laws of one nation may contradict laws of another nation without invalidating them. In Australia it is an offence to drive a car on the right-hand side of the road, whereas in the United States it is an offence to drive on the left-hand side of the road. Yet each law is valid within its own sphere of operation. Dualists argue that international law and national law similarly operate in different spheres, and hence may make contradictory demands without invalidating each other. International law, they say, binds states in relation to other states, whereas national law binds states and their citizens in relation to each other.

Kelsen disagreed with this reasoning and maintained that international and national law operate within the same sphere in relation to the same subjects. He argued that the state is not some separate metaphysical entity but a collection of individuals assembled and regulated by national law, like any corporation. All law regulates human behaviour. State responsibility at international law is actually individual responsibility. Kelsen wrote: 'That international law obligates and authorise states means this: it does not obligate and authorise individuals directly, like the national legal order, but only indirectly through the medium of the national legal order (whose personification is "the state")' (1967, 325). Modern international treaties sometimes create offences such as piracy, slave trading and terrorism that can be committed by persons acting not as agents of the state but as private individuals. Treaties have also established special *ad hoc* tribunals to try particular types of offences committed by individuals. They include the Nuremberg and Tokyo tribunals created following the Second World War, and the more recent UN tribunals on the Yugoslav and Rwandan conflicts. In 2002, the permanent International Criminal Court (ICC) was established under the *Rome Statute of the International Criminal Court*, with jurisdiction over crimes of genocide, crimes against humanity, war crimes and crimes of aggression. Some writers consider these treaties as international instruments that directly regulate the conduct of individuals (Starke 1998, 542). Even so, the apprehension, trial and punishment of offenders are achieved through the agency of different states.

If the rules of international law are regarded as moral rules (as Bentham and Austin did) the problem disappears, because in positivist legal theory law and morals occupy different fields. If so, we can say that the state has a moral obligation to behave as international law directs, but no legal obligation to do so. If, however, a rule of international law is considered to be law that is binding on a state, it cannot also be not binding on that state. A rule cannot be law and not law at the same time. (This is the principle of non-contradiction that Kelsen applied to law, following Kant.) How does a rule of international law become binding on a state? It can be binding because: (a) national law is subordinate to international law; or (b) national law recognises and gives domestic effect to the rule of international law. In each case international law becomes part of the single hierarchy or system of norms. Kelsen argued that the pure theory of law enables us to see the logical unity of national and international law. I will examine this argument presently, but first will address a threshold question.

As previously discussed, a legal order according to the pure theory is a coercive order. This is what distinguishes law from social and moral rules. Kelsen claimed that the international legal order is a coercive order. The coercive element in international law is found in the legal right of reprisal. A state whose right is violated by another state is permitted by international law to punish the offender by reprisal or use of force. Self-help is a legitimate means of rights protection at international law. International law also permits collective action to enforce its rules. Kelsen argued that in this respect international law resembles primitive law, where ostracism, self-help and group sanctions are means of enforcing the law (1967, 326). This is a questionable analogy, as I will presently argue.

Logical unity of national and international law: Kelsen's monist view

Kelsen argued that the unity of national and international law is seen whether primacy is accorded to international law or national law. I argue that unity, according to the pure theory, can be shown, if at all, only by acknowledging the supremacy of national law.

Does unity result from the primacy of international law?

According to this point of view, national legal systems are validated by a norm of international law. The norms of international law are ultimately validated by the basic norm of the international legal system. Many of the rules of international law today are found in treaties that nations have concluded among themselves. The United Nations Charter itself is a multilateral treaty. Other rules are made by international organisations established by treaty, such as the International Labour Organisation (ILO) and the World Trade Organisation (WTO). Yet all treaties derive their validity from a higher norm of customary international law expressed in the maxim *pacta sunt servanda* (agreements must be observed). Hence, as shown in Figure 3.3, the basic norm of the international legal system is something like: 'States ought to behave as international custom directs'. That is, if the international legal system is a system of law according to the pure theory. But is it?

In actual practice, national laws and state actions are frequently at odds with international law. The laws of many countries, for example, violate civil and political rights guaranteed by the *International Covenant on Civil and Political Rights* (ICCPR). Nations at war do not always observe the rules of international humanitarian law. States routinely violate WTO and ILO rules with impunity. Kelsen claimed that such conflicts do not negate the logical unity of the international and national legal systems. He compared the situation to that of unconstitutional laws remaining valid within state legal systems:

> The situation is exactly analogous to a situation within the state's legal order, without, on that account, causing any doubt as to its unity. The so-called unconstitutional statute,

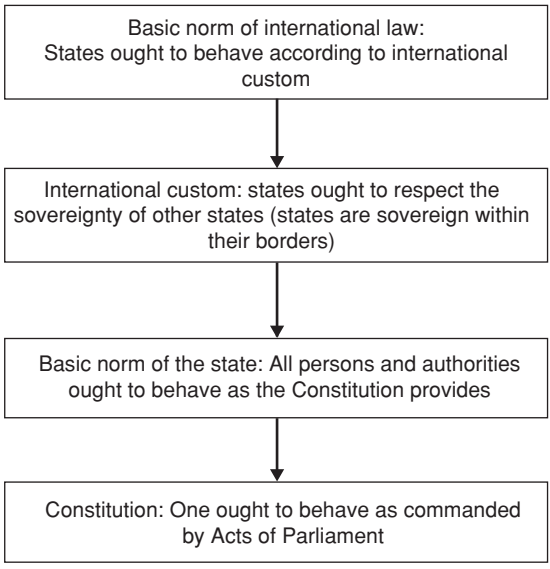

Figure 3.3 Monist version 1: primacy of international law

> too, is and remains a valid law, without the constitution having to be suspended or changed because of it. The so-called illegal decision, too, is a valid norm and stays valid until its validity is abolished by another decision. (Kelsen 1967, 330)

Kelsen argued that a national law that violates international law is valid until it is annulled. However, the offending state commits a delict (wrong) under international law for which all its citizens are collectively liable to sanction (Kelsen 1967, 328). The fact that there are no effective means of annulling the offending national law or inflicting punishment, in Kelsen's view, does not affect the validity of international law. This analogy of international law with constitutional law is misleading.

We say that an unconstitutional law will be effective until and unless it is annulled when there is a credible means of annulling the law. If a constitution does not provide any means of invalidating a law that violates it, it is idle to talk of the unconstitutionality of the law. There are constitutions that do not invalidate inconsistent laws. The constitutions of the United Kingdom and New Zealand are of this type. Similarly, it makes little sense to say that a national law is voidable for inconsistency with an international legal norm when the international legal order provides no means of invalidating the national law or of punishing the offending state. As Hart pointed out, not only national laws but national constitutions may defy international norms (1998, 574). The British Constitution, for example, permits Parliament to legislate contrary to international law.

Kelsen's comparison of international law with primitive legal systems is again faulty. Diffused pressures may be effective within a close-knit and interdependent group such as an extended family or tribe. Not so in the global community

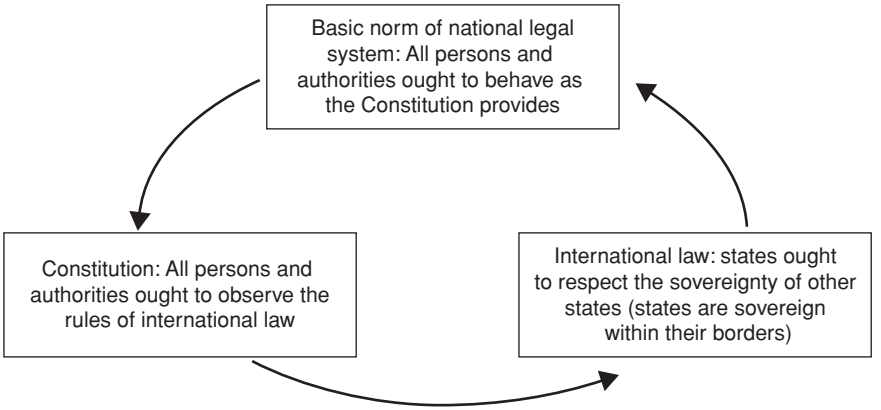

Figure 3.4 Monist version 2: primacy of national law

of sovereign and unequal states, where member states selectively adopt and abandon rules according to national convenience and their capacity to resist pressure from other nations. In most primitive societies the norm 'One ought to behave as custom directs' is effective and hence serves as the basic norm. In the community of nations, the norm 'States ought to behave as international custom directs' has much less effect. According to the pure theory the basic norm is an effective norm, and the effectiveness of the basic norm depends on the general effectiveness of the norms derived from it. If there is no effective basic norm at the international level, there can be no unity of international legal norms, and hence no unity of international and national legal systems.

Overall, Kelsen's attempt to ground the unity of national and international legal systems in the primacy of international law is doomed by the demands of his own pure theory.

Does unity result from the primacy of national law?

Kelsen's alternative explanation (illustrated in Figure 3.4) presupposes the sovereignty of a particular state and the primacy of its legal system. The legal system of a sovereign state may confer validity on the norms of international law. Such domestic recognition may be extended to all the norms or specific norms of international law. Recognition of international legal norms may occur in different ways. As Kelsen stated: 'Such recognition may take place either expressly by the act of the legislature or of the government or tacitly by the actual application of the norms of international law, by the conclusion of international treaties, or by respecting the immunities established by international law, etc' (1967, 335). International law so adopted becomes valid law only within the adopting state. If all states recognise a rule of international law it becomes valid for all states.

Three points must be made concerning this mode of integration of international and national law:

1. According to this view of the unity of international and national law, the basic norm of the unified legal order is the basic norm of the national legal order. The norm that confers validity on the international legal norm is ultimately derived from the basic norm located in the constitution of the state.
2. An international legal norm forms part of the national legal order only while its validity continues to be recognised by a valid national legal norm. An international legal norm may be invalidated by a subsequent valid national law.
3. Not all states recognise the same norms of international law at the same time. Hence, international law has no claim to universal validity.

The monist view of international law founded on the primacy of national law is consistent with the pure theory and with state practice of many nations. According to this view international law is law, but only to the extent of its recognition by individual states. Whether a particular rule of international law is recognised by the state is a question that is answered by referring to the laws, judicial decisions, customs and practices of that state.

The reader should bear in mind that the foregoing discussion considered the legal status of international law according to the pure theory. There is an alternative way of conceiving at least some parts of international law as law by looking outside the pure theory. A few thoughts in this direction are offered below.

An evaluation of the pure theory of law

Kelsen's pure theory of law enriched jurisprudence. Kelsen was the first legal positivist, long before Hart, to abandon the concept of law as sovereign command. Hart, in my view, did not sufficiently acknowledge his debt to Kelsen. Kelsen introduced a new dimension to legal theory by compelling us to think of the distinction, and also the relation, between fact and norm, between legislative act and its normative effect. Kelsen offered an internally consistent model of the legal system that in some respects reflects the intuitive thinking of lawyers and law makers. Tracing a law's validity back to the constitution is normal legal reasoning. So is the idea that valid laws form an internally consistent system of laws. Kelsen's theory, unlike his predecessors', recognised the laws of primitive societies and of the international community as law.

Criticisms of Kelsen are often directed at the concepts and the internal consistency of his theory. Critics may question the adequacy of his theory to explain legal systems as they actually exist. Kelsen's idea of law as a norm to which a sanction is attached does not easily account for some kinds of laws. Procedural and evidentiary laws, laws creating organisations, laws conferring liberties and rights and laws repealing other laws fit uncomfortably within the pure theory. His arguments for the logical unity of the international and national legal orders are unconvincing at the present time in history.

Purity of Kelsen's theory

Kelsen claimed that his theory is pure on two counts. It distinguishes law from morals and law from fact. Did Kelsen succeed in separating law from morals? According to Kelsen's theory a legal norm exists because it is valid. It is valid because its making is authorised by another valid norm and so forth. Ultimately it is validated by the presupposed basic norm. A legal norm may (and often does) imitate a moral norm or draw its content from the content of a moral norm. This imitation does not convert the moral norm into a legal norm or the legal norm into a moral norm. What is the nature of the duty to obey each of these norms? Let us consider the norm 'Do not steal', which, as we know, is a moral norm as well as a legal norm in most countries. Let us call the moral norm Norm M and the legal norm Norm L.

There is a moral duty to obey Norm M because it is a moral norm. There is a legal duty to obey Norm L because it is a legal norm validated in Kelsen's theory by the basic norm. However, two further questions may be asked to test Kelsen's claim that law is totally separate from morality.

Given that the content of Norm L is identical to the content of Norm M, is there a special moral duty to observe Norm L?

The answer to this question according to Kelsen's theory is as follows. There is a legal duty under Norm L not to steal in addition to the moral duty under Norm M not to steal. A breach of Norm L attracts a sanction prescribed by law, such as imprisonment. This sanction may not be imposed if the thief is not caught or the prosecution fails to make the case. The thief who escapes the state sanction may still suffer some other kind of social or psychological sanction for his breach of the duty under Norm M. (An acquitted thief may be shunned by society and may suffer from feelings of guilt and pressures of conscience or faith.) The coincidence of the content of Norms L and M does not defeat Kelsen's separation thesis.

Is there a general moral duty to obey a valid legal norm?

A moral system may contain a general moral duty to obey valid legal norms. Kelsen does not deny that such a moral duty may exist. His position is that the moral duty should not be confused with the legal duty. The duty to obey a legal norm arises not from a *moral* norm but from a higher valid *legal* norm. Ultimately the legal duty to obey Norm L is imposed by the basic norm of the legal system.

