idea should be attempted and carried out through gradual reform according to fixed principles', supra, note 67, 129. Kant also speaks of 'reformative revolutions' in this context, supra, note 71, 23.

76. Supra, note 44, 418.

77. Supra, note 2, 74.

However, despite the role of History in reconciling morality to nature in the Kantian philosophy, it must be emphasised that it is an Idea of history so that finally even history as a concept is subject to the pull of the two terms. Such an Idea of history shows how the perfect constitution must be achieved, which may conflict with the arbitrary happenings of actual history. Nevertheless, Kant thinks that given that Nature may have a 'plan or purpose' such an Idea helps interpret events and so justifies Nature 'or, better, of Providence'[78] as showing the possibility of the perfect constitution and directing the attention of sovereigns to it. In the light of this view of history, it may therefore be properly asked whether Kant actually succeeds in effecting the reconciliation necessary to his theory, or of avoiding the weaknesses of traditional natural law theory.

Returning to the remarks which opened this chapter, there seems to be a residue of circumstances in which quiescence may be impossible. This, however, proves to be illusory. For instance, Kant mentions a possible 'right of necessity' only to add 'it is monstrous to suppose that we can have a right to do wrong in the direst distress'. Kant also reacts sharply to Hobbes's identification of natural and positive law.

> According to him, the head of state has no contractual obligations towards the people; he can do no injustice to a citizen, but may act towards him as he pleases. This proposition would be perfectly correct if injustice were taken to mean any injury which gave the injured

78. Supra, note 71, 25. Analysis and prescription are again compounded.

> party a coercive right against the one who has done him injustice. But in its general form the proposition is quite terrifying.[79]

Kant also mentions 'inalienable rights against the head of state' but adds, 'these cannot be rights of coercion'.[80] It emerges therefore that the citizen has moral rights, but that these are to remain ineffectual. This is true even in the case of rights which pre-exist the state. Kant believes that there are such rights which provide the content for legal rights once the state is established. These however rely on the 'one sole and original right that belongs to every human being by virtue of his humanity', this is 'Freedom (independence from the constraint of another's will), insofar as it is compatible with the freedom of everyone else in accordance with universal law'.[81] However, this right is the basis of the Original Contract, breaches of which the people must still obey. In view of the role of Enlightenment and the freedom of thought that goes with it, it would seem that any attempt by the sovereign to suppress it permanently would justify revolution. This, along with the establishment of an hereditary nobility and a form of religion, are, Kant thinks, things which a people could not possibly will and thus could not have imposed upon them by the sovereign. Speaking of attempts 'to shut off all further enlightenment from the human race', Kant says these are 'absolutely null and void even if confirmed by the supreme power' and would represent a 'crime against human nature'.[82]

79. Supra, note 2, 76.
80. Ibid., 84.
81. Supra, note 2, 43-4.
82. Supra, note 73, 7.

In such cases, moral rights would be perverted at their very base and would represent not only an attempt to prevent the ultimate purpose of nature, but also to deny the possibility of any Ideas. Even here, Kant supposes that natural law cannot effectively conflict with positive law by echoing Pufendorf in claiming that such things can't arise:

> the people cannot rebel except in the cases which cannot at all come forward in a civil union, e.g., the enforcement of a religion, compulsion to unnatural sins, assassination etc., etc.[83]

As a result of Kant's arguments, natural law, as a criterion by which positive law is judged, is completely defused. Moreover, there is a strong tendency to identify the two systems so that what is seen as an absolute duty of morality is inherited by any legal system. The people therefore have neither legal nor moral rights against the sovereign. They may think, but ultimately they must obey. The sovereign alone is effectively above morality (the people and ruler having been accounted for). As Parker put it, quoted earlier, a desire that the sovereign be moral is not law, but only a desire.[84] As Kreiger puts it

> We have the interesting constellation whereby the natural law is superior to the constitutional law, and yet the subject's obligation under the constitutional law is superior to the ruler's obligation under the natural law.[85]

Indeed the principal objection is that made by Hill:

83. Kant, Reflexion 8051; Ak. XIX, 594-5, cited by Beck, supra, note 44, 412, c.f. chapter 1.

84. See chapter 1, note 37, supra.

85. Supra, note 69, 207.

> . . . it demands that we determine our principles of conduct by considering what rational legislators would will for a community of perfectly rational citizens, ignoring in the process the fact that we must live in a world of imperfectly rational men. The problem is that acting in this world by rules designed for another can prove disastrous.[86]

Kelsen's critique of the ideological use of natural law theory thus carries weight in respect of Kant's theory. However, it would be wrong to reject the importance of the role of enlightenment which Kant sees as the true revolution. Kant is certainly no simple admirer of the status quo but can provide no other mechanism of change than assumptions about history and reform dependent on the sovereign. Moreover, legal and moral obligation are combined and made absolute and this could undoubtedly render thoughts quite barren. In spite of this, Kant makes remarks at the end of his discussion of revolution in his essay 'Theory and Practice' that hint at the reformist tendencies of his theory:

> . . . a legal constitution of long standing gradually makes the people accustomed to judging both their happiness and their rights in terms of the peaceful status quo . . . It makes them prefer this passive state to the dangerous task of looking for a better one

but 'experience cannot provide knowledge of what is right' to this Kant opposes, 'a theory of political right to which practice must conform before it can be valid'. In consequence he rejects as a 'counsel of desperation' the idea that people are

> incapable and unworthy of being treated as their rights demand, so that they can and ought to be kept under control by a supreme power acting purely from expediency

86. T.E. Hill, The Kingdom of Ends, 314, c.f. Kelsen's remarks on utopian thought, chapter 1, note 32, supra.

for

> since there is no appeal to right but only to force, the people may themselves resort to force and thus make every legal constitution insecure.[87]

Moreover, Kant continually emphasises the supreme worth of the individual who is in Kantian terms an end in himself not to be used merely as a means by others.[88] If this formulation is to be taken seriously, then it might be supposed that Kant would mean this to limit the actions of the sovereign. However, such a limit would be moral and not practically enforced. Indeed, ultimately, it becomes plain that it is outside all politics, in the realm of morality and depending on Providence, that the true revolution must occur.[89]

In summary, Kant's theory of natural law can be seen to serve basically as a legitimization of the positive legal system. The contrary implications of the theory, stemming in particular from the individualism permitted by the moral law, are played down. In consequence, Kantian natural law merely says 'obey the positive law' and can offer only the hope that it might be just. Indeed, it justifies positive law even when it is confessedly unjust. Returning to the quotations given in section II, the contradictions can be seen to arise, in context, from the tensions in natural law theory where the legitimization conflicts with the criticism possible from its standard.

87. Supra, note 2, 86.

88. As a formulation of the categorical imperative, 'So act as to use humanity, both in your own person and in the person of every other, always at the same time as an end, never simply as a means', supra, note 47, 91.

89. Kant, supra, note 6, 112-3.

This of course goes no further than, say, Pufendorf. Despite this, there is an additional complication in Kant's theory because arguments derived from positive theory are deployed to reinforce the legitimization of natural law and to show that there is no legal right of revolution. A positivist theory would, however, not take the lack of a legal right as denying a moral right, leaving that as an open question. It is the natural law theory that closes that question, a result readily anticipated in Kelsen's critique.

Having applied Kelsen's critique of natural law, both in respect of actualization and legitimization, to Kant's jurisprudence, we are left only with a Kantian positivist theory reminiscent of Austin. The subsequent history of this theory - culminating in the Pure Theory - will now be discussed.

Chapter 4

From Kant to Kelsen

In this chapter, the Kantian legacy in Kelsen's work will be discussed. Similarities have already been pointed out in preceding chapters, whilst the unacceptable natural law theory in Kant has been isolated. Here Kant is seen as a transitional figure in the history of legal thought, in that there are in his work the bases of two conflicting traditions. In chapter 3 it was pointed out that the two theories in Kant hinged on the ambiguous status of the Original Contract. It would thus be relatively easy to dispense with such a notion in the decline of contract theory, thus sundering the theories which Kant had struggled to keep together. One tradition culminates in the Pure Theory about which the remainder of this thesis is concerned. The other tradition culminates in the work of Stammler and Del Vecchio which represent the natural law inheritance rejected by the positivism of the Pure Theory. In chapter 3, whilst outlining the positive legal theory of Kant, a strong parallel with Austin's positivism was developed. It therefore becomes clear how Kelsen could develop a positivist theory similar to, but independently, indeed in ignorance of, Austin based on Kant's work. Further, in terms of a longer historical perspective, the positivism of both Austin and Kant could be traced to an earlier common tradition that each drew upon. This tradition would include Hume and, ultimately, Hobbes.

I

Ebenstein has observed that

> Kelsen's work in legal theory throughout his whole life may be regarded as an attempt to do what Kant himself failed to do - to construct a theory of law along the lines of the Kantian critical philosophy which would enable legal science to come to grips with legal data and integrate them into a unified system.[1]

Kelsen also seems to have regarded his work in this light. Kelsen sees Kant as a representative of the traditional metaphysical dualism of natural law in his legal theory, whilst Kelsen believes Kant avoided this in his general philosophy. In Kant's jurisprudence

> metaphysical dualism has completely invaded his system, the same dualism which Kant fought so persistently in his theoretical philosophy. At this point, Kant abandoned his method of transcendental logic. This contradiction within the system of critical idealism has been noted often enough. So it happens that Kant, whose philosophy of transcendental logic was preeminently destined to provide the groundwork for a positivistic legal and political doctrine, stayed, as a legal philosopher, in the rut of the natural-law doctrine . . . As a matter of fact, this natural-law doctrine admits the validity of no other than the positive legal order. It is distinguishable from positivism merely by its mode of establishing its validity, which is absolute in the one case and only relative in the other. Ultimately, positivism proves itself only in discarding the particular ideology which the natural law theory uses in its justification of positive law.[2]

These remarks make plain why Kelsen devotes so much attention to the 'ideology' of natural law, for ultimately that is the only element

1. W. Ebenstein, The Pure Theory of Law: Demythologizing Legal Thought, 622-3.
2. Kelsen, Natural-law Doctrine and Legal Positivism, 444-5.

provided by natural law that is additional to the positivist system. Once this is established, Kelsen believes legal science can be cleared of non-scientific clutter, the justification of law (as opposed to its analysis) being left to the autonomous science of ethics.

Kelsen, in comparison with natural law, is pointing to the major difference between a logic of enquiry that remains formal and is concerned with relative validity and one which attempts to show that certain contents of law are 'true' in a way dependent on some other source. Thus, it is one thing to show the logical structure that practical reason must have and another to show that its conclusions are true. It has been shown how far Kant can provide a positivist theory of law that will give an analysis of a legal system as opposed to a dualistic metaphysics. On the other hand, Kant did not stop at that point but attempted to show both that the validity must rest on something outside the system and that it dictated that validity: resting not solely on formal criteria, but on certain contents. Both attempts are instances of a desire to make validity absolute. In Kant this is shown by the foundation of legal validity on a moral basis and on the subsequent attempt to show that certain contents can be excluded on the grounds of mere form. Kelsen meets these moves by severing legal and moral validity and by accepting that law and morality could have any content.

In Kelsen's system, the key notion is that of the Grundnorm[3] which resembles the Kantian categorical imperative in important respects. Both provide an ultimate test. If I wish to know whether a law is a valid law I can, in the Pure Theory, establish this by tracing its reason for validity back to a Grundnorm. However, this validity is only in terms of a given legal system and its Grundnorm. Moreover, because the Grundnorm is dynamic, empowering the creation of laws, it provides only a purely formal test and does not rule out specific laws on grounds of content. (It is hypothetical in form.) The categorical imperative is, however, universally valid so that a moral or legal maxim which can conform to it is valid irrespective of its mode of creation or of the normative system of which it is a part. Although it is seemingly formal in character, it is used by Kant to make assertions as to what contents can or cannot be valid. Thus a standard above law is introduced by which certain concrete laws are justified.

A difference between Kelsen's and Kant's concepts also arises from the nature of the test procedure involved. The Grundnorm, by empowering norm creation, implies a given system to which it is relative, that is hierarchical, and implies also organs given this creative task. Elements of this process have been noted in Kant's theory but there they depended more on the concept of sovereign rather than on the categorical imperative itself. Indeed, in judging

3. Discussion of the Grundnorm will recur in succeeding chapters, as will other doctrines mentioned here, thus only a general account is given for the present. See Kelsen, The Pure Theory of Law, chapter 5, c.f. Kelsen, General Theory of Law and State, chapter 10. Discussion of Kant summarises chapters 2 and 3, supra, and Kant, Groundwork of the Metaphysic of Morals.

a maxim as conforming to the categorical imperative, no system of norms is implied nor any organs to do so (as a result there is no relativity to a given system - there is only one categorical imperative). This leads to the most important difference between the two concepts: the Grundnorm is primarily a concept for legal analysis and the categorical imperative a concept of morality. (Kelsen's application of the Grundnorm to morality and the distinction between legal and moral systems will be discussed in chapter 12.) This is, of course, obvious. The categorical imperative's 'moralization' of law, although itself a law-like conception, when applied to law, and its failure to provide a distinctivelylegal analysis have been discussed already (chapter 3). Similarly, but conversely, in chapter 12 the Grundnorm will be shown to 'legalize' morality and consequently fail to provide a distinctively moral analysis of morality.

Because Kelsen separates legal and moral analysis he is able to maintain the separation of fact and value far more consistently than Kant. Although Kant made the distinction crucial it has been seen that in practice a merger was effected by means of acting as if and history. However, the transmission in Kant of Hume's is/ought distinction is probably the greatest Kantian legacy to Kelsen. Certainly, as will become apparent, it is quite fundamental to the whole of the Pure Theory. In Kant the distinction took the form of the two realms of Sein (to be) and Sollen (ought to be)[4] and the related cognition/volition distinction taken over by Kelsen. In terms of man, Kant made

4. This distinction underlies the ideas of causality and freedom, i.e. of natural science and morality that is the fundamental distinction in the Kantian system of philosophy.

the distinction between man as part of nature (homo phenomenum) and as an intelligible being (homo noumenenum).[5] Kelsen presses beyond this by outlining two related sciences: a causal science of nature and a normative science which deals with imputation.[6] In these respects, Kelsen is more consistent; for example, although Kant makes a distinction between cognition and volition, he also introduces the idea of a will in nature which effectively nullifies that very distinction. Nor is the distinction employed in analysis, for Kant combines both descriptive and prescriptive analysis or rather combines analysis with justification.

The Kantian legacy also includes a notion of science or Wissenschaft[7] and the related rejection of a rationalistic metaphysics.

Kelsen adopted from Kant the notion of science as an organized body of knowledge that proceeded according to principles and a single method which thereby produced a system of knowledge for a clearly defined subject matter. Science was thus distinguished, by its systematic procedure, from common sense. From metaphysics, science is distinguished by the nature of its principles. In Kantian terms, the distinction is between the transcendental principles of science and the transcendent principles of metaphysics.[8] This distinction is between principles beyond all experience and only accessible to pure reason and principles as organizing constructs or

5. See e.g. Kant, Critique of Pure Reason, 265-275.
6. Kelsen, Causality and Imputation, passim and Kelsen, Society and Nature.
7. See e.g. supra, note 5, 92-97.
8. See e.g. ibid., 299.

categories that are prior to experience (in the sense that they are implicit in knowledge and are, recognized as such, capable of explicit employment in the systematization of knowledge rather than dealing with a random confused mass). The concept of science thus derived is sharply distinguished from metaphysics. Moreover, it builds upon the fact/value distinction in confining science to its own factual matter and on the idea of science 'creating' its facts by categories applied to its material.[9] It, in turn, implies the possibility of investigating the formal properties of any material unalloyed by the variety of its substance. The notions of formality, systematization and fact are central to the Kelsenian model adopted from Kant (as will become clear in succeeding chapters). A further Kantian notion of science being a distinctive method for its subject matter reemerges in Kelsen's insistance on a distinctive juristic science and rejection of 'syncretism' of method.[10]

Kelsen's claim that his method is a legal science is not to be taken lightly for, in Kantian terms, it clearly is scientific. The key notion of the Grundnorm is thereby a Kantian transcendental-logical construction as a principle for the scientific analysis of legal knowledge

> the basic norm as represented by the science of law may be characterized as the transcendental-logical condition of . . . interpretation, if it is permissible to use by analogy a concept of Kant's epistemology. Kant asks: "How is it possible to interpret without a metaphysical hypothesis, the facts perceived by our senses, in the laws of nature formulated by natural science?" In the same way, the Pure Theory of Law asks:

9. This is true even if scientifically the facts are the norms of a legal system.

10. See O. Weinberger, Hans Kelsen as Philosopher, s.l.

> "How is it possible to interpret without recourse to meta-legal authorities like God or nature, the subjective meaning of certain facts as a system of objectively valid legal norms describable in rules of law?" The epistemological answer of the Pure Theory of Law is: "By presupposing the basic norm . . . "[11]

Put most simply, it is the Kantian epistemology that Kelsen draws upon, rather than Kant's specifically legal writing. Because of Kant's failure to employ these epistemological notions consistently, Kelsen hopes, by doing so, to complete in legal science the Kantian revolution.

In addition to the Kantian concept of science, Kelsen drew on the more contemporary concept of the Logical Positivists. It is no accident that Kelsen's theory is called legal positivism, nor that it was formulated in Vienna in close intellectual proximity to the Vienna Circle. Kelsen's rigorous adherence to science and his virulent rejection of metaphysics owes more to the Vienna Circle than to Kant. This also helps to explain the single-minded adherence to analytical distinctions; the is/ought distinction in particular. The same rigorous devotion to logic as held by the Circle also becomes apparent. One might then suggest a further parallel or classification of the Grundnorm, this time not in Kantian but logical positivist terms. This is that the Grundnorm is a kind of Verification Principle, in that both are used to exclude metaphysics; the first by providing a non-

11. Kelsen, The Pure Theory of Law, 202, c.f. Kelsen's remark on the use of 'hypothetical' as derived from Kant in Kelsen, Professor Stone and the Pure Theory of Law, 1137.

metaphysical test procedure for validity, the second a non-metaphysical test for meaning.[12]

There is, however, a very fundamental difference between the Pure Theory and Logical Positivism. This difference is that the Pure Theory, unlike Logical Positivism, does not confine itself to facts. The classic Logical Positivist position explains value statements as nonsense in as much as they fail to meet the Verification Principle (it being impossible to state what facts would confirm them). Because they are therefore not genuine propositions (in depicting facts) it is suggested that they are merely expressions of feeling. This gave rise to the Emotivist Theory of Ethics, seen in its most straightforward form in Ayer's Language, Truth and Logic [13]. As will be seen in discussing Kelsen's view of ethics, in chapter 12, Kelsen partially accepts this thesis and its consequent relativism with regard to ultimate values, but nevertheless, believes that there is far more to be said in general for legal and moral norms than this sharp solution would suggest. Rejecting the positivist Gradgrind total concern with facts, Kelsen suggests that a science of values is possible because there is an objective type of valuation. These valuations are made by reference to norms which are generally accepted standards of behaviour and which are, therefore, in a sense, objective rather than being merely subjective emotional outpourings. There is

12. For the ideas of Logical Positivism and of the Verification Principle in particular, see A.J. Ayer, Language, Truth and Logic.

13. Supra, note 12, chapter 6.

undoubtedly an affinity here with Kant's idea that objectivity lies not so much in correspondence to the world as to the common, uniform categories of judging. In the case of norms, therefore, although they lack the objectivity of a priori status, they are at least relatively objective despite their non-factual status. The characteristic statement made with reference to these norms is not causal, as in the case of facts (if water is heated, ceteris paribus, it expands) but is a statement of imputation (if a does b, he ought to be punished), commensurate with the idea of responsibility. It is not possible to achieve a causal science of norms but it is possible to create one based on imputation. In addition, it is also possible to examine norms in a systematic way, not only in derivation by content ('do not injure others' derived from 'do no wrong to others') but, more importantly, in a legal context by derivation by form (in the sense that a norm is a power derived from another power, etc.).

In broad terms, then, it seems that Kelsen's theory is a development of that of Kant, but reflecting the positivism of the Vienna Circle (and ultimately that of Hume).[14] Although Kelsen uses these influences only as the starting point of his own theory and adds distinctive contributions of his own (the emphasis on norms in particular) there are similarities to Austin's work, but these are accidental because Kelsen's theory was, as pointed out, developed independently of the British theorist. Specifically, in comparison with Kant it is suggested that Kelsen is more consistent in using Kantian distinctions, but also in stopping short in not attempting to overcome

14. This is not to deny a Kantian influence on the thought of the Vienna Circle itself.

them. This may seem to be a limitation of philosophy, but is rather an extension of the critical philosophy in placing limits to which philosophy can meaningfully go. Kelsen's explanation for Kant's failure seems to be that Kelsen believes Kant was unwilling to part company with Christian beliefs. Thus, Kelsen, for all his admiration for Kant's work and reliance on it says that 'Kant's ethics end at exactly the point where Thomas Aquinas left the subject five hundred years before'.[15]

II

Having discussed the Kantian legacy in Kelsen's work as the positivist tradition, it remains to consider the alternative natural law tradition. This can best be exemplified by the work of Stammler and Del Vecchio.

After a long period of quiescence, the revival of Kantianism in jurisprudence, which preceded the Pure Theory, came with the work of Rudolf Stammler (1865-1938). Stammler's theory of law attained its mature expression in 'Die Lehre von dem Rechtigen Rechte' (1902) and its final systematic form in 'Theorie der Rechtswissenschaft' (1911), which appeared in the year of Kelsen's first major work 'Hauptprobleme der Staatsrechtslehre'. Stammler's work represented the extension of a general revival in Kantianism in the form of neo-Kantianism, both in the Marburg school under Cohen and in the Heidelberg

15. Kelsen, The Foundation of the Theory of Natural Law, 141.

school under Windelband, at the end of the last century. Although intrinsically of great interest, Stammler's theory will be briefly outlined here only as background to the development of the Pure Theory.[16]

Stammler retained much of the Kantian philosophical apparatus, in particular that of the formal ordering of principles. However, it was, as in Kelsen, perhaps more the Kant of the 'Critique of Pure Reason' than of the legal thought of the 'Critique of Practical Reason' and its natural law base that was important for Stammler.

Stammler departed from Kant's legal theory in two related and clear respects. First, the individualistic basis of Kant's theory is modified considerably so that the point of departure is now a community, albeit comprised of individuals. Secondly, and more importantly, Stammler made an important distinction between the concept and the idea of law. This distinction is central to Stammler's move from traditional natural law theory (although Stammler's work is often referred to as a revival of natural law) and represents in effect the articulation of the tension of positivism and natural law theory in Kant.

The concept of law is represented by positive systems of law and covers all possible realizations, thus providing the elements of positivist theory. Strictly distinguished from that was the idea of law which is the harmonization of individual wills into a 'community of

16. This discussion is based on Stammler, The Theory of Justice.

men willing freely'[17] which, in turn, was Stammler's conception of justice. Justice in this sense bore little relation to traditional natural law, particularly as it was derived from the nature of law itself, rather than alleged human nature, nature or God. Although Stammler was sympathetic to natural law as a body of principles of justice, he was quite clear that positive law was preeminent. Nonetheless, there was an intimate relationship between positive concept and just idea, for Stammler thought that they were mutually reliant for their respective realizations. According to this view, justice was no longer a body of 'law above law' but rather in varying degrees, exhibited in positive law. Stammler called this 'natural law with variable content'[18] which expressed his notion that justice was a purely formal attribute that positive law could fulfil and toward which it strives. Stammler expressed this by saying 'All positive law is an attempt to be just law'.[19]

The basic principle of justice, the social ideal of a community of free willing men, was as it stood, too abstract so it was necessary to deduce from it further, more concrete principles. These, Stammler called 'principles of respect' and 'principles of participation'.[20] These were formulated respectively as:

> The content of a given volition must not be arbitrarily made subject to another volition.

17. Ibid., 153.
18. Ibid., XXXIX.
19. Ibid., 24.
20. Ibid., 161-3.

> A legal requirement may exist only so far as the person under obligation may remain his own neighbour (i.e. may be an end in himself.)
>
> A person who is a member of a community regulated by law must not arbitrarily be excluded from the community.
>
> A legal right or power of disposition granted to any one may be exclusive only in so far as the person excluded may still be his own neighbour.

Certain resemblances to the formulations of the categorical imperative are hardly accidental and this will be discussed below. However, it should be added that Stammler considered that a further theoretical construct was necessary to render the formal principles applicable to legal systems. The construct Stammler formulated was that of the 'special community'[21] which would serve as the 'model for just law'; in other words, an ideal community in which conflicting claims are settled according to the idea of justice and by which actual settlements can be evaluated. In the sense that this provided a model of a system based on formal justice, there is a resemblance to the Kantian Idea of the Contract.

Equipped with the principles and the model for just law, which Stammler considered purely formal, he attempted to demonstrate their applicability to actual legal problems including contractual problems, divorce, cartels and so on. Stammler did not claim that justice gave an easy deductive conclusion, but nevertheless, he did think that there was a correct answer to each problem according to justice. As Friedmann says, 'his solutions were generally those of a moderate liberal',

21. Ibid., 215-7.

although supposedly strictly determined by justice.[22]

Stammler's theory has been severely criticised as failing in its appointed task. Indeed, it is difficult to see how Stammler could possibly succeed in his own terms. Having sharply distinguished justice from positive law he attempts to unify them. However, justice is defined as formal, yet capable of giving solutions to actual problems. Whilst this might succeed in allowing a range of solutions as just it is difficult to see how only one is so indicated. In fact, despite Stammler's claims, e.g. 'there is not a single rule of law the positive content of which can be fixed a priori',[23] material elements were readily introduced which involved surrendering its formal status. In this respect, Stammler's formalism was as impure as Kant's. Such a result seems, with its attendant vagueness, inevitable. As Geny put it, the principles, as formal, would be

> merely abstract, aiming simply at unity, generality and universal validity. Hence if you try to adapt them to the tangible circumstances of life they refuse their service; at the very least they show themselves unequal to the task, because they demand of the facts a deconcretisation that it is impossible to attain.[24]

This is reinforced by Friedmann who says

> Stammler's main error was his attempt to make the idea of justice a matter of theoretical knowledge; it was therefore inevitable that he should confuse

22. W. Friedmann, Rudolf Stammler, 6. For example, contracts which resulted in slavery, alcoholism and enforcement of religious beliefs were banned.
23. Supra, note 16, 90.
24. F. Geny, The Critical System of R. Stammler, 549.

> principles generally acceptable to a moderate liberal with universally valid principles of justice. His idea of justice is therefore a cross between a formal proposition and a definite social ideal. . . [25]

From the discussion of Stammler's legal theory it should be apparent that it is similar to, and shares many difficulties with that of Kant. Although Stammler was insistant in concentrating on positive law and separating it from natural law in its usual form, there is little advance on Kant's solution. In particular, natural law again recurs within positive law and, whilst as in Kant, supposedly formal, retains in its notion of justice the idea of a determinate just norm as a standard for positive laws. With Kant's theory it shares a vagueness in its applicability and a self-given dilemma. The dilemma is that, if justice is purely formal, then - as Kelsen points out - it can allow any positive law to be justified with suitable definitions in the formula. Alternatively, if it becomes more restrictive it ceases to be formal. Like Kant's theory, therefore, the realms of positive law and justice remain distinct by definition and therefore impossible to unite in practice. Stammler's attempted solution was to reduce justice to an attribute of positive law in the sense that just laws are entirely positive. So, as Kant's theory represents the division between two systems: of justice and of positive law tenuously held together, Stammler's theory represents a confirmation of this and compromise to retain an inherent element of justice in positive law by surrendering justice as an autonomous

25. Supra, note 22.

system. Also justice as formal becomes the only acceptable realization left to natural law.

Kelsen's solution is to take the process to its logical conclusion. Positive law and justice are held analytically distinct and rigorously kept apart. This applies not only to justice as a system (natural law) but also as an attribute of positive law. Moreover, a formal theory of justice is shown as empty in that, rigorously scrutinized, it is capable of justifying any positive content and therefore no one in particular. Formalism, therefore, has no particular moral significance and can therefore be a representation of the structure of positive law without involving the idea of justice.

Kelsen's Pure Theory represents the ultimate consequence of separating positive and natural law by making the separation analytically absolute. Natural law, even in the formal character of justice, no longer remains. Justice is no longer a necessary attribute of some positive laws, but becomes merely a possible attribute. Justice itself ceases to be objective (substantive or formal) and becomes entirely relative.

However, the Pure Theory represents only one solution to the dilemma posed by Stammler's failure to construct a satisfactory compromise of law and justice. Just as the Pure Theory represents the positivist inheritance of Kant, so the natural law inheritance remains. The natural law inheritance would represent a return to a more traditional natural law theory, whilst retaining Kantian elements insofar as they are devoid of positivism.

The work of Giorgo Del Vecchio (1878-1970), Kelsen's contemporary, represents the natural law heritage of Kant. Del Vecchio, like Stammler, sharply distinguished the concept and idea of law, the latter being identified as natural law proper.[26] The distinction, however, represented a return to natural law as a system above positive law. Del Vecchio constructed this consistent and traditional natural law theory on strongly Kantian lines. He proceeded from the elements of autonomy, participation and rationality apparent in the categorical imperative, claiming that these represented the 'seed of justice' in man. This did not lead to a formal theory, but to a substantive theory of justice. He also adopted from Vico a perspective of history closely resembling that of Kant. This perspective was of history as the gradual realization of natural law in positive law, wherein it was already immanent (a process due to Reason). An affinity with Hegel also became apparent and served as a second important foundation for Del Vecchio's work. Although Del Vecchio lapsed into Fascism, looking to Mussolini's state as an embodiment of natural law, the obvious tendency for justifying the status quo was abandoned with an early defection from Fascism. Del Vecchio then explicitly adopted Locke's 'appeal to heaven'[27] which indicated his allegiance to natural law as a distinct system by which positive law should be judged. Whilst Del Vecchio's work reverts to traditional natural law theory, it clearly demonstrates the continuing vitality

26. This discussion is based on Del Vecchio, The Formal Basis of Law, Justice and Philosophy of Law.
27. Del Vecchio, Philosophy of Law, 456.

of it, something Kelsen was determined to combat. On the other hand, apart from maintaining Stammler's distinction between concept and idea of law, Del Vecchio progressed little further than Kant. The Kelsenian move of employing the distinction of concept and idea, to restrict legal science solely to the concept, was not made. From Kelsen's viewpoint, Del Vecchio's jurisprudence would fail for the same reasons as would Kant's jurisprudence. Indeed, Del Vecchio saw his own work and that of Kant as 'Critical Idealism', that is, belonging to the same school and attesting to the centrality of natural law to legal thought.

The brief summaries of Stammler and Del Vecchio represent a path not taken by Kelsen who developed what can now be seen as the positive heritage of Kant. The following chapters will discuss the resultant theory and its problems in detail. The historical perspective, which has formed the theme of the first section of this thesis, will now give way to the perspective of contemporary criticism of the Pure Theory in the next section.

Chapter 5

In defence of the Pure Theory of Law

I

Kelsen's Pure Theory was maintained with great consistency during his lifetime and it is this fact that makes appraisal of his work possible, despite a large output. If the amount of discussion that a work provokes indicates its merits, then Ebenstein's assessment of Kelsen as 'unquestionably the towering figure of twentieth century legal thought', would be secure.[1] Such discussion has continued, with occasional acrimony, for 40 years creating sharp differences of opinion, particularly after Kelsen's flight to America in 1940 where the general climate of legal theory was unfavourable. Much discussion has been of a critical nature and this chapter will attempt to consider the success of the major criticisms raised. It will be argued in Laski's words, 'granted its postulates I believe the pure theory to be unanswerable'[2] and that, far from succeeding, criticism rests on basic misunderstandings. This is indeed Kelsen's own view, it seems, so that his reply to critics (when he has thought it necessary) has taken the form of re-expounding his original contentions. That he rarely did this, lends weight to the idea that he thought that most criticism missed the point so widely as to render reply superfluous. Now many writers on theoretical subjects claim to be misunderstood, but are

1. W. Ebenstein, The Pure Theory of Law: Demythologizing Legal Thought, 619.
2. H. Laski, Grammar of Politics, vi.

there special reasons for thinking this true of Kelsen? The following will provide evidence for this; but there are two factors which I believe have rendered misunderstanding more likely in discussions of the Pure Theory. The first is the avowedly Kantian basis (already discussed) not only in the adoption of a generally unaltered Kantian epistemology, but in the rigorous Kantian formalism that pervades the Pure Theory as a whole. This has misled those for whom such foundations are uncongenial or unknown. When this has not been so the more pertinent and significant point questioning the foundations them selves, rather than dismissing them, has occasionally been made. To continue Laski's words - 'its substance is an exercise in logic, not life'.[3] The second source of difficulty lies in Kelsen's style, again under Kant's influence. Its very precision and lack of example, I believe, has misled many.

This chapter will demonstrate the truth of Laski's words by showing the Pure Theory in itself as unanswerable. Its postulates and indeed the primary postulate of a division between facts and values which it shares with most contemporary ethics will be dealt with in the conclusion, where doubts will be raised on the viability of that approach as a whole.

3. Ibid., this echoes a phrase used by Holmes in The Common Law, 1. (Holmes and Laski conducted a lengthy correspondence.) One aspect of this charge will be dealt with in chapter 11, infra.

II

In what sense is the Pure Theory of Law 'Pure'? The Pure Theory itself and not Law is pure. It maintains its purity from, on the one hand, facts (unlike sociological jurisprudence) by analysing norms and on the other, from morals (unlike natural law theory) in its understanding of legal systems. Whilst it is, unlike the latter, a science, Kelsen consistently thinking of science as 'value-free', it is not a science in the normal sense because it does not deal with facts but with norms. It is precisely the claim of purity from fact and value which is the root of most criticism (implicitly or explicitly) and will be dealt with in that order below. There is, however, a clear relationship between them for, just as law as a norm is logically separate from the facts of the world, so it is itself a fact viewed from the standpoint of morality which is a separate normative order. Criticism has also been directed at what might be called 'structural problems' alleged to result from the attempt of the Pure Theory to view law systematically. Although the main concern of this chapter is with the relation of facts to values as exemplified by the Pure Theory, some attempt is made below to deal with this further area on the grounds of completeness. (The specific problem of the structure of a system is dealt with in chapters 6 and 11.) The fourth strand of criticism I wish to identify is a looser one - that of ideological bias in the Pure Theory itself. This bears some relation to the attempted purity from morals, yet is worth separate consideration as it is a general questioning of integrity. Finally, some implications for more general political theory will be

spelt out, although this aspect of the Pure Theory has only rarely been criticised, rather than ignored. (Finally, I should perhaps emphasize that this categorization of criticism is mine and that the emphasis of the is-ought problem as crucial is often absent in a clear cut way from the critics themselves. This does, however, seem the best way both to group criticisms and to concentrate them on the most interesting points.)

III

Can a system of norms, such as the Pure Theory claims law to be, be understood without reference to the facts of legal behaviour? The fundamental postulate here and throughout is the logical distinction between an 'is' and an 'ought', Hume's celebrated discovery[4] and, since its exhumation, the central problem of ethics at least in 'Anglo Saxon' philosophy. On this depends the possibility of the Pure Theory being a positive, as opposed to a normative, science. Some confusion persists on this point, that is, the difference between the Pure Theory and Law itself. Law is an 'ought' (a norm) prescribing behaviour which is an 'is' (a fact), yet the Pure Theory treats law as a norm, as factual material for its science. Although it uses the word 'ought' as a consequence of its use in formulating a norm, it is not used evaluatively by the Pure Theory itself (it is thus in Kelsen's phrase a 'descriptive ought'). This distinguishes it from Natural Law

4. See chapter 1, note 17, supra.

Theory which implicitly or explicitly evaluates law. It is further distinguished from a sociological approach, according to Kelsen, in that it treats law as a normative order connected by imputation rather than as part of a causal chain. As Kelsen puts it:

> The factual behaviour of men - corresponding always and without exception to the natural order of things (in the sense of natural sciences) - may correspond to the juridical order, but that is by no means necessarily so . . . As the legal behaviour of men is always also determined by the causal nexus, legal cognition is threatened by the danger of comprehending the natural instead of the legal and normative order, i.e. of asking not how men ought to behave according to the law, even if they do not behave so in fact, but how they do behave in fact and why . . . [5]

Law itself can hardly be regarded as descriptive. Although a statement of law, e.g. 'murderers will be punished', sounds like a statement of a law of nature, it is clear that it would not only be false but redundant (for murderers do go unpunished and it would lack the prescriptive element).

Actual criticisms of the Pure Theory take the form of claiming that it is somehow more 'dependent' on facts than it admits. When Kant reviewed Herder's Philosophical History of Mankind he claimed that whenever Herder got to a difficulty he spoke of an 'influx' from the spiritual realm to solve it.[6] Kelsen, it is thought, allows himself an 'influx' from the world of facts, which is illegitimate by his own theory.

5. Kelsen, The Function of the Pure Theory of Law, 232.
6. Kant, Review of Herder, 37.

The first criticism is so elementary, so much so that I hesitate to attribute it to anyone (although Stone seems to regard it as telling) that it might seem trivial.[7] The question is how are we to know that a norm exists without empirical enquiry that it exists in fact? e.g. by enquiring that such a such a legislative decision or judgement was made. In short, if the Pure Theory is so pure, how can it be so sure that it has anything to theorize about? Two short answers can be given to this. Firstly, the Pure Theory claims to be describing something and treating it as a fact, that is, it requires its data; however, what it describes is also a norm; the facts that it is free from are those contingent to the existence of a norm. Secondly, the Pure Theory does not claim to be the only theory of law

> . . . the causes of the coming into existence of the law in general or of a particular legal order with its specific content, are beyond the scope of this theory. They are problems of sociology and history and as such require methods totally different from that of a structural analysis (of the law).[8]

Now this may appear to make the Pure Theory reliant on other (empirical) theories. Kelsen's reply to this is that unless we understand that a norm is central to understanding certain behaviour (or its meaning) we will not be able to say what are to count as facts. So that Kelsen would claim priority for the Pure Theory in its concern with norms.[9] (This should be distinguished from the further problem

7. J. Stone, Legal Systems and Lawyer's Reasonings, 126. See also J. Stone, Mystery and Mystique in the Basic Norm, passim.
8. Kelsen, Law, State and Justice in the Pure Theory of Law, 382-3.
9. Kelsen, Professor Stone and the Pure Theory of Law, 1157.

of what norms are involved, c.f. Section VI). But, it will be objected, the 'positing' of a norm is a fact if nothing else is.[10] Kelsen admits this - but maintains the logical division:

> Although law is a norm, not a fact, there is nevertheless an essential relationship between norm and fact. The norm is . . . the meaning of a fact, the fact by which the norm is established.[11]

or, as he puts it elsewhere,

> The act is a fact, the norm is the meaning of this fact. The act . . . actually exists in space and time, and as such is the effect of certain causes, according to the law of causality . . . Since the norm is not a fact but the meaning of a fact, its existence is different from the existence of a fact. Its existence is its validity. (This) . . . does not mean that this behaviour actually takes place or that it will take place in the future; it means that it ought to take place.[12]

This must be so because the norm is in a sense independent of its creation.

> A norm can be valid, even if the act of will whose meaning the norm is, no longer exists. Indeed, the norm does not become valid until the act of will whose meaning the norm is has been accomplished and hence has ceased to exist. The individual who has created a legal norm by an act directed at the behaviour of others, need not continue to will this conduct in order that the norm be valid.[13]

To see it as a command or 'a psychological act of will'[14] is incorrect.

10. Kelsen, On the Pure Theory of Law, 2.
11. Kelsen, What is the Pure Theory of Law?, 271.
12. Kelsen, On the Basic Norm, 107.
13. Kelsen, The Pure Theory of Law, 10.
14. This should reinforce the point made in an earlier chapter that 'will' does not mean a faculty. An act of will for Kelsen is merely the end point on a normative chain of imputation which may (but need not) correspond to a psychological act (e.g. a corporation can be construed as having a normative will, without a psychological one or a person can be said to will in merely being negligent and not psychologically willing at all).

(It should be added that, as will be seen below, a norm can be 'presupposed' as well as willed and that it ought to be objectively valid.)

Kelsen, then, believes there is in this case an intimate relation between fact and norm, but that they are neither identical nor totally independent of each other. In terms of Kant's epistemology the Pure Theory could even be said to 'create' its own facts from non-factual norms, as the material of its science.

It will be noticed that the second requirement of a positive norm is that 'The legal norm must to a certain extent be effective, that means: by and large obeyed and if not obeyed, applied'.[15] In other words for a norm to be considered valid which is essential for it being said to exist ('Its existence is its validity'[16]) at all then it must be effective. In short, the norm (ought) is made dependent on its actual effectiveness (is). This has been the subject of much criticism. In Friedmann's words, 'Kelsen here is forced to introduce an element which is neither factual nor normative'.[17] Amongst others who have found difficulty here are Wilk, Lloyd, Jones and, not unexpectedly, Stone.[18] The crux of the attack is simply that we see here an inconsistent intrusion of a fact (effectiveness), evem

15. Supra, note 10, 2.
16. Supra, note 12.
17. W. Friedmann, Legal Theory, 278.
18. J.W. Jones, Modern Discussions of the Aims of Legal Science, 83; D. Lloyd, Introduction to Jurisprudence, 2nd. edn., 302; J. Stone, supra, note 7, 105.

to the extent that it appears to be entering into the very definition of a norm. Firstly, let us consider why Kelsen finds it necessary to adopt this view.

A norm cannot be taken to exist if it is ignored. It is not like a physical object which is still 'there' regardless of who does or does not witness it (although some Berkeley an epistemologists would dispute this). To give an example: it is, or was until recently, I believe, an offence not to practice archery for a certain period each day (providing you were male etc.). It is, or was, also illegal to consume mince pies on Christmas day. Now assuming this is so, clearly (and fortunately) neither of these norms could be said to be effective in that they are neither obeyed nor applied. Can they be said to be valid? I think they could be so described only in an historical or unusual sense, and the same may be said in regard to their existence. They 'exist' as interesting facts and as entries in certain documents, but they cannot be said to exist as norms simply because they are not valid and are not, therefore, norms at all. As Kelsen puts it,

> A norm that is not obeyed by anybody anywhere, in other words a norm that is not effective at least to some degree, is not regarded as a valid legal norm. A minimum of effectiveness is a condition of validity.[19]

It has already been seen that a norm exists (is valid) is not identical or strongly dependent on its act of creation, but rather its creation is a condition of existence. Because of this, it is regarded as valid

19. Supra, note 13, 11, c.f. supra, note 9, 1139.

although it is not yet applied or obeyed. But, if this is independently valid, the more opportunities for its application that pass without effect the more its validity becomes doubtful (so that its validity is not totally independent). The same would apply in the case of a norm applied once only but fallen into disuse. Kelsen poses the dilemma

> The one extreme is the thesis that there is no connection between validity as something that ought to be and effectiveness as something that is . . . The other extreme is the thesis that validity and effectiveness are identical.[20]

The ultimate would be a norm being never effective and therefore redundant or always effective and being superfluous. Kelsen puts it as follows:

> "Validity" of a legal norm presupposes, however, that it is possible to behave in a way contrary to it: a norm that were to prescribe that something ought to be done of which everyone knows beforehand that it must happen necessarily according to the laws of nature always and everywhere would be as senseless as a norm which were to prescribe that something ought to be done of which one knows beforehand that it is impossible according to the laws of nature.[21]

(in short, despite the relation, is and ought are antagonistic).

Thus Kelsen believes that positing and effectiveness are both conditions of the validity of a norm. He draws the following analogy: Birth and nutrition are both conditions of life but they are not

20. Ibid.
21. Ibid.

identical with it. This will appear unsatisfactory. If effectiveness is only a condition of validity; within that qualification, how do we discover its validity? Indeed, validity is surely not a matter of degree; it either is or is not valid. Kelsen's reply is ' . . . the reason for the validity of a norm in general and a legal norm in particular cannot be a fact, but only another norm'.[22] For Kelsen the problem is: if a norm is subjectively valid - I ought to obey - how can I differentiate this from any order or as Austin pointed out, from a robber's demands? In short, how could I discover its objective validity? Kelsen's answer is that this must ultimately rest on a higher norm, until we reach the highest possible norm standing at the top of the pyramid, from which all norms derive their validity. This is the Basic Norm or "Grundnorm". This answer too has been regarded as extremely unsatisfactory by most critics, Lundstedt in particular, and most prominently by Stone.[23] Indeed, Stone sees it as the ultimate mystery of the Pure Theory and seems to think that it is the 'deus ex machina' brought in to resolve the inconsistencies that the Pure Theory abounds in. This is a central point of the Pure Theory which cannot be discussed in all its aspects (and indeed Kelsen has responded with a detailed refutation of Stone covering the entire problem). Here it will be necessary to acquit the Grundnorm of factual content. It will

22. Supra, note 10, 5.

23. J. Stone, supra, note 7, esp. 123-5, and Mystery and Mystique in the Basic Norm, c.f. the point by point refutation in Kelsen, supra, note 9, passim. See also, M. Ginsberg, Reason and Unreason in Society, 236. and A.V. Lundstedt, Legal Thinking Revised, 403. Most critics attack the central notion of the Grundnorm.

be discussed below in connection with moral content and with its structural role. (Here it should be pointed out that the Grundnorm is not only the source of validity for other norms when we are tracing validity but also this upward movement is the counterpart of the actual creation of law which concretizes law downward as it is applied.)

The problem that the Grundnorm encounters according to its critics is that, if it is anything, then it must be a fact. As Lloyd puts it,

> This seems to involve either a totally fictitious hypothesis on the one hand, or, on the other, a statement of fact, dressed up in the shape of a general norm . . .[24]

Stone says that the Grundnorm 'guarantees in some way that the system of norms by and large is "efficacious"' and concludes that it

> is not a self dependent beginning, and moreover, it is a norm which is apparently dependent for its status as such, despite all Kelsen's vehement denials that this is ever possible, on facts, the facts of men's actual behaviour and exposure to sanctions.[25]

(A point taken up by Hart in his 'rule of recognition' as will be seen in chapter 8.)

Now it is clear that the Grundnorm is not factual in the sense of smuggling in efficacy which is merely a condition of validity.

24. D. Lloyd, Introduction to Jurisprudence, 2nd. edn., 302.
25. Supra, note 7, 105.

Kelsen states

> The reason for the objective validity of a legal order is . . . the presupposed basic norm according to which one ought to obey a constitution which actually is established and by and large effective; and consequently one ought also to obey the norms created in conformity with the constitution and by and large effective.[26]

Indeed, we need not presuppose the Grundnorm because it is quite clear that a legal order can be regarded as effective without it. Its role is rather to give a reason for the objective validity of lower norms. As Kelsen says,

> it is not necessary to presuppose the basic norm, that only if we presuppose it can we consider a coercive order which is by and large effective as a system of objectively valid legal norms.[27]

However, when he replies to Stone

> Hence the basic norm does not "guarantee" the efficacy of the legal order; it does nothing to make this order effective[28]

- this may seem doubtful for there is a possibility of an indirect effect on efficacy by its objective status. This is unlikely because when the legal system presupposes the Grundnorm it does so because it already considers itself as objectively valid (that is, as a system of norms related to one another and not as a mere arbitrary collection of orders). Ordinary citizens will normally assume validity without this presupposition.

26. Supra, note 13, 219.
27. Ibid.
28. Supra, note 9, 1142.

If the Grundnorm has no factual content as 'guaranteeing' efficacy, has it any other factual part? It is not dependent on an act of will but it is presupposed. This presupposition is made firstly by the legal system itself, consciously or unconsciously, but is also recognized by the interpretation of legal science. Thus in one sense the legal scientist presupposes the Grundnorm but only descriptively of its already established presupposition. In fact no act of will could accomplish this presupposition without requiring yet another more basic norm that its norm be obeyed. It is distinguished from the constitution by being the reason for its validity (its meaning) just as lower norms are the reason for the validity of norms below them. Finch puts it thus:

> When the fundamental or basic norm is considered as investing a law-producing agency, the constitution in the legal-logical sense is formed. This agency or organ, sometimes referred to as the "historically first legislator", may now validly create norms or rules which will regulate the legislating authority, or legislature, itself. The regulating product of the first law-producing agency which refers to the next law-creating organ in the 'process of concretisation' of law is the constitution in the positive legal sense. On this basis, the objective validity of the content of the positive legal system is derived from the basic norm: but except for this dependence on the validating or authoritative character of the basic norm, the content of the positive law of the system is completely independent of it.[29]

Finch also points out how Kantian the terminology Kelsen uses here is, in particular the constitution as 'legal-logical' or 'transcendental-logical' as opposed to the 'positive legal sense', In a

29. J. Finch, Introduction to Legal Theory, 127.

legal system this validity is formal and only concerned with the competences granted by the system and not with connections made with contents. This Kelsen refers to as the difference between a "static" and "dynamic" order.

> The norm system that presents itself as a legal order has essentially a dynamic character. A legal norm is not valid because it has a certain content, that is, because its is created in a certain way - ultimately in a way determined by a presupposed basic norm.[30]

The Grundnorm is therefore presupposed by the legal system whenever, in its juristic thinking, it traces its validity to its root or enquires into its foundations. This has been misunderstood by Stone as meaning that the Pure Theory itself creates the Grundnorm itself, but if we mean by 'create' an act of will this is not so - rather the Pure Theory makes explicit what is already presupposed (usually implicitly) - it appears to do so only if no one within the legal system makes it explicit. This can hardly be termed 'fictitious' in the bad sense, as Lloyd believes, although as Kelsen says it is a fiction in the style of an 'as if'. At this point Olivecrona[31] objects that if the Grundnorm has hypothetical validity alone, it cannot confer validity on lower norms - but this misses the whole point. The lower norms are made hypothetically valid depending on the Grundnorm which in turn is a hypothesis. This is necessary in order to separate analysis and justification, for no absolute justification is offered (which is left as an open question). Neither can it be spoken of as a fact; for it, like other norms, is only related to its 'creation'

30. Supra, note 13, 198.
31. K. Olivecrona, Law as Fact, 2nd. edn., 114.

in a conditional sense and to efficacy in a similar manner. The root cause of the disquiet it causes lies in its Kantian status as a 'necessary idea' to order experience in a coherent manner. Since critics have failed to grasp this point, they have not been in a position to dispute it. An example of this can be found in Stone who cannot grasp its status.

> These terms appear to conceal an ambiguity, swinging between, on the one hand, a norm that is at the top of the pyramid of norms of each legal order, and on the other, some other norm which remains outside this pyramid, and is thus wholly metalegal, and amounts to a general presupposition . . .[32]

Hence the Grundnorm is both outside and inside the legal order. Kelsen's point, however, is that the Grundnorm is not a norm as others in the system because it is presupposed rather than created by will: nevertheless, as such it is the only means by which a valid system can be understood.

> It is "meta-legal" if by this term is understood that the basic norm is not a norm of positive law, that is, not a norm created by a real act of will of a legal organ. It is "legal" if by this term we understand everything which has legally relevant functions.[33]

This status can be understood as similar, but not the same, as that of the Categorical Imperative in Kant's philosophy of morals. It is not itself a moral principle yet it is essential to the understanding of what a moral principle is. (The actual differences between the Grundnorm and the Categorical Imperative have already been discussed

32. Supra, note 7, 104, c.f. Kant's remarks on the position of the sovereign, see chapter 3 at note 15, supra.

33. Supra, note 9, 1141, c.f. Chapter 3, note 16, supra.

in chapter 4.) This hardly exhausts questions about the Grundnorm: some will be dealt with in discussing 'moral' and 'structural' problems below, and its status will be discussed fully in a later chapter dealing with the Rhodesian cases (chapter 10).

The third area where critics have claimed that facts have intruded into the system is at the opposite end of the pyramid from the Grundnorm; that is at the level of actual application to the individual. This is put at its starkest by Hagerstrom who says that after all, we are now talking about a sanction which means the punishment of individuals and that is surely a very real fact, particularly to the recipient![34] And surely, it may be said, the crime itself is a fact too! Indeed, isn't, as Wilson says, the whole point of law · a causal (and therefore factual) one, in that it has a psychological impact?[35] In order to answer this it is necessary to explain Kelsen's view of sanctions.

Kelsen states his view of the sanction as follows.

> The action or refrainment constituting the condition of the coercive act ordered by the legal order represents the delict (usually called "the wrong") and the coercive act represents the sanction. An action or refrainment assumes the character of a delict only if the legal order makes it the condition of a coercive act as sanction. A coercive act assumes the character of a sanction only if the legal order makes it the consequence of a definite action or refrainment.[36]

34. A. Hagerstrom, Inquiries into the Nature of Law and Morals, 268-272.
35. C.H. Wilson, The Basis of Kelsen's Pure Theory of Law, 75.
36. Supra, note 13, 111.

This entails the somewhat surprising proposition

> The usual assumption according to which a certain kind of human behaviour entails a legal sanction because it is a delict is not correct. It is a delict because it entails a sanction.[37]

Because it is the law which defines a crime it is neither necessary nor desirable to have a prior definition, for this definition would be moral. It is

> the typical element of natural law doctrine . . . that certain patterns of human behaviour are, by their very nature, delicts.[38]

The factual element is thus behaviour, the meaning however is determined by norms. Even so, a certain behaviour deemed criminal is only a condition of a sanction, it does not cause the sanction. (Indeed, all too often the sanction does not follow the crime.) Because this behaviour is an 'is' it cannot 'break' or 'violate' a law ('ought') so that it is not denying the law (as Hegel thought).

> The delict appears as a condition, not as a negation of the law; and this shows that the delict is not a fact standing outside, much less in opposition to, the law, but a fact inside the law and determined by it . . . like everything else, so the delict can legally be understood only as law.[39]

In fact, the law merely says 'if X occurs, sanction Y will be applied', regardless of the fact that X may not occur. The same applies to the sanction which is the normative interpretation of the

37. Kelsen, General Theory of Law and State, 51.
38. Ibid., 52.
39. Supra, note 13, 113, c.f. Hegel, Philosophy of Right, ss. 90-103.

physical coercive fact. The law says a sanction will be applied, but means that it ought to be, although it is quite possible that it may not in fact transpire. (As Finch points out, this theory avoids Austin's problem, inherent in any imperative theory of making a sanction an addition to the norm.)[40] But, it will be objected, granted the idea of a crime and a sanction as 'hard' facts was naive, surely the law is nonetheless aimed at having a causal effect? - if it didn't, it would be pointless. Kelsen remarks

> If the Pure Theory of Law assumes that coercion is an essential element of law, it does so because a careful examination of the social orders termed "law" in the history of mankind shows that these social orders, in spite of their great differences, present one common element . . . they all prescribe coercive acts as sanctions[41]

but he adds

> Why a given legal order is actually effective, why men behave lawfully, is difficult to say, because we have no adequate method of ascertaining the motives of lawful behaviour.[42]

Kelsen does, however, speculate that

> it may be doubted whether the lawful behaviour of individuals is brought about by fear of the threatened sanction. So far as we know anything about the motives for the behaviour of individuals, we may surmise that moral or religious motives, for instance, are important, and even perhaps more effective than fear of the sanction of the law.[43]

40. Supra, note 29, 115.
41. Supra, note 8, 378.
42. Ibid., 379.
43. Kelsen, The Pure Theory of Law and Analytical Jurisprudence, 57. Kelsen avoids these problems by construing the legal norm as addressed to judges, from which the concept of duty is inferred as an auxiliary construct. This excludes problems of the motivation for obligation in obeying law.

As we have seen, Kelsen is only concerned with the norm which says a sanction should be applied, whether there is a coercive act as a result is a factual matter outside the Pure Theory (as too is the concept of duty which is merely a reflex of the sanction)[44]: so too are the possible effects of such a factual coercion, Kelsen doubting whether any theory can give an adequate account. The only effect this would have on the Pure Theory would be indirectly in the cases where application and obedience were totally lacking, being a condition of the existence of a norm by its effectiveness. The danger here, Kelsen believes, is of syncretism of methods.

> The factual behaviour of men . . . may correspond to the juridical order, but that is by no means necessarily so. Whereas the behaviour of men can never be in contradiction to the order determined by the causal nexus, it may very well be illegal. As the legal behaviour of men is always also determined by the causal nexus, legal cognition is threatened by the danger of comprehending the natural instead of the legal and normative order, i.e. of asking not how men ought to behave according to law . . . but how they do behave in fact, and why, i.e. for what reasons . . . [45]

The same point applies to the norm's effect on both the legal officials themselves and on the population as a whole. The temptation is to formulate empirical laws of behaviour, but this is not only to drop a concern with norms but is also highly speculative from the point of view of law. Indeed

> That the law is characterized as the "coercive order" does not mean . . . that it "enforces" the legal, that is, the commanded, behaviour. This behaviour is not

44. Supra, note 37, 59.
45. Supra, note 5.

> enforced by the coercive act, because the coercive act is to be executed precisely when an individual behaves in the prohibited, not the commanded manner.[46]

In this sense, legal behaviour is outside the concern of law and hence of the Pure Theory. Now clearly law tries to induce legally approved behaviour in a negative manner, but this is a factual matter, the norm merely stating that it ought to be and the Pure Theory in consequence concerning itself with that alone.

Kelsen throughout presupposes a sharp distinction between is and ought and his theory of law is a rigorous application of this doctrine. (Some Scandinavian Realists go further, wishing to exclude 'oughts' as a metaphysical remnant. Kelsen is, on that view, also a natural law theorist. Yet such a view, reminiscent of Logical Positivism, stemmed from a view of language as solely descriptive.)[47] As has been seen, this does not commit him to the absurd doctrine that there is no relation between them. They are not to be seen as totally unrelated, for this is as much a mistake as to see them as identified. To be a norm, a norm must be said to exist and this makes a fact relevant to it - the fact of its existence. This in turn requires the fact of it beginning its existence and the fact that it continues its existence. But these facts are only conditions for the norm, they are not the norm itself. This is paralleled in ethics, and is the difference between 'we believe X is wrong' and 'X is wrong' (i.e.'X is wrong' does not mean 'X is generally thought wrong'). The second way of stating the

46. Supra, note 13, 35.

47. As evidenced by Olivecrona's title 'Law as Fact', c.f. Hagerstrom, supra, note 34, 267.

relationship is to say that the norm is the meaning of a fact. That is, to understand given factual behaviour we must understand the norms with reference to which it is done. Indeed, it is the norm which tells us what is to count as a relevant fact (both in its creation and acceptance). The relation of meaning and condition is seen clearly in the case of the sanction. It is the law which allows us to see given behaviour as having the meaning of crime and, if this behaviour occurs, becomes a condition of a sanction which is the meaning of a coercive act if it is applied. (The sanction merely stating that a fact, the coercive act, ought to take place - the ought not being predictive of most cases, but being prescriptive to all cases.) The epistemological basis of this is Kant's distinction between Pure and Practical Reason, the former concerned with cognition, the latter with acts of will (volition) (which for Kant are the operation of distinct faculties). The Pure Theory itself is an act of cognition and is thus part of Pure Reason despite the fact that its subject matter is the product of people's Practical Reason; that is: their acts of will. The Pure Theory does not itself produce any acts of will, merely cognizing them. And, at the most fundamental level, the basis for that distinction is that between 'is' and 'ought'. Whilst this distinction has had great use in analysis and produced more clarity into the analysis of law and morals, I believe that it cannot be exclusively established. I hope to show this in another chapter (chapter 12 and conclusion). But, granted it as a postulate, I believe the first part of Laski's statement is borne out.

IV

The other aspect of the Pure Theory's purity is its rigid exclusion of morality from its analysis. This is perhaps of greater interest standing, as it does, against the tradition of natural law and against Fuller's well-known thesis that there is an 'internal morality' of law.[48] (It is also relevant to the Hart-Devlin debate as to whether law ought to enforce morality.)[49]

This part of the Pure Theory is a result of the same adherence to the is/ought distinction as above. This separation must be maintained so that law is treated as an 'is' to the 'ought' of morality. The danger here is that two norm systems are confused. This is not only analytically wrong but leads to practical evils as seen below. In this respect, the Pure Theory is in opposition to natural law Theory. It is worth devoting further attention to why Kelsen rejects natural law Theory and how it differs from the Pure Theory, before going on to ascertain whether the Pure Theory can avoid a merging of morality and law in the same and other ways.

> Generally the natural law doctrine seeks to maintain that both natural and positive law are given as simultaneously valid orders. To this end, it constructs, directly or indirectly, consciously or unconsciously, a relationship between the two, which presupposes the unity of a system of norms comprising both. Owing to the preponderance of positive law once its validity has been accepted, natural law has to adjust itself to positive law. It follows that natural law, at least in the particular guise of an idea which wholly excludes positive law, can no longer be maintained.[50]

48. See chapter 7, infra.

49. P. Devlin, The Enforcement of Morals; Hart, Law, Liberty and Morality. Notice that the question is law used to enforce morals is distinguished from the question whether it ought to.

50. Kelsen, Natural-law Doctrine and Legal Positivism, 414, c.f. chapter 1, note 36, supra.

This is particularly so when natural law 'delegates' positive law. As pointed out in chapter 1, the ideological point of this is generally to sanctify positive law as the embodiment of natural law by supposedly adding to its legal validity. The process is made easier by natural law's concern with general formulae rather than specific laws which can only be provided by positive law. Indeed, since natural law has no agency of its own and because people do not readily obey its norms, it must rely on positive law for its actualization. Although natural law is thus thought true law, in fact Kelsen believes it merely added extra authority to the creation of positive law.

