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ABSTRACT OF THESIS

This thesis is a fundamental re-appraisal of the critique of John Austin by H.L.A. Hart. Because Hart never adequately reconstructs the question that Austin was dealing with and because Hart fails to distinguish between description and definition, he fails to see the strength of Austin's theory.

In the development of his own view Hart's basic concepts are used with a shifting and variable content and he reintroduces many of the confusions which Austin sought to clear away.

Hart's position encourages those who would say that the judge's function is to be amoral, apolitical and to strictly apply the law, even though this is theoretically unsound and historically inexact.

I look at cases dealing with matrimonial violence and taxation to show the creative capacity which the judges have in relation to both common law and statutory rules, and then develop a line of argument to show that judges cannot avoid the two stage process of constructing the rule and then applying it, both of which, contrary to Hart's claims, necessarily involve complex judgments.

Hart's view of an acceptable natural law position is also confused, and fails to appreciate that Austin only rejected one variant of natural law (the one which Hart seeks to re-establish). When Austin's position is correctly understood it is found to be perfectly compatible with that of Aquinas.

In the final chapter, I develop a view of rules which derives much support from the work of Michael Polanyi, and which tends to support the conclusions of A.W.B. Simpson, to the effect that there can not be authoritative rules in the common law, and that whilst all are susceptible to change by the judiciary, we cannot tell which will be next.
Contents

Acknowledgements

Introduction 1

Chapter One The purpose and method of Austin's legal theory 9

Chapter Two Hart's critique of Austin 39

Chapter Three A critique of Hart's theory of law 80

Chapter Four Hart's theory and its consequences 128

Chapter Five Rules - their application and development 174

Chapter Six Epistemology - the common ground 217

Appendix 1 Notes to Introduction and chapters 1 - 6 258

Appendix 2 Bibliography 296

DECLARATION

In accordance with Regulation 2.4.15. I hereby declare that this thesis has been composed by me, and that it is my own work.

Robert N. Moles.
ACKNOWLEDGEMENTS.

I am deeply grateful to the following, without the assistance of whom, this thesis would not have been completed. To Colin Campbell who first helped me to appreciate the value of John Austin's work, and the need for an 'Austinian' response to The Concept of Law. To Jim Feeney who introduced me to the work of Michael Polanyi and R.G. Collingwood and to Peter Blyth for encouraging me to read the work of St. Thomas Aquinas in a new light. To Neil MacCormick, my supervisor, for having had the foresight to obtain the sixty volumes of the Summa Theologiae for the law library in the year before I came to Edinburgh, and for his encouragement and support when there seemed little enough reason to justify it. To Richard Kinsey who first helped me to see how the issues on which I was working could be brought together, and to David Nelken for his helpful comments and discussions on drafts. To Rob Proctor, whose assistance with word processing facilities has greatly speeded up the final stages, and to Marion Levitt for helping me overcome certain infelicities of style and grammar. Above all to Dolly McCann, whose unselfish devotion to others can be acknowledged, but not explained.
INTRODUCTION.

This thesis is intended to be a work of synthesis in at least two ways. Within the sphere of legal theory, I shall argue that there is more common ground between the theories of Austin and Hart than Hart himself would recognise, and that the theories of Austin and Aquinas are better seen as complementary rather than in opposition to each other. I shall also argue that the various disciplines of law, morals, politics, science, theology etc. must be united at two levels. At the theoretical level they must attain unity in a common view of epistemology, if they are to remain part of a rational and coherent intellectual structure - and at the level of human action, they are necessarily united.(1)

Traditionally in jurisprudence, questions have been asked such as, 'Are you a natural lawyer or a positivist?' 'Do you agree with the legal theories of Aquinas, Austin or Hart?' The problem with such questions is their suggestion that choices have to be made between mutually exclusive packages, rather than as alternative, although compatible, responses to similar problematics. In part, this thesis will be concerned to demonstrate that the dichotomies underlying such points of view are mistaken and misleading. It is important to realise that questions are asked on the basis of what we already know, or think we know, and that to attempt to answer a question which is fundamentally misguided is to squander much of the effort which is put into the attempt to answer it (2). To ensure that we ask the right questions, it is often beneficial to reflect upon the 'taken for granted' knowledge upon which our questions are based, and to consider whether it is as well founded as we assume it to be. For example, H.J. Eysenck in his book Crime and Personality is concerned with the question "Why is it that criminal activity, far from being universal, is restricted to a small proportion
of the population, probably less than ten per cent?" (3) Obviously a psychological theory constructed on the basis that society is comprised of 10% who are criminals and 90% who do not commit crimes of any kind would be very different from the theory which would result from the view that:

"The evasion of taxes, on a scale undreamed of in the years before the Second World War, is now one of the most alarming features of the financial life of this country. The disease has spread to all aspects of taxation... and to all ranks of society from the most exalted names in the City to the local corner shop. (4)

In legal theory, the choices put forward often reflect an inadequate understanding of the respective positions of the theorists they refer to. This has the effect of prejudicing the outcome of the enquiry in the same way as the police officers who take a view of the guilt or innocence of suspects prior to their collection of the evidence. Their expectations will undoubtedly have an effect upon the findings; evidence supporting the view formed will be picked up more readily and evidence supporting the contrary view may well be overlooked. If questions such as the above are put, it is possible that the implicit assumptions regarding the incompatibility between these theorists will be accepted, and this will have a most detrimental effect upon the reading of them.

This thesis will avoid much of the cut and thrust of current jurisprudential debate and will attempt to stand back from it in order to show that the parameters, within which that debate is conducted, need re-examination. Fashion and convention may prevail as much in the realm of academic ideas as elsewhere, and when the prevailing wind blows against one school of thought and in favour of another, it is the easiest thing in the world for those learning to walk to go with it rather than against it. Before long the wind becomes such an accepted part of the environment, that one hardly notices that it is blowing at all, and if anything, it rather helps one to jog along. It is like the
boy who preferred the clock without the pendulum because, although it no longer told the time, it went more easily than before, and at a more exhilarating pace (5).

The impression is sometimes given by people like Hart, that progress could be made more swiftly, if only we could cut adrift much of the intellectual baggage which has been holding us back and clouding our vision. What we need to do is to make a clean sweep and a fresh start, and the invigorating atmosphere generated by 'thinking for ourselves' will provide us with the conditions we need for getting it right.

There are of course many problems associated with this view. It may well be true that we can travel onwards more quickly if we do not have to consider what has gone before, but to assume, as this view does, that our thoughts ab-initio will be more profound than the accumulated wisdom of the ages, seems unduly optimistic (and as Macaulay's dictum makes clear, modernism is often nothing more than mere provincialism transferred from map to calendar (6)). Of course, if others find this method convincing, then they will have as little reason to develop our ideas, as we had to develop those that went before us i.e. we merely become part of their intellectual baggage. The result would then be a complete discontinuity of ideas. The more plausible outcome, of course, is that the ideas which seem obvious to us are merely those which others who went before us struggled long and hard to establish. Those creations which we put forward as our own gems are merely the unacknowledged creations of others, which we only begin to realise when we read their work. In asking questions then about the prevailing orthodoxy in jurisprudence I will argue that the development of ideas does not proceed more swiftly by dumping all that has gone before - without serious loss. It is my intention in this thesis to encourage the recovery of items of value from the dump, and to argue that we should recover our bearings before pressing further current lines of enquiry.
The most influential 'new start' in modern legal theory is that of Hart. The main statement of his position with regard to legal theory is contained in *The Concept of Law* (7) and the influence of this work both within and without jurisprudential circles is evidenced by comments such as:

*The Concept of Law* can keep company even with the massively erudite and acutely perceptive works of the great Austrian jurist Hans Kelsen, among the great works of twentieth century jurisprudence. It is a work of international eminence... (8).

It should be noted that this is not just an assessment of the value of *The Concept* at the time that it was written, but is a present statement of its worth. J.G. Murphy in his book on Kant, not being so stinting in his praise of it, says that "[t]his is probably the best book in legal philosophy ever written." (9) Be that as it may, the central theme of this thesis is to argue that there is a fundamental weakness in the account put forward by Hart, in so far as the methodology he employs is extremely confusing and this results from his failure to work out or adopt an adequate epistemology. This leads Hart to a grossly distorted perception of the enterprise in which Austin was engaged, and to put forward a theory of his own which has a peculiarly 'ad-hoc' quality about it. After looking in some detail at his critique of Austin and the way in which he develops his own theory, I shall then develop the picture by following up Hart's approach in different ways.

I will show that without proper attention to the epistemological status of his theory, discussions of Hart's position such as those put forward by Neil MacCormick, are of relatively little help to us. They may well prolong the debate, but they too are manifestations of the same confusions and appear more concerned to enlarge the building than to illuminate the entrance (10).

I will show that Hart's view of law is something of a trap for unwary legal commentators, in that by accepting uncritically such a view
of law as Hart proposes they will be led to adopt positions which are internally inconsistent and which have no more than a superficial claim to plausibility. In this section I will look at the work of J.A.G. Griffith in The Politics of The Judiciary and of P. Robson, P. Watchman and others in Justice Lord Denning and The Constitution (11).

Finally, I will show that careful attention to the cases, especially those to which Hart's theory should be most applicable, fails to provide him with adequate support. Here I will look at the trilogy of cases on the Domestic Violence and Matrimonial Proceedings Act 1967 - R v B, Cantliff v Jenkins and Davis v Johnson, all decided within a month or so of each other (12). It is here, in looking at the cases, that we can see most clearly why it is that Hart's account seems to be lacking in substance; and it is from here that I begin to build up the necessary epistemological basis for an adequate view of law. It will be seen, in the light of the earlier discussion, that Austin was in fact on the right track in terms of the methodology he employed, and that Hart has attempted to replace it with something greatly inferior. When we see the proper nature of Austin's enterprise, we can also appreciate that it is not at odds with the methodology employed by Aquinas.

I propose then to examine the major aspects of Hart's theory - the reasons for his departure from his influential predecessor, Austin, and those aspects of his theory which are regarded as Hart's own important contribution. I look to attempts to apply Hart's views in a practical way, and to see if they conform to the cases themselves. I shall then attempt to make explicit an account of epistemology, which Hart lacks, and from the standpoint of which we can see that there is no incompatibility between the theories of Austin and Hart, or indeed between those of Austin and Aquinas. However, the methodology derived from this epistemological position, as well as providing the basis for our re-assessment of Austin, Hart and Aquinas, will serve to show
another way in which this thesis is a work of synthesis.

One of the underlying concerns of this thesis is that legal theory has developed as another 'specialisation'. This may of course be useful when we need to focus on a particularly problematic area of understanding, but it only makes sense as an intermediary and not a final stage of thinking. There must be an attempt to link up those findings with other areas of knowledge. Otherwise, continued specialisation without synthesis means that we get to know more and more about less and less, and attempt to solve problems which are increasingly irrelevant to anyone other than a small coterie of individuals treading the same winding and increasingly narrowing path, which may, for all we know, be going round and round in circles. Such an environment facilitates the manufacture of 'artificial' problems, whose solutions are taken as a sign of progress. Morris Kline expresses well the effect that such an approach has within his own field of mathematics:

...specialisation has become so widespread and the problems so narrow that what was once incorrectly said of the theory of relativity, namely, that only a dozen men in the world understood it, does apply to most specialities.

The price of specialisation is sterility. It may well call for virtuosity but rarely does it offer significance. (13)

He speaks later of the way in which mathematicians and physical scientists go their separate ways, and that because of the intense specialisation even mathematicians do not understand other mathematicians (14). A.J. Ayer put it well when he said that "... if science may be said to be blind without philosophy, it is true also that philosophy is virtually empty without science." (15) Specialisation without synthesis is like the acquisition of knowledge by a committee - the information acquired by each individual is of no value without the members reporting back and exchanging their
information with the other members of that committee. Imagine six blind people standing around an elephant, each one holding a different part. Four of them have a leg each, one the trunk and one the tail. Unless they are able to pool the information which they have, and to know where they stand in relation to each other, the six would never be able to build up any idea of what an elephant is like, or in fact to realise that they were dealing with the same object (16). Yet it is important to remember that whilst the pooling of the information will enable each person to make greater sense of his experience than he could if he were alone, he is never able to experience more than a part of that which he understands. If he moves from the trunk to the tail he has to let go of the trunk. He cannot therefore experience the creature as a whole and his intellectual acceptance of it has to be based on trust. So with legal theory, whilst it obviously has a focus, we need to know in what ways its object is different from or similar to the objects of moral, religious, political and scientific thought and how we might know this.

The view taken in this thesis is that the aspect which Hart fails to refer to - that of epistemology - is crucial to an understanding of the relationships between the various disciplines, and in fact provides their common ground. I will show the ways in which the various modes of discourse are related and mutually supportive, but that if one fails to have regard to the epistemological basis of this relationship, then to move from one mode of discourse to another can become dysfunctional and lead to interminable confusion. This was appreciated by Austin and he set out to provide us with the necessary tools to enable us to make the appropriate discriminations. Hart, because he failed to understand what Austin was doing, re-introduced the very confusions which Austin sought to clear away. Subsequently, it has become necessary for Hart to make various adjustments to his position which have in effect brought him back into line with the Austinian model which he claimed to have
rejected.
CHAPTER ONE THE PURPOSE AND METHOD OF AUSTIN'S LEGAL THEORY.