Here is the ultimate problem for Kelsen's thesis concerning the separation of law and morals. The basic norm depends for its existence on efficacy. Efficacy of the basic norm depends on whether the particular legal norms derived from it are generally observed. Assume that the basic norm of a legal system is: 'Do as the Dictator commands'. If the Dictator's commands are ignored and the Dictator is powerless to enforce them, the basic norm of the dictatorship will cease. Is it possible to argue then that the existence of the basic norm depends on the moral attitudes of the people?

The moral attitudes of the people may be part of the state of affairs that makes the basic norm possible. This does not mean that the law is not separate from morality in Kelsen's scheme. The basic norm is not derived from this factual situation but is a mental construction of this state of affairs. The legal duty to observe the basic norm arises from this construction. This duty exists apart from any moral duty that one may have to observe the basic norm.

Separation of law from fact

Kelsen, following Hume and Kant, holds that an 'ought' cannot be derived from an 'is'. This logical proposition has not been contradicted. The law when understood as an 'ought' statement is eternally distinct from fact. The 'ought', however, cannot exist unless there are facts. Consider the norm that a court ought to impose a fine on a motorist convicted of a traffic offence under the *Traffic Act*. This norm exists because the following conditions exist:

1. It is validated by a higher valid norm such as: 'Acts of Parliament ought to be observed'
2. Parliament has passed the *Traffic Act*.

The second condition is a fact. The norm is separate from this fact in the sense that it is a mental construction of what the fact means. Nevertheless the relation between fact and norm is patent.

The same reasoning applies to the basic norm. The basic norm is presupposed because there is no higher norm from which it is derived. Nevertheless a basic norm must be effective. The state of effectiveness is a state of fact. The basic norm is a construction of this state of fact. The relation between fact and norm is again clear.

Kelsen's view that law is separate from fact is correct in the sense that legal norms are not derived from fact but are interpretations of fact. However, from another viewpoint law has an indispensable relation to fact inasmuch as the content of a legal norm is always an interpretation of a fact.

Explanatory weakness of the pure theory

Perhaps the most serious criticism of Kelsen is that his theory gives an elegant but misleading account of the law because of the particular definition of law on which it is based. FA Hayek remarked that this definition 'is postulated as the only possible and significant definition, and by representing as "cognition" what are simply the consequences of the definition adopted, the "pure theory" claims to be entitled to deny (or represent as meaningless) statements in which the term "law" is used in a different and narrower sense' (1982, II, 49). A theory is as good as its explanatory value. The pure theory defines a norm to include not only rules capable of guiding future behaviour, but also every *ad hoc* command that a person in authority issues. A tyrant's order to the executioner to hang an innocent man is as much a norm as the rule that persons ought to observe their contracts. Lumping together rules, commands, decrees and judgments under the

term 'legal norm' serves the purposes of Kelsen's chosen theory, but at the cost of obscuring some important features of law as a social phenomenon. The concept of the rule of law (*Rechtstaat*) loses meaning when the distinction between a rule of conduct and arbitrary command is obliterated. Kelsen was not a friend of dictatorship. He was in fact a fugitive from the Nazi regime. Yet, according to the pure theory, Germany was a law governed society under Hitler's *Reich*.

Kelsen equated the existence of a legal norm with validity, and defined validity as derivation from a basic norm. Many of the fundamental rules of social life (rules that made social life possible) existed before governments, parliaments and courts were established. The idea that these rules are valid today because they are derived from the basic norm of the current legal order is fictitious. The spontaneous emergence of new norms governing conduct that have no derivation from authority is an ongoing feature of social order. The rules of cyberspace and electronic transacting are but one illustration of this phenomenon.

Alternative concepts of legal systems

Hart provided an alternative view of a legal system (see discussion in Chapter 2). A legal system, according to Hart, arises when a society develops secondary legal rules. These rules establish ways to formally recognise primary legal rules, to make new legal rules (or modify existing ones) and to adjudicate disputes concerning their application. In practice, they establish legislatures and courts and determine their powers and procedures. The overriding rule among them is the rule of recognition. In Hart's system, legal rules – whether they are primary or secondary rules – exist because they are accepted by persons not simply through coercion but through a sense of obligation.

Legal positivist concepts of legal systems offered by Bentham, Austin, Kelsen, Hart and Raz have an important common element. It is that legal systems arise directly or indirectly out of the deliberate acts of human agents. There is an alternative conception of legal systems, which proposes that legal systems can and do arise spontaneously, as a result of human actions but not of deliberate human design. The roots of the spontaneous order tradition are commonly traced to the thinkers of the Scottish Enlightenment, principally Hume, Ferguson and Smith. Its later revival owes much to the work of the Austrian school in economics and modern institutional theory. The elaboration of this jurisprudential tradition is undertaken in Chapter 10.

4

Realism in Legal Theory

In the previous two chapters I discussed the two most influential versions of legal positivism. In this chapter I explain and consider the theories of the jurisprudential school known as the legal realists, who challenge legal positivism in important ways. Realists are also positivists in the sense that they seek to explain the law *as it is* as opposed to what the law *ought to be*. Realists agree with the positivists that law's connections with morality are only contingent or coincidental. An immoral rule may still be law. Theirs is a very different complaint: namely, that positivists misrepresent the nature of law by their undue focus on its formal features.

Legal realism refers mainly to two schools of thought. One is known as American realism and the other as Scandinavian realism. Scholars of both traditions reject the more formal descriptions of the law given by legal positivists, but differ in what they see as the chief defects of positivist theory. The American realists claim that the law in real life is very different from the law stated in the law books. The real law, they say, depends on how appellate courts interpret written words and how trial courts determine the facts in particular cases. There is uncertainty at both ends.

Scandinavian realism is a movement that started with Axel Hägerström's attempt to find a scientific theory of law that did not involve metaphysical explanations. Hägerström and those who followed him down this path found that the force of law could not be explained by physical facts alone. They claim that, however hard you try, it is not possible to find a corporeal thing that corresponds to concepts such as property, right or duty. Law, they say, exists by the psychological effects caused by certain facts. Whereas American realism is mainly about getting the facts right about law making, Scandinavian realism concentrates on

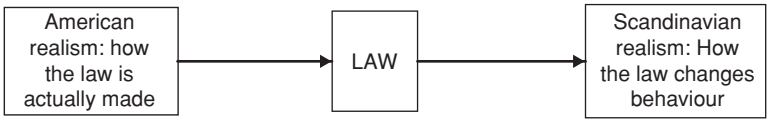

Figure 4.1 American and Scandinavian realisms at a glance

the psychological pressures that make people observe the law. This is illustrated in Figure 4.1.

The theorists even within each school do not speak with one voice, and the differences among them need to be examined. First, though, we must understand what sort of jurisprudence the realists criticise before we consider the nature of their criticisms. The main target of legal realism has been the attitude known as legal formalism. Legal formalism is often identified with legal positivism but, as observed below, this is only true of the most extreme versions of positivism.

Legal formalism and legal positivism

Legal formalism treats law as a closed and gapless system of rules that can be applied logically, without the need to take into account any policy or moral considerations. It treats the law as a system similar to mathematics. Mathematicians may calculate the time it takes a spacecraft launched from Earth to reach the planet Mars. They will need information such as the speed of the spacecraft, gravitational forces and planetary positions, but policy plays no part in their calculations. Legal formalism holds that a solution to a legal problem can be found by a similar process of deduction from known rules and established facts. According to the formalist view, policy plays a part in the making of law but has no role after the law is made.

It is hard to find a legal positivist today who would espouse formalism to this degree. Legal positivists, no doubt, think that law consists of rules and commands issued by recognised law makers such as monarchs, dictators, parliaments and judges. This means that the law is usually found written on paper or, in the modern age, in some form of electronic file. This is the idea of law that most lawyers and lay people have. It reflects the way lawyers, judges and law teachers usually go about the business of identifying and explaining the law. A law teacher instructs students to search for the law in statute books, law reports and commentaries written by legal scholars. Legal practitioners look to these sources to advise their clients and to argue their cases. Judges justify their decisions by the rules found in these written materials, or so they maintain.

However, modern legal positivists recognise that there is more to law than this. The most carefully crafted law will leave room for argument. There are a number of reasons for this. First, language by nature has limitations. There is only so much precision that language can achieve. As Hart pointed out, legal language has an open texture (1997, 128). Take the word ‘adult’. It will suggest

different ideas in different contexts. A person may be an adult for the purpose of being admitted to an adult movie, but not be an adult for the purpose of universal adult franchise. 'Reasonable care' will mean different standards of care in different activities. A surgeon's standard of reasonable care will be much higher than what is expected of a law professor. Even within one activity, opinions will differ on what is reasonable. Language consists not only of individual words, but also of combinations of words forming phrases, clauses, sentences and so forth. These combinations create further indeterminacy. Second, law makers cannot think of every question that may arise concerning the application of the law that they make. It is just too hard. Third, even if law makers can think of every question that can arise today, they cannot foresee what new questions may arise in the future. Law makers who used the word 'vehicle' in the 19th century would not have envisaged aeroplanes and spacecraft. The meaning of legal language changes because the world in which we live changes over time.

Facts are the other source of uncertainty about law. Even if all parties are agreed as to what the law means, they may disagree about the facts in issue. Take the case of motorist X, who is charged with the offence of driving on the prohibited side of the road. Assume that the prosecution, the defence and the judge all agree that the law requires motorists to drive on the left-hand side of the road. Yet X may deny that he drove on the right-hand side. Evidence will have to be found and evaluated to determine this question, and there is no certainty about the outcome. In more complex cases, large numbers of facts have to be proved and inferences drawn from the proven facts.

Modern legal positivists do not dispute any of this. They agree that the law can never be a mechanical process. What they say is that the law, despite the uncertainties at the edges, provides the general standards that make social life possible. Judicial discretion is unavoidable, but under the doctrine of precedent it serves rather than defeats the generality and predictability of the law. Hart explained the legal positivist position in this way:

> The open texture of the law means that there are, indeed, areas of conduct where much must be left to be developed by courts or officials striking a balance, in the light of circumstances, between competing interests which vary in weight from case to case. None the less, the life of the law consists to a very large extent in the guidance of both officials and private individuals by determinate rules which, unlike the application of variable standards, do *not* require from them a fresh judgement from case to case. This salient fact of social life remains true, even if the uncertainties may break out as to the applicability of any rule (whether written or communicated by precedent) to a concrete case. Here at the margin of rules and in the fields left open by the theory of precedents, the courts perform a rule producing function which administrative bodies perform centrally in the elaboration of variable standards. (1997, 135)

The American realists took a more radical view of the law, and some among them doubted the existence of legal rules at all. The American realists, though, were writing before Hart restated the central ideas of legal positivism. Hart's reformulation of legal positivism owes much to the realist critique of formalism.

American realism

A few general comments

Despite their serious differences, American realism and legal positivism share one important belief. It is that we must not confuse 'the law as it is' with 'the law as it ought to be'. They part company on the question of how we find 'the law as it is', as illustrated in Figure 4.2. The positivists, according to Hart, look to established primary rules and to secondary rules of recognition that designate law making bodies. American realists are sceptical about the degree to which rules represent the law. They seek to investigate how courts actually reach their decisions, given that rules are imprecise by nature and the discovery of facts is an imperfect process. Some realists regard law finding as an exercise in predicting how judges (or other officials) will decide legal disputes.

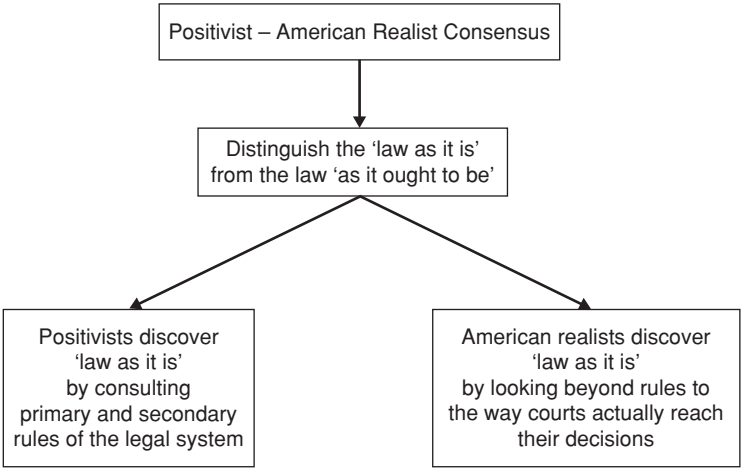

Figure 4.2 Divergence of legal positivism and American legal realism

It is important to note that the separation of law and morals in American realism is more ambiguous than in legal positivism. Most realists think that the degree of uncertainty inherent in rules allows judges to make moral decisions. The realists consider this judicial leeway to be a virtue of the law, as it allows greater consideration of justice. They also wish courts to use their discretion systematically to improve the law. The realists' separation of 'is' and 'ought', as Karl Llewellyn observed, is a temporary divorce (1962, 55). The divorce lasts while the scholars are discovering what courts actually do. The scholars will find that courts actually make moral decisions clothed in the language of logic. All that the divorce means is that at the initial stage of the inquiry the realists keep their own views of what the courts 'ought to do' separate from what the courts 'actually do'. The realists, on discovering that the courts in fact engage

in law making, recommend that the courts drop their formalistic pretences and engage in systematic and informed law reform.

Some writers, such as Jerome Frank, have observed two types of sceptics among American realists: rule sceptics and fact sceptics. Rule sceptics pay more attention to the uncertainties of the rules that make up the law. They are preoccupied with the work of appellate courts, which are the final arbiters of the law. Fact sceptics are more concerned with the uncertainties that attend the discovery of facts on which a judgment depends. Their focus is mainly on the work of trial courts (Frank 1949, viii–ix). There are many authors within the school of American realism; for want of time and space I have focused the following discussions on the work of three of the most influential among them: Oliver Wendell Holmes Jr was the instigator of the realist movement; Karl Llewellyn synthesised much of the work of the rule sceptics; and Jerome Frank was a principal thinker among the fact sceptics.