> The historical function of the natural-law doctrine was to preserve the authority of the positive law. The doctrine had, and still has, by and large, a conservative character.[51]

More recently, Kelsen believes, particularly as a result of Rousseau's work, natural law has appeared in a revolutionary light in that it has been held to contain more specific norms independent of and in conflict with positive norms, therefore depriving them of their legal validity so that they are no longer 'true' law. The Pure Theory avoids this dilemma by accepting every legal order as valid, subject to effectiveness etc., yet divorcing this from the moral question whether it is just. Hence a law can be legally valid yet morally wrong. It is worth reemphasising in passing that it is here that Kelsen thinks Kant failed to press his theory to its logical conclusion. In fact, Kelsen, as stated before, regards Kant as:

51. Supra, note 43, 48.

> the most perfect expression of the classical doctrine of natural law as it evolved in the seventeenth and eighteenth centuries on the basis of Protestant Christianity.[52]

This is undoubtedly true, for the more specific norms that Kant sees as borne out by conformity to the Moral Law tend to be remarkably similar to the positive law and morals of his time as shown in chapter 2. Nevertheless, there appears to be truth in Kelsen's remark about a revolutionary natural law for Kant often (as seen above) seems torn between counselling obedience to positive law and admitting that when it fails the Moral Law revolution is permitted.

How is the Pure Theory view of law different from that of natural law? Firstly, the Pure Theory sees the problem of validity as 'dynamic' and that of natural law as 'static'; this means that the Pure Theory is concerned with formally valid norms which authorize the creation of law and not what they create (the content). Natural law, however, is not created but 'discovered' and does not have this formal character, but is valid solely in terms of derivations of content. Secondly, and in consequence of this, the Pure Theory, concerned with positive law alone, sees the need for an organ to create law - the state. Natural law, however, Kelsen argues, should not need this as it is part of the natural, rational or divine order. Although used as an ideology, it becomes identified with the state. Kelsen maintains that natural law's true form should be a peaceful anarchy. Kelsen views its need for positive expression as inevitable

52. Supra, note 50, 445.

because he views natural law as a theory of justice, not law, using mainly empty formulas. Thirdly, natural law claims absolute, eternal and unrestricted authority but positive law is only relative to its state, changing and limited. (The distinction is between a categorical and hypothetical imperative.) Finally, in the light of this analysis there is a difference in function between the two orders. It is the difference between justice and peace. The function of positive law is not JUSTICE but stopping disputes. Indeed, the law may sentence a man for a crime which he did not commit yet this is valid law, but not natural law.[53] Law is thus a specific social technique which can serve many ends by its creation of peace.

Because of the need of natural law to be actualized, it is clear that it can form the content of positive law as viewed by the Pure Theory but when the question of validity arises, the legal system presupposes the Grundnorm and does not compare its content with the content of natural law and attempt to show their identity. (The Grundnorm doesn't rule out these further justifications.) But there is a further problem as the conservative/revolutionary character of natural law shows, so that although positive law may embody natural law content

> As a matter of fact, there is not one natural-law doctrine, but there are many different and even contradictory natural-law doctrines. Consequently, there is no positive legal order which is not in conflict with one of them, and, hence, to be considered as non-valid.[54]

53. Kelsen, The Idea of Natural Law, 47-8.
54. Supra, note 12, 109.

Several critics have, in a non-specific way, expressed unease with Kelsen's characterization of natural law. This is not surprising since Kelsen is vigorously opposed to it and has written at great length about it. Lauterpacht accuses Kelsen of smuggling natural law into the postulate of a system (this will be discussed below in chapter 11) and also of being over-formal in discussing it,[55] but it is difficult to see how it could otherwise be discussed in general terms. Ross has found much wrong with this aspect of Kelsen's work. In particular, he accuses Kelsen of identifying natural law with the laws of nature and not as something to be striven for.[56] This view is very far from the truth for although Kelsen believes natural law adopts, or would like to adopt, the certainty of laws of nature, he is quite clear that they are not identical. In fact he believes that the 'inadequacy of man, who is liable to error and wickedness'[57] illustrates how far from a law of nature and how difficult the striving is. Ross's other point is that Kelsen has failed to take account of the varieties of natural law, especially one.

> At any rate Kelsen does not consider the aspect of natural law which bases the doctrine on "nature" understood as the rational being of man, that is on evident, a priori principles inherent in the reason of man.[58]

But since this point is made in reviewing 'What is Justice?' whose

55. H. Lauterpacht, Kelsen's Pure Science of Law, 134-5.
56. A. Ross, Review of Kelsen's What is Justice?, 565.
57. Supra, note 53, 48.
58. Supra, note 56.

essay of that title contains a section beginning with the words

> The rationalistic type, which seeks to give an answer to the problem of justice by methods of human reason [59]

and discusses this, it is difficult to understand Ross's point. This is regrettably typical of criticisms made of Kelsen's work. However, Ross is probably correct in feeling a certain need for caution given the diversity between, say, Aquinas and Hobbes.

V

Turning to the general area of the role of morals in law, it is possible to identify five points in the Pure Theory where critics believe that morals have entered illegitimately and destroy the purity of the analysis. It will be argued that all these rest on a misunderstanding. In this respect, notice Kelsen's remark:

> I have never and nowhere defended the nonsense that the derivation of the positive legal norms . . . can be "pure".[60]

For the postulate of purity does not refer to the process of law-creation and law-application but to the theory which is pure; it is a pure theory of law, not a theory of pure law.

One area where morals are alleged to enter law is in its very source. Friedmann and Stone,[61] amongst others, believe that natural

59. Kelsen, What is Justice?, 13, (section v).
60. Supra, note 9, 1134.
61. Supra, note 17, 286, and note 7.

law, custom, precedent are all morally loaded, yet are all important sources of law. Kelsen can accept that this is so, yet still maintain the purity of his theory. As has been pointed out, law in the Pure Theory can have any content, including natural law, and does, indeed, have a considerable variety - much of it being moral. Kelsen's point however is that when we trace the validity of law we do so in a formal and pure sense, we do not base legal validity on feelings of moral approval, but ultimately on the legal system and finally, on the Grundnorm whose validity is presupposed. This is true of precedent and custom for it assumes a norm linking it to the legal system's validity. (Kelsen remarks that law is like Midas, 'everything it touches turns to law').[62] Kelsen is concerned with the source of validity, not source as a historical origin. As a source of validity the Grundnorm could stipulate any content, it says merely that the constitution ought to be obeyed, it does not say or add to the content of any possible constitution, if indeed the constitution has any content as opposed to stipulating the supreme legal organ.

Related to this general criticism is that of Friedmann and Castberg,[63] who believe that morals enter in fringe or difficult situations. However, as Dworkin points out,[64] these decisions too will be made on principle, that of a norm to which they will be referred when validity is questioned. The problem will be dealt with in greater detail in discussion of Dworkin's thesis in chapter 6.

62. Supra, note 13, 278.
63. Supra, note 17, and F. Castberg, Problems of Legal Philosophy, 46-7.
64. R. Dworkin, Is Law a System of Rules?, passim.

A second, not unrelated area where morals are said to enter is in the actual process of judgement when a higher norm is cited. For example, in the Swiss Civil Code where judges are allowed to act as legislators (Art 2) and to use principles of justice (Art 4) where set law is found insufficient. This is advanced by Stone who seems to vary between this view of the Pure Theory which entails a creative function for the judiciary and the view that it is purely mechanical.[65] Castberg[66], on the other hand, thinks that it is occasionally completely arbitrary. Kelsen's position is neither one of logical operation or of creative morality.

> I insist upon the law creating function not only of legislation but also of judicial decisions . . . (which) . . . cannot have a merely logical character.[67]

The actual extent of the role of logic has been a particular concern of Kelsen and one in which there has been some change of view (as chapter 11 will show). Kelsen maintains a distinction between statements and acts of will (as norms) and believes that there is no logical relation between wills. He did think it possible that the law of non-contradiction and of inference were operative but, as will be seen below, he ruled this out saying that two conflicting norms do not contradict each other. He also came to see that inference could not be logical because acts of will are not implicit in other acts of will so that, for example, legislation does not contain all legal decisions that judges make using it.[68] The concern is with

65. Supra, note 7.
66. F. Castberg, Problems of Legal Philosophy, 47.
67. Supra, note 9, 1155.
68. Kelsen, Law and Logic, 242.

practical justification and indeed decisions can be made contradictory to the obviously appropriate norm. In fact, Kelsen says there is a tendency for positive law to get lost in its application. (Instead of logic, Kelsen claims the process here is that of 'subsumption'). A given norm is inherently vague and it has no one meaning but a 'frame' of possible meanings, to declare one meaning as in individuation by the legal system, is primarily an act of will: this Kelsen calls 'political'[69] (a point raised in connection with the Rhodesian cases in chapter 10). Thus, morals clearly enter in this process. This does not render the Pure Theory impure because it only ascertains that one meaning has been willed or indeed it can indicate a range of possible meanings - but to decide itself would be 'politics masquerading as jurisprudence'. Whatsoever the meaning chosen, it will be valid because of its creation under a valid norm and it is this that the Pure Theory examines. Thus, although the law is not pure from morals, the Pure Theory's analysis is.

The third point of entry for morals is really the more generalized version of the preceding two (and is answered in a similar fashion); it is that regardless of its source or role in subsumption surely law has a content and this is impure. This is raised by Wilson and Stone[70] and, in this aspect, could be seen as a descendent of Hegel's criticism of Kant's ethics.[71] I suspect that what this criticism amounts to is a dissatisfaction with the task that Kelsen

69. Kelsen, Science and Politics, 654, c.f. chapter 10, note 43, infra.
70. Supra, note 35, and supra, note 7.
71. See chapter 2, note 28, supra.

asks for jurisprudence and a feeling that more interesting things can be done apart from examining norms and their validity. But the very formalism that the critics see as arid Kelsen sees as its virtue of purity. It is the distinction between those who wish to see a phenomenon whole at the expense of complexity and confusion and those on the other hand who want a clear analytical approach at the expense of abstraction. The situation is closely parallel to that between Positive Economics and Political Economics.[72] Paton puts this at the clearest

> Indeed what we obtain from this method is not a theory of legal development but simply the formal principles of juristic thought[73]

and although Laski thought it unanswerable, he expressed the same doubts about the Pure Theory.[74] To decide on this point would be somewhat glib. (Yet no one disputes the value of a purely formal discipline like geometry.) Briefly, I think that both are valuable and could be alternative ways of analysis, but if this is so, then the Pure Theory would have an advantage for it distinguishes itself from other methods but they do not seem sufficiently aware of this distinction (or, indeed, deny its existence). Personally, I believe the Pure Theory, because of its nature, has unique value particularly in what has been called the 'demythologizing of legal thought'.[75] In

72. E.g. between the positive economics of Lipsey and the neo-Keynesian economics of Robinson.
73. G.W. Paton, Jurisprudence, 18.
74. Supra, note 2.
75. Supra, note 1.

addition, as Lloyd says (referring to the General Theory) in comment to Laski's remark

> To some extent there is truth in this dictum, but it certainly does less than justice to the impressive display of learning, searching analysis, and striking insights ranging over the whole vast field of law, which characterises such a book as Kelsen's . . .[76]

In regard to the point that Kelsen must include content enough has already been said to show this as false.

A fourth area where Kelsen is thought to have admitted morals, as Fuller would point out,[77] is that he cannot avoid admitting that the function of law is moral (primarily as a system of laws). Kelsen's view is that law can serve many ends and, moreover, if the legislator has a moral purpose, this will be irrelevant to the validity of the norm, as will be any ensuing moral content. Kelsen of course could not deny that, as a possible content of law, morality could appear to be the end of certain norms. Kelsen sees the law as a specific social technique quite capable, according to one's view of morality, of serving moral ends, or not (one cannot objectively say that it is immoral or moral or a-moral in Legal Science). (Kelsen's own views on the relation will be discussed more fully in chapter 12.) A related point is that law supposedly has its own internal morality. This is Fuller's view as expressed in 'The Morality of Law'. Fuller believes that law has its own

76. Supra, note 24, 306.
77. See chapter 7, infra.

morality and expresses this as the following principles which must be fulfilled by good law: (1) Generality, (2) Promulgation, (3) Non-retroactive, (4) Clarity, (5) Non-contradiction, (6) Must not demand impossible acts, (7) Consistency over time, (8) Congruence between official act and rule. Kelsen does not discuss Fuller's theory in detail[78] but insists that

> law constitutes a value precisely through the fact that it is a norm: it constitutes legal value, which is at the same time a relative - moral value; which says no more, however, than that law is a norm. In so saying, therefore, we by no means accept the theory that law essentially represents a "moral minimum", that for a coercive order to be able to figure as law, it must fulfil a minimum requirement of morality. For this requirement presupposes an absolute morality of determinate content, or at least a content common to all positive moral systems.[79]

Because Kelsen believes morality is relative, he rejects the common morality that Fuller supposes. From Kelsen's position, it is possible to suggest more doubts about the thesis but these will be postponed until chapter 7.

The final point is an extension of the preceding one. As Hagerstrom sees, obedience to law has a moral value, so that at least that far law is dependent on morality.[80] From what has already been said, Kelsen's reply is obvious - law has a separate validity which may or may not coincide with moral validity (there are always immoral laws).

78. Chapter 7 will attempt to provide a Kelsenian discussion of Fuller's thesis.

79. Kelsen, Law and Morality, 89. This might be construed as a reference to Fuller; although the essay appeared in 1960, 4 years before Fuller's book, it might be in reply to Fuller's earlier work. Construed as about moral content it would hold against Hart's thesis of a minimum content of natural law discussed in chapter 8, infra.

80. Supra, note 34.

Kelsen is quite prepared to admit that the reasons for obedience to law are mainly moral, religious or habitual, but regards this as outside the Pure Theory which is concerned with the norm rather than people's attitudes to it. As has been seen, Kelsen does not think law exists to realize justice but to stop disputes, nevertheless, it cannot be denied that law is normally identified with justice (mistakenly) in people's minds. This may support the efficiency of norms, but, it will be remembered, that this is only conditional. The Pure Theory is only concerned with legal validity which is objective and not with the subjective apprehension of law.

It may seem that at least morality is a complementary system of norms in that it performs a semi-legal function of prescribing conduct which is beyond the power or scope of law to regulate. However, Kelsen sees this as irrelevant from the legal point of view, for the behaviour that does not carry a sanction must be seen as legally permitted. Despite this, it can hardly be doubted that law is assisted by morality in a total view of society.

In conclusion, it should be clear that Kelsen's critics have simply misunderstood his point that the Pure Theory, not law itself, is Pure. The Pure Theory being concerned with the formal legal validity of a system of norms can, by rigorous use of the distinction between the two norm systems, avoid this confusion. Kelsen's own view of morals, his ethical theory, and the relation of morals to law as systems will be discussed later in chapter 12. However, Ross voices what may be a suspicion shared by others: that Kelsen achieves 'purity by banishment' making the theory devoid of 'social reality'.[81]

81. A. Ross, On Law and Justice, 70, 339, c.f. supra, note 34.

But this is only admitting that the Pure Theory is successful in its task - which, it is suggested, has a distinctive contribution to make.

VI

Some criticisms of what might be called a 'structural' nature will now be dealt with. (The problem of the rules which make up the structure will be discussed in respect of Dworkin in chapter 6.) These all relate to the attempt to view law as a legal system rather than the adherence to a distinction between "is" statements and "oughts". But, it will be seen that these have some bearing on the problem of morals, for it might be suggested that morality enters the system at its weak points or renders the structure us able when it would not otherwise be so.

The major point that critics make against the idea of a legal system is that norms conflict, so that law is not a coherent system. This is asserted in various forms by Wilk and Friedmann,[82] amongst others. Kelsen's view of the matter is that norms do conflict and, if there is no further norm resolving this, it will present the legal system with a dilemma. Clearly this will be seen as unsatisfactory because, to the limited extent this occurs, it will be possible that a section of the legal system can appear in two ways. Kelsen makes the further important point that this is a conflict and not a contradiction. Because norms are not subject to logic, it is quite

82. K. Wilk, Law and the State as Pure Ideas: Critical Notes on the Basic Concepts of Kelsen's Legal Philosophy, and supra, note 17, 278.

possible that both norms can be valid at the same time; as such the Pure Theory is not called upon to decide between them, but leaves its resolution to an appropriate act of derogation or to a loss of efficacy of one or both. This is different from a logical contradiction; that X is the case and X is not the case cannot be resolved in the same fashion. However, although both norms are valid, it is clear that the same behaviour cannot satisfy both; but whilst undesirable, this is not a problem of legal theory. Kelsen's development of this thesis is discussed in chapter 11.

The same point about the possibility of conflicting norms reappears in various guises. For example, the possibility of emergency norms (seen above as a possible entry of morality) conflicting is raised in this specific context by Akzin.[83] Although this cannot be ruled out, it will normally be the case that such auxiliary norms are made so that their validity derives from established norms. A more serious instance would be if two Grundnorms conflicted, a possibility envisaged by Lloyd.[84] As has been seen, this, in the case of a static system and a dynamic system, would mean that the two would merge. However, if two Grundnorms of a dynamic system existed and thus conflicted, I think Kelsen would want to say that here you have a situation of potential or actual Civil War, and in effect two legal systems side by side. The most interesting case which illustrates this is that of Rhodesia which will be discussed in chapter 10. In this instance, Kelsen's doctrine was cited for ideological purposes

83. B. Akzin, Analysis of State and Law Structure.

84. Supra, note 24, 304, and supra, note 17, 278, 286, see also Raz's criticism discussed in chapter 8, part 3, infra.

to show that a separate legal system existed. This will be discussed in more detail in chapter 10. (Friedmann raises the further interesting point, that totalitarian systems appear to have dual systems of validity, e.g. the state and the party.)

A problem is also said to arise in finding which norms are valid. Stone thinks that the Grundnorm is so mysterious that it would be impossible to discover.[85] However, because Kelsen says the Grundnorm merely says (or is presupposed to say) that the constitution is valid (ought to be obeyed) this really leaves the problem of discovering the constitution in the sense of the ultimate authority. In some cases it has been suggested this will not be easy (e.g. British Commonwealth) but I do not think that will be as mysterious as Stone suggests. Golding[86] raises the point that it may not always be possible to see which norm is being applied. In most cases this should be obvious but, as was seen above, norms do have a frame of meanings which the Pure Theory can only point to.

The actual status of the Grundnorm as questioned by Stone, has already been dealt with. Much the same point is made by Lundstedt[87] when, in the process of dismissing Kelsen's work as absurd, he claims that the Grundnorm is only hypothetical and therefore cannot explain anything at all! But Kelsen is using the term hypothetical in a very Kantian sense.[88] This criticism is only evidence of the failure

85. Supra, note 7, 123.
86. M.P. Golding, Kelsen and the Concept of Legal System, 98.
87. A.V. Lundstedt, Legal Thinking Revised, 403, c.f. supra, note 31.
88. See supra, note 9, 1137.

of Lundstedt, Hagerstrom, Stone and others to argue at the Kantian basis. Instead of doing this, the world is seen entirely as facts and any other view as absurd,

> Kelsen has never understood that jurisprudence can be exercised empirically . . . The behaviour of the individuals as it actually is, is determined by laws of nature according to the principle of causality . . . Opposed to this Kelsen predicates legal 'reality' . . . Consequently the subject of legal science shall according to Kelsen lie completely outside the natural reality, i.e. the world in which we live.[89]

It is clear that this is a complete misunderstanding. Kelsen does not see the complete lack of relation that he is accused of, nor does he deny that a factual (sociological) study of law is possible; indeed, as has been seen, he is anxious to distinguish that study from his own. Moreover, the implicit identity of 'facts' as the world in which we live is an emotive appeal trading on the ambiguity of the terms employed. Much the same is true of Ross's statement

> Kelsen's philosophical education has stagnated in early impressions of Kantian philosophy, obsolete in the eyes of modern empiricist philosophy[90]

(yet this follows a statement that

> Kelsen's attitude towards the problem of value judgements is in accordance with the trend in modern antimetaphysical philosophy[91]

It also underestimates essential continuities between Kant and positivism).

89. Supra, note 87, 401. This may be taken as an extreme statement of Legal Realism.
90. Supra, note 56, 565.
91. Ibid.

Hence, Ross believes that despite the important (even central) exception, Kelsen's philosophical basis can be dismissed, seemingly because of its lack of total commitment to empiricism, as rather narrowly conceived. As Finch[92] correctly points out, it is this rejection of "metaphysics" and therefore the Kantian basis by the Scandinavian Realists that causes their misunderstanding (principally in the notion that the world consists entirely of facts mirrored in language entirely as descriptive.) Such a view is very like that of Wittgenstein's 'Tractatus,' a view rejected by Wittgenstein as falling prey to a too rigid model of how things are.[93]

Friedmann and Hart argue that Kelsen seems over-concerned with coercion in law, pointing out that this is absent in large areas of law. But, as has been seen, Kelsen adopts this as distinctive of the historical use of the word 'law'. As Benn and Peters point out,[94] a sanction is characteristic of legal systems, rather than all norms comprising them. In any case, Kelsen does not exclusively rely on it as a defining characteristic, nor does he over-emphasize criminal law, merely pointing out that ultimately a sanction could be brought into play if compliance was not forthcoming in, say, a civil case.

The final criticism comes again from Stone, who claims[95] that Kelsen confused the propositions of the Pure Theory with legal norms

92. Supra, note 29, 130-3.
93. See chapter 8, section 2, infra, and the conclusion for further discussion of this point.
94. S.I. Benn and R.S. Peters, Social Principles and the Democratic State, 83. For Friedmann on coercion, supra, note 17, 288. For Hart see chapter 8, section 1, infra.
95. Supra, note 7, 102.

themselves; thus creating norms itself. Stone further claims that Kelsen thought that only a jurist using the Pure Theory could be said to be doing his job correctly. Stone, however, does say that Kelsen has abandoned this view. I can find no evidence for this in Kelsen's work, he explicitly rejects it in the Pure Theory and denies[96] that he changed his view, because he never held that view in the first place. (Kelsen naturally believes his theory is correct and advocates it, but he does not think it is exhaustive of possibilities or should be adopted ideologically.)

VII

Ross[97] accuses Kelsen of falling prey to ideological tendencies by producing a doctrine of legal validity that

> is nothing but an ideological cloak to reinforce the established order, an unvanquished reminiscence of natural law in the pure theory of law.

Kelsen, however, merely asserts that positive law is law, but distinguishes it from just law and thus cannot be accused of a natural law ideology. Kelsen's exasperation at the criticism from all ideological viewpoints is perhaps offset by the circumstantial evidence it provides that if you are attacked from all points of the political spectrum, then it is unlikely that you are the servant of one. Ross's specific point is misconceived because the Pure Theory does not reinforce the established order; it merely says that it is legally valid

96. Supra, note 9, 1133-5.
97. Supra, note 56, 564.

whilst sharply distinguishing this from its moral worth, thus leaving entirely open the question of whether a legal system is good or just. This cannot thus be a sanctification of the status quo, for any alternative would be valid if similarly effective - in purely legal terms there is no ground for preference. As a moral relativist, he is clear that a given legal system will be bad as well as good, depending on the moral point of view.[98] What he sees as seriously misleading is the attempt to encapsulate the moral view as a criterion of what is law. This he sees as normally sanctifying legal orders with the weight of moral authority, it is precisely this that he is against. This is only to recognize hard facts. The Nazi legal order was valid, but utterly immoral, no contradiction is involved here. Indeed, having suffered at the hands of the Nazis on account of his Jewish origin, Kelsen might be forgiven for ruling out Nazi law in the style of natural law theory. And, indeed, his preference for democratic governments might have been allowed to sway him into a more evaluative theory allowing

98. Kelsen does admit that relativism has a moral counterpart in tolerance, supra, note 59, 23. Also, the preference for democracy as providing a context for science is admitted, ibid., 24. See also Kelsen's reply to Brunner who says that the totalitarian state is 'the ineluctable consequence' of 'a positivism void of faith and inimical to metaphysics and religion', ibid., footnote 20. Kelsen's Pure Theory was debated from the Marxist point of view in the Georgian Conference on Law (1930), where certain Soviet jurists were criticised for propagating Kelsen's theory, 'a typical fascist ideology of the decaying bourgeoisie'. Naneishvili rejected this view, claiming that the critics had not read Kelsen and specifically pointing to Kelsen's Foundations of Democracy as quite compatible with a Marxist interpretation of law. D. Lloyd, Introduction to Jurisprudence, 3rd. edn., 667-671. Stone, supra, note 7, 121, specifically rejects ideological accusations levelled at Kelsen's work.

condemnation of non-democratic forms. His marked preference for an international system to subordinate the state might also have clouded his assertion that states' legal systems are all valid. That Kelsen did none of these things seems to be a mark of intellectual integrity rather than ideological pandering. Indeed, if Kelsen was so anxious to provide an ideological cloak for the established order, it is surprising that he devoted so much effort to exposing theories that did just that.

VIII

Some of Kelsen's anti-ideological work, his 'demythologizing' as Ebenstein puts it, can be seen in his theory in its political applications.

Although Kelsen has contributed a wide range of work in the sphere of political science and sociology, it would be fair to say that here his work is difficult to disassociate from his central concern with law. However, an outline of the most interesting ramifications that the Pure Theory has for political theory can be given. These may not be original, as such, but they are part of a coherent attempt at analysis which illustrates its critical use.

'Justice is an irrational idea'.[99] By this Kelsen means that justice is relative, it is not embodied by the legal system although

99. Supra, note 59, 21.

from some points of view it may seem so. Nor, because of its relativism, can it be used as an absolute standard to pass judgement on legal systems. Although justice may be formal by some accounts for example 'giving each his due' or 'treating like cases alike' to Kelsen these, to be operative, need a definition of 'due' or what is to count as 'like' and it is here that one's relative moral or indeed political standpoint enters. Hence the pursuit of justice will be the pursuit of someone's idea of justice if it is to mean anything at all.

The identification of law and state. Fuller[100] claims that this 'identity of law and state . . . (is) the ultimate reductio ad absurdum of the positivist point of view'. Kelsen, however, believes the only way to satisfactorily identify the state is to say that it is the legal system. Normally, he thinks, it is usual to think of the state and law as separate entities; the idea being that a state is a community and law the order of that community. But to Kelsen the very concept of the state as a community is seriously misleading. This is especially so when a community is defined as the expression of 'common interests', to present them as such is to the ideological advantage of those in whose preponderant interest the communities are established; for interests after all conflict.[101] The state, therefore, masquerades as the community when in fact there are simply a collection of conflicting interests, whose consent is assumed. The correct definition of such community is that of the existence of specific relations between individuals. If these relations are governed by law then, granted a system of

100. Fuller, The Morality of Law, 236.

101. Supra, note 8, 379, supra, note 13, 284-319, c.f. supra, note 37, 181-201.

validity, this will constitute a state. The failure to grasp the state as a legal order, Kelsen believes, leads to a tendency to personify the state in some degree (something very common in international relations as will be seen in a later chapter). What should replace this is the concept of the state organs as comprising individuals acting in a legal relationship. One of the worst results of the separation of law and state is the idea of the "rule of law", the idea that the state itself is a person, as are its subjects, and is thus subject to the law itself. This has the convenient role of showing the state as a power that is always right since itself creates the very law which it allegedly obeys. Alternatively, the state is seen as the impartial arbitor bound by laws. Thus, the rule of law is not what it claims to be.

No separation of Public and Private Law.[102] Because all law is public law, the only distinction that can be made for private law is that it forms a further stage in the legal system. The doctrine of Public and Private law, Kelsen thinks, has exercised a strong influence in some legal systems because of its ideological use. It seems to guarantee an area that is 'non-political' and a limit on the state. It also pretends to be concerned with property rights, rather than political rights which are the domination of men over men. Really, however, property rights are nothing else than a particular form of political rights which may seem to have a less objectionable character.

102. Supra, note 13, 280-4, c.f. supra, note 37, 201-206.

There are no constitutional rights or any rights outside the law. Constitutional rights do not, as it may appear, impose obligations on the state, because they too are not ultimate, but are part of the state. What they do mean is that there is a special procedure for their annulment or for their change. The idea that there are rights against law is similarly an illusion if these are thought to have legal force. There can be no legal right which is prior to, or in any way independent of, the state.

In the above, I have summarized, I hope accurately, some of Kelsen's theory in its political implications. I think the desire to expose ideology is readily apparent.

In the foregoing I have tried to demonstrate that criticisms made of the Pure Theory fail, if taken on their stated level, because they fail to understand what they are criticising. This is doubtless due to their failure to tackle its fundamental assumptions and above all, the insistence on the is-ought distinction which, because not answered by critics, proves a devastating weapon in defence of the Pure Theory. In stating these criticisms, I have had to generalize them somewhat to avoid the excessive length that the statements of each individual critic would entail. Nevertheless, I would claim that these have represented fairly for two reasons. Firstly, because these criticisms are mostly asserted rather than argued in any depth, Stone being the only one who could claim to have produced a 'critique'. Secondly, because the criticisms have assumed a fairly standard form, presumably because they have simply been adopted by successive writers

with little change or question. Naturally the points discussed here only claim to be those of major significance and no claim to meet all possible criticism is made. Indeed, I have concentrated on those produced from within the field of jurisprudence. The statements of Kelsen's work can be taken as meeting these. As Gide put it, 'It has all been said before; but, because no-one listens, it must all be said again'. Since Kelsen is rarely drawn into specific refutations of critics, it would be a pity to lose the position by default. I believe, therefore, that Laski[103] was correct to see it as 'unanswerable', granted its presuppositions.

103. Supra, note 2.

In the following two chapters, the problems raised in this chapter are discussed in greater detail. In defending the Pure Theory, criticisms were dealt with as structural or as questioning the separation of law and morals. These problems have been at the core of two major debates in legal theory. The first developed from Dworkin's article, 'Is law a system of rules?', the second from Fuller's book the 'Morality of Law' and other writings of Fuller. In both cases the spokesman for positivist legal theory was Hart. Kelsen did not participate in either debate. Nevertheless, it is important that these debates should receive full scrutiny for, if the anti-positivist thesis in either case were upheld, the consequences for Kelsen's theory would be most serious. Although Kelsen's work did not figure often in these debates, it will be seen that he shares, is indeed committed to, the positivist theses under challenge. Rather than relying on presuming to supply a Kelsenian argument, reliance will be placed on showing the incoherence of both challenges (hence attacking the challengers, rather than defending Kelsen as in this chapter). These two chapters dealing with the debates form a trilogy with the chapter on Hart's version of positivist legal theory. There criticisms of Kelsen's theory from within positivism are dealt with. It will be suggested that such criticisms do not share all the usual misunderstandings of Kelsen's theory and, as such, carry greater weight. Nevertheless, generally speaking, the more constructive side of Hart's theory will be examined and, where it goes beyond that of Kelsen, reasons will be given for preferring the Kelsenian theory. In this context, therefore, the third major debate in contemporary legal theory will be dealt with - the debate about Hart's 'Concept of Law'.

As a result of these chapters, Kelsen's theory will be vindicated in the context of the major debates in current legal theory. As such, the continuing relevance and correctness of the Pure Theory will be demonstrated.

Chapter 6

Dworkin and Positivism

One of the major debates of recent years, which challenges a central positivist position, has been initiated by Dworkin in a series of articles, 'Judicial Discretion' (1963), 'Social Rules and Legal Theory' (1972), 'Hard Cases' (1975) and, most importantly, 'Is Law a System of Rules?' (1967). Dworkin has directed his criticism primarily at the legal theory of Hart but, as Dworkin makes clear, this is only his major example. He says

> I want to make a general attack on positivism, and I shall use H.L.A. Hart's version as a target, when a particular target is needed.[1]

In respect of the positivist position that Dworkin is attacking, it will soon become clear that Kelsen is as much a target, in that the points challenged are essentially as much those of Kelsen as of Hart. To this a slight qualification should be added: because Hart appears more vulnerable in offering a more elaborate version of judicial discretion, on which the argument centres, and states it in a manner that seems to allow more criticism.

At first it might appear that any challenge to the concept of rules as forming a legal system (as made by Dworkin) would be avoided by Kelsen. After all, Kelsen adopts the notion of norms as the basic elements of the legal system. Kelsen distinguishes norms from rules

1. R. Dworkin, Is Law a System of Rules?, 43.

in order to mark the difference between the normative elements of a legal system (a norm) and the description of these elements (a rule). Once this is made clear it is obvious that Kelsen's norm is essentially Hart's rule, both being normative components of law. Actually, in pursuit of clarity, Kelsen's translation of Rechtssatz as 'rule' restricts the English term to an unfamiliar and confusing usage. Kelsen's choice of terminology is hence rather unfortunate. From this it should not be inferred that a norm is equivalent in all respects to a rule as used by Hart, for clearly as central notions these would imply that there was little to choose between the two theories. Nevertheless, with these qualifications, both are equivalent in respect of Dworkin's case and therefore equally to be defended. Where Kelsen's theory leads to a distinctive reply, this will be emphasised. As the leading contemporary positivists, by refuting the criticism against Hart and Kelsen, this will be taken as vindicating positivism as such. In the case of Austin and Bentham, this is not argued here - but there can be little doubt that Dworkin's attack could be refuted in respect of these non-rule theories as far as it has any bearing on them. As Dworkin is exclusively concerned with rules it should be taken that he is not concerned with earlier positivism.

I

Law as a system of rules - Dworkin's challenge

Hart's theory will first be outlined. Hart elaborates his theory partly to meet the case presented by American Realism and by the 'rule

sceptics' in particular. The extreme case would be represented by Llewellyn in the oft-quoted passages from the 'Bramble Bush' (talking about legal officials)

> What these officials do about disputes is to my mind the law itself.[2]
>
> . . . rules, in all of this, are important to you as far as they help you see or predict what judges will do or so far as they help you get judges to do something. That is their importance. That is all their importance, except as pretty playthings.[3]
>
> If rules were results, there would be little need for lawyers.[4]

It should be made clear that these passages are quoted out of context (as they normally are) and are, in themselves, unrepresentative of Llewellyn's whole theory[5] (as he later protested) - and are in his own inimitable style. Yet they do represent, in extreme, the Realist approach, which is to look at what courts actually do, rather than what the rules say they ought to do. This approach is designed to attain predictability of decision in courts. Hart argues against this approach in general

> Rule-scepticism has a serious claim on our attention, but only as a theory of the function of rules in judicial decision.[6]

The rule-sceptic is, Hart believes, a 'disappointed absolutist' in the sense that he realises that the 'formalist' case fails on the

2. K. Llewellyn, The Bramble Bush, 12, see also E.H. Taylor, Hart's Concept of Law in the Perspective of American Legal Realism.
3. Ibid., 14.
4. Ibid., 18.
5. For a definitive survey see W. Twining, Karl Llewellyn and the Realist Movement.
6. Hart, The Concept of Law, 135, (my emphasis).

grounds that rules are inherently 'open textured' and so do not carry a determinate sense in them, but always require interpretation which is non-automatic.[7] The sceptic goes to the other extreme which relegates rules to the status of merely one factor in influencing judicial decision as part of the general study of judicial behaviour. Hart argues that generally this cannot be correct, for judges don't predict their own behaviour. This is part of the consequence of Realism in denying the 'internal aspect' of rules. Hart's point is brought out in his analogy of a game of 'Scorer's Discretion',[8] in which the rule is whatever the Scorer says it is. Hart invites the Realist to admit that this is unlike normal games and that the analogy holds for law. In Scorer's Discretion, it is quite senseless to talk in terms of a correct or incorrect decision (or even how one is better than another), because there is no longer any criterion by which this may be judged. Now this might seem to be the case in law, Hart argues, because finality is being confused with infallibility. In fact, as in a game, a judge can be wrong and make mistakes yet, unless these occurrences do not become frequent, this does not destroy the rule - yet for practical reasons, the process of appeal must stop somewhere. A further consideration arises if the attitude of the players in the game is considered; they too cite the rules, but these are unofficial applications, rather than predictions of scoring behaviour. This is of greater importance in the case of law where, by analogy, every citizen has to guide himself by the rules. Clearly, this is not possible if he is really engaged on a

7. Ibid., chapter VII, esp. 135, echoing J. Dickinson, Legal Rules: Their Function in the Process of Decision, 835-8.

8. Ibid., 138-144.

a massive predictive enterprise. The strength of Hart's argument need not be considered for present purposes as Dworkin accepts most of the case against Realism as advanced by Hart.[9] Dworkin's target is rather the area in which Hart accepts Realism, that is: in the area of judicial discretion.

Hart's arguments leave us somewhere between the formalist (rules, with no true discretion) and the sceptic (discretion, with no true rules). How can a legal system accommodate both rules and discretion? In his influential article 'Positivism and the Separation of Law and Morals', Hart explains his answer with the example of a rule forbidding vehicles in a park.[10] Clearly, in normal circumstances, this would occasion little difficulty in interpretation. There is a core of settled meaning, arising in this case simply from language. (Hart should not be taken as believing all problems are just linguistic, based on the interpretation of a key word, etc.). However, there are bound to be some cases where the applicability of the rule is not clear. Take the word 'vehicle'. Do roller-skates constitute a 'vehicle'? These cases may be uncommon, but they cannot be ruled out in advance. It follows that there is no simply deductive decision process, yet normally there is no great problem of interpretation. These cases Hart terms the 'penumbra'. The mistake of Realism is to take the untypical as standard (something not unrelated to the concentration on court s' decisions where, by virtue of there being a case,

9. R. Dworkin, Judicial Discretion, 626, 'Professor Hart in his recent book . . . provides what seems to me a persuasive answer to the radical argument' (i.e. of Realism). Dworkin goes on to support Hart's discussion of 'Scorer's Discretion' (see chapter 8, section 1, infra).

10. Hart, Positivism and the Separation of Law and Morals, 22-3.

there may be no clear cut interpretation). The mistake of formalism would be to take the standard as the whole (omitting the difficult cases).

Dworkin summarizes Hart's theory as being the claim that there is a mass of settled rules with occasional 'hard cases' where judicial discretion is required. Hart's language might suggest this but, as will be seen, this oversimplifies Hart's point with unfortunate consequences. To this, Dworkin adds what he considers, with good reason, to be two further positivist principles: first, the rules that comprise the legal system derive their validity from a common source - a Grundnorm or Rule of Recognition - which provides the means of identifying them as legal, as opposed to moral, rules. Secondly, the positivist theory explains legal obligation in terms of a valid rule, such that one is obligated if there is a rule covering one's behaviour (either by requiring, permitting or forbidding it).[11]

Dworkin's case against positivism can now be stated.[12] Dworkin claims that positivism cannot adhere to the three points together (i.e. discretion, rules derived from a Grundnorm and rule-based legal obligation). The basic fault, Dworkin believes, lies in the reliance on rules. The central question is, as the title of his article suggests, is law a system of rules? Dworkin's answer, however, is not as radical as this question might suggest. Dworkin does not deny that legal systems consist of rules, but rather wishes to add to rules, so that they are

11. Supra, note 1, 38-9.
12. Ibid., 64.

not the sole components of legal systems. Dworkin's answer to his own question would thus be a qualified 'yes'. To rules, Dworkin wishes to add principles by which he means 'principles, policies and other sorts of standards'[13] which operate when the rules 'run out'. This is the case in 'hard cases' where they determine judicial decision in the absence of rules. Dworkin, therefore, wishes to exclude even the limited area of Realism admitted by Hart in the exercise of judicial discretion.

'Hard cases', where principles come into play, Dworkin suggests, occur when rules are inapplicable. Initially, Dworkin suggested that this is the cases when (1) a court overrules a 'textbook' rule, (2) a rule is ambiguous and its application correspondingly uncertain, (3) two rules apply in the same case, (4) there is no relevant rule, so one has to be created, (5) the rule includes vague terms like 'reasonable', etc.[14] However, Dworkin in his main article refers to these cases as simply where rules 'run out'. Dworkin's concept of 'hard cases' will be challenged later. For the present, it is sufficient to note that this is a concept attributed to positivism (and Hart in particular) by Dworkin. Hart merely referred to 'problems of the penumbra' (suggesting (2) above).

Dworkin charges positivism with exclusive reliance on rules, to the neglect of principles. The questions therefore arise as 'what are principles?' and 'how are they distinguished from rules?'. Dworkin's

13. Ibid., 43.
14. Supra, note 9, 627.

thesis can be given by extensive quotation from the relevant passages, where he relates the distinction to the two examples of 'hard cases' that he offers:

> My immediate purpose, is to distinguish principles in the generic sense from rules, and I shall start by collecting some examples of the former. The examples I offer are chosen haphazardly; almost any case in a law school casebook would provide examples that would serve as well. In 1889 a New York court, in the famous case of Riggs v. Palmer, had to decide whether an heir named in the will of his grandfather could inherit under that will, even though he had murdered his grandfather to do so. The court began its reasoning with this admission: 'It is quite true that statutes regulating the making, proof and effect of wills, and the devolution of property, if literally construed, and if their force and effect can in no way and under no circumstances be controlled or modified, give this property to the murderer.; But the court continued to note that 'all laws as well as all contracts may be controlled in their operation and effect by general, fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime.' The murderer did not receive his inheritance.
>
> In 1960, a New Jersey court was faced in Henningsen v. Bloomfield Motors Inc. with the important question of whether (or how much) an automobile manufacturer may limit his liability in case the automobile is defective. Henningsen had bought a car, and signed a contract which said that the manufacturer's liability for defects was limited to 'making good' defective parts - 'this warranty being expressly in lieu of all other warranties, obligations or liabilities'. Henningsen argued that, at least in the circumstances of his case, the manufacturer ought not to be protected by this limitation, and ought to be liable for the medical and other expenses of persons injured in a crash. He was not able to point to any statute, or to an established rule of law, that prevented the manufacturer from standing on the contract. The court nevertheless agreed with Henningsen. At various points in the court's argument the following appeals to standards are made: (a) '(W)e must keep in mind the general principle that, in the absence of fraud, one who does not choose to read a contract before signing it cannot later relieve himself of its burdens'. (b) 'In applying the principle, the basic tenet of freedom of competent parties to contract

is a factor of importance.' (c) 'Freedom of contract is not such an immutable doctrine as to admit of no qualification in the area in which we are concerned.' (d) 'In a society such as ours, where the automobile is a common and necessary adjunct of daily life, and where its use is so fraught with danger to the driver, passengers and the public, the manufacturer is under a special obligation in connection with the construction, promotion and sale of his cars. Consequently, the courts must examine purchase agreements closely to see if consumer and public interests are treated fairly.' (e) '"(I)s there any principle which is more familiar or more firmly embedded in the history of Anglo-American law than the basic doctrine that the courts will not permit themselves to be used as instruments of inequity and injustice?"' (f) '"More specifically, the courts generally refuse to lend themselves to the enforcement of a 'bargain' in which one party has unjustly taken advantage of the economic necessities of the other . . . "'

The standards set out in these quotations are not the sort we think of as legal rules. They seem very different from propositions like 'The maximum legal speed on the turnpike is sixty miles an hour' or 'A will is invalid unless signed by three witnesses'. They are different because they are legal principles rather than legal rules.

The difference between legal principles and legal rules is a logical distinction. Both sets of standards point to particular decisions about legal obligation in particular circumstances, but they differ in the character of the direction they give. Rules are applicable in an all-or-nothing fashion. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision . . .(it) might have exceptions, but if it does it is inaccurate and incomplete to state the rule so simply, without enumerating the exceptions. In theory, at least, the exceptions could all be listed, and the more of them that are, the more complete is the statement of the rule.

But this is not the way the sample principles in the quotations operate. Even those which look most like rules do not set out legal consequences that follow automatically when the conditions provided are met. We say that our law respects the principle that no man may profit from his own wrong, but we do not mean that the law never permits a man to profit from wrongs he commits. In fact, people often profit, perfectly legally, from their legal wrongs. The most notorious case is adverse possession - if I trespass on your land long enough, some day I will gain a right to cross your land whenever I please. There are many less

dramatic examples. If a man leaves one job, breaking a contract, to take a much higher paying job, he may have to pay damages to his first employer, but he is usually entitled to keep his new salary. If a man jumps bail and crosses state lines to make a brilliant investment in another state, he may be sent back to jail, but he will keep his profits.

We do not treat these - and countless other counter-instances that can easily be imagined - as showing that the principle about profiting from one's wrongs is not a principle of our legal system, or that it is incomplete and needs qualifying exceptions. We do not treat counter-instances as exceptions (at least not exceptions in the way in which a catcher's dropping the third strike is an exception) because we could not hope to capture these counter-instances simply by a more extended statement of the principle. They are not, even in theory, subject to enumeration, because we would have to include not only these cases (like adverse possession) in which some institution has already provided that profit can be gained through a wrong, but also those numberless imaginary cases in which we know in advance that the principle would not hold. Listing some of these might sharpen our sense of the principle's weight (I shall mention that dimension in a moment), but it would not make for a more accurate or complete statement of the principle.

A principle like 'No man may profit from his own wrong' does not even purport to set out conditions that make its application necessary. Rather, it states a reason that argues in one direction, but does not necessitate a particular decision. If a man has or is about to receive something, as a direct result of something illegal he did to get it, then that is a reason which the law will take into account in deciding whether he should keep it. There may be other principles or policies arguing in the other direction - a policy of securing title, for example, or a principle limiting punishment to what the legislature has stipulated. If so, our principle may not prevail, but that does not mean that it is not a principle of our legal system, because in the next case, when these contravening considerations are absent or less weighty, the principle may be decisive. All that is meant, when we say that a particular principle is a principle of our law, is that the principle is one which officials must take into account, if it is relevant, as a consideration inclining in one direction or another.

The logical distinction between rules and principles appears more clearly when we consider principles that do not even look like rules. Consider the proposition, set out under (d) in the excerpts from the Henningsen opinion, the 'the manufacturer is under a special obligation in connection with the construction, promotion and sale of his cars'. This does not even purport to define the specific duties such a special obligation entails, or to tell us what rights automobile consumers acquire

as a result. It merely states - and this is an essential link in the Henningsen argument - that automobile manufacturers must be held to higher standards than other manufacturers and are less entitled to rely on the competing principle of freedom of contract. It does not mean that they may never rely on that principle, or that courts may rewrite automobile purchase contracts at will; it means only that if a particular clause seems unfair or burdensome, courts have less reason to enforce the clause than if it were for the purchase of neckties. The 'special obligation' counts in favour, but does not in itself necessitate, a decision refusing to enforce the terms of an automobile purchase contract.

This first difference between rules and principles entails another. Principles have a dimension that rules do not - the dimension of weight or importance. When principles intersect (the policy of protecting automobile consumers intersecting with principles of freedom of contract, for example), one who must resolve the conflict has to take into account the relative weight of each. This cannot be, of course, an exact measurement, and the judgment that a particular principle or policy is more important than another will often be a controversial one. Nevertheless, it is an integral part of the concept of a principle that it has this dimension, that it makes sense to ask how important or how weighty it is.

Rules do not have this dimension. We can speak of rules as being functionally important or unimportant (the baseball rule that three strikes are out is more important than the rule that runners may advance on a balk, because the game would be much more changed with the first rule altered than the second). In this sense, one legal rule may be more important than another because it has a greater or more important role in regulating behaviour. But we cannot say that one rule is more important than another within the system of rules, so that when two rules conflict one supersedes the other by virtue of its greater weight. If two rules conflict, one of them cannot be a valid rule. The decision as to which is valid, and which must be abandoned or recast, must be made by appealing to considerations beyond the rules themselves. A legal system might regulate such conflicts by other rules, which prefer the rule enacted by the higher authority, or the rule enacted later, or the more specific rule, or something of that sort. A legal system may also prefer the rule supported by the more important principles. (Our own legal system uses both of these techniques.)

It is not always clear from the form of a standard whether it is a rule or a principle. 'A will is invalid unless signed by three witnesses' is not very different in form from 'A man may not profit from his own wrong', but one who knows something of American law knows that he must take the first as stating a rule and the second as stating a

principle. In many cases the distinction is difficult to make - it may not have been settled how the standard should operate, and this issue may itself be a focus of controversy. The First Amendment to the United States Constitution contains the provision that Congress shall not abridge freedom of speech. Is this a rule, so that if a particular law does abridge freedom of speech, it follows that it is unconstitutional? Those who claim that the first amendment is 'an absolute' say that it must be taken in this way, that is, as a rule. Or does it merely state a principle, so that when an abridgement of speech is discovered, it is unconstitutional unless the context presents some other policy or principle which in the circumstances is weighty enough to permit the abridgement? That is the position of those who argue for what is called the 'clear and present danger' test or some other form of 'balancing'.

Sometimes a rule and a principle can play the same role, and the difference between them is almost a matter of form alone. The first section of the Sherman Act states that every contract in restraint of trade shall be void. The Supreme Court had to make the decision whether this provision should be treated as a rule in its own terms (striking down every contract 'which restrains trade', which almost any contract does) or as a principle, providing a reason for striking down a contract in the absence of effective contrary policies. The Court construed the provision as a rule, but treated that rule as containing the word 'unreasonable', and as prohibiting only 'unreasonable' restraints of trade. This allowed the provision to function logically as a rule (whenever a court finds that the restraint is 'unreasonable' it is bound to hold the contract invalid) and substantially as a principle (a court must take into account a variety of other principles and policies in determining whether a particular restraint in particular economic circumstances is 'unreasonable').

Words like 'reasonable', 'negligent', 'unjust', and 'significant' often perform just this function. Each of these terms makes the application of the rule which contains it depend to some extent upon principles or policies lying beyond the rule, and in this way makes that rule itself more like a principle. But they do not quite turn the rule into a principle, because even the least confining of these terms restricts the kind of other principles and policies on which the rule depends. If we are bound by a rule that says that 'unreasonable' contracts are void, or that grossly 'unfair' contracts will not be enforced, much more judgment is required than if the quoted terms were omitted. But suppose a case in which some consideration of policy or principle suggests that a contract should be enforced even though its restraint is not reasonable, or

> even though it is grossly unfair. Enforcing these contracts would be forbidden by our rules, and thus permitted only if these rules were abandoned or modified. If we were dealing, however, not with a rule but with a policy against enforcing unreasonable contracts, or a principle that unfair contracts ought not to be enforced, the contracts could be enforced without alteration of the law.[15]

Dworkin concludes

> Once we identify legal principles as separate sorts of standards, different from legal rules, we are suddenly aware of them all around us.[16]

Typically, principles operate in the area of judicial discretion. Discretion, Dworkin claims, 'like the hole in the doughnut', exists in terms of the surroundings, which in the legal case are those provided by rules. Dworkin believes that positivists cannot be using the term discretion in a 'weak' sense, (either as merely non-mechanical application or as simply in being the final authority), but must mean it in a strong sense. This strong sense, Dworkin takes to be not being bound by authoritative standards (although other standards may apply) and this is the case with 'hard cases'. The emphasis on a strong sense suggests that 'hard cases' are not so much the result of difficulties with existing rules, but rather where there are no applicable rules at all for what the court decides. (What 'hard cases' actually are will be discussed in the next section).

15. Supra, note 1, 44-9 (footnotes omitted). The principle cases are, Riggs v. Palmer, 115 N.Y. 506, 22 N.E., 188 (1889). Henningsen v. Bloomfield Motors Inc., 32 N.J. 358, 161 A. 2d 69 (1960).

16. Ibid., 49.

Against possible objections, Dworkin argues that there is nothing in the nature of principles which makes them incapable of binding a judge. Moreover, although principles may not dictate a result like a rule, this does not show that principles can't incline decisions in certain directions or shape rules themselves. Finally, although principles are admittedly inherently controversial, this doesn't rule out their use as law. Dworkin's answer to these doubts about the effectiveness of principles is that, at least, there is one case where principles undeniably have effect. This is the case when principles are used to decide on departures from existing rules; principles providing considerations both for and against change.

This concludes the already lengthy exposition of the substance of Dworkin's case. It is now possible to present the dilemmas positivism would be faced with if it accepts Dworkin's case. Dworkin believes that if principles exercised by judicial discretion in 'hard cases' were admitted by positivism, as they would have to be to give an adequate account of law, positivism would have to abandon one of its central doctrines as outlined by Dworkin.

First, the idea of a Grundnorm must be abandoned or it must be accepted that extra-legal standards play a part in judicial decision. The Grundnorm is the source of validity for rules in a legal system in the sense that it is, by showing their connection to it, that they are marked as legally valid. Principles, however, because of their nature, are precluded from this procedure. In the case of rules, the procedure operates by connecting the rule to its origin in some competent institution so that its validity relies on its pedigree.

> But this test of pedigree will not work for the Riggs and Henningsen principles. The origin of these as legal principles lies not in a particular decision of some legislature or court, but in a sense of appropriateness developed in the profession and the public over time.[17]

Principles, as varied and complex, would be difficult to include in a Grundnorm without making assumptions about its content. Moreover, it would be impossible to allow for their shifting weight and indeed their possible mutual incompatibility.

> True, if we were challenged to back up our claim that some principle is a principle of law, we would mention any prior cases in which that principle was cited, or figured in the argument. We would also mention any statute that seemed to exemplify that principle . . . Yet we could not devise any formula for testing how much and what kind of institutional support is necessary to make a principle a legal principle, still less to fix its weight at a particular order of magnitude. We argue for a particular principle by grappling with a whole set of shifting, developing and interacting standards . . . [18]

As supporting evidence, Dworkin cites the problems Hart faces in accommodating custom as a valid source of law. Dworkin thinks that principles would be like custom in this respect.

If principles cannot be validated by reference to a Grundnorm this would mean that it was not the mark of valid law that positivism takes it to be - the Grundnorm would no longer serve its criterial function and there would no longer be any clear distinction between law and non-law (a consequence that becomes more likely when Dworkin

17. Ibid., 60.
18. Ibid., 61.

asserts that 'no ultimate distinction can be made between legal and moral standards').[19] In effect this would create an intrusion of natural law thought, for morality would be taken as legally binding irrespective of positivist criteria. The alternative of abandoning the Grundnorm would be equally, if not more, unattractive.

Secondly, the positivist theory of judicial discretion is seen as inadequate, for it fails to take account of principles. There could be no strong sense of discretion because principles would fill in where rules ran out. On the other hand, positivism could not abandon a theory of discretion because it could not, as a consequence, account for 'hard cases' or judicial innovation. Nor could it, Dworkin believes, just confine discretion to the normal interpretation of open-textured rules, for this would 'trivialize' an important judicial role.

Thirdly, the positivist notion of discretion, without principles, destroys the positivist theory of legal obligation. For, if a case is not covered by a rule, then there can be no legal obligation, because this depends on there being a rule. Nor is it any better to base this obligation on the rule that emerges from a 'hard case', because this could only bind retrospectively; which would be a very unattractive theory. Acceptance of principles resolves this problem; for they would be sufficient to create legal obligation, even in the absence of rules, so that it could be quite fairly said to preexist judicial decision.

19. R. Dworkin, Social Rules and Legal Theory, 855.

In sum, Dworkin is claiming that the discovery of principles cannot be reconciled with the rule-based positivist model without major alterations. Yet the omission of principles means that positivism is partially inadequate in not providing a coherent account of judicial discretion. The solution, according to Dworkin, is to develop a theory which does justice to principles even at the cost of abandoning cherished positivist doctrines and, in particular, accepting that the model of the system of rules is only a partial account. Dworkin's theory entails taking seriously judicial denials that they ever make law, for there are always available principles. In other words, judges do discover law and not make it[20] (in as much as the resulting rules are the outcome of principles and not judicial legislation). Dworkin even embraces the idea that it is possible to arrive at a correct answer. 'For all practical purposes, there will always be a right answer in the seamless web of our law'.[21] Rather than discuss this surprising outcome, it would be well to concentrate on Dworkin's initial arguments, for it may well be that the positivist theory need not be so readily abandoned.

II

Legal Systems and Principles

Dworkin's constructive theory will not be discussed in detail here,[22] but only in regard to the purported improvements that principles would

20. Austin's reference to this as 'a childish fiction' is relevant here, Lectures, II, 634.
21. R. Dworkin, No Right Answer?, 84.
22. It is to be found in Dworkin's Taking Rights Seriously, see also Dworkin, Hard Cases, passim.

bring if included in an amended positivist model. More importantly, Dworkin's own theory can be eschewed because the reason for its development, the dilemmas of positivism, can be resolved.

Dworkin's attack on positivism will be challenged on the following grounds which are such that, even if one succeeds, it is sufficient to vindicate the model of rules:

1. Dworkin does not provide criteria sufficient to distinguish principles from rules. Principles are therefore really rules and therefore acceptable to positivism.

2. Positivism can accept principles as described by Dworkin without the alle ged consequences, retaining a Grundnorm, a theory of discretion and a theory of legal obligation based on rules.

3. Dworkin misunderstands discretion, so that there are no hard cases as he believes. This includes Riggs and Henningsen, which are readily understood on the positivist model.

Finally, even if Dworkin's criticism succeeds:

4. Dworkin's constructive solution to the deficiencies of the model of rules is itself worse than the model it is meant to correct. Even if the positivist theory is found wanting, Dworkin's solution is not to be preferred.

Initially, it must be said that Dworkin's attack on positivism is somewhat unfair. Dworkin assumes that Hart's theory is designed to explain judicial decision making and interpretation. Now, whilst it is

true that Hart goes more deeply into these problems than Kelsen, he does not aim to provide a full-blown theory to rival Realism in this respect. Rather both Hart and Kelsen are centrally interested in a different range of problems and regard discretion, and the 'internal morality of law' as subsidiary problems. It ismisplaced to take what is, even in Hart's version, an outline with suggestive remarks, as an elaborate theory. Nor can it be objectively said that there is something misplaced with the positivist emphasis, for it should be observed that Dworkin, as Fuller, assumes the central features of the positivist model without analysis - concerning himself with peripheral problems, with the additional vice that these are taken as central and even typical. In other words, the exceptional becomes the paradigm. Even were Dworkin's concerns taken as important, there would be grounds for saying that, partially, they would form a different enterprise, as the subsequent development of Dworkin's thesis indicates. In addition, Dworkin's assumptions about the positivist model tend to present it as a simplified, logically clear-cut and dried, closed system; which is taken as sharply denying any 'influences' outside straightforward rules.

1. The all-important distinction that Dworkin makes between rules and principles is unclear. Initially, the distinction seems to rest on the role of application and, in particular, on the concept of weight. Rules are supposedly applicable in a straightforward way as valid or invalid ('applicable in an all or nothing fashion').[23] This is because exceptions can be stated in the case of rules. With

23. Supra, note 1, 45.

principles this cannot be so, because the weights of principles vary from case to case. This, Dworkin claims, can be seen in cases of conflict; where rules conflict one is invalid (either an exception is made to one on the basis of the other or not), whereas this is not so in the case of principles. Indeed, Singer,[24] on whom Dworkin draws, claims that principles never conflict because a more complete specification of the situation would show which principle had more weight; although this would not mean that the other principle did not have weight also. It is because of the weight factor that there is no valid/invalid distinction to be drawn for principles.

Can exceptions be made to rules? Dworkin thinks that they can in principle, so that a list could be exhaustively given of all of them.[25] Obviously, there would be severe limits on this in practice as well as in the required foresight. Moreover, because of inevitable vagueness, it would be difficult to make exceptions in any clear-cut manner. This would be exceptionally difficult in a rule of precedent. Dworkin does not explain how this might be accomplished, and there seems to be no reason why such exceptions would be fixed enough to enable them to be exhaustively stated. Rules, on the other hand, do seem to have a dimension of weight. Rules are not applicable in an 'all or nothing fashion' which 'dictate results, come what may'. Indeed, the difficulty is precisely judging <u>if</u> a rule is applicable.

24. M.G. Singer, <u>Moral Rules and Principles</u>, esp. 170-1.

25. This is a very idealistic view of rules. P.M.S. Hacker in <u>Insight and Illusion</u>, 138, 296-300, points out from a Wittgensteinian perspective, that a rule is properly so called if it operates sufficiently in covering most normal cases. This allows a large area of vagueness, which in turn permits an important element of flexibility. It is submitted here that Hacker's conception is far more acceptable than Dworkin's absolutist and idiosyncratic version.

There can, of itself, be no guarantee that a rule important on one occasion will be considered so on another; more so, when it is in conflict with another. The process of 'weighing' principles, described by Dworkin, seems equally applicable to difficult decisions about rules. On the other hand, it is difficult to be precise about the 'weights' of rules because Dworkin provides little enlightenment as to their nature.

I would suggest that Dworkin's criteria of differentiation fail to accomplish their role. This is because there is no clear distinction where Dworkin wishes to make it. Dworkin tends to define each term in terms of its opposite, without any independent differentiation. The point seems to be conceded when Dworkin states that neither form nor function is a clear means of differentiation.[26] Perhaps this is not unexpected in the case of form, given the flexibility of language, but it is a serious admission to allow that rules can act as principles - why not admit that principles <u>are</u> rules? Admittedly, language may not be the best logical guide, but the idea of rules 'containing' principles seems to be a further concession which erodes the purported distinction. Dworkin has thus failed to give a logical criterion of differentiation.

There is, however, a difference of degree, which positivism, because it is not committed to the rigidity Dworkin attributes to it, can accommodate. The clearest way this can be stated is to point to the degree of specificity. 'Principles' as so called by

26. <u>Supra</u>, note 1, 48.