The main concern of the earlier part of this thesis will be a critical appraisal of the ideas put forward by Hart. However, in order that we may develop a properly rounded view of Hart's ideas, it is probably best to start where he himself started. Hart begins the development of his own position by considering Austin's theory, which he considers to be inadequate, and hopes that if only we can see why it is inadequate, the way forward will become clearer.

That the critique of Austin is regarded as important by Hart cannot be doubted when it is seen that three of the ten chapters in The Concept are given over to a critique of that position. I do not propose to set out Hart's critique of Austin, to be followed by my own critical comments. Rather, I will first set forth what I consider to be Austin's purpose and method of proceeding - and then evaluate some of the main points of Hart's criticism in the light of this.

The Materials: Before I begin my discussion of what I take to be Austin's purpose, it is desirable to make a few preliminary observations regarding the nature of the materials which we have to work from. The only book by Austin to be published in his lifetime was The Province of Jurisprudence Determined (1), which was published in 1832. We do know that subsequent to its publication Austin was much prevailed upon to publish a further edition, but that he refused to do so. There appear to have been two reasons for this. The first was that he was engaged on a far more ambitious project which would supersede this work (2). The second was well expressed by his wife Sarah Austin when she said that in 1844 another earnest appeal was made to him to publish a second edition.
of The Province:

To give a mere reprint of the book would have been easy enough, and it is what any one else so encouraged would probably have done; but Mr Austin had discovered defects in it which had escaped the criticism of others; and with that fastidious taste and scrupulous conscience which it was impossible to satisfy, he refused to re-publish what appeared to him imperfections. Lectures (Preface) p15.

By comparison, it is worth noting that since The Concept was first published in 1961, it has been reprinted on at least seven occasions without revision. However, it is clear from his subsequent publications that Hart has reconsidered several of the points put forward in The Concept (3). The view taken here is that if such adjustments were actually made to The Concept, the surgery required would be so radical as to kill the patient.

The other important source of our knowledge of Austin's thought is derived from the various lectures which he gave. The first series of lectures was delivered at the University of London between 1828 and 1832 after he had accepted the Chair in Jurisprudence, and the second series was delivered at the Inner Temple in 1834. These lectures were not of course published in printed form during the author's lifetime, and only managed to reach a wider audience in this manner as a result of much dedicated work by Sarah Austin. The two series of lectures were subsequently put together and published in two volumes. They comprised the lectures which had been previously published as The Province, (subject to a few alterations which were made in accordance with later memoranda of the author) together with those of his lectures at the University of London and the Inner Temple as could be reconstructed from the available manuscripts. Some indications of the author's thoughts as to how these two series of lectures could be collated survived him and these were followed by Sarah Austin when she originally prepared the lectures for publication.

Further changes were made by the subsequent editor, Robert Campbell,
when preparing the fifth edition. J.S. Mill had attended the original lectures and his notes of these were made available to Sarah Austin for the purpose of a new edition which she did not live to complete. In preparing the fifth edition, Campbell made use of these notes to help with the arrangement, and to make additions to the lectures following those which comprise *The Province*.

It is important in any assessment or understanding of Austin's work to bear in mind Sarah Austin's comments regarding the materials upon which she had to work. She said in her Preface to the Lectures:

"I have also to explain why I have determined to publish them in the incomplete and unfinished state in which he left them." (p1) "A great portion of the manuscript was in so imperfect and fragmentary a state..." (p22) "...after looking over a mass of detached and half-legible papers..." (p27) "Such are the materials laboriously brought together and marvelously wrought, which lie broken and scattered before me." (p25)

She referred to the want of uniformity and consistency in the lectures as she proposed to publish them, but that as her own time for work could not be long and was extremely precarious, she resolved to publish them in that state to secure them from the chance of destruction (p27). It was obviously an agonising task for her to prepare and publish the materials which she knew to be only preparatory:

"I have sometimes doubted whether it was consistent with my obedience to him to publish what he had refused to publish." (p21) "It seems hardly necessary to repeat (yet perhaps I cannot repeat too often), that this book shows not what the author had done, but what he intended to do..." (p23)

The incomplete nature of the materials which Austin left to us was clearly appreciated by the reviewer of *The Province* when he said in his review of 1861:

Of this vast scheme, which as appears from his papers he had turned in his mind for many years, and invested with a considerable degree of unity and definiteness, one fragment only was completed. (4)

It is therefore incumbent upon us to accept the materials in the
spirit in which they were put before the public. As incomplete and fragmentary statements of the author's views on the matters with which they deal, yet which might provide the basis upon which future generations of students could build, working in a more congenial environment than that in which Austin found himself. In this context, Eira Ruben's remark seems particularly unfortunate:

Happily for the student of his thought Austin suffered from a nervous disability that prevented him from ever completing the enormous intellectual tasks that he set himself. (5)

Austin's Purpose: If we take Austin's overall goal as his purpose, and the steps which he takes in pursuit of that goal as disclosing his method, then there seems to be no doubt at all about the former. In a much neglected part of Sarah Austin's Preface to the Lectures, she provides us with direct evidence of her husband's purpose. If we had paid more attention to these remarks and considered them in the light of the foregoing comments about the state of the materials, then we might have hesitated long before attributing to Austin a 'might is right' view of jurisprudence, or suggesting satisfaction with a cleavage between positivism and natural law (6). She tells us that John Austin was much concerned about the relations between law, positive morality and ethics, and this concern was so immediate to him, that as we have already seen, it was one of the reasons why he was reluctant to work further on The Province. She then says:

That he had long meditated a book embracing a far wider field I well knew...I feared that this great work would never be accomplished...But I saw that nothing would shake his resolution...His opinion of the necessity of an entire refonte of his book (The Province) arose, in a great measure, from the conviction, which had continually been gaining strength in his mind, that until the ethical notions of men were more clear and consistent, no considerable improvement could be hoped for in legal or political science, nor, consequently, in legal or political institutions. Lectures (Preface) p16.
Austin himself stated in an advertisement referring to a proposed book by him entitled The Principles and Relations of Jurisprudence and Ethics that:

Positive law (or jus), positive morality (or mos) together with the principles which form the [test] of both, are the inseparably connected parts of a vast organic whole. To explain their several natures, and present them with their common relations, is the purpose of the essay on which the author is employed.

There are aspects here which we must bear in mind if we are to derive maximum value from Austin's work. When referring to his proposed book, he refers to the fact that for him, positive law, positive morality and the principles which are the test of both (which are clearly, for Austin, the principles of Divine Law), are inseparably connected parts of a vast organic whole. If this one small but important aspect of Austin's position had been appreciated by his critics, then many of the charges which have been levied against him would not have been made. Ayer appreciated the nature of this relationship. After referring to the Gestalt psychologists as people who speak most constantly about genuine or organic wholes he says, "...if the analytic method involved a denial of this fact, it would indeed be a faulty method." (8) He goes on to state that in his opinion, it clearly does not have this implication. In other words, there is no incompatibility between Austin's analytic method, i.e. his separation of positive law, positive morality and ethics, and his view that the aspects to which he refers are parts of an organic whole. However, in order to properly understand his method, it is essential to place it in this context. The failure of Hart to appreciate this is central to his misunderstanding of Austin.

It follows that being concerned with analysis, Austin's approach is first to take things apart (or to take out that in which he is interested) and then to put them back together again. As we can see from the foregoing extract, it is his intention first to explain the several
natures (of positive law, positive morality and Divine Law), and then to present them with their common relations. This it seemed to him was the only way to understand this 'vast organic whole'. As we shall see later in chapter three, much of Hart's view is based on the claim that when Austin speaks of positive law, he does not include factors of positive morality (what Hart calls the 'internal attitude'). When put like that, it can be seen that Hart's position is based on confusion, and takes half the story as representing the whole. Whilst Austin makes the separation for purposes of analysis, one cannot ignore his claim that these aspects are part of 'an organic whole'.

It is a matter of great sadness that Austin never got beyond the first stage. Yet to construe the materials without taking account of the comments of the very person who compiled them, and to assume that Austin's purpose can be gleaned from them as if the first step represented the whole of his proposed journey, despite his specific statements to the contrary, is bound to lead to the sort of distortions which are now part of the accepted wisdom concerning 'Austinian legal theory'(9). In fact, Austin includes the whole of Lectures I-XXVII under the heading 'Preliminary Explanations' - Lectures pp74-77.

Ruben goes so far as to state that:

...he cannot accept a theory that is critical of law; ...He ...claims that the law is neither just nor unjust - there is no independent test for law. (10)

How then are we to understand his letter to the Chief Justice of the Common Pleas, Sir William Erle, when he says that, "I intend to show the relations of positive morality and law (mos and jus) and of both, to their common standard or test;..."? Lectures (Preface) p17. Or his views on the proper subject of jurisprudence, when he says:

And this distinguishes the science in question [that of positive law] from the science of legislation: which affects to determine the test or standard...by which positive law ought to be made, or to which positive law ought to be adjusted. Lectures (Uses) p1072.
These are not just isolated statements, but reflect a sentiment which runs throughout Austin's work. Ruben's views, and many others like them, are based on a systematic misreading of Austin and show no sensitivity to the factors outlined above. It is ironic that in the paragraph following the above statement by Ruben, she expresses a forlorn hope, "I hope that the nature of the values that I have underlined and that Austin espouses, will help give a more accurate interpretation of his Legal Positivism." Such hope must of course await a more accurate reading of his writings.

Austin's Method: There are two possible approaches to what is intended by 'method'. It could mean that interpretation of, or construction to be imposed upon an author's work, which will enable us to make the best sense of it. Or, it could mean the approach which the author actually had in mind when engaged upon his work, in which case discovering it is a factual and psychological question. This is a common problem of interpretation, as is made clear by Raymond Brown in the context of theology, when he said that:

K. Stendahl has isolated the core of the hermeneutical problem today, namely the contrast between 'What did Scripture mean when it was written?' (the goal of literal interpretation) and 'What does it mean to me?' (11)

If we were to ask these same questions of Austin's work, and there were to be an ambiguity, or if one meaning was to make sense of a passage (or the work as a whole) and another meaning was to make non-sense of it, then that which does the former is to be preferred. On this view, such would be the case, even if there was some evidence to the effect that as a question of psychological fact, the author actually took the contrary view. It is in other words an interpretative question, and our guide to the best interpretation will be that which produces the soundest theory of law, and not that which most faithfully reflects Austin's
psychological approach. For my part, I have no reason to believe that there is a divergence between the two, although as we shall see in the final section of this chapter, there are many who take a different view. However, it is fair to say that this way of determining the best interpretation of Austin is quite in accordance with Hart's own approach, as we will see at the beginning of chapter two. It is also in line with the approach adopted by Julius Stone for, as he says, "...we are interested in what can be learned from Austin (that is, in what will survive examination), not in literary biography." (12)

In his understanding, Austin commenced at the most abstract level, and gradually worked towards the object of his particular interest, allowing us always to see how the particular relates to the whole, and not forgetting that for Austin, law, positive morality and ethics 'are the inseparably connected parts of a vast organic whole', Lectures (Preface) p17. How then did he suggest that we approach an understanding of this whole? We have the clear indication that he understood the relations between the various disciplines in the following manner, not forgetting that the plan which follows appears to have been prepared for the guidance of law students (13).
IDEA OF A COMPLETE LEGAL EDUCATION.

*(A) Philosophy of the Human Mind: including its History.

(B) Logic: including its History.

Ethics

(C) Politics: (D) Political Economy: (in the largest sense):

Ethics (in a narrower sense):

Jurisprudence. (E) Ethics (sensu stricto).

Philosophical or General Positive or Particular Jurisprudence: International Law.

(F) Historical and Dogmatical Outlines English Law.

of Roman, Canon, and Feudal law;

with continued reference to General Jurisprudence. Occasional Lectures on French, Prussian or other Systems.

(G) Historical and Dogmatical In Detail:

Outlines of English Law;

with reference to General Jurisprudence, including English Constitutional Law and English Ecclesiastical Law.

(H) Common Law.

Equity:

Practice of Conveyancing.

*I have not been able to discover to what these letters refer. - S.A.

It is interesting for us to note here, as a precursor to our later discussions about the relationship between the views of Austin and those of Aquinas, that when D'Entreves is speaking of how far removed the medieval approach to politics is from our own, he says that "politics were to St. Thomas a branch of ethics."(14) The similarity with Austin's views on this relationship is clear. Austin explains that jurisprudence is either General or Particular, Lectures (Uses) pl138. By Particular (or 'national', as he sometimes calls it - Lectures (Uses) pl072)
Austin means the study of those laws and rules of a specified community. By General, he means a study of those principles common to all systems:

Though every system of law has its specific and characteristic differences, there are principles, notions, and distinctions common to various systems, and forming analogies or likenesses by which such systems are allied. Lectures (Uses) p1072.