Oliver Wendell Holmes Jr and the birth of American realism

Realist thinking was introduced to American jurisprudence by Oliver Wendell Holmes Jr (1841–1935). Holmes the lawyer must not be confused with his famous father Oliver Wendell Holms Sr, who was a physician, poet and essayist. Holmes Jr was called to arms during the American Civil War and served with distinction on the side of the Union before becoming a lawyer, Harvard law professor, philosopher and judge. He served on the Massachusetts Supreme Court for 20 years and on the US Supreme Court for 30 years. He had an enduring interest in history, philosophy and science – disciplines that he brought to bear on his writings. His thought was influenced by the British empiricists, American pragmatists such as William James, John Dewey and Charles Sanders Peirce, the historian Henry Maine and the evolutionary biologist Charles Darwin. Holmes was the flawed genius of American jurisprudence. We cannot notice his flaws without understanding his merit.

Holmes' most famous writing is his 1885 speech at the dedication of the Boston Law School's Rich Hall, which was later published by the *Harvard Law Review* under the title 'The path of the law'. It is reputed to be among the most widely read law review articles ever. It is also Holmes' most extravagant and undisciplined statement, and readers who try to gather Holmes' legal philosophy solely from this speech are likely to be seriously misled. Holmes' views on law were formed in the 1870s, during his teaching years at Harvard College and later at the Harvard Law School. However, we must look to his earlier writings to gain a firmer grasp of his legal philosophy. The following four themes run through Holmes' jurisprudence:

1. The law is an evolutionary process. It is the product of experience and not logic. It reflects society's adaptation to a changing world.
2. Courts play a vital role in the evolution of the law by actively reforming the law to suit changing conditions. Decisions of the appellate courts are

presented as logical deductions from established rules, but in fact they are legislative in nature. Courts make new law for new conditions.

3. Statutes depend for their efficacy on the courts and hence they are not law until enforced by the courts.
4. Law, for the above reasons, turns out to be nothing more than predictions about how courts will decide a dispute.

The evolutionary character of law

Holmes' evolutionary view of the law is first evident in the constitutional law lectures that he delivered at Harvard College in 1871–72. Holmes criticised Austin's theory that law is the command of a political sovereign, anticipating by nearly a century most of Hart's arguments in *The Concept of Law*. Holmes observed that law may exist independent of and even in opposition to sovereign will. He wrote that 'other bodies not sovereign, and even opinion, might generate law in a philosophical sense against the will of the sovereign' (Holmes 1871, 723).[1] Austin, as the reader will recall from Chapter 2, claimed that custom and common law become law only by the tacit command of the political sovereign when they are adopted by the courts. Holmes dismissed this as fiction. He noted that 'custom and mercantile usage have had as much compulsory power as law could have, in spite of prohibitory statutes' (1871, 724). Custom has performed its regulatory function before the courts are asked to recognise it as law.

This is a quintessentially evolutionary view. The law grows spontaneously as the result of human actions, even without the direction of law makers. This insight echoes the evolutionist thinking of the Scottish Enlightenment, discussed in Chapter 10. It recalls Adam Ferguson's famous saying that 'nations stumble upon establishments, which are indeed the result of human action, but not the execution of any human design' (1966 (1767), 122). Holmes fully unveiled his evolutionary conception of the law in his 1880 Lowell Lectures at Harvard University, which were later published as *The Common Law*. In his first lecture Holmes decried the tendency to treat the law like a mathematical system of axioms and corollaries. 'The law embodies the story of a nation's development', and to know what it is 'we must know what it has been and what it tends to become' (Holmes 1963 (1881), 5).

There are two problems with law's adaptation to change. One is that there is always some lag between change and the law's response to it. The second is that rules of law tend to remain in place after the reasons for their existence have ceased. Holmes described the evolutionary process of the law thus:

> The customs, beliefs, or needs of a primitive time establish a rule or a formula. In the course of centuries the custom, belief or necessity disappears, but the rule remains. The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for. Some ground of policy is thought of,

1 This quote is from Holmes' account of his own lectures given in the 'Book notices' section of volume 6 of the *American Law Review*, of which he was editor.

> which seems to explain it and to reconcile it with the present state of things; and then the rule adapts itself to the new reasons which have been found for it, and enters on a new career. The old form receives a new content, and in time even the form modifies itself to fit the meaning which it has received. (1963, 8)

Holmes sought to demonstrate his theory by the history of tort and crime. He argued that early liability rules arose from the desire for revenge. Why else did ancient law require the dog that bit the plaintiff to be handed to the plaintiff tied on a log four cubits long? Or banish the rock that made the plaintiff trip over and break his collarbone? In more modern times, why do our courts attach strict liability to the circus owner for damage caused by an escaped lion, or vicarious liability to the pizza café owner for the accident caused by the delivery boy, even when in each case the owner is faultless? The most telling example is the admiralty rule under which admiralty courts order the arrest and sale of a ship to pay for damage caused by collision, even when the owner had leased the ship and had no control over it whatsoever. Holmes quoted Chief Justice Marshall: 'This is not a proceeding against the owner; it is a proceeding against the vessel for an offence committed by the vessel; which is not the less an offence, and does not the less subject her to forfeiture, because it was committed without the authority and against the will of the owner' (1963, 27). Courts of the present age have given policy reasons for strict liability and vicarious liability that are far removed from the original revenge motive. The law that initially served one purpose is now serving another.

Liability rules have not always evolved in this way, but Holmes' central point is this. Law is the product of social and economic forces. Law adapts and acquires new meanings to suit the convenience of the times. Holmes saw in the law's progression one of the most important features of evolution, whether biological or cultural. It is that adaptation is never perfect. The world does not stand still, so by the time a thing adapts to the world the world has moved on. This also means that the law can never be fully logical. As Holmes put it: 'The truth is that law is always approaching, never reaching consistency . . . It will become entirely consistent only when it ceases to grow' (1963, 32). This is a profound observation that anticipated a key insight of the modern science of emergent complexity, a topic that is discussed in Chapter 10.

Judicial role in legal evolution

The appellate judge takes centre stage in Holmes' theory of law. Social forces may provide the stuff of the law, but for the realist in Holmes what matters in the end are the concrete decisions of the appellate courts as to what the law is. (As discussed presently, there are other realists who focus more on the evidence aspect of legal disputes and consequently place the trial judge and jury at the centre of their investigations.) The final arbiter of the law (as opposed to facts) in common law systems is not the legislature but the judges of the highest court of appeal. In the United States, that court is the state Supreme Court or the US

Supreme Court, depending on the kind of case. In Britain it is the House of Lords, and in Australia it is the High Court of Australia.

Holmes did not help his own cause by not being careful to distinguish what judges ought to do from what they in fact do. He switched back and forth between descriptions and prescriptions without warning. At some points he appeared to contradict his own injunction to keep 'the law as it is' separate from 'the law as it ought to be'. This is particularly evident in *The Path of the Law*. However, a careful reading allows us to separate Holmes' descriptive account from his prescriptions.

Appellate judges, according Holmes, perform a legislative function in attuning the law to 'what is expedient for the community concerned'. However, they do so unconsciously and without admitting the legislative nature of what they do:

> Every important principle which is developed by litigation is in fact at the bottom the result of more or less definitely understood views of public policy; most generally to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis. (Holmes 1963, 32)

Judicial legislation and the certainty of the law

Holmes' prescriptive thesis was that judges should shed their pretence and should legislate overtly. Judges should recognise their inevitable duty to weigh 'considerations of social advantage' in stating the law (Holmes 1897, 467). Holmes believed that the judges do this anyway, often unconsciously. The real foundation of the judgment is left unexpressed because judges dislike discussing policy and clothe their decisions in the language of logic.

Holmes' prescription is easier said than done. A litigant who takes a dispute to a court expects a judgment according to law, not policy. If the law is based on a judge's view of right policy, public faith in the law and the judicial system will quickly decline. More importantly, it will deny people the guidance of the law as regards right and wrong conduct. Holmes was aware of this problem. He wrote: 'Finally, any legal standard must, in theory, be capable of being known. When a man has to pay damages, he is supposed to have broken the law, and he is further supposed to have known what the law was' (1897, 89). This is the reason that, in the field of negligence, the broad test of reasonable care (the prudent man test) has been progressively replaced by precedents on specific classes of acts and omissions. Yet the judicial method that Holmes commended does not easily reconcile the opposing needs of legal adaptation and legal certainty.

Holmes, as well as those who followed, paid insufficient attention to the way in which judges adapt the law to the changing world. They do not explain how community expectations or 'public policy' filter into the law through the judicial sieve. If judges legislate, they do so in a very special way. They cannot decide what is good for the community on the basis of their personal convictions. The court receives the signals of community good from the community's own practices and expectations. The arguments of the litigants before the court in the end are not about policy, but about the legitimacy or reasonableness of their expectations.

The court decides what expectations are reasonably held according to the practice of the community. Expectations change as the conditions of social life change. Holmes was right to observe that in some areas of the law, the community expectations may be unclear so that judges are left with legislative discretion. Even in these areas, however, the courts ought to adopt a policy that is most consistent with the grown system of rules. If the Court of Exchequer in *Rylands v Fletcher* (1868) [1] LR 3 HL 330 had decided that the loss should be borne not by the party that introduced the dangerous substance to the neighbourhood but by the party that was most able to bear the loss, the system of rules upon which British society and commerce functioned would have been instantly destabilised.

Holmes was aware of these constraints on judicial discretion. His language unfortunately tends to hyperbole, and consequently gives false impressions of his theory. A more nuanced account of the role of the judge in common law is offered by another evolutionary theorist, FA Hayek, whose jurisprudence I discuss in Chapter 10.

Law as prophecy: the trouble with the 'Bad Man' point of view

Every lawyer owes certain duties to the client. Foremost among them is the duty to advise the client about the chances of success if the case goes to court. The lawyer therefore tries to predict the court's answer to the client's claim. There is no controversy here. However, in 'The path of the law', Holmes made the extraordinary claim that law consists only of predictions of what the courts will do in particular cases: 'The primary rights and duties with which jurisprudence busies itself again are nothing but prophecies' (1897, 458). These prophecies lie scattered within statute books and law reports; the lawyer's job is to generalise them and reduce them to a manageable system (1897, 458).

Holmes' remarks were so extravagant that one might wonder whether he got carried away by the occasion or whether judicial office had coloured his judgment, for by this time he was a judge. The remarks are not only untrue but they also contradict Holmes' own view of the law, written before he became a judge! As noted previously, Holmes believed that law has its origins in the life of the community and exists before it is recognised and enforced by courts. The law has already done its work before it gets noticed in the courts. Holmes was right only if he was merely identifying an important aspect of legal practice, and not the law generally.

The view of law as prediction led Holmes to his famous 'bad man' thesis. If the law is nothing but predictions of what the courts will do, the best way to discover the law is to see it from the viewpoint of a really bad man. Holmes' logic is this: the good man does not try to test the law, but the bad man is always trying to get away with what he can. Holmes wrote:

> If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience. (1897, 459)

The 'bad man' viewpoint is focused on wrongs. How many years will I get if I get caught? How can I swindle my employer? How can I avoid paying for the goods that I bought? A good man or woman will also want to know the law *as it is* in order to be law abiding. Hart pointed out that in our daily lives we observe rules as standards of conduct and not simply as predictions (1997, 137). Besides, there is much more to law than the punishment of wrongs. Good men and women want to know how to bequeath property, how to set up a charity, how to establish a trading partnership or a corporation. The legal process, as W Twining observed, is viewed from different standpoints by different actors; the bad man's standpoint is not that of the judge, or the prosecutor, or the legislator (1973, 285). The bad man test is not always the most direct or reliable route to finding the law.

Law as prophecy is about what courts and other authorities do when faced with a dispute or claim. However, as Holmes himself noticed before his judicial career, the law has a life outside the courts. Hart's comparison of the law with the rules of a game is vivid and compelling. Children and adults play various games, such as cricket, football, hockey or netball, for their enjoyment. These games are often played without umpires or referees. The game is possible because the players by and large voluntarily observe a set of rules. Try to imagine a game of football or netball without any rules, and you will see a completely different activity. The introduction of an official to oversee the game and to enforce its rules does not change the rules that pre-existed (Hart 1997, 142). The law is like that.

Holmes was right to reject formalism and the idea of law as commands of sovereign bodies. His error was to identify the law with the commands of a different sort of sovereign, the appellate court.

Karl Llewellyn and the Grand Style

Karl Llewellyn (1893–1962) held chairs in law at the universities of Yale, Columbia and Chicago. He is best known for his book *The Bramble Bush: On our law and its study*, first published in 1930, which became the most read introductory legal text in American law schools. Llewellyn's most important writings on jurisprudence are conveniently collected in one volume, *Jurisprudence: Realism in theory and practice*.

Llewellyn observed that traditional jurisprudence failed to investigate one of the most important aspects of the American legal system: the way that courts balance the contending demands of the two ideals of law – certainty and justice. Like other rules sceptics, Llewellyn mocked the idea that rules provide unfailing guidance to judges, leaving them only the task of its mechanical application. However, Llewellyn valued rules and the certainty they bring to the law. His point was that mathematical certainty is not in the nature of law. He considered, moreover, that the degree of uncertainty is not a vice but a virtue of the law. Llewellyn's key ideas about the law may be summarised as follows.

Rules and discretion

Rules are porous and judges have discretion in understanding and applying the law. Llewellyn followed Holmes in pointing out that society is always in flux, so law is ever catching up with society. The probability is 'that any portion of law needs re-examination to determine how far it fits the society it purports to serve' (Llewellyn 1962, 55). The courts bear primary responsibility for this re-examination.