Dworkin can thus be classed as part of a spectrum of rules in degrees of abstractness. Rules, as defined by Dworkin, are specific and as such it is possible to have a clearer idea of likely exceptions. However, unless these exceptions are specified in advance, they will merely be the outcome of the weighing process that Dworkin thinks applicable only to 'principles'. (This is qualified below.) 'Principles', because vaguer, are unlikely to generate obvious exceptions. This difference is reflected in the linguistic form, rules being formulated with some precision whereas 'principles' are given as unqualified expressions.

Behind this difference lies the second spectrum: that of systematization. Rules are generally part of a system; as such, it is important that conflicts should be resolved. This makes it look as though rules are valid in a clear cut way, but this is not a logical characteristic.[27] Rather it is part of the demand of systematization. Indeed, it is not so much an extensive list of exceptions that operates, as some more straightforward principle of decision or of derogation (e.g. lex posterior derogat priori) or simply that rules have more fixed weights. Such a procedure is far more practical in systematic terms than lists of exceptions. 'Principles' on the other hand are not so systematic and so conflicts are not pre-resolved rather they are more capable of resolution on each occasion. 'Principles' do conflict as much as rules, but there is no simplified decision procedure, each case is considered on its merits. 'Principles' may be initially equally valid until weighed, but this is true also of rules

27. See chapter 12, infra.

(this after all is why there is a problem), and this is resolved by rendering one as inapplicable. Because this does not happen with 'principles' it seems as though both remain valid - despite the decision of a particular case - (but this is also true in rules unless the derogation procedure is final, as Kelsen was to show in his later view of conflicting norms).[28] It is not surprising that rules seem more readily applicable, for this is essential to the maintenance of the system where it is necessary to have a determinate decision, reliability and certainty.

From the foregoing it is not surprising that rules are more appropriate to law and principles to morality. However, these are not mutually exclusive categories, and there is no reason to claim that legal systems should not contain rules that tend towards principles, nor to claim that such principles must (because they are principles) be moral. Indeed, if this is accepted, the notion of a Grundnorm becomes essential to the identity of the legal system.

Dworkin cites, in particular, the use of principles to change rules. From this, however, no logical distinction can be inferred. Generally speaking, the more abstract standard would be 'higher' and therefore able to justify either change or continuity of lower standards. This does not mean that there is a set of principles above a shifting mass of rules. A rule could be used as a standard to change other rules at one time, yet itself be changed another. This is only to point to the fact that rules can fulfil both functions without any alteration in their nature.

28. See chapter 10, infra.

2. If, despite the previous argument, it was claimed that, notwithstanding the lack of a clear distinction, there was an important, if vague, difference, could these principles be accepted? In short, could the model of rules accommodate principles as a logically specific type of standard? The basic problem is that of validity because Dworkin claims that principles could not be validated by means of a Grundnorm, because of their intrinsic nature.

> We argue for a particular principle by grappling with a whole set of shifting, developing standards . . . We could not bolt all of these together into a single 'rule', even a complex one.[29]

But this does not seem to be true. In fact there are at least three ways in which principles could be validated by a Grundnorm, without relying on anything so vague as a 'sense of appropriateness'.

First, given the lack of a clear distinction between rules and principles, some principles could be validated as rules are.[30] (Dworkin does not challenge the validation of rules as such.) Principles could also be validated by means of rules in which they are a component; a possibility allowed by Dworkin's admission of this internal relation.

Secondly, in the case of vaguer principles, this validation can be indirect. This seems more representative of how Dworkin sees principles and so more attention will be given to this type. In this case,

29. Supra, note 1, 61.
30. Hart actually uses 'rule' to embrace 'standards and principles', supra, note 6, 121.

principles act as summaries or portmanteau rules. Dworkin's failure to recognize this stems, as Raz points out,[31] from his neglect of individuation. Principles in this sense play a vital role in individuation, filling the unhappy gap left by the impossibility of stating exceptions to rules in a systematic context. (In this sense they further erode the sharp edges of rules that the idea of exceptions provides). Principles therefore state, portmanteau-fashion, a whole range of rules without undue repetition.

> We often have need to refer summarily to a body of rules without specifying their content in detail. Such references are frequently made by courts in justifying their decisions. These references usually take the form of a statement of principle, but they are not statements of the content of laws of a special type, namely legal principles.[32]

An example of this usage would be a principle of freedom of speech which refers eliptically to all laws touching on the subject, such that this principle can be said to be 'recognized'. Much the same can be said of the principle 'no profit from crime' in Riggs and principles about contracts in Henningsen. It should be clear that this type of principle is well qualified to serve as a standard of changing rules. Raz suggests in this connection that principles, inter alia, (1) make interpretation in a coherent manner possible by generalizing amongst laws on the same subject, (2) stemming from this interpretation role, they allow laws to be changed in the light of other laws on that subject, (3) they provide the grounds for making exceptions in particular decisions by encapsulating a body of laws

31. J. Raz, Legal Principles and the Limits of Law, 827-8.
32. Ibid.

which conflict with the most obviously applicable rule, (4) they provide a base to create new rules, by building on those that already exist.[33]

Thirdly, a principle can be specifically validated by the Grundnorm. Even 'non-legal' principles can be validated thereby becoming law. This may be by validating judicial discretion but limiting it by enjoining adherence to moral or political principles - even those as vague as 'natural justice'.

Having admitted principles by reference to a Grundnorm, the remaining positivist theses of discretion and legal obligation can be catered for, because it is clear that they are tied to rules and have no independent validity. (It must be admitted that the rule of recognition is more vulnerable because it relies on acceptance for its validity and it may not be immediately clear why acceptance of principles independently should not validate them without a rule of recognition. This is not a difficulty with the Grundnorm because it is not a practice, but a presupposition). There are, then, no principles outside rules.

3. Even if there are principles distinct from rules and they are incapable of validation by reference to a Grundnorm, do they ever enter law? According to Dworkin, principles come into play in 'hard cases'. What are 'hard cases'?

33. Ibid., 839.

Dworkin's concept of 'hard cases' seems to lack hardness. Generally, 'hard cases' are when rules 'give out' and cannot determine judicial action; leaving a set of cases for judicial discretion. This is a very bizarre interpretation of positivism (as one assumes it is meant to be). Hart does not speak of hard cases and, in the passage Dworkin cites in support of his attribution, is actually stressing how much needs to be done in examining the 'creative function left to them by the open texture of law in statute or precedent'.[34] Perhaps Dworkin has been misled, taking Hart's discussion of penumbral cases, into thinking that this is a clearly defined group. This would still be a most odd interpretation in the light of Hart's (and Kelsen's) emphasis on the degrees of vagueness of rules and the 'essential continuity' of the spectrum of discretion. Moreover, Hart, in context (as seen above), is pointing out the shortcomings of the extremes of 'rule-formalism' and 'rule-scepticism', showing an area of agreement yet inherent vagueness. Rather, the positivist theory is that hardness, in some degree, is ubiquitous. Indeed, common sense might suggest that litigated cases must present some hardness otherwise, if the rule was straightforward, there would be little point in actually taking the case to court. Rules do not suddenly run out as Dworkin assumes, but become more and more open to interpretation. Once again, Dworkin has attempted to impute a sharp dichotomy to positivism where none exists. The positivist theory in this respect is even clearer in Kelsen who explicitly states

> There must always be more or less room for discretion, so that the higher norm in relation to

34. Supra, note 6, 44.

> the lower one can only have the character of a frame to be filled by this act . . . Hence every law-applying act is only partly determined by law and partly undetermined.[35]

This view is the outcome of Kelsen's insistance on the inevitable combination of application and creation in a dynamic system.

Are there 'hard cases' in Dworkin's sense of the term? If we take it that a non-hard case is one where a rule is straightforwardly applicable, this leaves us with two possible types of 'hard cases'. Where there are more than one rule available or where there are no rules at all. But it cannot be that the former is intended for no principle is needed, rather a resolution of rules already there.[36] This resolution can be achieved in keeping with the model of rules, as pointed out above, either by weighing the rules themselves or using rules and principles as portmanteau statements of rules. Such resolutions seem adequately described as problems of the penumbra which, as pointed out, are not hard cases. The problem then, only arises because Dworkin has an unnecessarily absolutist conception of a rule.

Alternatively, 'hard cases' may not be cases where rules are somehow inadequate, as Dworkin suggests in 'Judicial Discretion', but rather where rules have actually 'run out', in the sense that there are no rules. The fault in this version is that there are no 'hard cases'. Anyone not able to base a case on a rule of law simply has

35. Kelsen, The Pure Theory of Law, 349, c.f. Hart, supra, note 10, 27.

36. This is suggested by Dworkin's definition of a 'hard case' in Hard Cases, 1060, as being 'when no settled rule dictates a decision either way'.

no case. Admittedly, principles must be argued, but unless the case is to be dismissed,[37] these must be grounded on rules in the manner already indicated. Nor can there be no rule in a strict sense, for the prima facie gap is readily filled merely by extension of existing rules in many cases (e.g. electricity is included as 'property' for cases of theft).

Riggs does not exemplify a 'hard case', for there was a rule, but doubt about its applicability resolved in terms of legislative intent and the 'no profit' principle summarizing other relevant laws. Henningsen also is not a 'hard case', for although Dworkin says that Henningsen 'was not able to point to any statute, or to any established rule of law',[38] this becomes 'no established rule seems to be suitable',[39] which is ammended to 'certain rules about automobile manufacturer's liability were altered'.[40] Indeed, Henningsen and Riggs were argued in terms of rules because the problems arose because of rules. The rules did not 'run out', but were reached by weighing (particularly in the complexity of Henningsen). To put it simply, the problem was not that there weren't rules, but that there were too many! This is ignored by Dworkin because this operation is excluded by his definition of what rules are.

In consequence of the above arguments, the model of rules can withstand Dworkin's criticism. True, there is, by the degree of dis-

37. Even dismissal is in fact a rule.
38. Supra, note 1, 44.
39. Ibid., 55.
40. Ibid., 58.

cretion, some degree of retrospection; which, with the ubiquity of 'hardness', also becomes ubiquitous. Yet it must be said that this seems to be demanding more certainty than legal obligation would ordinarily require. In any theory of law, as rules or not, a law cannot be totally settled in advance of all cases and it is only frank to recognize that this may be inevitable, because rules do not 'apply themselves'. It might also be that the Realist case has been implicitly assumed here by Dworkin in thinking that lack of predictability means that the rule is correspondingly tenuous.

Dworkin's other point about positivism and discretion is also shown to be unfounded. Dworkin is dismissive of non-hard case discretion.

> The proposition that when no clear rule is available discretion in the sense of judgment must be used is a tautology. It has no bearing, moreover, on the problem of how to account for legal principles . . . The positivists speak as if their doctrine is an insight . . .[41]

But all this is wide of the mark. No such claims were made, nor is the doctrine designed to account for principles as, in Dworkin's sense, they do not figure in legal systems. Dworkin has invented a theory, attributed it to positivism without justification, and then demolished it. Dworkin may think that without this theory, positivism on this problem is reduced to 'triviality'[42] - but he doesn't show this.

41. Ibid., 55.
42. Ibid., 59.

Dworkin also thinks that positivism is committed to an undemocratic theory in that it effectively enrols judges as 'deputy legislators' who have not been elected.[43] Now, from the absence of 'hard cases', the role of judges as law-creators appears unexceptionable; because necessary for any individuation of law. This does not entail that any creation is unrestrained, as Dworkin implies, for judges are always partly applying law as well (as Kelsen points out).[44] It would only create a problem in the non-existent 'hard cases'. Dworkin's own solution in hard cases itself seems similarly undemocratic. It is to this we can now turn.

4. From the above considerations, positivism can be seen to emerge unscathed from Dworkin's challenge. However, even were Dworkin's case proven, there are additional reasons for doubting his own solution of principles. Assuming that there are genuine hard cases in which there are no rules, how can principles solve the problem? Given Dworkin's characterization of principles, it is difficult to see how they can provide any remedy. It is left unclear how the vagueness and shifting weights of principles can provide any ground for a decision, much less a decision that is correct as Dworkin claims. A further difficulty arises in knowing what is to count as a 'principle'. Without a validation test, directly or indirectly to a Grundnorm, it cannot be said with any certainty what is a legal principle. The 'test' suggested by Dworkin of a 'sense of appropriateness'[45] would hardly help. Now it may be that this is really an

43. R. Dworkin, Hard Cases, 1058.
44. Supra, note 35.
45. Supra, note 1, 60.

invitation to reintroduce a natural law theory; but, even so, no test of validity is provided at all - anything could be a principle. In Dworkin's lengthy discussion of this point, we are presented instead with the confessedly superhuman Hercules J. (who is contrasted with a supposedly positivist Herbert (Hart?) J.).[46] The reliance on Hercules of 'superhuman skill, learning, patience and acumen'[47] might lead to the impression that this has little relevance to actual legal systems. Hercules J. apparently not only has access to definite knowledge of what are the (fixed?) principles of his society, but can, despite their characteristics, get determinate answers to particular cases. Moreover, Hercules J. must develop 'a full political theory that justifies the constitution as a whole'.[48] The dangers in this notion probably do not need to be spelt out. Rather than hitting on the correct solution, the introduction of Scorer's Discretion seems more practically likely. What are the principles? How are weights decided? Are there always relevant principles? How do we know that principles themselves don't deadlock? Is there no discretion between principles?

It is also hard to understand how principles can create legal obligation given their admitted character. Indeed, if they are used when rules 'run out', it entails vagueness as the answer to the search for clarity. If we are worried by discretion creating obligation retroactively, this is not assuaged by the remedy of resort to

46. Supra, note 43, 1103.
47. Ibid., 1083.
48. Ibid., 1084.

the shifting galaxy of principles. In other words 'hard cases' only become 'very hard cases'.

Also of concern is Dworkin's moral theory which supports the judges' extra-legal ramblings. This includes 'moral facts' which support the idea of a correct answer and the reintroduction of Blackstone's 'childish fiction' that judges only find law.[49] (Probably also a confusion is involved between the decision as ultimate and as infallible, a confusion Hart points out,[50] at least in any practical instance of Dworkin's idea). This line of argument produced by Dworkin has obvious natural law affinities. As Kelsen remarks:

> Traditional theory will have us believe that the statute, applied to the concrete case, can always supply only one correct decision and that the positive-legal "correctness" of this decision is based on the statute itself. This theory describes the interpretive procedure as if it consisted merely in an intellectual act of clarifying or understanding; as if the law applying organ had to use only his reason but not his will, and as if by a purely intellectual activity, among the various existing possibilities only one correct choice could be made in accordance with positive law.[51]

Much the same may be said of Dworkin's thesis with the exception that 'principles' replace 'statute'.

If the above arguments in support of the model of rules are accepted and the indications of the model of principles are seen as

49. Supra, note 21, see also supra, note 20.
50. Supra, note 10, 28.
51. Supra, note 35, 351.

unsatisfactory, then the position is that as stated by Hart

> We are invited to include in the 'rule' the various aims and policies in the light of which its penumbral cases are decided on the ground that these aims have, because of their importance, as much right to be called law as the core of legal rules whose meaning is settled. But although an invitation cannot be refuted, it may be refused . . . everything we have learned about the judicial process can be expressed in other less mysterious ways.[52]

This may seem to Dworkin to be 'trivial', one might also say it is more judicious than the alternative.

Finally, an extra dimension should be added by consideration of Kelsen's notion of a dynamic system. It is apparent from Dworkin's discussion that the model in question is a static one. Unfortunately this model is at its most misleading precisely at the point of discretion. If a rule grants powers then further flexibility is added to that already inherent in interpretation. Given a dynamic model, it is quite consistent that positivism could countenance discretion of a most radical kind. For example, the already mentioned articles of the Swiss Civil Code[53] explicitly grant wide ranging judicial discretion, but such a rule need not be explicit, <u>any</u> may be construed from the operation of precedent and so on. Kelsen is prepared to accept a system approaching Scorer's Discretion, that of a Platonic judge, which would require only the single empowering norm, that what the judge decides is law.[54] Nevertheless, unless arbitrary, further rules built on past decisions would be generated.

52. <u>Supra</u>, note 10, 28-9.
53. See chapter 5 at note 65, <u>supra</u>.
54. Kelsen, <u>General Theory of Law and State</u>, 144.

III

In the foregoing section it has been suggested that Dworkin's attack on positivism fails. Very largely this is due to his interpretation of the positivist thesis of judicial discretion, which is oversimplified and even simply wrong. The main flaw in Dworkin's analysis is that, in considering whether the legal system comprises rules, he adopts a peculiar notion of what a rule is. It is precisely the assumption, that a rule could be definitively stated, made by Dworkin at the outset, that is at fault. This leads him to look for some standard that could be used in the interstices of such rules. But this is not a positivist thesis. Rules are inherently vague and, as both Hart and Kelsen see, it is precisely the indeterminacy of rules where judicial discretion is required (and weighing takes place). There are no fixed edges to a rule, its applicability is not something deduced from its statement, but is a <u>decision</u>. A list of exceptions cannot simply be drawn up, even in principle, but must be decided in each case. Dworkin's model would only be applicable where judicial discretion had <u>already</u> been in operation and even then where it had produced very compendious and clear limits to rules. But in that event Dworkinian discretion would be superfluous, either it would be judged that a case would fall under one of these determinate rules or there would be no case at all.

IV

Rules and Ideology

Although there are conclusive reasons for adopting an analysis based on rules and for rejecting the extreme realism of Llewellyn's famous remarks, it should be pointed out that rules serve an ideological function. This lies at the bottom of Dworkin's concern over cases of strong discretion. Ideologically, rules serve as the 'rule of law' in opposition to arbitrary power. It is therefore essential that arbitrary elements in a legal system should not only be limited but also should appear to be so. Given the task of law in resolving disputes, the need to appear objective (an appearance that rules provide) should be obvious, particularly when, in the nature of things, usually one party will lose his case. Rules, therefore, suggest public checkability, impersonality and a lack of bias. If justice is 'irrational' it cannot be attained, the alternative is peace and rules help create this. This is especially evident when law is considered as essentially coercive.

The danger in the notion of rules lies, not in their existence - given the lack of an alternative - but in their corruption (in other words, masking arbitrary decision in their guise). This is to admit something of the realist argument in some cases. In addition, attention should be directed at semi-judicial proceedings of arbitration and administration where rules play a less significant role. Finally, rules, in performing their function, make the law impersonal, yet this leads to some element of bad faith, for it may encourage literalism in interpretation so as to evade responsibility.

Dworkin is, however, extending the ideology of rules, even although he is including principles, in reducing discretion to nothing.

Chapter 7

Fuller and Positivism

Fuller's concept of the internal morality of law (hereafter I.M.L.) has been developed over a long period and, more recently, in opposition to the legal positivism of Hart. Fuller's main statement of his thesis is given in 'The Morality of Law', although his earlier views on the role of purpose in law add much to an understanding of his thesis. Initially, an account of what Fuller is actually claiming will be given. Following this, Fuller's attitude to positivism will be discussed, in particular why Fuller thinks positivism fails to provide an adequate account of law. It will then be possible to examine the validity of Fuller's account and to challenge its importance.

I

Fuller and the inner morality of law

Fuller's account of law might be described as a natural law theory, but this, of itself, would not do justice to the novelty of his theory. Traditional natural law theory, as has been seen, has taken the form of a supra-legal order which serves as a substantive standard by which positive law is judged. Whilst not denying this external moral standard, Fuller claims that law is itself inherently moral in a formal sense - thus avoiding the problems of substance in older natural law. Morality, according to Fuller, is not normally

analysed by legal philosophers and Fuller claims to remedy this with the distinction that he makes between 'a morality of duty' and 'a morality of aspiration'.[1] These two moralities are on a single scale, ranging from the most basic duties necessary for the survival of society to the highest realization of human potential. This distinction has a long heritage; for example, Bradley employs a similar distinction.[2] Fuller's distinction has been attacked, particularly by Summers,[3] but it is sufficient for the present that it is accepted for the basis of argument. Fuller maintains that, thus equipped, we can see that law has an internal morality which is 'largely a morality of aspiration'.[4] It is now possible to state the internal morality.

Fuller relates the story of Rex who displays a peculiar ineptness at making law. From the wreckage of Rex's legislative career and its disasters, Fuller states essential requirements for making any law.[5]

1. there must be rules that give generality.
2. they must be promulgated so that all can know what the law is.
3. they must be non-retroactive as far as possible.
4. they must be clear.
5. they must not contradict one another (or themselves).

1. L. Fuller, The Morality of Law, chapter 1.
2. Between 'My Station and its Duties' and 'Ideal Morality' in Ethical Studies, (chapters 5 and 6).
3. R.S. Summers, Professor Fuller on Morality and Law, 103-113.
4. Supra, note 1, 41-44, esp. 43.
5. Ibid., chapter II.

6. they must not require the impossible.
7. they must be constant over time and not changed frequently.
8. there must be congruence between rules and action by officials under them.

With the exception of 2 these, because of their flexibility, are a morality of aspiration. Also, because of this characteristic, there is no guarantee that these requirements will not conflict. For example, a situation may arise because of which one might have to remedy one branch of I.M.L. by retrospective legislation. Fuller accepts this, pointing out that departures from I.M.L. tend to be cumulative. Because of the aspirational character of I.M.L., it is also not possible to state when it has been completely fulfilled. For example, how clear can we make the law? On the other hand, Fuller claims that there are minimal requirements (which are duties) for the existence of law. Fulfillment of these requirements at this minimal level is a necessary condition for the existence of law.

> A total failure in any one of these eight directions does not result in a bad system of law, it results in something that is not properly called a legal system at all.[6]

It is important to point out that this claim is about law as a legal system (there can be laws that are retroactive and unclear, but the system must not be composed entirely of them). It is also a claim about the form of law, which is held to be necessarily morally good. Finally, it is partly a claim about evaluating law, but is expressed as a definition (so that ultimately a law becomes so bad it is not

6. Ibid., 39.

'really' law at all, just as a tool which can do nothing as its function is not 'really' a tool). Further aspects of Fuller's claim will emerge if we consider why Fuller thinks positivism is inadequate as a legal theory.

Fuller shares with positivism the notion that law is a system of rules. Fuller, however, does not place much importance on the positivist enterprise of analysis of that system. Fuller believes that positivism lacks a social dimension and presents a model that distorts the working of law.[7] This model is managerial, that is one of a one way projection of authority which attempts to view law in the absence of the distinctive purpose of law (or Rule of Law). Such a model represents law as brute force. Once, however, this is rejected, an analysis in terms of purpose reveals that law is a two-way process with tacit understandings and a heavy moral bias. Fuller's concern with purpose predates the full formulation of I.M.L. In an earlier debate with Nagel,[8] Fuller related the story of a boy opening a clam, deriving the conclusion that the boy's actions would only become intelligible in terms of its purpose. The moral of this was that interpretation of human action must account for its inherent purposefulness. From this it becomes apparent that Fuller thinks that positivism is committed to a behaviouristic account of the crudest

7. Ibid., chapter III, 207-9.
8. L. Fuller, Human Purpose and Natural Law, esp. 697-9.
E. Nagel, On the Fusion of Fact and Value, a Reply to Professor Fuller.
L. Fuller, A Rejoinder to Professor Nagel.
E. Nagel, Fact, Value and Human Purpose.

kind, or, at least, a position of claiming that purpose is irrelevant (as morbidly denying purpose).[9] Fuller, therefore, proceeds to give an account of law in terms of purpose. This, Fuller believes, bridges the is/ought gap that underpins positivism. Purpose is both factual and evaluative and it seems, if connected with human action, necessarily moral. Fuller seems to take the positivist claim that 'the existence of law is one thing, its merit or demerit another'[10] (that there is no necessary connection between law and morals) as meaning that law is morally indifferent in practice. Moreover, he accuses positivism of neglecting to analyse morality - taking it as any standard other than law.

> In its concern to assign the right labels to the things men do, this school seems to lose all interest in asking whether men are doing the right things.[11]

The outcome of this, Fuller claims, is both quite untrue to life and extremely dangerous; for he seems to think that positivism tries to be prescriptive, or at least encourages immorality, by giving it the title of law. It was positivism that prevailed in pre-war Germany and Fuller says,

> I cannot see either absurdity or perversity in the suggestion that the attitudes prevailing in the German legal profession were helpful to the Nazis. . . . The first attacks on the established order were on ramparts which, if they were manned by anyone, were manned by lawyers and judges. These ramparts fell almost without a struggle . . . German

9. Inferred from L. Fuller, Positivism and Fidelity to Law - A Reply to Professor Hart, 670.
10. Austin, Lectures, I, 214.
11. Supra, note 9, 643.

> legal positivism not only banned from legal science any consideration of the moral ends of law, but was also indifferent to what I have called the inner morality of law itself.[12]

The positivist version of the dilemma of a law that is too evil to be obeyed, is dismissed as

> like saying I have to choose between giving food to a starving man and being mimsy with the borogroves.[13]

Fuller also claims that this dilemma means that

> moral confusion reaches its height when a court refuses to apply something it admits to be law.[14]

In this context, he states that Kelsen's identification of law and state is the 'ultimate reductio ad absurdum of the positivist point of view'.[15] At times, Fuller seems to accept that positivism is not commited to the practical divorce of law and morals and does not deny the mutual influence; but, in so saying, Fuller is then unable to understand why law is not therefore necessarily moral.

Fuller's views, including those on positivism, have not gone without challenge. Initially it must be said that Fuller, in particular, does not seem fully cognizant of the fact that his study and that of positivism are not about the same thing. Partly as a result, Fuller seems genuinely astonished that anyone should find his thesis unaccept-

12. Ibid., 659.
13. Ibid., 656.
14. Ibid., 655.
15. Supra, note 1, 236.

able, but blames this partly on the misunderstanding of his position (which is also a source of astonishment). From the brief survey of Fuller's view of positivism, however, it might properly be asked whether Fuller is himself guilty of some misunderstanding. The idea that positivism presents a one-way projection of authority is rather bizarre; even Austin, who might be thought to fit this description, emphasised the importance of the citizen's acceptance (one might argue this is implicit in the concept of authority, as distinct from power). Nor is the charge that positivism is committed to a purpose-less behaviourism any more well founded; rather, positivism is not committed to the idea of purpose held by Fuller, as will be seen. (Thus admitting many possible purposes.) The misunderstanding of positivism's view of the relation of law and morals is most serious. Kelsen, for example, doesn't deny that morality plays a part in interpretation by courts; that it influences what becomes law; that it plays a major role in acceptance of legal systems; that it is used as a standard to judge law; that it fosters morality, and so on. Positivism merely claims that the law is not necessarily moral - 'immoral law' is not a self-contradictory term (even when law means a legal system as a whole). The distinction may not occur in practice at all times; but it is, nevertheless, implicit and is used in analysis as a means of achieving clarification. Although this point has been made in reply to Fuller, by Hart amongst others, he does not seem to grasp the point of it.[16] The counter-charge that positivism does not provide a theory of morality is rather odd; particularly in

16. Ibid., 154-9.

regard to Hart (and even more so in view of Hart's 'minimum content' of natural law theory), but also to Kelsen, given the latter's writings on justice. Conversely, one may wonder whether Fuller's 'theory' of morality really amounts to much more - comprising as it does a well established distinction and a confusing account of purpose. Indeed, it will be seen that, although Fuller presupposed an external morality of law in the traditional mould, its actual character is elusive. The charge that positivism is dangerously subservient seems particularly unfair, especially considering the history of natural law theories providing legitimation to states and the role of Bentham and Austin as reformers. More importantly, one might think that the positivist dilemma of an immoral law is not a fanciful statement, but a genuine problem. Far from being the height of moral confusion, one might say that it is Fuller, rather than positivism, who is confused at this dilemma. In order to judge this it is now necessary to turn to an examination of Fuller's own theory.

II

A Positivist Critique of Fuller

The positivist critique of Fuller's theory can be derived principally from Hart and his contributions to the Hart-Fuller debate. However, such is the nature of Fuller's theory, that it has attracted many critics and, indeed, many supporters. Some of the criticism stems from the differing nature of Fuller's and the positivist's

enterprise. It has already been seen that Fuller accuses positivists of neglecting I.M.L., the obverse of this is that Fuller is accused of neglecting central problems of the positivist analysis. In addition, criticism focuses on the 8 requirements of I.M.L. and questions their status for a variety of reasons. The major criticisms made of Fuller's theory, however, stem from the differing views of the is-ought problem. Given the argument of this thesis, that this should be so, should occasion little surprise. Fuller does not share the central positivist distinction between fact and value and it is around this point that the debate centres. This gives rise to several closely related criticisms pointing out consequences of Fuller's failure to make the distinction accepted by positivism. Partially, these tend to show that it is the 'external' morality of law that is more important - an importance that positivism does not deny, but logically separates from law itself. In this respect, Fuller's own contribution to natural law in its traditional sense and his view of morality will be dealt with. Finally, the adequacy of Fuller's theory will be assessed in the light of definition in legal theory.

In a comparison of Fuller's theory with positivism, the most striking feature is that the two theories seem engaged on quite different enterprises.[17] This is quite easily seen from the range of problems that each considers significant and the way that these

17. Hart, Review of Fuller's The Morality of Law, 1282, makes this point. Hart also says, 'I am haunted by the fear that our starting points and interests in jurisprudence are so different that the author and I are fated never to understand each other's work', ibid, 1281.

are not of common concern. Whilst positivism does not deny I.M.L., it questions both its surrounding assumptions and its importance (as will be seen). Fuller, on the other hand, is rather dismissive of positivist concerns; however, this is more unfortunate because they figure in Fuller's analysis; but in a vague and unexamined way. The idea of a legal system is important for Fuller because the I.M.L. requirements apply to a system and not individual laws. However, Fuller does not provide any analysis of a legal system - perhaps the central concern of positivism, instead there are only suggestive hints on topics like efficacy, individuation, etc. In particular, Fuller is critical of the hierarchical model of Kelsen, yet does not provide any alternative. Similarly, the notion of a rule is assumed and, apart from direct bearing on I.M.L., not dealt with in any depth. As Hart says, Fuller 'speaks throughout as if the notion of a rule were unambiguous and otherwise unproblematic'.[18] Coercion, as employed in Kelsen's theory, is also criticised as a criterion of law, yet the full implications of the positivist theory do not appear to have been appreciated, nor its subtlety realized.[19] Fuller himself does not provide any clear notion of the role of coercion, yet we can assume it is central; for I.M.L. only becomes significant if considered from the point of enforcement (an unclear law seems innocuous unless individuals are punished under it). Finally, given Fuller's antipathy to concepts such as system and coercion, it is hardly surprising that Fuller rejects the positivist notion of validity,

18. Ibid., 1281.
19. See Hart's defence of Kelsen at this point, ibid., 1288-9.

which is independent of morals. It must be said that, at the very least, positivist legal validity is clear, whereas, as will be seen, Fuller's notion of validity is very far from clear. As Hart says, Fuller merely says that law 'derives its ultimate support from a sense of its being right'. To this Hart replies, 'Is it really not possible, without weaving fictions to be more specific than this?'.[20] But what can be said about the status of I.M.L. itself?

Criticism about the 8 requirements of I.M.L. can easily be misplaced. This is largely due to the flexibility (or vagueness) of Fuller's formulation (and the exceptions he admits). For example, it is stipulated only that a total failure of I.M.L., in one or more of its requirements in a system, would result in no law. Fuller can therefore accommodate a great deal of retroactive legislation, for instance, whilst still regarding a system as law, albeit bad law. Nor is Fuller committed to the idea that a law failing I.M.L. is necessarily bad. He examines each of the requirements in turn and it is clear that a requirement may, for moral reasons, be rejected. For example, a retrospective law may be essential to cure a hopelessly unclear law. Indeed, Fuller suggests that there may be antinomies between the requirements, so that breaches tend to be cumulative. Nor is Fuller committed to total fulfillment of requirements, because they are aspirations not duties in that sense. It is only in failure that minimum adherence is lost. Fuller is not, then, vulnerable to a few counter examples.

20. Ibid., 1294.

Where Fuller is vulnerable is in regard to the status of the 8 requirements. Summers,[21] for example, claims that the list is by no means complete. Summers adds: (1) failure to establish authoritative law-making procedures, (2) failure to comply with law-making procedures, (3) failure to provide interpretative procedures, (4) failure to provide for execution. Without examining these points individually, they do indicate that Fuller has not provided for the role of institutions in his model. Partly this seems to stem from his allegory of Rex who seems to be a fairly simple Austinian commander, although one that is sensitive to his subject's reactions. Curious also is the absence of any constructive role for the courts. Once away from the simple model of Rex, it is clear that the problems created by I.M.L. failure would fall upon the courts who, ordinarily, would be expected to render laws workable. Another point can be drawn out of Summer's criticism. This is the logical point that we are given no idea of the criteria on which these requirements are based, or their relationship - we cannot therefore say if the list is complete. Indeed it isn't at all clear whether the reason for failure is the unhappiness of the subjects and the consequent loss of efficacy or some more technical reason. Despite what Fuller says, it is possible to suggest that the 8 requirements are an 'unpacking' of the notion of rules - which are taken as general and prescriptive. Indeed, with the exception of the existence of rules themselves, the remaining 7 requirements have to do with prescription in a performative sense - that is with the possibility of obedience. In the light of J.L. Austin's work, it seems that a condition of prescribing - getting someone to do some-

21. Supra, note 3, 121-3.

thing - it is minimally necessary that the thing prescribed be possible (a problem to be encountered with conflicting norms in chapter 11). Failure in this sense would mean that the 'prescription' was not genuine. In the case of I.M.L.-failure, the prescription would fail because the subject could not be said to have understood the prescription or be able to carry it out. If this is the criterion behind I.M.L., then this will apply to individual laws as well, yet Fuller makes the requirement that of a system. The difficulty here is that Fuller does not provide any idea how a 'failed' law can exist within an operative system, so that the requirement of a system looks like a failure-proof stipulation in his theory. Indeed, the stipulation of 'total failure' is not helpful for we do not know what this would be like, but rather require clarity at the point where a system contains many laws which fail I.M.L., but many which do not. In the absence of an analysis of a system, it is difficult to know why a I.M.L.-failed single law is not also a non-law by Fuller's arguments.

Although the status of Fuller's theory has been challenged, most criticism stems from what is seen as Fuller's neglect of the fact-value distinction. It is here that Hart's criticisms can be considered. I believe from the picture that has been presented of Kelsen's theory, a Kelsenian critique would resemble that of Hart in all important respects. Indeed, whilst distinguishing Kelsen's theory from his own, Hart defends Kelsen (and Austin) - even, as in the role of coercion or the Grundnorm, where the analysis differs - because they represent possible answers to problems that Hart sees as important.

Hart believes that Fuller is confusing morality (ought) with efficiency (is) and that I.M.L. are merely maxims which make law creation efficient.[22] In this sense, law is on an equal footing with carpentry (and its 'good craftsmanship'), as Fuller admits.[23] Hart, however, takes this to the less inoffensive case of poisoning, where a similar set of maxims could be drawn up. ("Avoid poisons however lethal if their shape, colour or size is likely to attract notice").[24] In Kantian terms, Fuller has confused a hypothetical with a categorical imperative - his "morality" is only a form of prudence. Hart draws the conclusion that I.M.L. is 'compatible with very great iniquity'.[25] Hart also observes:

> Only if the purpose of subjecting human conduct to the governance of rules, no matter what their content, were itself such an ultimate value, would there be any case for chosing the principles of rulemaking as a morality, and discussing whether it was a morality of duty or aspiration.[26]

In addition to this remark of Hart, the point is further brought out when Dworkin expresses Fuller's dilemma as follows:

> He wants to show that making even bad law requires some compliance with principles of morality. When he produces principles compliance with which is indeed necessary to law, they turn out to be strategic or criterial rather than moral principles. When he insists on considering them moral principles (or substitutes for

22. Supra, note 17, 1286.
23. Supra, note 1, 96.
24. Supra, note 17, 1285-6.
25. Hart, The Concept of Law, 202.
26. Supra, note 17, 1287.

> their principles which are moral) he is no longer able to show that compliance with them is necessary to law.[27]

Strangely, enough, Hart finds himself in agreement with a modern Natural law theorist, D'entrèves, who sees I.M.L. as merely 'technological'.[28] Fuller's reply to this point is an expression of puzzlement:

> Does Hart mean merely that it is possible, by stretching the imagination, to conceive the case of an evil monarch who pursues the most iniquitous ends but at all times preserves a genuine respect for the principles of legality?[29]

Fuller also expresses disgust for Hart's poisoner example. However, given Fuller's rejection of the fact-value distinction, this reaction is consistent. Hart is assuming that means can remain facts which are unaffected and unaffecting the ends which they serve. Fuller, however, is suggesting that experience shows otherwise. As Lasalle put it:

> Show us not the aim without the way, For ends and means on earth are so entangled
> That changing one, you change the other two; Each different path brings other ends in view.[30]

Fuller's views on the means-end relationship are tied up with his idea of purpose already mentioned above. Hart claims that Fuller

27. R. Dworkin, The Elusive Morality of Law, 638.
28. A.P. d'Entrèves, The Case for Natural Law Reexamined, 31.
29. Supra, note 1, 154.
30. Ferdinand Lassalle, Franz von Sickingen, cited, A. Koestler, Darkness at Noon, 193.

'perpetrates a confusion between two notions that it is vital to hold apart: the notions of purposive activity and morality'.[31] This is worth considering at some length forming, as it does, the basis for the earlier Fuller-Nagel debate on purpose.[32] It is Fuller's argument that it is impossible to interpret human behaviour without knowledge of its purpose. Fuller relates a story of the boy's actions which only become meaningful once we see his purpose is to open a clam.. Much the same can be said of law; which, according to Fuller, shows the conjunction of is and ought - is can only be explained by what it ought to be. Positivism, on the other hand, is taken as implying descriptions of merely physical behaviour, or that purpose is irrelevant. Now positivism is not committed to denying purpose, but does not concur with Fuller 'that there is at least an "intersection" of "is" and "ought", since the judge, in deciding what the rule is', does so in the light of his notions of what 'it ought to be in order to carry out its purpose'.[33] In one sense this is unexceptionable, but positivism would insist that the whole point would presuppose the distinction it invokes. No positivist would deny that 'oughts' influence 'is' nor, as Fuller thinks, would they deny the role of purpose; for example in judicial discretion. After all, since Heydon's case, that purpose has played a part in interpretation is well recognized.[34] However, it is doubtful that positivism

31. Supra, note 17, 1286.
32. Supra, note 8.
33. Supra, note 9, 662.
34. Heydon's Case (1584) 3 Co. Rep. 7b.

would wish to make purpose the sole interpretative standard (in context). After all, a law might have no purpose in any clear sense; it might have several; it might have a changing purpose. (Rather it is not the law but the maker who has a purpose if at all). Fuller's concept of purpose, however, is a rather unfamiliar one, for it at times assumes a metaphysical character. Purpose can be unconscious and indeed becomes teleological; for Fuller talks of common law as if, 'working itself pure'[35] and of laws revealing purposes of which their framers were not aware. Speaking of this usage, Nagel says

> I cannot even see in the history of the common law the operation of such a process; and I find it gratuitous to assume that the manner in which legal precedents were used in courts of common law in the nineteenth century for settling historically novel issues, would have been regarded by seventeenth century common law judges as implementations of a common end-in-view, where that end-in-view was then out of view because not stirred into active consciousness by the facts of the case being decided.[36]

Fuller also uses the concept to connect his I.M.L. to his substantive natural law, so that he says

> A purpose is, as it were, a segment of man. The whole man, taken in the round, is an enormously complicated set of interrelated and interacting purposes. This system of purposes constitutes his nature . . .[37]

35. This echoes Lord Mansfield's dictum in Omychund v. Barker 1 Atk. 21. 33. 26 Eng Rep 15, 22-23. (ch 1744), c.f. Fuller, Human Purpose and Natural Law, 703 and supra, note 9, 636. In the Anatomy of Law, 89 and in Human Purpose and Natural Law, 703, Fuller cites Wittgenstein in support of a similar point. Unfortunately, in context Wittgenstein is denying the notion of purpose that Fuller advocates. Wittgenstein, Philosophical Investigations, ss. 69, 70. On the notion of purpose see articles by Spareshott, Emmet, Laird, Taylor and Nakhnikian cited by Summers, supra, note 3, 117.

36. E. Nagel, On the Fusion of Fact and Value, a Reply to Professor Fuller, 81.

37. L. Fuller, American Legal Philosophy at Mid-Century, 461.

The striking point is that the examples which Fuller uses, of the clam and of constructing a machine from a plan, are non-moral.[38] In other words, the notion of purpose, in itself, does not make the activity moral (it might make it immoral - as there are undoubtedly bad purposes). As Cohen puts it

> the besetting sin of Fuller's jurisprudential discussions is to confuse any evaluation with moral evaluation, and any use of the term ought with a moral use of it.[39]

The point is that the existence of a purpose does not settle the question whether it is the purpose that it ought to be. Nor is there anything in purposeful activity that makes it moral, indeed, as J.L. Stocks[40] says, there is no necessary connection between morality and purpose

> Morality may call on a man at any moment to surrender the most promising avenue to his own moral perfection.

In sum, therefore, the notion of purpose will not bridge the distinction between efficiency and morality. More so because being unclear itself it can hardly clarify the problem it is introduced to resolve. Indeed, rather than merging the morality-efficiency distinction, the distinction enters the notion of purpose itself.

38. S.I. Shuman, Legal Positivism: its Scope and Limitations, 77-9.
39. M. Cohen, Law, Morality and Purpose, 644.
40. J.L. Stocks, Morality and Purpose, 29. This book supplies a brilliant attack on the notion of morality as purposeful. Even were purposes actually established, it is a further and more dubious step to argue that these really form one overall purpose. As.K. Nielsen puts it in The Myth of Natural Law, 133, 'because there are purposes in life it doesn't follow that there is a purpose to life'. Nielsen also points out that there is an equivocation between purpose as function and as intention.

Given the preceding arguments, the positivist case can be stated as denying any necessary connection between the inner and external moralities of law.[41] Positivism does not deny that law and morality are related in many ways, for example, in the way moral notions influence what becomes law, how law is interpreted, the reasons for obeying law and so on.[42] As Hart puts it

> Sometimes what is asserted is a kind of connection which few if any have ever denied; but its indisputable existence may be wrongly accepted as a sign of some more doubtful connection, or even mistaken for it.[43]

Nor is positivism committed to the view that law ought to be uninfluenced by morality; it merely maintains that a separation can be made in analysis and that the relation, however well attested in practice, is not a necessary one. Fuller does not seem to reply directly to this point and to say what the relationship is if not necessary. Given admissions made about flexibility in I.M.L., it is difficult to see that this central positivist case can be answered. In general, Fuller seems to think that the relationship is one where I.M.L. inclines towards external morality or that it 'overlaps'.[44] But if this is so, it would not meet the positivist point. Fuller seems to be arguing on empirical grounds or on practical grounds. For example, Fuller dismisses Hart's claim that I.M.L. is compatible with great iniquity, on the grounds that no examples are given - but this is not to the point.[45] (Slavery laws could no doubt meet I.M.L. but such an

41. The inner morality being conceived as an 'is' and the external as an 'ought'.
42. Supra, note 25, 198.
43. Ibid., 181.
44. Supra, note 1, 4.
45. Ibid., 154.

example is not necessary to the positivist case.) Fuller has several substantial arguments which try to counter the positivist point. First, Fuller believes 'that there is a kind of reciprocity between government and citizen with respect to the observance of laws'.[46] This means that the citizen has a prima facie duty to obey the law if it fulfils I.M.L. (I.M.L. being the government's duty). This, however, cannot show that I.M.L. is incompatable with immorality, for the duty is admittedly only prima facie. Secondly, the requirements of I.M.L. will limit what can be made law on grounds of enforceability; the unenforceable laws will tend to be immoral. Fuller suggests prohibitions on contraception and homosexual acts, but these examples make clear that a particular liberal idea of morality is in question (moreover these have been, and are, enforced with reasonable success). Upholders of a morality holding differing views would clearly not see the same I.M.L.-morality connection. Fuller also instances race laws as being ruled out by the requirement of clarity, but, as Hart points out

> It shows only that the principle that laws must be clearly and intelligibly framed is incompatible with the pursuit of vaguely defined substantive aims, whether they are morally good or evil. In particular, it does not show what the author asserts - that clear rules are not "ethically neutral" between good and evil substantive aims. There is therefore no special incompatibility between clear laws and evil. Clear laws are therefore ethically neutral though they are not equally compatible with vague and well-defined aims.[47]

46. Ibid., 39.

47. Supra, note 17, 1287. Many commendable laws use vague notions like 'fairness' etc. Perhaps Fuller would be on safer ground with the more modest claim that generally the perpetrators of evil acts are not candid about their intentions.

Fuller's response to this is to make another assumption explicit; 'coherence and goodness have more affinity than coherence and evil'[48] which in turn seems to depend on the assumption that order, as such, is good. As Hart puts it

> we need the additional premise that good ends are essentially or peculiarly determinate and bad ends are essentially vague and indefinable.[49]

Fuller's assumptions are so vague it is difficult to assess their worth. In view of empirical counter examples, it must be assumed that they have some metaphysical status, but as such, they seem highly disputable. Fuller also makes a connection with morality on the grounds that I.M.L. gives due weight to men's responsibility and rationality, assuming that these are necessarily moral values.[50] But this assumption ignores the fact that they are also values for efficiency. When Fuller claims that positivism cannot explain why retroactive or non-general laws are bad, he overlooks both the badness of inefficiency and badness in terms of the external morality.

III

Implicit in the positivist case is the notion that it is the external morality that is the important one. Here positivism is at one with traditional natural law and modern adherents such as

48. Supra, note 9, 636, and reasserted in Fuller, A Reply to Professors Cohen and Dworkin, 664.

49. Supra, note 17, 1287.

50. See C.L. Palms, The Natural Law Philosophy of L.L. Fuller and D. Sturm,, Fuller's Multidimensional Natural Law Theory. But many games or rule-governed activities also do this without becoming moral, c.f. supra, note 1, 162.

D'entrèves. Indeed it is disputed whether it is proper to refer to I.M.L. as a morality at all given that Fuller's definition seems to span any human activity that is evaluated. If, for instance, I.M.L. is compared with what is normally referred to as morality, it has very little resemblance except perhaps in the sense that a certain activity is supposed to have its 'own' 'morality' but even then one senses that the inverted commas denote an important metaphor. The importance of the external morality seems to be admitted by Fuller for he argues for its connection to I.M.L. although it receives relatively little attention in comparison. Also it must be remembered that I.M.L. is quite formal (whatever its tendencies for substantive good) whereas moral issues are substantive.[51] Perhaps the question can be put as asking how far can I.M.L. resolve the problem of obligation to obey the law. The answer, I think, must be very little - there is much more in the general context of law that seems equally important. Most importantly, however, it is clear that generally external morality is the overriding concern. The fact that a law is immoral in the light of the external morality, in any but the most marginal cases, would outweigh any goodness it has in respect of clarity, etc. The same can be said for a legal system as a whole, although the fact that Fuller stipulates I.M.L. as applying to systems disguises considerations of whether to obey bad laws which are contained in an otherwise good system. Moreover, as I.M.L. is not intended as a criterion for individual laws, it does not solve the problem of obligation as it

51. It is perhaps unfair to point out that morality itself has no internal morality, but this is presumably because it is not made.

most typically arises. Also, there may arise, even in the case of systems, a situation where a morally bad system is corrected by much legislation by its successor which, whilst morally good, breaks the requirements of I.M.L. (Both Hart and Fuller have discussed the cases arising in the aftermath of the Nazi era - in particular those of grudge-informers who used quite legal, immoral Nazi procedures to immoral ends.[52] The problem then produces a conflict between the moral desire that punishment be visited on such people with the fact that this would require retroactive legislation which was so prominent a feature of the previous regime). Even were I.M.L. and morality not seen as conflicting in certain situations, but rather I.M.L. was seen as an additional test, it seems obvious that its effect would be marginal.

A further point arises from the importance of morality in comparison with I.M.L. This is that a law can conform to I.M.L. without accepting it.[53] Assuming that I.M.L. has moral tendencies this does not prevent an unscrupulous government from adopting its form merely as a means of increasing the likelihood of obedience of its subjects. Presumably Fuller would want to dismiss such cases as untypical, although this, of course, would not answer the point about a necessary connection.

The importance of more substantive considerations is brought out if consideration is given to where the immorality of I.M.L.-

52. Supra, note 1, appendix, and Hart, Positivism and the Separation of Law and Morals, part III; E. Bodenheimer, Significant Developments in German Legal Philosophy Since 1945; H.O. Pappe, The Validity of Judicial Decisions in the Nazi Era; Fuller, supra, note 9, sections V and VI.

53. As Dworkin points out, what tends to produce goodness is not itself necessarily good, R. Dworkin, Philosophy, Morality, and Law - Observations Prompted by Professor Fuller's Novel Claim, 674-5, c.f. supra, note 3, 128.

failure really lies. For it is clear that making a law (or, if you prefer, not making a law) that is retroactive is not in itself bad; the immorality arises when such a law is enforced. It is therefore the consequences of enforcement that produce the immorality and this generally takes the form of the injustice of punishing in the absence of culpable fault (in the sense that objectively blame could not be attached to behaviour not definitely wrong and for which the subject is not responsible). Generally speaking, were not an I.M.L.-failed law otherwise corrected, one would expect it to remain inefficacious and hence ultimately to become invalid. In this sense, I.M.L. presents conditions of efficacy not morality.

If the external morality of law is more important, or even if it is seen only in connection with I.M.L., it is obviously of concern. What then does Fuller say in this traditional area of natural law? This is of interest because some writers who support Fuller have claimed that part of the misunderstanding of Fuller arises from the neglect of his substantive theory of natural law. Positivist critics have found problems in Fuller at this point. The major complaint seems to be that Fuller himself does not provide a clear theory of morality, which in view of its alleged connection with law is a serious omission in an account which, unlike positivism, does not treat morality as a separate concern. Apart from making a distinction within morality, between aspiration and duty, Fuller says little more than 'Morality . . . is concerned with controlling human conduct by rules'.[54] This is vague and also very similar to Fuller's definition

54. Supra, note 1, 130-3. Fuller distinguishes law from this simply as an 'enterprise'.

of law (which given their congruence in Fuller's theory is not surprising). Law is simply marked as an 'enterprise',[55] also controlling human conduct by rules, which suggests institutions and some degree of deliberate creation, although Fuller rejects force as a further differentiation. Morality, and its nature as distinct from law, is left in the most vague terms. The most forceful and comprehensive critic of Fuller's notion of morality is Summers.

Summers[56] criticises Fuller's notion of a duty-aspiration distinction and the accompanying idea of a scale. Summers points out how questionable the criteria of differentiation used to establish the distinction are. For example, Fuller states that duties are embodiments of the 'most obvious demands of social-living',[57] whilst aspirations are to do with excellence. Summers objects to this by pointing out how many duties there are which are not vital to social life. Fuller also claims that people are not praised for doing their duty, but are for moral aspiration.[58] Summers objects that this is clearly false. Fuller also claims that duties are normally a matter of forbearance[59] but as Summers says 'the morality of aspiration, for some persons, consists very largely of a life of abstinence'.[60] Moreover, it could be added that it is quite normal to alternate formulations of a moral demand; as a forbearance ('never lie') and as

55. 'Law is the enterprise of subjecting human conduct to the governance of rules', supra, note 1, 106.
56. Supra, note 3, 103-113, esp. 106-7.
57. Supra, note 1, 5.
58. Ibid., 30.
59. Ibid., 42.
60. Supra, note 3, 107.

aspiration ('always tell the truth'). Summers goes on to question Fuller's thesis where the distinction is established more by suggestive hints. Summers main contention can, however, be summarized simply as that Fuller does not establish his distinction in any clear way. If Summers is correct, then Fuller hasactually done little to provide enlightenment on the external morality of law.

Much as Fuller fails to provide us with a clear idea of the external morality of law, so he fails to provide any real natural law theory. Indeed, as Savarese says 'Fuller has given up all hope of formulating a substantive natural law'.[61] This may be taken as symptomatic of Fuller's problem of failing to get beyond efficiency to morality itself. Fuller's natural law theory, such as it is, seems to comprise a view of a common human nature as purposeful, rational and responsible,

> one central indisputable principle of what may be called substantive natural law . . . I would find it in the injunction: Open up, maintain, and preserve the integrity of the channels of communication by which men convey to one another what they perceive, feel and desire.[62]

As it stands, and lacking further explanation (as it does), then this is hopelessly vague. Indeed, it hardly seems substantive at all. By the standards of traditional natural law it is also impoverished, but Fuller does not commit himself further. Yet surely traditional natural law is correct in seeing the external standard as most important; a point of view that positivism would share, although

61. R.J. Savarese, Review of Fuller's Morality of Law, 257.
62. Supra, note 1, 186.

disagreeing on the nature of the relationship to law. Positivism sees the relationship as that of law as an is to the ought of morality as shown in the defence of the Pure Theory in chapter 5. In consequence, the relationship cannot be necessary according to Hume's fork. Hence the positivist case against Fuller about the separation of law and external morality shares the basic is/ought presupposition as does the attack on Fuller's concept of purpose.

IV

The positivist criticism above, taken as a whole, represents the working out of the implications of the is/ought dichotomy in its varied aspects. Reasons have been given for believing that the dichotomy reappears in the ways Fuller seeks to overcome it. However, it may be that all these arguments mistake Fuller's intentions, which may explain why Fuller finds them so incomprehensible. This has been clearly put by Nicholson who draws attention to

> Fuller's basic assumption, so basic that it is probably insufficiently emphasized, is that law per se is morally good[63]

The positivist arguments would therefore 'slash harmlessly at empty air'[64] for Fuller would, by definition, avoid any challenge - for it is not to the point to attempt to connect law and morality when they are unified in the very concept of law. As Nicholson says, the critics

63. P. Nicholson, The Internal Morality of Law, Fuller and his Critics, 318.

64. Ibid.

> have shown toomuch. What they have shown is not so much the difficulty of establishing "a necessary connection between law and morality" as its impossibility. Any attempt to make such a necessary connection must be open to the critics appeal to the logical gap between statements of law (fact) and morality (value).[65]

The truth of the positivist case is conceded, but it is shown to be misplaced. The Fuller assumption is about law, rather than particular laws, and can therefore meet empirical objections that there exist laws that are morally bad as counter examples.

The argument that 'law per se is good' is Fuller's basic point not only seems to represent Fuller accurately, but, in effect, admits most of the positivist case and therefore represents from the positivist viewpoint the only remaining support for Fuller's thesis. However, should this support, too, prove untenable, then Fuller's whole case would collapse. This will now be demonstrated.

The resolution of what many feel to be a genuine problem by definitional fiat is objectionable (especially when it is not made clear that this is all that is happening).[66] Counter examples are ruled out simply by denying them the title 'law', or by saying they are not 'true' law, yet the resort to such steps suggests a departure from normal usage. It must be observed, however, that the expression 'bad law' is not self-contradictory nor Pickwickian. Yet

65. Ibid., 319.

66. Fuller, himself, accuses positivism of definitional fiats, which he finds objectionable, supra, note 9, 631.

it seems Fuller can admit this, yet claim that law *per se* is still good. But the problem is how something can be *essentially* good when there are admitted exceptions. The answer would seem to be that this is a piece of essentialist metaphysics. Moreover, if Fuller can stipulate a definition then it is quite open for others to do so. Nicholson attempts to answer this worry by saying that 'Law is indeed thought of as something good, *ceteris paribus*; hence the sense of shock when the opposite is stated'.[67] The claim is, then, that Fuller's definition is in keeping with ordinary usage - but is it? Many would no doubt question this, after all there are many things not subjected to law or others left to non-legal or moral regulation or even left unregulated. Law is not necessarily good at least in the sense that the more we have the better we shall be, conversely, law is often seen as a necessary evil or a last resort. It may well be that some law is good in the sense that, over a range of actions, it is better that there be law, but this seems a very culture-bound view (is *any* legal order better than *none*?). I allude not just to primitive societies (society without law), but to D'entrève's observation that the assumption 'that law is essentially good' is a particularly Anglo-Saxon notion.[68] Moreover, the opposing is/ought idea that 'the existence of law is one thing; its merit or demerit another', seems quite acceptable to usage, and not just in individual cases. Usage apart, there is a clear logical distinction and even usage may be said, without fiction, to presuppose it. Nor

67. *Supra*, note 63, 320.
68. *Supra*, note 28, 23-4.

does usage necessarily fall into the trap of inferring an identity because of a common stock of concepts. Indeed, usage employs law and morality as distinct concepts.

If Fuller's definition does not square with usage, then it is merely stipulation and, by ruling out counter examples, he is achieving consistency not correctness (tautologists tell us nothing about the world). As Wittgenstein would say, he is so ruled by the theory that its maintenance, rather than accuracy, becomes paramount. Indeed, on purely pragmatic grounds, a theory that explains our common concepts, rather than setting up rival ones, would be preferable. One might draw an analogy to Hare's discussion of his reasons for preferring a formal definition of morality; on the grounds that this allows argument between beliefs which would otherwise be ruled out at the start by definition.[69] Put simply, to rule out is therefore to leave unexamined. In addition there is a practical preference for a theory which covers the widest range of prima facie cases, rather than the narrower theory-derived one.[70]

The grounds for theory apart, what does per se mean? What is its logical status? Clearly it is not an empirical matter, this can only mean that it is a metaphysical definition, and we might say too that, after all, positivism is a metaphysics. This issue will be further discussed in the conclusion. Suffice to say for the present, that positivism in this instance does not appear to prejudge the

69. Hare wishes to argue with e.g., Nazis, rather than simply dismiss them from the start, R.M. Hare, Freedom and Reason, 160. This would also avoid the converse of making a phenomenon moral ab initio by definition.

70. C.f. Hart's remarks on law as coercive, see chapter 8, section 1, infra and supra, note 25, 205-7.

issue as much as Fuller. Indeed, for Fuller there is not a genuine issue, but then the problem is that of explaining why many think there is. Fuller, on the other hand, seems involved in what has been called a 'vast definitional exercise'.[71]

Two final points can be made against Fuller's theory which also centre on the problem of definition.

First, the seemingly uncontroversial notion that law is the enterprise of 'subjecting human conduct to the governance of rules'[72] tends to rule out, by definition, other uses of law. For if this end is considered good, then I.M.L. will be, at least as a means, good too. But law has other ends and, importantly, it could be a merely legitimizing factor which disguises more arbitrary means of power. The Nazi system seems to have had this character, legal rules being perverted to disguise unrestrained power. Moreover, such a notion of law is hopelessly wide for it could equally include games and, indeed, any rule governed activity where the rules are the product of a conscious process or 'enterprise'.

Secondly, there is a deep confusion pervading Fuller's theory. It is a confusion between definition and grading. Fuller thinks that a good law is necessarily more of a law than a bad one, but anything has a set of defining characteristics by which it is distinguished from other things. However, when these characteristics are used as criteria of excellence, it is a logically different operation as

71. W.L. Morison, Review of Fuller's Morality of Law, 184.
72. Supra, note 55.

Urmson points out.[73] In short, this merely underlines the is-ought distinction in another area where Fuller fails to recognize it.

V

Looking at both Fuller and Dworkin as critics of positivism, it is clear that they share a common approach. This is to accept, or at least assume, much of the positivist case, whilst demarcating an area where positivism is deemed to fail. In Dworkin's theory, this takes the shape of reserving an area of 'hard cases', in Fuller it is in the form of law itself. Both theorists, by excluding positivism, are merely reverting to natural law, not the natural law of the traditional variety, but a natural law within the interstices of positivism. Both are faint inheritors of Stammler; in principles of justice and in justice-as-formal. Both fail. Dworkin, principally because he can only conceive of rules as having a natural law absoluteness[74] and Fuller, because he accepts the natural law merger of fact and value.[75] Thus, the two major assaults on positivism are rejected.

In discussing Fuller and Dworkin as critics of positivism, positivism has been taken as a uniform theory. This has been made possible by the concentration on basic positivist premises which are shared

73. J.O. Urmson, On Grading, 159.

74. C.f. R. Dworkin, No Right Answer?, 84 and the idea that there is one answer to every legal problem.

75. Compare Stammler's idea of natural law with a variable content with the formal nature of Fuller's 'inner morality' of law.

by Kelsen and Hart. However, having established the common basis, it is now possible to examine the differences between the positivism of Kelsen and of Hart. This will be done in the following chapter by defending the Pure Theory against Hart's criticisms made from within positivism. The differences revealed will then be shown to result from the development of twentieth century philosophy of which legal positivism is a part. Finally, the work of another theorist within the same tradition will be considered.

Chapter 8 Part 1

Kelsen and Hart

A comparison of the jurisprudence of Kelsen and Hart would require, and merit, an extended and penetrating analysis. Here, however, comparison is restricted to the most important differences, which cannot be taken as exhaustive nor as covering many differences of emphasis. Where Kelsen and Hart agree broadly, as they do in many areas, particularly in contrast to non-positivist jurisprudence, this will be taken as read. In this chapter, areas of disagreement will be discussed alone and reasons will be advanced for preferring Kelsen's jurisprudence to that of Hart in those areas. This has the effect of seeming to deny the adequacy of Hart's version of positivism. Such a denial would be unjustified. Hart's contribution to legal theory, and positivism in particular, in terms of significance, can only be compared in this century to that of Kelsen. The criticism in this chapter is advanced from Kelsenian premises and so the merits of Hart's theory are not considered in their own terms. Indeed, in the part of the chapter following, reasons will be given for the idea that the differences between Kelsen and Hart depend on philosophical presuppositions, such that there may be no absolute grounds for preferring one to another.