Many of these principles, he suggests, are common to the scanty and crude systems of rude societies as well as to the maturer systems of refined communities. He appreciates that the maturer systems may have numerous analogies in addition which obtain exclusively between themselves. So, for Austin, the exclusive or appropriate object of General Jurisprudence is the exposition of such principles as are abstracted from positive systems (15). He specifically tells us that he will restrict his focus of attention to those maturer systems:

I mean, then, by General Jurisprudence, the science concerned with the exposition of the principles, notions, and distinctions which are common to systems of law: understanding by systems of law, the ampler and maturer systems which, by reason of their amplitude and maturity, are pre-eminently pregnant with instruction. Lectures (Uses) p1073.

He acknowledges that, at first, such an enterprise may appear to have little prospect of success, for the common principles are mixed up with the individual peculiarities of each system and expressed in the language peculiar to each system. Also, that these basic principles may not be conceived with equal clarity in each system - but, making allowances for this, they are found in more or less similar form in each. At the outset of the Lectures and in his discussion on the uses of jurisprudence, he reiterates the point which we noted in our discussion of his overall purpose:

Of Laws or Rules there are various classes. Now these classes ought to be carefully distinguished. For the confusion of them under a common name, and the consequent tendency to confound Law and Morals, is one most prolific source of jargon darkness and perplexity. By a careful analysis of leading terms, law is detached from morals, and the attention of the student of jurisprudence is confined to the
distinctions and divisions which relate to law exclusively.
Lectures (Uses) p1076.

So his concern is with the confusion surrounding law and morals, and by analysis he wishes to separate the two in order that the student can restrict his attention to the legal aspects (16). He is indicating here that his reason for the separation of law and morals is to assist those who are learning about the various disciplines. We must remember to read this in the light of what has gone before - that ontologically they are inseparable, but that for heuristic purposes they can be separated analytically. We have also seen that Austin does not expect the law student to confine his studies to law exclusively, but that when he is engaged on the study of law, he is expected to understand the nature of this distinction.

We can now see that Austin's approach is first to gain an understanding of the whole, by developing an appreciation of the sub-groups of which that whole is comprised, and an appreciation of the relationships between those sub-groups. The only book which Austin published in his lifetime was his attempt to complete this important but preparatory exercise - to enable us to distinguish the object of jurisprudence from those other matters, and the title of that work is most appropriately (as we might expect) related to its content - The Province of Jurisprudence Determined. A version of this was edited by Hart in 1954. The title might be paraphrased as 'a branch of learning' or 'sphere of action' - defined. To define something is to 'mark out limits of' or to 'make clear, esp. in outline' (17). When it is realised that the ten lectures of The Province were the first in a series of some fifty seven, we can see how it was perfectly consistent with his method to spend the first few lectures determining the scope of the enterprise: (18)

It will be apparent to the reader that, upon whatever new enquiry he entered, Mr Austin's invariable method of proceeding was, first to determine precisely its limits,
and then to lay down in the most accurate manner the plan
of the arrangement to be pursued through the whole course
of the investigation. And there are the clearest indications
in the manuscripts themselves that this preliminary portion
of his task was, in every case, most carefully and laboriously
executed. Unfortunately, in many instances, the execution was
carried no further; he never filled up the outline he had
sketched with so masterly a hand. Lectures (Preface) p27.

In the lectures following The Province we are given some idea of
how Austin intended to develop his ideas from this initial position. In
elucidating the basic concept of law he looks at the aspects of command,
duty, sanction, sovereign, subject and independent political community.
He takes the same approach to an understanding of these aspects as we
saw him take earlier to those of law and morality, i.e. that they are
ontologically inseparable but that for heuristic purposes we need to
discuss them separately. He expresses this as clearly as possible in his
first lecture, in his discussion of command, duty and sanction. In his
marginal note he refers to "[t]he inseparable connexion of the three
terms, command, duty and sanction." Then he sums up his position as
follows:

To those who are familiar with the language of logicians
(language unrivalled for brevity, distinctness, and
precision), I can express my meaning accurately in a
breath.- Each of the three terms signifies the same notion;
but each denotes a different part of that notion, and
connotes the residue. Lectures (I) p92 (emphasis in original).

He moves on in his subsequent lectures to show how 'rights' can be
seen as the other side of the coin as it were to 'duties', and places
stress on the correlative nature of the two ideas (19). He talks of the
similarities between the civil and the criminal law, and stresses the
differences in terms of those who have the power to enforce these duties.
We can now see The Province in a clearer perspective, and how this
fits in with what Sarah Austin suggested her husband always did at the
commencement of his study, i.e. 'determined precisely its limits'.
We now need to look more closely at how he actually set about this task.
Description: Some take the view that Austin was engaged in putting forward descriptions of law but that he was not very successful in this attempt (20). Such an opinion underlies many of Hart's comments on Austin as we will see in the next chapter, so it is important in our discussion of Austin's method to consider whether this was what he was trying to do.

We know already that Austin distinguishes between Particular and General or Universal jurisprudence and in relation to the latter he states that "[t]he proper subject of General or Universal Jurisprudence (as distinguished from Universal Legislation) is a description of such subjects and ends of Law as are common to all systems..." Lectures (Uses) p1077. Austin further distinguishes those common aspects of law into those which are necessary and those which are not. By necessary, he means those notions and distinctions without which we cannot imagine coherently a system of law i.e. we cannot imagine a system of law without conceiving them as constituent parts of it. Lectures (Uses) p1073. We also know that The Province is a work within the category of General Jurisprudence, and that it is not concerned with all the subjects of law which are common or necessary to all systems, but that it is a preliminary step towards that initial goal. It is to 'describe' so much of those common or necessary aspects of legal systems as will enable it to determine the line of demarcation between law and morals, which as we have already seen is its function. "It is necessary to define accurately the line of demarcation which separates these species from one another,..." Lectures (1) p86.

The principal purpose or scope of the six ensuing lectures, is to distinguish positive laws (the appropriate matter of jurisprudence) from the objects now enumerated:...And, since such is the principal purpose of the six ensuing lectures, I style them, considered as a whole, 'the province of jurisprudence determined'. For, since such is their principal purpose, they effect to describe the boundary which severs the province of jurisprudence from the regions lying on its confines. Lectures (Analysis of I-VI) p80 (emphasis added).
There is great value then in restricting The Province to the minimum necessary content, for this purpose. Austin regarded the whole of his lectures as dealing primarily with what is 'necessary', as he puts most of the subjects with which he deals in the Lectures, into this category - Lectures (Uses) p1073. Of the remaining subjects with which he deals, he accepts that they are not necessary, but that they are so frequently found in mature systems of law, because of their obvious utility, that they may fittingly be brought within the topic of General Jurisprudence. The point is that the Lectures as a whole are intended to deal more fully with necessary features, but that The Province is only required to deal with them in so far as they are relevant to its function which is to act as a criterion of demarcation between law and morals (21).

All we need to appreciate at this stage is the value, in the light of this purpose, of restricting the content of the concept of law in order that we do not exclude too much from the province of jurisprudence. We can see how the focus of Austin's concern is abstracted from particular systems of law, but how does this fit in with the descriptive view, of which there appears to be some suggestion in Austin's writings? Well, we have to distinguish between different possible objects of description. Austin's concern is with a feature which is common to all legal systems (at least the mature ones), and which is abstracted from particular legal systems with a view to providing a criterion of demarcation between the subjects of law and morals. If Austin is properly seen as being descriptive at all it is clear then that he is describing that feature or concept. Can we agree then with Toulmin and Baier?

Accordingly, we may ask whether the individual statements composing a description are true or false, but we never ask of the description as a whole, whether it is true or false. The questions which arise in practice are always whether enough information has been given for the purpose in hand...(22)
There are several different aspects to this which need to be understood. The part of their suggestion with which I agree is that for descriptions of any sort we have to consider the purpose for which the description is being used, and make our evaluation of it in that context. As we have just seen in our discussion of Austin's 'criterion of demarcation', and the 'minimum necessary content', his purpose is very specific, and our evaluation of his description of that feature, must be in the context of that particular purpose. Such a purpose, it need hardly be added, is very different from that which would be regarded as a description of the way in which 'a legal system works' or of what 'a legal system looks like' for, in truth, it is not a description of a legal system at all (23) - it is a description of an analytical tool which can be used to enable us to determine what features of the social order properly belong to a legal system. It is a description of a concept (24).

We have then to distinguish between the description of a concept, and other descriptions. As we shall see more clearly in chapter six, all statements have two aspects to them: the conceptual and the empirical, or what we will call here the observational. The former are concerned with the management or organisational aspects of our understanding and the latter are concerned with the aspects of perception. As we shall see, the two are always related in that perceptions always depend upon some organisational framework, and an organisational framework implies that we have some things which require organisation. Descriptions then involve references in one or other of these fields. The difference affects the way we assess the value of the description. Where the description is concerned with the observational field, then what Toulmin and Baier say is persuasive; except that I would prefer to say that the individual statements composing the description may be regarded as 'accurate or inaccurate' rather than as 'true or false'. As for the
description as a whole we merely ask whether the information is adequate given the purpose in hand. There is some way in which the particular observations can be checked, perhaps by attempting to repeat the observations, or obtaining corroboration from an independent source. However, we recognise that all observations are made at a greater or lesser degree of abstraction, hence we include the notion of 'purpose' when assessing the adequacy of the observations and of the description as a whole.

When we talk of the description of a concept, the position is different in this important respect: the object being described does not exist in an area where we could, even in principle, have an equal right of access to check the particular observations which make up the description. They concern what we might call 'mental phenomena'. We cannot, as we can with the other class of descriptions, in the observational field, have access to the object of description independently of the other's statements about them. Here, it is the statements contained in the description which constitute the concept. The statements not only constitute the description, as with the other form of description, but unlike that other form, they also constitute the object of that description. All we can do is to accept the statements at face value and put them together in the way explained. We cannot assess the individual statements as we can in the observational field, for we cannot make our own observations of the object which is being described. Our assessment is only in terms of the usefulness of the resulting concept. It is for this reason that conceptual analysis depends on setting out the conceptual system being employed by way of definition. That Austin proceeds in this manner, I shall show shortly. Later, I shall argue that Hart's rejection of the relationship between definition and theoretical development is mistaken.

One way of distinguishing a description of a concept from a
description in the observational field is to say that the statements comprising the former, constitute a definition of that concept. Only if it is agreed that such a definition may be regarded as a description of a concept, can we agree that Austin is concerned with being descriptive. In that event we shall claim that his critics mistake the object of his descriptions, and take his conceptual descriptions for empirical ones, and challenge them by applying the wrong test. The better approach might be to say that despite the occasional comment to the contrary in the Lectures, it is clear from the whole tenor of the Lectures that Austin is concerned to develop or construct a concept, for the purpose which we have outlined above, by way of definition. In what follows I will continue to speak of descriptions of concepts as 'definitions' of those concepts.

It only remains for us to mention in this section that Toulmin and Baier go on to say:

[T]here is no end to the number of things we might put into a description of anything...it always makes sense to talk of adding to a description, making it fuller than it is: the ideal of a complete description as one which enumerates all the qualities of the thing described is accordingly an illusion. (25)

Interestingly, the reviewer of Austin's Province in the Edinburgh Review, used language which has been almost exactly reflected in the foregoing comments of Toulmin and Baier:

As any one is at liberty to use words in whatever sense he pleases, so long as he uses them consistently, such theories as these cannot be said to be either true or false. They are, as scientific definitions must always be, nothing else than rival classifications, more or less complete or convenient. (26)

Popper makes a similar point when he says,"Observation is always selective" (27), as does Gibbs in the legal context when he states, "[n]o phenomenon is ever completely explained. Further explanation is pursued only by examining particular facets of the phenomenon."(28) The other side of the coin to this has been indicated by Kline in his
discussion of mathematics, which we must note here as a preliminary to our discussion in the next chapter. He says, in relation to his discussion of the Kantian view of mathematics, that:

We attempt to abstract from the complexity of phenomena some simple systems whose properties are susceptible of being described mathematically. This power of abstraction is responsible for the amazing mathematical description of nature. Moreover, we see only what our mathematical "optics" permits us to see. (29)

The point is, of course, that the organisation and systematisation of perception depend as Kline points out on the power of abstraction. This will necessarily—in Austin's sense—limit what we see. We can always 'see more' as Toulmin and Baier point out. The important question is whether we do so by gradually developing our abstract models to retain the advantage of system and order, or whether we do so by a series of ad-hoc descriptions which, whilst they may be individually interesting, do not have the degree of cohesion and coherence which we require in order that we might regard them as constituting a 'theory'. In fact, the very idea of abstraction means that certain aspects of the available material have been left out (30). Its value is that it enables us to see more clearly what remains. This idea has been well expressed by Margaret Boden in her discussion of modern approaches to information systems:

Conceptual models working top-down [and this is the approach employed by Austin] enable an interpretative system to cope more sensibly with the input, to think before it looks. This is particularly useful when, as in vision generally, the input contains a great deal of information only some of which is relevant to the concerns of the system at the time. (31)

Later, she expands on this in a way which is of particular interest in the context of our discussion of Hart's misunderstanding of Austin:

When one is introspectively aware of actively trying to sort out genuine outlines..., one often 'imagines' the more obvious bodies to be out of the way while one puzzles over the rest.... So, by the time that the more obscure parts of the picture are looked at carefully, much of the confusing detail has already been removed. (32)

The failure to appreciate this aspect of the 'top down' approach
accounts for much of the confusing and distorting work which we find in modern legal theory, and in particular, Hart's *Concept of Law*. MacCormick, who as we shall see later, attempts to improve and develop Hart's views, indicates that he believes it possible to be exhaustively descriptive, although he states that it is not an aim which he pursues in his book on legal reasoning (33). However, I need only reiterate here, that for Austin to include any more than the minimum necessary content in *The Province*, would not only be unhelpful, it would actually be dysfunctional, given its purpose in the overall scheme of his lectures.