Law and morality

Llewellyn shared with other American realists the belief in a temporary divorce between law and morality. The realists' quest is a moral one: to help improve the law. However, to improve the law they must know 'the law as it is' as opposed to what they would like the law to be. Realists then discover that 'the law as it is' is shaped by moral (policy) considerations that the courts apply in the guise of logic. At this point the realists remarry law and morality. They want the courts to take their marital duties seriously, i.e. to actively align the law with justice and be frank and open about what they do. Law's liaison with justice should not be a clandestine affair but an open and scrutable partnership.

Distrust of rules as descriptions of what courts do

Llewellyn, like other rule sceptics, did not believe that rules fairly represent the way courts actually decide cases (1962, 56). A lawyer who wants to find out what the courts actually do must engage in the systematic study of opinions (judgments) of the courts. When realists express scepticism of rules, they are referring to the rules written down in statutes and past judicial precedents. The offence of murder is defined in the *Criminal Code Act*. The good lawyer will not stop at the definition in the Act, but will study the judgments of the appellate court to see how, in particular kinds of cases, the courts have understood and applied this definition. Again, consider a judgment that explains a common law rule. The good lawyer will not be guided solely by the words of one majority judgment, but will explore a line of decisions to see how the courts have worked the rule in practice.

Llewellyn thought that these are the reasons realists regard the law as generalised predictions of what the courts will do (1962, 158). Why do some realists think that these predictions are not actually rules? Realist lawyers discover, by deep and systematic study of opinions, the way that the rule operates in practice – which may be different from how it is stated in the law books. If so, have they not found the real rule? The realist argument is that all we can do from the study of precedents is predict, because we cannot be certain that what is established in past opinions will be followed in the next case. I can think of three reasons why a rule may not be followed. First, the later court may not wish to follow the rule because it does not respect the law and believes that it has arbitrary power to depart from it. The court in such a case acts like a common criminal.

The rule remains, but it is violated. Second, the later court may think that the earlier opinions got the law badly wrong, and hence the established view should be rejected or revised. In this case the existing rule is replaced by a new rule. Third, a later court may think that the earlier line of precedents was correct in the social conditions that prevailed, but that conditions have changed, and with them the expectations of the members of society. Therefore the old rule set by past precedents must be modified or replaced. In theory, every rule is susceptible to this kind of change. This is why the law is an evolutionary process.

The question for the realist, then, is this: can we ever call something a rule which is not static, but is dynamic and adaptive and hence changes over time? If we cannot, then we must abandon altogether the notion that society is governed by rules. The word 'rule' then will apply only in mathematical and logical systems or in natural science. If so, we will deprive ourselves of the use of the concept of a 'rule' in social contexts, though it has been the basis of society from the beginning of human history and long before there were courts or parliaments.

Llewellyn, to be fair, did not deny the existence or utility of rules. His major thesis was that we miss something about the nature of law if we regard the law as sourced only in rules. He believed that rules, properly understood, serve the dual purpose of promoting legal certainty while allowing judicial freedom to do what is just.

In fact, Llewellyn wanted to make rules sharper. He recommended grouping cases and fact situations into narrower categories than had been the past practice. The reason is obvious. Consider the rule that a surgeon should take reasonable care during an operation and afterwards. Surgeons who wish to avoid liability will want to know much more about this rule. They would like to know, in relation to particular types of surgical cases, what type of advice, tests, procedures and post operation care will suffice to dispel a claim for damages if there is a mishap. This can be discovered only by seeing how the courts in the past have treated surgical misadventure in different kinds of situations. One would hope that this is what a good textbook on torts or medical law today provides.

Law reform

American realism had two major aims. The first was to gain a better factual understanding of what the law is and how it works. Realists thought that traditional positivist theory did not do this very well. However, most realists – Llewellyn among them – were not content just to describe the process of law but wished to make the law better, to serve its social purpose. This involved evaluating the effects of the law as it stands. Llewellyn urged judges and lawyers to evaluate the law constantly by considering its effects.

The American realists did little to develop a theory about how we may evaluate the effects of law. Holmes, in his Boston speech on 'The path of the law', asked students to study political economy so that they could find out the costs and benefits of particular legal rules. This kind of inquiry entered law school curricula only with the rise of the 'law and economics' movement in the second half of the

20th century, and even then only in a few schools. The law reform agendas of many American realists were driven by their own perceptions of what was wrong with American society, particularly its market based economy. History shows that their views did not have much traction in the courts or in the public mind.

The Grand Style

In 1959, during the course of an address to the annual meeting of the Conference of Chief Justices, Llewellyn unveiled his views about the Grand Style or manner of reason. He believed that the appellate courts of the United States were at their glorious best during the first half of the 19th century, when the Grand Style of judicial reasoning was dominant. The judicial lustre began to fade in the latter part of that century and by 1909 its practice was all but dead. Llewellyn saw a revival of the tradition at the time he spoke, and used his address to encourage its restoration. So what is this admirable Grand Style?

The style, in essence, is to test each decision against life wisdom, and where necessary to vigorously recast precedents in the light of that wisdom. Llewellyn explained:

> In any event, as overt marks of the Grand Style: 'precedent' is carefully regarded, but if it does not make sense it is ordinarily re-explored; 'policy' is explicitly inquired into; alleged 'principle' must make for wisdom as well as for order if it is to qualify as such, but when so qualified it acquires peculiar status. On the side both of case law and of statutes, where the reason stops there stops the rule; and in working with statutes it is the normal business of the court not only to read the statute but also implement that statute in accordance with purpose and reason. (1962, 217)

In simpler terms, judges working in the Grand Style give themselves the authority to reshape the law according to their wisdom, provided that the grounds for doing so are explicitly stated and discussed.

The trouble with Llewellyn's formulation is its elasticity. Most judges may be able to associate with the style by giving their own interpretation to these words. What 'does not make sense' to one judge may make perfect sense to another. Reason may lead different judges to different destinations and 'reason may stop' at different points for different judges. The formulation is consistent with what people understand as judicial activism as well as judicial restraint. Llewellyn, though, was proposing by these words a much larger role for the appellate judge than the legal culture of countries such as England and Australia currently permits.

Fact sceptics

Jerome Frank, a fact sceptic, derided rule sceptics as living in an artificial two dimensional legal world of rules and predictions. The world of the fact sceptics, he claimed, is three dimensional, with the third dimension made up of facts in dispute (1949, ix). The fact sceptics also practise rule scepticism, for they

distrust what the rule books say on the state of the law. Their primary interest, though, is in the incurable uncertainties that attend the trial aspect of cases. Frank explained the aim and spirit of fact scepticism as follows:

> No matter how precise or definite may be the formal legal rules, say these fact skeptics, no matter what the discoverable uniformities behind these formal rules, nevertheless it is impossible, and will always be impossible, because of the elusiveness of the facts on which decisions turn, to predict future decisions in most (not all) lawsuits, not yet begun or not yet tried. The fact skeptics, thinking that therefore the pursuit of greatly increased legal certainty is, for the most part futile – and that pursuit, indeed, may well work injustice – aim rather at increased judicial justice. (1949, ix)

The idealised view of the law is something like this. The law consists of rules that are knowable in advance. When a legal dispute arises, and it ends up in court, the judge or the jury ascertains relevant facts. Facts are established by evidence heard by the judge or jury. The court then applies the law to the facts so found and reaches the judgment.

Every lawyer knows that reality is different from the ideal. Facts cannot be proved beyond all doubt. The law expects only certain imperfect standards of proof to be met. Even in a criminal trial, the prosecution's burden is to prove the commission of the offence beyond a reasonable doubt. There are sound reasons for these imperfect standards. Facts must be based on evidence, and evidence is given by witnesses or found in documents and material things such as a blood stained knife with the accused person's DNA on it. There may not be witnesses. The recollections of witnesses may be affected by a large number of factors, such as impaired sight or hearing, inaccurate observation, misinterpretation of observed facts, and fading memory. Judges and juries also have to draw inferences from the established facts through guesswork.

The common law rules of evidence and the requirements of natural justice and due process seek to make the trial process fairer and more reliable, but the system remains human – imperfect and prone to error. All this is commonplace for the competent lawyer. Frank, though, raised two other causes of legal uncertainty that lawyers usually do not talk about: namely, (a) prejudice or bias on the part of judges and juries; and (b) the breakdown of the distinction between rules and facts in judicial reasoning.

Effects of prejudice

There are different kinds of prejudices that may affect the way judges and juries decide questions of fact. There may be overt prejudice on grounds such as race, gender, religion or political views. Where bias is demonstrable, the decision may be overturned. However, there are other biases of judges and jurors that are not easy to detect. Appearance, dress, mannerisms and habits of parties and witnesses may have a positive or negative influence. This is why lawyers pay attention to how their clients and witnesses present themselves in court. Frank commented:

> Concealed and highly idiosyncratic, such biases – peculiar to each individual judge or jury – cannot be formulated as uniformities or squeezed into regularised 'behaviour patterns' . . . The chief obstacle to prophesying a trial court decision is, then, the inability, thanks to these inscrutable factors, to foresee what a particular trial judge or jury will believe to be the facts. (1949, xi)

Frank was scathing of juries and 'judicial jury worshippers'. He regarded jurors as 'hopelessly incompetent' fact finders. Judges' instructions to the jury he dismissed as 'an elaborate ceremonial routine' which today seems like 'debased magic spells or cabalistic formulas' (1949, 180–2). The reason for this harsh judgment is the fact that juries are neither specialised nor accountable. They do not have to give reasons for the general verdicts (guilty or not guilty) that they declare. Faith in juries is not universal, even in the common law world. Frank was not saying anything new here, as his views of juries were shared by respected mainstream commentators. Much more interesting are his thoughts on the rule–fact distinction.

Dissolution of the rule–fact distinction

According to the common (idealised) accounts of the law in action, the court comes to findings of facts and then applies relevant legal rules to the facts so found. Frank argued that this is not the way judges often decide cases. He claimed that in their preoccupation with rules, traditional legal theorists and rule sceptics fail to notice that rules and facts are often indistinguishable in the thought processes of judges and juries (1949, xiii).

Frank argued that judges come to a decision about the right outcome and then work backwards to the appropriate rule. Justices Holmes, Cardozo and Hutcheson had previously made this point. Frank gave an interesting demonstration of this judicial tendency. A drunken driver runs over a man and causes him serious injury. In some American states, such as Georgia, these facts are construed as 'assault with intent to kill', and in others, such as Iowa, are held to be 'reckless driving'. Thus, different rules are applied to the same fact type in different states. A study reveals the reason. In Iowa, 'reckless driving' carries a harsher penalty than in Georgia. If Georgian courts wish to give a similar penalty, they must construe the same facts as constituting the graver offence of 'assault with intent to kill'. Frank considered this to be evidence that courts first determine what punishment the driver deserves and then find a rule that allows the selected punishment to be imposed (1949, 101–2).

This means that facts, crucially, determine the choice of rule. When facts come to light in the course of the trial, the judge begins to think about what justice demands or what the decision ought to be. In the final analysis the judge is guided by intuition. As Hutcheson wrote, a judge 'waits for the feeling, the hunch, that intuitive flash of understanding that makes the jump-spark connection between question and decision' (1928–29, 278). Justice Cardozo said much the same when he talked of the law's 'piercing intuitions, its tense, its apocalyptic moments' (1928, 59).

However, we must be cautious in embracing these ruminations. These are words of self-proclaimed realists, but they are more romantic than realistic. This kind of agonised pondering relieved by lightning bolts of wisdom may be what happens in really hard cases, but such cases are not so common that this account reflects normal practice. The routine work of trial courts is quite humdrum. The facts are reasonably clear and so are the rules. The judge acts very much according to the official script, by applying known rules to believable facts.

Frank's comments on juries are more persuasive and enlightening, though again not very original. Juries are instructed on the applicable law, but they have the freedom to give a verdict that they believe is right, even against the legal instructions they receive from the judge. Usually they are asked only to give a general verdict saying that an accused person is guilty or not guilty of the offence charged. They do not have to give reasons for the verdict and, except in the most unreasonable verdicts, their decisions are rarely reversed on appeal. In reality, they mix up facts and rules and produce a composite decision on the charges.

The legacy of American legal realism

American realism as a distinct movement was not long lived, but it continues to influence jurisprudential scholarship directly and indirectly. Its influence within the United States is considerable, for a number of reasons. First, the great champions of American realism initially were highly respected serving judges such as Holmes, Cardozo and Hutcheson, who were justifying their own judicial philosophy. They said things about judicial conduct that others would have been hesitant to express. Second, the US Constitution bestows on the federal judiciary, and in particular on the US Supreme Court, a political status that is unknown in other common law countries. This is partly because of the constitutional structure of divided powers and the limitations on legislative power cast by the American Bill of Rights. The court therefore has greater capacity to heed the realist doctrines. Third, the realists' appeal for critical examination of legal rules for their social effects provided inspiration for late 20th century American legal theorists on both the left and the right. On the left, the critical legal studies movement saw legal rules and doctrines as supportive of the hierarchical structure of society and markets. On the right, the law and economics movement began to evaluate laws for economic efficiency, examining in particular their role in increasing or decreasing transaction costs. Legal realism's influence on the courts of other common law countries has been variable but modest. British and Australian courts have been touched only lightly by American realism.

However, legal positivism owes a large debt to American realism that is rarely acknowledged. American realism jolted legal positivism out of its complacency by questioning widely held assumptions about the nature of rules. It should be remembered that Holmes exposed the weaknesses of the command theory of law long before Hart. Realism prompted the rethink of legal positivism that was brilliantly undertaken by scholars like Hart and Raz. It forced positivists

to distance themselves from formalism and to reconsider the nature of legal language and judicial discretion. It may even be true to say that Holmes made Hart possible.