It may be objected that the differences between two positivist theories are unlikely to be of great moment. In reply it may be said that they may be illuminating and also, because sympathetic, lead to a more penetrating criticism of Kelsen's work. Such is more likely

to be the case because Hart often attempts to go beyond Kelsen's work in pursuit of a fuller analysis. These attempts perhaps lie behind Kelsen's jocular remark in public debate with Hart (as reported by the latter)

> that the dispute between us was of a wholly novel kind because although he agreed with me I did not agree with him.[1]

I

Given the preceding remarks, it is apposite that discussion of the relation between the two theories should begin where Hart makes an important advance over Kelsen. This is in relation to the idea that there is a minimum content of natural law.[2] Kelsen, as has been argued repeatedly, believes that law can have any content. Now, whilst this is logically unassailable, given the distinction between the law as it is and as it ought to be and the corresponding separation of law and morals, it may be possible to say more about the content of law. This is what Hart attempts. He considers if there can be any limits on the content of laws of a non-logical variety. Are there any features of the human condition that could have this effect? Hart suggests that there are, and these can be listed as: (1) human vulnerability, (2) approximate equality between individuals, (3) limited altruism, (4) limited resources, (5) limited understanding and strength of will. Hart claims that these are obvious truisms which

1. Hart, Kelsen Visited, 710.
2. Hart, The Concept of Law, 189-195.

place practical limits on the sort of thing that can be the subject of law. For example, we expect an emphasis on restraint of violence, mutual forebearance, security of ownership and some means of sanctions. Neither the truisms about the human condition nor their outcome are necessary.[3] It is quite possible that we might be quite different creatures than we are - such an eventuality could not be logically ruled out. If this were the case then the content of laws would be very different; indeed, our very concept of law would change or even cease to exist. The point may be brought out if Hart is seen as making a brilliant extension to Wittgenstein's concept of language games (or more properly what Wittgenstein refers to as 'imaginary language games').[4] Certain fundamental changes in humans or the world can be imagined so that they are very different from those as we know them. Such changes would not leave our concepts untouched. For example, in a world where objects expanded and contracted quite arbitrarily our present concept of measurement would be meaningless. This relationship between the human condition and concepts is not causal but such that there is, nevertheless, a rational relationship or, as Hart terms it a 'natural necessity'.[5] This idea may seem ridiculously platitudinous and the actual deductions about legal content stupendously slight. Therein lies its importance - because this is all that can be said. Natural law

3. Because of this Kelsen rejects a minimum content. Kelsen believes that morality could have any content, unless we accept an absolute morality which, as a relativist, Kelsen is unwilling to do, Kelsen, The Pure Theory of Law, 65, c.f. chapter 12, infra.

4. The relationship of Hart's theory to the work of Wittgenstein will be dealt with in the second section of this chapter, infra. C.f. Wittgenstein, Philosophical Investigations, 230, and Wittgenstein, Zettel, ss. 383-8.

5. C.f. Wittgenstein, Remarks on the Foundations of Mathematics, I, s. 141, 'What we are supplying are really remarks on the natural history of man . . . observations on facts which no-one has doubted, and which have only gone unremarked because they are always before our eyes'.

theory has always greatly exceeded these modest statements. It has sought a much harder connection and also a more detailed and far more extensive one. The price paid for this is that it becomes controversial and it strains the rationality of the connection. Hart, by stating only a bare minimum, is showing that, in his sense, there is at least some truth in natural law, if only in practical terms. Kelsen's argument is not, however, thereby defeated for his claim is that there is no logical connection. The difference between Kelsen and Hart can be compared to the debate in ethics between Hare and Foot.[6] Hare sets out formal criteria of morality to admit the largest amount of beliefs that claim to be moral (so as not to rule out any ab initio). Foot, on the other hand, points out that some beliefs can meet Hare's criteria yet, because they have no obvious connection with human wellbeing, etc., cannot be meaningfully called moral, in other words, there is some practical limit on the content of morality.

The preceding discussion shows the fruitfulness of Hart's approach without thereby contradicting that of Kelsen. Hart's arguments are part of his answer to what he sees as one of the three persistent questions about the nature of law ,[7] that is, the connection between legal and moral obligation. It is to another of these questions that we may now turn.

6. See e.g. R.M. Hare, The Language of Morals; Hare, Descriptivism; P. Foot, Moral Beliefs.

7. Supra, note 2, 13.

II

Hart asks 'What are rules and to what extent is law an affair of rules?'[8] Hart's answer takes us to the central notion of Hart's jurisprudence.

Hart, in the words of Austin, claims to have found the 'key to the science of jurisprudence',[9] which, in the context of Hart's usual caution, shows how much importance he attached to his discovery. The 'key' is Hart's distinction between primary and secondary rules; which is the foundation of Hart's theory and also the feature that has attracted most criticism. One way of approaching this key is to consider Hart's version of the development of a legal system (which can be compared to that of Kelsen given in the chapter on international law).

Hart evisages a pre-legal system of social morality which consists of primary rules.[10] These rules, however, suffer from certain deficiencies. They are uncertain, in that it is difficult to state what actually is to count as the rules. They are static, meaning that there is no procedure for changing them, as is likely to become necessary. They are inefficient, in the sense that their enforcement is occasional and often arbitrary. The remedy for these defects of 'primary' rules is the introduction of 'secondary' rules which correspond to each deficiency. Certainty is achieved by the adoption

8. Ibid.
9. Ibid., 20-25, 79-88, esp. 79.
10. Ibid., 89-96.

of a 'rule of recognition'; a rule or complex of rules by which the validity of other rules in the system can be related. (It is in fact Hart's version of Kelsen's Grundnorm). Change is achieved by 'rules of change' which empower the creation of new primary rules and abrogation of old ones. Efficiency is achieved by 'rules of adjudication' which regularise procedure and application of primary rules. The parallel to Kelsen's theory of the development of legal systems is obvious; yet in Hart this is not a process of centralization and institutionalization but is entirely a matter of rules. Each adoption of secondary rules is seen as a step towards law (which is not marked by sanctions as such) rather than, as in Kelsen, a development within law. Hart also tends to assume that it is law which creates secondary rules which are absent from the pre-legal system. As, according to Hart, power conferring rules are secondary, Hart tends to assume that a moral system consists solely of primary rules, which has been criticised as a far too oversimplified view of morality.[11] In consequence, Hart attributes to law the creation of powers, e.g. of marriage, which as power-conferring precede a legal system. Indeed, Hart rather underestimates how much law merely recognizes and is founded upon a preexisting settled moral system. Part of the reason for this is undoubtedly Hart's rejection of coercion as distinctive of law, this leads him to pick secondary rules instead. However, it is untrue to say, as one critic says, that Hart is merely saying that the existence of law depends on a constitution and that this is platitudinous.[12] Hart is

11. L.J. Cohen, Critical Notice of Hart's Concept of Law, 406-411, esp. 409-410.

12. J.R. Lucas, The Phenomenon of Law, 90-1.

rather pointing to a development of degrees which may eventually create an institution.

Hart's principal objection to Kelsen's theory is not that it is wrong, but that it is inadequate, because it distorts the way rules actually operate.[13] Kelsen's theory is seen as a possible alternative but one that may pay the price of distortion. In particular, by presenting rules (norms) as directions to officials of the legal system, Kelsen attains a false appearance of unity, Hart believes. The same is true, according to Hart, of Kelsen's definition of all legal rules as necessarily coercive and duty imposing. For Kelsen, a non-coercive rule that confers powers is internally connected to a coercive duty imposing norm and is not seen as independent being merely a fragment of it. (The resultant norm is thus complex).[14] Hart, on the other hand, prefers to sharply separate the two rules and to see them as autonomous rule types making up the legal system as a whole. Also rules are taken not merely as addressed to officials, but rather at the population in general.[15] Here the distinction between power conferring and duty imposing rules is discussed. Whether the latter or any law is necessarily coercive, is discussed later.

Primary and secondary rules are identified as duty imposing and power conferring respectively. In addition, they are distinguished by being on different levels - secondary rules are about primary rules.

13. E.g. supra, note 2, 35-41, esp. 38, and 239.
14. Ibid., c.f. Kelsen, General Theory of Law and State, 143-4.
15. Ibid.

(In Kelsen these distinctions are combined in a 'norm'.) As Hart puts it,

> Rules of the first type impose duties; rules of the second type confer powers, public or private. Rules of the first type concern actions involving physical movement or change; rules of the second type provide for operations which lead not merely to physical movement or change, but to the creation or variation of duties or obligations . . . while primary rules are concerned with the actions that individuals must or must not do, . . . secondary rules are all concerned with the primary rules themselves. They specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined.[16]

Building on his critique of Austin who, he claims, failed because he lacked the notion of a rule (something with which Kelsen would agree). Hart claims

> so many of the distinctive operations of the law, and so many of the ideas which constitute the framework of legal thought, require for their elucidation reference to one or both of these two types of rules, that their union may be justly regarded as the 'essence' of law, though they may not always be found together whenever the word 'law' is correctly used.[17]

(This last remark seems intended to allow international law as 'law' properly so called in spite of an absence of secondary rules.)[18] In the foregoing a third means of differentiating between primary and secondary rules seems to emerge in a distinction between physical and non-physical rules. However, it is clear that the essential difference

16. Ibid., 79, 92.
17. Ibid., 41.
18. See chapter 9, infra, for the consequences of this.

is one of duty/power coupled with one of levels.[19]

Although Hart claims his distinction is a key to jurisprudence because of its great explanatory power, it has been said that this is really due to its ambiguity. This ambiguity stems from the fact that Hart is actually compacting two quite separate distinctions and that these are unclear in themselves.

First level rules need not impose duties but can create powers. This point calls into question Hart's equation of public and private powers as secondary. This has been attacked by Cohen and Hughes,[20] amongst others, who point out that there is a difference between private competence and public power which reflects the respective sanctions and diffuse pressure which support them. It may be that Hart is seeking uniformity here at the cost of distortion. This may also be true of Kelsen for he equates 'norms of competence' with powers.[21] The consequences for Kelsen are not so serious, however, for he does not wish to use the 'key' distinction.

Second level rules need not create powers but can impose duties. Lee[22] has pointed out that a system is quite conceivable where second level rules do not result in power conferment, as is the case in any personal rule. More importantly, the rule of recognition, the secondary rule par excellence, actually imposes duties on courts for example

19. A much fuller list of implied distinctions is given by P.M.S. Hacker, Hart's Philosophy of Law, 20. See also, C.F.H. Tapper, Powers and Secondary Rules of Change, 248.
20. Supra, note 11, 396-9. See also G. Hughes, Professor Hart's Concept of Law, 332.
21. Kelsen, The Pure Theory of Law, 54-8.
22. K.K. Lee, Hart's Primary and Secondary Rules, 561.

in the following of precedent.

Finally, some rules of procedure and evidence do not seem to fit clearly into either distinction. Yet Hart would not wish to say that they were 'incomplete' rules, for this is basically the same move as Kelsen's 'fragmentary' norms which Hart criticises.[23]

Are the two compacted distinctions clear in themselves? It becomes clear that they are not.

First and second level are merely relative terms.[24] There is no reason to suppose that a second level rule cannot be 'about' another second level rule.[25] Nor is there any reason to think that second level rules are not about behaviour in a direct way. Conversely, first level rules can be 'about' second level rules in the sense that they refer to them and make them operative. (Indeed, all rules are about actions under rules.)

Power conferring and duty imposing are also relative,[26] for they are aspects of the same thing. For there to be duty, there must be power (in the sense of validity) and vice versa. Indeed, the two aspects are correlated for, if we regard powers as rights, the traditional relation of rights and duties is arrived at. It is

23. Supra, note 2, 35.
24. This might be called the 'vertical' distinction.
25. As the rule of recognition undoubtedly is.
26. This might be called the 'horizontal' distinction.

this relation that Kelsen marks by making duties to be inferred from powers which are in turn directions to judges. This makes the relationship clear, whereas Hart does not give an account of it. Moreover, it is not even necessary that duty and power is split between different people. If I have a duty, I must also have the power to do it. If I have a duty to refrain, then correspondingly I have power to do otherwise, and so on. As Radin put it, 'The two terms are identical in what they seek to describe as the active and passive forms of indicating an act'.[27] Of course, there may be powers without corresponding duties, but not if they are exercised. This points to the fact that the exercise of a power is optional but, once the option is in fact taken, then duties are thereby also made operative. Perhaps the best argument for Kelsen's view which does not separate the two terms, by construing power-conferring laws as fragments of sanction imposing norms, is that it represents how laws actually function. If a law grants power to do something it, in the same law, imposes a duty not to interfere with the exercise of that power. It is only by this means that the granted power can be understood as a law rather than a wish. (As will be seen, Kelsen argues that the imposition of duty must be backed by a sanction, so that all norms are both duty imposing and sanction backed.) If this is correct, then it is misleading of Hart to talk as if there were two rules and also complicating in that it requires additional explanation of their relationship.[28]

27. M. Radin, A Restatement of Hohfeld, 1141 (a power given to a to do x is only the obverse of a duty on b, c and d to refrain from interfering with x done by a).

28. See D.N. MacCormick, Law as an Institutional Fact, 118, for a different formulation of this point. It should also be pointed out that duty and power are definitionally linked: A duty to refrain from 'theft' is dependent on powers of legal transfer of property, and a definition of 'property', for its sense.

In defence of Hart it may be said that the foregoing arguments presuppose Hart is making a sharp distinction and, in fact, he is merely claiming that the 'key' embraces characteristics which normally coincide along the primary/secondary line. Moreover, Hart himself says 'we have made only a beginning'.[29] It is sufficient, however, merely to point out some of the difficulties, for it is admitted that Hart provides an alternative approach to Kelsen which cannot be disproved. In this case, therefore, it is to the adequacy of the theory and, in particular, its possible distortion that we must look. So far, then, Hart's theory is seen as creating some distortion. Moreover, it involves some reductionism; for, as Hart accuses Kelsen of reducing all rules to one type, so Hart merely reduces to two. Finally, it would seem legitimate to demand more clarity of a distinction if it is to serve as the 'key' to jurisprudence.

The remaining persistent question about the nature of law, as identified by Hart, is 'How does law differ from and how is it related to orders backed by threats?'[30] In other words, is law necessarily coercive as Kelsen claims? It is in this area that Hart and Kelsen diverge most notably. (This has important consequences, as seen in the chapter on international law.)

Hart's jurisprudence is developed in criticism from Hart of Austin, and it is intended to remedy its defects.[31] Austin defines

29. Supra, note 2, 32.
30. Ibid., 13.
31. Ibid., chapter II.

law as command backed by sanction. Hart rejects this, but whereas he is right to replace command with the notion of a rule, his rejection of coercion is misleading. Austin's notion of sanction implied that all legal obligation was the result of fear of coercion, which was thus pervasive and ever present. Hart rejects this idea because he believes that coercion is untypical, being the guarantee, rather than the constant motive, of obedience. Hart also wishes to emphasise that the law is not just coercive as may be applicable to duty imposing rules, but also creates powers. Finally, Hart wishes to give prominence to the way individuals shape their lives in reference to law, by applying law themselves and following it for various reasons. It will be claimed that, whilst Hart is correct in rejecting the simple Austinian model of coercion, this does not imply that an alternative coercive model, that of Kelsen, should also be rejected.

Hart believes that a coercive theory of law distorts law by widening the notion of 'sanction' and by narrowing the notion of 'law'.[32] By this Hart means that, in order to make power conferring laws fit the sanction mould, 'sanction' is extended to cover failures in the use of powers. This leads to the idea that nullity is a sanction, so that a failed contract resulting from breaching the rules is equated with, say, imprisonment as an undesirable consequence. The other distortion is to restrict the application of the word 'law' to those laws which have sanctions, any laws failing this are treated as being only 'fragments' of laws. This thereby, according to Hart, reduces the variety of laws to a single stereotype. In the Pure Theory

32. Ibid., 35.

a further distortion arises because laws are treated as directives to apply sanctions addressed to judges. The content of a law and its consequent duties become, by this theory, either antecedent hypothetical clauses ('if X is done, apply sanction of kind Y') or are to be inferred from such directives.[33]

Speaking of the reduction of all laws to those backed by sanctions, Hart claims that the distinctive nature of power conferring laws will be lost.

> Why should rules which are used in this special way, and confer this huge and distinctive amenity, not be recognized as distinct from rules which impose duties, the incidence of which is indeed in part determined by the exercise of such powers? Such power-conferring rules are thought of, spoken of, and used in social life differently from rules which impose duties, and they are valued for different reasons. What other tests for difference in character could there be?[34]

The consequence is to 'reduce apparently distinct varieties of legal rule to a single form alleged to convey the quintessence of law', and

> . . . make the sanction a centrally important element (but it) will fail if it is shown that law without sanctions is perfectly conceivable.

It will, 'purchase the pleasing uniformity of pattern to which they reduce all laws at too high a price'.[35]

33. Kelsen, General Theory of Law and State, 63.
34. Supra, note 2, 41. MacCormick calls this a 'shaky sociological assertion', supra, note 28, 116.
35. Ibid., 38.

Does the insistance on law as coercive distort power conferring laws? Although Kelsen does not adhere to the notion of nullity as sanction, it will be useful to consider Hart's reasons for rejecting that concept. Austinians developed the 'nullity of sanction' theory to allow the sanctions model to accommodate things like contracts and trusts, the idea being that a failed contract was the equivalent of a sanction. Hart advances two arguments against this.[36]

First, nullity is connected to the rules (of contract) in a different way from how punishment is connected to the rules of criminal law. Hart claims that this is shown if we subtract punishment from rules: which still leaves a standard of behaviour. This is not the case if we take away nullity (as a punishment), for this does not leave a standard of behaviour - only a void. But this argument surely fails. True, the subtraction of punishment leaves a standard of behaviour (which Hart concedes may be moral rather than legal), but this is surely true of nullity which also would leave a standard of behaviour - a non-legal agreement or promise in the case of a contract. Hart does not see this because he has assumed that powers, as secondary rules, are peculiarly legal rather than that law recognizes preexisting powers of morality. Because of this he cannot conceive of a non-legal predecessor of a contract. But surely this is wrong. If Hart could show the standard of behaviour left by the removal of coercion is <u>legal</u> this <u>would</u> establish his argument. But Hart does not show this. Conversely, nullity is not

36. <u>Ibid</u>., 33-5, stemming from his power/duty distinction.

internally related to contracts, as Hart supposes, but is externally related, just as much as a sanction to a criminal law. This is so because nullity has to be determined by courts (and is not automatic on failure to follow required procedures), as does a criminal sanction. A difference does follow from this, however, for after the court's decision a null contract is deemed not to have existed, whereas the criminal law and the crime are seen as legally relevant. But this does not, of itself, establish Hart's point.

Secondly, Hart claims nullity is not a sanction because

> . . . in many cases, nullity may not be an 'evil' to the person who has failed to satisfy some condition for legal validity'.[37]

In other words, I may have concluded a contract that is extremely onerous when I find that it has been rendered invalid by mistake, etc. But this is surely incredible. Hart claims

> Rules conferring private powers must, if they are to be understood, be looked at from the point of view of those who exercise them,[38]

and it is this that distorts Hart's view. Hart's view, perhaps, has the merit of pointing out that it is not the nullity itself that is the sanction, for then his second argument is true. The connection of sanction to nullity is rather an external one, as Hart's first argument may lead one to suspect, and as Kelsen would believe. If a

37. Ibid., 33. Hart admits this is only a minor point, which is just as well for it is obviously purely contingent. (Consider also a criminal sanction need not be taken as a punishment by the criminal, e.g. people deliberately getting arrested to obtain somewhere to sleep.)

38. Ibid., 40. Rather, it is to whom is likely to suffer that we must look for a sanction's effect. (The sanction would be felt by the other party who did not find it onerous.).

contract is null, then sanctions will not be applied if it is breached.[39] It is not primarily in the failure to make contracts that the sanction appears, but in the failure to keep them. Now there is nothing wrong in calling a nullity a 'sanction', if it is seen that the reason for that 'evil' is the absence of any enforcement to maintain it. (This might be expressed as a negative and positive sanction respectively.) Indeed, santions being refused is the mark of nullity. Hart does not see this because he concentrates on the agent who assumes powers under contract and does not see that the correlation of this is that duties are imposed on others, which requires a sanction.In this sense primary and secondary are not distinct rules as shown above. (In other cases the disability may be merely the withholding of recognition by law.) In summary, it is argued above that because Hart thinks that there are no pre-legal powers and that the perspective should be the power creative agent he is unable to see that sanctions are pervasive, even although he does see that nullity as sanction is only an initial sanction, the real sanction following upon it.

Hart's own view of the relationship of law to sanctions is not clear. Hart believes that law without sanctions is perfectly possible but, by relegating coercion to a background, it is not made clear when it is absent. Hart offers no arguments in support of non-coercive law which he seems to concede may be really moral. To Kelsen, of course, this is nothing but the reintroduction of natural law. On the other

39. This would actually correspond to Hart's idea of sanctions as a 'guarantee' (rather than a constant threat), ibid, 193.

hand, Hart seems to assume coercion by talking of law as 'when physical sanctions are prominent or usual'.[40] Elsewhere, in arguing for the minimum content of natural law, Hart also states

> We can say, given the setting of natural facts and aims, which make sanctions both possible and necessary in a municipal system, that this is a natural necessity.[41]

These remarks suggest that Hart sees coercion as a 'natural necessity' which relies on human beings as they are, rather than logically, being tied to the concept 'law'. Such a view would not refute Kelsen's point that law is necessarily coercive, for Kelsen can be construed as meaning for humans as they are. Indeed, in his critique of natural law, he points to men as they are as the stumbling block of the ideals of natural law. Moreover, if men were so different that coercion was no longer necessary, it could be claimed that our concept of law was also radically changed.

From the foregoing arguments there is no reason to dissent from Kelsen's theory that law is coercive and that power-conferring laws are internally related to coercive norms which Hart calls 'narrowing' the notion of 'law'. Hart argues that the distinction that he makes between power and duty rules is reflected in usage, but were this so, it would not bar the Kelsenian point that analysis uncovers an essential unity to all law - coercion. Nor is the common man's idea of law

40. Supra, note 2, 84. Hart adds, 'even though these are neither closely defined nor administered by officials but are left to the community at large, we shall be inclined to classify the rules as a primitive or rudimentary form of law'.

41. Ibid., 195. Hart does not think that this is the case with international law.

clearly in favour of Hart, for it seems likely that, from that point of view, law is coercive (if only as a standard minimal motive).

One consequence of Hart's view is that he is unable to make a clear distinction between law and morality without coercion. However it will be seen in a later chapter that Kelsen's theory is not without difficulties in this respect.[42] True, Hart uses coercion as one distinguishing feature, but the others are questionable. Briefly - Hart claims that morality is distinguished by (1) its importance - yet there seems to be a clear common membership between important moral rules and those legally enforced, (2) non-deliberate change - but Hart assumes morality is a simple traditional affair, (3) voluntary character of moral offences, in that unintentionality is an excuse - but this neglects the strict liability prominent in tribal group customs; otherwise we have responsibilities towards events which we did not bring about, Hart overlooks the flexibility of moral responsibility (am I responsible for racialism merely by living in a racialist society?), (4) Hart cannot fall back on sanctions as a distinguishing mark, for he maintains that there are social sanctions behind morality.[43] Yet there are clear differences between legal and social sanctions. Briefly - legal sanctions are marked by (1) deprivation of liberty, rights or possessions, (2) legal sanctions of any type are backed by

42. See chapter 12, infra.

43. Supra, note 2, 169-176. Conversely, Hart points out the similarities, ibid., 168; 'They are alike in that they are conceived as binding independently of the consent of the individual bound and are supported by serious social pressure for conformity; compliance with both legal and moral obligations is regarded not as a matter for praise but as a minimum contribution to social life to be taken as a matter of course. Further both law and morals include rules governing the behaviour of individuals in situations constantly recurring throughout life . . . both make demands which must obviously be satisfied by any group of human beings who are to succeed in living together.'

force to prevent obstruction, (3) sanctions are determined with relative precision in regard to amount and duration (usually only one, or a few, sanctions are applied for each breach), (4) sanctions are organized and are applied by a specialized group.[44]

Given the difficulties involved in Hart's account, the Kelsenian model may be preferred. At least one of the reasons for Hart's views on sanctions appears to be his use of the game analogy where coercion is not so apparent. This analogy seems to be one reason why he finds Kelsen's theory of law, as being directives to judges, as a distortion. Indeed, Hart says that to reduce all rules to one type would 'obscure their character and subordinate what is of central importance in the game'.[45] Yet there are clear differences between the law and a game - particularly because the former, unlike the latter, is non-optional, complex, pervasive, involves changing rules and reciprocation and, importantly, is generally coercive. Whilst it would be odd to claim rules of games were directives to umpires (when the game has an umpire), it is not so to describe the law as directives to judges. It is by this means that a legal system can be understood in its own terms, rather than how it may appear to its subjects.

Hart produces one argument against Kelsen's theory of law as directives to judges. Hart claims that, on Kelsen's account, it is impossible to distinguish between a sanction and a tax because both exihibit the same form.[46] Moreover, taxes can be seen as penal and

44. J. Raz, The Concept of a Legal System, 150-1. These points will be taken up in greater detail in chapter 12, infra.
45. Supra, note 2, 239.
46. Ibid., 39.

fines merely as a tax. Not only can they have this effect, but this may be the intention (e.g. a heavy tax is imposed to discourage the activity taxed). Yet this point is a rather self defeating one, for, if commonly taxes and sanctions are not distinct, then Kelsen is only reflecting usage. Indeed, Kelsen can be seen as pointing out the essential identity, in that they are both directed at behaviour and regulating it in a broadly coercive manner. Now obviously there is a distinction between tax and sanction in most cases. Hart thinks this can only be recognized by taking a

> step outside the limits of juristic definition in order to determine when a compulsory money payment is a sanction and when it is not.[47]

This would involve, presumably, some reference to what people see as undesirable behaviour and so on. However, it is by no means clear that Kelsen is committed to this view which Hart sees as compromising the Pure Theory. What the distinction is between tax and sanction can only be a matter for the legal system to determine. Although both tax and sanction have the same form, this does not prevent the legal system stipulating which is which and in this the attitude of the population is irrelevant. Of course, there is an obvious distinction in that taxes are not normally the business of the courts which would only deal with them, not in terms of first order application, but only in second order enforcement when the first (directed by another organ) had failed.[48]

47. Supra, note 1, 721.
48. Taxes would then only figure in the antecedents to the directive to apply the norm.

In the light of the above discussion, it should be clear that Hart has not produced any clear argument against Kelsen's coercive-directive theory, except that it is 'distortive'. Yet Hart's own theory has also been seen to entail certain distortions. It should be remarked, however, that any model is bound to incur distortions simply because it is a model and not the thing interpreted. A model succeeds partly by its accuracy, but also in terms of what it is attempting to display (and in this sense the models of Kelsen and Hart may not be entirely equivalent). All models simplify, but this is inevitable for them to carry out their function. The point is neatly put by Lewis Carrol's tale of the map on a scale of 1 to 1 which, indeed, is accurate - but unusable because it covers the country!

III

Kelsen's central notion of the Grundnorm has attracted much attention. Hart, however, does not reject it, but substitutes his own rule of recognition[49] which occupies an analogous place in his system to the Grundnorm in Kelsen's. Indeed, Hart refers to the Grundnorm as a rule of recognition.[50] It is therefore valuable to compare the two concepts and discover why Hart is not content with the Kelsenian version. It may then be asked if Hart's version is an improvement.

49. Supra, note 2, chapter VI.
50. Ibid., 245, 105-6.

What is the rule of recognition? It is a sort of hybrid between Austin's organ and Kelsen's norm as the ultimate source of validity - because for Hart it is a norm resulting from a practice.[51] Speaking of the rule of recognition, Hart says it

> will specify some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts. The existence of such a rule of recognition may take any of a huge variety of forms simple or complex.[52]

> The rule of recognition providing the criteria by which the validity of other rules of the system is assessed is in an important sense . . . an ultimate rule: and where, as is usual, there are several criteria ranked in order of relative subordination and primacy one of them is supreme.[53]

> Some writers, who have emphasized the legal ultimacy of the rule of recognition, have expressed this by saying that, whereas the legal validity of other rules of the system can be demonstrated by reference to it, its own validity cannot be demonstrated but is 'assumed' or 'postulated' or is a 'hypothesis'. This may, however, be seriously misleading. . . . We only need the word 'validity', and commonly only use it, to answer questions which arise within a system of rules where the status of a rule as a member of the system depends on its satisfying certain criteria provided by the rule of recognition. No such question can arise as to the validity of the very rule of recognition which provides the criteria; it can neither be valid nor invalid but is simply accepted as appropriate for use in this way. To express this simple fact by saying darkly that its validity is 'assumed but cannot be demonstrated', is like saying that we assume, but can never demonstrate, that the standard metre bar in Paris is the ultimate test of all measurement in metres, is itself correct.[54]

51. But c.f. supra, note 19, 22, also Hart, Legal and Moral Obligation, 91.

52. Supra, note 2, 92.

53. Ibid., 102.

54. Ibid., 105-6. The remarkable assertion that validity only arises within a legal system omits its role in legal science and will be discussed fully below.

> . . . whereas a subordinate rule of a system may be valid and in that sense "exist" even if it is generally disregarded, the rule of recognition exists only as a complex, but normally concordant, practice of the courts' officials, and private persons in identifying the law by reference to certain criteria. Its existence is a matter of fact.[55]

(It may also be added that, following from Hart's theory of the development of the legal system, the rule of recognition is a luxury not a necessity.)

The rule of recognition is designed to remedy defects in the Grundnorm, principally to correct distortions and obscurities. However, it will be argued here that the Grundnorm is preferable because of the deficiencies of the rule of recognition. As Hacker remarks

> Hart's conception of a rule of recognition has occasioned much puzzlement, for his analysis is incomplete and often obscure.[56]

This can be shown in terms of the differences between the rule of recognition and Grundnorm as given by Hart.

1. The question whether a rule of recognition exists and what its content is, i.e. what the criteria of validity in any given legal system are, is regarded throughout this book as an empirical, though complex, question of fact. This is true even though it is also true that normally, when a lawyer operating within the system asserts that some particular rule is valid he does not explicitly state but tacitly presupposes the fact that the rule of recognition (by reference to which he has tested the validity of the particular rule) exists

55. Ibid., 107.

56. Supra, note 19, 22.

> as the accepted rule of recognition of the system. If challenged, what is thus presupposed but left unstated could be established by appeal to the facts, i.e. the actual practice of the courts and officials of the system when identifying the law which they are to apply. Kelsen's terminology . . . obscures, if it is not actually inconsistent with . . . (this point).[57]

The idea that the ultimate rule or norm is a fact is clearly quite opposed to Kelsen's view. Perhaps it was this assertion that caused Kelsen's affirmation 'norm is norm' on his meeting with Hart, with the consequences described in Hart's account.[58] The rule of recognition unites at the pinnacle of the system what Kelsen has struggled to separate throughout. Kelsen's objection would be that Hart cannot explain how a fact can give normativity, indeed the validity-efficacy gap is as open as ever, for what is done need not be what ought to be done as a practice. Nor, correspondingly, is it at all clear how subsidiary rules can acquire normativity from a fact. The result is that the rule of recognition cannot explain validity. This is precisely what Kelsen avoids by terminating the validity chain in a presupposition. The reason why its validity cannot be questioned is not, as Hart suggests, because of its criterial status, but because it is a fact and it is meaningless to talk of the validity of facts. If Hart is right, it must be a very odd fact.[59]

57. Supra, note 2, 245-6.

58. Supra, note 1.

59. If a practice is a fact it is always possible to ask why it should be followed. Whilst in some practices, e.g. the use of colour predicates, such a question is odd or even meaningless, in a legal system capable of reform it is not.

The difficulties in Hart's thesis can be pressed at the crucial point; that is at the exact relation between the rule and its practice. On Hart's theory, it is impossible to explain rules that are not practices. This has been pointed out by Raz, Woozley and Kemp. As Kemp points out

> The trouble here seems to spring from the fact that Hart has not moved far enough away from the view that law, and social rules in general, are merely statements of habitual behaviour. For although he makes some important distinctions between the existence of a habit and the existence of a rule, he seems to think that the existence of a rule entails the existence of a habit of obedience to it, even though the reverse entailment does not hold.[60]

An example of this would be some speed limits which are undoubted rules but do not elicit the required obedience. Indeed 'There is a rule that they should do it' does not entail 'they do it as rule' for it is not contradictory to say 'There is a rule but few or none obey it'. Nor does it seem contradictory to say 'there is a rule but it has never been practiced', or 'there is a rule that I accept as valid but I do not follow it'.

The reason for this gap is clear on Kelsenian grounds for it is the gap between validity (rule) and efficacy (practice) which distinguishes a science of norms from natural science. This relationship is subjected to careful analysis by Kelsen, but is only assumed by

60. J. Kemp, Review of Hart's Concept of Law, 190; J. Raz, Practical Reason and Norms, 53-8; A.D. Woozley, The Existence of Rules. Other difficulties of making a practice serve as a rule can be seen with the use of custom in international law and primitive societies, see chapter 9, infra. This need not deny a normal congruence, as perhaps indicated by the oddity of the statements given as examples, but what is required is something tighter than mere congruence.

Hart. The result is that the is-ought gap remains as open as ever. Even although we can admit most rules are practised, this doesn't prevent the distinction being analytically made.

The consequence of Hart's view is that it is impossible to explain the normative character of rules. That there is a practice does not mean that there is a rule that says one should follow the practice - this could only be presupposed - but it is precisely this sort of presupposition that Hart refuses to make. The rule of recognition in one sense tries to go beyond the Grundnorm in seeking a non-normative basis of validity yet, in another sense, it stops a step short of the Grundnorm with a fact which itself can only be explained, in terms of validity, with reference to a norm as its counterpart. This norm, in turn, can only be valid by virtue of a presupposition. (It is not a 'needless reduplication' as Hart thinks.)[61] Kelsen's language is not vague, but the only accurate account of what is involved - it is Hart not Kelsen who leaves things unexplained. The fusion of is and ought in the rule of recognition is surprising, given that elsewhere Hart maintains the separation as does Kelsen.[62] Surely, therefore, the separation can be analytically made in the rule of recognition and its practice, as elsewhere. Kelsen's reasoning need not be rehearsed at this point as it would repeat its statement in earlier chapters. However, Hart can be defended on the grounds that he is linking his theory to Wittgenstein's concept of

61. Supra, note 2, 230. The merger of is and ought in the master concept of the theory is reminiscent of Kant's categorical imperative as an Idea, prescriptive and evaluative.

62. Given Hart's criticisms of Ross in Scandinavian Realism for failing to maintain this distinction, it is easy to share Ross's puzzlement in reviewing The Concept of Law that Hart seems to agree that the distinction not be made in the Rule of Recognition (i.e. merger of is and ought has therefore only been postponed from the rest of the system). Ross, Review of Hart's Concept of Law.

language games as the term practice and the use of the Wittgensteinian 'standard metre' example suggest. This involves quite different suppositions from the positivist ones of Kelsen and relies on the social context of language rather than its logic. Discussion of these differences will be postponed until the next section of this chapter.

2. Kelsen speaks of presupposing the 'validity' of the basic norm . . . no question concerning the validity or invalidity of the generally accepted rule of recognition as distinct from the factual question of its existence can arise.[63]

This extends the previous point. However, a remarkable point becomes apparent because it is clear that Hart's assertion only holds true within the system; it does not explain how legal science can talk of the validity of the rule of recognition. For legal science cannot just accept it as a fact, for it has normative status within the system under analysis, nor can it, as a science, accept it as a criterion, but must presuppose it in the sense of an explanatory hypothesis to explain validity relations within the described system. This is not unrelated to Hart's internal/external distinction (which corresponds to acceptance and indifference to validity) and which fails to allow the peculiar status of legal science in being, partly, both. (Probably Hart would claim that legal science is external and on the same footing as the disaffected citizen who accepts the law as a mere fact without accounting its validity, but, even if this could be properly called external,

63. Supra, note 2, 245-6.

it can hardly correspond to the status of legal science, which itself neither accepts nor rejects validity, but as a science can only presuppose it. The 'external' citizen may be said to reject validity but still to follow the law as the basis for his actions, this is hardly true of the legal scientist.[64] The peculiarity of legal science arises because it is not <u>just</u> a description from outside but an <u>interpretation</u> of how law is seen inside. If the rule of recognition was just a fact it would only be a description of the behaviour of the practice - but legal science goes beyond this by presupposing a norm as the normative counterpart of the behaviour described.

3. Kelsen's basic norm has in a sense always the same content; for it is, in all legal systems, simply the rule that the constitution or those 'who laid down the first constitution' ought to be obeyed. The appearance of uniformity and simplicity may be misleading. If a constitution specifying the various sources of law is a living reality in the sense that the courts and officials of the system actually identify the law in accordance with the criteria it provides, then the constitution is accepted and actually exists. It seems a needless reduplication to suggest that there is a further rule to the effect that the constitution (or those who 'laid it down') are to be obeyed.[65]

64. C f. <u>ibid</u>., 87-8, 108 and <u>supra</u>, note 1, 715-6. This point is made by Ross, who also concentrates on Hart's elusiveness on this point, 'To me it is astonishing that Hart does not see, or at any rate does not mention, the most obvious use of the external language in the mouth of an observer who as such neither accepts nor rejects the rules but solely makes a report about them: the legal writer in so far as his job is to give a true statement of the law actually 'in force'.' But to this some qualifications should be added from the foregoing remarks about the 'external' citizen and about the idea of description. Hart's problem can be judged from his difficulties in understanding Kelsen's insistence on legal science using 'descriptive oughts' in its rational reconstruction of a legal system in his debate with Kelsen . Ross, <u>Review of Hart's Concept of Law</u>, 1189.

65. <u>Ibid</u>., 245-6. More accurately the Grundnorm is formal.

The Kelsenian reply to this would be that if the constitution is in terms of acceptance, then this is a fact and cannot be a basic norm. If the constitution is taken as a collection of rules, then the question arises why these are valid and, since this cannot be answered by reference to a fact, a norm must be presupposed. Moreover, it is essential to see that the constitution is a unity despite the fact that it contains many rules. Hart cannot avoid complexity, or contradiction, because he does not take the additional step of unifying the constitution (the practice of the rule of recognition need not itself be unified). He is therefore unable to provide a criterion of unity for a legal system which becomes an arbitrary collection of sets of rules. Kelsen can do this by making the Grundnorm entirely formal.

4. Kelsen's view is that it is logically impossible to regard a particular rule of law as valid and at the same time to accept, as morally binding, a moral rule forbidding the behaviour required by the legal rule . . . One reason for using the expression 'rule of recognition' instead of 'basic norm' is to avoid any commit ment to Kelsen's view of the conflict between law and morals.[66]

Hart is here pointing to part of Kelsen's theory that was to be revised. As it stands, therefore, given that Kelsen was to reject the view attributed here (discussed in a separate chapter), this is not a difference between the two concepts.[67]

66. Ibid.
67. See chapter 11, infra.

In the foregoing, reasons have been given for preferring Kelsen's version of positivism to Hart's amendments at the most significant points. These, if accepted, would mean that Hart does not show any ground for abandoning the Pure Theory. Indeed, Kelsen's version of the Grundnorm is preferred because it maintains consistently the positivist premise of the fact/value separation, and in so doing can explain the normativity of law which cannot be done by reference to a fact. The Grundnorm can also explain the unity of a legal system because, unlike the rule of recognition, it is not complex nor practice dependent. (The unity of the Rule of Recognition depends on the unity of practice, about which Hart says it is 'normally concordant').[68] The Grundnorm can also explain the identity of law by tracing a law's validity to it. This is not possible with the rule of recognition because, as a practice, there can be no certainty as to what is the rule nor, because as Hart admits, it is only a luxury which may not actually exist in law, especially in more primitive systems.[69]

That these consequences follow can be seen when Hacker, after defending Hart's thesis, makes the following points:

> . . . there is no reason why there should not be numerous distinct rules of recognition, addressed to different judicial organs, having distinct content although similar form.[70]
>
> . . . there need be no rule of recognition in a system which specifies all the criteria of validity of the system.[71]

68. Supra, note 2, 107.
69. See the earlier discussion of Hart's theory of legal development in this chapter, supra.
70. Supra, note 19, 24.
71. Ibid.

> . . . although some rules of recognition are ultimate, and although they severally serve to identify all the valid rules of the system they are not the only ultimate rules.[72]

It becomes apparent, therefore, that the rule of recognition cannot accomplish what the Grundnorm can. Most importantly, it fails to allow the special status of legal science. This last point can be seen if a distinction between the rule of recognition and the Grundnorm not mentioned by Hart is made. The vital difference between the two concepts is that the rule of recognition is a positive law (or complex of laws) whereas the Grundnorm is a juristic construction (which is why its validity is presupposed). If this is so, then the validity of one positive law is being answered by another positive law, but the validity of that second law is also in question. The only way to terminate the vicious circle is for validity to be presupposed - which is exactly what Kelsen does.

Finally, perhaps the most important difference between Grundnorm and rule of recognition needs to be emphasised. This difference arises from Hart's second objection to the Grundnorm: whilst the validity of the Grundnorm is presupposed, that of the rule of recognition cannot be questioned (and, it can be added, natural law merely asserts validity of its basic norm).[73] Hart, as his analogy of a game shows, is here making the same move as Weldon.[74] Weldon argues that just as the only reply

72. Ibid.

73. This gives a tripartite classification of answers to the problem of ultimate validity, 1. Natural law - the problem is answered with a fact (reasserted), 2. Kelsen - the problem is left open, 3. Hart - the problem cannot be raised (it is meaningless).

74. T.D. Weldon, The Vocabulary of Politics, 56-61 ('Rights'). It needs hardly be added that this short, sharp solution to one of the traditional and long established questions of political philosophy has been very controversial, even resented by some. Of course Weldon's and Hart's questions are different. Weldon is questioning the whole 'game', Hart questioning its fundamental practice, but to equate them would only require the practice (of judges) being taken as a separate game within the more general game of law.

to 'why should I obey the umpire?' is 'This is a game of cricket, isn't it?' so the only reply to 'Even if it is the law, I don't see why I should obey it' is 'Well, this is Great Britain, isn't it?'. The strength of this argument obviously depends on that of the analogy; is it as meaningless to question a fundamental rule of law, as it seems to be a rule of a game or the standard metre?[75] The answer, I think, must be no. Just as there are differences between law and a game, so there are, moral evaluation aside (being consistently positivist), questions that can be asked about ultimate legal practice that cannot be asked about the relatively simple, arbitrary, fixed and fairly unimportant rules of a game. If Hart does not wish to consider these - that is one thing, to call them 'meaningless' is another.

In summary, Hart's criticisms of the Pure Theory are seen to fail and the proffered alternatives are seen to involve disadvantages not suffered by the Pure Theory itself. The defence of the Pure Theory has here, as elsewhere, relied on invoking the is/ought distinction and also by stressing a more thoroughgoing analysis, which reflects a differing, more rigid, conception of legal science. Whilst the status of the is/ought distinction will be discussed in the conclusion, the next section will concentrate on the differing backgrounds to the conceptions of legal science held by Kelsen and Hart.

75. See this chapter, the text following note 45, supra.

Chapter 8 Part 2

In a comparison of the jurisprudence of Kelsen and Hart, such as attempted in part 1 of this chapter, numerous differences are revealed. There, however, it was pointed out that both Kelsen and Hart can be seen as representatives of legal positivism; such that, in chapters 6 and 7, a general attack on positivism represented by Hart could usually be seen as an equivalent attack on Kelsen. Whilst, of course, the first part of this chapter qualifies this somewhat, it is the task of this second part to reveal something of the differing bases within the positivist tradition of Kelsen and Hart. This can be done by an examination of the underlying philosophical theory of each jurist.

I

The jurisprudence of both Kelsen and Hart is representative of what might be called Analytical Philosophy; that is: 'Anglo-Saxon' philosophy since Russell. Yet Kelsen and Hart exemplify two distinct phases within the development of Analytical Philosophy as a whole. It will be argued that Kelsen's jurisprudence has clear affinities with the first phase of Analytical Philosophy, which is here taken to include Russell's Logical Atomism and the Wittgenstein of the '<u>Tractatus</u>' along with the Logical Positivism of the Vienna Circle (an affinity already pointed out in chapter 4). Hart's jurisprudence, on the other hand, has clear affinities with Analytical Philosophy since the Second World War, which is here taken to mean the Wittgenstein

of the 'Philosophical Investigations' and, more generally, Linguistic Philosophy. Because Wittgenstein's work figures in both phases, and was indeed in part responsible for initiating each, most reference will be to his work. The word 'affinity' is used to indicate that basic procedures in general philosophy find their counterparts in legal analysis. More loosely, however, it is here claimed that there is a correspondence of methods and a shared intellectual approach between the two phases of general philosophy and the two positivist legal theories.

The aim of the philosophy of Russell and of the Tractatus was to use logical analysis to uncover the formal structure of language hidden beneath everyday usage.[1] Indeed, the distinction between grammar and logical form is probably Russell's greatest achievement. The structure thus obtained was of a unified logical system which had none of the faults of everyday usage (diversity and vagueness), being definite and precise. The analysis revealed in the world basic units of a common logical type which it was the role of the logical structure of language to represent or 'picture'. These units were dubbed 'objects' by Wittgenstein and 'logical atoms' by Russell. In combination they built up 'facts' and ultimately the material of the world as more familiar to us. There is some doubt, however, of the exact nature of these components; for Russell, and perhaps Wittgenstein, seemed to conceive of them as ultimately sense data and therefore not external. With this view went the notion that the sole

1. The following outline summarizes, with all the attendant risks of such undertakings, B. Russell, The Philosophy of Logical Atomism and L. Wittgenstein, Tractatus Logico - Philosophicus, (Key terms are given in the index to each book).

function of language was descriptive in picturing these atoms. Further implied was the notion of a language system; for everything not picturing at least possible combinations of atoms was excluded. There were, then, Kantian limits not to experience but to what could meaningfully be said. In particular Wittgenstein took this to exclude metaphysics, ethics, religion and ultimately his own philosophy. All of these were of great profundity but, because of the picturing of language, could not be said. The Logical Positivists took a much harsher view, dismissing whatever lay outside the system as nonsense.[2] This move accompanied the elevation of science, or a certain view of science, as the paradigm of all knowledge. The desired result was achieved by the adoption of the Verification Principle which excluded all propositions that could not conceivably be verified from the system. The principal target was metaphysics, which included most previous philosophy. Finally, in giving this sketch, it should be mentioned that there is considerable doubt as to how far Wittgenstein would subscribe to the theory that the Logical Positivists attributed to him. Put simply, the latter could be described as a cruder, more consciously 'scientific' application of the former's work.

Kelsen's analysis of law shares mutatis mutandis the same basic notions of Logical Atomism. First, Kelsen believes that law is not

2. This outline is based on A.J. Ayer, Language, Truth and Logic. This is not the most recent exposition of Logical Positivism (note Ayer's qualifications in the introduction added in 1946). However it is cited as both contemporary with the formative years of the Pure Theory and as being the most forceful statement of the main ideas. (Note that non-sense rapidly becomes nonsense.)

exclusively given in its presentation by various legal systems. Beneath the 'grammar' of law there is a unified logical system which can be revealed by analysis. Beneath the diversity of laws were revealed basic units which are called 'norms' which have a common logical form as a directive to a judge to apply coercion. ('If X occurs, apply sanction Y').[3] By combination and relation to norms with the addition of particular material the normal laws we encounter are built up. Also the same element of internality is apparent in the norm being conceived as addressed to a judge and thus, only indirectly, about the world outside the system. Unlike logical atoms, norms can be, in a sense, more inclusive than their surface counterparts; for example, constitutional laws are considered by Kelsen to be incomplete norms, principally because they lack a coercive character.[4] More typically, there will be one or more norms corresponding to every law. Also, unlike logical atoms in Wittgenstein's sense of a fact (although not in Russell's counterpart), norms are internally related in a hierarchical fashion - so that each norm is dependent on others for its normative status.[5] Indeed, Wittgenstein insisted on the logical independence of each 'fact' and denied any internal relation. However, Wittgenstein came to see this view as mistaken, a more that was to undermine the whole structure of the philosophy of the 'Tractatus'.[6] The concept of a system of norms of a particular logical type is also used to exclude

3. Kelsen, The Pure Theory of Law, sections 4, 34,
4. Kelsen, General Theory of Law and State, XI B a, b.
5. Supra, note 3, section 35.
6. See e.g., A. Kenny, Wittgenstein, chapter 6 c.f. D. Pears, Wittgenstein, chapter 5.

everything not in conformity with that type. Here, just as Logical Atomism excluded ethics and metaphysics, so its legal counterpart excludes morality and natural law. Thus, both logical grammar and legal science are descriptive and do not evaluate their subject. Kelsen is also inclined to treat natural law as dismissively as the Logical Positivists were inclined to treat metaphysics.[7] Both indeed see their opponents as essentially belonging to the pre-history of their subjects. In respect of ethics, a view of evaluation as belonging outside the system is indicated in philosophy and law. As already indicated in chapter 4, legal science has a test procedure analogous to the Verification Principle; the Grundnorm. If a purported norm cannot be related to the Grundnorm it is held as invalid just as an unverifiable proposition is held as meaningless (or a pseudo-proposition). Although there is a clear logical difference between the hierarchical relationship established by the Grundnorm and the methodological status of the Verification Principle, both share a certain ambiguity. For both seem to be a basic presupposition on a par with the traditional theories attacked. Thus, the Verification Principle itself seems to be a metaphysical hypothesis, as the Grundnorm may be a natural law hypothesis (a view disputed in chapter 11). The adoption of science as a paradigm, alike by Logical Positivism and the Pure Theory, has already been mentioned in chapter 4. Finally, there is a certain ambiguity in the role of theory. Wittgenstein was inclined to see his own theory as failing in the standard of meaningfulness founded on language as descriptive. Kelsen has been

7. Supra, note 2, chapter 1, 'The Elimination of Metaphysics'.

construed, likewise, of in effect 'creating' his own norms in order to analyse law, thus also breaching his own principles. That this is not so in fact should be apparent from the preceding discussions of Kelsen's work and will be dealt with again in chapters 10 and 11.

In contrasting the first phase of Analytical Philosophy with the second, inevitably differences will be stressed more than continuities. Particularly with reference to Wittgenstein it is highly disputable whether there are continuities or rather a sharp break.[8] As far as legal philosophy is concerned, the extent of this continuity should be apparent from the preceding chapters. Indeed, in jurisprudence, the continuity is stressed by the universally accepted denotation of 'legal positivism' for both Kelsen's and Hart's theories.

The second phase of Analytical Philosophy cannot so readily be outlined in a few basic doctrines as in its first phase. In Wittgenstein's case this is due to the abandonment of the self-conscious systematization of the early philosophy. In its place there is piecemeal investigation utilizing various techniques, 'reminders' or distinctions.

The basic task of philosophy was conceived as removing confusion about language, including the reductive systematization of Logical Atomism, by careful investigation and attention to usage. The aim was no longer pursuit of a logically perfect language beneath ordinary language but, rather, to look at it in its social context and how it

8. Supra, note 6.

was used. There are affinities between this phase and later positivist jurisprudence - bearing in mind that law is inherently less complex and more systematic than language as a whole. This can be illustrated by taking some of the central themes of the 'Philosophical Investigations'[9] in conjunction with Hart's jurisprudence.

Initially the question 'what is law?' is not given a categorical answer with reference to a supposed common element.[10] Instead the question is reformulated so that it is clear what is actually being asked - principally so that the question can be answered by reference to how law operates. In his early article 'Definition and Theory in Jurisprudence', Hart rejects the older style of definition and, thereby, what seems a profoundly metaphysical problem is dissolved into a complex of genuine questions. This move can be directly compared with Wittgenstein's discussions of concepts such as time.[11] The general approach is enshrined in the slogan 'Don't ask for the meaning, ask for the use'.

Jurisprudence can draw directly on linguistic philosophy simply because law is expressed in language. As Hart says, a 'sharpened awareness of words (can be used) to sharpen our perception of phenomena'.[12] For example, as seen in chapter 6, the traditional problem of whether judges make or apply law is reduced, particularly in dis-

9. This outline is based on L. Wittgenstein, Philosophical Investigations, (the incidence of the concepts mentioned can be seen from the index).
10. Hart, The Concept of Law, 5.
11. Referred to ibid., 13.
12. Ibid., 14. Here Hart is quoting the Oxford 'ordinary language' philosopher J.L. Austin, A Plea for Excuses, 8.

cussion of judicial discretion, to the 'open texture of language'[13] which allows no precise meaning but gives a core and a penumbra of meaning. This can be compared to Wittgenstein's rejection of determinate meanings and his emphasis on application of a word as a decision. One might also add that, just as the idea of an absolute standard of certainty is no longer sought, so in judicial discretion infallibility is seen as finality in terms of practice.

A central theme of the 'Philosophical Investigations' is that of rules in language usage and action in general.[14] Much of this carries over into jurisprudence where laws are conceived of as rules. They are not analysed into rules but rather assimilated to them on the grounds of similar use. Wittgenstein employs the concept of rules in rejecting the idea of meaning as a kind of naming.[15] Naming cannot, without a rule, account for what it seeks to explain. For pointing and naming, for example, presuppose a rule that these are to count as pointing or naming. The naming model of meaning is shown to be misleading. Similarly, the command model of law cannot explain law's normativity, for it too presupposes a rule; that such a person is to be the commander.[16] The Austinian notion of habitual obedience is as unsatisfactory as the habitual association in meaning theory. Speaking of Austin, Hart says:

> The elements he uses do not include the notion of a rule or of the rule dependent notion of what ought to be done; the notions of a command and a habit

13. The expression is from F. Waismann, Verifiability, 119.
14. See supra, note 9, esp. ss. 208-38.
15. See the early sections of ibid.
16. Supra, note 10, 67-76.

> however ingeniously combined cannot yield them or take their place.[17]

Furthermore, because rules rely for their formulation on words, this, with a previous point about the 'open-texture' of language, allows Hart to reject the determinateness supposed by the idea of discovering rules and the scepticism that says a rule or law is what the judge says it is. (Rules are not predictions.)

Another theme of the 'Philosophical Investigations' is the rule-based notion of Games. Wittgenstein repeatedly talks of 'language games' which overlap and, taken together, make up language as a whole. In law the situation is less complex and this allows Hart to talk of law on the analogy of a single game. Indeed, just as Wittgenstein invented imaginary language games to show up the presuppositions of the ones we have, so Hart invents Scorer's Discretion to distinguish the Realist view of discretion and the actual practice of it.[18]

Related to games is the wider notion of a practice which is the social context of games. It is the practice or convention which is the ultimate appeal because absolutes are rejected. So the persistent questioner can ask 'does 2 + 2 really = 4?' or 'is 'red' really red?' but can only be pointed to the practice which has no ulterior justification. Similarly Hart can base the validity (justification) of a legal system on the practice of the judges. This move has already

17. Hart, Introduction to Austin, Province of Jurisprudence Determined and the Uses of Jurisprudence, vi.

18. Supra, note 10, 139-141.

been discussed in the first section of this chapter.

Wittgenstein referred to the 'motley of language'[19] in reaction to his earlier attempt to reduce language to one type. It has been seen that Kelsen argues that there is a common type or element - the norm behind varieties of law. Hart reacts against this analytical reduction, claiming that 'serious distortion' occurs when this is done. Hart's backing for this is linguistic; that laws are 'spoken of as different', in other words, an appeal to usage.[20]

With the abandonment of a clear system, the exclusion of other areas becomes more difficult. For example, whereas Kelsen distinguishes law from morality as coercive, a topic further examined in chapter 12, Hart can only indicate a vague boundary depending on the 'seriousness' of social pressure.[21] Also, rather than excluding natural law completely as Kelsen does, Hart is prepared to countenance a minimal natural law because, as seen earlier, it is embedded in our conceptual framework - particularly in the assumption of a need for survival. As Hart puts it

> we are committed to it as something presupposed by the terms of the discussion: for our concern is with social arrangements for continued existence, not with those of a suicide club.[22]

Finally, in this brief survey, some mention needs to be made of the Wittgensteinian notion of criteria and Hart's related concept of

19. See the discussion in R.J. Fogelin, Wittgenstein, chapter 10.2.
20. Supra, note 10, 41.
21. Ibid., 169.
22. Ibid., 88.

defeasibility.

The relationship between the concepts of defeasibility and criteria is examined thoroughly by Baker in 'Defeasibility and Meaning',[23] where not only is the general similarity pointed out, but the necessity of a constructivist theory of meaning employing the Witthensteinian criterial relation is seen as essential to support the employment of defeasibility in law. Here only the similarity need be pointed out.

Baker explains Hart's concept of defeasibility in terms of the notion of contract.

> There is a list of positive conditions required for the existence of a valid contract . . . Knowledge of these conditions does not give a full understanding of the concept of contract. What is necessary in addition is knowledge of the distinctive ways in which the claim that there is a valid contract may be challenged and thereby reduced or defeated. Such defences include fraudulent misrepresentation, duress, lunacy, and intoxication. The concept of contract may best be explained by setting out a list of conditions necessary and normally sufficient for the existence of a valid contract together with 'unless' clauses that spell out the conditions under which this existence claim is defeated. It is this distinctive feature of the explanation of 'contract' that is singled out by the term "defeasible".[24]

About constructivism, Baker says it:

> explains the sense of a sentence by specifying the conditions under which we correctly judge it

23. See also G. Baker, Criteria, A New Foundation for Semantics, passim.

24. G. Baker, Defeasibility and Meaning, 31.

> to be true (and those under which we correctly judge it to be false), where these conditions must be ones such that we do have an effective method for determining whether they hold.

It is

> a genus of semantic theories marked off from the more familiar truth-conditions theory by taking sense to be related to evidence, i.e. to the conditions under which a statement can be recognized to be true or false.[25]

From the foregoing it is clear that both constructivism and defeasibility share a concept of meaning which is in terms of evidence, in normal circumstances (ceteris paribus) and both, as it were, put the onus of disproof on the questioner; for it is only by citing counter evidence that meaningful doubt can be raised.

In conclusion, Kelsen and Hart are seen as counterparts to the general development of Analytical Philosophy. Caution, however, has to be exercised in this view for Kelsen shares certain ideas of the later phase, for example the rule-like nature of norms (his departure from Logical Positivism at this point is discussed in chapter 12). Moreover, this need not be taken to deny a continuity in their work. Indeed, in parallel to philosophy in general, it might be said that they share many presuppositions when contrasted with earlier views and that they represent alternative answers to the same questions. If this is so then, given that a philosophy can be characterised by what it sees as the main problems to be addressed, this speaks more for an essential continuity.

25. Ibid., 50-51.

Chapter 8 Part 3

Kelsen, Raz and the Grundnorm

The work of Joseph Raz in recent years has done much to advance the theory of legal systems on the foundations created by Kelsen.[1] Raz could not be described as a follower of Kelsen, for this would be inaccurate and would do injustice to his own insights. Nevertheless, Raz shares a common concern and a certain approach with Kelsen such that his criticism is sympathetic and penetrating. A full discussion of the relative merits of Raz's and Kelsen's theories is not attempted here. Many of Raz's insights, indeed, represent not simply criticism, but an attempt to develop the foundations laid by Kelsen. Further, Raz indicates certain points where much remains to be done. Finally, Raz offers his own interpretation of Kelsen's theory, which is most illuminating. As examples of these assertions, Raz's 'reconstruction' of Kelsen's theory of norms, his identification of problems of efficacy (and the relationship between application and obedience) and his discussion of the static-dynamic theories may be cited.[2]

Not all Raz's criticism succeeds; for example, he claims that Kelsen cannot explain judicial legislation[3] but, from what is said in the discussion of Dworkin, this seems unjustified. Rather it is essential to consider Raz's major disagreements with Kelsen, these being a

1. See works cited in Bibliography, infra, esp. The Concept of a Legal System (1970), The Identity of Legal Systems (1971) and Practical Reason and Norms (1975).
2. These are contained in The Concept of a Legal System, see esp. chapter VI. 'Legal Systems as Systems of Norms', where Raz attempts a reconstruction of Kelsen's theory of norms, see also ibid, chapter V, 5.
3. Ibid., 67.

general view of Kelsen's norm system and of the doctrine of the Grundnorm in particular.

After a lengthy discussion of the Pure Theory in his book 'The Concept of a Legal System', Raz raises what he considers to be the objectionable features of Kelsen's Theory. They are that its norms are: '(1) directed only to officials; (2) granting permissions and only indirectly imposing duties; (3) too complex to identify and to handle and (4) repetitive in that large parts of family law, property law, company law, etc. are parts of a great many laws (of all the laws of contract and all the laws of torts, for example).'[4] Now such criticism obviously resembles that of Hart discussed elsewhere. It should be noted that such an interpretation is not shown to be impossible but, rather, in Hart's terms, to be a 'distortion'. To adopt Hart's phrases elsewhere, this is an invitation and cannot be disproved but only declined. On the other hand, Hart also provides an invitation which may similarly be declined. Which one is accepted rather depends on what is required from an analysis. This will be taken up in the conclusion.[5] Suffice to say here that Kelsen is attempting to show relationships within law which may not be immediately apparent (the enterprise of analysis). Given this aim, it would not be a valid criticism to say that these conclusions run counter to 'common sense'.