Definition: In this section I will argue that the central theme of *The Province* is to set up the criterion for the recognition of that which is legal by stipulative definition, and in chapter six I shall further argue that this is the only proper way in which conceptual analysis can proceed, whether in law, mathematics or science. If there is some doubt about whether or not Austin is concerned with descriptions, there can be no doubt that the main vehicle by which his argument moves in *The Province*, is by way of definition. If we look to the introductory paragraphs of his first lecture, we find the following:

para 1  I begin my projected course with determining the province of jurisprudence, or with distinguishing the matter of jurisprudence from those various related aspects; trying to define the subject of which I intend to treat, before I endeavour to analyse its numerous and complicated parts. Lectures (1) p86 (emphasis added)

He is making it as clear as possible in his very first paragraph that he sees his project in two stages. First, by way of definition, to mark out the boundaries of his subject i.e. *The Province*. Then to go on to an analysis of its different parts i.e. the other forty seven lectures.

para 2  It is necessary to define accurately the line of demarcation which separates these species from one another... Lectures (1) p86 (emphasis added).

That his definitions proceed by way of stipulation also seems difficult
para 3 Rej ecting the appellation Law of Nature as ambiguous and misleading, I name those laws or rules, as considered collectively or in a mass, the Divine Law or the Law of God. Lectures (1) p86 (emphasis in original).

para 5 As contradistinguished to the rules which I style positive morality....For the sake, then, of getting a name brief and distinctive at once, and agreeably to frequent usage, I style that aggregate of rules, or any portion of that aggregate, positive law. Lectures (1) p87 (emphasis in original).

para 8 I place together in a common class, and denote them by the term positive morality. Lectures (1) p87 (emphasis in original).

The whole of The Province continues in this vein, and examples can be found in almost every section e.g. Lectures (V) at p171,'I denote...' 'I name...', at p 169 'I style....I say...', and at p 172 'I mark...'

When he speaks of 'command' as being the key to the science of jurisprudence he says of such terms "[a]nd when we endeavour to define them..." - Lectures (1) p89, (emphasis in original). It would be tedious to provide more examples, but they can be found on almost every page.

What then are the potential problems with this way of proceeding? David Bohm captures well the nature and attendant dangers of definition, and it is worth quoting the following passage in full:

In essence, the process of division [this is, at least in part, the function which definition serves for Austin] is a way of thinking about things that is convenient and useful mainly in the domain of practical, technical and functional activities...However, when this mode of thought is applied more broadly to man's notion of himself and the whole world in which he lives...then man ceases to regard the resulting divisions as merely useful or convenient and begins to see and experience himself and his world as actually constituted of separately existing fragments. Being guided by a fragmentary self-world view, man then acts in such a way as to try to break himself and the world up, so that all seems to correspond to his way of thinking. Man thus obtains an apparent proof of the correctness of his fragmentary self-world view though, of course, he overlooks the fact that it is he himself acting according to his mode of thought, who has brought about the fragmentation that now seems to have an autonomous existence, independent of his will and of his desire. (34)

In terms of an explicit acknowledgment of the fragmentations or
divisions which he is introducing, we could not have a clearer example than that which Austin provides us with. I shall be suggesting in chapter three that the same cannot be said for Hart. Austin not only sees the need for definition, but is very conscious of the difficulties involved in this way of going about things:

Many of those who have written upon Law, have defined these expressions. But most of their definitions are so constructed that, instead of shedding light upon the thing defined, they involve it in thicker obscurity. In most attempts to define the terms in question, there is all the pedantry without the reality of logic: the form and husk, without the substance. The pretended definitions are purely circular; turning upon the very expressions which they affect to elucidate, or upon expressions which are exactly equivalent. Lectures (Uses) p1075.

Austin would agree with Hart's suggestion that definition is not the way in which all problems of this nature can be solved. "In truth, some of these terms will not admit of definition in the formal or regular manner."(35) By 'formal or regular', I take him to mean the form of definition whereby an abridged and concise expression is put in place of the term to be defined. So for Austin, this approach to definition is simply inapplicable in some cases, and of the remaining cases where it could be applicable, he finds it unhelpful:

In truth, some of these terms will not admit of definition in the formal or regular manner. As to the rest, [these remaining cases] to define them in that manner is utterly useless. For the terms which enter into the abridged and concise definition, need as much elucidation as the very expression which is defined. (36)

How then is he to overcome this problem?

The import of the terms in question is extremely complex. They are short marks for long series of propositions. And, what aggravates the difficulty of explaining their meaning clearly, is the intimate and indissoluble connection which subsist between them. To state the signification of each, and to shew the relation in which it stands to the others, is not a thing to be accomplished by short and disjointed definitions, but demands a dissertation, long, intricate and coherent. Lectures (Uses) p1076.

This then is the raison d'être of The Province of Jurisprudence Determined. It is the dissertation which is intended to remedy the defects of short and disjointed definitions. It is not intended to avoid
definitions, but only to avoid the defects of a particular type of
definition - the short and disjointed type. What aggravates the
difficulty? The 'intimate and indissoluble connection' which subsists
between the various aspects. This is why he ties all his definitions
into each other (37). Why command, duty and sanction are all part of the
same notion - why command is linked to the sovereign, and duty to the
aspect of subordination, and all have to be understood in the context of
an independent political community. Thus the whole discussion of The
Province, in dealing with all these aspects, is still only the
elucidation of one notion or concept.

Austin and 'natural law': As we have already seen, Austin's
concern was to develop a better understanding of positive law, positive
morality and of the principles which form the test of both. We should,
therefore consider briefly the circumstances which gave rise to the need
for this clarification, especially as it has a significant bearing on a
matter which will be referred to at various stages in this thesis - that
of the relationship between Austin's theory and that of 'natural law'.

It has become traditional, when discussing either of these
theoretical positions, to distinguish it from the other. For example,
J.W. Harris, in his recent book - Legal Philosophies - states in his
discussion of natural law that:

The second fundamental assault on natural law doctrine is
'legal positivism'. This expression is used in many ways, but most of its adherents would at least subscribe to the
following two propositions. First, no element of moral value enters into the definition of law. Secondly, legal provisions
are identified by empirically-observable criteria, such as legislation, decided cases and custom. Their contention is
that there is no law but positive law, and therefore no such thing as 'natural law'. (38)

Then when he moves on to his discussion of 'the command theory of law',
Harris states:
Is there not then a difference between our perceptions of what the law requires, and our views as to what it would be reasonable to require? The assumption that there is such a difference, and the working out of the implications of the difference, have been the hallmarks of the theoretical tradition known as legal positivism. According to legal positivism, law is not some set of propositions derivable by reasoning from the nature of things, as the natural lawyers would argue. One version of this approach saw law as the commands of political superiors, or the state sovereign. This is the command theory of law. (39)

So we see that a discussion of natural law requires the positivist position to be stated, and that a discussion of positivism requires the natural law position to be stated, and that the two are clearly held out as being incompatible in that one affirms what the other denies. Further, as we shall see in chapter three, Hart determines his own position, first in response to that of Austin and then in response to natural law. He does so by putting forward what Harris refers to as a 'sociological conception of natural law'(40). If we are to properly evaluate Hart's response to these issues, then we must first have a clear understanding of Austin's position.

Austin first of all distinguishes two ways in which the term 'natural law' is used:

Natural law, as the term is commonly understood by modern writers upon jurisprudence, has two disparate meanings. It signifies the law of God, or a portion of positive law and positive morality. Lectures (Outline) p37 (emphasis in original).

He then gives an expanded view of what the second of these two categories involves:

For natural law, considered as a portion of positive, is positive law fashioned by the legislator or judge on pre-existing law of another description: namely, on the law of God truly or erroneously apprehended; or on rules of positive morality which are not peculiar to any nation or age, but obtain, or are thought to obtain, in all nations and ages. Ibid (emphasis added).

As the writer of the early review of the Lectures makes clear, "...it was this Roman idea of a jus gentium, or portion of law common to all nations, which grew insensibly into the modern idea of Natural Law."(41)
As we shall see in chapter three, it is just this 'sociological natural law' that Hart attempts to re-introduce as the core of good sense in natural law theorizing. We need only point out here that this view of natural law was one which was quite common in Austin's day, and was one which Austin firmly rejected. The reviewer of the Lectures states:

Being observed or recognised universally, these principles were supposed to have a higher origin than human design, and to be (we quote Mr. Austin) 'not so properly rules of human position or establishment, as rules proceeding immediately from the Deity himself, or the intelligent and rational Nature which animates and directs the universe.' This notion, once formed, was, by an obvious process, so enlarged as to include merely moral, or merely customary rules which had obtained general acceptance; 'every rule, in short, which is common to all societies, though the rule may not obtain as positive law in all political communities, or in any political community'. (42)

As the reviewer continues to say, each writer was led to include in his scheme whatever maxims of justice approved themselves to him as an individual moralist, "...provided they appeared to be at once self-evident and universal."(43) This, as we shall see in due course is just the sort of position which Hart thinks makes good sense. The problem with this view was neatly put by Sir Henry Maine in his Ancient Law:

In studying these writers, the great difficulty is always to discover whether they are discussing law or morality - whether the state of international relations they describe is actual or ideal - whether they lay down that which is, or that which, in their opinion, ought to be. (44)

That this is the very problem with which Austin was primarily concerned is clear from what we have already seen of his work. That it derives, at least in part, from the contemporary writers on natural law at the time he was writing, is also put beyond doubt by Austin:

For, through the frequent confusion (to which I shall advert hereafter) of positive law and positive morality, a portion of positive morality, as well as of positive law, is embraced by the law natural of modern writers on jurisprudence,... Lectures (IV) p154.

His conclusion is also clearly expressed:

I shall show that the supposition of a natural law (considered as a portion of positive law and morality) involves the
intermediate hypothesis which is compounded of the theory of utility and the hypothesis of a moral sense: that, assuming the pure hypothesis of a moral sense, or assuming the pure theory of general utility, the distinction of human rules into natural and positive, were utterly senseless, or utterly purposeless. *Lectures* (Outline) pp37,38 (emphasis in original).

All we need note for present purposes is that Austin's evident hostility to natural law is not a blanket condemnation of such views, as is suggested by Harris, but is an attack upon a particular variant within the natural law tradition. As we have just seen, Austin uses a twofold classification of natural law theories, and focusses his criticism on the second group which in his view commits the important error of confusing issues of law and morality. He does not criticise the first group who use 'natural law' to signify the law of God. He merely prefers to use the term 'Divine Law' to avoid possible confusion.

It can be seen then that John Finnis, like Harris, rather overstates the case (at least in respect of Austin) when he says, "Bentham, Austin, Kelsen, Weber, Hart, and Raz all published stern repudiations of what they understood to be the theory of natural law;..." (45) For as we have just seen, Austin appreciated that there was more than one theory of natural law. For present purposes it is sufficient to note that his position was not, as is often claimed, one of total rejection of natural law theory (even if he totally rejected the use of the label 'natural law' as being confusing).

In chapter three I shall look at Hart's treatment of this issue, and I will suggest that we can do better than providing an account of natural law which is no more than, "...generalisations based on 'truisms', facts so obvious that they need no proof."(46) As Harris suggests, such views might provide useful 'sociology for Martians', but I believe we can do better. I shall put forward the case that the epistemology implicit in the work of both Aquinas and Austin is very similar (as are many of the conclusions which they reach), and that their theories are not, as is often suggested, incompatible.
However, I must make it clear that I am not suggesting that Austin had directed his attention to the issue of the relationship between his own theoretical position and that of Aquinas. So far as I am aware, there is no evidence to support such a contention. I merely wish to suggest that if on a proper understanding of Austin, his views are compatible with those of Aquinas, then we do not find ourselves in a position where we have to reject one or the other, but may benefit from the rich contribution made by both. In such a situation, we would be in a far superior position to that of Harris's Martians.