Scandinavian realism

American realists were preoccupied with the way law is made in practice, and how it ought to be made. The central concern of Scandinavian realism is to explain how the law changes the behaviour of people. They seek to explain scientifically the force of the law, free of the metaphysical (mystical) element imbedded in traditional explanations. Their scientific inquiry leads to the finding that the force of the law is produced by the psychological effects caused by the ritualistic modes of law making, such as the process by which parliament approves legislation or a judge pronounces a judgment. So, did the Scandinavian realists who pursued a non-mystical account of the law's force end up with a mystical explanation? The answer depends on what we mean by facts. If the psychological effects produced by legal procedures and concepts are facts, then the realists can justly claim to have provided an empirical explanation of law.

Scandinavian realism is known in the Anglophone world mainly though the writings of four scholars who best represent this important school of thought: Axel Hägerström, Karl Olivecrona, Vilhelm Lundstedt and Alf Ross. The following discussion is based on their writings.

Hägerström and the mystical force of law

Scandinavian realism was born of the inquiries concerning law and morals undertaken by the Swedish philosopher Alex Hägerström (1868–1939). Hägerström was not a lawyer but a philosopher with a deep interest in law. He held a chair in philosophy at the Uppsala University in Sweden until his retirement.

Hägerström was a philosopher in the empiricist tradition. He wished to study social phenomena such as law with the rigorous methods of the empirical sciences. He wrote his major works in the 1920s, and as a critic of the command theory of law preceded Hart by several decades. His investigations led to the conclusion that concepts such as property, right and duty could not be explained in the way that we explain natural objects and events. Hägerström's writing is very dense and his arguments are complex, as are his examples. The key message, though, is quite simple.

According to Hägerström, any concept that does not correspond to a physical thing is meaningless. The concept 'chair' has meaning because it corresponds to a real object that we can see and touch. Hägerström argued that concepts such as 'right', 'duty' and 'property' are meaningless because there are no facts that correspond to their existence. What does the statement 'I have the right of property

to my house' mean? The state will use its coercive power to help me protect my house from the acts of others in certain circumstances – for example, if I have not let the house to a tenant – or the state will allow me to use force to protect it. The fact of state protection does not correspond to my right of property. The state intervenes only if an unauthorised person interferes with my possession, and there is no guarantee that the state will always assist (Hägerström 1953, 1–2). What if the invader disputes my title and I cannot prove it? So is there any set of facts that correspond to 'right of property'? I can say that the fact of my peaceful enjoyment of the house corresponds to the 'right of property'. In that case I will have no right when I really need it, which is when someone disturbs my peaceful enjoyment. Hägerström wrote: 'This insuperable difficulty in finding the facts which correspond to our ideas of such rights forces us to suppose that there are no such facts and that we are here concerned with ideas which have nothing to do with reality' (1953, 4). This is true if one looks for exact correspondence. I argue below that Hägerström's insistence on exact correspondence for anything to qualify as real reveals his fundamental misunderstanding of the nature of society and law – but let us first complete his account of what law is.

If legal words have no basis in reality and if they do not refer any real thing, do we have law at all? The answer, according to Hägerström, is that not only do we have law, but civilised life is not possible without law. What, then, is the nature of law, and how does law guide people's behaviour? Hägerström correctly said that the law's force on people cannot be explained by the physical laws of nature, but only by its psychological effects. Here is a simple explanation.

If I pour water into my kettle and place it on a fire the water will boil in a few minutes. The causal connections are evident. The fire heats the kettle, which then heats the water to boiling point. All this happens according to the laws of nature. Now, Parliament passes an Act which provides that a pedestrian should not cross the road until a green light signals permission to do so. Consequently most people cross the street only on the green light signal, even if it is safe enough to cross the road when the light is red. The connection between the Act of Parliament and the pedestrians' behaviour is not physical like the connection between the fire and the water in the kettle. What if a policeman standing by physically restrains a person from crossing before the green light appears? Here the physical link is between the policeman and the pedestrian, not between the Act and the pedestrian. The policeman may be obeying a different law that requires police officers to physically prevent unlawful acts. In that case the link between the law and the policeman's behaviour is not physical. In each case, the effect of the law on the actor is mental. Hägerström concluded that legal concepts exert mysterious forces that the laws of nature cannot explain. They 'belong to another world than that of nature' (Hägerström 1953, 5). Legal concepts and forms thus have a magical quality. They are magical not in the sense of the dark arts of witches and sorcerers, but in the sense that they move people by words and forms that are meaningless when put to empirical test.

How does this magic work in practice? Take the case of legislation. If a group of private individuals gather in a hall and proclaim that all persons in Australia should drive on the right-hand side of the road, they would be dismissed as lunatics. However, if the group are the elected representatives of the people and they assemble in Parliament House and make the same statement according to certain procedures, the people are likely to obey it as law. The magic is not in the content of the law but in the form of the law. Legislators know how the legal system works. They know that when a right is enacted there will follow in society a change in behaviour. One class of persons will obtain a benefit and another class will give it. They also know that anyone who meets the requirements of procedural law will gain a judgment and that the judgment will be enforced. Although rights are contingent on certain facts, whether the facts actually exist is beside the point if procedurally the plaintiff meets the conditions for a judgment (Hägerström 1953, 316).

Similarly, in a court case the judge knows that the judgment will produce certain consequences. The judge's decree is a means of psychological compulsion in the case. The effect comes about not because the right exists but because of the judge's pronouncement. Hägerström rejected the common view that a remedy to enforce a right exists because the right exists. Since rights have no empirical existence, the judge can never take account of any right that exists prior to the judgment. What we call a right is nothing but the changes in the social behaviour brought about by the judgment.

Inadequacy of Hägerström's theory

The error at the heart of Hägerström's theory is that of trying to understand social phenomena like law by the methods of linear science. Society is a complex and dynamic order. It is not like a chair or other object. It is not even like an individual animal, although animal life also represents complex order at a different level. Society comprises groups of interacting individuals. As the modern science of complexity (discussed in Chapter 10) reveals, rules of behaviour can arise spontaneously as a result of the interactions of individuals, even without legislatures and courts. These rules are honed by the accumulation of experience. They establish rights and duties. These rules pre-date authority.

Hägerström thought that the idea of a right is meaningless because it does not correspond to a stable fact or state of affairs. In other words, anything as unstable or contingent as a right has no existence. This is clearly wrong, and is a result of what scientists call linear thinking. We can understand a right as a kind of relation between two persons. It can be in relation to a thing such as a house, or a contract such as a contract of service. The fact that this relationship is unstable (because the house may be invaded or the hired plumber may not do his job) does not mean that the relationship is unreal. Uncertainty is a feature of complex life systems, and society is one such system. The fact that a right is not always respected or enforced does not mean that there is no such thing as a right. On the contrary, if there are no rights and duties society will not exist; nor will

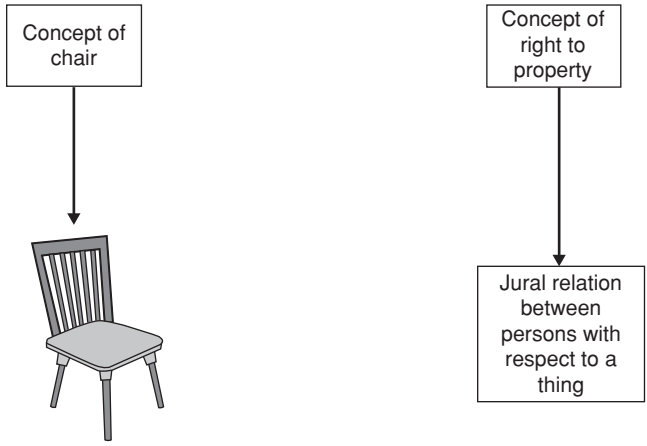

Figure 4.3 Idea and fact

courts or legislatures. In Figure 4.3, the set on the left shows the connection of the concept of a chair to the stable object to which it refers. The set on the right shows the connection between the concept of a right to property and the jural relationship to which it refers. The fact that this relationship is not corporeal and is variable does not mean that the concept of property right is meaningless.

Hägerström's error can be shown in another way. When he said that a right is nothing but a change in the social behaviour brought about by a court's judgment, what does it really mean? A change in social behaviour can be effected only if there was prior social behaviour. Social behaviour is always prior to any court's judgment. If there is no prior social behaviour there is nothing for the court to change. Social behaviour is not random but patterned. Rights and duties arise from the expectations created by these behavioural patterns.

Hägerström attributed the people's observance of the law to the magical or mystical forces generated by legal words and forms. This belief also arose directly from his linear view of the world. He thought that only things that can be perceived with our sensory organs are real. The factors that make people voluntarily observe the law are magical because they cannot be physically sensed. This belief arises from a primitive monist view that the world consists only of physical things and events. In contrast – as Karl Popper explained in his famous 1978 Tanner Lecture at the University of Michigan – our universe actually consists of three interacting worlds: (1) the world of physical objects and events; (2) the world of mental objects and events; and (3) the world of the products of the mind and culture such as scientific theories and art. Popper provided a fuller explanation of the three world theory in his book *Objective Knowledge* (1972). As Popper pointed out, these are inseparably interacting worlds. The facts that correspond to the concepts of right, duty and property are to be found in the second and the third worlds and are as real as the facts of the physical world.

What Hägerström put down to magic, Hart and Alf Ross regarded as the reflective acceptance of rules by thinking human beings. The internal aspect of

rules is a critical dimension missing from the work of the Swedish realists, but clearly present in their Danish counterpart, Alf Ross.

Hägerström's followers: Karl Olivecrona

Hägerström's philosophy was embraced and developed by his student, Karl Olivecrona (1897–1980), who was Professor of Jurisprudence at the University of Lund in Sweden. Olivecrona was a controversial figure who believed that a monopoly of force is the fundamental basis of law.[2] His views are summarised below.

The binding force of law

Olivecrona recognised that law belongs to the natural world of cause and effect. Law is produced by natural causes – the actions of human beings – that have natural effects in the form of actual influence on the conduct of judges and individuals. Law cannot be part of the natural world of cause and effect and also be apart from it. However, the law's effect is psychological. The binding force of the law is an idea in human minds. There is nothing in the outside world that corresponds to this idea (Olivecrona 1939, 16–17). The important thing to note here is that Olivecrona regarded the psychological effects of law as part of the natural world, and not of another world as Hägerström thought.

Olivecrona was otherwise faithful to Hägerström's view of the binding force of law. The constitution is held in reverence. Rules made in accordance with the constitution have a psychological effect on judges and people. The general attitude towards the constitution places some persons (legislators etc) in positions where they can put pressure on people to direct their actions. They gain a psychological mechanism to influence actions.

The content of a rule of law

Olivecrona rejected the idea that a rule of law is a command. A command implies a personal relationship between the one who commands and the person commanded. Such a relationship is lacking when the legislature makes general laws. He preferred the term 'independent imperative', though at other times he used 'legal performatives'. The content of the law consists of imagined actions of imagined people (such as judges) in an imaginary situation. The action that is the crime is imagined by the legislator, and the punishment is the imagined response of the judge.

Force

Although Olivecrona rejected the command theory of law, he regarded force as the basic ingredient of law. Law consists mainly of rules about the application of force. Rules may contain patterns of conduct for citizens, but the patterns are only an aspect of the rules about force. Rules of civil and criminal law are at one

2 In a 1940 pamphlet, *England eller Tyskland* (*England or Germany*), Olivecrona argued that only German hegemony could guarantee the peace and unity of Europe.

and the same time rules for private citizens and rules for officials about the use of force. Thus the rule 'A person must not commit murder' means that: (a) persons must not commit murder, and (b) if a person commits murder, the court must impose life imprisonment if the charge is proved, and the officials must forcibly imprison the accused person.

Morality and law

While many believe that morality influences law, Olivecrona proposed the opposite: that law shapes morality. Law has always been there, hence a child grows up in a moral environment conditioned by law. He maintained that law is a primary factor in the development of morals. Law's effectiveness depends on its moral influence, but the moral influence of law is required only for a limited number of fundamental rules. As for the rest, it is enough that the idea of a moral obligation to abide by the law is sustained and that it is not damaged by unreasonable laws or arbitrary jurisdiction. Olivecrona's views reflect the law of an older time, when the moral law was indistinguishable from the legal law. In ancient times, law was the community's traditional morality. Olivecrona conceded that, ultimately, the law rests on the moral duty to obey the law, a duty that will cease if the law fails to serve its fundamental social purpose.

The idea that law is the source of morality finds expression in Vilhelm Lundstedt's explanation of the Scandinavian realist position on justice. The statement that a claim is just, Lundstedt argued, contains a tautology insofar as it is based on material law. All legal claims are just. The only kind of justice external to the law arises in cases where the law does not provide a clear answer. Then there is a balancing of interests, but that is nothing but a question of evaluation. The common sense of justice does not support material law but receives its entire bearing from the law. Legal machinery takes feelings of justice into its service and directs them in grooves and furrows advantageous to society and its economy (Lundstedt 1956, 51).

Alf Ross's revision of Scandinavian realism

Alf Ross (1899–1979) was a Danish moral and legal philosopher. He was schooled in the jurisprudential tradition of the previously considered Swedes, but developed a brand of realist thinking that drew him very close to the positivism of Hart. The most serious defect in the Scandinavian attempts to describe the law by the methods of empirical science was their failure to reveal the nature of a rule, or what Hart termed the internal point of view that makes a rule obligatory. Ross attempted to address this aspect by his description of norms and legal rules.

Norms

Ross pointed out that a norm has two aspects: (a) a directive to do or not something; and (b) the correspondence of the directive to some social facts. One

without the other cannot be a norm. The norm 'Drive on the left-hand side of the road' contains a directive to behave in a certain way. However, if everyone drives on the right-hand side of the road, it really has no existence. It is an empty statement. Hence, Ross defined a norm as 'a directive which corresponds in a particular way to certain social facts' (1968, 82). There is a norm that a person should not steal what belongs to another. It corresponds to the fact that people usually do not steal.