Raz's criticism of the Grundnorm constitutes his most fundamental disagreement with the Pure Theory and leads him in 'The Concept of a

4. Ibid., 120.
5. See also this chapter, part 2, supra.

Legal System' to prefer a theory based on 'validity chains'. Initially, such an alternative analysis retains basic elements of Kelsen's theory because 'validity chains' are the relations between the norms of a legal system. Raz indicates that the two basic aims of the Pure Theory , explaining the unity and identity of legal systems,can be accomplished by means of validity chains and so the Grundnorm is a superfluous construct. (These, along with a third aim of explaining the normativity of law, have already been mentioned in connection with Hart.) However, in a more recent article, 'Kelsen's Theory of the Basic Norm', the alternative is dropped, for it may be that it too would be vulnerable to the same criticisms.

Speaking of the aim of explaining the unity and identity of legal systems, Raz states Kelsen's theory 'depends on . . . two axioms . . . It is not difficult to see that both axioms must be rejected'. This would result, Raz claims, in the failure of Kelsen's theory. Raz's two arguments which seek to show this, will be dealt with individually and can be given by full quotation:

> The first axiom asserts that all the laws belonging to one chain of validity are part of one and the same legal system. If this axiom were correct, certain ways of peacefully granting independence to new states would become impossible. Suppose that country A had a colony B, and that both countries were governed by the same legal system. Suppose further that A has granted independence to B by a law conferring exclusive and unlimited legislative powers over B to a representative assembly elected by the inhabitants of B. Finally, let it be assumed that this representative assembly has adopted a constitution which is generally recognized by the inhabitants of B, and according to which elections were held and further laws were made. The government, courts and the population of B regard themselves as an independent state with an independent legal system.

> They are recognized by all other nations including A. The courts of A regard the constitution and laws of B as a separate legal system distinct from their own. Despite all these facts, it follows from Kelsen's first axiom that the constitution and laws of B are part of the legal system of A. For B's constitution and consequently all the laws made on its basis were authorized by the independence-granting law of A and consequently belong to the same chain of validity and to the same system.[6]

1. There are two arguments against this view. First, there are good grounds for doubting the views of courts, etc., in A and B as being fully accurate. When tracing back the validity of laws in B we would arrive at the constitution. If it is asked why this constitution is valid, the reason lies in its delegation from the legal system of A ('the historically first constitution'). For practical purposes there is little doubt that presupposing the Grundnorm of B's constitution would suffice. Problems would only occur if A attempted to reassert control of B, this would either confirm B's status as a colony or would show B as independent. The outcome would be a matter of effectiveness on which validity will ultimately depend.

Secondly, we are led to international law, for on Raz's point, it becomes impossible to explain how one valid legal system can recognize another as valid. Kelsen's answer is that each system can see other systems of independent states as delegated from its own within their own area of jurisdiction. In this sense, 'independence' is a relative term. Given Kelsen's theory (expounded in chapter 9), it is possible

6. J. Raz, Kelsen's Theory of the Basic Norm, 98.

to explain how other states can be seen as independent, yet also to recognize the validity of their legal systems. The mistake lies in seeing these as mutually exclusive or to disregard the problem of how other systems have legal validity. In the absence of an alternative theory, Kelsen's seems acceptable. Raz concludes that Kelsen would consider the views of the courts and population of B as irrelevant, but it is possible to represent their view in terms commensurate with the Pure Theory. Raz continues:

> But the attitude of the population and the courts is of the utmost importance in deciding the identity and unity of a legal system in the sense in which this concept is commonly used.[7]

One might add 'used by Hart', but it is not clear how this would answer the problem of validity of other independent systems.

> The second axiom on which his theory of the identity and unity of the legal system depends says that all the laws of one system belong to one chain of validity. When discussing this axiom we saw that Kelsen admits, at least by implication, that disregarding the basic norm, all the positive laws of a system may belong to more than one validity chain. Some may owe their validity to a customary constitution while others derive their validity from an enacted constitution. It is only the basic norm that units them in such a case in one chain of validity by authorizing both constitutions.
>
> A legally minded observer coming to such a country and wondering whether the enacted and the customary constitutions belong to the same legal system will be referred by a Kelsenite to the basic norm. It all depends, he will be told, whether or not there is one basic norm authorizing both constitutions or whether each constitution is authorized by a different basic norm. Being told in answer to further questions that

7. Ibid., Kelsen indirectly accounts for this by means of considering efficacy.

> that to know the content of the basic norm he should find out "the facts through which an order is created and applied", for they determine it, he may very well be driven to despair. It seems that he can only identify the legal system with the help of the basic norm whereas the basic norm can be identified only after the identity of the legal system has been established. Even if our diligent observer succeeds in establishing that at least two sets of norms are effective in the society, one, a set of customary norms, the other, of enacted norms, there will be nothing a Kelsenite can say to help him decide whether or not they form one system or two. There is nothing in the theory to prevent two legal systems from applying to the same territory. Everything depends on the ability to identify the basic norm, but it cannot be identified before the identity of the legal system is known. Therefore, the basic norm cannot solve the problem of identity and unity of legal systems, and Kelsen has no other solution.[8]

The main point of the criticism is 'Everything depends on the ability to identify the basic norm, but it cannot be identified before the identity of the legal system is known.' The answer is simply that these processes of identification are not mutually exclusive. It would be quite wrong to assume that the Grundnorm is the sole criterion of identity even in tentative instances. Indeed, we may assume that the constitution will give a clear core of laws which can then be defined and added to using the Grundnorm.[9] Clearly the Grundnorm is the ultimate criterion but this doesn't rule out using other criteria subject to later confirmation. The subsidiary point, 'There is nothing in the theory to prevent two legal systems from applying to the same territory' can be accepted, but one might qualify this as being a pathological state. Generally, using the test of what is efficacious it may be possible to identify two legal systems.

8. Ibid., 99.
9. Something like this is mentioned by Raz himself in The Identity of Legal Systems, 797.

Were these to prove contradictory and to provide no means of derogation or resolution of such conflicts then the legal scientist would have no optyion but to identify two legal systems. However, unless these conflicts are settled, it must be assumed that either one partial system delegates another or that they are mutually delegated by a third norm or partial system (by analogy with Kelsen's discussion of international law). True, Kelsen makes the unity of the system a methodological point, but this is not confused with an insistence that there can only be one system, (although practically this is to be expected) for each given territory.

If these observations on Raz's criticism are accepted, then failing further criticism, Kelsen is justified in looking to the Grundnorm to solve the problems of unity and identity of a legal system. In any case, one might suspect that the examples at the base of the proferred criticism are both untypical of the main concerns of a legal system. Were they accepted, and there is no reason to do this, they would still be of little consequence in normal circumstances.

Preface to chapters 9 to 12

In the remaining chapters of this thesis, certain specific problems of the Pure Theory are examined in detail. In chapter 9 the problem of international law as seen by the Pure Theory is dealt with. This merits attention not only as forming an important part of any full legal theory but also on account of the originality of Kelsen's approach. Chapter 10 deals with the use of the Pure Theory by courts. In particular the Rhodesian Constitutional Cases are examined for the light they shed on the practical application of Kelsen's work. Chapter 11 deals with the problem of how far norms can be said to have the logical characteristics of ordinary propositions. This is of specific concern because this is one of the few topics on which Kelsen changed his basic theory. The reasons and consequences of this change are therefore examined in detail. Finally, chapter 12 goes beyond law and looks at Kelsen's theory of morality as a further example of a norm system. There it will be suggested that Kelsen cannot provide an adequate account of morality.

Chapter 9

The Pure Theory of International Law

Pollock claimed that, 'One good test of the worth of ideas and theories in general jurisprudence is their application to international law'.[1] In this respect, the Pure Theory should also be tested. More so, as international law has been closely allied to natural law, it is important to see if a positivist theory can be constructed. Finally, in this sphere as elsewhere, Kelsen's work may seem vulnerable, a point particularly pressed by Lauterpacht.[2]

International relations have long been the subject of legal, as well as political scrutiny. For legal theory the status of international law as law, has been a major topic of speculation. Austin referred to it as 'positive morality',[3] thereby denying its status as law, because its rules were not laid down by a determinate person or body having the characteristics of a sovereign. Holland claimed that international law could be law 'only by courtesy'.[4] Such views of the status of international law have readily gone hand in hand with the doctrine of the sovereignty of the state. As such, sovereignty has occupied a central place in legal thought, as well as in political ideology. Hence Austin's definition of law as the commands of a sovereign could hardly include international law within his definition. In view of this widely shared view it is of some significance when one

1. P. Pollock, Essays in Jurisprudence and Ethics, 30.
2. H. Lauterpacht, Kelsen's Pure Science of Law, 134.
3. Austin, Province of Jurisprudence Determined, 176-7.
4. T.E. Holland, Jurisprudence, 133.

of the greatest legal theorists of modern times, who shares Austin's positivist outlook, arrives at a completely opposite conclusion.

Kelsen devoted a great deal of attention to international law throughout his life.[5] His work in international law is informed by a central argument - that international law is law in the true sense. This accompanied a further argument which denies the necessity of the doctrine of sovereignty in interpreting law. In consequence, Kelsen rejected sovereignty as being a mainly ideological concept of little legal consequence.

In discussing international law it is generally implicitly assumed that national law is the paradigm of true law. From this assumption unfavourable comparisons with international law follow which portray the latter as falling far short of the former. These comparisons, as H.L.A. Hart[6] points out, are of two basic types. Firstly, contingently, international law is seen as deficient in the status of its rules, chiefly because of their non-coercive nature. Secondly, essentially, states, in contrast to the individuals subject to national law, are seen as incapable by definition or by nature, of being subject to any other legal order than their own. Kelsen's defence of the legal status of international law will be considered in respect to these two critical approaches.

5. The main sources are General Theory of Law and State, part 2, Pure Theory of Law, VII, Principles of International Law and numerous articles, e.g. International Peace - By Court or Government, Recognition in International Law, Compulsory Adjudication in International Disputes, Peace Through Law, The Principle of Sovereign Equality of States as a Basis for International Organization, The Strategy of Peace.

6. Hart, The Concept of Law, 211.

I

International law is law in the true sense.

Kelsen, as seen in earlier chapters, defines law as a coercive order of norms which are arranged in a hierarchical structure so that the validity of a lower norm is always derived from a higher norm, never from facts. This holds to the positivist principle that norms or values are never inferred from facts. Ultimately the system culminates in a source of validity at the top of the hierarchy. This source, unlike Austin, Kelsen believes is not a sovereign, but rather the Grundnorm, whose validity must be presupposed in legal interpretation. This has the advantage of eliminating the difficulties created by the Austinian sovereign and the assimilation of laws to commands. Not the least of these difficulties is that of actually locating the sovereign in all but the most straightforward of cases. Once the concept of sovereignty is abandoned, the absence of an international sovereign no longer proves an insurmountable barrier to the legal status of international law.

Despite the abandonment of sovereignty as a legal concept, this not only leaves the ideological theory of sovereignty untouched, but does nothing to answer several basic objections to the legal status of international law. The ideology of sovereignty will be considered below, so it is to the more immediate basic objections that we must now turn. Once again assuming national law as the paradigm of true law, three major deficiencies present themselves. Firstly, there is no international legislature and therefore no institution to create international law.

Secondly, there is no international judiciary which has acknowledged legal competence in all matters. Thirdly, there is no international executive and, in particular, no 'police force', except in rare, limited occasions when the United Nations has created a peace-keeping force drawn from member states.[7] Generalizing from these points, it is obvious that we encounter no institutions comparable to those of national law. Such institutions as there are of international law are of only limited authority. More seriously, not only is there a lack of centralization in the absence of institutions, but also there is no centralized coercion. For Hart this latter objection is more apparent than real, for by Hart's definition of law, coercion is not an indispensable defining characteristic. Moreover, Hart points out that individuals and states are so different as legal subjects that the dire consequences of an absence of centralized coercion from national law are not so evident in international relations where peace is not immediately excluded.[8] Centralized coercion is therefore neither definitionally or practically essential to international law, according to Hart. This approach is not available to Kelsen who defines law as essentially coercive. This presents a serious problem for Kelsen because he believes that without a coercive sanction being attached to behaviour it cannot be considered as a delict (or legal wrong). Hence, because law alone defines what is crime, if there is no law (as a coercive order) there can be no crime, but only moral wrong. Such a view would not differ essentially from that of Austin.

7. In general these tend to be non-coercive. The Korean War action is a notable exception. The U.N. is vulnerable in relying on member states to provide a peace-keeping force.

8. Supra, note 6, 214.

To understand Kelsen's reply to the basic objections concerning the lack of centralized institutions and of coercive rules, it is essential to see his rejection of their underlying assumption. This is the assumption of national law as a paradigm. This, in turn, represents legal systems as static, whereas in fact they are constantly evolving. Kelsen argues that international law is at a level of development from which national law has long departed. In this respect it shares the basic characteristics of primitive legal orders encountered in certain tribal societies.[9] Between primitive law and the law of the modern state there are no differences of kind, but only of degree of centralization. Whereas developed legal systems are marked by a high degree of centralization, primitive law is extremely decentralized. The development of a legal system is precisely that of increasing centralization. This, Kelsen thinks, is not only historically borne out, but is almost inevitable, given the demands on a legal system and the problems that it has to solve.

How can international law be interpreted as a primitive legal system?[10] This becomes clear if the 'deficiencies' mentioned above are considered, for it will be seen that they are shared by both systems. Furthermore, it will be seen that these are only deficiencies from a narrow interpretation of national law.

9.. This is to be distinguished from Pollock, First Book of Jurisprudence, 14, who claims a resemblance to 'those customs and observances in an imperfectly organized society which have not fully acquired the character of law but are on the way to becoming law'. (My emphasis).

10. Hart, supra, note 6, 222, points out that the similarity is one of form.

Although international law has no legislature, it does have a source of law which is highly decentralized. This source is custom. Custom may seem to be a very inadequate source of law. As Hearn puts it

> Law cannot be predicated of mere customs which are not even true commands much less the commands of any competent State.[11]

However, it is important not to prejudge the issue by taking enacted law as a model. Although in developed legal systems custom is only a residual source of law,[12] this should not blind us to its legal status when it is the sole source. Despite this, there must be considerable doubt that custom can provide sufficient law. Kelsen answers this with the principle that what is not forbidden by law is permitted. In this sense there are no 'gaps' in international law, which is thus pervasive and of unrestricted validity. This is not to say that custom is otherwise satisfactory as a source of law. Indeed, the basic problem is the indeterminateness of custom. What is customary? How uniform has it to be? How long must it be established? Which acts are relevant in creating custom, rather than being merely usually expedient? Are words or acts or both creative of custom? How general must its adoption be? The fundamental problem becomes one of who is to decide what custom is. Clearly a legal system is in a precarious state when everyone, in principle, can decide for themselves what the law is. Thus, even although custom may be seen as obligatory,[13]

11. W.E. Hearn, The Theory of Legal Duties and Rights, 40.
12. In this sense they are the source only in the sense of historical origin, their source of validity is ultimately the Grundnorm of the legal order. In custom source as origin and as validity is united.
13. It is essential that custom is seen as binding rather than just being expedient in normal circumstances.

unless there is an objective criterion, effectively it will fail to create obligations at all. This is especially so where group solidarity is lacking and self interest is rampant, as may be the case in international relations. An additional difficulty is encountered in a period of rapid change when all the usual problems become more pressing.[14] Because of these difficulties, a centralized means of adjudication becomes essential.

The first step in legal development, Kelsen believes, is the establishment of some form of judiciary and that this precedes the establishment of an executive. Such a judiciary solves the basic question of the definition of custom by providing an authoritative ruling in each case. Moreover, because, according to Kelsen, the decision of courts in individual cases, creates law, this, by modification of custom, creates new law.[15] Kelsen sees international law as being on the threshold of this stage. Various attempts have been made to establish an international institution of arbitration including the present International Court of Justice.[16] The essential weakness of such attempts stem from the lack of compulsory adjudication. Hence, it is still open to states to reject such a court's authority, although rulings have almost always been carried out. In fact, for reasons of prestige, it is more likely that states may accept a court's general authority but reject it in specific cases, for example by reserving a sphere as a 'political' matter. An example of this is

14. As in the last century.
15. Every application of law being in part creative.
16. Submission of disputes must be by mutual agreement of all parties, the Court does not therefore have compulsory jurisdiction.

provided by the U.S. Declaration of August 14, 1946, which accepted the compulsory jurisdiction of the International Court of Justice, but excluded, 'matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America' and contained other exemption clauses. As Morganthau points out, it is impossible to envisage a case that could not be reserved according to these exemptions.[17] Such distinctions, Kelsen claims, are merely aspects of the ideology of sovereignty. There is nothing in the nature of any international dispute that makes it incapable of legal interpretation. The idea that disputes can be non-legal is merely a means of paying lip-service to an international court whilst avoiding its effects on particular interests. This has the undesirable consequence that parties to a dispute are free to reject law when they wish to. Such a rejection is entirely political, but by, in effect, pleading a special case, tacitly admits that such matters should normally be settled according to law. It is precisely at this point that Kelsen suggests that we must look to for the next step in legal development. This would be to make the judicial process compulsory in all international disputes. Kelsen has repeatedly urged this as the best practical step for international law to strive for. Such a step is not unrealistic, Kelsen believes, given the establishment of non-compulsory courts and the lesser likelihood of states seeing such a court as an infringement of their sovereignty when compared to an international executive.

17. H. Morganthau, Politics Among Nations, 283-5.

Kelsen suggests that international law has suffered from a strong desire to establish an international executive which has been seen both as the essential prerequisite of effective international law and as completely impractical because of its conflict with state sovereignty. If the normal historical development of a legal system is followed, then the establishment of an executive could be left to a later stage, after the authority of an international court is accepted. Initially, decisions would be left to states to interpret and implement, but the obvious partiality that this would allow would create the conditions for the gradual development of an executive. This would be the culmination of the development of international law.

International legal development has suffered from an additional confusion of the demands of law with those of mutual defence. This, Kelsen believes, was a major weakness in the League of Nations. The problem of mutual defence is best dealt with by systems of alliances which would not affect the impartiality of an international court by confining it to one group of states. A concern with defence is, however, hardly surprising given the fact of war. Having discussed the general objection that international law lacks centralized institutions, the general objection that it lacks coercive sanctions can now be considered.

How can international law enforce sanctions and therefore define and prevent international legal wrongs? In particular, how can international law accommodate war? The answer to both the apparent lack of coercive sanctions and the seeming intractability of war is provided by the doctrine of 'just war' - bellum justum . This doctrine figures

prominently in the history of the theory of international law and is, Kelsen believes, an established principle of that order. The doctrine of bellum justum is not confined to theorists such as Cicero, Augustine, Aquinas, Grotius, Vattel, etc., but is also found in practice in primitive legal systems including that of international law. This assertion rests, not just on the rather dubious claims that states make to justify war (although these cannot be dismissed entirely), but also on its adoption in generally accepted positive international law, where war is not prohibited as a sanction. Kelsen interprets the Covenant of the League of Nations, the U.N. Charter, the Kellogg-Briand Pact and the Versailles Settlement as recognizing the legal status of 'bellum justum'.[18] According to the doctrine of bellum justum war can be either a sanction or a delict (as is the case with coercion within the state).[19] It can be a sanction if it is a resort permitted by international law for a breach of that law. As such, it represents the highest degree of reprisal, including economic sanctions, seizure of property, etc., authorized by international law. Again the stage of legal development is very primitive, for there is no centralized institution which employs war as a sanction, so that each state is delegated to act as an organ of international law as part of a system of 'self-help'.[20] As such, international law shares all the disadvantages of certain tribal legal systems. In particular,

18. The demand for reparations in the Peace Treaty of Versailles presupposed the illegality of the war. The Covenant of the League laid down clear conditions under which a state could resort to war. The Kellogg Briand Pact did not exclude war as a sanction, nor is it excluded by the U.N. Charter.
19. Hart, supra, note 6, 227 calls this a 'dubious analogy'.
20. The victim has a right to seek redress but no obligation.

there is no standard of justice, which means in principle that a state can resort to war when it is expedient. The lack of centralized coercion also means that only the most powerful can actually succeed in enforcement. This means that everything depends on the balance of power. In particular, as in the case of tribal law where one family group is authorized to impose a sanction on another for a delict, there can be no certainty that the sanction may not be seen as a delict in turn, resulting in a vendetta. In international terms a peace treaty imposed on a defeated state may serve as a genuine or imaginary wrong to be corrected with a future war, as a sanction, in more favourable times. The most obvious example would be the reaction of Nazi Germany to the Versailles Treaty. This situation is exacerbated by the lack of proportion between delict and sanction that tends to prevail. The amount of force will vary if it is to repel an attack or remove the threat of attack altogether. There is an obvious tendency to retaliate beyond mere self defence. The central problem of the bellum justum is that of deciding when a war is permitted by the doctrine. A simple identification of a just war as one of defence is clearly inadequate for there is no clear line between defensive and aggressive war. A war of aggression may be the only means of effective defence for, given the nature of modern war, it might be unrealistic to merely wait to respond, when the initial attack might be devastating. Nor is there any clear standard of what constitutes a state's vital interests, which it is authorized to protect, or what is necessary for self-preservation. Without such a standard, definitions are supplied by states highly sensitive of their own interests and in circumstances hardly conducive to an objective view. Indeed, international law suffers from much vagueness brought about by a need to find formulae to reconcile

divergent interests. This means that it is difficult to know when a breach has occurred or whether acts of violence are not permitted in some circumstances in response. As Morganthau points out, even clearly established law is brought into doubt if it seems ineffacious, a situation normally absent from municipal law.[21] Thus, without an international court, the bellum justum can become nothing but a pretext for any expedient action.

Reparations do not provide an alternative to war and sanctions, for Kelsen sees these as merely a substitute for an obligation that a state has failed to keep. Hence a state is required to make reparations for past aggressive acts under the threat of sanctions. If it fails to make reparation, then a sanction is applied in response to the further delict that such a failure constitutes. International law is therefore reliant on war as its main sanction despite the weaknesses in the bellum justum doctrine. Even the definition of war is unsettled, being seen as aggressive acts in some cases or as merely a consequence of a declaration of war in others. War can be undeclared in some cases, like that of Vietnam and declared in others without actual fighting, as in the 'War' between certain South American states and Nazi Germany. Thus, even apart from the political aspects which bias definition, there are very central uncertainties concerning war. However, international law has been successful, in some respects, in regulating the conduct of war, principally by the Hague Conventions (1899 and 1907) and the Geneva Conventions (1949).

21. Supra, note 17, 279.

Kelsen does not deny that the nature of international law is very undeveloped and that it is precarious in effect. This situation is the result of the relative strength of states to interpret international law to suit what they consider to be expedient. Thus, whilst formally states appear to be bound by international law, there are many political means of evading legal liability. At worst this is mere lip service, at best this is the foundation for the development of a stronger legal system. Kelsen's view of the situation is that it is not inevitable that it should be so, and that there is hope for future development from the basis already established. Such a view can only be verified by future events, the first being the establishment of an international court with compulsory jurisdiction. However, a more serious criticism of international law can be made. That is, that international law not only suffers from defects capable of future rectification, but that it is defective in its very nature. This criticism is the obverse of the idea that states are fundamentally incapable of being legally bound. It is to the idea of sovereignty that we must now turn.

II

Sovereignty as legal theory and ideology

Sovereignty, as Kelsen says, is a 'word of many meanings'. There are a variety of possible theories of sovereignty and its relation to international law, and Kelsen examines these in turn as legal theories. Apart from its obvious importance, sovereignty must be examined, for clearly it is the major reason for the continuing decentralization of international law.

In the strongest version of legal sovereignty it is assumed that only national law is true law. Kelsen's reasons for rejecting this have already been considered. Moreover, it is, as Hart points out, unjustified to assume that it is otherwise a kind of morality as Austin would believe.[22]

A modified version of sovereignty would be that there are two quite separate legal systems: the national and the international. This must also be rejected, Kelsen believes. Kelsen's reasons for rejecting this theory lie partly in his methodological assumptions about the unity of legal systems.[23] This may appear questionable and depends on complicated arguments about the logical status of norms. The conviction that law is a unity, however, seems to be shared by proponents of sovereignty who often assume only national law is valid, despite their acceptance of international law. In any case it might seem that there is a decisive objection to the idea of the unity of international and national law. This is that there are in fact conflicts between the two systems. Kelsen suggests that these do not destroy the unity of law, for there are conflicts within single legal systems and that this explains the apparent existence of two conflicting laws. Such a conflict is quite possible between two levels of a national legal system, although there one law is generally regarded as annulable on the grounds that the highest or the most recent law must alone be valid. It is thus possible to construe a conflict between international law and national law as that between two levels of the same

22. Hart, supra, note 6, 228.
23. But see chapter 11, infra, for a discussion of this view.

system. As international law lacks a procedure for annuling laws, this is left entirely to the national legal system. There is nothing in the nature of either of the laws which conflict to say which will be annulled. Because this is a decision made by the national legal system, it may give preference to a national law, but this need not necessarily be the case.[24] From this examination it appears that there is no reason to assume that national and international law are not part of the same system.

Another version of sovereignty assumes that states cannot be bound by international law, but that they are bound in certain respects by their own self-limitation. The best example of such a theory is provided by Morganthau who, whilst admitting some elements not based on consent, believes that it is the essential source of international law.[25] International law is thus the creation of treaties, explicitly, and more generally by tacit consent and thus very weak. On this theory international law is valid only in so far as recognized as such by states. The result of this view is a sort of 'social contract', not of sovereign individuals, but of sovereign states. Kelsen suggests this international social contract suffers all the defects of the more familiar one of Rousseau and others. Particularly, the assumption that states somehow have rights outside of international society is as absurd as that of pre-social individual rights.[26] Furthermore, the

24. For example, the Constitution of the Federal Republic of Germany, Article 25, states, 'The general rules of international law shall form part of federal law. They shall take precedence over the law and create rights and duties directly for the inhabitants of the federal territory'.

25. Supra, note 17, 275.

26. In addition there is no equality of states even before international law. Hart uses this as a distinction from municipal law where parties are approximately equal. Supra, note 6, 190-1.

idea of tacit consent, failing actual consent, is as defective as the notion of a General Will and serves the same function as a fiction. States are also bound by international law irrespective of their recognition of it. For example, when a new state comes into existence or acquires coastal territory for the first time, it is never doubted that a state is bound immediately by general international law and maritime law respectively. Indeed, the whole concept of self-obligation is a meaningless fiction, as Hart points out,[27] for obligation rests on a practice that must involve more than one party. Such a practice presupposes a norm that only international law can provide. Treaties are no exception to this for to be genuinely binding they presuppose the norm pacta sunt servanda (treaties ought to be kept) which is a norm of international law (although, as will be seen, it is not the Grundnorm of that order, as Kelsen once thought. Kelsen rejected this view because,as a Grundnorm, it would not be hypothetical but would be too positive. Moreover it could only explain treaty-established international law).

Rejecting the idea of the self-limitation of states, there is another possible view of sovereignty which accepts the validity of international law by including it within national law. In this case all legal orders are seen as flowing from the Grundnorm of a national legal order. Hence, although international law is seen as valid and binding on what might be called the state's domestic law, this validity rests ultimately on the state's Grundnorm. Hence the single Grundnorm delegates international law, domestic national law and the legal

27. Ibid., 220.

orders of all other states within their own spheres. Kelsen likens this to solipsism where everything in the world is dependent for its existence on one self. Like solipsism it is implausible, but not obviously false. However, it does have the unfortunate effect that there are as many international laws as there are states, and there appears to be no reason to accept one state as the lynchpin of all legal systems rather than another.[28] Moreover, this idea of sovereignty, which sees all other orders as subordinate,has the consequence of supporting a general outlook of imperialism. Whilst this does not disprove the theory in itself, the ideological use of such a view may be seen as a further disadvantage.

The alternative to a unified system, where the state is sovereign in a limited sense, is to accept that states are all subordinate to international law.[29] In this case states are delegated by norms of international law, and ultimately its Grundnorm. This Grundnorm Kelsen formulates as custom: 'States ought to behave as they have customarily behaved.'[30] This formulation is that of the current stage of international law. From this norm treaties are delegated by the principle 'pacta sunt servanda' thus creating particular international law amongst states as distinct from general international law which is valid irrespective of treaties. National legal orders are delegated so

28. This is true of the theory which maintains that there is only one legal system based on one state. The theory that there are many unified systems, each dependent on a state, is contradictory (as a sort of multiple solipsism).

29. This rejects the notion of sovereignty as highest power.

30. Hart objects that this is 'an empty repetition of the mere fact that the society concerned (whether of individuals or states) observes certain standards of conduct, as obligatory rules', Hart, supra, note 6, 230. The reason for Kelsen's view and for rejecting this view of Hart is discussed in chapter 8, supra.

that their Grundnorms are only basic in a relative sense. The idea of sovereignty as unlimited power is excluded by this interpretation, but sovereignty as not subordinate to other states is quite compatible with it. In this respect we encounter the main function of international law which is to define the validity of states. This is done according to the principle of effectiveness.[31]

The principle of effectiveness entails the recognition by international law of a state, providing it has an effective legal order whose laws are generally applied and obeyed.[32] The validity of the state is delimited in regard to territorial, personal and temporal spheres.[33] The territorial validity of the state is determined by international law in the setting of boundaries. This is a legal function because there are no boundaries which, of their nature, are necessarily those of a state. This is most obvious in the case of territorial waters. The personal sphere of validity is defined by treating the state just as a juristically defined corporation is treated in national law, i.e. as a juristic person.[34] By this means the idea of the state as a superior or metaphysical person is avoided. The difference between the state and a corporation is only a matter of degree according to Kelsen. The difference is marked by the almost exclusive reliance on states for the enforcement of international law. Thus

31. Morganthau, supra, note 17, 275, partially accepts this but claims that the main basis of the definition of validity relies on a mutual contract.

32. There are other criteria of a state; as being relatively centralized and independent of other states.

33. It is no objection that states are historically prior, for just as the family is prior to the state, this does not affect the logical priority of the latter.

34. 'Person' is a way of referring to the unity of the state's legal order.

international law is generally applied to individuals only by national law which means that international law contains only 'incomplete norms' which direct only the content, not the application of law. This does not mean that international law is different from national law in being only indirectly concerned with individuals, for the state is interpreted solely as individuals acting in a certain official capacity. That means only that individuals' acts are imputed to the juristic person of the state. Moreover, the 'individual' of national law is also a juristic construction which is not necessarily identical with the physical individual. The idea that state and individual are radically different entities is decisively rejected.[35]

Whether international law in its implementation by national law must be transferred into appropriate national legislation is a question that can only be settled by the legal order concerned. It may well be the case that international law may be applied directly,[36] its validity being considered as a sufficient source of law.

International law can, in any case, directly obligate individuals as in the case of piracy and war crimes. In these cases, sanctions of international law are applied as punishment-irrespective of imputation of liability to the state, and may be imposed by states other than that of the recipient. This was recognized in the Nuremberg trials,

35. This is counter to Hart's argument, supra, note 8.
36. Supra, note 24. This can also occur in Common Law countries for international law can be seen as part of common law.

> That international law imposes duties and liabilities upon individuals as well as upon states has long been recognized . . . Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.[37]

In addition, it is also possible for an individual to have personal access to an international court. There are various international agencies which are delegated by international law and other non-state bodies, such as the Catholic Church whose concordats are recognized by international law, which serve as institutions of that law, although not able to use war as a sanction. International law is also deemed to be valid in areas which are not the territory of states, including the sea. Generally, however, international law is applied by states, although they are not exclusively authorized in that respect.[38]

The State, as a juristic person, is unusual as being collectively responsible for the acts of its agents. This also means, as Kelsen points out, that responsibility is absolute. Such a situation is rare within national law where limited liability is normal. As a result of the state's collective responsibility, the total population is considered responsible for the acts of its government and is thus liable to the consequences, including war, if the government is in breach of international law. This situation is a consequence of the primitive nature of international law. It is comparable to tribal law, where sanctions

37. Cited in Kelsen, Principles of International Law, 217.

38. Federal states are generally considered as single states in international law unless foreign affairs are the responsibility of component states.

are left to a family group which is authorized to inflict the sanction on a member of another family group in reprisal for a wrong, irrespective of whether that member actually committed the wrong himself.

International law also delimits the sphere of validity of the state in its temporal aspect. In other words, it defines when a state comes into being or ceases to exist and can establish its essential continuity despite changes of government. This is important in cases of revolution, which, although illegal by definition of national law, can nevertheless be accorded validity by international law. Hence, although Russia, prior to the Revolutions of 1917 and after, remains the same state in international law, the German Reich is deemed to have ceased to exist in 1945 and to have been succeeded by two new states: of East and West Germany. To these delimitations in the various spheres of validity it may be objected that they are actually accomplished by recognition of other states.

The recognition of one state by another is part of the delegation to states of international law and, as such, the establishment of the relationship is part of international law. Recognition of a <u>government</u> is required as a separate act only in the case of a revolution, otherwise the recognition of a state is taken also to imply recognition of a government (for to be a state in international law entails having a government). The nature of recognition is, however, complicated by a confusion between political and legal recognition. This confusion is, for instance, responsible for the idea that recognition can be conditional.

This seems to be the case, for political recognition permits of degrees from mere acknowledgement, to exchange of embassies and conclusion of treaties. Legal recognition is unconditional for a state is, as a legal order, either valid or invalid. This does not mean that legal recognition cannot be withdrawn, but rather that this must be by a separate unconditional act. Similarly, the often used distinction between de jure and de facto recognition is entirely political and is of no legal consequence.[39] Indeed, misleadingly, the de facto recognition must be legal in nature if it is to be recognition at all. Generally, any further recognition will be of a political nature. With the exception of recognition following a revolution, recognition of a government is a political act additional to the recognition of the state. Another exception is in the case of governments in exile, where it is possible to legally recognize a government which has no state. In this case the general criterion of recognition, effectiveness, is considered to apply not in the effectiveness of the state's legal order, but in the effectiveness of measures a government is taking to regain control of a state. Despite this, it is clear that recognition of a government in exile can be a purely political act with no legal basis. By authorizing recognition, international law provides for its validity independently of state sovereignty. However, the central criterion of effectiveness[40] suffers from certain defects.

39. This should be compared to the remarks of Beadle, C.J. cited in chapter 10, note 18, infra.

40. Effectiveness in international law must be distinguished from efficacy as a criterion for the establishment of a norm, supra, note 37, 420-1.

With the principle of effectiveness, the problem of the decentralized situation of international law recurs. For, with the enforcement of law left to individual states and thus being uncertain, it may well be the case that a legal wrong goes 'unpunished' and, if it remains so, becomes valid. Thus, for example, an illegal act, such as the unprovoked seizure of territory can, if it succeeds and remains effective, lead to the recognition of the occupying state as the valid authority for that territory. This is in sharp contrast to national law where the principle ex injuria jus non oritur is well established. Indeed, Hart considers this as a highly significant (but not ultimate) difference between the two systems, (certain domestic trespasses, if maintained long enough give rise to propriety rights).[41] As such, this is a consequence of the decentralization of international law, for in national law the state is in a position to uphold ex injuria jus non oritur in, for example, contracts. (where a contract concluded under coercion is null). An attempt to establish the principle in international relations was made with the Stimson Doctrine,[42] which entailed the denial of recognition to illegal acts. However, in the absence of provisions to stop such acts, the Doctrine must be considered as being of a mainly political nature. A most conspicuous absence of the principle ex injuria jus non oritur from international

41. Supra, note 6, 227.

42. This was the result of a refusal by the United States not to 'recognize any situation, treaty or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris' and was applied to the Japanese occupation of Mancuria. In 1932 the Assembly of the League of Nations declared that 'it is incumbent upon the Members of the League of Nations not to recognize any situation, treaty or agreement which may be brought about by means contrary to the Covenant of the League of Nations, or to the Pact of Paris'. (The Pact of Paris of 1928 is better known as the Kellogg-Briand Pact.)

law occurs in the case of peace treaties. Although these are valid international law, they can be imposed by a state that has illegally resorted to war, if that war is successful. Thus the peace treaty is valid irrespective of the war's illegality.[43] Effectiveness as a principle is, therefore, a compromise between law and reality. Too readily accepted and it brings international law into contempt by condoning illegality. Too readily rejected and it advertises the impotence of international law.

The foregoing theory of the primacy of international law denies the special nature of the state that theories of sovereignty presuppose. Sovereignty is not seen as a property or special power of states, but only in a limited sense as legal independence from other states (but not from international law). In this sense there is no restriction on the legal competence of the state and no area that cannot be regulated by the state's law except where it is restricted by international law. Sovereignty as a power, or the state seen as a uniquely all-embracing institution, is seen as an ideological conception of no legal consequence. The state is one of a number of juristic persons and its power in legal terms is nothing other than the effectiveness of its legal order. Concepts such as the state's power are undoubtedly of political interest but must be kept clear of any legal analysis. This is specially true of an analysis that claims to be scientific and pure of any non-legal bias, such as Kelsen's Pure Theory claims to be.

43. Being imposed by the victor.

Thus, contrary to the ideology of Sovereignty, international law is of unrestricted validity and regulates matters even traditionally supposed to be the exclusive concern of the state. (International law is also unique in that its determination of the sphere of validity of states can be accomplished by it alone). An exception to the validity of international law is, however, suggested by the United Nations Charter, Article 2, Paragraph 7, which states,

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter;

However, the impossibility of such a principle being within international law is evident from the remainder of Paragraph 7 which states,

> this principle shall not prejudice the application of enforcement measures under chapter vii.

Hence, this recognizes that any matter, domestic or otherwise, can give rise to a delict and hence the application of a sanction. The character of Article 2, Paragraph 7, is therefore somewhat contradictory in its attempt to assure states of their sovereignty in a political sense.

With the theory of international law primacy, Kelsen, as in the case of state primacy, offers an epistemological analogy. Kelsen believes that the primacy of international law is like the objective view of the world, which is independent of the existence of this or that particular self. As in the theory of state primacy, there are ideological considerations, but in this instance they tend to be of an internationalist or pacifist kind.

Kelsen suggests that whether the primacy of international or national law (in the modified sense) is accepted, either is possible as an interpretation. Moreover, as both accept the two orders as a unity, neither presents a barrier to a world legal order. On either interpretation the content of international law, as distinct from its structural position, remains the same. Conversely, there is nothing in the content of international law to suggest either interpretation as inevitable. The decision to adopt either one or the other theory must be made on non-legal, that is, ideological, grounds. Such a decision cannot be made by the Pure Theory which merely presents the interpretations as alternatives of equal possibility. It can hardly be doubted that Kelsen would prefer the primacy of international law and an ideology of pacifism. This preference does not intrude on the Pure Theory, however, as a pretended proof, for, as such, it would render it impure.

Having discussed Kelsen's theory it is worthwhile to draw out some of the comparisons, already noted at various points, between the Pure Theory and the theories of Morganthau and Hart.

III

The 'Realist' position of Morganthau has been cited on occasion in the foregoing. Morganthau's view bears strong resemblances to that of Kelsen whose work was probably a source for Morganthau.[44] In particular, the idea of international law as a decentralized primitive system

44. Supra, note 17, part one, part six and chapter 25.

relying on self help and the problems and precarious status of such a system is shared by both writers. However, Morganthau's emphasis on the realism of power behind state's interests leads him to a particularly strong version of sovereignty which he sees as the major stumbling block to international peace. At this point, it might be said that Morganthau is a consistent realist, but that Kelsen is a more consistent demythologizer of the ideologies surrounding sovereignty. Nevertheless, it seems that Morganthau's conception of power must form a suppressed premise in Kelsen's theory which, as it were, provides the non-legal setting to which legal conceptions have to adapt. Kelsen would, in consistency, not be barred from exploring such a line of enquiry, given his admission that municipal law and 'justice' can be the outcome of constellations of interests at a given time. Presumably, however, Kelsen would see such investigation as outside legal enquiry.

An emphasis on power also enables Morganthau to distinguish the b ulk of international law which is normally kept, and is even codified to some degree, because it does not involve directly the power situation, from the more exceptional cases which are concerned with power.[45] The former, Morganthau suggests, include trade law, diplomacy etc., where, as a matter of long run self interest, states will abide by the law even if unfavourable in specific cases.

Morganthau's theory is less optimistic in respect of future developments in international law because he sees, unlike Kelsen,

45. Ibid., 275.

compulsory adjudication as resting on the consent of states. This, in turn, is due to his acceptance of power and sovereignty as unalterable facts of the international situation. Despite this view, Morganthau does accept that the International Court of Justice is an important advance, particularly in comparison with the Permanent Court of International Justice which, unlike its successor, had little autonomy and a membership of the court which was lacking in continuity.[46] Morganthau does make an important point in showing that major disputes in international law have the character of a challenge to the law itself as representative of the status quo; whereas in municipal law the status of the laws' authority is not brought into question.[47] There is nothing in Kelsen's theory to deny this; indeed, Kelsen readily accepts that law represents a status quo and a result of conflicting interests even in municipal law. However, it might be realistic to accept Morganthau's point that an explicit challenge is often involved.

Morganthau also points out how prominent the need for guarantees for law are in the international sphere.[48] Ideally this would take the form of collective security, but only some progress has been made towards that goal. Morganthau points out the essential weakness of the League of Nations in that respect; for it could only recommend action in support of member states.[49] Because of the precarious nature of the security this provided, it was the usual practice for states to provide for their own security or seek the help of a super-

46. Ibid., 285.
47. Ibid., 420.
48. Ibid., 291.
49. Ibid., 296.

power. Such a provision is little more than self help. The United Nations represents a modest advance in this respect.[50] By Articles 39 and 41 the Security Council is given powers to intervene as an enforcement agency. However, it is reliant on the contributions of member states in any action that might occur. Such contributions may, of course, not be forthcoming. The use of the veto (Chapter VII of the Charter) reintroduces decentralization, for states involved in any conflict may be members of the Council or allied to them, which means, in effect, that the problems of enforcement brought about by the balance of power are not eliminated.

With the important exception of the idea of international law based on the consent of sovereign states, adopted by Morganthau but rejected by Kelsen, there is great similarity between the two theories. Such differences as there are stem from Morganthau's emphasis on political power and there is no reason why this cannot supplement the Pure Theory in an extra-legal capacity, providing its concomitant ideology of sovereignty is exposed as not inevitable. The basis of agreement can be seen when Morganthau's characterisation of 'Realism' in politics is outlined, for Kelsen could assent, mutatis mutandis, to most of the basic ideas, whilst remaining consistent to the Pure Theory.[51] There is, forexample, a common awareness of the conflict of interests; of the need to demarcate a sphere of analysis for any systematic study; a rejection of psychological and ideological theories and an emphasis on rational reconstruction; a recognition that states are not ultimate

50. Ibid., 299-304.
51. Ibid., 4-15.

political organizations; a distinction between morals and the political or legal sphere coupled with a recognition that there is much interaction; autonomy of spheres avoiding confusion of methods and so on. Also noticeable is the strong tendency to demythologizing in Morganthau, already noted in Kelsen.

In comparison with Kelsen, Hart's theory - with the exception of a theory of just war (occasioned by Hart's rejection of Kelsen's view of law as essentially coercive) [illegible] is very similar. Hart's general jurisprudence has been examined in detail in an earlier chapter, however, it is sufficient here to note Hart's emphasis on the development of secondary rules, rather than institutions, in the development of legal systems.[52] Hart thinks that international law is, at least formally, like primitive law,[53] although it is not clear whether Hart believes there is an international rule of recognition - the Hartian equivalent of the Grundnorm.[54] Hart, despite his denial of coercion as a mark of law, nevertheless distinguishes international law from morality, for they appear as quite distinct systems and this is seen in the possibility of moral appraisal of international law (and also the fact that international law contains much that is morally indifferent). Pointing to the use of municipal law as a paradigm of true law, Hart states that amongst all other rules, international law must present the closest analogue, such differences as there are being merely contingent.[55] Hart also reinforces Kelsen's rejection of the

52. Supra, note 6, 91.
53. Ibid., 222. Hart states that there is a formal similarity.
54. Ibid., 204.
55. Ibid., 231, echoing Bentham.

consent theory of international law. Hart points out that any obligation (self-obligation or otherwise) presupposes a rule and that, in this instance, this can only be provided by international law.[56]

IV

A suspicion about Kelsen's theory should arise at this point. If Kelsen can accept international law as law in spite of its undeveloped nature, why cannot Kelsen also accept natural law? After all, international law and natural law have a common historical source, therefore what is acceptable of one should be acceptable of another.[57]

Kelsen describes international law as comprising 'incomplete norms', in the sense that they require a coercive element provided by the positive legal systems of states. This incompleteness is a characteristic shared by constitutional norms which only attain completeness when part of lower, coercive norms. This may be explained by saying that the system of law has a 'normative shadow' (a norm system). Generally there will be a clear relation of law to norm - perhaps, but not necessarily, one norm to each law. However, because

56. Ibid., 220-1.

57. This seems to be implied by Lauterpacht, supra, note 2 and 125-9, but, at the time of Lauterpacht's article, Kelsen held the international Grundnorm as 'pacta sunt servanda'. Other, more general critics, include W. Friedmann, Legal Theory, 278-80, and W.B. Stern, Note on Kelsen's Theory of International Law.

Kelsen defines law as essentially coercive, he defines each norm as coercive. This naturally raises a problem for some norms exist that are seemingly non-coercive. Kelsen's answer is that these are internally connected to coercive norms and only then become complete norms. This theory was discussed earlier in connected with Hart's theory. Suffice it, for the present, to show that this theory is deeply embedded in the Pure Theory. If this is the case, surely it is plausible to include natural law as incomplete norms? In a sense Kelsen agrees. International law in its present state contingently depends on positive law but, in doing so, it resembles, perhaps, natural law. However, natural law, as seen in an earlier chapter, is destroyed in the process. Now it might be thought that international law is similarly destroyed, becoming like natural law, an ideology to support any state. The difference is that international law is independently established as a non-formal system in a way that natural law is not. The reason for this is that there is a general consensus on what is international law coupled with some content and explicit positivisation in international bodies - so that it is not totally dependent on states.[58] In addition, because it, of its nature, affects other states, it rests on a mutual practice in the way that natural law in any given state cannot.

In summary, therefore, it can be accepted that there is some similarity between natural law and international law. The difference

58. Of course this does not deny that the validity of international law can stem from the Grundnorms of national legal systems as was shown earlier. However, although this is also the case with natural law, as chapter 1 shows, it is destructive of any autonomous natural law. The possibility of an autonomous natural law like international law is ruled out for reasons given in the text.

is that the latter is dynamic, and developing into a system comparable to municipal law, without destroying its fundamental nature.

V

In conclusion, it is clear that Kelsen provides challenging views in reply to the two main lines of criticism of international law. Kelsen affirms the legal status of international law and denies the special status of the state. This does not blind Kelsen to the precarious nature of international law and the immense potential of national interest for corrupting the development of such law. Kelsen also does not, realistically, expect war to be banished in the forseeable future, either as a wrong or as a sanction. Whilst it would be too sanguine to expect either wrongdoing or reprisals to disappear from international relations, it would be possible to move towards a lesser degree of reprisal. With the development of international law to centralized institutions, it is possible to envisage the replacement of national law by a comprehensive international law which would come to regulate individuals directly, in place of national law, and would not need a resort to war. Sanctions would remain only in the form of punishment. Such would fulfil Kelsen's idea of 'peace through law'.

Chapter 10

The Pure Theory in the Courts

Hans Kelsen's Pure Theory of Law and its doctrine of the Grundnorm has achieved a certain notoriety rather removed from its contribution to jurisprudence as such. Such notoriety arises from the occasions on which it has been used as an authority by Commonwealth Courts in the difficult political and constitutional situations created by the aftermath of revolution. Examples of these occurred in Pakistan in 1958 and in Uganda in 1966. However, the most complex and controversial instance was that of Rhodesia following the Unilateral Declaration of Independence of 1965.[1] There the courts moved towards acceptance of the Smith regime and its new Constitution in a series of decisions of major political significance.

After outlining the main legal events, it will be argued that the Rhodesian judiciary and notably Beadle C.J. misrepresented Kelsen's positivist Pure Theory and its concept of Grundnorm as an authority at crucial points in their deliberations in order to disguise from observers, and perhaps from themselves, the profoundly political nature of their actions.[2] In particular, it will be shown that the role of the Pure Theory was to set the terms of that deliberation and to provide the criteria of acceptance of the 1965 Constitution and of the Smith regime; a role utterly illegitimate according to that same Theory. Furthermore,

1. The State v. Dosso (1958) 2 P.S.C.R. 180; Uganda v. Commissioner of Prisons ex p. Matovu (1966) E.A. 514; Madzimbamuto v. Lardner-Burke N.O.; Baron v. Ayre N.O. GD/CIV/23/66, Government Printer, Salisbury (Lewis and Goldin J.J.); (1968) 2 S.A. 284 (Appellate Division); (1969) 1 A.C. 645 /Privy Council); R. v. Ndhlovu (1968) 4 S.A. 515; Dhlamini and Others v. Carter N.O. (1968) 2 S.A. 445.
2. The text relied on was Kelsen, General Theory of Law and State.

it will be argued that according to the Pure Theory the courts' actions could only be political and not the outcome of purely legal reasoning alone. In this light the ensuing debate about the role of the Pure Theory in the courts will be examined and the Theory will be defended against doubts raised about its integrity in that context. Specifically, it will be argued that, correctly understood, the Rhodesian case does not provide evidence of the immorality thought by some to be consequent upon a positivist approach to law.

I

Prior to U.D.I. (11.11.65), the Rhodesian courts were sitting under the 1961 Constitution granted by Britain which reserved certain residual powers to the British Government, whilst there was nevertheless a convention that the latter should not legislate for Rhodesia except in the event of a breach of that Constitution.[3] In addition, the Colonial Laws Validity Act, 1865 denied the right of a colonial legislature to alter a constitution except in the manner stipulated within it. Entrenched within the Constitution was a Declaration of Rights which guaranteed basic human rights and freedoms, including protective provisions to secure the observance of proper legal procedure and protection from discrimination by laws or administrative action. A right of appeal to the Privy Council was also provided by the Constitution as part of that Declaration. At the time of U.D.I. the Smith regime promulgated a new Constitution which introduced

3. The Crown retained ultimate control over the power to pardon.

fundamental changes from that of 1961, whilst retaining other provisions. The New Constitution provided for the appointment of an official to serve as the Queen's representative, replacing the Governor. The Rhodesian legislature took all power to make laws, denying any such power to the British Government and it made the previously entrenched clauses of the 1961 Constitution subject to a majority decision of the legislature. In the light of ensuing legal developments, a significant change was effected by abolishing the right of appeal to the Privy Council, whilst providing for the continuing in office of the sitting judges (subject to an oath of loyalty). The 1965 Constitution did not present itself as deriving validity from its predecessor, but declared its own validity. In response to U.D.I. and the new Constitution the Governor issued statements dismissing the Ministers forming the government and calling on the people to refrain from supporting the regime the Ministers now formed. However, the people were asked to carry on their normal tasks and maintain law and order, the judiciary being specifically included in that request. A few days later the British Government replied with the Southern Rhodesia Act, 1965 and the Constitutional Order, 1965. These were held to be retrospectively effective as from the date of U.D.I. and denied legality to the acts of the Rhodesian legislature, placing authority in H.M. in Council.[4] The United Nations passed a resolution (5.11.65) calling upon Britain to resolve the situation by the use of force. This was followed by a Security Council

4. The British Government did very little in using these powers for legislation.

resolution (12.11.65) calling on member states not to recognise the Smith regime and to enforce sanctions against it. The British Government eschewed the use of force and adopted a policy of negotiation, relying on the effect of sanctions to ensure a successful conclusion.

The Rhodesian judiciary were placed in a very difficult position. The new regime, presumably motivated by a desire for respectability,[5] allowed the courts to continue in office after an unsuccessful attempt had been made to enforce an oath of loyalty. As Beadle C.J. said

> That the present situation is a wholly unprecedented one seems beyond question. It is unprecedented because here, during the course of the revolution, a court which has not "joined the revolution" has been permitted to sit and continue to function and now has to adjudicate as such a court.[6]

What the court felt it had to adjudicate was ultimately the success of the revolution and consequently the validity of the new regime and its Constitution. This occurred in a series of cases which questioned the legitimacy of the new regime; the most important being Madzimbamuto v. Lardner-Burke N.O.; Baron v. Ayre N.O. which, for obvious reasons, became known as the "Constitutional Case". Both Madzimbamuto and Baron were subject to a detention order made before U.D.I. and which, in terms of the State of Emergency under which it was made, had expired. Their detention was nevertheless continued by an order made under the 1965 Constitution. This was challenged before

5. As Dias says, this enhanced the show of legality and avoided the controversy of packing the bench. See R.M.W. Dias, Legal Politics, Norms behind the Grundnorm, 258. This meant the provision for oaths of the 1965 Constitution was ignored.

6. Madzimbamuto v. Lardner-Burke N.O.; Baron v. Ayre N.O. (1968) 2 S.A. 307.

the High Court of Rhodesia on behalf of the detainees on the grounds that 'the Parliament of Rhodesia has no legal existence and everything done by it is invalid'.[7] In reply, on behalf of the regime, it was argued before the High Court (in terms redolent of the Pure Theory),

> that a legal order ceases to have validity when it loses efficacy and no longer coincides with reality, and that this applies whether the new order which replaces it came about in a legitimate way or not, provided only that the prior efficacy of the old order has passed to the new one.[8]

Failing this, it was argued (in terms imported from international law) that even if the regime was not clearly the de jure government it was undoubtedly the de facto government and hence some of its acts were clearly legitimate.[9] Closely connected to this was an argument that the enforcement of the regime's laws was necessary for public order - the 'doctrine of necessity'.[10] The court (Lewis and Goldin J.J. presiding) held that the stronger case failed because this was not an argument applicable to the present situation where, despite the lack of a legitimate internal succession of regimes, there was still an external sovereign. This being the case, the court could not decide whether such sovereignty had ceased, internal efficacy not being considered as a critical test. In reply to the alternative arguments, the court emphasised its reliance (for continuing in office) on the regime and the lack of British assistance in that respect. It was held necessary to avoid what would be, in effect, a legal vacuum.

7. Judgement 6 per Lewis J.
8. Supra, note 2, 115, The Basic Norm of a Legal Order was cited; supra, note 7, 9. The applicability of Kelsen's theory and others was rejected; ibid., 17 per Lewis J.
9. Supra, note 7, 26 per Lewis J.
10. Ibid., 63 per Lewis J. The discussion was in terms of 'salus populi suprema lex'.

Consequently it was found that the detention orders at least were consistent with maintaining order without detriment to the fundamental rights of the 1961 Constitution.[11]

Those arguments advanced by the regime all figured in the case on appeal. Of these the argument of 'efficacy to validity' set the terms of much of the deliberation.

On the appeal of Madzimbamuto and Baron to the Appellate Division of the High Court the judges carried out an extensive survey of cases from other legal systems (including those arising from the U.S. Civil War)and of numerous works of jurisprudence.[12] Amongst the latter, Kelsen's Pure Theory was prominent. The Chief Justice in particular imparted a strong Kelsenite flavour to the proceedings; especially by the employment of Kelsen's concept of Grundnorm.[13] Beadle C.J. posed the problem as one of deciding whether the Grundnorm had changed. This he proposed to determine by judging the efficacy of the change of regime (whether it was generally accepted and obeyed), making this the criterion of validity of its Constitution. In this connection, Beadle C.J. cited the use of Kelsen's theory in the earlier Pakistan and Uganda cases which also concerned the validity of a post-revolutionary regime.[14] The sections of Kelsen's 'General

11. Ibid., 74 per Lewis J.
12. Supra, note 6, 284. Cases relied on in particular were Baldy v. Hunter, 171 U.S. 388 (1898); Johnson v. The Atlantic Gulf and West Indian Transit Co. 156 U.S. 618 (1894).
13. See chapter 5 at note 28 for a brief outline of the concept of Grundnorm.
14. Supra, note 6, 316-8.

Theory of Law and State' specifically relied on were those entitled The Principle of Legitimacy; Change of the Basic Norm; The Principle of Effectiveness.[15]

With these references to hand, Beadle C.J. argued that, although the Smith regime was the effective government, it was impossible to say if it would remain so, because at that time the outcome of the application of sanctions could not be predicted. Hence, it was not possible to accept the regime as having validity. He then held that the old Grundnorm was inoperative but that the regime had not yet succeeded in 'setting up' a new Grundnorm and that, consequently, the legal system was in the position as described by Dias[16] (where there is no longer a Grundnorm, but some criterion which gives the quality 'law' has to be used, even if it belongs to the old order). Eekelaar's view that there was a 'split' in the Grundnorm, retaining de jure elements of the 1961 Constitution whilst depending in a de facto change, was also referred to.[17] These formed the background to Beadle C.J.'s solution which was to base the court's authority on the de facto government whilst not 'joining the revolution'. This did not of course

15. Supra, note 2, 117-119.

16. R.M.W. Dias, Jurisprudence, 381 referred to; supra, note 6, 351. Kelsen would doubtless say that this would still ultimately (in interpretation) require a Grundnorm. Beadle C.J., however, appeared to rely on the 1961 Constitution. Whilst it is possible to make sense of this when coupled with dependence on a de facto regime, it is difficult to square in legal theory as Fieldsend A.J.A. pointed out.

17. Supra, note 6, 351. Referring to this, J.D. Finch, Introduction to Legal Theory, 121, says, 'A split in governmental allegiance in a country does not, for instance, connote a split in the basic norm, any more than the inapplicability of the basic norm to a disunited political system presents us with a case of juristic schizophrenia!'.

imply that everything the de facto government did was lawful for otherwise it would be de jure, as Beadle C.J. pointed out. The Chief Justice concluded

> The present Government has effectively usurped all the governmental powers under the old Grundnorm, but has not yet succeeded in setting up a new Grundnorm in its place. As a result of this effective usurpation it can do anything which the Government it usurped could have done, but until the present Government has achieved the status of a de jure Government, and the revolutionary Grundnorm becomes the new Grundnorm, it must govern in terms of the old Grundnorm . . . until its new constitution is firmly established, and has thus become the de jure constitution of the territory, its administrative and legislative acts must conform to the 1961 Constitution.[18]

Fieldsend A.J.A., taking a more rigorously legal view, rejected this 'half-way house' solution, pointing out that the Smith regime could not even be regarded as the de facto government because it did not control the judiciary. Claiming that the court still sat under the 1961 Constitution, Fieldsend A.J.A. rejected the possibility of even embarking on an enquiry into the existence of a constitution,

> the court cannot sit to determine whether the constitution under which it was created has disappeared . . . A court created by a written constitution can have no independent existence apart from that constitution.[19]

(Indeed, as he pointed out, a court is normally thought of as guardian of its constitution). The basis for the court's enquiries in this respect was not satisfactorily explained and it is difficult,

18. Supra, note 6, 351-2.

19. Supra, note 6, 429-30, criticising the Pakistan and Uganda cases. The Privy Council concurred; (1969) 1 A.C. 668.

following Fieldsend A.J.A., to see how it could be.[20] He concluded that the court's authority could come only from its original Constitution, if this was in doubt then so must be the court's authority also. However, in the circumstances, he was prepared to accept a limited doctrine of necessity to avoid a legal vacuum in practice (providing that it did not further the usurpation, was necessary for public order and retained the individual rights of the 1961 Constitution).[21] This approach was rejected by Beadle C.J.

The court upheld the validity of the Proclamations of Emergency as being necessary for the maintenance of law and order. However, the judges unanimously held that the particular detentions under review were invalid, as the need for continuing the detention had to be reassessed on each renewal by the Minister, which had not occurred in this instance.[22] The Smith regime regarded this as something of a victory and proceeded to embark on a new series of detentions within the court's criteria. These included the detentions of Madzimbamuto and Baron.

The case was considered by the Privy Council which held unambiguously that the British Government retained sovereignty. It rejected

20. J.W. Harris, When and Why Does the Grundnorm Change? 127, argues from the possibility of judicial determination of its own power in individual cases, that it is thus correct to extend this to the constitution. This does not follow, for the latter effectively entails that judges can determine their own powers in all cases at once including the very determination by which they do so. Nevertheless, it cannot be denied that judges can enquire into particular contents of their constitutions.

21. Supra, note 6, 441.

22. That is, on grounds independent of the Constitutional position.

the compromise solution of Beadle C.J. and with it a de jure/de facto distinction,[23] which the Board held was inapplicable in an internal situation. The doctrine of necessity was also rejected as inappropriate for there was, in the opinion of the Board, no legal vacuum because the power to make laws lay with H.M. in Council.[24] The Privy Council appeared to accept the argument by the Chief Justice of Pakistan,[25] which purported to rely on Kelsen's authority, arguing that the essential condition to determine whether a constitution has been annulled is the efficacy of the change. In this respect it was held that it was impossible to say that the British attempt to reassert sovereignty would fail. The Board emphasised the difficulty of determining efficacy, as witnessed by the different views of the Rhodesian judges.[26] Furthermore, it took that difference as indicating that the decision lay with the court rather than being an objective test.[27]

The case of R. v. Ndhlovu[28] gave the Rhodesian court an opportunity to reply to the Privy Council. Beadle C.J. criticised the Privy Council's

23. Madzimbamuto v. Lardner-Burke and Another (1969) 1 A.C. 723, remarking that this pertained to international recognition which was a matter of politics. They held that the continued sitting of the court was proof of British sovereignty; ibid., 670, agreeing with Fieldsend, A.J.A.