Austin as empiricist: It only remains in concluding this chapter to say a few words about an account of Austin's work which has recently been put forward and which adopts a position quite contrary to that which I have set forth. W.L. Morison in his recent book *John Austin*, puts forward the claim that Austin is an empiricist, and although the assertion is made frequently,(47) and even on occasion based on an appeal to the 'expert' testimony of others,(48) I must confess to sharing the same reservations as Gerard Maher when he says:

I must say at once that I feel something to be amiss when we find an argument that asserts that a writer is a certain type of philosopher but then goes on to point to so many and cogent counter-examples. (49)

Morison informs us that Hart has perceptively assessed and dissected Austin's theory, (which is, he states, to be distinguished by the name of 'naive empiricism'). However, Morison goes on to say that he wishes to continue to defend Austin's empiricism in what he calls its 'general drive'(50). Insofar as the defence of Austin is put forward by someone who claims that Austin resolved his problems by attributing 'magical' properties to language, and that he achieved his results by a feat of 'logodaedaly',(51) I do admit to being sceptical of the form the defence might take. When I find that the 'defence' contains the
following claim, I come to the conclusion that a plea of guilty might have been a more charitable course to take:

Bentham and Austin detected a confusion of this kind between the legal and moral and set out to eliminate it by identifying law for their purposes with positive rather than moral law. But their definition of positive law was a disaster, firstly because it was only a minor modification of the professional man's notion of law, and, secondly because it was achieved by appealing to a supposed state of affairs which nobody since Bentham and Austin's time has felt able to believe in. (52)

Much of course could be said about this. If Morison believes that in the chapter entitled 'A defence of Austin's philosophy against Hart', he needs to concede that Austin's definition of positive law was a disaster, one wonders what he would have said had he been counsel for the prosecution. Can it seriously be claimed that a view of law is disastrous because it is only slightly different from the view of those who are professionals? If it is true that Austin's view was so close to that of 'professional opinion', and also that nobody since has believed in such a view of the world, there must then have been a completely undocumented revolution in ideas which requires some explanation. When Morison states that Austin, "...excluded by his definition from law some matters which he especially wanted to teach, such as international law," is he suggesting that Austin felt that what he could teach was in some way controlled by a definition? If so, we need only refer Morison to Austin's plan of 'a complete legal education'.

Morison tells us time and time again that Austin is an empiricist and then states, again, in his defence of Austin, that:

To attempt to find a comprehensive or omnipotent centre of control is anti-empirical, for we just do not observe this kind of phenomenon by ordinary means. We have to assume or conceptualize or abstract it and empiricists prefer to avoid these activities. (53)

Presumably, all views based on the doctrine of 'parliamentary supremacy' would be regarded by Morison as 'anti-empirical' for they surely attempt to assert the existence of such a centre of control. If it is true that empiricists prefer to avoid abstractions, and we must remember that
Morison is a self-confessed empiricist, then at least we can rest content in the knowledge that despite Morison's claims Austin is not an empiricist.

As we have already seen at length, Austin is much concerned with a centralized and hierarchical power structure, and he could not tell us more clearly that his major interest is, in Morison's terms, 'anti-empirical'; "As principles abstracted from positive systems are the subject of general jurisprudence, so is the exposition of such principles its exclusive object."(54) What are we to make of Austin's statement, which we looked at earlier, to the effect that he intends to show that law is the subject of an abstract science?(55) Morison puts forward the suggestion that Austin does not speak of 'conceptions', for if he were to do so, then it would suggest that his mind had been active in constructing them (56). If this really was Austin's intention, then it is impossible to believe that Austin would have proceeded to establish his definitions in the manner which we noted earlier in this chapter. When a person proceeds in stating on almost every page - indeed in paragraph after paragraph, 'I name..' 'I style..' 'I say..' he appears to my mind to be putting it beyond doubt that he is involved in some process of construction. It seems to me that the use of such language is incompatible with the claim that Morison seeks to establish, that, "...the predominant view on which Austin seems to proceed is that things really belong to classifications in reality, and all that we do is detect them."(57) This is to make the mistake which Bohm referred to when he said that people cease to regard the divisions as merely useful or convenient, and begin to see and experience the world as 'actually constituted of separately existing fragments'. Whilst Morison clearly states that he adopts such a position, his claim that Austin did also, has not been made out:

Since the syllogism can give us no new truth, and since
it may mislead, what is its use?
I incline to think that the important part is not syllogism.
But terms, propositions, definitions, divisions (abstracted from all particular matter) are all-important. (58)

Here we have Austin linking definition and division with abstraction, in the way that we have suggested, together with his confirmation that these definitions and divisions which are the result of abstraction are all-important.

If The Province can be seen as Austin's solution to the problem which we referred to in the immediately preceding section - the confusion between positive law and positive morality - which was a particular problem in the context of 'modern theories of natural law'; then his remaining lectures can be seen as the solution to the other aspect which was of concern to him and which was referred to in the early review of The Province:

The law of England in the present day may be not altogether unfairly described as a mass of details which no memory can embrace, and which hardly any understanding can reduce under the heads to which they properly belong;... (59)

If Austin were to give an account of his observations of the English legal system it would probably be in terms such as these. To suggest that The Province and the Lectures were mere observations is not supported by the expressions used in the early review:

The general object of jurisprudence is to lay down principles as to the nature of law, and to devise for legal purposes classifications of the various actions and relations of mankind;... (60)

It seems to me that the 'laying down of principles' and the 'devising of classifications' must go beyond the observational to the creative and constructive. Stone puts the problem well when he says that if an empiricist merely intends to suggest that any thinker approaches his problem on the basis of his own knowledge and experience, who would not be an empiricist? However, he continued to say, the suggestion that Austin's system was intended to be no more than a reflection of law, is not borne out by Austin's claim that the English law could be made to
conform more closely to his system than it does (61). Morison is critical of Ruben for confusing, "...questions of definition and empirical questions about Austin..."(62) yet does the same himself insofar as he argues that these definitional questions are empirical.

It must also be clear from what I have said so far in this chapter, that I do not accept Morison's view that theories which claim that Austin was engaged in setting forth a conceptual framework necessarily assert that he was 'divorced from empirical investigation'(63). I have attempted to indicate, and will explain further in later chapters (especially chapter six) that the conceptual and the empirical (or observational) are inextricably bound up together. It is for this reason that I find it of particular interest and importance to show how the ideas which are being developed here are supported by those who are engaged in understanding how the natural sciences work.

Morison notes that the early reviewer of The Province states that in so far as Austin's work is definitional, it cannot be said to be true or false (64). It seems surprising that Morison passes over this remark without comment, yet repeatedly affirms that Austin believed that he was dealing with matters of truth or falsity (65).

Much of Morison's account is based on a view of what Austin actually intended. Whilst it must by now be clear that I find his account quite unconvincing, we must remember that the intention which was set out earlier, and which is in common with Hart's, is to make the best use of Austin's materials. Whether or not Morison has reflected accurately the intentions of Austin, is a different question from whether or not he has made the most constructive use of his materials. When we see that Morison's defence of Austin concedes that Austin's definition of law is a disaster, because based on a view of the world that nobody since has believed in, we may wonder whether it is really so different from Hart's view - that Austin's enterprise was 'a record of a failure.'
In the introduction, I referred to Hart's 'new start' and to the hazards involved in rejecting, in total, the views of earlier theorists. That Hart claims to do this can hardly be doubted. In chapters II, III and IV of The Concept, he discusses what he takes to be, "[t]he clearest and the most thorough attempt to analyse the concept of law in terms of the apparently simple elements of commands and habits..." The Concept p18. However, he does this, not in order to build upon its foundations, but in order to reject it - completely. Chapter V has the sub-heading 'a fresh start', and he expresses his conclusion in these terms, "[t]he last three chapters are therefore the record of a failure and there is plainly need for a fresh start" - The Concept p78.

The defect, according to Hart is basic and irremediable:

...at each point where the theory failed to fit the facts it was possible to see at least in outline why it was bound to fail and what is required for a better account. The root cause of failure is that the elements out of which the theory was constructed...do not include, and cannot by their combination yield, the idea of a rule, without which we cannot hope to elucidate even the most elementary forms of law. The Concept p78.

Whether by 'elementary forms' Hart means 'elementary systems' or 'elementary aspects of systems', be they simple or sophisticated, is not clear. However, the purport of the comments is clear - the criticism is fundamental, and the rejection total. If only Hart had taken Collingwood's advice - 'Before evaluating a philosopher, reconstruct the problem he was attempting to deal with', then he would not have missed the point so completely (1).

I must look then at the way in which Hart arrives at this conclusion, and examine the extent to which it is supported by his arguments. There is one point, however, which must be continually borne in mind
throughout the following discussion. In chapter one, I took the view that the best approach to interpretation was that which would lead to the most sensible account of Austin's materials — whether or not that interpretation was the same as the author himself would have put upon them. We can now see, as we noted then, that this was quite in accordance with Hart's own approach to interpretation.

Hart opens his critique of Austin's theory by stating that he will, where necessary, move away from the specific formulations of Austin:

So we have not hesitated where Austin's meaning is doubtful or where his views seem inconsistent to ignore this and to state a clear and consistent position. Moreover, where Austin merely gives hints as to ways in which criticisms might be met, we have developed these...in order to secure that the doctrine we shall consider and criticise is stated in its strongest form. The Concept p18.

Although Hart has approached the matter with a fairly free hand, he indicates that he will only move away from Austin's own position to remove doubt, or to make the theory more consistent or better able to withstand criticism. It is on this basis that his view of Austin must be assessed.

In the last chapter, a view was put forward of Austin's purpose and method which I would claim is not only clear and sensible, but is also consistent with Austin's published work. It is also consistent with views on epistemology which have been expressed in theology, science and mathematics. To say that such an account has limited value is, as we have seen, merely to state the obvious. If Hart is to put forward an account of Austin's work which shows it to be of no value — then we must question whether he is really doing what he claims. Is he putting forward that stronger and clearer version, or is he in effect providing us with a straw man which he will then himself demolish? We can only properly assess this if we examine closely his criticisms of Austin, and assess them in the context of a more detailed consideration of Austin's theory than we were able to give in the last chapter.
The Gunman: A whole generation of law students have grown up with the view that the image of 'the gunman' reproduces the essential aspects of Austin's theory of law. Hart pays Austin a rather dubious compliment when he says:

Indeed it is a virtue of Austin's analysis, whatever its defects, that the elements of the gunman situation are, ...not themselves obscure or in need of much explanation;...

The Concept p20.

It is, of course, true that all the essential aspects of such a situation are immediately apparent, but before we congratulate Austin, if only on this point, we must ask the important but prior question as to whether it is a reasonable typification of his analysis. I shall first state what Hart has to say in relation to 'orders backed by threats', 'commands' and his 'conclusions' before moving on to discuss what I regard as serious defects in his position.

Orders backed by threats: Hart approaches his account of Austin's theory by indicating that expressions in the imperative mood may have different functions, such as to make a request, a plea or a warning. However, these indicate only a few 'rough discriminations', and are not of particular significance for Hart. His main concern is with that most important use of the imperative - where one person orders another to do something, and indicates that some unpleasant consequences will follow upon failure to comply. Although Hart makes the further observation that one could distinguish between 'ordering' and 'giving an order' he again states that "[w]e need not here concern ourselves with these subtleties." The Concept p19. As a matter of style, one might question the value of introducing, within the space of one page, two discriminations, which he then immediately rules out as irrelevant. They would probably have been regarded by Austin as 'ingenious but
useless refinements'. However, the only sort of imperative with which Hart is going to be concerned is that of 'order', and he says in relation to this:

Although a suggestion of authority and deference to authority may often attach to the words 'order' and 'obedience', we shall use the expressions 'order backed by threats' and 'coercive orders' to refer to orders which, like the gunman's, are supported only by threats, and we shall use the words 'obedience' and 'obey' to include compliance with such orders. The Concept p19.

We must note several points in connection with this. In the discussion so far, (on pages 18, 19, of The Concept) Hart has spoken of what people may / customarily / usually / normally / characteristically / naturally...say or do. However, we note here that he has used the stipulative form 'we shall...' to limit the meaning of the words he uses, and indicates that they are not being used in their more usual sense - 'obedience' often indicates authority, but it will not do so for Hart. Now there is nothing strange or startling in this, for as we have seen it is a central feature of Austin's work. It would obviously be quite wrong for us, in response to Hart's further discussion, to object that his analysis was faulty because he was using 'obedience' in an unusual way. Hart would rightly respond by saying that we had missed the point - that as he had made his meaning clear, the usual meaning was neither here nor there. I merely pause to make the point that sauce for the goose is sauce for the gander. For Hart to put forward the 'usual use' of a word as an objection to Austin's stipulated use, is equally, neither here nor there, and we shall, as Hart develops his position, frequently have occasion to remind ourselves of this point.

So we know then that Hart is dealing with that class of terms called IMPERATIVES - that he is concerned only with the sub-class of imperatives called ORDERS, and the sub-class of orders which are supported ONLY BY THREATS. The relevance of this to Austin has already
been indicated by Hart, and he is here taking the opportunity to develop the point. When speaking of the situation where a gunman orders his victim to hand over his purse, and threatens to shoot if he refuses, he said:

To some it has seemed clear that in this situation where one person gives another an order backed by threats, and, in this sense of 'oblige', obliges him to comply, we have the essence of law, or at least 'the key to the science of jurisprudence'. This is the starting point of Austin's analysis by which so much English jurisprudence has been influenced. The Concept p8.