Note, however, that a norm corresponds to social fact in a particular way. This particular way refers to the fact that people observe the directive consciously, with a sense of obligation. Thus, not every social practice or regularity of behaviour reveals a norm. Most people sleep at night out of biological urge. People generally celebrate Christmas by setting up a Christmas tree, but they do not feel that they ought to do it. Bricklayers observe certain technical practices when they build a wall. They do so out of practical necessity and not out of a feeling of social or moral obligation. Hence, these regularities are not norms (Ross 1968, 84). Persons must feel that the directive is 'binding'.

The word 'binding' can refer two kinds of situations. It can mean being coerced by threat of punishment to do or not do something. This is the fear of sanction. Ross rejected this idea. It does not account for many kinds of norms that people observe even in the absence of sanctions. The other meaning of 'binding' is the feeling of obligation, experienced internally, that the norm is valid (1968, 86–7). If a norm is binding in the latter sense, it cannot be discovered solely by external observation of behaviour.

Legal rules

The definition of a norm given above is consistent with both law and moral rules. What is special about law that distinguishes legal rules from other norms? The existence of a norm does not depend on sanction. However, that does not mean that society may not establish institutional systems to impose sanctions for breaches of particular norms recognised as deserving of sanction. Legal rules are a special type of norms about the use of coercion. They contain directives to those in authority. Typically they are addressed to the courts in the form of laws that prescribe punishments for crimes, or other types of sanctions for breaches of other kinds of law. Their effectiveness depends on: (a) allegiance of officials to the constitution and the institutions under it; and (b) non-violent sanctions of disapproval and criticism that are implied in this attitude (Ross 1968, 90–1). Since they are directed to officials, legal rules are not generally enforced but are followed voluntarily. A court usually does not have to be coerced into doing justice according to law.

Are there then two sets of legal norms – one addressed to the citizen (primary norms) and the other addressed to authorities (secondary norms)? From the logical point of view, there are only secondary legal norms that prescribe how cases are to be decided. These norms stipulate the conditions under which violent coercion may be applied. From the psychological point of view, there are two

sets of norms. Primary norms are those followed generally by citizens whether or not there is coercion. They may be obeyed because of both interested feelings (fear of sanctions) and disinterested feelings (respect for law and order) (Ross 1968, 91–2).

Ross's theory of law just described has only a tenuous connection with the Hägerström legacy. He was empiricist in presenting law as social fact, free of the metaphysical baggage of natural law thinking. However, Ross explored more thoroughly what Hägerström left unexplained as the magical or mystical force of legal forms. He did so in ways remarkably similar to Hart's positivism. Ross's philosophy of law leaves room for spontaneously grown norms of society to be recognised as law. His definition of legal norms as special norms directed to officials about the application of coercion is too narrow and artificial, and his system will stand even if the definition is widened to include the primary norms of behaviour to which sanctions are applied by the state.

Assessment of Scandinavian realism

Scandinavian realism, except for the work of Alf Ross, has not made a significant or lasting impact on the jurisprudence of the common law world. Even so, its contribution must not be undervalued. The Scandinavians drew attention to an aspect of the phenomenon 'law' that had not been the subject of serious study previously, and unfortunately remains neglected to date in the jurisprudence of Anglophone countries. Whereas the American realists galvanised our thoughts about the realities of law creation, the Scandinavians illuminated the way law serves its function by altering human behaviour. This is the psychological dimension of law. Laws are not corporeal things. We cannot hold them in our hands. They are not even ideas about real things (Kant's phenomena). They are ideas about how persons should *behave* in the real world in relation to material things and events. The force of the law, though, is real and observable as empirical fact. People usually change behaviour as the law commands, even if there is no fear of punishment. The Scandinavians deserve much credit for drawing our attention to the incorporeal but real nature of law.

Hägerström's view that there is no such thing as a legal right was flawed by his failure to notice that the real world consists not only of tangible things but also of mental constructs. Popper and later philosophers of science recognised the place of ideas in the real world. Hägerström's followers refined his insights, and in Ross's work we find a more realistic and useful theory that explains the nature and function of law. The Scandinavians, despite their shortcomings, revealed an aspect of law that offers rich intellectual rewards for scholars willing to explore the psychology of law.

PART 2
LAW AND MORALITY

5

Natural Law Tradition in Jurisprudence

> *From a purely factual standpoint the history of the natural law idea teaches one thing with the utmost clearness: the natural law is an imperishable possession of the human mind. In no period has it wholly died out.*
>
> Heinrich A Rommen (1955, 215)

The idea of a higher moral law that positive human law must not violate has a long and continuous history in both Western and Eastern thinking. It is found in Greek philosophy at least from the time of Heraclitus of Ephesus (c. 535–475 BC). It has a central place in Judeo-Christian doctrine as set out in the writings of Augustine, Thomas Aquinas and the Scholastics. It lived in the natural rights discourses of Grotius, Hobbes, Locke, Pufendorf and others. In Vedic (Hindu) philosophy the moral law of governance is revealed in the *Dharmasastra*. In traditional Sinic culture, Confucian philosophy subordinated law to ethics. The religious *Sharia* is a powerful influence on the law of Islamic nations. In our age, basic human rights are posited as universal higher norms binding on nation states. In Western philosophy such higher moral law is commonly known as natural law.

Natural law is so called because it is believed to exist independently of human will. It is 'natural' in the sense that it is not humanly created. Natural law theories are theories about the relation between the moral natural law and positive human law. Natural law theories vary in aims and content but they share one central idea: that there is a kind of higher (non-human) 'law', based on morality, against which the moral or legal validity of human law can be measured. Natural law theory in its most uncompromising form proclaims Saint Augustine's doctrine that unjust law is not law – *lex injusta non est lex.* We discover, though, that this is not a central tenet of some other natural law theories. Most natural law theorists maintain that the duty to obey the law is ultimately a moral duty.

One of the difficulties about understanding the natural law tradition has much to do with the modern legal mindset. Lawyers think of the law as rules enforceable in a court of law. Hence, if natural law is to make any sense to the

modern legal mind, it must be capable of judicial recognition and enforcement even against positive state law. Natural law thinking, though, represents a much broader philosophical program. It investigates the moral principles that ought to govern political action, law making and adjudication as well as the personal lives of citizens (Finnis 1980, 23). The 'law' that natural law theory speaks of has a much wider meaning than the positive law of the state.

An examination of all the strands of natural law thinking would take up a large volume. Hence, I focus this chapter mainly on the classical tradition of natural law thinking in Western legal philosophy. This has been the most influential and most examined version of natural law theory. The chapter begins with several conceptual clarifications that will be helpful for a systematic presentation of the subject. It is followed by a discussion of some of the key historical contributions to this tradition by Western philosophers, from antiquity to the modern era. The chapter concludes with the discussion of John Finnis' restatement of the classical doctrine.

Law of nature, natural right and natural law

The terms 'law of nature', 'natural right' and 'natural law' signify distinct concepts, though they have important connections. They are sometimes used interchangeably, leading to misunderstandings. Hence it is helpful to begin our discussion by distinguishing these concepts.

Law of nature

A law of nature, in the strictest sense, is a scientific theory about the physical universe and how it functions. The law of gravity states that all objects with mass attract each other. Hence, an object thrown into the air will fall to earth. The second law of thermodynamics postulates the irreversibility of natural phenomena. Heat will flow from a hot object like my stove to a cold object like my saucepan, but the reverse is impossible. These are examples of the most exact type of the laws of nature. They take the form: 'If A, then B'. They are accepted as inflexible laws until refuted by evidence.

Human life is governed by the laws of nature. Human beings, like all other organisms, cannot exist without food, oxygen and other life sustaining conditions. This is because of unchangeable laws of nature. No food, no life. An organism's physical development and functioning are determined by the genome – the genetic instructions encoded in DNA. Some would regard this as a law of nature. Laws of nature also have much to do with human behaviour. The human race, like all other living species, reproduces. Hence, most human individuals reaching adulthood have a natural inclination to sexual procreation. Humans have natural instincts such as desire, love, compassion, hate, jealousy and fear. The human race is also a social species in the sense that by nature humans tend

to live in interacting groups that we call society. We owe a great deal of our knowledge of these aspects of human existence to the biological, psychological, behavioural and social sciences – the so-called 'soft' sciences.

Laws of nature, whether they are of the precise kind (as studied in the physical sciences) or of the tentative kind (as examined in the soft sciences), are not normative laws. They inform us about the world *as it is* but not about how we ought to behave. On the contrary, natural law is about norms of behaviour.

Natural rights

Human existence depends on life sustaining conditions. Therefore, some philosophers argue that a person is endowed with certain natural rights and liberties simply by virtue of being born. These are the rights that are necessary for existence as a human being. The most basic of these are the right of self-ownership and the liberty of self-preservation. Thomas Hobbes wrote in *Leviathan*:

> *Jus Naturale*, is the Liberty each man hath, to use his own power, as will himself, for the preservation of his own Nature; that is to say, of his own Life; and consequently, of doing anything, which in his own Judgment, and Reason, hee shall conceive to be the aptest means thereunto. (1946 (1651), 91)

Similarly, John Locke wrote that every person 'hath by Nature a Power, not only to preserve his Property, that is, his Life, Liberty and Estate, against Injuries and Attempts of other Men; but to judge of and punish the breaches of Law in others' (1960 (1690), 341–2). Locke and Hobbes were speaking of a state of nature, by which they meant the conditions before there was civil government. Since these rights are inherent in all persons they must have existed before the establishment of kings, parliaments and courts – that is, before positive law. In other words, there were human rights before there was human law. If they are not derived from human law they must be conferred by a 'natural law', so the theory goes.

Natural rights are sometimes identified with the law of nature, particularly in the older literature. They are certainly not part of the laws of nature in the scientific sense discussed previously. A law of nature is about what *will* happen. If there is fire there will be heat. A person will die if deprived of food. On the contrary, a natural right is about what *ought or ought not* to happen. A law of nature cannot be violated. (If violated, it ceases to be recognised as a law of nature.) Natural rights can be and frequently are violated. A person has a natural right to live. Yet we know that murder happens and in some places people are put to death by law.

Natural law

The idea of natural law is different from that of natural right, but they are closely related. It is difficult for us to think of a right that is not based in law. If I have a

right to live, it is because others have a duty not to deprive me of my life. This duty is created by a law of some kind. Legal positivists will say that it is unlawful to take another's life because the law of the state forbids it. Natural law theorists will say that the duty not to take human life exists even in the absence of positive law. It exists by virtue of natural law. The relation between natural law and natural right is similar to the relation between positive law and legal right. Whereas a legal right is derived from a positive law a natural right is derived from a principle of natural law. Natural law, though, is not coextensive with natural rights. Some natural law theories have broader aims than the preservation of natural rights. Theological versions of natural law theory, for example, may enthrone religious law over human law.

Some Greek philosophers, who will be mentioned presently, believed that universal moral rules are part of the unchanging law of nature. However, a law of nature in the modern scientific sense is about the way the universe is, whereas natural law is about what ought to be done or not done. There are two important implications of this. First, natural law cannot repeal or change the law of nature. Second, as we noted in the previous chapter, a rule of natural law cannot be logically derived from a law of nature, because an 'ought' does not flow logically from an 'is'. Although the law of nature and natural law are logically distinct, they have important practical connections. The law of nature sets the conditions for life on Earth. These conditions can be destroyed by natural causes or by human action. A person may be killed or maimed by disease or natural disaster. Natural law has nothing to say about such matters except perhaps to demand that persons help victims of disaster. Natural law's concern is with human actions. Natural law asks human actors not to engage in acts that deprive persons of their natural rights.

What, then, is natural law? The common element in all versions of natural law is that it is a kind of universal law that is not humanly created. Beyond this, the notions of natural law differ with respect to its source and the nature of the obligations it creates. The rest of this chapter is an exploration of these aspects.

Two great questions in natural law theory

There are two questions that any credible natural law theory must address:

1. How do we discover the natural law?
2. What effect has natural law on human law?

These two questions cannot be entirely separated. If a rule or principle has no binding effect (legally or morally) it is not a law in a practical sense. Yet the questions address different aspects of natural law theory that are worth keeping in mind as we continue our discussions.

Discovering natural law

At the heart of all natural law theory is the belief that there are universal moral laws that human law may not offend without losing its legal or moral force. A natural law theory cannot leave this question to the subjective moral judgment of each person. If each individual is free to decide which laws they are morally bound to obey (or are morally bound to disobey), there may soon be no laws at all and society may descend to a Hobbesian state of nature. (Imagine what would happen on the roads if each motorist was free to decide which traffic rules to follow and when, or if individuals were free to exempt themselves from the law of homicide according to their own moral judgment.) Hence, the first challenge of a natural law theory is to demonstrate how universally valid moral laws can be discovered.

Philosophers of classical antiquity identified natural law rules with the eternal order of the universe. Theologians trace natural law to divine will. Natural rights and social contract theorists consider the rules of natural law as dictated by the indispensable conditions of human life. Other theorists derive natural law from self-evident values and practical reason. This chapter will consider each of these viewpoints.

The effect of natural law on rulers and subjects

Theories of natural law also differ with respect to their effect on human actors. Some theorists regard natural law as creating moral obligations only. According to these, law makers have moral obligations not to make laws in violation of natural law and individuals may have no moral obligation to obey an immoral law, though they may face legal consequences for disobedience. Other theories accord superior legal force to natural law, such that a human law that violates natural law has neither moral nor legal validity (*lex injusta non est lex*). Figure 5.1 offers a highly simplified snapshot of the main variance among natural law theories.