24. Lord Pearce dissenting, to reach a position similar to Fieldsend A.J.A.; ibid., 731-745, esp.732.

25. The State v. Dosso (1958) 2 P.S.C.R. 185.

26. Supra, note 23, 669.

27. Ibid., 669-671. They held that the regime was not de facto (agreeing with Fieldsend A.J.A.) and that the judges should continue under the 1961 Constitution or resign.

28. R. v. Ndhlovu (1968) 4 S.A. 515.

approach as being unrealistic and legalistic.[29] The efficacy of the regime was then reconsidered and it was found possible to 'predict with certainty that sanctions will not succeed in their objective of overthrowing the present Government'.[30] The new Constitution was thus efficacious and hence valid. Citing the Pakistan and Uganda cases, Beadle C.J. concluded that by remaining sitting the court therefore accepted this change.[31] Whatever weight might be attached to considerations of efficacy the acceptance of the regime was not unexpected coming, as it did, in the wake of the court's decision in Dhlamini v. Carter.[32] Here the Rhodesian Appeal Court refused a delay to allow sufficient time to appeal to the Privy Council (and thus in effect denied an entrenched clause of the 1961 Constitution) on the grounds that a favourable decision would prove ineffective.[33] Despite that decision, the accused were reprieved by Royal Prerogative from their death sentences. This effectively ended the pretence of loyalty to the Queen that the regime had fostered and brought the courts to a Rubicon, bringing their loyalty into conflict with their dependence on the regime and its executive. No compromise was possible and the court held that the prerogative of mercy now lay with the regime.[34] Any idea of retaining whole or part of the 1961

29. Ibid., 517-523. This seems partly a reply to the Board's criticism of his political leanings and to its failure to conduct an enquiry into efficacy. The Privy Council is open to this latter charge because of its use of the efficacy argument.
30. Ibid., 532 the use of force being ruled out.
31. Ibid., 522. A republican Constitution followed on 1.3.70.
32. Dhlamini and Others v. Carter N.O. (1968) 2 S.A. 445.
33. Ibid., 466.
34. Ibid., 469 per Beadle C.J.

Constitution was no longer possible. Fieldsend A.J.A. and Young J. resigned. The majority of the judiciary remained, in effect joining the revolution. The three Africans reprieved by the Queen were executed on the 6th March, 1968.

It is clear from these decisions that the courts, and the Chief Justice in particular, formed much of their deliberation in terms of the Pure Theory and especially its concept of Grundnorm and the relation of efficacy to validity. Indeed, the dependence of the change of Grundnorm on efficacy was made the crucial test in determining the court's attitude to the Smith regime, and was treated as equivalent to resolving the status of the Constitution. Whilst there can be little doubt of the relevance of the Pure Theory to these events, what may be doubted is the propriety of the role in which it was cast.

II

Speaking of misconceptions of Kelsen's theory, Finch rightly asserts,

> they are largely attributable to a confusion of the two senses of the word constitution . . . In particular, the constitution in the positive legal sense has been taken for the basic norm, which it is not.[35]

35. Supra, note 17, 126-7. This also contains a careful analysis of the relation of the two concepts and of the use of the concept of Grundnorm in general. Probably the clearest exposition provided by Kelsen is that given in his reply to Stone; Kelsen, Professor Stone and the Pure Theory of Law.

It is submitted here that the Rhodesian case proves the validity of this assertion and, indeed, provides the classic example of such a confusion. Although the court misinterpreted Kelsen's work at other points, as several writers have indicated, these misinterpretations arise from the deeper confusion of Grundnorm and Constitution indicated by Finch and are explicable only in terms of it. Grundnorm and Constitution were generally treated as synonymous in the Rhodesian case, as in those of Pakistan and Uganda. This enabled the court to treat Kelsen's remarks on the legal science concept of Grundnorm as being directly applicable to the status of the Constitution and the judges' decisions concerning it.

The evidence for this confusion will become apparent from an examination of the terms (below) and from the further misinterpretations that this confusion created. It is also apparent in the deliberation of Beadle C.J. who gave the authoritative formulation adopted by the court. In the following examples, Grundnorm and Constitution are used as synonymous with each other and, in one place, with another concept called the 'fundamental law' (from Madzimbamuto v. Lardner-Burke,[36] my emphasis throughout).

(p. 315) It may be accepted that a successful revolution which succeeds in replacing the old Grundnorm ('or fundamental law') with a new one establishes the revolutionaries as a new lawful government.

(p. 327) They were satisfied that the revolution had succeeded and the 'fundamental law' had changed and had been replaced by the new constitution.

36. Supra, note, 6.

(p. 323) . . . unconstitutional change in the Grundnorm.

(pp. 351-2)

> The present government has effectively usurped all the governmental powers under the old Grundnorm but has not yet succeeded in setting up a new Grundnorm in its place . . . To sum up here, therefore, I consider that the present Government having usurped effectively the governmental powers under the 1961 Constitution can now lawfully do anything which its predecessor could lawfully have done but until its new Constitution is firmly established . . . [37]

The situation in the Pure Theory is radically different. There Grundnorm and constitution are sharply distinguished. This must be so because the Grundnorm is the reason for the validity of the constitution as seen by legal science and merely marks the fact that a constitution is accepted by the legal system. The Grundnorm says for example, "one ought to obey the prescriptions of the historically first constitution".[38] The constitution and other positive laws prescribe by means of the norms they contain, the prescription being what the norm states ought to be the case. The Grundnorm however is a presupposition of legal science, for if it was another prescription like the constitution (and hence another positive law) it would always be possible to ask why that prescription in turn was itself valid. The Grundnorm is thus at the top of a hierarchy of norms which are the normative elements of the positive laws of a legal system - which is thus itself a hierarchy. (A law contains various elements, only the

37. The expression 'setting up a Grundnorm' is the most obvious betrayal of the confusion for, whilst it is clear how a government may 'set up' a constitution, it is far from clear how it should 'set up' a concept of analytical jurisprudence. If it is strange to find the courts acting as legal scientists, then it must be stranger still to find a government doing so as well!

38. Kelsen, Pure Theory of Law, 204.

prescriptive element itself being the norm and thus the subject of legal science). It is the Grundnorm which answers the question, if it is asked in legal science, why lower norms in a legal system and the constitution can derive their validity from other norms rather than from facts. Thus, the validity of a lower norm is derived from a higher one. It may seem that validity really derives from the court's decision in applying a norm or from the legislative process, but these in turn rely on norms which grant such powers (the system is, in Kelsen's words, 'dynamic' as it creates powers of norm creation, rather than merely dictating specific norms; it is thus creative at the level of the court's application). Ultimately, the system derives from the norms of the constitution, but when those are questioned their validity can only be assumed by means of the Grundnorm. As no facts can give validity, and as the hierarchy of validity must stop somewhere, the system rests on a presupposed validity, which thus marks the validity of the system as a whole. Indeed, the system is defined as comprising those norms which derive their validity from the single common source of the Grundnorm. In Kelsen's words, by means of the Grundnorm

> the subjective meaning of the acts performed in accordance with the constitution, are interpreted as their objective meaning, as valid norms.[39]

By this, Kelsen means that it is only by analysing norms that laws (which contain them) can be understood in such a manner as to distinguish between a demand, such as a gangster may make, and a prescription which we see as the outcome of a valid legal system.

39. Ibid.

From the example given above, it is clear that the Grundnorm is presupposed with reference to a specific constitution and has no independent status, and furthermore can in no way determine what its contents may be (merely clarifying in legal analysis the validity given to the constitution as a result of its recognition by the courts). Most importantly, it must be emphasised that the Grundnorm is not prescribed by the Pure Theory because the theory is concerned with cognition and does not prescribe at all.[40] Thus the Pure Theory could not create a law on its own account, which is obviously something only those authorised to do so by the legal system can do. It is because of this that the Pure Theory can only presuppose for the sake of intellectual coherence. It is true that Kelsen does refer to the Grundnorm as the 'constitution in the legal-logical sense' as opposed to the 'constitution in the positive legal sense', but the two radically different concepts are never confused by him. This distinction is so basic to the Pure Theory, occurring repeatedly (and should be obvious from the passages cited by the judges), that it is difficult to imagine a more fundamental misinterpretation. Reasserting this distinction against Stone's attempt to merge the two concepts, Kelsen (not without cause) testily remarks, 'This interpretation is without any foundation in my writings'.[41]

40. Except in the limited sense that the Grundnorm is stipulated by Kelsen for use in interpretation by legal science. It is never prescribed to law. Kelsen is here maintaining the distinction between cognition (understanding) and volition (willing). All science, including legal science, is concerned with cognition, even if its subject matter is actually created by 'acts of will' (in the case of legal science; the prescription of norms). This distinction, as seen in chapter 4, derives from Kant, where it is expressed as the distinction between pure and practical reason. This is correlated to the fact-value distinction, facts and values being the outcome of cognition and volition respectively. This is so even in legal science where a system's value (a norm) is a fact from the point of the legal scientist.

41. Kelsen, Professor Stone and the Pure Theory of Law, 1141. However the potential that the Pure Theory had for a more active, and less scientific, role is pointed out in chapter 11, infra.

In persistently committing this confusion, the court was enabled to treat as prescriptive for its decisions a theory that is entirely descriptive and consequent on that very decision itself. In other words, the court took the Grundnorm as granting validity itself rather than being a recognition of the outcome of the court's acceptance of a constitution as valid. By doing so the judges disguised the overtly political nature of that decision. This was accomplished by means of using the confusion to equate the validity presupposed of a constitution by the Grundnorm in legal theory with the validity bestowed on the Constitution by its acceptance by the court. (For whatever constitution is accepted a Grundnorm is consequently assumed in legal science.) The latter act of political decision was thus seen as inevitable as a result of being presented in the guise of the former act of interpretative necessity. Hence the logical necessity of the Pure Theory was enlisted in support of 'political necessity', This presentation gave credence to the court's view that its decision was forced upon it by the Grundnorm change outside its control. The clearest demonstration of this was by the way the problem was posed as being whether the government had successfully 'set up a Grundnorm', which is far removed from the presupposition of legal science which the Grundnorm actually is. By such means the court converted, what according to Kelsen, is a purely cognitive act into an impossible prescription. For, as seen above, the Grundnorm must be presupposed (and cannot be a positive law) otherwise, as a prescription, it would be unable to answer the question why that prescription itself was valid. Moreover, because of the confusion of Grundnorm and Constitution, the judiciary were able to present themselves as impartial scientists. In turn this was responsible for the activity of predicting efficacy that

the court embarked upon, an activity utterly alien to the Pure Theory, but readily comprehensible if one is applying a post-decision description as prescriptive in making that very same decision itself.[42] That decision could only be an act of norm creation and not a presupposition of legal science. With an act of norm creation Kelsen is clear that politics may typically be the main determinant, constrained only by the need to found the validity of the norm thus produced (embodied in a law) on a higher norm. However, when the norm in question is the constitution itself and thus the highest positive norm (the Grundnorm being formal and in no way effecting its contents), then it is clear that such a choice is without such constraint of a higher norm and can be entirely political.[43] This doubtless may appear to be an odd conclusion, but it stems from the scant justification of deciding on the validity of the Constitution, as Fieldsend A.J.A. pointed out. Such an activity is not specifically rejected by Kelsen, in the passages cited or elsewhere, for the simple reason that it is not envisaged by him.

The court, having committed the central confusion of Grundnorm and constitution, assumed Kelsen's remarks on the relation of efficacy to the concept of Grundnorm as being equally applicable to the 1965 Constitution. However, this committed the court to a new misinterpretation. According to the Pure Theory, the relationship of efficacy to

42. A descriptive theory can only be interpreted as prescriptive if its description is treated as being of a future state of affairs, which it is then held as implicitly prescribing to the present.

43. See e.g. Kelsen, Science and Politics, 654.

validity is always a conditional one. Efficacy (coupled with an act of norm creation) is a condition for the existence of a norm which thus provides the subject matter of legal science. So that if a norm was never obeyed it would cease to be a norm as far as legal science is concerned, although the law corresponding to the norm may remain on the statute book. However, once established, the reason for a norm's validity can only be another norm above it in the hierarchy and ultimately the Grundnorm itself. (This is the difference between asking whether there is a norm and asking why it ought to be obeyed). This follows from Kelsen's rigorous positivist distinction between facts (is) and norms (ought) for, as seen abovem no fact can make a norm valid. Despite the fact that the conditional nature of the relation was pointed out in an article by Eeekelaar[44] cited by the court, it nevertheless saw efficacy as automatically conferring validity. The reason for this clear misunderstanding lies in the confusion of Grundnorm and Constitution which allowed the court to obliterate the distinction between descriptive theory and prescriptive decisions, enabling them to treat as necessary consequence a merely conditional relation. (Hence Kelsen's remarks on the conditions for legal science to establish the existence of a norm were treated as a precedent for the court). It is hardly surprising that the court should

44. J.M. Eekelaar, Splitting the Grundnorm, 161 cited; supra, note 6, 351. See also Eekelaar, Rhodesia: the Abdication of Constitutionalism, 22-23. In Kelsen efficacy is a necessary condition for a norm to be said to exist. Only then, if the existence of a norm is established, can its validity be determined solely by its derivation from other norms. The court took the relation as being 'conditional' in the sense that efficacy was an immediate, necessary and sufficient condition for validity, thus neglecting Kelsen's insistence on the distinction between fact and value. This perversion of Kelsen's Theory followed readily from the merger of the constitution in the positive legal sense with the Grundnorm.

have contradicted Kelsen at this point, as Eekelaar pointed out, if the deeper source of confusion outlined above is appreciated. Eekelaar's point has been criticised by J.W. Harris[45] on the grounds that it assumes that Kelsen requires something else before conferring validity, when (it is said), all that is required to confer validity is a decision to interpret the system of laws as a logically consistent field of meaning, 'a decision which entails no value commitment'.[46] From the above discussion it will be clear that, whilst this may be true for a legal scientist interpreting a legal system, it has absolutely no import for the quite different position of a judge deciding to accept a regime's constitution as the basis of his law.[47] The mistaken relationship of efficacy to validity is then, it is submitted, merely the outcome of deeper confusion.

45. Supra, note 20, 116. In the space available it is not possible to deal with Harris's arguments which are based on distinctions made between various types of validity. It is argued here that these are rendered irrelevant by appreciation of the central confusion made by the court. Harris thus maintains that judges can be both judges and legal scientists at the same time, a view seen here as profoundly mistaken and not in any way in accord with the Pure Theory. (Even were this granted, it is submitted that Harris is misled by distinguishing between validity, as derived from higher norms, and non-conflict between norms, and greatly over-emphasising the role of the latter in Kelsen. Whilst it is true this logical version of validity plays a role in Kelsen's work, it is progressively diminished and rejected in Law and Logic of 1965. This problem will be dealt with in chapter 11, infra.)

46. Ibid., 116 c.f. 123.

47. This reasserts the distinction cogently argued by F.M. Brookfield, The Courts, Kelsen and the Rhodesian Revolution, 342-344. It is here argued that Harris is wrong in rejecting Brookfield's argument, and that this logical distinction has tremendous political import.

Doubts may remain that, even correctly understood, the Pure Theory might have some indirect persuasive authority.[48] However, this would be a basic misunderstanding of the strict limits that the Pure Theory sets itself. The Pure Theory does not attempt to usurp the decision-making role of a judge because the theory is not part of the legal system. As Kelsen puts it

> Never, not even in the earliest formulation of the Pure Theory of Law did I express the foolish opinion that the propositions of the Pure Theory of Law "bind" the Judge in the way in which legal norms bind him.[49]

This, once again, makes clear the differing roles of legal scientist and judge in Kelsen's view.

Another line of attack on the use of the Pure Theory by the court has been made by pointing out how imprecise Kelsen's criteria of efficacy are. Kelsen's formulation is that "A legal order is regarded as valid, if its norms are by and large effective, (that is, actually applied and obeyed)".[50] This this seems to leave open an area of judicial politics. As Dias puts it

> The truth of the matter is that effectiveness is only what the judges choose to regard as such; which places considerable power in their hands.[51]

This seems abundantly borne out by the sort of evidence that the

48. C.f. Harris, supra, note 20, 125.
49. Supra, note 41, 1134, in reply to J. Stone, Legal Systems and Lawyer's Reasonings, 102-3.
50. Supra, note 38, 212.
51. Supra, note 5, 254.

judges considered in deciding efficacy, e.g. the state of the Rhodesian building trade, and by the disagreement amongst the judges as to the degree of efficacy. One cannot escape the conclusion that this is a very accurate picture of the court's activities in adopting efficacy as its criterion, which became a 'cloak for personal decision' as Dias claims. This analysis would show that the Pure Theory could not be held directly responsible for the decision, but only at the cost of showing its vulnerability to political use. Fortunately it is unnecessary to resort to this as the above arguments show. The only reason that this appears to be a weakness is because of the confusion of Constitution and Grundnorm, which allowed the theory to be treated as prescriptive, whereas in fact it was never intended to be applied by judges at all. The basic mistake is thus not so much applying the Pure Theory wrongly, as in applying it at all. Thus a methodological device of legal science was held as being binding on the court. Such a formulation as Kelsen provides can afford to be loose because it was not designed to serve as a crucial test, or for a situation where the constitution is in doubt.[52] Hence the legal scientist can only begin his work once the courts have resolved these problems in their own terms.

Arising from this attack made by Dias, another point is made by Honoré.[53] This points to the ambiguous position of the judges whose

52. As S.A. de Smith, Constitutional Lawyers in Revolutionary Situations, 106 points out, Kelsen's model is of a straightforward coup d'etat.

53. A.M. Honoré, Reflections on Revolutions, 272. Also referred to by the Privy Council; supra, note 23, 669.

acceptance of validity is part of the very efficacy on which they rely in judging that validity (thus being entirely circular). Thus, if the courts apply laws under a constitution, this is an important part of that constitution's effectiveness. This should have been evident from the Pure Theory where application of norms by organs of the legal system is relevant to efficacy (as well as obedience to them by the populace). As Dias remarks

> . . . one cannot help remarking that it is the judges who, by these decisions, kept cementing effectiveness layer by layer until it reached a point at which they could look back on their own handiwork and treat it as an objective fact.[54]

Although, as pointed out above, this state of affairs only arose because the judges were able to merge their role with that of legal scientists by means of their central confusion, Dias's description is again an accurate picture of the consequences.[55] Such a state of affairs does not arise in the Pure Theory properly understood because, according to it, the legal scientist is not in a position to help create efficacy but can only commence his work once it has been established (merely recognising that fact). Nonetheless, having adopted the Pure Theory as an authority and representing it as obliging them to make decisions regardless of their personal or political views, the flaw that Honoré points out did seem to be realised by the judges and, hence, to threaten the role they assumed. In this light it is interesting to observe the difference in importance that the judges attributed to the court's decision in the Constitutional case.

54. Supra, note 5, 253.
55. C.f. Harris, supra, note 20, 123.

Beadle, C.J. and Jarvis A.J.A. claimed that the decision would make very little difference to the regime; it being already the de facto government. Quenet J.P. and Macdonald J.A. claimed that it would make no difference at all because the revolution had succeeded in all respects. Fieldsend A.J.A. however held that the court's position was of sufficient significance to render the revolution inefficacious whilst the courts remained independent. (Hence for Fieldsend A.J.A. a favourable decision would at least be a conferment of efficacy). From this it is apparent that the more inclined the judges were to recognise the regime, the more they reduced the significance of this in maintaining an appearance of passivity. Despite his own arguments casting doubt on the court's use of the Pure Theory, Honoré sees the majority view as an outcome of 'Kelsen's political quietism'.[56] However, from the foregoing arguments, it is clear that the court had no authority from the Pure Theory to adopt any decision or attitude. The 'quietist' attitude which the court professed bore little relation to what, in fact, they were doing, which was of a highly political nature, as seen indeed by Honoré's argument (and those of others given above). Kelsen's theory is politically quietist because it is a science of law and strives to be non-ideological. The Pure Theory was never intended as an ideology of passivity to be adopted by courts. That the court adopted it as its practical policy can only be attributed to the Pure Theory as a result of confusion.

56. Supra, note 53, 272.

It has been emphasised above that the judges' misrepresentation of the Pure Theory allowed them to present their decision as the unavoidable outcome of legal realities. Some idea of the consequences in the judges' reasoning can be seen by Beadle C.J.'s remarks in the Constitutional case.[57] For example: (p. 327) 'The law cannot vary with the political views of the individual Judge who "declares" it'. (p. 327) 'The question of whether or not at the time the 'fundamental law' had changed was a question to which only one correct answer could in the circumstances be given, and this did not in any way depend on the political views of the Chief Justices'. (p. 328) '. . . in a revolutionary situation the political views of the Judge do not play any more significant a part in determining what the law is than they do in normal times'. And in R. v. Ndhlovu, having accepted the Smith regime as valid, he rejected the view that

> . . . a Judge, by carrying on with his humane task of preserving the law and order and avoiding chaos is either joining or at least aiding or approving of the revolution. This is not so. The Judge is simply forced into a position of accepting the facts and the laws as they are, whether he likes them or not. He has, as I have said before, simply been overtaken by events.

He then drew an analogy between a murder and the demise of the 1961 Constitution claiming that they are both unalterable facts; the establishment of which did not entail judicial approval in either case. Declaring the 1961 Constitution invalid he added

> The Judges, by taking cognisance of the fact that this is so, cannot justly be accused of being in

57. Supra, note 6, 284.

> any way responsible for the change, nor can it be implied that by accepting the fact of the change they approved of it. The change is not a matter of their making.[58]

From the foregoing discussion these professions of political innocence can be seen as fundamentally misleading, the judges themselves making the political decision to confer validity on the new regime's Constitution which was then seen as a 'fact' outside their control, making their political or personal attitude 'irrelevant'. Where Beadle C.J. did speak of a personal choice this was in terms of a decision to carry on after the 'fact' had been established. But as de Smith remarks

> For all practical purposes a legal system or a constitution is valid when the judges have unambiguously accepted it as valid. To this extent the constitution is what the judges say it is.[59]

Somewhat in tension with the Chief Justice's repeated apolitical professions, he also stressed the need to accord with political realities, which provoked the Privy Council to remark

> Beadle C.J. frequently invokes "political realities". It is difficult to avoid saying that in so doing he departs from the terms of his judicial oath since he appears to prefer "political realities" to law.[60]

It should now be clear that the politics of the court are in no way derived from the Pure Theory of Law. This answers the charge made

58. Supra, note 28, 533. See also the remarks cited from supra, note 6, 351, on 'setting up a Grundnorm'.
59. Supra, note 52, 104.
60. Supra, note 23, 670, c.f. Beadle, C.J., supra, note 6, 327.

by Dias against Kelsen. Dias sees the case as an illustration of the practical evils of positivism and its divorce of morals and law (claiming therefore that the Grundnorm should be made a moral phenomenon, introducing a natural law element). This seems plausible from Beadle C.J.'s statement

> My approach to the position of the Judges and of the High Court and, indeed, to these cases as a whole, is a "positivist" approach; because I think that in the situation which exists in Rhodesia today what "is" or what "is not" the law can only be decided on the basis of accepting things as they actually "are", and not simply as they "ought to be".[61]

As Dias points out, it is clear that the judges' decision was primarily a personal one, the issue is thus whether Kelsen's positivism supports this. From the foregoing arguments it should be obvious that it does not. Dias argues that the main issue should be whether (morally) to accept a Grundnorm which perpetuates inequalities; something he sees a positivist theory neglecting. However, it should be clear now that this should be directed at the Constitution; not at a concept of legal science. It is the Constitution that may perpetuate inequalities and may be morally repugnant - not the Grundnorm. In this respect it must be remembered that Kelsen's theory is a Pure Theory of Law, not a theory of pure Law. It would be highly misleading to build a moral bias into the Theory (and the concept of Grundnorm), no matter how congenial this might be. On the other hand, there is no reason why the constitution should not have a moral bias. Moreover, although the Pure Theory makes no evaluation itself, this in no way rules out moral evaluation of constitutions.[62] The Rhodesian decisions cannot

61. Supra, note 6, 326, and quoted by Dias, supra, note 5, 256. Once again merging the roles of legal scientist and judge.

62. For a defence of positivism against this type of charge, see H.L.A. Hart, Positivism and the Separation of Law and Morals.

be taken as a warning of the evils of the Pure Theory's positivism, for the judges, despite their statements to the contrary, did not and could not act as Pure Theorists.

Conclusion

The above discussion demonstrates what de Smith has called 'fundamentally political judgements dressed in legalistic garb'.[63] It was not therefore surprising as a decision by members of the ruling European elite.[64] Nevertheless, this conclusion must be tempered by the fact that the Privy Council also committed the same basic confusion (of Grundnorm and Constitution) which had allowed the Rhodesian court to conceal its politics.[65] This serves as a warning

63. Supra, note 52, 94.

64. de Smith, Ibid., 108. For the political backgrounds of the judges see C. Palley, The Judicial Process: U.D.I. and the Southern Rhodesian Judiciary, 263. The fact that Young J. was once a leader of an anti-African party, yet resigned from the courts on legal grounds, should caution against seeing the judiciary as merely motivated by personal politics.

65. Supra, note 23, 725. Having asserted sovereignty, the Privy Council had no need to consider the efficacy argument. Munir C.J.'s discussion was referred to; supra, note 25, 185 but was held inapplicable as there were two rivals contending for power in the Rhodesia case but no rival in that of Pakistan or Uganda. Nevertheless, the Privy Council did appear to follow Beadle C.J. in regarding the efficacy of the regime (determined by the possibility of the British Government regaining control) as relevant. Although the Board concluded on these grounds that the Smith regime was illegal, this argument was superfluous. Moreover, Beadle C.J. took the Privy Council's discussion as supporting his own emphasis on the efficacy argument. Despite this, the Board made it clear that it rejected the idea that Kelsen or any other writer of jurisprudence could serve as an authority in the way the Rhodesian court intended; supra, note 23, 668.

for the future against using a complex and demanding theory like Kelsen's without great caution; more so when Kelsen's work makes so rare an appearance in the considerations of Commonwealth courts, and then only as a resort when other authorities are found wanting.[66] It is then that the basic confusion, pointed out by Finch, in use with a legalistic outlook, can mislead us innocently into a particular way of looking at matters. For then the Rhodesian court's decision may seem, after all, to be a perfectly natural outcome. As Wittgenstein remarked in a different context, 'The decisive movement in the conjuring trick has been made, and it was the very one thought quite innocent'.[67]

Finally, underlying the confusions in the constitutional case, it is not difficult to see the impact of Kelsen's positivist presuppositions. The is/ought distinction takes the form of the efficacy/validity gap ignored by the judges. It also appears, along with a conception of legal science, in the distinction between scientific description and the prescriptions of the judges. In turn this allowed the compounding of Constitution and Grundnorm, which has been shown as the central confusion of the whole case.

66. de Smith, supra, note 52, 93.
67. L. Wittgenstein, Philosophical Investigations, s. 308.

Chapter 11

The Pure Theory and the Logic of Law

Holmes' familiar dictum 'The life of the law has not been logic: it has been experience',[1] represents a deep seated aversion to the use of logic in legal reasoning. Indeed, legal reasoning is taken as having its own particular methods which should not be reduced to what is felt to be a logical straightjacket. Distrust of logic is particularly a feature of common law systems where 'dry logic' is an effective term of abuse when applied to a particular decision. It is felt that decisions are not the product ofdeduction from principles, that 'cases do not unfold their principles for the asking'[2] and that law is not a consistent logical system. In consequence of this widespread feeling, there is great interest in the question as to whether law has its own particular method of reasoning. However, despite condemnation of logic in law, it is not easy to pin down the specific faults this is supposed to engender nor, indeed, to identify either instances or supporters of 'logical law'.[3]

The Pure Theory of law with its aim of presenting a rational reconstruction of a legal system does <u>not</u> (it should be emphasised) claim that legal reasoning is a logical process. On the other hand, the Pure Theory does claim that law can be represented in such a way as to exhibit an inherent structure that could be called 'logical'. In consequence, the Pure Theory is as much the object of disapproval

1. O.W. Holmes, <u>The Common Law</u>, 1. As Kelsen points out in <u>Law and Logic</u>, 251, Holmes cannot mean that there is no logic in law.
2. B.N. Cardozo, <u>The Nature of the Judicial Process</u>, 29.
3. For a general discussion see A.G. Guest, <u>Logic in Law</u>.

of those who reject logic in law as those who reject logic about law.

I

Kelsen maintained the major theses of the Pure Theory with tenacity and great consistency from the earlier formulations up until his death in 1973. In contrast, Kelsen's views on the role of logic in legal science and, more generally, in the normative sphere as a whole, underwent a gradual but fundamental change. This change took the form of a move from the assimilation of logic to legal science to a complete separation. As such, the role of logic represents a recurring problem to the Pure Theory. This problem can be exhibited by comparing Kelsen's discussions of conflicting norms as they occur in 'Natural law Doctrine and Legal Positivism' (1929), the 'General Theory of Law and State' (1945),[4] the 'Pure Theory of Law' (1960) and the late essay 'Law and Logic' (1965). These show a move from treating a norm conflict as a logical contradiction to treating it as a dilemma. Corresponding to this move it will be seen that the Pure Theory undergoes a progressive disengagement from an active role in these conflicts.

In the following chapter, Kelsen's changing views will be traced and the implications for the role of the Pure Theory will be examined. Further, the effect on the Pure Theory's representation of judicial reasoning will be indicated, and the role played by Kelsen's emphasis

4. Natural-law Doctrine and Legal Positivism will be dealt with together with the General Theory as they represent the same views in this respect.

on the interpretation of the status of the norm as the result of an act of will will be shown as significant in this respect.

It will be argued that the problem arises from Kelsen's definition of science which contains the characteristics of being unified and descriptive. These will be shown to conflict in Kelsen's earlier discussions. Kelsen's final view will be shown to resolve the conflict by accepting a less ambitious notion of unity.

In the 'General Theory' Kelsen states his position forcefully in a manner reminiscent of both Kant and, more directly, of Logical Positivism:

> All quest for scientific knowledge is motivated by an endeavour to find unity in the apparent multiplicity of phenomena. Thus, it becomes the task of science to describe its object in a system of consistent statements, that is, statements not contradicting each other. That is true also for the sciences of law and morality, sciences whose objects are norms. Contradictions are also banned within the sphere of these sciences. Just as it is logically impossible to assert both "A is" and "A is not", so it is logically impossible to assert both "A ought to be" and "A ought not to be".5

This statement makes clear how central to Kelsen's idea of science is the idea of logical contradiction for, without it, the construction of a unified system cannot be accomplished. This entails an active role for legal science when faced with contradictions in its material. Yet besides the demand for unity the second characteristic of science (according to Kelsen) appears, that it is descriptive or pure of

5. Kelsen, General Theory of Law and State, 374.

participating in its aubject matter. However a tension between the two begins to become apparent:

> Two norms which by their significance contradict and hence logically exclude one another, cannot be simultaneously assumed to be valid. It is one of the main tasks of the jurist to give a consistent presentation of the material with which he deals. Since the material is presented in linguistic expressions, it is a priori possible that it may contain contradictions. The specific function of juristic interpretation is to eliminate these contradictions by showing that they are merely sham contradictions. It is by juristic interpretation that the legal material is transformed into a legal system.[6]

The danger here is that Kelsen is presenting legal science as competent to decide what is actually a problem for the legal system or, more specifically, the courts. Where the legal system does not resolve the conflict the Pure Theory seems intended to go beyond description. Whilst Kelsen repeatedly affirms that the Pure Theory does not itself create norms, an affirmation basic to its very status, here it seems to be doing something very akin to that. In fact, at this point, Kelsen is perilously close to merging the descriptive 'ought' of legal science with the prescriptive 'ought' of law, by reading the logical requirement of non-contradiction from the statements of the former into the norms of the latter. Rather than pursue this active role, in consistency the Pure Theory ought to remain impartial as it does, say, between alternative constructions of any norm (there

6. Ibid., 375. It should be noted that Kelsen throughout discusses only norms as 'oughts', although he takes norms to include 'mays' and 'cans'. The latter permissions and authorizations would demand a more complex analysis, see S. Munzer, Validity and Legal Conflicts, c.f. Kelsen, The Pure Theory of Law, 74.

is no single correct interpretation in law of a given norm), merely pointing out a range of possible interpretations.

If Kelsen is correct here and we do face a logical contradiction, it is apparent that, at most, only one norm can, in consequence, be valid (just as two logically contradictory statements cannot both be true). This rules out a conflict of duties, where we seem to be faced with two conflicting, yet equally valid, duties.

> What is ordinarily called a 'collision of duties' is an event which does not occur in the normative sphere, and does not involve a contradiction between two normative judgements, but rather a competition of two different motives, of two psychological impulses, pushing in different directions.[7]

Such a solution would not therefore result in a contradiction because logical contradiction applies to statements not to facts. The fact here is that the agent feels himself under two opposing forces. If this conflict occurs between two norm systems, then Kelsen supposes this would be resolved by a higher norm delegating the two systems; otherwise, 'insoluble logical contradiction between them could not be excluded'.[8] To this Kelsen adds, 'This situation is impossible for cognition of norms'.[9] What actually happens, according to Kelsen, is that the 'contradiction' gives way in the agent to one valid norm and the other being merely a fact that that norm is regarded as valid by

7. Kelsen, Natural-law Doctrine and Legal Positivism, 409; c.f. Kelsen, Law and Logic, 235.
8. Ibid., 408.
9. Ibid.

others (so that the latter becomes a fact and there is no contradiction between an 'is' and an 'ought'). In wider terms, a contradiction between two systems is resolved by showing that from a given point of view, only one norm can be valid. For example, when a legal and moral norm conflict only the legal norm can be valid from the legal point of view.[10] This saves the Pure Theory from making contradictory statements when two systems are involved - but only at the cost of disregarding the dilemma of the individual caught between two norms which he sees as valid.

Partly, this solution could be acceptable. For, as far as legal science is concerned, a norm in the sense of being the material of legal science is a fact and therefore might be seen as non-contradictory in the event of a conflict. But Kelsen does not explain how any science could avoid a contradiction in its statements when confronted by conflicting facts.[11] Moreover, subjectively (if not objectively) there is still a contradiction to the individual and this must result in contradictory statements describing the situation. But this is precisely what Kelsen refuses to admit into legal science and it is this that is responsible for the confusion here. The supposition that there would, between two conflicting systems, be a higher coordinating norm may be desirable in terms of coherence but cannot be guaranteed in fact. Nor is Kelsen's account of the individual's resolution of the dilemma satisfactory. Of course there are strong

10. Ibid., 410.
11. The difference seems to be that the facts of natural science, being non-linguistic, are alogical.

echoes of Kant's thesis that duties cannot really conflict, one duty being only apparent or 'sham', so that there are no genuine dilemmas.[12] However, this is not convincing for, unlike, contradictory statements, where at most only one can be true, the other becoming necessarily false, it is possible that two norms might contradict each other yet with the consequence that obedience to one does not automatically render the other any less valid. This can be demonstrated by the feeling of remorse.

The problem is that truth and validity are assumed to be equivalent in status as values in logical functions, but this is not so. I cannot know two contradictory statements are true, that is simply a mistake. Yet I can accept two contradictory norms as valid, that is a dilemma. It might be said, however, that there is an equivalent to remorse in knowledge in that I may continue to wish a statement as true despite the fact that its contradictory is also true. But this will not do for wishing is not the same as knowing. The resolution can only take the form of one fact being an 'is' and the other an 'ought'; the contradiction thus ceasing. Now, as Kelsen suggests, this resolution is possible from the side of norms but it is not necessary; I can still regard both as 'oughts'. Conversely, resolution is necessary from the side of facts (and fact becoming an ought). Why is there this asymmetry? The answer why I cannot accept contradictory facts as true, yet can accept two contradictory norms as valid is simply because there is only one world, but any number of possible worlds. Therefore, in facts consistency is imposed as a requirement of truth as correspondence.

12. Kant, On a Supposed Right to Tell Lies from Benevolent Motives.

Kelsen is on stronger ground in thinking that consistent presentation can be achieved by confining legal science to law in any conflict between a legal norm and a moral norm. In that case the moral norm would cease to be legally significant. Contradiction is excluded from norm sciences by locating it between them. (Although this may not be true in moral science, assuming a moral norm that a law ought to be obeyed and that it contradicts a non-legal moral norm.)

Having discussed norm conflicts from the point of view of the individual and between systems and Kelsen's treatment of them, it is necessary to examine the even more problematic topic of norm conflicts within a legal system (that is within the same system).

Clearly a legal system may contain contradictory norms. The Pure Theory, unlike natural law, is especially prone to this as a difficulty because it accepts that a legal system may be dynamic, validity being conferred in powers of norm creation, rather than being deduced by contents. The production of equally valid norms cannot, therefore, be ruled out in advance by definition. Kelsen is aware of this:

> The pure principle of delegation cannot guarantee (a rational interpretation). For it bestows validity upon any content, even the most meaningless, provided it has been created in a certain way. It justifies any norm, regardless of its content, on condition that it has been created by a certain procedure, even a norm with a self-contradictory content or two norms whose contents are logically incompatable.[13]

13. Supra, note 7, 402.

Yet, given Kelsen's insistence on the unity of science which he expresses in true Kantian fashion: 'To know an object and to recognize it as a unity means the same thing',[14] such a state of affairs is intolerable:

> If cognition encounters such sense-destroying contradiction in legal materials . . . such contradiction in one and the same system must be resolved.[15]

Now clearly the legal system may itself solve the contradiction itself simply because it is generally undesirable. There are many ways by which this can be done. Formally, derogation may be used to render one or both norms invalid. Less formally, judicial interpretation could construe the norms as mutually self-limiting or demarcate separate spheres of validity. Informally there may be a tacit agreement not to enforce one or either of the norms. Kelsen, however, adopts the view that the Roman Law principle 'lex posterior derogat priori is central here. This principle seems to be central in giving effect to the 'self evident assumption' that contradictions are soluble.[16] Obviously, when the principle is part of positive law, this may be the case. Kelsen, however, intends its application as wider than such cases:

> This principle, while it is not ordinarily stated as a positive rule of law, is taken for granted wherever a constitution provides for the possibility of legislative change . . . Insofar as such a principle has not been expressly stated it can only be established by way of interpretation, that is, through an interpretation of the legal materials.[17]

14. Ibid., 410.
15. Ibid., 402.
16. Ibid., c.f. Kelsen, Law and Logic, 228.
17. Ibid., 402.

This suggests that the principle 'lex posterior derogat priori' is at least tacitly part of a legal system. But even that may not be the case:

> All these interpretations are not necessarily made in application of any positive legal rules of interpretation, but most often even in contravention of the wording of positive rules of law . . . [18]

Several points can be made about this thesis. First, 'lex posterior derogat priori' cannot be the only principle which resolves a contradiction because it cannot resolve a self-contradictory norm and, as Kelsen recognizes, a prior, but higher norm may derogate a later, lower one (i.e. 'lex prior derogat posteriori'). Secondly, there is of course contradiction in logic, but no specifically logical means of resolving it. Thirdly, in consequence, legal science is unable to supply a principle of resolution independently of the legal system that has a uniquely 'scientific' basis. Fourthly, as Kelsen came to see, resolutions such as lex posterior derogat priori seriously misrepresent the operation of derogation.[19] Finally, and most seriously, the problem already mentioned occurs. If there is a contradiction and the system itself does not resolve it, can it be assumed that it tacitly does so?

The central difficulty faced by Kelsen can be expressed as the danger that the Pure Theory faces in its task of cognition when it

18. Ibid., 403. This statement is difficult to reconcile with Kelsen's claim not to 'inaugurate any new method of scientific jurisprudence. It merely reveals the logical assumptions of a long-used method through an analysis of the procedure actually followed', ibid., 406 (my emphasis).

19. See note 28, infra.

intrudes on volition. The Pure Theory in Kelsen's first formulation of conflicting norms seems required to make a decision that only the system itself can make. For derogation is a function of law not legal science. Legal science can recognize derogation when it occurs (e.g. when norms lo se efficacy), but it cannot accomplish that operation itself.

The dilemma is that Kelsen requires legal science to be both descriptive and unified. When faced by an order containing contradictions, legal science can either maintain unity, which endangers its purely descriptive status, or it can surrender unity to maintain its description. Kelsen's repeated discussions of the problem of conflicting norms chart a move from the former view expressed in the 'General Theory' to the latter as expressed in 'Law and Logic'.

In fact, Kelsen came to change his views on conflicting norms because he recognized that derogation undermined the assumed equation of truth with validity which extended logic to norms. Yet the dilemma posed above seems implicit in the change, for 'interpretation' progressively retreats from its ambiguous role of reconstruction. This does not imply that Kelsen ever intended the Pure Theory to create norms itself, but rather, that interpretation must have fidelity to the system which is its subject.

The difficulties arising here are nonetheless severe:

> It has already been pointed out that it is the function of the basic norm not only to recognize a historically given material as law, but also to comprehend it as a meaningful whole. It must be frankly admitted that such

> an accomplishment would not be possible by means of pure positivism, that is, merely by means of the dynamic principle of delegation as expressed in the basic norm of positive law. With the postulate of a meaningful, that is, non-contradictory order, juridical science oversteps the boundary of pure positivism. To abandon this postulate would at the same time entail the self-abandonment of juridical science. The basic norm has here been described as the essential presupposition of any positivistic legal cognition. If one wishes to regard it as an element of a natural-law doctrine . . . very little objection can be raised.[20]

This statement is both an accurate presentation of the problem created for the Pure Theory and also extremely damaging. Critics have gleefully seized upon the intrusion of natural law into the Grundnorm to show the impossibility of Kelsen's enterprise. Kelsen is undoubtedly correct in believing that non-conflict is, at least implicitly, a central notion of natural law (analytic upon its character as timelessly and universally true).[21] Nevertheless, its use to unify science seems entirely misplaced. That Kelsen considered it necessary at such cost is a tribute to the tenacity of his belief in the Kantian notion of unity in science.[22] But the import of unity from a metaphysical source is radically unscientific, both from a Kantian and particularly from a positivist point of view. Kelsen's solution cannot therefore be regarded as satisfactory.

In the 'Pure Theory of Law' of 1960 a distinct change is noticeable. In discussing the unity of the legal system, Kelsen states:

20. Supra, note 7, 437.

21. C.f. Kelsen, Professor Stone and the Pure Theory of Law, 1142. Conflicts, as pointed out, are not actualized because of the purely formal nature of natural law.

22. Kelsen insists on the 'transcendental logical principles of cognition (in the sense of Kant)' as 'the conditions of all experience', supra, note 7, 436.

> To be sure, it is undeniable that legal organs may create conflicting norms . . . This conflict . . . is not a logical contradiction in the strict sense of the word, even though it is usually said that the two norms "contradict" each other. For logical principles especially the principle of the exclusion of contradictions, are applicable to assertions that can be true or false; if a logical contradiction exists between two assertions, only the one or the other assertion can be true; if one is true, the other must be false. But a norm is neither true nor false; but either valid or invalid. However the assertion describing a normative order by saying that a certain norm is valid according to that order can be true or false; and particularly so the rule of law describing a legal order by saying that, according to that order, a certain coercive act ought to or ought not to be performed under certain conditions. Therefore, logical principles in general, and the Principle of the Exclusion of Contradictions in particular, are applicable to rules of law describing legal norms and therefore indirectly also to legal norms. Hence it is by no means absurd to say that two legal norms "contradict" each other. And therefore only one of the two can be objectively valid . . . A conflict of norms is just as meaningless as a logical contradiction.[23]

In this passage logic is seen as applicable to norms only per analogiam. Conflicting norms are now presented as meaningless without interpretation

> we then have a meaningless act of norm creation and therefore no act at all whose subjective meaning can be interpreted as its objective meaning.[24]

As a result, although contradiction is not ruled out in a legal system, it offends the unity of the Pure Theory which descriptively would contain contradictory statements. The task of resolving this situation still, therefore, depends on the Pure Theory:

23. Kelsen, The Pure Theory of Law, 205-6 (my emphasis).
24. Ibid., 207.

> . . . since the cognition of law, like any cognition, seeks to understand its subject as a meaningful whole and describe it in non-contradictory statements, it starts from the assumption that conflicts of norms within the normative order which is the subject of this cognition can and must be solved by interpretation.[25]

The Pure Theory's requirement of unity is thus projected onto the legal system which in fact may be lacking in unity.

Kelsen gives examples of how interpretation can resolve the contradiction.[26] If the conflict is between norms of the same level at different times of creation it can be resolved by 'lex posterior derogat priori'. If between norms at the same level at the same time then the conflict can be taken as giving an open choice of interpretation to an organ, or as making a partial limitation of validity when the conflict is not total (e.g. when a statute says 'all offenders shall be punished', but also 'offenders under 18 shall not be punished' clearly this may be interpreted as 'all offenders over 18 shall be punished'). Otherwise resolution may be achieved by loss of efficacy of one or both norms. When the norms in question are of different levels there can be no conflict

> because the lower norm has the reason for its validity in the higher norm. If a lower norm is regarded as valid, it must be regarded as valid according to a higher norm.[27]

Hence, although the norms conflict in content, there can be no contradiction of validity because that depends on formal powers delegated.

25. Ibid., 206.
26. Ibid.
27. Ibid., 208.

If a norm is created which contradicts in content the norm under which it is created it remains valid until derogated (perhaps by the principle that the higher norm derogates the lower). This shows that contradiction is between contents, i.e. it is material rather than formal.

The role of the Pure Theory is now more restricted than Kelsen had at first thought. The Pure Theory, firstly, makes explicit the various ways by which a 'contradiction' can be resolved by the legal system. If, however, the legal system does not resolve the 'contradiction' the Pure Theory does not, for example, apply the principle 'lex posterior derogat priori', but rather than validate one norm, it views the situation as meaningless. This Kelsen takes to mean that no validity can be accorded in the situation because a meaningless norm cannot be valid. The problem has become less pressing for the legal system because it is not now faced with an outright contradiction; but correspondingly, this shifts the burden of logical consistency more to the Pure Theory. In short, the weakening hold of logic actually renders the descriptive problem more accute.

At the time of the 'Pure Theory of Law' in 1960, Kelsen still wished to maintain the role of logic and therefore the unity of the legal system despite the problem which this incurs. However, in 'Law and Logic' of 1965, both requirements are decisively rejected. Kelsen's change of view stems from his investigations into derogation which resulted in the essay 'Derogation' of 1962.

Kelsen came to see that derogation could not be a function of one of two conflicting norms which concern incompatible behaviour, but rather must be the function of a third norm which is addressed, not to behaviour, but to one or both of the norms concerned. By derogation the validity of one norm is removed by another norm which is addressed to it. The former theory that derogation is the result of two norms about the same behaviour must be rejected because it presupposes a principle as to which would be valid, but unlike '<u>lex posterior derogat priori</u>', there is no necessity as to <u>which</u> principle this might be. More importantly, there is no guarantee that there <u>is any</u> such principle.

A derogating norm does not conflict in validity with the norm it addresses because, specifically, it removes that norm's validity and in so doing, by fulfilling its function, loses its own validity which is self-curtailing. Not only does this accurately represent derogation as it actually operates, where the norm to be derogated is specifically the subject of a repeal (for example) rather than applying a conflicting norm to the same behaviour, but it also avoids an unwelcome consequence of the latter. This consequence is that the legal system would necessarily have to specifically <u>permit</u> the previously banned behaviour or would demand contrary behaviour. However, derogation need not entail such consequences - merely stating that the previously banned behaviour is no longer banned - no positive consequence being necessary.

With this new view of derogation not dependent on contradiction it is possible to elaborate a more sophisticated analysis of types of

norm conflict. Most importantly it allows the recognition of genuine conflicts of norms and the expulsion of logic even per analogiam, in the form of the principle of non contradiction:

> There is no doubt that such conflicts between norms exist. They play an important part under the name of "conflict of duties" in the field of morality and in the field of law, especially, however, in the relationship between morality and law. The conflict between norms presupposes that both norms are valid. The assertions concerning the validity of both conflicting norms are true. Therefore, a conflict between norms is not a logical contradiction and cannot even be compared to a logical contradiction. Derogation repeals the validity of one of the valid norms. But in case of a logical contradiction between two assertions, one of the two assertions is untrue from the very beginning its truth is not repealed for it does not exist at the outset.[28]

It becomes clear that, whilst contradictories necessarily render at least one fact as untrue, with norms there is no such necessity:

> The conflict can, but need not be, solved by derogation, and derogation will take place only if it is stipulated by a norm-creating authority. Just as the conflict between norms is not a logical contradiction, derogation solving the conflict is not a logical principle either; but it is the function of a positive norm, especially a positive legal norm, just as in the case where derogation takes place without there being a conflict between norms.[29]

From this one problem becomes apparent with the previous theory of derogation. It is that it need not solve the problem of norm conflict but may actually perpetuate it. Moreover, and more importantly, resolution of conflict is a function solely of the legal system. Hence

28. Kelsen, Derogation, 271.
29. Ibid.

Kelsen accepts Merkl's view

> the precept 'lex posterior derogat priori' is valid only as a positive rule of law and not as a logical axiom as it is commonly understood.[30]

If a legal system fails to attain unity, it is no longer the function of legal science to manufacture it by interpretation. Legal science must therefore permit contradictory assertions about conflicting material.[31] This entails sacrifice of the demand for unity in its logical sense. However, the other fundamental characteristic of science is now clearly established, for the danger of interpretation allowing science a norm-creative role is removed. Kelsen appears to recognize this for in concluding 'Derogation' he remarks:

> . . . the science of law is just as incompetent to solve by interpretation existing conflicts between norms, or better, to repeal the validity of positive norms as it is incompetent to issue legal norms.[32]

Unity must be surrendered to Purity.

The intellectual journey is completed in the essay 'Law and Logic' of 1965 where Kelsen sharply distinguished that which he had formerly identified. The fact that a norm can be derogated only underlines the former erroneous equation of validity with truth. There is no procedure whereby a statement can lose its truth as a norm can lose its validity.

30. A. Merkl, Allgemeines Verwalt ungsrecht (1927), 211 cited by Kelsen in supra, note 28, 275.

31. Law cannot derogate a norm of another system, e.g. to resolve a conflict of law and morality, except by derogating its own norm which is in conflict.

32. Supra, note 28, 274. Kelsen still, however, seems to think that 'lex posterior derogat priori' is normally assumed by a legal system, but does not by this means make it an axiom of the Pure Theory as in supra, note 18.

Logically truth is not something that comes into being and later disappears. Moreover, the status of truth is quite independent of any act of thought because it lacks the dimension of temporality, but a norm is only valid on condition that it is willed. Underlying this is the fact that truth is a property of statements, whereas validity is the existence of norms. Consequently, whilst a false statement is still a statement, an invalid norm is no longer a norm.[33] This explicitly rejects the argument per analogiam:

> Since there is no analogy between the truth of a statement, so far as it is the meaning of an act of thought, and the validity of a norm, which is the meaning of an act of will, a conflict of norms cannot be a logical contradiction, or anything analogous to such a thing; and hence it cannot be resolved either according to the logical principle of non-contradiction, or by any principle analogous to this.[34]

The Pure Theory itself loses its excessive concern with coherence and turns to clarity rather than avoiding appearing as contradictory itself. Because of this the Pure Theory loses all pretension to an active interpretative role (as in either of the two earlier senses).

The Pure Theory thus withdraws from the tendeney to slide from cognition that interpretation can lead to. If there is a conflict, legal science can only confirm the existence of this conflict, and must leave its resolution to the act of will of the legal authority, or to customary non-observance.[35] However the clarity that the Pure

33. Kelsen, Law and Logic, passim.
34. Ibid., 233.
35. Ibid., 235.

Theory introduces could aid the legal authority particularly as it identifies several different types of conflict.[36]

Kelsen extends this late rejection of logic even to include inference between norms.[37] Kelsen maintains that there can be no inference of validity, as there is inference between true statements so that one statement can establish another as true. However, between norms the same relationship cannot hold because an act of will is required to establish the inferred norm which is not automatically valid. There is no similarity to statements where the truth of one is implicit in another, for Kelsen believes that a general norm cannot implicitly contain individual norms. A norm that all thieves should be sent to prison willed by a legislator does not imply that a given thief in the future should be so imprisoned 'For one cannot will that of which one knows nothing'.[38] This is particularly the case where the individual norm is willed by another, e.g. a judge whose act of will cannot be contained in another's. All that can be said, Kelsen thinks, is that once established an individual norm can be justified in accordance with a general norm. The argument here reflects Kelsen's renewed insistence of norms as the meaning of acts of will.

However this argument is not correct. As a result of valid inference from a true statement another true statement can be obtained, but this is insufficient for the establishment of the second statement,

36. Supra, note 28, 269.
37. Ibid., see also Kelsen, On the Practical Syllogism, passim.
38. Supra, note 33, 242.

which although true, may not be known to be true (there are many whose logic is weak). Surely, therefore, this does provide a parallel with norms. From a valid norm inference can obtain another valid norm, which, however, may also be insufficient because an act of will may not take place. However, there is a clear sense in which the validity of the second norm is contained in the first if it is said that the knower of one assertion 'knows' what it entails. The point is that in addition to inference in statements and norms a further act of knowledge or will is required. If, however, it is claimed that there is a sense of 'know' which implicitly contains the inference there is no reason to deny that there is an equivalent sense of will with norms. This holds good despite the fact that truth is considered independent of knowledge in a way in which norms are not independent of will. The reason is that so long as the first norm is willed the validity of the second is willed also. This is parallel to truth, for the truth of the second statement is dependent on the truth of the first. Moreover, the truth of the second statement can be established independently in just the same way as a second norm could be willed independently of the first. Nevertheless, there is a distinction considered in dynamic terms, for a delegation of power to will or create norms there need be no material inference and that would require a separate act of will. (In terms of norm creation this must be distinguished from the situation of merely carrying out action according to one's norm by another.) Also, it must be added, that an act of will itself requires an act of knowledge and therefore it is, as it were, at one stage removed from the inference. One of the reasons that Kelsen gives against normative inference is that one act of will cannot 'contain' another, but it is not clear what this is

supposed to mean. Possibly Kelsen is emphasising the psychological connotations of will (something omitted from the 'General Theory' where norms are conceived of a 'depsychological commands').[39] If so, the conception of norms as meanings of acts of will represents something of a change in Kelsen's treatment of norms. This is rather dubious because acts of will in the Pure Theory are normally taken to be termination points in imputation chains and are not necessarily paralleled by any psychological acts. It would be odd if Kelsen were to confuse them at this point alone. Hence, if psychologically interpreted, Kelsen may be right that a person does not will implications, but logically this is surely incorrect. This is paralleled by the case of truth, for both share the same notion of 'containment'. Thus, if it is accepted for truth then it should be accepted for validity as a value in functions. If, for example, I order someone to bring a shelf of books, as an act of will it is not necessary for me to will separately for each individual book. I may not, indeed, know them individually. By virtue of meaning a general norm, I also will the individuals. In this instance, norms have inference at least per analogiam. On the other hand, Kelsen is surely right to point out that in cases of application the result is not automatically acquired as is the truth of a validly inferred statement from another true statement, but here the appropriate parallel should be with knowledge not truth.

39. Supra, note 5, 30-4.

II

Having outlined Kelsen's views on the relationship of logic to norms, it can be asked what are the consequences of Kelsen's change of view. As seen above, Kelsen surrenders unity to purity in his idea of science. In one sense, therefore, the admission that

> with the postulate of a meaningful, that is, non-contradictory order, judicial science oversteps the boundary of pure positivism[40]

is accepted because, as a result of the dynamic principle, such an order cannot be guaranteed. This is possible because a norm can delegate a power of norm creation (according to the dynamic principle) which may result in a norm whose content may conflict with any content that the higher norm may have (according to the static principle). Thus it is clear that in formal terms there is a unity (dynamically) but there is no material unity (statically). Because there is no guarantee that this will not happen or that it will be reversed (e.g. overturned on appeal) there are two distinct senses of unity (the dynamic and static principle cannot therefore be mapped in terms of each other). Kelsen's solution is therefore to surrender the material unity (static) which was admitted to be a vestige of natural law.[41] By adopting formal unity (powers, as such, cannot conflict formally), Kelsen is enabled to

40. Supra, note 20.

41. Natural law would have to assume a non-contradictory order to maintain its absolute character. The formalist unity differs from that obtaining in natural law theories of justice, criticised in chapter 1, infra. There formalism was disguised under the pretence of providing substantive notions of justice, illicitly provided by positive law. Here, however, true formalism explicitly reliant dynamically on positive law is accepted. The result is the consistent concentration on positive law which only a denatured natural law could accept.

exclude natural law from the activity of legal science (for example in the natural law principle '*lex posterior derogat priori*') by excluding the presupposition that necessitated it from the notion of science. The exclusion of natural law is in respect of both a perfectly coherent order and of a jurisprudence that has a prescriptive function. In turn this means that legal science completely excludes evaluation and hence reaffirms the is/ought distinction. From this no undesirable consequences emerge for the Pure Theory, for it maintains purity and unity by finally becoming fully legal in concentrating on the dynamic system, and hence becoming strictly positivist. (The functions of identity, individuation etc., now becoming dynamic.) However, this outcome does have the consequence that morality which lacks the dynamic principle may have contradictions and there is no necessary principle of moral derogation, either in the moral system or in a moral science. Given Kelsen's demand for a unified science this therefore entails that there can be no Kelsenian moral science, indeed, for there may not even be a moral system.[42]

III

Conflicting norms

Having argued that Kelsen was correct in terms of the consistency of the Pure Theory to change his views on norm conflicts, it can be seen that unity can be maintained *irrespective* of logical contradiction

42. Discussed in chapter 12, *infra*. It should be noted that, as Kelsen believes, the content of international law is unaltered by the interpretation of the normative order.

(because it is material). If this is so, the Pure Theory could, contrary to Kelsen's reasoning, accept a logic of norms. (This has already been argued in respect of inference.) The question, therefore, arises how far logic is applicable to conflicting norms.

There are certainly strong grounds for arguing that something like a contradiction arises when norms prescribe mutually exclusive behaviour. One reason is simply that both norms cannot be satisfied by the same behaviour and thus, if equally valid, offend against Kant's 'ought implies can'. This corresponds to both Hare's and Von Wright's reservations that such a case is somehow faulty because not applying to possible behaviour.[43] However, this need not be so if norms originate in differing systems for, in a sense, each system is indifferent to the other and from its own point of view is not demanding the impossible. Between systems, therefore, there is no necessary correspondence to truth where there can, because there is only one world, only be one system. Something like the case with truth becomes more likely if the norms in question originate from the same source. If an authority prescribes two mutually exclusive pieces of behaviour then something has gone wrong, which is not necessarily the case between two systems or authorities. This seems to be because prescriptions have something to do with the notion of wanting or getting people to do something, or, more strongly, to bring about a state of affairs. It could be regarded as definitive of a prescription that

43. G.H. von Wright, Norm and Action, chapter VII.
R.M. Hare, Some Alleged Differences between Imperatives and Indicatives, passim.

this is so. Now, given that there is no intention to confuse, (which may deliberately be the case) and that the prescriptions are both sincere, then in J.L. Austin's terminology, the act of prescription has miscarried or is 'infelicitous'.[44] Indeed, it can be doubted whether it is a genuine prescription at all. True, this may seem comparable to Wittgenstein's problem in the Tractatus[45] - are contradictory propositions genuine propositions since they do not 'picture'? But, whereas these are always meaningless, it is not clear that this is so of two norms. The difference is best brought out by Williams[46] when he says that something has gone wrong even to think inconsistent assertions, whilst we all have experience of conflicting demands from different sources. However, this experience is more rare from a single source. If I say to you "do and do not close the door" you would suspect this was, at least, something of a whimsey, chiefly because it is not clear what I am prescribing, or indeed what state of affairs I hope to realize. This is very much worse than the more typical 'ought implies can' failure which is concerned with physical impossibility. If I prescribe that you are to run at 60 m.p.h., then there is at least a very slight chance that you might be able to do this, by some new discovery etc. If I am more reasonable then there is at least a case for you to try (one often having a pessimistic view of one's capabilities). Clearly this is not reasonable when we are dealing with a logical contradiction, which will necessarily be

44. J.L. Austin, How to do Thing with Words, 14-45, 104.
45. L. Wittgenstein, Tractatus Logico-Philosophicus, 4.46.
46. B. Williams, Consistency and Realism, 12.

disobeyed.[47]

If we believe that norms can contradict then perhaps only one can be valid and that there is thus no "real" contradiction at all. This was notoriously Kant's view, particularly where lying was concerned, and is thus consistent with his doctrine "ought implies can". Doubtless this was partially due to Kant's suspicion of utilitarian backsliding hiding behind a pretended dilemma. But surely there are genuine cases of such conflicts of duties or moral dilemmas where we see two norms as equally valid as Kelsen came to see. It will not do to say that the one we choose alone is valid for it is clear that the other will occasion remorse (which presupposes the other norm is not invalid) despite the fact that we cannot act under it as well (i.e. attempts to fulfil the alternative are not thereby rendered unnecessary). It might be said that such remorse is irrational but this is to confuse the need to make a decision with logical principles (it also renders it superficial and rules out tragedy). One is even more suspicious because one is not given any criteria of deciding which norm is valid. (A Kantian example of, say, the overriding validity of promise keeping when conflicting with another duty looks odd when we envisage someone risking several lives in keeping a trivial promise or the possibility of evading any other duty by quickly promising ourselves not to do it). Kelsen is obviously closely following Kant in the 'General Theory' and it is plain that the same

47. Obviously the possibility of fulfilment rests on the exact formulation used, the sense of words employed and the ingenuity that may be exercised.

desire for unity and coherence that underlies the Pure Theory also underlies the Moral Law.