Command: Having dealt with 'orders backed by threats' Hart now wishes to deal with 'command' and his treatment of it can be put quite briefly. Hart says that:

...the simple situation, where threats of harm and nothing else is used to force obedience, is not the situation where we naturally speak of 'commands'. The Concept p20 (1st emphasis added, 2nd in original).

His discussion of command is couched in terms of how it is naturally / typically / characteristically used, and he refers to five features which we shall call 'the five factors of command'.

(i) It has a very strong implication of a relatively stable hierarchical organisation of men;

(ii) The commander has a position of pre-eminence (usually a general, not a sergeant);

(iii) It need not be the case that there is a latent threat of harm in the event of disobedience;

(iv) It is to exercise authority over men, not power to inflict harm;

(v) It is primarily an appeal to authority, not fear.

Conclusion: Hart then states his conclusion as follows:

It is obvious that the idea of a command with its very strong connexion with authority is much closer to that of law than our gunman's order backed by threats, though the latter is an instance of what Austin, ignoring the distinctions noticed in the last paragraph, misleadingly calls a command.
This statement of Hart's has three distinct steps which we must clearly separate if we are to appreciate the force of his conclusion.

(i) 'Command' is closer to law than 'order backed by threats'.

(ii) Although Austin used the former, he actually meant the latter.

(iii) Austin overlooked the five factors of command.

The first point is uncontestable. The second is completely untenable. It bears no relationship to Austin's position whatever, and although it moves away from Austin's statement of his position, which Hart stated he would do in certain circumstances, it is so far from being an improvement on that position that Austin would probably have regarded it as the 'veriest foolishness'. Because of the tremendous influence of Hart's suggestion, I cannot unfortunately, dismiss it so lightly; I must examine it in great detail, to see if there is any trace of credibility in it. I must compare the 'gunman's order backed by threats' with what Austin actually said to see if it is possible that Austin was referring to that, but mistakenly called it a 'command', as Hart suggests. I will then move on to see if it is possible that Austin overlooked the five factors of command as Hart also suggests.

Austin meant 'gunman's order' but mislead us by calling it a 'command'. Austin does say that a command is the expression of a wish combined with the power to inflict an evil if it be not complied with (2). This expression is the closest I can find to Hart's suggestion. But merely to leave it like that is to ignore what went before and what followed that statement. Austin precedes that comment by saying that 'command' is the key to the science of jurisprudence and morals, therefore its meaning should be analysed with precision, and he speaks apologetically of the length he has to go to in order to do this.
(a) Violence or intensity of motive: By motive, Austin means the motive or will of the person expressing the wish. He examines the suggestion of Dr. Paley to the effect that unless the motive to compliance be violent or intense, there is no command. This seems to capture well an important aspect of the gunman situation. I would certainly take the view that if someone pointed a gun to my head and threatened to shoot me if I failed to hand over my purse, his motive could fairly be regarded as violent or intense. Austin took the view that this could mean one of two things:

(i) "If he means, by a violent motive, a motive operating with certainty, his proposition is manifestly false." Lectures (I) p90. Austin acknowledges that the greater the detriment and the greater the chance of incurring it, the more likely it is to bring about compliance, but that no conceivable motive will render obedience inevitable.

(ii) He considers the proposition that by violent motive is meant one which inspires fear. Of this he states that:

The truth is, that the magnitude of the eventual evil, and the magnitude of the chance of incurring it, are foreign to the matter in question...But where there is the smallest chance of incurring the smallest evil, the expression of a wish amounts to a command, and therefore, imposes a duty. Lectures (I) p90.

So Austin only requires the ability to enforce any detriment, however small, and whether or not the recipient is in fear of it. I will hereafter use 'detriment' rather than 'evil' as the former seems to make the point more clearly to the casual reader. This important point is clearly not reflected in the gunman situation.

(b) Institutionalisation of power: By this I mean to indicate a factor which I referred to earlier. Austin intends to prevent the fragmentation of his concept of law by making it one inseparable piece. To understand 'command' we have to understand 'duty' and 'sanction' (each connotes the other two). But command also implies the
relationship between sovereign and subject - or to take it in the steps which Austin takes: "[i]t appears then, that the term **superiority** (like the terms **duty** and **sanction**) is implied by the term **command**." Lectures (I) p97 (emphasis in original). Command is then intended to indicate the relationship of superior and inferior. It might rightly be said that the gunman is, of course, a superior in terms of power. Austin, however, makes it clear in his Lectures (VI) that the only relationship of superior and inferior with which he is concerned, in this analysis, is that which is indicated by the relationship of sovereign and subject: "I proceed to distinguish sovereignty from other superiority or might, ..." Lectures (VI) p220. Of course he then makes it clear that we cannot properly understand sovereignty without an appreciation of what he means by 'independent political society':

> The superiority which is styled sovereignty, and the independent political society which sovereignty implies, is distinguished from other superiority, and from other society, by the following marks or characters... Lectures (VI) p220 (emphasis added).

The remaining 118 pages of the lecture are given over to an elucidation of those features. The whole set of terms (command, duty, sanction, sovereign, subject and independent political community) have been inextricably bound together as part of one concept. Is it possible that Austin in explaining each individual aspect and its relation to the whole, in some 250 pages of text, actually intended to refer to the gunman situation (but only mistakenly called it a command) the aspects of which Hart himself states are so obvious that they are in need of little or no explanation? One only has to ask the question to see its absurdity.

Even if Hart attempted to salvage his position by claiming that he only intended to indicate that Austin started with a gunman situation, not that it reflected his final position, we could still give no quarter. When Hart states that "...we shall follow Austin in an attempt to build
up from it [the gunman situation] the idea of law", The Concept p20, he fails to reflect what Austin said in the first sentence of his first lecture:

The matter of jurisprudence is positive law: law, simply and strictly so called: or law set by political superiors to political inferiors. Lectures (I) p86,(emphasis added).

(c) Generality of law: There is a further limitation which renders Hart's depiction of Austin inapplicable. Austin did not say that all commands of a sovereign were to be regarded as law. At the very outset of Lecture I, he makes it clear that:

Commands are of two species. Some are laws or rules. The others have not acquired an appropriate name ... I must, therefore, note them as well as I can by the ambiguous or inexpressive name of 'occasional or particular commands.' Lectures (I) p92.

The distinction being:

Now where it obliges generally to acts or forbearances of a class, a command is a law or rule. But where it obliges to a specific act or forbearance, or to acts or forbearances which it determines specifically or individually, a command is occasional or particular. Lectures (I) p92 (emphasis in original).

Now Hart does of course introduce this aspect as he develops his discussion of Austin, but not until he has firmly established the notion of the gunman. The point here is to show that the gunman has no place in Austin's theory, and that Hart's presentation of it is misleading by suggesting that for Austin, the distinction between the gunman and a statute is only a relatively minor one - the statute is addressed generally to a group. The Concept p7. The distinction for Austin is not minor; it is made apparent from the outset by him, and he spends several pages discussing it in his first lecture. It must now be clear beyond peradventure that the 'gunman backed by threats' situation must be excluded on this further ground. Gunmen do not oblige generally to acts or forbearances of a class, and neither are they sovereigns.
commanding subjects in an independent political community. (3)

Austin ignored the five factors of command. Now that we have a better appreciation of Austin's position, we can see that contrary to Hart's claim that Austin ignored these five factors, his position is in fact very nearly compatible with them as we shall see by taking each of them in turn.

Factor (i) It has a very strong implication of a relatively stable hierarchic organisation of men. The aspect of stability is dealt with by Austin's requirement that "[t]he bulk of the given society are in a habit of obedience or submission to a determinate and common superior". Lectures (VI) p220 (emphasis in original). We shall deal with Hart's main criticism of this requirement later; for present purposes it is sufficient if we note that Austin draws the following distinction:

In case the generality of its members obey a determinate superior, but the obedience be rare or transient and not habitual or permanent, the relationship of sovereignty and subjection is not created thereby...
Lectures (VI) p222 (emphasis added).

We simply need to note that Austin contrasts 'habitual or permanent' with 'rare or transient', the former obviously being used to indicate something of a lasting or enduring quality. As this enduring quality is part of his concept of law, we cannot agree with Hart in saying that Austin has ignored the 'relatively stable' aspect of command (4).

Austin also gives a concise statement of what he means by 'sovereignty':

If a determinate human superior, not in a habit of obedience to a like superior, receive habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society, and the society (including the superior) is a society political and independent.
To that determinate superior, the other members of the society are subject; or on that determinate superior, the other members of the society are dependent.
Lectures (VI) p221 (emphasis in original).

I am unable to read this as indicating anything other than a
'hierarchical organisation of men' or perhaps we should say nowadays '...of people'. Hart's suggestion that Austin has ignored the factor of a relatively stable hierarchical organisation of men must be rejected in total.

Factor (ii) The commander has a position of pre-eminence (usually a general, not a sergeant). Austin says of sovereigns (who are of course the authors of the commands with which he is concerned) that they are distinguished by the following marks:

1. The bulk of the given society are in a habit of obedience or submission to a determinate and common superior: let that common superior be a certain individual person, or a certain body or aggregate of individual persons. 2. That certain individual, or that certain body of individuals, is not in a habit of obedience to a determinate human superior. Lectures (VI) p220 (emphasis in original).

He also refers to the sovereign as being 'supreme' Lectures (VI) pp221, 222. We have then the clearest possible statement - a paradigm case - of a commander who is pre-eminent. Hart's suggestion that Austin ignored this factor must also be rejected.

Factor (iii) It need not be the case that there is a latent threat of harm in the event of disobedience. Just before making this point, Hart states that, "[t]his word, [command] which is not very common outside military contexts, ..." The Concept p20. It cannot be doubted that in Hart's paradigm use (the military context) there exists a latent (I would say manifest) threat of harm for acts of disobedience. His suggestion that there need not be a threat of harm, therefore, must rest upon an 'uncommon' use. I must confess that such a use is so uncommon that I cannot think of it, and as Hart gives us no indication of what it might be, it is perhaps better if we reject this point as a sustainable criticism of Austin who, on this point, clearly has no wish to embrace the uncommon view of things.

Factor (iv) It is to exercise authority over men, not power to inflict harm. It seems to me highly unlikely that Austin failed to see
the connection between 'command' and 'authority' as Hart suggests. To command, for Austin, only required the expression of the wish by the sovereign, to the subject, combined with the ability and will to exact some detriment in the event of disobedience. One must remember the nature of his enterprise which we discussed in the last chapter. He merely wished to point to a distinctive feature of law — but did not intend to suggest that it was the only feature of law. But this is a way in which Hart frequently misunderstands Austin. There seems to be no inconsistency in saying with Hart that 'to command is characteristically to exercise authority and is primarily an appeal to that authority', and to say with Austin that 'it necessarily implies that the commander has the power to inflict some detriment in the event that his commands be not complied with.' We can see then that if this point is based on Hart's factor (iii) — his denial of necessary connection with detriment — then it must fall with that other point. If Hart does not deny this necessary aspect of detriment, then his point regarding authority is perfectly consistent with Austin. To point out that a commander has the capacity to enforce his orders, does not preclude him from attempting to maximise obedience by appeals to authority, or by indicating the moral basis of his position, or in any other way legitimating that possible use of power. To observe that sovereigns are universally liked or loved, far from diminishing the power of Austin's analysis may well show its value. If the answer to the question, 'Can such sovereigns impose a detriment on those who fail to comply?' is answered in the affirmative, then Austin has helped us to observe a feature which was not immediately apparent to us. By using his concept of law, he has enabled us to cut through the primary or superficial impressions we may have of a situation, and see the underlying power relationships. However, although Austin was concerned with necessary aspects of law, he did discuss in some detail the moral basis of human actions in his opening lectures. Lectures
(III and IV).

Factor (v) It is primarily an appeal to authority, not fear. As we have seen, Austin would agree that an understanding of law cannot be based on an analysis which requires fear. We must then ask of Hart when he says that to command is primarily an appeal to authority — does he mean by this that it is necessarily an appeal to authority? If the answer is 'no', then the observation is clearly irrelevant to Austin's purpose which is to deal with necessary features. If the answer is 'yes', then it has to be considered whether it is one of those necessary terms which needs to be included within the criterion of demarcation, which is to distinguish between the legal and the non-legal. We remember that the concept of 'right' was a necessary feature of law for Austin, but that he did not include it within The Province. In other words, Hart has to show that without the factor of authority in the criterion of demarcation, matters irrelevant to the discussion of jurisprudence will be admitted. Ironically, because Hart fails to understand what Austin is doing, he ends up arguing against his own interests. As we shall see shortly, it is clear that Hart feels that Austin is describing the legal process, rather than describing a concept. He therefore wishes the description (of the legal process) to be filled out. However, as we have seen, Austin is describing a concept, and that concept actually operates as a criterion of exclusion. Therefore, if Hart's suggestion were to be accepted, by adding more to this criterion, it would end up excluding more, not including more as he wishes.