Fusion of law and morals in early societies

Most people today who live in politically organised states associate law with enactments of law makers of one sort or another. They distinguish between legal rules, which can be enforced with the assistance of the courts, and moral rules, which are sustained by social pressures and the good sense of individuals. This has not always been the case. In fact, the notion that law can be made by a legislator is alien to many traditional societies that lack the paraphernalia of the state. A tribal society that has no law maker is organised according to customary rules of behaviour. It is evident that the people in older societies considered that

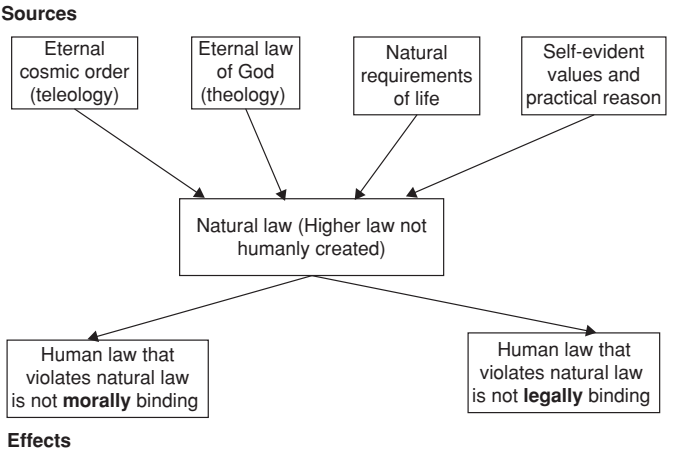

Figure 5.1 Variance of theories concerning sources and effects of natural law

certain customary rules of conduct were binding upon them, although it was impossible say how those rules were established. These customary rules may not be the kind of rules that courts in modern states would enforce. However, from the viewpoint of the people who observed them, they were obligatory in the same way that we in modern society consider legislation to be obligatory.

In the natural history of humankind, deliberate law making is a relatively recent activity. The anthropologist Edmund Leach pointed out that in the context of human history as a whole, law making is unusual (1977, 7). FA Hayek reminded us that humans lived in groups held together by common rules of conduct for something like a million years before they developed reason and the language needed to articulate those rules (1982, vol. 1, 74). It is not easy to separate law and morals when the law takes the form of social custom. Fritz Kern, in his classic work *Kingship and Law in the Middle Ages*, explained the difference between the modern and the medieval conceptions of law:

> According to the modern view, there is only one way in which the ideal law, Antigone's law of the Gods, can lawfully or constitutionally prevail over the positive law, the law of the State: by the enactment of new positive law . . . The medieval conception is in complete contrast. Here the law is sovereign, not the State, the community, the magistracy, the prince, or any other person or body which we should contrast with the law. The State cannot change the law. To do so would be to commit something like matricide . . . The medieval world was filled with theoretical respect for the sanctity of the law – not for the prosaic, dry, flexible, technical, positive law of today, dependent as it is upon the State; but for a law which was identified with the sanctity of the moral law. (1970, 154–5)

It is not a coincidence that in many languages legal right and moral right are expressed by the same word. The English word 'right' signifies what is right in law as well as what is morally right. As P Vinogradoff observed, that is also the case with the Latin *ius*, the German *Recht*, the Italian *diritto*, the Spanish *derecho*

and the Slavonic *pravo* (1927, 1). The Sanskrit word *dharma* has both legal and moral connotations. These words go back to a time when the legal law and the moral law were for the most part one and the same.

The great law codes of the ancient world were attributed to mythical law givers. These legendary kings, heroes and prophets claimed to have received the law from divine sources (Kern 1970, 157). Historians generally agree that ancient 'law givers' – such as Ur-Nammu, Hammurabi, Solon, Lykurgus and the authors of the Roman Twelve Tables – did not intend to invent new law but to declare existing law. The ruler's duty in medieval feudal society was to uphold the law, not to make or remake it (Carlyle & Carlyle 1903–38, vol. 1, 172, 244; Ullman 1966, 150–1). When rulers legislated they purported to purge the law of its corruptions. This was the theory. In practice the ruler made law out of practical necessity, without actually repudiating the myth that the law could not be violated. As Kern stated, if the law of the mythical law giver stood in the way of desirable innovations, it would simply be regarded as perverted by corrupt tradition, and hence capable of improvement (1970, 160). According to this theory, there was no higher natural law by which the validity of the law could be adjudged. The law was the moral law, binding on ruler and subject alike.

The idea of a higher 'natural' law made sense only when law separated into state law and moral law. This bifurcation occurred when rulers gained political power to alter the law at will, and the realisation dawned that not all law was unalterable and unchanging divine law (Rommen 1955, 4). As states grew, law became associated with the will of authorities such as legislatures and courts. Once human authorities were conceded the power to actually make law, as happened in the Greek city states, the need to curb that power was obvious. No appeal could be made to the law itself, as the law was what the law maker willed. Only a higher law was capable of setting aside the human law. The Greeks formulated a theory of natural law in accordance with their understanding of the universal good.

Natural law thinking in Greek philosophy

Greeks believed in the existence of a higher natural law that human law or human actions must not offend. Natural law is just law, and just law is that which is in harmony with the universal laws of nature. Aristotle (384–322 BC) fairly represented the Greek view of natural law when he wrote:

> There are two sorts of political justice, one natural and the other legal. The natural is that which has the same validity everywhere and does not depend upon acceptance; the legal is that which in the first place can take one form or another indifferently, but which, once laid down, is decisive: e.g. that the ransom for a prisoner of war shall be one mina, or that a goat shall be sacrificed and not two sheep . . . (1976 (350 BC), 189)

Thus, man-made laws may differ from state to state but the natural law is the same everywhere (Aristotle 1976, 190). Laws of nations can differ without violating universal natural law. Aristotle compared the different rules of justice established by local legislation or convention (custom) to the standards for measuring commodities such as wine and corn. (Even today, the same corn will be measured in kilograms in most countries but in pounds in the United States.) The ethical goal of individuals and societies is to live according to the general laws of the universe. Hence, the laws of a society, whether customary or enacted by rulers, ought to conform to the higher law. There was a belief that the defiance of an unjust law was morally justified. The dramatist Sophocles (496–406 BC) captured this view in the memorable words of the heroine Antigone, who ignores a royal order and gives her brother an honourable burial. When King Creon exclaims: 'And still you had the gall to break this law?' Antigone replies:

> Of course I did. It wasn't Zeus, not in the least,
> Who made this proclamation – not to me.
> Nor did that Justice, dwelling with the gods
> Beneath the earth, ordain such laws for men.
> Nor did I think your edict had such force
> That you, a mere mortal, could override the gods,
> The great unwritten, unshakeable traditions.
> They are alive, not just today or yesterday:
> They live forever, from the first time,
> And no one knows when they first saw the light.
> (Sophocles 1984 (c. 441 BC), 81–2)

Unquestioned belief in higher law was an almost universal feature of ancient societies, and its hold on the Greek communities of the classical age was not surprising. The interesting jurisprudential question is: why did great philosophers of this period embrace this view? The explanation is found in the philosophical outlook known as teleology. It is not easy to understand the Greek theory of natural law without knowing the central idea of teleology.

Teleology

Philosophers look at nature in different ways. According to one view nature has no design, plan or purpose. It takes its own uncharted course. It is true that nature obeys certain universal laws, but these laws do not exist for a purpose. Rain does not fall so that farmers can grow crops. Farmers learned to grow crops where there was rainfall. The leopard does not have spots so that it can be a successful predator. The leopard is a successful predator because of the advantage of having spots. I do not have eyes so that I can see things. I see things because I have eyes. This view is known as metaphysical naturalism, mechanism or accidentalism. Charles Darwin's theory of evolution by random variation

and selective retention (discussed in Chapter 10) epitomises the naturalistic view.

In sharp contrast, the teleological view holds that everything happens for a purpose. Nature is not random – things do not happen by chance but according to an overall design. Saint Thomas Aquinas wrote of teleology: 'Every agent acts for an end, otherwise one thing would not follow more than another from the action of the agent, unless it were by chance' (*Summa theologica* I, Q 44, art. 4; Aquinas 1947, 232). This means that every object and life form, including human beings, has a purpose in existing. How does something have a purpose? There cannot be a purpose without someone or something determining the purpose. Therefore teleology inevitably leads to the conclusion that the universe and everything within it functions according to a divine or supernatural plan. The contrast between the teleological and naturalistic worldviews is often illustrated by the opposing views of Aristotle and Lucretius about the organs of the human body:

- Aristotle in *De partibus animalium* (*On the parts of animals*): 'Nature makes the organs to suit the work they have to do, not the work to suit the organ' (IV, xii, 694b; 1972 (350 BC), 413)
- Lucretius in *De rerum natura* (*On the nature of natural things*): 'Since nothing at all was born in the body that we might be able to use it, but what is born creates its own use' (IV, 833; 1947 (50 BC), 1, 405).

According to teleology, there are two kinds of purpose at work in every object – external and internal. Externally, every object serves the purpose of another object. Soil and water allow grass to grow, grass feeds cattle and cattle provide us with beef to eat. Internally, every object tends towards the perfection of its own nature. A tree will grow roots, branches and leaves. A lion will learn to roar, be brave, hunt and do what lions do. A stone thrown into the air will fall to earth. Human affairs, according to teleology, are no different. Parents will procreate, love and nurture their offspring. Citizens will discharge their civic responsibilities. Traders will trade fairly. Rulers will rule justly. We know that reality is sometimes different. Some plants do not grow, a stone projected into outer space may not fall to earth, a lion may turn out to be timid, a parent may neglect children, a trader may cheat and a ruler may become a tyrant. Some of these failings can be explained by external causes (e.g. without rain a plant may not grow to a tree). Human beings, though, are capable of intentionally violating the order of nature. These universal laws are violated, not only by common criminals but also by great and noble people in their excessive pursuit of the good. Such violations are called *hubris*. When violations occur, some kind of Olympian law punishes *hubris* and restores the eternal order. A famous example of the punishment of *hubris* from Greek mythology comes from the Persian Wars (499–448 BC). The Persian king Xerxes sought to subjugate all of Greece. His forces had to cross the Hellespont, the narrow channel of sea that separates Asia Minor from Europe, known today as the Dardanelles. He ordered a bridge to be built across the Hellespont by linking a large number of ships, thus defying

nature. Not long after, his naval fleet was partly destroyed by storms and then crushed in the battle at Salamis.

The best known teleological philosophers of Athens were Socrates, Plato and Aristotle. Much of what the world knows of Socrates' philosophy has been gathered from Plato's reports of Socrates' dialogues with his followers. Teleology took on concrete shape in Plato's theory of ideal forms. Everything in this world has an ideal form that exists on a heavenly plane. What we perceive by our senses in this world are imperfect copies of the ideal forms. Physical things exist only to the extent that they imitate the pure idea of the thing. The perfect circle exists as an *idea*. The circle that I draw is an imitation of the idea that can never be perfectly achieved, even with the most precise instrument. The more the figure deviates from the perfect form the less it is a circle, and at some point it ceases to be a circle. Likewise there is the idea of a perfect straight line, a perfect square, a perfect elephant, a perfect citizen, a perfect ruler, a perfect law, perfect justice, and so forth. Perfection of one's nature is the highest good.

Teleologists thought that it is the natural tendency of human beings to live according to the order of nature. They believed that it is only by living in harmony with universal law that a person can find the state of true happiness or wellbeing known as *eudemonia*.

Deciding what is natural: the Sophist challenge

The teleological worldview, even if true, offers only a partial solution to the first problem of natural law theory: namely, how do we determine the universal laws by which a person ought to live and the state ought to be organised? It is not a sufficient answer to life's problems to say that every thing and every being has a tendency to move towards the perfection of its nature. Individuals face moral dilemmas about what is right and wrong. Society is ever divided about questions of what is just. Teleology is unhelpful here. What is considered natural in one place or age may be considered unnatural in another place and another time. Discrimination according gender, skin colour, language, religion, caste, class or sexual preference has been regarded as natural in some societies at different times. Most modern states outlaw such discrimination as being unnatural. Greek society entrenched many social divisions that are considered unnatural today. The greatest teleological philosophers, Plato (c. 427–348 BC) and Aristotle, regarded slavery as part of the natural order and slaves as property, only a notch above livestock. Plato said of slaves: 'the human animal is a difficult possession; for it is stiff-necked, and evidently not willing at all to be or become easily managed in terms of the inevitable distinction in deed between slave, free man, and master' (1980 (360 BC), 7). Aristotle considered slaves to be an animate article of property (1905 (350 BC), 9–10). In the civilised world today, slavery is condemned as inhuman and contrary to nature (see, for example, Article 4 of the *Universal Declaration of Human Rights*).

Teleological reasoning had its contemporary critics. Epicurus (writing two and a half millennia before Bentham) argued that the principle of utility was the only rational basis of moral judgment. The most serious challenge to the teleological philosophers was posed in the second half of the fifth century BC by the Sophists.[1] The Sophists were itinerant teachers who, unlike the philosophers, made healthy profits out of teaching. They became famous for training aspiring politicians in the art of rhetoric and for propagating controversial views. Many of them were foreigners with no particular loyalty to Greek institutions. Teleology promoted the belief that the laws of a state generally reflected the order of nature. Sophists would not have a bar of this. Sophist thinking was based not on teleology but on untempered rationalism. Sophists regarded the hierarchical structure of Greek society as unnatural and Greek laws as artificial constructs that served the interests of the powerful, contrary to natural law. Hippias pre-empted Rousseau, Marx, Locke, Paine and the United Nations by 2500 years in preaching the oneness of all humanity. Alcidamus declared: 'God made all men free; nature has made no man a slave' (Rommen 1955, 9). What was needed, the Sophists argued, was not piecemeal law reform but radical overhaul of the system. All of this was subversive of the stability, order and ethical foundation of Athenian society.