IV

Normative inference

Is there not some way of rendering logic applicable to normative reasoning at least indirectly as Kelsen thought at the time of the 'Pure Theory of Law' in 1960? One way of doing so, in regard to inference, is suggested by R.M. Hare in his article 'Imperative Sentences' of 1949[48] which is similar to the article 'Imperatives and Logic' by Jörgensen which Kelsen criticises[49]. Hare's procedure[50] is to take the well-worn syllogism and add imperative 'dictors', thus:

Let all men be mortal
Let Socrates be a man
Let Socrates be mortal

The reason why the conclusion follows is because the syllogism depends on an indicative element, its 'descriptor' (the traditional syllogism). The solution of Jörgensen[51] and Dubislav[52] is similar, depending as it does on an indicative element called the 'theme of demand'. Williams accomplishes the same result, using inference by means of 'obedience

48. This does not represent Hare's present view but is chosen for its clarity.
49. Erkenntnis, 7, 288-291 cited by Kelsen, supra, note 33, 229-231.
50. R.M. Hare, Imperative Sentences, 17.
51. It should be mentioned that generally Jörgensen rejects the applicability of logic to norms for reasons similar to those of Kelsen, but is driven to admit the force of the inference argument.
52. W. Dubislav, Zur Unbegründbarkeit der Forderungssätze, Theoria (1937), 341, cited by A. Ross, Imperatives and Logic, 33, 38.

statements', that is, the indicatives that would hold true were the imperatives actually fulfilled.[53]

Ross, speaking of Dubislav's solution,[54] calls it an 'evasion' and not a solution. Ross points out that logical inference is still applicable only to the indicatives and not to the imperatives themselves. By implication the same is true of the other solutions and that of Kelsen in 1960, for there the inference is between the indicatives in statements about norms, rather than the imperative norms themselves. Hare's solution may withstand Ross's point, however, for Hare has made, as it were, the indicative part of the norm. The other solutions seem still to leave the indicative element as external. To see Hare's point we need only imagine that the indicative is false or senseless to see that the imperative element is dependent to the extent that it would be invalidated in consequence, (as far as we accept 'ought' implies 'can').

Kelsen's reply to Jörgensen's solution contained in 'Law and Logic'[55] is of interest, for there, Kelsen is by implication rejecting his own solution contained in the 'Pure Theory of Law' and agreeing with Ross. Kelsen thinks that Jörgensen is confusing the functions of thinking and willing (which reasserts the imperative/indicative distinction): a 'norm cannot contain both an imperative, i.e. prescriptive, and

53. Supra, note 46, 2 referring to P.T. Geach, Imperative Inference.
54. A. Ross, Imperatives and Logic, 37.
55. Supra, note 33, 229-231.

an indicative, i.e. descriptive factor'.[56] Now in one sense this is incorrect, for the same act, in this case an utterance, can perform two functions or 'speech acts' at once, as Hare accepts in 'Meaning and Speech Acts' (1970).[57] We might agree with Hare's reservation that we can only get the full meaning if we concentrate on the imperative, which is thus primary. Nonetheless, this would not prevent the indicative element carrying the implication as Hare shows in his earlier article. However, if Kelsen is taken as confining the 'norm' to a pure element of a norm statement, this possibility will not arise. This would seem to be consistent with the pervasive use of the is/ought distinction by Kelsen. It would also echo the distinction between law and norm. The result is that whilst inference is perhaps possible between norm statements, it is excluded between norm elements. But is such a norm element conceivable? It is difficult to see how a norm can be established without some indicative element.[58] The search for a component to bear the non-logical properties seems to press beyond language, but there we cannot say if there is a contradiction.

The result of this problem and its attempted solutions reinforces the essential role of the is/ought distinction (expressed as indicative/imperative). The more the distinction is insisted on, the less applicable will inference seem.[59] Given Kelsen's adherence to the distinction it is more consistent that he should adopt the later view of rejecting inference between norms and the possibility of logical conflict in the

56. Ibid., 230, but Kelsen seems to merge them, ibid., 247.

57. C.f. supra, note 44, 149 (e.g. the utterance 'there is a tiger behind you' performs the speech acts of describing and warning at the same time.)

58. i.e., what is the norm about?

59. Hare wishes to uphold the is/ought distinction and allow inference between normative statements.

normative sphere.

Finally, in the light of what has been said about the reliance on language and indicatives in stating a norm, it should be said that a formal contradiction (p. ~p) may in the real world situation be capable of some resolution. (That is, if values are given to p.) Indeed, it might prove difficult to exhaust means of obeying conflicting norms.[60] Impossible situations would thus become a small residual category. What constitutes obeying an imperative? It surely cannot be a correspondence to a mental act or some shadowy projected state of affairs. What is the essential element? What is merely contingent or peripheral? Indeed, surely there is no clear answer because fulfilment can be in unanticipated ways or done unwittingly. More so because there are limits to the determinateness of any specification. As Wittgenstein points out, 'It is in language that expectation and its fulfilment make contact'.[61]

In conclusion, whilst Kelsen was justified in changing his views on the attitude of legal science to unity and to the expulsion of logic as contradiction and inference from norms, both depend on the basic assumptions of the Pure Theory. Kelsen, then, is seen in his later views as consistent. But, particularly in respect of the logical properties of norms, doubts have been raised which in turn cast doubt on the presuppositions behind Kelsen's views. These doubts will recur in the conclusion.

60. This, in legal terms, is obviously one of the requirements of Fuller's 'inner morality' of law. In context there are numerous practical possibilities for resolving the conflict without acting in accordance with both norms (which means effectively derogating one or both norms).

61. L. Wittgenstein, Philosophical Investigations, s. 445.

Chapter 12

The Pure Theory of Ethics

This chapter is concerned with the Pure Theory in relation to ethics. In the preceding chapters, the Pure Theory has been defended in its analysis of law, but in the present chapter, doubts will be raised as to the applicability of the theory to ethics and on the consequent view of the relationship of morality to law. The need for an exposition and critical appraisal of Kelsen's theory of ethics is seen if Bergman and Zerby are correct in stating that 'There are . . . few things on which Kelsen is so vague as on the nature of ethical theory and its relation to the theory of law . . .'[1]

Kelsen's view of morality can be described as emotivist and legalist. The two sections of this chapter deal with each respectively.

I

Kelsen's emotivism shares some of the basic notions of Emotivism as a general theory of ethics, but departs from it in important respects. Principally such departures will be seen as consequent upon the other characteristic of Kelsen's ethical theory; its legalism.

Emotivism in its contemporary form can be traced to the distinction made by Ogden and Richards, in 'The Meaning of Meaning' (1923), between

1. G. Bergman and L. Zerby, The Formalism in Kelsen's Pure Theory of Law, 111.

descriptive and emotive meaning (although there are earlier foreshadowings in the work of Hagerström). The most elaborate formulation came in 1945 with the publication of Stevenson's 'Ethics and Language', but probably the most famous and forceful statement remains that given by Ayer in 'Language Truth and Logic' (1936).[2] Initially it is Ayer's theory that will be taken as the basis for the following discussion.

The Emotivist theory arose out of the main positivist contention that propositions were either verifiable, tautologous or nonsensical. Moral propositions were not held to be verifiable because they did not seem to be descriptive at all of a state of affairs. In addition, Moore's naturalistic fallacy had been well digested and was taken to show that ethical properties were not natural[3] (and, hence, empirical). Moore's solution was, however, not acceptable, depending as it did on completely unverifiable intuitions of non-natural properties. But neither did moral propositions seem to be tautologies. Could they be nonsense? It is difficult to see how, plausibly, moral language could be so written-off. Given the central tenets of positivism it therefore became essential to find an explanation that would allow moral language without denying positivism. The solution was to abandon the idea of language as solely descriptive (as Moore had tacitly assumed). (As Wittgenstein remarked later, 'every such use of language is remarkable, peculiar, if one is adjusted only to consider the description of physical objects'.)[4] Moral language was not of

2. Esp. chapter 6.
3. G.E. Moore, Principia Ethica, chapter 1.
4. L. Wittgenstein, Zettel, s. 40.

propositions at all, but evinced emotion (as distinct from reporting it). Morality was thus a more or less elaborate extension of 'boo!' and 'hooray!'. Such outpourings also serve to arouse feelings in others and, thus, are similar to commands and so on (a point particularly emphasised by Carnap).[5] Emotivism was thus the outcome of an epistemological dilemma.

One consequence of Emotivism was that as non-propositional, moral language was neither true nor false and thus unverifiable. Conflicts between moral utterances are therefore not decidable in objective scientific terms, but solely by the relative effect on the hearer. There are thus no genuine moral arguments, merely emotive . . . outpourings or disguised disagreements about facts (for example about the consequences of acts). However, in this sense, a common system of values can be such a fact. As Ayer puts it

> If our opponent concurs with us in expressing moral disapproval of all actions of a given type t, then we may get him to condemn a particular action A, by bringing forward arguments to show that A is of type t. For the question whether A does or does not belong to that type is a plain question of fact . . . What we do not and cannot argue about is the validity of these moral principles. We merely praise or condemn them in the light of our own feelings.[6]

Ayer adds in summary

> . . . ethical philosophy consists simply in saying that ethical concepts are pseudo-concepts and therefore unanalysable . . . It appears, then, that ethics, as a branch of knowledge, is nothing more than a department of psychology and sociology.[7]

5. R. Carnap, Philosophy and Logical Syntax, s. 4.
6. A.J. Ayer, Language, Truth and Logic, 147.
7. Ibid., 148-9.

Such an outcome which treats ethics as factual is abhorrent to Kelsen despite the shared initial epistemological theory. Kelsen's struggle against the reduction to facts of the normative essence of law has been dealt with in chapter 5. Because, as will be seen, Kelsen conceives morality as essentially legalistic in character, he is committed to the same opposition to the reduction to fact in morals as he is in law. Kelsen's principle target in his rejection of the normal Emotivist theory is Schlick who, in turn, rejects the Kelsenian notion of ethics as a theory of norms.[8] Thus, Schlick claims ethics is a science of facts 'Ethics has to do entirely with the actual',[9] 'a norm is nothing but a mere expression of a fact'.[10] Schlick also says, somewhat inconsistently 'only where the theory of norms ends does ethical explanation begin',[11] and makes it clear that this is psychological explanation:

> For one might say, "In such case there would be no ethics at all; what is called ethics would be nothing but a part of psychology!" I answer, "Why shouldn't ethics be a part of psychology?"[12]

Whilst, from Kelsen's point of view, the rejection of metaphysics and the demand for science will be commendable, the denial of norms and consequent syncretism of method is not.

Kelsen's reply is:

> Schlick's attempt to present ethics as an empirical factual science obviously rests on perfectly legitimate

8. M. Schlick, Problems of Ethics, 21.
9. Ibid.
10. Ibid., 15.
11. Ibid., 23.
12. Ibid., 29.

> aim of removing it from the field of metaphysical speculation. But this aim is sufficiently accomplished if the norms which form the subject-matter of ethics are recognized as the meanings of empirical facts brought about by men in the world of sense, and not as the commands of transcendental entities. If the norms of morality, like those of positive law, are the meanings of empirical facts, ethics, no less than legal science, can be described - in contrast to metaphysical speculation - as an empirical science, even though its subject-matter does not consist of facts, but of norms.[13]

Both Schlick and Ayer, therefore, fail to distinguish between the norm-creating act and the norm laid down as the meaning of this act. Kelsen is thus not so determined as them to bring ethics back to facts and description, despite the allowance made for emotive meaning. The divergence occurs in part because Kelsen takes emotivism more seriously, but also because he amends it by the addition of norms. Arriving at Ayer's point of deciding how to classify moral utterances, Kelsen, like Ayer, rejects the idea of absolute ethics and, in keeping with his rejection of natural law, also rejects intuitions. Kelsen is also thus prepared to accept the relativity of moral beliefs; however this relativity is not merely subjectivism.

Kelsen distinguished between subjective moral judgements and objective moral judgements. Subjective moral judgements have all the characteristics of the Emotivist theory. They can be merely wishes or acts of will which can be seen as facts, which are about other facts - the object or behaviour evaluated. Thus, such judgements 'describe only the relation between two facts'.[14] As expressions, such judgements

13. Kelsen, Law and Morality, 93.
14. Kelsen, The Pure Theory of Law, 19.

are 'a function of the emotional component of consciousness . . . it is the expression of an emotional approval or disapproval, akin to the exclamation "bravo!" or "phooey!"'.[15] Clearly such views are the same as those of Ayer.

Kelsen goes beyond the Emotivists by adding objective moral judgements which result from the introduction of norms and which relate norms to objects and behaviour. Ayer, as shown, had thought that moral argument was really about facts, in so far as it was an argument at all. Partly this meant argument about consequences and the means to certain presupposed ends. Kelsen, too, agrees with Ayer's point, saying that such are problems about purposes[16] which factually concerns the relation between means and ends. As there is no objective purpose, because it is a natural law notion, there are only subjective purposes and these are facts, as much as subjective wishes or acts of will are. On the other hand, Ayer raises the possibility that moral argument can centre on a shared value or system of values, the problem then being whether certain behaviour accords with them. Ayer regards such values as facts - but Kelsen claims that, distinguishing norm creation from norms, they are norms.[17]

Kelsen sharply distinguishes between a norm creating act, a fact, and the norm itself, which is the meaning of that act. The

15. Ibid., 20.
16. Ibid., 23.
17. Ibid., 21.

creating act may have all the factual or emotive aspects of subjective judgements, however the norm created has, as it were, an independent existence dependent on its general acceptance as valid. In consequence, the value judgements related to a norm cease to have the character of subjective judgements. As such, objective judgements need not have any emotive character at all, for it is possible to evaluate behaviour according to a norm without emotion, because it is either true or untrue that behaviour corresponds to the norm. Such judgements do not permit of degrees as do subjective judgements (depending on the strength of emotion), but state either the behaviour is valid or invalid according to the norm. Such judgements do not involve consideration of the factual or emotive nature of the act of norm creation. Indeed, in the case of, say, customary norms, it may not be possible to make any assessment of that act. The 'objectivity' involved refers to the judgement made, the norm itself is 'objective' only in the weak sense of being generally accepted as valid - as opposed to subjective emotions. The norm is relative to those that accept it, it has no absolute status (although treated as such).[18]

On the basis of norms, ethics can be a genuine normative science dealing descriptively with values whilst being neither empirical in dealing with facts nor metaphysical. As such many new questions can be asked because we are no longer dealing with simple emotive outbursts. Given norms as shared values, the problem arises of how norms relate to each other. Kelsen suggests that moral norms, like legal

18. Ibid.

norms, form a system. However, the nature of the moral system differs fundamentally from all but the most primitive legal systems. Moral systems are static as opposed to legal systems which are dynamic. This means that moral norms are deduced from other norms in virtue of their content. For example

> Such norms as "You must not lie", "You must not deceive", "You shall keep your promise", follow from a general norm prescribing truthfulness.[19]

Legal norms, however, consist additionally in norms granting powers to create norms which may or may not be deduced from any content. In short, there is a difference in the process of individuation, principally manifest in a lack of institutions in the moral system. Given the relativity of norms, however, there is no guarantee that there may not be several norms on the same level not deduced from a higher norm and thus not from (ultimately) a Grundnorm. This is likely because, as Kelsen suggests, conflicts between norms occur both for the individual and for society as a whole. A prisoner chooses between life or freedom, a society between economic security and individual liberty, and so on.[20] As there is no institution for the resolution of moral conflicts, this can only be done by a norm that allocates differing validities to the norms in question. This norm is justice.

'Justice is social happiness. It is happiness guaranteed by a social order'.[21] Because men cannot find happiness alone, Kelsen

19. Kelsen, General Theory of Law and State, 112.
20. Kelsen, What is Justice?, 5-6.
21. Ibid., 2. This assertion shows strong affinities with the utilitarianism espoused by Schlick.

suggests, they attempt to find it in society. There can be no justice in the sense of securing happiness to each individual because some happiness depends on things no social order can satisfy, but more importantly because happiness for one individual means unhappiness for another. The only happiness that can be secured is that of collective satisfaction of certain socially recognized interests. Which interests ought to be satisfied at the expense of others is answered by justice, not by rational cognition. The point is that justice is itself a norm and is a product of human will and is as relative as any other norm. That people agree about justice is no proof of its absolute character.

> Absolute justice is an irrational ideal, or what amounts to the same, an illusion - one of the eternal illusions of mankind.[22]

Various interests have various conceptions of justice and there is nothing to make one more right than others. Moreover, justice in this context is as equally unsatisfactory as in natural law, where its other weaknesses are apparent, as shown in chapter 1.

In summary, Emotivism is found at all levels of morals in Kelsen's theory; from individual expressions to theories of justice. However, this does not prevent the establishment of norms which, as objective,

22. The irrationality of justice is one of Kelsen's most controversial theses. Kelsen obviously takes this in opposition to absolutist conceptions of justice - that is, most conceptions of justice. Thus it derives from Kelsen's relativism rather than his emotivism. A clearer idea of Kelsen's meaning can be gained from his correspondence with Professor Cahn, cited in the latter's review, E. Cahn, Review of Kelsen's What is Justice?, 1057-8.

become autonomous from the emotive background. This is most clearly seen when the distinction is made as one of judgements. The establishment of norms means that many more questions can be asked; principally as to the relations between norms and the possibility of a normative system. Before turning to these problems in the following section as the 'legalism' of Kelsen's ethics, it remains to ask how far the first characteristic - emotivism - is acceptable.

It has been seen how far Kelsen is an Emotivist, differing only in as far as he is, in addition, a legalist, whilst not removing the basic Emotivist element at all. As such, Kelsen's view of ethics is very unsatisfactory.

Initially it can be said that the reasons for the theory are highly suspect, for it arises out of epistemological despair rather than a full philosophical analysis of morality. Even although Emotivism represents a move from a simple language-as-description theory, it hardly recognizes the many uses that language has.[23]

Emotivism is only a more recent example of many unhappy attempts to reduce morality to some other phenomenon with which we are supposedly more familiar. This, of course, only postpones difficulties - for ethical problems become, say, problems of happiness which are no clearer. Moreover, this reduction goes on despite the fact that the logical

23. As a corrective see L. Wittgenstein's Philosophical Investigations, s. 23.

grammar of morals is different from that of the suggested models.

Kelsen is on strong ground when he shows that objective judgements need not have emotive components and it may be doubted whether many moral judgements are not like those. But if emotion is not necessary to moral utterance, neither is it sufficient, for emotions are not all, or even normally, moral.

A further problem is that, in confusing causes with reasons, the theory must assess argument solely in terms of effectiveness; but this implies the abandonment of reasoning altogether, for other means may be more effective. Indeed, the idea that moral utterance is to effect others is highly questionable. We need not want, or expect, our view to be adopted by our audience; conversely, they may already share it.

Finally, the relationship to facts is grossly oversimplified, for it is unclear what counts as a 'fact' and why certain facts are acceptable to moral reasoning and why others are irrelevant.

Emotivism was, because of its background, something of an ad hoc solution and, as such, has generally been superceded by more sophisticated theories. One reason for this can be found in the problems just outlined and another in the general view that the theory is not only well-nigh vacuuous in its simplicity, but, put simply, runs counter to our experience of morality.

II

In this remaining section, Kelsen's legalism is dealt with. Legalism is taken to mean a tendency to see morality as a kind of shadow legal system, principally by assuming that it is equally systematic. Kelsen's own arguments will first be used to show the traditional means of differentiating law and morality are inadequate. However, Kelsen's own differentiation - coercion - is seen to imply a more fundamental distinction: that of systematization. It is then argued that morality is unlike law, not because of a simple lack of coercion, but because it is not systematic and because its norms are basically unlike legal norms. This, therefore, challenges the whole idea of morality as a system of norms, an idea which Kelsen successfully employs in respect of law. Kelsen's extension of the Pure Theory to morality, albeit with some reservations, is therefore rejected.

It has been suggested in the foregoing section that moral systems are basically static and that legal systems are dynamic. A simple index to this is provided by the relative incidence of authorities or institutions. However this does not clearly distinguish the two systems. On the one hand, a primitive legal system based on decentralized custom would be relatively static, especially outside the single dynamic Grundnorm authorizing custom. On the other hand, a moral system could be highly dynamic if it was formal and contained numerous authorities. Such would be the case in certain religious systems of ethics.[24]

24. But some doubt must be felt about religious systems which seem to have legal and moral characteristics.

Correspondingly, there can be no distinction made in terms of dependence on acceptance, for clearly a dynamic moral system could contain inefficacious norms.

Morality and law also cannot be distinguished in any clear way in terms of their content. For clearly, for example, a norm 'do not kill' can be a legal, moral and religious norm. Undoubtedly, it is true that there are many norms that are not shared by the systems and perhaps there are also some norms that are practically incapable of being shared (could the law include a norm about 'helping others'?), or that it would be pointless to share (could there be a moral norm about which side of the road to drive on?).

A favoured distinction is that morality is concerned with individuals whereas law is concerned with society as a whole. But this is hardly tenable because individual norms, including so called 'duties to oneself' in Kant, would be meaningless outside a social context. Nor can it be said that an individual is in a unique moral position against society, for the law, too, grants individuals powers and so on, against society.

A deeper distinction suggested between law and morality, and one adopted by Kant, is that law regulates external behaviour only, whereas morality also regulates internal behaviour.[25] In practice, law purports to regulate internal behaviour and is centrally concerned

25. This follows Kelsen, supra, note 14, 60-62, c.f. Hart, The Concept of Law, 168.

with the nature of intention. This suggests that the distinction is unrealistic in that the reason why intentions are crucial to law and morality is because they issue in acts which are the main concern of both. Kelsen suggests that this point is clear if we consider that what counts as a bad intention is one defined as likely to issue in bad acts. Nor can support for the distinction be gained from the idea that morality is acting against inclinations or, in traditional terminology, 'passions'; for there is no reason to think that passions are all bad or bad in themselves.

Hart also suggests various distinctions between law and morality,[26] and these have been discussed elsewhere. The conclusion being there, as with the distinctions suggested above, that there is no clear distinction. Nevertheless, this would not deny that a distinction could be made using various combinations of those above. Nor should it be taken that, in most cases, there is any difficulty in making a distinction. (Individual norms can be classified according to their membership of systems, i.e. by tracing their validity to the appropriate Grundnorms.)

Kelsen suggests that there is a critical distinction between law and morality, not in subject matter, but in technique. It is simply that law is a coercive order[27] and that this distinguishes it from morality. Enough has been said about Kelsen's view of individual

26. Hart, The Concept of Law, 169-176.
27. Supra, note 14, 33.

legal norms as necessarily coercive, but this does not answer an obvious objection; might there not be a non-coercive legal order? Kelsen would object that such an order would be natural law and thus not law at all. Behind that reply is the point that Kelsen has achieved the reply merely by definition. However, Kelsen merely asserts that coercion is characteristic of law as it is at present. If law became less coercive, including more and more norms not backed by sanctions, then correspondingly, its status as law would be increasingly subject to doubt. If law became completely non-coercive it would cease to be law and become morality instead. If that happened there would be no positive law and hence, given the identity of law and state, no state. This finds obvious common ground with Marx who, defining the state as coercive, sees it withering away when coercion ceases (a line of thought that was pursued by Pashukanis with a theory of a non-coercive legal order.)[28]

Kelsen's distinction might be attacked from the other direction; is morality not coercive? (Indeed, following J.S. Mill even more coercive, because more pervasive.)[29] Kelsen's reply is that it is. Moral sanctions take the form of disapproval, ostracism and even religious sanctions in the form of eternal damnation, and so on. So Kelsen concludes

> The only relevant difference between social orders is not that some prescribe sanctions and the others do not, but that they prescribe different types of sanctions.[30]

28. See J.D. Finch, Introduction to Legal Theory, 190-1. See also Kelsen, The Communist Theory of Law, chapter 6.

29. J.S. Mill, On Liberty, esp. 'when society is itself tyrant . . . its means of tyrannising are not restricted to the acts which it may do by the hands of its political functionaries', ibid, 129-130.

30. Supra, note 14, 28.

How this should be construed is clear from Kelsen's statement

> certain social orders themselves provide definite sanctions, whereas, in others, the sanctions consist in the automatic reaction of the community not expressly provided by the order.[31]

Kelsen's point is, then, that law and morality are both social orders and employ sanctions. Law is to be distinguished in that its sanctions are both definite and organized. Kelsen leaves the problem at that point and does not go on to seek a reason why legal norms should have these particular characteristics and morality not.

It will now be argued that Kelsen's real distinction - systematization - is the correct one. However, this will be seen to entail that morality cannot be analysed in legal fashion. In consequence, the legalism of the Pure Theory cannot accommodate morality. Initially the point can be made that definiteness and organization are relative characteristics, yet it must be admitted that, except in systems of religious ethics which, in fact, are quasi-legal, morality does not share these characteristics. Why then do legal norms have this character? Part of the reason must be because law is institutionalized, which means that precision can be given to punishment in terms of amount and antecedent conditions, also it means that sanctions become the responsibility of a determinate group whose ability to enforce sanctions is privileged, in the sense that further sanctions are applied in support of them. But, in turn, this depends in part on the ability of law to create relatively precise legal norms and to individuate them by deter-

31. Supra, note 19, 16.

minate procedures (where reasoning is made explicit as it may not be in morality).[32] In short, institutions allow law to be a system in the sense of a coherent order. These points show that the distinguishing factor in Kelsen is not coercion, but in the relation of coercion to the norm. Kelsen's view of legal norms as directives to officials to apply sanctions imply the previous points. Sanction is thus built into the legal norm, but is external and contingent to a moral norm (i.e. a moral norm without a sanction is perfectly possible but an unsanctioned legal norm is not). Moreover, although the moral norm may authorize a sanction, the legal norm is a directive to an official in an institution, therefore institution is built into the legal norm also. The existence of officials permits the precision in application of coercion by a group whose actions are in turn backed by further sanctions. It also allows the creation of law to be dynamic and its reasoning to be explicit, which alone allows law to be a system, because it is deliberately created and maintained as such. Law thus self-consciously sees itself as a system with a single source of validity. This is not the case with morality which is hardly systematic and in which the positing of a single Grundnorm appears unrealistic. Indeed, Kelsen himself seems reticent in suggesting that there is a moral Grundnorm. Even were it possible to establish a moral Grundnorm, there is no reason to expect that there may not be others. This is partly because individuals do not consciously concert their moral norms in a system.

32. See J. Raz, The Concept of a Legal System, 150-1. Conversely, Kelsen does admit that there is legal coercion that does not take the form of a sanction. Such coercion arises where there is no delict, for example quarantine, evacuation, etc..

The systematic structure of law, in comparison with morality, can be seen in the problem of conflicting norms already dealt with in chapter 11. Conflicts between legal norms cannot be ruled out, but their existence can be terminated by various procedures; that is, their derogation is allowed for, indeed, it is a prime aim of law to resolve disputes, not to generate new ones. With morality, conflict between norms is, as Kelsen seems to recognize, endemic.[33] There is no agreed procedure for solving moral dilemmas, for each case a separate decision is called for. Indeed, the notion of 'solving' a moral dilemma may be inappropriate for its existence may not be considered wrong and its avoidance itself immoral. The situation is made more confusing because ordinary language and undeliberative reasoning is used, little attempt being made to attain clarity.

The systematic nature of law engendered by its deliberate creation is also seen in the process of learning which is entirely formal, whereas, typically, morality is rarely learnt by formal instruction but acquired in learning language and the values it encapsulates, and by ad hoc "underlining".

It may be doubted whether morality is a system like law because its norms do not seem to have the essential rule-like character of laws. Morality seems to comprise rules, principles, ideals, notions of the Good Life and so on; which, without authoritative reasoning, are not guaranteed to be related. Even were morality solely consistant of rules it seems unlikely that they are as determinate or constant as legal rules; for example, except in rare cases, it does not seem to be

33. Supra, note 20.

true that a moral norm precedes the act, rather than nationalizing when motivation is brought into question.[34] This is not the case in law where the whole point is that a norm be explicit so that behaviour may be conducted accordingly.

The difficulties of applying the Pure Theory's analysis to morality seem to be recognized by Kelsen when he claims that categorical norms cannot be the subject of normative science[35] (in his definition of science as a unified system). But it seems that morality is primarily an affair of categorical norms (always do X, never do Y) and it is precisely this that make moral dilemmas a normal part of experience. Now partly it is true that such statements in categorical form are a function of the way morality is learnt and thus no list of exceptions or competing norms are given. This does not deny that these norms or principles to give them their proper name cannot be made into rules, and the very distinction between the two formulations has been disputed in chapter 6 with reference to Dworkin. Perhaps the point is best put; that whilst law is primarily an affair of rules, morality is primarily an affair of principles.

34. At least in the sense that few deliberately act on principle. This point is neatly put by the recollection of J.L. Austin by Isaiah Berlin, 'Austin seemed to regard with a certain irony R.M. Hare's attachment to "principles", and seemed not to think much of what were offered as examples of such things.' When Hare was asked by Austin what he would say if offered a bribe, Hare said he would say, "I don't take bribes, on principle' to which Austin replied, 'Would you Hare? I think I'd say, "No thanks".' I. Berlin, (ed.), Essays on J.L. Austin, 40, note.

35. Supra, note 14, 100.

In fairness to Kelsen it must be pointed out that other theorists, for example Kant, have viewed morality as a quasi-legal system. Clearly it is an attractive strategy and has some foundation, at least in the common origin of law and morality, yet here it is suggested that the development of law is primarily one of increasing institutionalization and consequent systematization.[36] This development leads ultimately to a legal system but, in contrast, leaves morality as a non-systematic collection of beliefs. Kelsen is partially aware of this problem, but does not investigate it fully. Indeed, it becomes noticeable that his discussion of moral 'systems' tend to be of religious ones which are already quasi-legal. Although a legalistic analysis of morality is not surprising coming from any jurist, it creates difficulties for Kelsen - for a legalistic ethic is a clear example of natural law thinking. That it is so can be seen from the desired result which is the ready identification of morality as a 'law above law' which is superior to ordinary law. Kelsen is saved from the full effect of this doctrine for his relativism (apparent in his view of justice) avoids the absolutism that natural law ethics presuppose.[37] Moreover, to insist on a legalist analysis of ethics would obliterate the distinction between law and morality that, it has been

36. This formulation is therefore preferred to Kelsen's 'centralization' in the development of a legal system, c.f. chapter 9, infra.

37. Most obviously in the idea of 'justice as an irrational idea' which is the exact converse of the natural law idea of justice as a perfection of rationality.

shown, Kelsen assumes.[38]

In conclusion, it is thus suggested that Kelsen's legalistic ethics are both misleading and inconsistent with his theory as a whole. A third characteristic of Kelsen's ethics has been mentioned - its relativism, no arguments are offered against this characteristic for Kelsen's theory falls on the criticism of the other characteristics.[39]

In the foregoing sections, doubt has been cast on the essential characteristics of Kelsen's ethics. In consequence, it is suggested that, as Kelsen seems at times to recognize, there can be no Pure Theory of Morality.

38. As stated in the text I use 'legalism' to mean a tendency to interpret morality as if it were a kind of legal system, whilst admitting that is lacking in some respects (e.g. regularized coercion). In particular the very notion of system I take to be a legalistic one. This use differs little from that of J.N. Shklar, who takes it to be an 'ethical attitude that holds moral conduct to be a matter of rule following', Legalism, 1, but more widely adds, 'Legalism is, above all, the operative outlook of the legal profession', ibid., 8 and which sees morals and politics as law-like but, because of their lack of some legal characteristics, to sharply demarcate them from law itself, ibid., 9. Conversely, the view of morality implied in the text should not be taken to be one of extreme individualism and one rent with dilemmas. It is not denied that morality can, at least in respect of certainty and regularity, be sometimes legalistic - for example the confined morality portrayed by Jane Austen.

39. This is fortunately the case because relativism in general, and in ethics in particular, is too large a subject to be adequately dealt with here. However, it may fairly be inferred from the arguments offered in support of Kelsen's critique of an absolute natural law, that Kelsen's relativism is as acceptable in ethics as it is in law. This should be qualified somewhat, however. For, given the Hartian argument about a minimum content of natural law, it should be added that relativism need not be taken as a merely collective arbitrary set of beliefs. There is in what Wittgenstein called a 'form of life' a constraint on the sort of thing morality can be. (Morality is neither totally dependent nor independent of the human condition.) c.f. Wittgenstein's remarks on colour and number systems, Zettel, ss. 352-364.

Conclusion

The Pure Theory has been defended throughout the preceding chapters on the basis of its positivist presuppositions. In particular, two central presuppositions have been identified: first a conception of science and secondly, and more importantly, an adherence to a sharp separation of facts and values. Both these presuppositions have played a strategic role in the arguments presented.

The conception of science has been deployed in the rejection of natural law theory which is seen as unscientific. Also, the conception has figured in what were termed 'structural' problems of the Pure Theory, which recurred in the discussion of the logical structure demanded by the Pure Theory's conception of science. A Pure Theory of ethics was rejected on the grounds that morality did not have the necessary structure demanded by Kelsen's science. In addition, a notion of science was found to underlie the differences between Kelsen and Hart, because Kelsen had a more rigorous conception than Hart who would not qualify so clearly as a positivist in this respect. Finally, a conception of science as descriptive and not prescriptive was used to reject the judicial reasoning in the Rhodesian cases. This last point clearly connects the presupposition of science to that of the is/ought assumption. For it is central to a positivist conception of science that it has a clearly defined set of factual data and that its task is to treat these in a non-prescriptive method. In other words, it is concerned wholely with what is and not with what there ought to be.

The is/ought distinction has been deployed in the rejection of natural law and it was shown that Kelsen's case was dependent on variations of the Humean distinction.[1] Also shown was the use of the distinction to reject parts of the Kantian heritage in the development of the Pure Theory. Of central importance in the general defence of the Pure Theory, the distinction was used to reject criticisms which were shown to fail to recognize its importance, let alone offer any alternative basis. Hence the distinction was used to show that the Pure Theory was autonomous of both sociological and natural law theory. In addition, the distinction was used to show incoherences in Fuller's legal theory and also in a central part of Hart's theory; Hart therefore again not being so clearly positivist as Kelsen.

In reviewing the deployment of the presuppositions, or less deliberately their incidence, only the main uses have been mentioned. However, it should be realized that the Pure Theory assumes them in other respects. But sufficient should have been done to establish that the structure of the Pure Theory depends on them as foundations.

Are the foundations secure?

It is the task of this conclusion to examine that question. Arguments will be offered to show that the presuppositions are not inevitable. This formulation is preferred to the more dubious one of establishing their truth or falsity, for given the logical status of presuppositions

1. Hume, A Treatise of Human Nature, 521, cited in chapter 1, supra, note 17.

it is not clear what this would entail.

In the following discussion, the presuppositions of positivism in law are shown briefly to be in keeping with Positivism in general. The two main presuppositions are then dealt with separately, although as pointed out, they are interconnected. Firstly, the conception of science assumed by positivism is shown, on the basis of recent work in the philosophy of science, to be disputable. Secondly, the is/ought distinction is similarly shown to be disputable in the sense that it does not create an irremovable dualism as positivism tends to suppose. Supplementary assumptions to the is/ought distinction are also discussed in order to show that the distinction cannot be established by collateral arguments.

I

In his book Positivist Philosophy: Hume to the Vienna Circle,[2] Kolakowski identifies four basic characteristics of Positivist Philosophy as a whole.

1. the rule of phenomenalism - 'there is no real difference between "essence" and "phenomenon". Many traditional metaphysical doctrines assumed that various observed or observable phenomena are manifestations of a reality that we cannot get to know in the ordinary way.'

2. L. Kolakowski, Positivist Philosophy: Hume to the Vienna Circle, chapter 1 (9-18).

2. the rule of nominalism - 'we may not assume that any insight formulated in general terms can have any real referents other than individual concrete objects'.

3. the is/ought dichotomy, this denies that values are empirical and in consequence that they are genuine knowledge.

4. the unity of scientific method, which takes science as paradigmatic of knowledge and as a method which is universally applicable.

Kolakowski remarks that these are all related, but for purposes of the discussion of legal positivism, it is suggested that 1, 2 and 4 are best dealt with together and 3 separately. This also reflects their occurrence in legal positivism. It should be apparent that mutatis mutandis 1, 2 and 4 have a counterpart in the legal positivist rejection of the metaphysics of natural law: that is, in its concentration on positive law as a phenomenon which is referred to as the sole concrete expression of law which is studied in a scientific manner. The is/ought dichotomy is also accepted, although in legal positivism, for reasons seen in chapter 12, knowledge of values and hence a value science are not excluded. In the following, 1, 2 and 4 are grouped as the presupposition of science because the main question to be tackled will be whether a positivist notion of science can successfully be distinguished from non-science. This approach is chosen in preference to a more detailed intrinsic one because it questions the status of the presupposition as a whole. In addition, given the equation of natural law as metaphysics (or more correctly as a sub-class of metaphysics) the success of a positivist demarcation from non-science (or rather 'pseudo-science) is essential for the autonomy of legal positivism as such.

II

The favoured Logical Positivist distinction between science and metaphysics was the Verification Principle.[3] This laid down that any proposition that could not be verified was meaningless. Metaphysical propositions all fell within the category of unverifiable and were therefore dismissed as meaningless.[4] Verifiable statements were then left as the subject matter of science and philosophy was reduced simply to philosophy of science. The main problem however was although these were undoubtedly the desired consequences, it became clear that the Verification Principle could not accomplish its set task.[5] Problems arose about its own actual logical status, about what it was verifying, and about what verification actually constituted. No clear agreed answer emerged. In particular it proved difficult to formulate the Principle to demarcate science from metaphysics. Too lenient in terms of 'relevant' verifying experiences and metaphysics would be let in, too strict in terms of them and general scientific laws would be excluded (for we could not experience all instances).[6]

More recently, the debate on the status of science has been taken up by Kuhn and Popper.[7] Whilst Popper has been a leading critic of

3. The more traditional distinction was reliance on the inductive method.
4. See esp. A.J. Ayer, Language, Truth and Logic, passim.
5. For a general discussion of Logical Positivism and the problems encountered by the Verification Principle, see J. Passmore, A Hundred Years of Philosophy, chapter 16.
6. Ibid., 389-90.
7. T.S. Kuhn, The Structure of Scientific Revolutions.
I. Lakatos and A. Musgrave, eds., Criticism and the Growth of Knowledge, (contains papers by participants in the debate).
P.K. Feyerabend, Against Method: Outline of an Anarchistic Theory of Knowledge.
K.R. Popper, Objective Knowledge.
K.R. Popper, Conjectures and Refutations.
K.R. Popper, The Logic of Scientific Discovery (contains Popper's attack on Logical Positivism).

positivism and the Verification Principle, Popper like the Logical Positivists is insistant on the autonomy of science. Popper bases this on a common scientific method which is applied to independent facts. Opposed to this is the theory of Kuhn who stresses that science is a communal activity and not a privileged type of knowledge. Kuhn argues that the scientific community operates with a shared paradigm which dictates what counts as normal science. In other words, the paradigm points to some areas as 'problems' and some methods as acceptable procedures, it also in effect says what counts as relevant facts. Thus, although there is a common emphasis on empirical tests the actual content and concern of these depend on the paradigm adopted. The paradigm is generated by the outstanding scientific achievement - say, Newtonian physics - which radically alters the scientific perception of the world in what Kuhn calls a 'Scientific Revolution'. The paradigm is thus established until the next revolution brings in a new paradigm. This view has important consequences for the autonomy of science. For example, the paradigms are as much assumptions as the assumptions made by other types of knowledge, not excluding metaphysics. Moreover, notions of coherence and objectivity, of principles and method are essentially relative to the paradigm and as such have no <u>absolute</u> unquestioned status. It becomes impossible to argue between paradigms or, more importantly, to establish the truth of one rather than another. This is the case between two scientific paradigms, but also between a scientific paradigm and a non-scientific one. Indeed, the 'correct' paradigm is established as that currently employed by a consensus of scientists.

It is hardly possible to reach any conclusion on this debate about the status of science and it is sufficient for the present merely to establish that there is a dispute and that in consequence the positivist conception of science is not inevitable.[8] However, a qualification should be advanced to the Kuhnian argument if it is taken to make truth totally dependent on the conventions established by the paradigm. This is the counterpart to Hart's minimum content of natural law and is the Wittgensteinian argument that there is a 'natural necessity' in the concepts which we have.[9] The same must also be true of scientific theory. Not just anything will count as a 'fact' for example as Kuhn seems to imply and Feyerabend accepts. As Wittgenstein says

> "You'll surely run up against existence and non-existence somewhere!" But that means against facts, not concepts.[10]

In other words there is, according to Wittgenstein, a via media between radical conventionalism (facts totally dependent on concepts) and radical realism (facts totally independent of concepts). In terms of the

8. In a recent published version of a broadcast discussion, Hilary Putnam summed up current views of the philosophy of science. In reply to the question '. . . what is the point of continuing to use the category 'science'? Does it any longer clearly demarcate something differentiable from everything else?', Putman stated 'I do not think it does . . . the method which is supposed to draw this line is rather fuzzy - something that we cannot state exactly, and attempts to state it have been very much a failure.' In reply to the supplementary question, 'Is there any longer a single "scientific method"?', Purnam stated 'I don't think there should be. In fact, in the culture, I do not really believe there is an agreement on what is a science and what is not.' Hilary Putnam on the loose-fitting garment of science, 463.

9. See chapter 6, part 1, supra, esp. the first section.

10. L. Wittgenstein, Zettel s. 364. This line of argument obviously qualifies the points made in chapter 11, supra, about the singularity of truth in comparison with the multiplicity of validities (see the text after note 12).

status of science in demarcation from metaphysics such a view would indicate a vague distinction between the two. Moreover, Kuhn seems to imply that debate about paradigms is really a process of persuasion, for the truth and falsity etc., is fixed by the paradigm thus making interparadigmatic comparison impossible in rational terms. But one would want to say that whilst a world of theory-free facts is a realist myth facts must exert some limits on theory. Scientific paradigms would then be distinguished from metaphysical ones by the need to be 'grounded' in experience. But this is the vaguest of distinctions.

Support for Kuhn's theory can be gained from Wittgenstein's general conventionalism, but more particularly from the celebrated 'duck-rabbit' argument.[11] As this will again be referred to in discussion of the is/ought distinction, it should be outlined here. Wittgenstein gives a picture which can be seen as either a duck or a rabbit. Wittgenstein notes that we can only see the picture as something, in this case a duck or rabbit. We are only aware of this when we experience the 'dawning' of a new aspect. What we call 'seeing' is in fact 'seeing as', we are unaware of this except in the ambiguous cases like the 'duck-rabbit'. There is, in consequence, no seeing simplicite r. It may be thought that we need not see it as anything, but if we see it we must see it as something if only as random lines etc. Wittgenstein draws the conclusion that we do not see certain facts and then interpret them or rather place an interpretation on them. There are then no conceptually free facts. This is

11. L. Wittgenstein, Philosophical Investigations, 212.

not simply analogous to Kuhn's discussion of paradigms, but is a basic part of their operation. To use an example provided by Kuhn; where the Aristotelian saw a body falling with difficulty, Galileo saw a pendulum.[12] The point can be put better by Hanson;

> Kepler regarded the sun as fixed: it was the earth that moved. But Tycho followed Ptolemy and Aristotle in this much at least: the earth was fixed and all other celestial bodies moved around it. Do Kepler and Tycho see the same thing in the east at dawn?[13]

It should be added that the constraints of 'natural necessity' also recur in this example, for we cannot see the 'duck-rabbit' as anything, although there are many more possible conceptual contexts in which it could be seen as.[14]

In the foregoing, some doubts have been raised about the Positivist conception of science, simply by sketching the recent debate about the status of science.[15] If nothing else, this is taken to show that whilst science and metaphysics may be distinct, the distinction is not as clear as Positivists have assumed. That there is a distinction may be nothing but a dogma. At least one favoured distinction: that science is concerned with facts and metaphysics with concepts is shown to be arguable. More technical means of establishing the distinction based on 'scientific method' are shown to be conceptually

12. T.S. Kuhn, The Structure of Scientific Revolutions, 17-18.
13. N.R. Hanson, Patterns of Discovery, 5.
14. It is difficult to see how the 'duck-rabbit' could be seen as a cube for example.
15. The mere existence of the debate is not taken as proving positivism as mistaken, or that it is not beyond doubt merely because someone has doubted it. Rather, that there is a very serious and widely held challenge to the orthodox view.

dependent. It is now possible to turn to the other distinction which, in terms of legal positivism and the Pure Theory in particular, is more vital. Despite dealing with this separately, it has been emphasised that the two conceptions are interrelated. This will be confirmed for it will be argued that the distinction between science and metaphysics underpinning the one presupposition is at bottom the same as the is/ought distinction which is the other presupposition.

III

The is/ought distinction is undoubtedly central to the status of the Pure Theory. It is also central to the twentieth century discussion of ethics and much else besides.[16] As pointed out in a previous chapter, the distinction stems in modern usage from Hume's Treatise.[17] It also underlies other distinctions; the descriptive/prescriptive distinction for example. In the following, the distinction is shown not only as not inevitable but, more strongly, as positively misleading.

The importance of the is/ought distinction is reflected in the extent of the debate about it and the attempts made to deductively overcome it. Of these attempts the most famous and most debated is that of Searle.

16. See e.g. the papers in W.D. Hudson, ed., The Is-Ought Question.
17. Supra, note 1.

In How to derive 'ought' from 'is' (1964) and more recently in Speech Acts (1969)[18] Searle attempts to show that a relation of entailment can be established in an argument from is to ought. This would meet Hume's insistance that a deduction be established between the two terms. Searle's proof goes as follows:

1. Jones uttered the words "I hereby promise to pay you, Smith $5".
2. Jones promised to pay Smith $5.
3. Jones placed himself under (undertook) an obligation to pay Smith $5.
4. Jones is under an obligation to pay Smith $5.
5. Jones ought to pay Smith $5.[19]

Searle of course adds a great deal in support of this argument. Most importantly he relies on a distinction between 'brute' and 'institutional' facts.[20] The concept of an 'institutional' fact allows the move from 1 to 2. Given this move, the other moves can be accomplished as tautologies.[21] Most criticism (and there is a great deal) centres on this initial move. Hare accuses Searle of employing an equivocal use of 'promise'.[22] Flew attacks it for much the same reason, pointing out that Searle is failing to derive an 'institutional' from a 'brute' fact.[23] But Searle's point is simply that promising is an 'institutional' fact not a 'brute' fact. But this in turn leads to the problem of the status of these 'institutional' facts, which also has

18. J. Searle, How to Derive 'Ought' from 'Is', passim, and Speech Acts, chapter 8.
19. J. Searle, Speech Acts, 177.
20. Ibid., 184-5.
21. Or, more simply, unpacking what promising is.
22. R.M. Hare, The Promising Game. Hare is not prepared to accept that the other moves are necessarily tautologous.
23. A. Flew, On Not Deriving 'Ought' from 'Is'. Flew generally supports Hare's point about the equivocal nature of 'promise' as used by Searle.

been the subject of much debate since its introduction by Anscombe in 1958.[24] Rather than pursue the convolutions of either debate here, it is noted that firstly the example is highly artificial and that secondly, it is much disputed that Searle has really succeeded. This second point is of the greatest consequence for it expresses the point that, for all its artificiality, Searle seems to have both succeeded and to have failed.

In ordinary discourse, arguments take a simpler form and are not dressed as deductive inferences. For example 'he has done wrong - he ought to be punished' is a perfectly acceptable piece of reasoning that is logically fallacious: here the important thing to notice is that (a) the move from is to ought is made all the time in ordinary speech, (b) it is logically fallacious. The former can be established by observation. The latter by recognizing that is/ought non-deduction is, as Hume's original remark shows, merely part of the more general rule that the conclusion of an argument cannot contain what is not contained in its premises. There is thus a dilemma, either accept that (a) is a correct move and that a cornerstone of logic, and reasoning generally is to be abandoned, or accept (b) and resign oneself to the illogicality of the mass of people. Neither is attractive, although the latter is probably preferred by professional philosophers. Nor is it acceptable to leave the seeming contradiction. Fortunately, there is a way out of the dilemma - so that (a) is taken to be a

24. G.E.M. Anscombe, On Brute Facts; D.Z. Phillips, Miss Anscombe's Grocer; D.Z. Phillips, The Limitations of Miss Anscombe's Grocer; D.Z. Phillips and H.O. Mounce, Moral Practices, appendix 2; C. Williamson, Miss Anscombe's Grocer and Mr. Phillip's Grocer. See also supra, note 19; supra, note 22; supra, note 23.

correct move and (b) is also accepted and logic vindicated.

The solution of the dilemma between ordinary discourse and logical inference is that both are in order despite their seeming contradiction simply because they are not equivalent. In short, the two do not translate. Logic assumes that it is representing a distinction found in ordinary language but it is wrong.[25] This, of course, does nothing more than focus attention back on the distinction itself. Unless there is a way of establishing the distinction, its existence is merely a dogma. Hence, there may be a direct analogy to Quine's argument in Two Dogmas of Empiricism.[26] There Quine attacks the distinction between analytic and synthetic statements pointing out that none of the proposed formulations, such as between what is and is not true by definition, actually allow a distinction to be made. Quine concludes

> But for all its a priori reasonableness, a boundary between analytic and synthetic statements has not been drawn. That there is such a distinction at all is an unempirical dogma of empiricists, a metaphysical article of faith.[27]

25. Just how subtle ordinary language can be, compared to the simple clarity of logic, is easily forgotten. Consider the following extract from George Eliot's Middlemarch:
'"What can I do, Tertius?", said Rosamand, turning her eyes on him again. That little speech of four words, like so many others in all languages, is capable by varied vocal inflexions of expressing all states of mind from helpless dimness to explanative argumentative perception, from the completest self-devoting fellowship to the most neutral aloofness. Rosamand's thin utterance threw into the words "What can I do!" as much neutrality as they could hold.' (542).

26. W. van O. Quine, Two Dogmas of Empiricism, esp. 20-37.

27. Ibid., 37. See also Quine's concluding remarks that 'Science is a continuation of common sense', ibid., 45, and about scientific posits that 'Epistemologically these are on the same footing with physical objects and gods', ibid.

However, with the is/ought distinction, it is not essential for present purposes to show that there is no formulation, but merely that none occurs in ordinary language. Although Quine's arguments do tend to support the lack of is/ought distinction in as much as the idea of synthetic truth dependent on autonomous facts is brought into doubt.

It has been noted above that there is in effect only 'seeing as' so that there are no facts plus interpretation but rather interpretation is the fact. In other words, there are no simple facts. A distinction between fact and value can be drawn but only relative to the conceptual context. But this does not mean that values are merely assigned to the supposed conceptual component ('seeing as') placed on the factual component ('seeing') for this very distinction is rejected. Rather the distinction is drawn by alteration of the conceptual context so that a 'fact' interpretation is produced but this is still an interpretation. Just as the interpretation of the 'duck-rabbit' is still an interpretation, even if it is only of lines etc. Now the point is that in much of language that is used about human action etc., the standard interpretation is that of a value conceptual context, the pure 'fact' conceptualization is the exception and there are no deconceptualized facts. Consider the usage of 'criminal', this carries normally a strong value conceptualization, only exceptionally in sociological work is a 'value-free' conceptualization used. But, leaving aside the debate about the possibility of 'value-free' science, it is atleast possible to assert that such a 'value-free' conceptualization is itself a value. The

point is, however, simply that although the distinction use is available, to make it is not somehow more correct or profound. If anything, not to make it has the support of the far wider usage. But the conclusion is that the distinction's status is dependent on the conceptual scheme in which it occurs. Is one conceptual scheme preferred to another? Of course this is basically the same question about the relative status of paradigms, although paradigms are given within a conceptual context. Some qualification was urged against the idea that there was no way of deciding the correctness of one paradigm against another based on the constraints exercised by nature. But such a criterion, however loose, will not be available unless the use of paradigms is supposedly equivalent. It cannot be assumed that this is so between the conceptual context of ordinary usage and that of science.

But cannot the distinction be made in other than ordinary usage? It becomes apparent that there is no independent non-question-begging definition on which to ground the classification. Even worse, the formulations of the distinction, e.g. is/ought, fact/value, descriptive/prescriptive and so on are certainly not equivalent as generally assumed both in recent moral philosophy and in the previous chapters. It is noticeable that the supposedly factual component of such formulations collapses in ordinary usage,[28] e.g. John is good, it is a fact that John is good, he described John as good (consider also; John tells lies, the machine ought to work).[29]

28. Alternatively, the classifications could be given a technical meaning, but this would only admit that they are not about ordinary usage in any deductive procedure.

29. More strongly, in a recent case, the judge, as reported 'described the defendant as a vicious, little liar'.

The point is that it has been merely assumed that the second terms of these dichotomies are logically separable from the first. More importantly, it has been assumed that moral discourse can be adequately located on that side. But this location cannot be achieved without stipulation. (So there is a further failure of equivalence.) The dichotomies are nothing but a priori linguistic classifications. As such they have no independent grounding and are thus solely definable in terms of mutual exclusion. This, of course, means that a priori deduction is ruled out by definition between the two terms (simply because they are taken as values for the variables X and not X). But, as pointed out, the terms excluded from deduction are not those of ordinary usage.

It may be objected that people must be able to agree on facts but disagree about values, but people then do not agree on the same facts any more than the duck-seer sees the same as the rabbit-seer or as Tycho and Keplar see the same thing at dawn. Of course this, by implication, accepts that valuations are not uniform for there are many conceptual contexts of evaluation, particularly in morality.

Whereas Searle insisted on promising as an 'institutional' fact, here a more radical proposal is made: that language and its contexts is an institution and that the only facts are those intrinsic to the particular conceptual context.[30] However, if this is so, the argument

30. The normality of a usage of promising can be brought out by noting that it is a defeasible concept. Searle's move from 1 to 2 is defeasibly correct, i.e. unless there are certain clear exceptional circumstances.

given here may be vulnerable to those produced against Searle and others.

Hare, in an article Descriptivism (1963) claims that even if the distinction between descriptive and evaluative is blurred, nevertheless there is a distinction. Thus, if we take a description which seems evaluative, it would be possible to isolate in analysis a purely descriptive element Ø which Hare terms a 'neutral description'.[31] From Ø, no evaluation would follow and so the distinction would be salvaged. What Hare accomplishes is simply making the thesis true by definition. In effect, descriptive is strictly defined as non-evaluative and then it is quite correctly concluded that no evaluative statement follows from a non-evaluative one. But this only succeeds in highlighting the initial point of translation for Hare is tacitly admitting that Ø required for the failure of deduction is quite other than the descriptions of ordinary usage. The interesting thing is not that Ø is possible, but that the possibility is not taken up and in consequence that there is no Ø language! Hare is simply not talking about the language, and therefore the morality, that we have, but about an abstract a priori invention. To do so is not wrong, but neither is it particularly valuable.[32]

31. R.M. Hare, Descriptivism, 123.

32. That is, it is here argued not that the distinction cannot be made but rather that it is not more correct to make it.

Much the same is true of Flew's response to Searle's original argument. Flew insists that the argument simply is non-deductive for a 'detached reporter' would not be able to establish a deduction. Of course this also implicitly concedes the case, for language users are not normally 'detached reporters', who would not in any case be using the same language.[33]

In the preceding arguments, the distinction has been shown as dependent on a conceptual context that normally does not arise. By conceptual context is meant linguistically nothing more than a language game and institutionally nothing more than a practice or convention. In discussing Hart's jurisprudence, arguments were offered against his use of this very concept. Whilst some reservations must still be held about the implied coherence and autonomy of such practices (is there a legal practice?) it was seen that counter arguments were, at base, invocations of the is/ought distinction. Hart's point can be taken as being that such distinctions are practice-dependent. However, this does not show that another practice such as legal philosophy itself cannot make the distinction - even if its subject does not, but then the question arises whether they are about the same thing. Here it is only suggested that in place of the constraints of natural necessity, there are constraints placed on interpretation: by the system itself and by legal science. More so on the latter because it must play part of the same language game if it is not to be a 'detached observer'.[34] This suggests that

33. Supra, note 23.

34. This problem underlies the status of legal science in Kelsen's theory in comparison with that of Hart. See chapter 8, part 1, supra, text after note 63.

legal philosophy ought not to make a distinction not made in the system. But this need not be the case, for the systems' self interpretation is not privileged if the common subject is legal behaviour, although this must include legal language itself. This is only a more specialized instance of the ambiguous status of philosophy as a whole and its possible status as an autonomous language game.[35]

Returning to the original problem of the lack of equivalence between ordinary usage and logical philosophy, there was seen to be no standard by which to reject one or the other. Each is a conceptual context which cannot mutually be mapped. Both are 'seeing as'; there

35. Apart from the is/ought distinction it may be thought that some collateral support could be derived from the Naturalistic Fallacy in establishing the presuppositions of positivism. The Naturalistic Fallacy elaborated by G.E. Moore in chapter 1 of Principia Ethica purports to show the impossibility of deriving goodness from any natural properties and would thus be a special instance of no value (goodness) from a fact (a natural property). The Naturalistic Fallacy has been as central to modern ethics and as much discussed as the is/ought distinction. As such, it might provide strong support to the other distinction. Unfortunately, the Naturalistic Fallacy, on inspection, seems even less well founded than the is/ought distinction. Apart from difficulties in determining the precise formulation of the Fallacy, Moore makes four crucial assumptions: (1) That goodness is the key and typical valuation term and will display the operation of other terms which can be derived from it; (2) That goodness is a simple non-complex quality; (3) That goodness is a property, the task of language being descriptive of it; (4) That definition takes the form of analysis. None of these seem particularly well founded and may be quite simply false. Moreover, Moore's theory of intuition of a non-natural property of goodness is beset with difficulties and indeed Moore himself provides no enlightenment at all on the subject of intuition. The seemingly powerful open-ended argument used in support is also disputable. This takes the form that it is always possible to question the equation of goodness with any property (e.g. is pleasure good?) Now apart from the insecurity of making a fallacy dependent on usage, it would in reply, be possible to meet the argument. For example, why is pleasure not defeasibly good? (i.e. good ceteris paribus), accepting that the two are normally interchangeable, or otherwise providing a complex of natural properties which would eliminate the sense of questioning their collective goodness. The formulation of the Definist Fallacy - simply that goodness is indefinable or non analys able, is also beset with problems;on this aspect, see C. Lewy, G.E. Moore on the Naturalistic Fallacy.

is no 'seeing' by which their correctness can be judged - for it is not even clear that they are about the same thing or that they are to accomplish an even peripherally shared task. They are different maps to a country which we can never visit.

In consequence of the foregoing chapters, the Pure Theory has been seen to rest on basic presuppositions. In this conclusion arguments have been advanced to show that these presuppositions need not be accepted for they enjoy no privileged status. Conversely they have not been shown to be unfounded. It is thus concluded that there is no reason to reject the Pure Theory, but also no reason to assume that it is exhaustive of jurisprudence.

Bibliography 1.

a. Cases

Baldy v. Hunter, 171 U.S. 388 (1898).

Dhlamini and Others v. Carter N.O. (1968) 2 S.A. 445.

Heydon's Case, (1584) 3 Co. Rep. 7b.

Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A. 2d 69 (1960).

Johnson v. The Atlantic Gulf and West Indian Transit Co., 156 U.S. 618 (1894).

Madzimbamuto v. Lardner-Burke N.O.; Baron v. Ayre N.O. GD/CIV/23/66, Government Printer, Salisbury; (1968) 2 S.A. 284 (Appellate Division); (1969) 1 A.C. 645 (Privy Council).

Omychund v. Barker 1 Atk. 21. 33. 26 Eng Rep 15, 22-23 (ch. 1744).

R v. Ndhlovu (1968) 4 S.A. 515.

Riggs v. Palmer 115 N.Y. 506, 22 N.E. 188 (1889).

The State v. Dosso (1958) 2 P.S.C.R. 180.

Uganda v. Commissioner of Prisons, exp. Matovu (1966) E.A. 514.

b. Constitutions, Statutes, etc.

The Swiss Civil Code (1907). English version, trans. I. Williams, Oxford (1925).

Basic Law for the Federal Republic of Germany, adopted by the Parliamentary Council on 8/5/1949 effective 15/3/1955, English trans. ed. Linguistic Section of the Foreign Office of the Federal Republic of Germany, Bonn (1955).

Constitution of Southern Rhodesia, 1961, granted by Southern Rhodesia (Constitution) Order in Council, 1961 (1961, no. 2314).

Colonial Laws Validity Act, 1865, 28-29 Vict., C.63 (U.K.).

Southern Rhodesian Act 1965, 1965 c. 76 (U.K.).

Southern Rhodesian Constitutional Order, 1965, S.I. no. 1952.

Unilateral Declaration of Independence (U.D.I.), Proclamation no. 53 of Rhodesia, Government Notice, 1965, no. 737N (reprinted in International Legal Materials (1966), vol. 5, 230-1).