This sort of misunderstanding of Austin is widespread, and accounts for many of the sweeping rejections of his ideas. Harris for example says:

Supposing one accepted — nobody does, but let's suppose — that the laws of the modern state do have just those elements in terms of which Austin defines general commands, and no others. (5) (Emphasis added).
I can find no warrant in Austin's Lectures for suggesting that he thought that the laws of the modern state had the elements he indicated, 'and no others'. In fact the evidence is all the other way. Of course there are many other factors involved in the complex phenomenon of law. But, he would insist, laws of modern states do have the factors which he indicated, and he would say that the value of his analysis is that this is often not recognised or is often overlooked. Harris continues:

If his theory were right, then every positive law would contain the four elements of wish, sanction, expression of wish, and generality — as well as a fifth element of 'emanation from a sovereign person or body' ... To test it, we must look to see whether each of these elements is present in every law, or whether laws contain further elements not specified by his definition. (6) (Emphasis added).

This last sentence, specifying the test for Austin's theory, is very confusing. Whilst accepting that Austin is engaged in definition, it treats his theory as if it were an attempt at description, and suggests some incompatibility between the first half of the test and the second half. Even if Austin were engaged in description, the test is unacceptable, for as we saw in the last chapter, there are always further aspects which can be added to any description but this does not mean that the description, as far as it goes, is a failure. If the test were accepted, all descriptions would fail it; and we would know this before considering the details of any particular description.

However, as we noted in the previous section, Austin is engaged in the definition of a concept which is to act as a principle of exclusion. It will a fortiori leave untouched many aspects of law (some important, some even necessary) which are not relevant to the purpose which he has in hand. This simple point, although a commonplace in other disciplines seems not to be appreciated by Hart. Miller, in writing on psychology, points out that attention both selects and suppresses, but points out that the suppression is a necessary consequence of the fact that attention is limited and selective. Polanyi, in writing on science makes
a similar point when he says that attention can hold only one focus at a
time (7), and as we shall see in chapter six, this consideration is also
an important feature of Aquinas's position.

'Command', 'Law' and their connection with 'Authority'. Hart
concludes his section on the gunman with a rather strange suggestion.
It is to the effect that 'command' is closely connected to the idea of
'law' in that both involve the element of 'authority'. He continues:

... for the element of authority involved in law has always
been one of the obstacles in the path of any easy explanation
of what law is. We cannot therefore profitably use, in the
elucidation of a law, the notion of a command which also
involves it. The Concept p20.

The steps in this curious piece of logic seem to be as follows:

(i) Austin uses a term 'command' and indicates an aspect of it not
always appreciated i.e. that there is an important power relationship
underlying it. Hart attempts unsuccessfully to deny this as we saw
earlier.

(ii) Hart then points to a further contingent and perhaps well-
accepted view, that it also is concerned with 'authority', although he
does not give any explanation of what he means by this.

(iii) Hart then suggests that the 'authority' of command has close
connections with the 'authority' of law.

(iv) He suggests that because the 'authority' of law is not easy to
explain, we should reject the idea of 'command' because of its
association with this same difficult idea.

(v) Hart's idea to avoid this difficulty is to replace 'command'
with 'order'. But of course, as he has already pointed out, we do have
one small problem with 'order' - it, "... suggests some right or
authority to give orders not present in our case." The Concept p19
(emphasis added).

(vi) Hart overcomes this difficulty by using the phrases 'order
backed by threats' and 'coercive orders' and limiting 'obedience' and 'obey' stipulatively. We have already seen that Hart approves of this because the elements of such a situation are not in need of much explanation, and now we can see that he also likes them because they have little connection with law. Our main difficulties here are his suggestion in point (iv) that because a term indicates an aspect which is not easy to explain, we should reject it. If Austin had taken the view that anything which stands in the way of an easy explanation of law was to be avoided, he would never have embarked on his ambitious project, for he told us at the outset that his project was most difficult and required long circumlocutions. The main difficulty though, is his move in point (vi). We must remind ourselves of what Austin was trying to do - if we accept that 'command' is suggestive of 'authority'. Austin was very much aware of the role of authority and clearly felt it to be a dangerous guide. He thought that the way forward was to ensure the widest possible diffusion of the knowledge of ethical principles through the great mass of the people and only then might it be the case that:

...the multitude might clearly understand the elements or groundwork of the science, [of ethics] together with the more momentous of the derivative practical truths. To that extent, they might be freed from the dominion of authority: ... Lectures (III) p133.

Austin was concerned with the role of authority, and saw it as being related to the extent to which positive laws accorded with positive morality or ethics. He pointed to the danger of having a commander who is regarded as 'an authority'. Significant proportions of Lectures II and III are given over to a discussion of this position. Having explained the contingent nature of authority, and the danger of relying upon it as a source of social control, he then sets out by stipulation his concept of law - which does not include it. It is in this very context that Hart uses the same approach to achieve the same goal. He
also uses stipulation to exclude authority. He points out that 'order' and 'obey' have associations with 'authority', so he excludes it from the former by the addition of the qualifying words 'backed by threats', and he excludes it from the latter by the stipulation 'we shall use ..'.

Hart's error is now becoming clearer. It was not that Austin failed to appreciate the role of authority, or that he included it within his concept of command - he clearly did not do this. What Hart is doing then is to set up, without specifically saying so, the popular meaning of command; and then suggesting that this popular meaning constitutes some reason for not using "command" in the way in which Austin used it, and which was different from that popular meaning. The very same argument would, of course, prevail against Hart's use of 'obey'. This is obviously an illegitimate step, whether used against Hart's own stipulations, or those of Austin. The further illegitimate step is to take the view that the only solution to this imagined problem is to utilise the concept of the gunman, which, as Hart seems to be saying, has little connection with the idea of law, and indeed seems to him, for this reason, to be most appropriate in elucidating Austin's concept of law. Hart is hinting here at a problem which Austin states explicitly, and which we noted earlier - the circularity of many pretended definitions, which turn upon the very expressions which they effect to elucidate. It would be surprising if Austin were in fact guilty of an error which he could see so clearly - and of course, he is not. Command is associated with authority, and Austin explains the nature of this association, adding for good measure that the association is not always an influence for the good. Command is then utilised by Austin in his explanation of the concept of law, but in such a way that it does not bring with it this element of authority:

If you express or intimate a wish that I shall do or forbear from some act, and if you will visit me with an evil in case I comply not with your wish, the expression or intimation of your wish is a command. Lectures (I) p89
He continues to make it clear that the distinguishing feature of command, for his purposes, is the power and purpose of the commanding party to inflict a detriment if the command is not complied with. He is making it clear here that the relevant factors are power and purpose — and whilst 'authority' may be a factor upon which power is based, it is a contingent factor related more to the efficacy of commands than to their existence. Austin, as if to underline the point says, as we have seen, that opinion should not be based upon 'authority', but on a soundly educated public. He does accept that in the nature of things, there will always be scope for authority in the forming of opinions which go to make up the positive morality of a group, but he does not suggest that there is a necessary link between authority and the commands of the sovereign. Lectures (III) p138. In other words, he does not conflate the sources of legal and of moral authority.

Definition: Although Hart discusses 'definition' in the section of his book which precedes his critique of Austin, we must regard what he says concerning definition, as part of that critique. As we have seen, definition is an important part of Austin's method (and is one which Hart himself adopts on occasions) therefore a critique of that way of proceeding will have a direct effect on our assessment of Austin.

We know, of course, from Hart's inaugural lecture that he is critical of the role of definition and particularly that, "... though theory is to be welcomed, the growth of theory on the back of definition is not."(8) However, whether it is to be welcomed or not, we can see that in mathematical theory it appears to have been extremely useful, and we must keep an open mind as to whether it might not yet prove to be as useful in legal theory (despite Hart's view to the contrary):

We know that deductive mathematics began with the Greeks and that the first seemingly sound structure was Euclid's Elements. Euclid started with definitions
Hart states that the need for a definition is usually felt by those who are at home with the day-to-day use of the word in question and sense distinctions which divide one thing from another but cannot state what they are:

It is in this way that even skilled lawyers have felt that, though they know the law, there is much about law and its relations to other things that they cannot explain and do not fully understand. The Concept p13.

He suggests that such people need a map to exhibit clearly the relationships dimly felt to exist between the law they know and other things; that the definition is not merely about words, but about the realities we use the words to talk about. The Concept p14. This captures well the spirit motivating conceptual analysis. Through experience in a particular area, an 'insight' is gained which is thought to be significant. One then stands back from the fray and attempts to formulate - by way of definition - a model of the concept which is thought to be useful. As Boden puts it:

...intelligence in general requires the use of representations (variously termed "models", "schemata", "scripts", and "frames") that can provisionally supply default values of specific variables as well as defining the broad outlines of the phenomenon being thought about. (10)

As we saw in the last chapter, Boden accepts that when dealing with these outlines, the more obvious aspects are often imagined to be out of the way in order that we can focus more clearly on the aspect being dealt with. We can then attempt to demonstrate the usefulness of the perspective which the concept provides us with by returning to the phenomena and saying, as it were, 'if I look at the world in this way, how will it appear then?' If we become more aware of something we had only been 'dimly' aware of previously, then our insight has been clarified, the conceptual model has been useful, and we can either develop it further, or go on to some other profitable activity.

Some philosophers have considered the deliberate
suspension of belief, of the natural attitude, to be of the essence of philosophy. Husserl called it the epoche, a kind of putting-of-the-world-in-brackets and suspending judgment so that one could have a better look. (11)

If a sociologist is concerned to understand sport, and feels that there is a common ground between sports which is not often recognised, he may decide to test his insight. He will do so by formulating, by way of definition, the various aspects of that feature. He will then use his definition (which when completed will constitute what we call a concept or a conceptual model) as a defining criterion of sport. If it transpires that 99% of what had heretofore been commonly regarded as 'sport' came within that new definition, then it has not simply indicated to us in a more complicated way what we had already known intuitively. It has shown us, by testing against the 'realities' of the world that there is common ground, where previously it had not been recognised.

If however, a significant proportion of what had previously been regarded as sport now fails to come within this new definition it might be thought that it was merely capricious, arbitrary or what Austin referred to as an 'ingenious but useless refinement', unless there was some other redeeming feature. The conceptual model works in much the same way as a scientific theory and can be most interesting where it fails to work; it draws our attention to the difference between the 1% and the remaining 99% which had previously not been apparent to us. Hart states that such development by way of definition is not always illuminating, but his explanation as to why it fails, when it does, is interesting, and I will now look at each of the steps in his argument in order that we may assess their impact on the value of Austin's explanation.

(a) Family Membership: Hart states that success in the use of
definition depends on factors which may not be satisfied:

Chief among these is that there should be a wider family of things or genus, about the character of which we are clear, and within which the definition locates what it defines; for plainly a definition which tells us that something is a member of a family cannot help us if we have only vague or confused ideas as to the character of the family. The Concept p14.

The difficulty with this objection is that if we are clear about the wider family, this may only be because a similar exercise has already been carried out with regard to the criteria for membership of that wider family - but this, on Hart's view, could not have been done unless that family had itself been located within an even wider family, the membership of which was clear - and so it leads inevitably to an infinite regress. What Austin does with his concept of law is to put forward criteria which indicate what belongs within the province of jurisprudence and what does not. After The Province, he begins to fill in the outline. Our understanding of jurisprudence is not vitiated because we do not have a detailed understanding of those things which do not belong within the province of jurisprudence. Hart seems to require a detailed understanding of the whole before we can understand a part. This seems to put the cart before the horse, and would inevitably render knowledge impossible. I would claim that understanding a part is a step towards a better understanding of the whole. As Collingwood expresses it, "[t]he superordinate science A is always logically prior to the subordinate sciences B and C, but in the order of study it is always posterior to them." (12) Polanyi, in his discussion of science, explains that the logical premisses of factuality are not known to us or believed by us before we start establishing facts, but that the premisses must be deduced after we have accepted them, and that:

Since the process of discovering the logical antecedent from an analysis of its logical derivate cannot fail to introduce a measure of uncertainty, the knowledge of this antecedent will always be less certain than that of its consequent. (13)

However, if Hart is merely trying to say that before we build up a
detailed knowledge of that part, we should be able to locate it within a wider framework, then of course I would whole-heartedly agree. I indicated this problem in the introduction when I referred to the problem of specialisation without synthesis. Austin of course appreciated it too, and went to unusual lengths to deal with it. We can see from his plan of the various branches of knowledge, that he wished to show the relationship of jurisprudence to ethics, politics and philosophy. We know from his first lecture that he commences his discourse by showing the relationship of positive law to positive morality and Divine Law. In his Lectures, the list of contents has brief notes on each chapter; this is followed by an outline of the whole course of lectures, which is followed by an abstract of the outline and even this is followed by a resume of the abstract in tabular form. This is followed in turn by an analysis of Lectures I-VI. The importance which Austin attached to the use of 'Tables' (or plans) is clear from his Lectures (see Preface p24, and pp916-988).