The philosophers had two responses to these attacks, one simple and the other sophisticated. The simple answer was that the natural order was embodied in the laws of the 'polis' (the city state), as they were god given. Heraclitus of Ephesus, writing before Socrates, claimed that 'all human laws are fed by one divine law' and 'the people ought to fight in defence of the law as they do of their city walls' (Fragment 44; Bakewell 1907, 34, 6). Plato began his book *The Laws* by putting into the mouths of three strangers the view that the laws of their cities were god given (1980 (360 BC), 3). The best person in a city is 'one who throughout his life served the laws more nobly than any other human being' (Plato 1980, 115). Rommen observed that Socrates, Plato and Aristotle had a 'strong belief in the excellence of the existing laws of the polis as well as in the conformity of such laws to the natural law' (1955, 19). Socrates' reverence for the laws of the polis was so great that he willingly carried out his own execution (by drinking hemlock) after a jury found him guilty of the charge of criticising Athenian democracy. What these philosophers meant by the laws of the polis were not the politically expedient laws of the rulers. Athens at the time of Socrates and Plato was governed successively by corrupt oligarchies and democracies. Plato lamented in his Seventh Letter that 'law and morality were deteriorating at an alarming rate' (1980, 16). Aristotle, in his *Politics*, was critical of contemporary democracies and oligarchies. The laws that the philosophers identified with natural law were the fundamental and enduring laws of the polis known as *nomoi* (singular: *nomos*). Nevertheless,

1 The first of this group was reputed to be Protagoras. Others included Gorgias, Prodicus, Hippias, Thrasymachus, Lycophron, Callicles, Antiphon and Cratylus.

even these laws needed a more sophisticated defence against the Sophist charge that they entrenched power and privilege and denied human rights to different classes. The sophisticated argument was that the natural law is discoverable by reason.

Role of wisdom

Socrates, Plato and Aristotle identified moral rectitude with justice. The moral man was the just man and the moral state was the just state. The key question, then, is what makes a just person and a just state? According to the teleological worldview, every thing and every being has a position and a purpose in the overall scheme of the universe. Hence, a just person is one who lives according to their position. Socrates put it bluntly when he said that 'justice consists of doing the things that belong to oneself and not interfering with other people' (Plato (1974, 204).[2] The question remains: how do we figure out what is just conduct? The Greeks did not have a single God or a Holy Book. They had a pantheon of gods and most believed in various oracles, of which the Oracle at Delphi is the most famous. Hence, the philosophers turned to the examination of the human mind to discover justice.

Plato

Plato argued that the mind is made up of three elements. The first is *reason*. which is the capacity to calculate and decide. This is the reflective element. The second is *appetite*. It is a form of irrational and instinctive impulse. Plato nominated thirst, hunger and sexual arousal as primary examples of this mental aspect (1980, 215). The third element is *spirit*. Indignation, stubbornness, blind courage and recklessness are examples of spirit. It is different from appetite because it is an attitude and not an instinct. It is different from reason because it is not logical and calculating.

The three elements are often in conflict. Imagine that your bakery sold you a loaf of bread that you later discover is underweight. You are naturally annoyed. The next day is a public holiday and all food shops are closed except this bakery. Appetite makes you hungry and reason tells you to go to the cheating baker but your indignation tells you not to go there again. This is the kind of conflict that has to be resolved within the mind. Plato believed that spirit, though irrational, is usually on the side of the right: it is the natural ally of reason (1980, 217). A just person, according to Plato, is one who will not allow these three elements to trespass on each other's functions but bundles them into a 'disciplined and harmonious whole. Such a person is ready for action of any kind . . . whether

2 Plato's method was to explain his ideas through a series of dialogues or debates between his teacher and friend, the philosopher Socrates (469–399 BC), and his critics and followers. The real Socrates left no writings and his thoughts and words are known only as reported by his students and followers, of whom the most notable by far was Plato. The words that Plato puts into the mouth of Socrates are generally treated as Plato's own. Hence the Socrates of Plato's writing is sometimes called the Platonic Socrates.

it is political or private' (1980, 221). The knowledge that allows a person to harmonise these elements is wisdom, hence wisdom is the key to just conduct (Plato 1980, 221).

What makes a just state? The corrupt and violent politics of his time convinced Plato that the existing constitutions of the Greek city states were unreformable. In his Seventh Letter he wrote:

> I was forced, in fact, to the belief that the only hope of finding justice for society or for the individual lay in true philosophy, and that mankind will have no respite from trouble until either real philosophers gain political power or politicians become by some miracle true philosophers'. (1980, 16)

In keeping with the teleological outlook, Plato regarded the just state as one that ensures that each class of persons 'does its own job and minds its own business' (1980, 206). Only true philosophers acting as social guardians could achieve this. In *The Republic*, Plato set out the details of what he thought would be the ideal (and therefore just) state. What is true of the individual mind, Plato thought, is true also of the state. The state has to balance the elements of reason, appetite and spirit. These elements are represented by three classes: reason by the guardians (philosopher-rulers); appetite by the entrepreneurs; and spirit by the auxiliaries (the military class). The guardians are those who have the wisdom to harmonise these elements. Plato's model state was the first blueprint for an authoritarian communist state. In Plato's republic, there is no marriage and no families. Children are raised and educated by the state and assigned to the different classes according to ability. Education, like everything else, is determined by the state.

Unfortunately Plato missed three central problems of political theory. First, assuming that we need social guardians, how do we identify them? Second, how do we make sure that wise men and women who become rulers govern wisely? Third, if the guardians become corrupt, how may they be replaced? The fact that the rulers are philosophers was, for Plato, a sufficient safeguard against misrule and injustice. However, these guardians are not gods or angels, but fallible and potentially corruptible human beings like the rest of us. History endlessly exposes the fallacy of entrusting absolute power even to the wisest and the best. It is for this reason that the Scottish philosopher David Hume wrote that 'in contriving any system of government, and fixing the several checks and controuls of the constitution, everyman ought to be supposed a *knave*, and to have no other end, in all his actions, than private interest' (1985 (1742), 42).

In any case, Plato's justice is not what people today associate with natural law. It subordinates the rights of individuals to the stability of a state organised according to an inflexible class division. As such, it is hard not to accept Karl Popper's damning conclusion that Platonic justice served 'the cause of the totalitarian class rule of a naturally superior master race' (1993, 119).

Aristotle

Aristotle is the most influential philosopher of the classical age. His discussion of the 'intellectual virtues' established the framework for natural law reasoning, which persists to this day. Aristotle rejected Plato's theory of ideal forms and his version of the ideal state. He believed in the eternal natural order of the universe, and that justice conforms to the laws of this order. Like Plato, he believed the polis to be part of this natural order and that a person could live the good life only by participating in the polis. Like Plato, he believed that the state takes precedence over the individual. However, unlike Plato, Aristotle did not believe that the best form of government is the rule of philosopher-guardians. He acknowledged the advantages of a system where political power is shared among the monarchical, aristocratic and popular elements of society. Importantly, truth for Aristotle was not the preserve of any class or sect. Truth is there to be discovered by those who have the intellectual virtues.

Aristotle noted that two kinds of knowledge are involved in the search for principles of right conduct. The first is knowledge of things that are invariable. This is knowledge about the universe as it is (Aristotle 1976, 204). There is no choice in these matters. Something is or something isn't. (Earth orbits the Sun or it doesn't; fire causes heat or it doesn't.) The second type of knowledge concerns matters that are variable. Societies have different laws and moral codes that are shaped by cultural, geographical and historical factors. Some societies allow the death penalty, abortion, euthanasia, homosexual marriage and polygamy while some others don't. Aristotle called this kind of knowledge *calculative*, in the sense that it involves the weighing up of choices for action. This is the origin of the distinction between pure reason and practical reason that Aquinas, Kant and later Finnis adopted.

Aristotle identified five modes of thinking that help in the discovery of truth, whether it is about the physical world or about right conduct. First, there is scientific inquiry (*episteme*). Science reveals the world as it is. Science can be demonstrated and it can be taught. The law of gravity can be explained and demonstrated by simply throwing something in the air and taking some measurements. More complicated experiments will demonstrate other natural phenomena. Second, there is intuition (*nous*). Scientific inquiry can only proceed on certain first principles and assumptions that must be taken as self-evident. Something cannot exist and not exist at the same time. Time is irreversible. Two plus two is four. Deductions from factual premises must be taken to be true. (If all humans are mortal, then Socrates the human is mortal.) Apart from logic, there are assumptions that we need to make to answer any question of fact. For example, we must trust the evidence of our senses until it is disproved. (Even laboratory experiments depend on sensory observations.) This kind of knowledge cannot be demonstrated but must be intuitively grasped. Third, there is art or technical skill (*techne*). This is about the right way to craft something. A bridge cannot be built in any way we like – or a ship, or a telescope. A violinist cannot

play a tune simply by reading the notes in a music sheet. The creator must have, in addition to scientific knowledge, certain artistic or technical skills that come from experience and innate ability. Fourth, there is prudence or practical wisdom (*phronesis*). Prudence is not about finding facts or producing things but about what is to be done or not done (Aristotle 1976, 210). It includes farsightedness and regard to consequences of actions. It is a quality required for the proper management of a household or a state (Aristotle 1976, 209.) Fifth, there is wisdom (*sophia*). Whereas prudence is concerned with practical (variable) matters, wisdom is about universal and eternal things. Wisdom combines intuitive understanding of the indemonstrable first principles and scientific knowledge. It is 'knowledge of what is by nature most precious' (Aristotle 1976, 212). A prudent person may lack wisdom and one who is wise may not be prudent.

The problem is that the wisest of persons can disagree on important questions. As wise as he was, Aristotle considered as *just* anything that tended to conserve the happiness of a political association, including laws that discriminated among the different classes (1976, 173). He even justified slavery as part of *universal justice* as revealed by wisdom. The wise men and women of today would have none of this. There was also a notion of *particular justice* in Aristotle's scheme. Particular justice had two forms: distributive and rectificatory. Distributive justice was distribution according to merit. Distributive justice, for Aristotle, was not what the socialists of our age demand. Merit might mean wealth in an oligarchy, excellence in an autocracy and free birth in a democracy (Aristotle 1976, 178). Thus, even in a democracy those born to slavery had the rough end of distributive justice. Distributive justice put each person in their assigned place in society. Aristotle's rectificatory justice was more like the notion of justice administered by modern courts. It was concerned with correcting harm caused by wrongs such as tort, crime and breach of contract through compensation, equity and, in the case of crime, by punishment (Aristotle 1976, 179). Rectificatory justice did not allow a slave or woman to find emancipation. It only ensured treatment that befitted their inferior position. Rectificatory justice reinforced distributive justice. (See further discussion in Chapter 12.)

Reception of natural law in Rome

After the passing of the three giants of teleological philosophy – Socrates, Plato and Aristotle – the message of natural law was sustained by the Stoics, from whom it was received by Roman jurists and orators. Stoics were a school of philosophy founded by Zeno of Citium (334–262 BC). The school's name derives from the *Stoa Poikile*, the painted colonnade at the Agora of Athens where Zeno taught his students. Zeno preached that reason is natural to the human mind and that reason, unless corrupted by passion, accords with the natural order of the world. Passion gets in the way of reason, hence to discover the natural law through reason persons must subdue their passions and become sage. In some

respects the Stoics were shockingly rationalistic. Chrysippus saw no reason to abstain from incest or cannibalism (Long & Sedley 1987, 430–1). He did not propose killing people for food, but thought it irrational to waste body parts of dead or amputated persons if they were edible. Only a few fragments survive of Zeno's *Republic*. It appears, though, that he approved Chrysippus' views on incest and cannibalism, saw no point in building temples and court houses, favoured communal wives and wished to get rid of the Athenian educational curriculum (Long & Sedley 1987, 430, 433).

Apart from their more outrageous proposals, the Stoics had a profoundly positive bearing on the natural law tradition. Stoicism rescued natural law from the stifling grip of Platonic thinking that deified the polis, entrenched privilege and consigned slaves, women and foreigners to sub-human status. The polis by this time was disappearing – swallowed up by Alexander's empire in the east and by the Roman republic in the west. The Stoics preached that class divisions were not natural but man made. In a decadent age when slavery increased exponentially and gladiators were forced into mortal combat with each other or with wild beasts for popular entertainment, Stoics argued for equality of the human race. Epictetus called slavery 'an abysmal crime' and Seneca said that citizens and slaves were blood relations equal under natural law (Rommen 1955, 24–5). Stoicism entered Roman jurisprudence initially through the writings of the great Roman orator, lawyer and senator, Marcus Tullius Cicero (106–43 BC). Its influence grew under Emperor Marcus Aurelius (161–180), who was himself a Stoic scholar and a sagely figure. We owe to Cicero the most precise and unambiguous statement of the Stoic natural law idea. In *On the Republic* he wrote:

> True law is right reason, in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoing by its prohibitions. And it does not lay its commands and prohibitions on good men in vain, though neither have any effect on the wicked. It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely. We cannot be freed from its obligations by senate or people, and we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different law now and in the future, but one eternal and unchangeable law will be valid for all nations and all times, and there will be one master and ruler, that is God, over us all, for he is the author of this law, its promulgator, and its enforcing judge. Whosoever is disobedient is fleeing from himself and denying his human nature, and by reason of this very fact he will suffer the worst penalties, even if he escapes what is commonly called punishment. (Cicero 1928 (54–51 BC), 21)

In this remarkable passage, Cicero captured all the elements of the Stoic natural law theory: (1) Natural law reflects the cosmic order of nature and is not man made. (2) We do not need wise men to tell us about the natural law, for reason reveals its principles. (3) Natural law is moral law; hence it cannot be repealed or altered by legislation. (4) Natural law is morally binding on rulers and subjects