United Nations Resolution (5 Nov. 1965), G.A. Res. 2022 (XX).

Security Council Resolution (12 Nov. 1965), U.N. Doc. S/RES/216.

Government of the League of Nations in A. Zimmern, The League of Nations and the Rule of Law, 1918-35, London (1945) 511.

Versailles Peace Treaty, 1919, H.M.S.O. (1919).

General Treaty for the Renunciation of War (Pact of Paris or Kellogg-Briand Pact), Cmd. 3410 (1929).

Charter of the United Nations, in H. Morganthau, Politics Among Nations, 4th. ed., New York (1967) 553.

Bibliography 2

Works by Kelsen

Books

Natural Law Doctrine and Legal Positivism (1929), repr. in General Theory of Law and State, trans. A. Wedberg, Cambridge, Mass. (1945) 391.

The Legal Process and International Order, London (1934).

Legal Technique and International Law, A Textual Critique of the League Covenant, Geneva (1939).

Law and Peace in International Relations, Cambridge, Mass. (1942).

Society and Nature, Chicago (1943).

Peace Through Law, Chapel Hill, No. Car (1944).

General Theory of Law and State, trans. A. Wedberg, Cambridge, Mass. (1945).

The Political Theory of Bolshevism, Berkeley (1948).

The Law of the United Nations, New York (1950).

The Communist Theory of Law, New York (1955).

What is Justice? Justice, Law and Politics in the Mirror of Science, Berkeley (1957).

Principles of International Law, 2nd rev. edn., ed. R.W. Tucker, New York (1966).

The Pure Theory of Law, 2nd rev. edn., trans. M. Knight, Berkeley (1967).

Essays in Legal and Moral Philosophy, ed. O. Weinberger, trans. P. Heath, Dordrecht (1973).

Articles

God and the State (1923), repr. in Essays in Legal and Moral Philosophy, ed. O. Weinberger, trans. P. Heath, Dordrecht (1973) 61.

The Conception of the State and Social Psychology, Int'l J. Psycho-Analysis 5 (1924) 1.

The Idea of Natural Law (1928), repr. in Essays in Legal and Moral Philosophy, ed. O. Weinberger, trans. P. Heath, Dordrecht (1973) 27.

State-Form and World Outlook (1933), repr. in Essays in Legal and Moral Philosophy, ed. O. Weinberger, trans. P. Heath, Dordrecht (1973) 95.

The Legal Process and International Order, The New Commonwealth 2 (1934) 104, 122.

The Pure Theory of Law: It s Method and Fundamental Concepts, trans. C.H. Wilson, L.Q.R. 50 (1934) 474, (1935) 517.

The Party-Dictatorship, Politica 2 (1936) 19.

Centralization and Decentralization, in Authority and the Individual, ed. Harvard University, Cambridge, Mass. (1937) 210.

The Function of the Pure Theory of Law, in Law, A Century of Progress 1835-1935, ed. School of Law of New York University, New York (1937) vol. II, 231.

The Philosophy of Aristotle and the Hellenic-Macedonian Policy, Int'l J. Ethics, 48 (1937) 1.

The Soul and the Law, R. Religion 1 (1937) 337.

Platonic Justice, Ethics 48 (1937-8) 367.

The Separation of the Covenant of the League of Nations from the Peace Treaties in The World Crisis, ed. Graduate Institute of International Studies, London (1938) 133.

Causality and Retribution, J. Unified Science 9 (1939) 234.

The Emergence of the Causal Law from the Principle of Retribution (1939), repr. in Essays in Legal and Moral Philosophy, ed. O. Weinberger, trans. D. Heath, Dordrecht (1973) 165.

Causality and Retribution, Philosophy of Science 8 (1941) 533.

The Essential Conditions of International Justice, Proceedings of 35th Annual Meeting of the American Society of International Law, Washington (1941) 70.

International Peace - by Court or Government?, American J. Sociology 46 (1941) 571.

The Law as a Specific Social Technique, U. Chicago L.R. 9 (1941) 75.

The Pure Theory of Law and Analytical Jurisprudence, Harvard L.R. 55 (1941) 44.

Recognition in International Law, American J. Int'l L. 35 (1941) 605.

Judicial Review of Legislation, A Comparative Study of the Austrian and American Constitutions, J. Politics 4 (1942) 183.

Platonic Love, American Imago 3 (1942) 1.

Post War Problems, Proceedings of the American Academy of Arts and Sciences 75 (1942) 11.

Revision of the Covenant of the League of Nations, World Organization (1942) 392.

Value Judgements in the Science of Law, J. Social Philosophy and Jurisprudence 7 (1942) 312.

Collective and Individual Responsibility in International Law with Particular Regard to Punishment of War Criminals, California L.R. 31 (1943) 530.

Compulsory Adjudication of International Disputes, American J. Int'l L. 37 (1943) 397.

Peace Through Law, J. Legal and Political Sociology 2 (1943) 52.

Quincy Wright's A Study of War and the Bellum Justum Theory, Ethics 53 (1943) 208.

The International Legal Status of Germany to be Established Immediately upon Termination of the War, American J. Int'l L. 39 (1944) 689.

The Principle of Sovereign Equality of States as a Basis for International Organization, Yale L.J. 53 (1944) 207.

The Strategy of Peace, American J. Sociology 49 (1944) 381.

The International Law of the Future, Proceedings of the Institute of World Affairs, 21st session (1945-6) 190.

The Legal Status of Germany According to the Declaration of Berlin, American J. Int'l L. 39 (1945) 518.

The Old and the New League, American J. Int'l L. 40 (1945) 45.

Roscoe Pound's Outstanding Contribution to American Jurisprudence, Harvard L. School Yearbook 12 (1945-6).

The Rule Against Ex Post Facto Laws and the Prosecution of Axis War Criminals, JAG J. 2 (1945) 8, 27, 46.

Limitations on the Functions of the United Nations, Yale L.J. 55 (1946) 997.

Membership of the United Nations, Columbia L.R. 46 (1946) 391.

Organization and Procedure of the Security Council of the United Nations, Harvard L.R. 59 (1946) 1087.

The Preamble of the Charter, J. Politics 8 (1946) 134.

Sanctions in International Law Under the Charter of the United Nations, Iowa L.R. 31 (1946) 499.

Sanctions Under the Charter of the United Nations, Canadian J. Economic and Political Science 12 (1946) 429.

Is a Peace Treaty with Germany Legally Possible and Politically Desirable?, American Political Science R. 41 (1947) 1188.

Will the Judgement in the Nuremberg Trial Constitute a Precedent in International Law?, Int'l L.Q. 1 (1947) 153.

Absolutism and Relativism in Philosophy and Politics, American Political Science R. 42 (1948) 906.

Collective Security and Collective Self-Defence Under the Charter of the United Nations, American J. Int'l L. 42 (1948) 783.

Law, State and Justice in the Pure Theory of Law, Yale L.J. 57 (1948) 377.

The Settlement of Disputes by the Security Council, Int'l L.Q. 2 (1948) 173.

Withdrawal from the United Nations, World Politics Q. 1 (1948) 29.

The Atlantic Pact and the U.N. Charter, The New Leader 32 (1949) 10.

Collective and Individual Responsibility for Acts of State in International Law, Jewish Yearbook Int'l L. (1948-9) 226.

Conflicts Between Obligations Under the Charter of the United Nations and Other International Agreements, U. Pittsburgh L.R. 10 (1949) 284.

Hundredth Birthday of Josef Kohler, American J. Int'l L. 43 (1949) 346.

The Natural Law Doctrine Before the Tribunal of Science, Western Political Q. 2 (1949) 481. repr. in What is Justice?, Berkeley (1957) 137.

Causality and Imputation, Ethics 61 (1950) 1 also repr. as Causality and Accounting, in Essays on Legal and Moral Philosophy, ed. O. Weinberger, trans. P. Heath, Dordrecht (1973) 154.

The Draft Declaration on Rights and Duties of States, American J. Int'l L. 44 (1950) 259.

Is the North Atlantic Treaty in Conformity with the Charter of the United Nations?, U. Kansas L.R. 19 (1950-1) 1.

Is the North Atlantic Treaty a Regional Arrangement?, American J. Int'l L. 45 (1951) 162.

Recent Trends in the Law of the United Nations, Social Research 18 (1951) 135.

Science and Politics, American Political Science R. 45 (1951) 641.

What Happened to the Security Council?, The New Leader 27 (1951) 10, 31.

The Idea of Justice in the Holy Scriptures (1953), repr. in What is Justice?, Berkeley (1957) 25.

Foundations of Democracy, Ethics 66 (1955), Supplement, 1.

A 'Dynamic' Theory of Natural Law, Louisiana L.R. 16 (1956) 597.

What is Justice?, based on the farewell lecture to the University of California at Berkeley (1952), repr. in What is Justice?, Berkeley (1957) 1, also repr. in Essays in Legal and Moral Philosophy, ed. O. Weinberger, trans. P. Heath, Dodrecht (1973) 1.

Why Should the Law Be Obeyed?, in What is Justice?, Berkeley (1957) 257.

Aristotle's Doctrine of Justice, in What is Justice?, Berkeley (1957) 110.

Letter to Professor Cahn in E. Cahn, Review of Kelsen, What is Justice?, New York U.L.R. 33 (1958) 1056.

On the Basic Norm, California L.R. 47 (1959) 107.

Law and Morality (1960), repr. in Essays in Legal and Moral Philosophy, ed. O. Weinberger, trans. P. Heath, Dordrecht (1973) 83.

Plato and the Doctrine of Natural Law, Vanderbilt L.R. 14 (1960) 23.

Sovereignty and International Law, Georgetown L.J. 48 (1960) 627.

What is the Pure Theory of Law?, Tulane L.R. 34 (1960) 269.

Derogation (1962), repr. in Essays in Legal and Moral Philosophy, ed. O. Weinberger, trans. P. Heath, Dordrecht (1973) 261.

The Foundation of the Theory of Natural Law (1963), repr. in Essays in Legal and Moral Philosophy, ed. O. Weinberger, trans. P. Heath, Dordrecht (1973) 114.

Law and Logic (1965), repr. in Essays in Legal and Moral Philosophy, ed. O. Weinberger, trans. P. Heath, Dordrecht (1973) 228.

Membership in the United Nations, Columbia L.R. 65 (1965) 437.

On The Concept of Norm (1965), repr. in Essays in Legal and Moral Philosophy, ed. O. Weinberger, trans. P. Heath, Dordrecht (1973) 216. (Chapter 1 of an uncompleted projected work 'The General Theory of Norms').

Professor Stone and the Pure Theory of Law, Stanford L.R. 17 (1965) 1128.

Norm and Value, California L.R. 54 (1966) 1624. (taken from chapter 1 of The Pure Theory of Law, trans. M. Knight, Berkeley (1967)).

On The Pure Theory of Law, Israel L.R. 1 (1966) 1.

Law and Logic Again (1967), repr. in Essays in Legal and Moral Philosophy, ed. O. Weinberger, trans. P. Heath, Dordrecht (1973) 254.

On The Practical Syllogism (1968), repr. in Essays in Legal and Moral Philosophy, ed. O. Weinberger, trans. P. Heath, Dordrecht (1973), 257.

Bibliography 3

Works by Kant

Lectures on Ethics (1775-1781), trans. L. Infield, London (1930).

Critique of Pure Reason (1781A, 1787B), trans. N. Kemp Smith, 2nd. edn., London (1933).

Idea for a Universal History from a Cosmopolitan Point of View (1784), trans. L.W. Beck, in Kant on History, New York (1963) 11.

What is Enlightenment? (1784), trans. L.W. Beck, in Kant on History, New York (1963) 3.

Reviews of Herder's 'Ideas for a Philosophy of the History of Mankind' (1785), trans. R.E. Anchor, in Kant on History, New York (1963) 27.

Groundwork to the Metaphysic of Morals (1785), trans. H.J. Paton, as The Moral Law, London (1948).

Conjectural Beginning of Human History (1786), trans. E.L. Fackenheim, in Kant on History, New York (1963) 53.

Critique of Practical Reason (1788), trans. L.W. Beck, New York (1956).

On the Common Saying, 'This May be True in Theory, But it Does not Apply in Practice' (1793), trans. H.B. Nisbet, in Kant's Political Writings, ed. H.S. Reiss, Cambridge (1971) 61.

Religion Within the Limits of Reason Alone (1793), trans. T.M. Greene and H.H. Hudson, New York (1960).

The End of All Things (1794), trans. R.E. Anchor, in Kant on History, New York (1963) 69.

Perpetual Peace (1795), trans. L.W. Beck, in Kant on History, New York (1963) 85.

Metaphysical Elements of Justice, part one of the Metaphysic of Morals (1797), trans. J. Ellington, New York (1964).

Metaphysical Principles of Virtue, part two of the Metaphysic of Morals (1797), trans. J. Ellington, New York (1964).

On a Supposed Right to Tell Lies from Benevolent Motives (1797), trans. T.K. Abbot, in Kant's Critique of Practical Reason and Other Works in The Theory of Ethics, London (1883) 361.

Anthropology, From a Pragmatic Point of View (1798), trans. M.J. Gregor, The Hague (1974).

An Old Question Raised Again: Is the Human Race Constantly Progressing?, from The Strife of the Faculties (1798), trans. R.E. Anchor in Kant on History, New York (1963) 137.

Bibliography 4

Books and Articles

Abelson, R., Unnatural Law, in Law and Philosophy, S. Hook, ed., New York (1964) 141.

Acton, H.B. Kant's Moral Philosophy, London (1970).

Akzin, B., Analysis of State and Law Structure, in S. Engel and R.A. Metall, eds., Law, State and International Order, Essays in Honour of Hans Kelsen, Knoxville (1964).

Hans Kelsen - In Memoriam, Israel L.R. 8 (1973) 325.

Allen C.K., Law in the Making, 7th ed., Oxford (1964).

Ames, J.B., Law and Morals, Harvard L.R. 22 (1908) 97.

Ansbro, J.J., Kant's Limitations on Individual Freedom, The New Scholasticism 47 (1973) 88.

Anscombe, G.E.M., On Brute Facts, Analysis 18 (1957-8) 69.

Aquinas, Selected Political Writings, ed. A.P. D'entrèves, trans. J.G. Dawson, Oxford (1949).

Aris, R., A History of Political Thought in Germany from 1789 to 1815, London (1936).

Aristotle, Nicomachean Ethics, trans. W.D. Ross, Oxford (1954).

Rhetoric, trans. W.D. Ross, Oxford (1954).

Armstrong, A.C., Kant's Philosophy of Peace and War, J. Philosophy 28 (1931) 197.

Attwooll, E., Review of Kelsen, The Pure Theory of Law, Tulane L.R. 42 (1968) 913.

Atwell, J.E., A Brief Commentary on the Symposium: Kant and Revolution, J. History of Ideas 32 (1971) 433.

Auerbach, C.A., On Hart's Definition and Theory in Jurisprudence, J. Legal Education 9 (1956) 139.

Austin, J., Lectures on Jurisprudence, ed. R. Campbell, 2 vols., London (1885).

The Province of Jurisprudence Determined and The Uses of the Study of Jurisprudence, ed. H.L.A. Hart, London (1954).

The Province of Jurisprudence Determined, repr. New York (1970).

Austin, J.L., A Plea for Excuses, Proceedings Aristotlean Society 57 (1956-7) 1.

How To Do Things with Words, ed. J.O. Urmson, and G.J. Warnock, Oxford (1962).

Axinn, S., Kant, Logic and Mankind, Ethics 68 (1958) 286.

The Kantian Definition of the Degree of Rationality, Kant Studien 51 (1959-60) 27.

Kant On Authority, Southern J. Philosophy 8 (1970) 157.

Kant, Authority and the French Revolution, J. History of Ideas 32 (1971) 423.

Ayer, A.J., Language, Truth and Logic, 2nd edn., London (1971).

Baker, G., Criteria: A New Foundation for Semantics, Ratio 5 (1974) 156.

Defeasibility and Meaning, in Law, Morality and Society: Essays in Honour of H.L.A. Hart, ed. P.M.S. Hacker and J. Raz, Oxford (1977) 26.

Beck, L.W., Introduction to Kant On History, New York (1963).

Kant and the Right of Revolution, J. History of Ideas 32 (1971) 411.

Bell, R.S., Understanding the Model of Rules: Towards a Reconciliation of Dworkin and Positivism, Yale L.J. 81 (1972) 912.

Benditt, T.M., On 'Levels of Rules and Hart's Concept of Law', Mind 83 (1974) 422.

Benn, S.I. and Peters, R.S., Social Principles and the Democratic State, London (1959).

Bergman, G.M., The Communal Concept of Law, Yale L.J. 57 (1947) 55.

Bergman, G., and Zerby, L., The Formalism in Kelsen's Pure Theory of Law, Ethics 55 (1944) 110.

Berlin, I., and others, Essays on J.L. Austin, Oxford (1973).

Bernstein, R.J., Professor Hart on Rules of Obligation, Mind 73 (1964) 563.

Birmingham, R., On What a Rule Is, Connecticut L.R. 8 (1975) 88.

Black, M., Models and Metaphors: Studies in Language and Philosophy, Ithaca N.Y. (1963).

Blackstone, W., Commentaries on the Laws of England, Oxford (1765-9) repr. New York, (1966).

Bodenheimer, E., Power and Law, Ethics 50 (1939) 127.

Significant Developments in German Legal Philosophy Since 1945, American J. Comparative L. 3 (1954) 379.

Modern Analytical Jurisprudence and the Limits of its Usefulness, U. Pennsylvania L.R. 104 (1955-6) 1080.

Jurisprudence: The Philosophy and Method of Law, Cambridge, Mass. (1962).

Review of Hart, Concept of Law, UCLA L.R.10 (1963) 959.

Boonin, L.G., Concerning the Relation of Logic to Law, J Legal Education 17 (1964) 155.

Bosanquet, B., The Philosophical Theory of the State, 4th edn., London (1925).

Bourke, J., Kant's Doctrine of 'Perpetual Peace', Philosophy 17 (1942) 324.

Bradley, F.H., Ethical Studies, 2nd edn., Oxford (1927).

Brecht, A., The Myth of Is and Ought, Harvard L.R. 54 (1940-1) 811.

Breckenridge, G., Legal Positivism and Natural Law: The Controversy between Professor Hart and Professor Fuller, Vanderbilt L.R. 18 (1965) 945.

Brierly, J.L., The Outlook for International Law, Oxford (1944).

Brookfield, F.M., The Courts, Kelsen and the Rhodesian Revolution, Toronto L.J. 19 (1969) 326.

Brown, S.M., Has Kant a Philosophy of Law?, Philosophical R. 71 (1962) 33.

Buckland, W., Some Reflections on Jurisprudence, Cambridge (1945).

Bury, J.B., The Idea of Progress, London (1920).

Bustamente y Montoro, A.S. de, Kelsenism, in Interpretations of Modern Legal Philosophies, ed. P. Sayre, Oxford (1947) chapter 43.

Cahill, W.F., One Phase of the New Debate on the Iniquitous Law: Hart and Fuller on Radbruch, Catholic Lawyer 5 (1959) 119.

Cahn, E., Review of Kelsen, What is Justice?, New York U.L.R. 33 (1958) 1056.

Cairns, H., Legal Philosophy From Plato to Hegel, Baltimore (1936).

California Law Review, Essays in Honour of Hans Kelsen, New York (1971).

Cameron, J.T., Observations on the Concept of Law, Juridical R. (1963) 101.

Campbell, A.H., Review of Fuller, The Morality of Law, Modern L.R. 28 (1965) 370.

Cardozo, B.N., The Nature of the Judicial Process, New Haven (1921).

Carnap, R., Philosophy and Logical Syntax, London (1935).

Carpenter, R.V., The Problem of Value Judgements as Norms of Law, J. Legal Education 7 (1954-5) 163.

Carrio, G., Legal Principles and Legal Positivism, trans. M.I. O'Connell, Buenos Aires (1971).

Carritt, E.F., Morals and Politics, Theories of their relation from Hobbes and Spinoza to Marx and Bosanquet, Oxford (1935).

Ethical and Political Thinking, Oxford (1947).

Cassirer, E., Rousseau, Kant and Goethe, trans. J. Gatmann, P.O. Kristeller and J.H. Randall, Princeton N.J. (1945).

Castberg, F., Problems of Legal Philosophy, 2nd rev. English edn., London (1957).

Chloros, A.G., Some Aspects of the Social and Ethical Element in Analytical Jurisprudence, Juridical R. 67 (1955) 79.

What is Natural Law?, Modern L.R. 21 (1958) 609.

Christie, G.C., Vagueness and Legal Language, Minnesota, L.R. 48 (1964) 885.

The Notion of Validity in Modern Jurisprudence, Minnesota L.R. 48 (1964) 1049.

The Model of Principles, Duke L.J. (1968) 649.

Chroust, A.H., On the Nature of Natural Law, in Interpretations of Modern Legal Philosophies, ed. P. Sayre, Oxford (1947) chapter 5.

Clark, R.S., Hans Kelsen's Pure Theory of Law, J. Legal Education 22 (1969) 170.

Cohen, H.E., Recent Theories of Sovereignty, Chicago (1937).

Cohen, J., Theory and Definition in Jurisprudence, Proceedings Aristotelian Society Supplement 29 (1955) 213.

Cohen, L.J., Critical Notice of Hart's Concept of Law, Mind 71 (1962) 395.

Cohen, M., Law, Morality and Purpose, Villanova L.R. 10 (1965) 640.

Cohen, M.R., A Critique of Kant's Philosophy of Law, in The Heritage of Kant, ed. G.T. Whitney and D.F. Bowers, New York (1939).

Positivism and the Limits of Idealism in Law, Columbia L.R. 27 (1927) 237.

Collingwood, R.G., The Idea of History, Oxford (1946).

Copleston, F.C., History of Philosophy, vol. 6, Wolff to Kant, London (1961).

Cullison, A.D., Logical Analysis of Legal Doctrine: The Normative Structure of Positive Law, Iowa L.R. 53 (1968) 1209.

Danto, A.C., Human Nature and Natural Law, in Law and Philosophy, ed. S. Hook, New York (1965) 187.

Davis, P.E., The Moral Content of Law, Southern J. Philosophy 9 (1972) 13.

Del Vecchio, G., The Formal Bases of Law, trans. J. Lisle, New York (1969).

Justice, a historical and philosophical essay, ed. A.H. Campbell, trans. L. Guthrie, Edinburgh (1952).

Philosophy of Law, trans. T.O. Martin, Washington (1953).

D'entrèves, A.P., The Case for Natural Law Reexamined, Natural Law Forum 1 (1951) 5.

Natural Law, 2nd edn., London (1970).

Devlin, P., The Enforcement of Morals, Oxford (1965).

Dewey, J., German Philosophy and Politics, 2nd edn., New York (1944).

Dias, R.M.W., Jurisprudence, 2nd edn., London (1964).

The Value of a Value Study of Law, Modern L.R. 28 (1965) 397.

Legal Politics, Norms Behind the Grundnorm, Cambridge L.J. 26 (1968) 233.

Dickinson, J., Legal Rules: Their Function in the Process of Decision, U. Pennsylvania L.R. 79 (1931) 833.

Legal Rules: Their Application and Elaboration, U. Pennsylvania, L.R. 79 (1931) 1052.

Donoso, A., Jurisprudence Today; Natural Law v. Positivism, U. Detroit, L.J. 41 (1963) 59.

Dostoyevsky, F., The Brothers Karamazov, trans. D. Magarshak, London (1958).

Duncan, A.R.C., Practical Reason and Morality, Edinburgh (1957).

Dworkin, R.M., Judicial Discretion, J. Philosophy 60 (1963) 624.

Philosophy, Morality and Law, Observations Prompted by Professor Fuller's Novel Claim, U. Pennsylvania L.R. 113 (1965) 668.

The Elusive Morality of Law, Villanova L.R. 10 (1965) 631.

Comments on the Unity of Law Doctrine, in Ethics and Social Justice, ed. H.E. Kiefer and M.K. Munitz, Albany N.Y. (1968) 200.

Social Rules and Legal Theory, Yale L.J. 81 (1972) 855.

Hard Cases, Harvard L.R. 88 (1975) 1057.

Is Law a System of Rules?, in The Philosophy of Law, with introduction by R.M. Dworkin, Oxford (1977) 38.

No Right Answer?, in Law, Morality and Society, Essays in Honour of H.L.A. Hart, ed. P.M.S. Hacker and J. Raz, Oxford (1977) 58.

Taking Rights Seriously, London (1977).

Dyke, C., Comments on the Symposium: Kant and Revolution, J. History of Ideas 32 (1971) 437.

Eastwood, R.A., and Keeton, G.W., The Austinian Theories of Law and Sovereignty, London (1929).

Ebbinghaus, J., Interpretation and Misinterpretation of the Categorical Imperative, in Kant, a Collection of Critical Essays, ed. R.P. Wolff, London (1968) 211.

Ebenstein, W., The Pure Theory of Law, Madison (1945).

Hans Kelsen, in The International Encyclopaedia of Social Sciences, ed. D. Sills, London (1968) vol. 8, 361.

The Pure Theory of Law: Demythologizing Legal Thought, California L.R. 59 (1971) 617.

Eekelaar, J.M., Splitting the Grundnorm, Modern L.R. 30 (1967) 156.

Rhodesia: The Abdication of Constitutionalism, Modern L.R. 32 (1969) 19.

Principles of Revolutionary Legality in Oxford Essays in Jurisprudence, 2nd series, ed. A.W.B. Simpson, Oxford (1973) 22.

Ehrenzweig, A.A., Preface, to Essays in Honour of Hans Kelsen, ed. California L.R., New York (1971) 609.

Eliot, G., Middlemarch, ed. R. Speaight, London (1973).

Fackenheim, E., Kant's Concept of History, Kant Studien 48 (1957) 381.

Feyerabend, P.K., Against Method: Outline of an Anarchistic Theory of Knowledge, Minnesota Studies in the Philosophy of Science, vol. 4, Minneapolis (1970).

Finch, J.D., Introduction to Legal Theory, 2nd edn., London (1974).

The Institutional Claims of Law as a Moral Stimulus, unpublished paper.

Finnis, J.M., Revolutions and Continuity of Law, in Oxford Essays in Jurisprudence, 2nd series, ed. A.W.B. Simpson, Oxford (1973) 44.

Flew, A., On Not Deriving 'Ought' from 'Is', Analysis 25 (1964) 25.

Fogelin, R.J., Wittgenstein, London (1976).

Foot, P., Moral Beliefs in Theories of Ethics, ed. with an introduction by P. Foot, Oxford (1967) 83.

Frankena, W.K., On Defining and Defending Natural Law, in Law and Philosophy, ed. S. Hook, New York (1964) 200.

Friedmann, W., An Analysis of 'In Defence of Natural Law', in Law and Philosophy, ed. S. Hook, New York (1964) 144.

Legal Theory, 5th edn., London (1967).

Stammler, in The Encyclopaedia of Philosophy, ed. P. Edwards, London (1967) vol. 8, 6.

Friedrich, C.J., The Philosophy of Law in Historical Perspective, 2nd edn., Chicago (1963).

Inevitable Peace, Cambridge, Mass. (1948).

Fromm, E., Fear of Freedom, London (1942).

Fuller, L.L., American Legal Philosophy at Mid-Century, J. Legal Education 6 (1954) 457.

Human Purpose and Natural Law, J. Philosophy 53 (1956) 697, repr. in Natural Law Forum 3 (1958) 68. (All references are to the former).

A Rejoinder to Professor Nagel, Natural Law Forum 3 (1958) 83.

Positivism and Fidelity to Law - A Reply to Professor Hart, Harvard L.R. 71 (1958) 630.

The Morality of Law, New Haven (1964), new edn. (1969) with additional chapter, 'A Reply to My Critics'.

A Reply to Professors Cohen and Dworkin, Villanova L.R. 10(1965) 655.

Anatomy of Law, London (1971).

Geach, P.T., Imperative Inference, Analysis Supplement (1963) 37.

Geny, F., The Critical System of R. Stammler, in R. Stammler, The Theory of Justice, trans. I. Husik, New York (1925) appendix 1, 493.

Gerber, D., Levels of Rules and Hart's Concept of Law, Mind 81 (1972) 102.

Gerstein, R.S., The Practice of Fidelity to Law, Law and Society R. 4 (1970) 479.

Giannella, D.A., Thoughts on the Symposium: The Morality of Law, Villanova L.R. 10 (1965) 702.

Ginsberg, M., Stammler's Philosophy of Law, in Modern Theories of Law, ed. W.I. Jennings, Oxford (1933) chapter 3.

The Concepts of Juridic and Scientific Law, Politica 4 (1939) 1.

Reason and Unreason in Society, London (1947).

Golding, M.P., Kelsen and the Concept of Legal System in More Essays in Legal Philosophy: General Assessments of Philosophies of Law, ed. R.S. Summers, Oxford (1971) 69.

Goldmann, L., Immanuel Kant, trans. R. Black, London (1971).

Gough, J.W., Social Contract, A Critical Study of its Development, 2nd edn., Oxford (1963).

Graham, K.G.M., Does Fuller Have an Inner Morality?, Political Science Quarterly 24 (1972) 24.

Gregor, M., Laws of Freedom: A Study of Kant's Method in Applying the Categorical Imperative in the Metaphysic der Sitten, Oxford (1963).

Gross, H., Review of Fuller, The Morality of Law, New York U.L.R. 40 (1965) 1220.

Gross, L., Hans Kelsen, American J. International L. 67 (1973) 491.

Guest, A.G., Logic in the Law, in Oxford Essays in Jurisprudence, ed. A.G. Guest, Oxford (1961) 176.

Guest, S.F.D., Hart's Primary and Secondary Rules, Otago L.R. 2 (1972) 417.

Hacker, P.M.S., Insight and Illusion: Wittgenstein on Philosophy and the Metaphysics of Experience, Oxford (1972).

Sanction Theories of Duty, in Oxford Essays in Jurisprudence, 2nd series, ed. A.W.B. Simpson, Oxford (1973) 131.

Hart's Philosophy of Law, in Law, Morality and Society: Essays in Honour of H.L.A. Hart, ed. P.M.S. Hacker and J. Raz, Oxford (1977) 1.

Haezrahi, P., The Concept of Man as End in Himself, in Kant, A Collection of Critical Essays, ed. P. Wolff, London (1968) 291.

Hagerstrom, A., Inquiries into the Nature of Law and Morals, ed. K. Olivecrona, trans. C.D. Broad, Stockholm (1953).

Hall, J., Living Law of Democratic Society, New York (1949).

Studies in Jurisprudence and Criminal Theory, New York (1958).

Hancock, R.N., Ethics and History in Kant and J.S. Mill, Ethics 68 (1957) 56.

Kant and Natural Right Theory, Kant Studien 52 (1960-1) 440.

Kant and Civil Disobedience, Idealistic Studies 5 (1975) 164.

Hanson, N.R., Patterns of Discovery, Cambridge (1958).

Hare, R.M., The Language of Morals, Oxford (1952).

Freedom and Reason, Oxford (1963).

Descriptivism, Proceedings of the British Academy 49 (1963) 115.

The Promising Game, in The Is-Ought Question, ed. W.D. Hudson, London (1969) 144.

Some Alleged Differences Between Imperatives and Indicatives, Mind 76 (1967) 309.

Meaning and Speech Acts, Philosophical R. 79 (1970) 3.

Imperative Sentences, in R.M. Hare, Practical Inferences, London (1971) 1.

Harris, J.W., When and Why Does the Grundnorm Change?, Cambridge L.J. 29 (1971) 103.

Harrison, J., Kant's Examples of the First Formulation of the Categorical Imperative, and The Categorical Imperative, in Kant: A Collection of Critical Essays, ed. R.P. Wolff, London (1968) 228 and 259.

Hart, H.L.A., The Ascription of Rights and Responsibility, Proceedings Aristotelian Society 49 (1949) 171.

Justice, Philosophy 28 (1953) 348.

Definition and Theory in Jurisprudence, L.Q.R. 70 (1954) 37.

Theory and Definition in Jurisprudence, Proceedings Aristotelian Society 29 (1955) 239.

Are There Any Natural Rights?, Philosophical R. 64 (1955) 175.

Review of Hagerstrom, Inquiries into the Nature of Law and Morals, Philosophy 30 (1955) 369.

Analytical Jurisprudence in the Mid Twentieth Century - A Reply to Professor Bodenheimer, U. Pennsylvania L.R. 105 (1957) 953.

Positivism and the Separation of Law and Morals, Harvard L.R. 71 (1958) 593, repr. in The Philosophy of Law, ed. R.M. Dworkin, Oxford (1977) 17. (All references to the latter edition.)

Scandinavian Realism, Cambridge L.J. 17 (1959) 233.

Legal and Moral Obligation, in Essays in Moral Philosophy, ed. A.I. Melden, St Louis, Miss. (1958) 82.

The Concept of Law, Oxford (1961).

Law, Liberty and Morality, Oxford (1963).

Punishment and Responsibility, Oxford (1963).

Kelsen Visited, UCLA L.R. 10 (1963) 709.

Self-Referring Laws, in Festkrief Till Karl Olivecrona, ed. P.A. Norstedt, Stockholm (1964) 307.

Introduction, to J. Austin, The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence, London (1965).

Review of Fuller, The Morality of Law, Harvard L.R. 78 (1965) 1281.

Legal Positivism, in The Encyclopaedia of Philosophy, ed. P. Edwards, London (1967) vol. 4, 418.

Kelsen's Doctrine of the Unity of Law, in Ethics and Social Justice, ed. H.E. Kiefer and M.K. Munitz, Albany, N.Y. (1968) 171.

Bentham on Legal Rights, in Oxford Essays in Jurisprudence, 2nd series, ed. A.W.B. Simpson, Oxford (1973) 171.

Law in the Perspective of Philosophy, 1776-1976, New York U.L.R. 51 (1976) 538.

Hearn, W.E., The Theory of Legal Duties and Rights, London (1883).

Hegel, G.W.F., Philosophy of Right, trans. T.M. Knox, Oxford (1942).

Hill, R.E., Legal Validity and Legal Obligation, Yale L.J. 80(1970) 47.

Hill, T.E., The Kingdom of Ends, in Proceedings of the Third International Kant Congress, ed. L.W. Beck, Dordrecht (1972) 307.

Hippel, E. von, The Role of Natural Law in the Legal Decisions of the German Federal Republic, Natural Law Forum, 4 (1959) 106.

Hobbes, T., Leviathan, ed. M. Oakeshott, Oxford repr. (1957), pages to this edition given in brackets.

Elements of Law, ed. F. Toennies, Cambridge (1928).

Hofstadter, A., and McKinsey, J.C.C., Logic and Imperatives, Philosophy of Science 6 (1939) 446.

Holland, T.E., Jurisprudence, 12th edn., Oxford (1916).

Holmes, O.W., The Common Law, London (1887).

Honoré, A.M., Reflections On Revolutions, Irish Jurist (1967) 268.

Southern Rhodesia, in The Annual Survey of Commonwealth Law, ed. A.M. Honoré, London (1967) 92.

Groups, Laws and Obedience, in Oxford Essays in Jurisprudence, 2nd series, ed. A.W.B. Simpson, Oxford (1973) 77.

Hood-Phillips, O., Review of Hart, The Concept of Law, L.Q.R. 78 (1962) 574.

Horvath, B., Comment on Kelsen, Social Research 18 (1951) 313.

Hubbard, F.P., One Man's Theory . . . A Metatheoretical Analysis of H.L.A. Hart's Model of Law, Maryland L.R. 36 (1976) 39.

Hudson, W.D., ed., The Is-Ought Question, London (1969).

Hughes, G., The Existence of A Legal System, New York U.L.R. 35 (1960) 1001.

Professor Hart's Concept of Law, Modern L.R. 25 (1962) 319.

Positivists and Natural Lawyers, A Review of The Morality of Law, Stanford L.R. 17 (1965) 547.

Rules, Policy and Decision Making, Yale L.J. 77 (1968) 411.

Validity and the Basic Norm, California L.R. 59 (1971) 695.

Hume, D., Treatise of Human Nature, ed. E.C. Mossner, London (1969).

Iyer, T.K.K., Constitutional Law in Pakistan, Kelsen in the Courts, American J. Comparative L. 21 (1973) 759.

James, L.C., Law, Morals and the Limits of Contractual Power, South Dakota L.R. 3 (1958) 24.

Janzen, H., Kelsen's Theory of Law, American Political Science R. 31 (1937) 205.

Jolowicz, H.F., Lectures on Jurisprudence, ed. J.A. Jolowicz, London (1963).

Jones, J.W., Modern Discussions of the Aims of Legal Science, L.Q.R. 47 (1931) 62.

The Pure Theory in International Law, British Yearbook International L. 16 (1935) 5.

Historical Introduction to the Theory of Law, Oxford (1940).

Jones, O.R., The Private Language Argument, London (1971).

Jones, W.J., Morality and Freedom, in the Philosophy of Kant, Oxford (1940).

Kanowitz, L., The Place of Sanctions in Hart's Concept of Law, Duquesne L.R. 5 (1966) 1.

Kearns, T.R., Rules, Principles and Law, American J. Jurisprudence 18 (1973) 114.

Legal Normativity and Morality, Western Ontario L.R. 14 (1975) 71.

Kelly, G.A., Rousseau, Kant and History, J. History of Ideas 29 (1968) 347.

Idealism, Politics and History: Sources of Hegelian Thought, Cambridge (1969).

Kemp, J., Review of Hart, The Concept of Law, Philosophical Q. 13 (1963) 188.

Kant's Examples of the Categorical Imperative, in Kant: A Collection of Critical Essays, ed. P. Wolff, London (1968) 246.

The Philosophy of Kant, Oxford (1968).

Kenny, A., Wittgenstein, London (1973).

King, B.E., The Concept of a Lawyer's Language, Cambridge L.J. 11 (1953) 404.

The Basic Concept of Professor Hart's Jurisprudence, Cambridge L.J. 21 (1963) 270.

The Concept, Idea and Morality of Law, Cambridge L.J. 24 (1966) 106.

King, J.C., Bradley's 'Duty for Duties Sake' and Kant's Ethics, Kant Studien 59 (1968) 309.

Kleist, H. von, Michael Kohlhaas, in The Marquise of O and Other Stories, ed. and trans. D. Luke and N. Reeves, London (1978).

Kocourek, A., A Century of Analytical Jurisprudence Since J. Austin, in Law, A Century of Progress, New York (1937) vol. 2, 195.

Koestler, A., Darkness at Noon, London (1964).

Kolakowski, L., Positivist Philosophy: Hume to the Vienna Circle, London (1972).

Körner, S., Kant's Conception of Freedom, British Academy Proceedings 53 (1967) 193.

Kant, London (1970).

Kretschman, P.M., An Exposition of Kant's Philosophy of Law, in The Heritage of Kant, ed. G.T. Whitney and D.F. Bowers, New York (1939).

Krieger, L., The German Idea of Freedom, Boston, Mass. (1957).

Kant and the Crisis of Natural Law, J. History of Ideas 26 (1965) 191.

Kuhn, T.S., The Structure of Scientific Revolutions, Chicago (1962).

Kunz, J.L., The Vienna School of Law and International Law, New York U.L.R. 11 (1936) 370.

Ladd, J., Kant's View of the Relation of Law to Morality, J. Philosophy 57 (1960) 762.

Introduction, to Kant, The Metaphysical Principles of Justice, ed. and trans. J. Ladd, New York (1965).

Lakatos, I., and Musgrave, A., eds., Criticism and the Growth of Knowledge, Cambridge (1970).

Laski, H., A Grammar of Politics, 4th ed. repr., London (1955) with additional introductory chapter.

Lauterpacht, H., Kelsen's Pure Science of Law, in Modern Theories of Law, ed. W.I. Jennings, Oxford (1933) chapter 7.

Lee, K.K., Hart's Primary and Secondary Rules, Mind 77 (1968) 561.

Lewis, J.U., Moral Obligation and the Concept of Law, Rutgers L.R. 23 (1968) 68.

Analysis of Purposeful Activity: Its Relevance to the Relation Between Legal and Moral Obligation, American J. Jurisprudence 16 (1971) 143.

Lewy, C., G.E. Moore on the Naturalistic Fallacy, Proceedings British Academy 50 (1964) 251.

Llewellyn, K., The Bramble Bush, New York (1930).

Lloyd, D., The Idea of Law, London (1964).

Introduction to Jurisprudence, 2nd edn., London (1965).

Introduction to Jurisprudence, 3rd edn., London (1972).

Locke, J., Second Treatise of Government, ed. J.W. Gough, Oxford (1956).

Lovin, K., Hart and the Morality of Law, American J. Jurisprudence 21 (1976) 131.

Lucas, J.R., The Phenomenon of Law, in Law, Morality and Society: Essays in Honour of H.L.A. Hart, ed. P.M.S. Hacker and J. Raz, Oxford (1977) 85.

Lumb, R.D., Natural Law and Legal Positivism, J. Legal Education 11 (1959) 503.

Lundstedt, A.V., Legal Thinking Revised, Stockholm (1936).

Lyons, D., The Internal Morality of Law, Proceedings Aristotelian Society 71 (1970-1) 105.

Mabe, A.E., Hart and the Moral Content of Law, Southern J. Philosophy 10 (1972) 93.

McBride, W., The Essential Role of Models and Analogies in the Philosophy of Law, New York U.L.R. 43 (1968) 53.

MacCormick, D.N., Legal Obligation and the Imperative Fallacy, in Oxford Essays in Jurisprudence, 2nd series, ed. A.W.B. Simpson, Oxford (1973) 100.

Law as an Institutional Fact, L.Q.R. 90 (1974) 102.

MacCallum, G.C., Dworkin on Judicial Discretion, J. Philosophy 60 (1963) 638.

MacFarlane, L.J., Pronouncing on Rebellion: The Rhodesian Courts and U.D.I., Public Law (1968) 325.

MacGuigan, M.R., Law, Morals and Positivism, U. Toronto L.J. 14 (1961) 1.

Positive Law and the Moral Law, Current Legal and Social Problems 2 (1961) 89.

Marshall, G., Rights, Options and Entitlements, in Oxford Essays in Jurisprudence, 2nd series, ed. A.W.B. Simpson, Oxford (1973) 228.

Positivism, Adjudication and Democracy, in Law, Morality and Society: Essays in Honour of H.L.A. Hart, ed. P.M.S. Hacker and J. Raz, Oxford (1977) 132.

Mattern, J., Concepts of the State, Baltimore (1928).

Meiklejohn, D., Kantian Formalism and Civil Liberty, J. Philosophy 51 (1954) 179.

Mermin, S., On Defining 'Law', A Dissent from Fuller, Indiana L.R. 6 (1973) 683.

Mill, J.S., On Liberty, ed. M. Warnock, London (1962).

Moore, G.E., Principia Ethica, Cambridge (1903).

Moore, R., Kelsen's Puzzling 'Descriptive Ought', UCLA L.R. 20 (1973) 1269.

Morganthau, Politics Among Nations: The Struggle for Power and Peace, 4th ed., New York (1967).

Morison, W.L., Some Myth About Positivism, Yale L.J. 68 (1959-60) 212.

Review of Fuller, The Morality of Law, Sydney L.R. 5 (1965-7) 181.

Morris, H., Review of Hart, The Concept of Law, Harvard L.R. 75 (1962) 1452.

Morriss, C., Four Eighteenth Century Theories of Justice, Vanderbilt L.R. 14 (1960) 101.

Mueller, G.O.W., The Problem of Value Judgements as a Norm of Law: The Answer of A Positivist, J. Legal Education 7 (1954-5) 567.

Mullock, P., Some Comments on Hart's Legal System - A Reply to Professor Summers, Duke L.J. (1965) 62.

The Inner Morality of Law, Ethics 84 (1974) 327.

Munzer, S., Legal Validity, The Hague (1972).

Validity and Legal Conflicts, Yale L.J. 82 (1973) 1140.

Murphy, J.G., The Highest Good as Content, Kant Studien 56 (1965-6) 102.

Kant: The Philosophy of Right, London (1970).

Kant's Theory of Criminal Punishment, in Proceedings of the 3rd International Kant Congress, ed. L.W. Beck, Dordrecht (1972).

Murray, J.E., Observations on the Morality of Law, Villanova L.R. 10 (1965) 667.

Nagel, E., On the Fusion of Fact and Value: A Reply to Professor Fuller, Natural Law Forum 3 (1958) 77.

Fact, Value and Human Purpose, Natural Law Forum 4 (1959) 26.

Nakhinikian, G., Professor Fuller on Legal Rules and Purpose, Wayne L.R. 2 (1956) 190.

Contemporary Ethical Theories and Jurisprudence, Natural Law Forum 2 (1957) 4.

Naughton, E.R., Regarding the Symposium on Law and Morality, Villanova L.R. 10 (1965) 671.

Nicholson, P.P., The Inner Morality of Law: Fuller and His Critics, Ethics 84 (1974) 307.

Kant on the Duty Never to Resist the Sovereign, Ethics 86 (1976) 214.

Nielsen, K., The Myth of Natural Law, in Law and Philosophy, ed. S. Hook, New York, (1964) 122.

Noonan, J.T., Review of Hart, The Concept of Law, Natural Law Forum, 7 (1962) 169.

Ogden, C.K., and Richards, I.A., The Meaning of Meaning, London (1923).

Ojo, A., The Search for a Grundnorm in Nigeria, International and Comparative L.Q. 20 (1971) 117.

Olafson, F.A., Essence and Concept in Natural Law Theory, in Law and Philosophy, ed. S. Hook, New York (1964) 234.

Olivecrona, K., Law as Fact, 2nd edn., London (1971) (All references to this book).

Law as Fact, in Interpretations of Modern Legal Philosophies, ed. P. Sayre, Oxford (1947) Chapter 25.

Oppenheim, F., The Metaphysics of Natural Law, in Law and Philosophy, ed. S. Hook, New York (1964) 241.

Palley, C., The Judicial Process: U.D.I. and the Southern Rhodesian Judiciary, Modern L.R. 30 (1967) 263.

Palms, C.L., The Natural Law Philosophy of L.L. Fuller, Catholic Lawyer 11 (1965) 94.

Pannam, C.L., Hart and Analytical Jurisprudence, J. Legal Education 16 (1965) 379.

Pappe, H.O., The Validity of Judicial Decisions in the Nazi Era, Modern L.R. 23 (1960) 260.

Parker, F.H., Remarks on the Symposium: The Morality of Law, Villanova L.R. 10 (1965) 673.

Parker, R., Natural Law and Kelsenism, Ohio State L.J. 13 (1952) 160.

The Pure Theory of Law, Vanderbilt L.R. 14 (1960-1) 211.

Passmore, J., A Hundred Years of Philosophy, 2nd ed., London (1968).

Paton, G.W., Jurisprudence, 3rd edn., Oxford (1964).

Paton, H.J., The Aim and Structure of Kant's Grundlegung, Philosophical Q. 8 (1958) 112.

The Categorical Imperative, 6th edn., London (1967).

Patterson, E.W., Hans Kelsen and his Pure Theory of Law, California L.R. 40 (1952) 5.

Jurisprudence, Brooklyn (1953).

Paulsen, F., Kant, Life and Doctrine, trans. J.E. Creighton and A. Lefevre, London (1907).

Paulson, S.L., Constraints on Legal Norms: Kelsen's View in the Essays, U. Chicago L.R. 42 (1975) 768.

Payne, M., Hart's Concept of a Legal System, William and Mary L.R. 18 (1976) 287.

Pears, D., Wittgenstein, London (1971).

Petrie, H., Science and Metaphysics: A Wittgensteinian Interpretation, in Essays on Wittgenstein, ed. E.D. Klemke, Chicago (1971).

Phillips, D.Z., Miss Anscombe's Grocer, Analysis 28 (1968) 177.

The Limitations of Miss Anscombe's Grocer, Analysis 29 (1969) 97.

Phillips, D.Z., and Mounce, H.O., Moral Practices, London (1969).

Pincoff, E.L., The Rationale of Legal Punishment, New York (1966).

Plato, The Republic, trans F.M. Cornford, Oxford (1941).

Pollock, P., Essays in Jurisprudence and Ethics, London (1882).

First Book of Jurisprudence, 6th edn., London (1929).

Popper, K.R., Conjectures and Refutations, London (1963).

The Logic of Scientific Discovery, New York (1965).

Objective Knowledge, Oxford (1973).

Potter, N., Paton on the Application of the Categorical Imperative, Kant Studien 64 (1973) 411.

Pufendorf, S.F. von, Elementorum Jurisprudentiae Universalis Libri Duo, trans. W.A. Oldfather (1931), repr. New York (1964), page numbers are given to this edition in brackets.

De Jure Naturae et Gentium Libri Octo, trans. C.H. and W.A. Oldfather (1934), repr. New York (1964), page numbers are given to this edition in brackets.

Putnam, H., Hilary Putnam on the Loose-Fitting Garment of Science, The Listener (13/4/1978).

Quine, W. van O., Two Dogmas of Empiricism, in W. Van O. Quine, From a Logical Point of View, 2nd edn., Cambridge, Mass. (1961) 20.

Radin, M., A Restatement of Hohfeld, Harvard L.R. 51 (1937-8) 1141.

Rashdell, H., The Theory of Good and Evil, 2nd edn., Oxford (1924).

Raz, J., The Concept of a Legal System, Oxford (1970).

The Identity of Legal Systems, California L.R. 59 (1971) 795.

Legal Principles and the Limits of Law, Yale L.J. 81 (1972) 823.

On the Functions of Law, in Oxford Essays in Jurisprudence, 2nd series, ed. A.W.B. Simpson, Oxford (1973) 278.

Kelsen's Theory of the Basic Norm, American J. Jurisprudence 19 (1974) 94.

Practical Reason and Norms, London (1975).

Reichel, H., Del Vecchio's Legal Philosophy, in G. Del Vecchio, The Formal Bases of Law, ed. J.H. Drake, New York (1969) appendix 1, 339.

Reiss, H.S., Kant and the Right of Rebellion, J. History of Ideas 17 (1956) 179.

Introduction, to Kant's Political Writings, ed. H.S. Reiss trans. H.B. Nisbet, Cambridge (1970).

Rommen, H.A., The Natural Law, trans. T.R. Hanley, St Louis (1947).

Natural Law in Decisions of the Federal Supreme Court of the Constitutional Courts in Germany, Natural Law Forum 4 (1959) 1.

In Defence of Natural Law, in Law and Philosophy, ed. S. Hook, New York (1964) 105.

Rooney, N., Law Without Justice?: The Kelsen and Hall Theories Compared, Notre Dame Lawyer 23 (1947) 140.

Rose, S.D., Review of Hart, The Concept of Law, Tulane L.R. 36 (1961) 188.

Review of Fuller, The Morality of Law, Tulane L.R. 39 (1965) 387.

Ross, A., Imperatives and Logic, Philosophy of Science 11 (1944) 30.

Review of Kelsen, What Is Justice?, California L.R. 45 (1957) 564.

On Law and Justice, London (1958).

Validity and the Conflict Between Legal Positivism and Natural Law, Revista Juridica de Buernos Aires 4 (1961) 46.

Review of Hart, The Concept of Law, Yale L.J. 71 (1962) 1185.

Directives and Norms, London (1968).

Russell, B., The Philosophy of Logical Atomism, in Logic and Knowledge, Essays 1901-50, ed. R.C. Marsh, London (1956) 175.

Sacksteder, W., Kant's Analysis of International Relations, J. Philosophy 51 (1954) 848.

Saner, H., Kant's Political Thought; its Origins and Development, trans. E.B. Ashton, Chicago (1973).

Sartorius, R., Social Policy and Judicial Legislation, American Philosophical Q. 8 (1971) 151.

Hart's Concept of Law, in More Essays in Legal Philosophy, ed. R.S. Summers, Oxford (1971) 131.

Savarese, R.J., Review of Fuller, The Morality of Law, Georgetown L.J. 53 (1964) 250.

Schenk, H.G., Preface, to Essays in Honour of Hans Kelsen, ed. California L.R., New York (1971) 614.

Schlick, M., Problems of Ethics, trans. D. Rynin, New York (1961).

Schwarz, A.B., John Austin and the German Jurisprudence of His Time, Politica 1 (1934) 178.

Schwarz, W., Kant's Philosophy of Law and International Peace, Philosophical and Phenomenological Research 23 (1962) 71.

The Right of Resistance, Ethics 74 (1963-4) 126.

Kant's Refutation of Charitable Lies, Ethics 81 (1970-1) 62.

Searle, J.R., How to Derive 'Ought' from 'Is', Philosophical R. 73 (1964) 7.

Speech Acts, Cambridge (1969).

Segond, J., The Neo-Kantian Philosophy of Law, in G. Del Vecchio, The Formal Bases of Law, ed. J.H. Drake, New York (1969), appendix 2, 357.

Shklar, J.N., Legalism, Cambridge, Mass. (1964).

Shuman, S.I., Legal Positivism, Detroit (1963).

Sidgwick, H., The Elements of Politics, 2nd edn., London (1897).

Silber, J.R., The Ethical Significance of Kant's 'Religion', in Kant, Religion Within the Limits of Reason Alone, trans. and ed. T.M. Greene and H.H. Hudson, New York, 1960.

Silving, H., Analytical Limits of the Pure Theory of Law, Iowa L.R. 28 (1942) 1.

Law and Fact in the Light of the Pure Theory of Law, in Interpretations of Modern Legal Philosophies, ed. P. Sayre, Oxford (1947), chapter 31.

Positive Natural Law, Natural Law Forum 3 (1958) 24.

Sources of Law, New York (1968).

Simpson, A.W.B., Analysis of Legal Concepts, L.Q.R. 80 (1964) 535.

Singer, M.G., Moral Rules and Principles, in Essays in Moral Philosophy, ed. A.I. Melden, St Louis, Miss. (1958) 160.

Generalization in Ethics, New York (1961).

Hart's Concept of Law, J. Philosophy 60 (1963) 197.

Sinha, S.P., Fission and Fusion of Is-Ought in Legal Philosophy, Villanova L.R. 21 (1975-6) 839.

Smith, S.A. de, Constitutional Lawyers in Revolutionary Situations, Western Ontario L.R. 7 (1968) 93.

Snyder, E., Hans Kelsen's Pure Theory of Law, Howard L.J. 12 (1966) 110.

Soper, E.P., Legal Theory and the Obligation of a Judge. The Hart/Dworkin Dispute, Michigan L.R. 75 (1977) 473.

Sophocles, Antigone, in The Theban Plays, trans. E.F. Watling, London (1947).

Stammler, R., The Theory of Justice, trans. I. Husik, London (1925).

Stankiewicz, W.J., In Defence of Sovereignty, Oxford (1969).

Starke, J.G., Fundamental Views and Ideas of Hans Kelsen, Australian L.J. 48 (1974) 388.

Stern, W.B., Note on Kelsen's Theory of International Law, American Political Science R. 30 (1936) 736.

Stevenson, C.L., Ethics and Language, New Haven (1944).

Facts and Values: Studies in Ethical Analysis, New Haven (1963).

Stocks, J.L., Morality and Purpose, London (1969).

Stone, J., Mystery and Mystique in the Basic Norm, Modern L.R. 26 (1963) 34.

Legal Systems and Lawyer's Reasonings, London (1964).

Human Law and Human Justice, London (1965).

Preface, to Essays in Honour of Hans Kelsen, ed. Californian L.R., New York . . (1971) 612.

Stone, R., Affinities and Antinomies in Jurisprudence, Cambridge L.J. 22 (1964) 266.

Strauss, L., Natural Right and History, Chicago (1953).

Natural Law, in The International Encyclopaedia of Social Sciences, ed. D. Sills, London (1968), vol. 11,80.

Stumpf, S.E., Austin's Theory of the Separation of Law and Morals, Vanderbilt L.R. 14 (1960) 117.

Sturm, D., Fuller's Multidimensional Natural Law Theory, Stanford L.R. 18 (1966) 612.

Summers, R.S., Professor Hart's Concept of Law, Duke L.J. (1963) 629.

Is and Ought in Legal Philosophy, Philosophical Q. 13 (1963) 137.

A Brief Rejoinder to Professor Mullock, Duke L.J. (1965) 63.

Professor Fuller on Morality and Law, in More Essays in Legal Philosophy, ed. R.S. Summers, Oxford (1971) 102.

Niave Instrumentalism and Law, in Law , Morality and Society: Essays in Honour of H.L.A. Hart, ed. P.M.S. Hacker and J. Raz, Oxford (1977) 119.

Tapper, C.F.H., A Note on Principles, Modern L.R. 34 (1971) 628.

Powers and Secondary Rules of Change, in Oxford Essays in Jurisprudence, 2nd series, ed. A.W.B. Simpson, Oxford (1973) 242.

Taylor, E.H., H.L.A. Hart's Concept of Law in the Perspective of American Legal Realism, Modern L.R. 35 (1972) 606.

Taylor, R., Law and Morality, New York U.L.R. 43 (1968) 611.

Twining, W., Karl Llewellyn and the Realist Movement, London (1973).

Urmson, J.O., On Grading, in Logic and Language, 2nd series, ed. A. Flew, Oxford (1961) 159.

Vaihinger, H., The Philosophy of the 'As-If', trans. C.K. Ogden, 2nd edn., London (1935).

Vaughan, C.E., Studies in the History of Political Philosophy, before and after Rousseau, 2 vols., Manchester (1925).

Vinogradoff, P., Common Sense in Law, 3rd edn., ed. H.G. Hanbury, Oxford (1959).

Voeglin, E., Kelsen's Pure Theory of Law, Political Science Q. 42 (1927) 268.

Waismann, F., Verifiability, in Logic and Language, 1st series, ed. A. Flew, Oxford (1951) 117.

Ward, K., The Development of Kant's View of Ethics, Oxford (1972).

Weinberger, O., Introduction to Hans Kelsen, Essays in Legal and Moral Philosophy, Dordrecht, (1973).

Weldon, T.D., The Vocabulary of Politics, London (1953).

Welsh, R.S., The Constitutional Case in Southern Rhodesia, L.Q.R., 83 (1967) 64.

Wick, W., Introduction, to Kant, Metaphysical Principle of Virtue, New York (1964).

Wilk, K., Law and the State as Pure Ideas : Critical Notes on the Basic Concepts of Kelsen's Legal Philosophy, Ethics 51 (1940) 158.

Wilkins, B.T., Teleology in Kant's Philosophy of History, History and Theory 5 (1966) 172.

Wilkins, J.R., Preface, to Essays in Honour of Hans Kelsen, ed. Californian L.R., New York (1971) 611.

Williams, B., Consistency in Ethics, Aristotelian Society Supplement 39 (1965) 103.

Consistency in Realism, Aristotelian Society Supplement 40 (1966) 1.

Williams, G., Language and the Law, L.Q.R. 61 (1945) 71, 179, 293, 384, L.Q.R. 62 (1946), 387.

International Law and the Controversy Concerning the Word 'Law', British Yearbook International Law 22 (1945) 146.

Williams, T.C., The Concept of the Categorical Imperative: A Study of its Place in Kant's Ethical Theory, Oxford (1968).

Williamson, C., Miss Anscombe's Grocer and Mr. Phillips's Grocer, Analysis 28 (1968) 179.

Wilson, C.H., The Basis of Kelsen's Pure Theory of Law, Politica 1 (1934) 54.

Witherspoon, J.P., The Relation of Philosophy to Jurisprudence, Natural Law Forum 3 (1958) 105.

Wittgenstein, L., Tractatus Logico-Philosophicus, trans. D. Pears and B.F. McGuinness, London (1971).

Philosophical Investigations, 2nd edn., trans. G.E.M. Anscombe, Oxford (1969).

Remarks on the Foundations of Mathematics, 2nd edn., trans. G.E.M. Anscombe, Oxford (1967).

Zettel, trans. and ed. G.E.M. Anscombe and G.H. von Wright, Oxford (1967).

Wolff, F.O., Kant and Hobbes, Concerning the Foundations of Political Philosophy, in Proceedings of the Third International Kant Congress, ed. L.W. Beck, Dordrecht (1972) 607.

Wolff, R.P., Kant: A Collection of Critical Essays, London (1968).

Wollheim, R., The Nature of Law, Political Studies 2 (1954) 128.

Woozley, A.D., The Existence of Rules, Nova 1 (1967) 63.

Legal Duties, Offences and Sanctions, Mind 77 (1968) 461.

Wright, G.H. von, Norm and Action : A Logical Enquiry, London (1963).

Wu, J.C.H., Stammler and his Critics, in R. Stammler, The Theory of Justice, trans. I. Husik, New York (1925) appendix 2, 553.

Bibliography 5

Theses

Gislason, G., The Notions of Validity in Modern Jurisprudence, Oxford B. Litt. (1971-2).

Harriss, J., Law and Legal Science: an inquiry into the concepts of 'legal rule' and 'legal system', L.S.E. Ph.D. (1972-3).

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The Pure Theory of Law: Problems and Perspectives

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Abstract

This thesis is an analysis of Hans Kelsen's Pure Theory of Law. It traces its development in critical reaction to natural law theory and to Kant in particular. It then defends the Pure Theory on the basis of presuppositions uncovered in its development. It further defends the Theory in the light of the major debates in jurisprudence of recent years. Certain specific problems are identified in the Theory and closely examined, including a discussion of its use in the Rhodesian Constitutional Cases. Finally, the conclusion attempts some assessment of the validity of the presuppositions on which the Theory is based.