Having stated that this family grouping is an essential aspect of 'definition', Hart then rejects definition out of hand without any discussion of Austin's extensive treatment of it in Lectures (I). Hart states that:

It is this requirement that in the case of law renders this form of definition useless, for here there is no familiar well-understood general category of which law is a member. The most obvious candidate for use in this way in a definition of law is the general family of rules of behaviour; yet the concept of a rule as we have seen is as perplexing as that of law itself, so that definitions of law that start by identifying laws as a species of rule usually advance our understanding of law no further. For this, something more fundamental is required than a form of definition which is successfully used to locate some special, subordinate, kind within some familiar, well-understood, general kind of thing. The Concept p15. (1st emphasis in original 2nd added).

This extract is a little difficult to understand in that the earlier part of it seems to say that there is no wider group to which law belongs, and the last sentence of it, if it has any meaning at all,
seems to say that if there is a wider family to which law belongs (and I take him to indicate this by 'familiar, well understood, general kind of thing') then this approach is not sufficiently 'fundamental'. It is a pity that Hart did not look at Austin's treatment of law as a command, within a wider species of commands, to demonstrate its superficiality. His rejection of the family of 'rules' on the basis that the concept of a rule is as perplexing as that of law itself, is something of an own goal for Hart. Later, on the same page of The Concept as the above extract, he states, "...and here perhaps we have a principle similar to that which unifies the different types of rules which make up a legal system..." It seems to be a clear implication of Hart's own approach that he starts by identifying laws as a species of rule and does what Austin is critical of in that he casts them before the reader without any attempt at explanation - Lectures (Uses) p1075. As we shall see in the next chapter, the concept of 'rule' is quite central to Hart's thesis, yet we shall have occasion to mention (as we have now) that Hart utilises the term on many occasions in advance of his discussion of it, which seems to belie his suggestion regarding its complexity.

(b) Common Characteristics: Hart states that:

The supposition that a general expression can be defined in this way rests on the tacit assumption that all the instances of what is to be defined as triangles and elephants have common characteristics which are signified by the expression defined. Of course, even at a relatively elementary stage, the existence of borderline cases is forced upon our attention, and this shows that the assumption that the several instances of a general term must have the same characteristics may be dogmatic. Very often the ordinary, or even the technical, usage of a term is quite 'open' in that it does not forbid the extension of the term to cases where only some of the normally concomitant characteristics are present...so that it is always possible to argue with plausibility for and against such an extension. The Concept p15 (emphasis in original).

There are several points here which we need to consider, and which are a helpful insight into Hart's misunderstanding of Austin. It is not
that Austin assumes that all instances of a general term have the same characteristics - he would agree with Hart that there are obviously borderline cases (although I am not sure he would agree that there are borderline cases of triangles and elephants as Hart suggests). If Hart had understood the purpose of the first six of Austin's lectures which comprise *The Province* he could have been in no doubt of this, although, to be fair to Austin, he does attempt to make his position as clear as possible. "For, since such is their principle purpose, they affect to describe the boundary which severs the province of jurisprudence from the regions lying on its confines." *Lectures* (Analysis I-VI) p80.

In other words, the whole of *The Province* is concerned with nothing other than borderline cases - it is the borderline. The suggestion that one is being dogmatic in not extending the term to cases where only some of the characteristics are present, does not apply to Austin either; "[t]here are other objects improperly termed laws (not being commands) which yet may properly be included within the province of jurisprudence." *Lectures* (I) p98. He thereby includes specifically some cases which are only partial cases - they are not commands - with the rest. It should be noted, though, that the determining factor as to where the line should be drawn is not as Hart suggests a question of usage; or at least for Austin it clearly is not, and for Hart to fail to deal with this issue in some detail indicates another important misunderstanding of Austin. Hart is correct in saying that usage of a term does not forbid extension of it to cases which fall on the far side of the borderline - it would be clearer if he had said that usage neither allows nor forbids anything - it is merely an extrapolation from practice. To suggest that it might allow or forbid something is to re-introduce the whole of the is / ought problem (15). To say of usage that it is 'open' is simply another way of saying that it is confused
and confusing, and this of course was a central concern of Austin's.

Austin, and Hohfeld after him, were very much concerned with this confusing aspect of 'usage' and unlike Hart who, as we shall see, attempts to construct a theory which incorporates it, they were reformers and were concerned to try and do something about it:

It is common enough to use ordinary words in variable senses. This variable usage is not disapproved by lexicographers and linguists [and one might add by linguistic philosophers]; they record all the usages...There is peril, however, in this common multiple usage of important words; it very frequently causes misunderstanding. He [Hohfeld] took these words out of this common usage, even though that usage is confused, overlapping, and inconsistent. His effort was to remove the overlap and inconsistency, forcing a judge or other user to have a clear and definite meaning (thought, concept) and to choose the one word that would convey that exact meaning to another person...One whose own mind is cloudy and confused is certain to convey only cloudy and confused thoughts to others. (16)

This captures well the nature of the project in which Austin was engaged, and clearly indicates that the concern is not to reflect usage, but to reform it; or at least to encourage its development in a systematic way. Austin indicates this clearly when he says that:

It is not meant to be affirmed that these principles and distinctions are conceived with equal exactness and adequacy in every particular system. In this respect different systems differ. Lectures (Uses) p1073.

To point out, as Hart does, that plausible arguments can be put for and against certain extensions, is not of course to say anything very significant. The point is that the lectures comprising *The Province* contain the reasons explaining why Austin draws the line where he does. To point out that the line could have been drawn differently is trivially true, but does not of itself provide any reason for extending it to the aspects which Hart refers to, nor does it acknowledge the reasons which Austin gave for not doing so. Usage cannot be the guide, because it is often the problem, and Austin is often unsparing in his comments regarding it: "In English law, we find the same useless and misleading jargon, and employed, as usual, still more inconsistently."
(c) Analogy: Hart takes the view that:

...the several instances of a general term are often linked together in quite different ways from that postulated by the simple form of definition. They may be linked by analogy as when we speak of the 'foot' of a man and also of the 'foot' of a mountain. They may be linked by different relationships to a central element. Such a unifying principle...Or again - and here perhaps we have a principle similar to that which unifies the different types of rules which make up a legal system - the several instances may be different constituents of some complex activity. The Concept p15 (emphasis in original).

Hart is telling us here that the simple form of definition will not do because the different instances of a general term may be linked in a way which is incompatible with that simple definition. However, Hart fails to establish this point in what follows that statement; and if these comments are intended to be part of his rebuttal of Austin, as I take them to be, then he demonstrates again his misunderstanding of Austin. He points out that instances of a general term may have different relationships to a central element, which he refers to as a unifying principle, or that they may be different instances of a complex activity. These observations are of course perfectly compatible with Austin, who would merely add that his concern was with that 'central element' or 'unifying principle'. As we saw earlier, Austin was very much aware of the differences between different systems, and of the complexities within each system, but he nevertheless thought that there would be some benefit in trying to identify that which the different systems have in common. It seems that this is a logical first step if one is to develop an understanding of the differences within a complex activity, in that one must first establish what it is that makes them part of 'the same activity'.

Hart then rounds off his discussion of definition by saying that in answer to the question 'What is law?'

...nothing concise enough to be recognised as a definition
could provide a satisfactory answer to it. The underlying issues are too different from each other and too fundamental to be capable of this sort of resolution. This the history of attempts to provide concise definitions has shown.

P16.

Austin would of course agree that the use of concise definitions is not of much assistance. We saw earlier, how he thought them to be inapplicable or 'utterly useless'; how he recognised that what was needed was a dissertation, long intricate and coherent - the six lectures comprising The Province of Jurisprudence Determined, so far from being a concise definition, are longer than The Concept of Law.

Unlike Hart, however, Austin recognised the role which definition had to play and made this an integral part of his dissertation. Hart takes the view that definition cannot help in the resolution of this problem - it is worth noting that in the first sentence of the above extract, he is not just rejecting one type of definition, but anything which could be recognised as a definition. In its place Hart puts 'description', but as we shall see in the next chapter, this is to do covertly what Austin does explicitly, i.e. Hart's descriptions are 'disguised definitions of the concepts'.

Meaning and Use: Hart makes the observation that:

It is here worth noticing that though jurists, Austin among them, sometimes speak of laws being addressed to classes of persons this is misleading in suggesting a parallel to the face-to-face situation which really does not exist and is not intended by those who use this expression. The Concept p21 (emphasis in original).

This is of course another of those 'ingenious but useless refinements'. Hart acknowledges that 'addressed', is not intended to be understood, by those who use this expression, in the way in which he suggests it could be taken. Well, insofar as we know that the expression was not intended to be taken in that sense, then we are not of course misled. This is however an opportunity for Hart to spend further time in
pointing out that the suggestion of the face-to-face situation (which the author did not intend) is close to that of the gunman situation (which has nothing to do with Austin as we have seen).

I pointed out earlier in this chapter that to oppose a 'popular' meaning of a word or phrase to the meaning which an author intended is not very constructive. We can see more clearly in the case of this example why this is so. Hart's suggestion here is that there is a popular meaning of 'addressed', and although the author is not using the word in that way, we might be misled. Yet this seems inconsistent with the philosophical views of the school to which Hart subscribes.

MacCormick states that:

[T]here was a convergence in ideas between Wittgenstein and his Cambridge acolytes and the proponents of 'linguistic analysis' in the Oxford mode. They shared the view that philosophers must be alert to the way in which language, ...can itself be the very source of philosophers' problems about the nature of the world. Words do not always and necessarily 'stand for' things...(17).

It is all the more surprising then, that Hart seems not to appreciate what Wittgenstein was saying in Part 1 of his Philosophical Investigations. In discussing the multiplicity of 'language games', he tells us that we understand the meaning of words (i) by looking to the language game in which they are employed, and (ii) by understanding their use in that language game. If we apply this, we can understand the language game which Austin was using - that of definition (although Hart takes him to be engaged in the different game of description). We can see the way in which 'addressed' works in Austin's language game - there being no suggestion that 'face-to-face' addressing was meant or intended (as Hart acknowledges). That then is all there is to say about the meaning of a word. For Hart to take this word out of its context, to attribute a meaning to it without considering which language game or how used, and then to suggest that this meaning could still be a cause of confusion when the word is put back into a context which will not wear
it, is surprising. In this case, we do not have to see the context as the overall flow of Austin's argument, but only the specific sentence in which it occurs. As Hart shows in his footnote, the relevant sentence reads, "...addressed to the community at large." His suggested meaning is clearly rendered inappropriate by the words which follow 'addressed' - 'the community at large'.

Similar considerations apply to Hart's suggestion that, "Austin occasionally suggests that a person is bound or obliged only if he actually fears the sanction." The Concept p236 (emphasis in original). He cites in support of this the sentence, "[t]he party is bound or obliged to do or forbear because he is obnoxious to the evil and because he fears the evil." In the paragraph immediately preceding the one from which Hart takes this sentence, Austin points out that to be under an obligation is to be liable to an evil (or detriment - no mention of fear). In the paragraph immediately following it he points out that the sanction is the evil, and the obligation is liability to that evil (again, no mention of fear). Hart rather grudgingly accepts that "[h]is main doctrine, however, seems to be that it is enough that there is the 'smallest chance of incurring the slightest evil' whether the person bound fears it or not." The Concept p236. There really is no reason to be hesitant about this - for Austin states it to be so in the clearest possible terms in his first lecture as we have already noted. If he had regarded fear as a factor, it is inconceivable that he would not have dealt with it with the same painstaking care which he gave to all the other factors with which he was concerned. Hart's suggestion here only has credibility when the remarks to which he refers are removed from their context - they are in any event peripheral, in the sense that they are comments made 'in passing' rather than as a specific focus of attention, and this approach has the effect of undermining Austin's position, rather than strengthening it as Hart stated he would.
We should remind ourselves that Hart stated that, "... we have not hesitated where Austin's meaning is doubtful or where his views seem inconsistent to ignore this and to state a clear and consistent position." The Concept p18 (emphasis added). Not only has Hart failed to live up to his own statement of intention, but he has also manufactured a few extra difficulties of his own. On no view could it be accepted that he has ignored seeming inconsistencies.

Content of Laws: Hart's main difficulty in this section is his continuing failure to appreciate Austin's method in The Province. His criticism is based on the view that the description of law provided by Austin is superficial, it obscures the complexity of law and distorts our view of the way in which the legal system works in practice. To most of which Austin would enter a demurrer; the point being that he was not intending to provide a description of law - he was providing a conceptual tool to enable us to distinguish between the legal and the non-legal; and for this exercise we require in our criterion the minimum necessary content, as we have seen.

We will now look to see how this failure of understanding with regard to Austin's purpose brings about a disjunction between Hart's criticisms and the object of his attack. Why it is that Hart's interpretation of Austin would have Austin attempt to say too much and then show how he did it badly. Stone makes this point quite clearly when he says that it is to invite cross-purposes to criticise the validity or usefulness of Austin's system in terms either of societies or purposes which lie outside its own postulates. "The fact that we may be more interested in the law of other societies, or in other aspects of law, would not prove Austin wrong."(18) If we see that Austin was merely making a preliminary point at the outset of his intellectual endeavours, although in some detail, then many of the purported inconsistencies and
contradictions will be resolved. As Collingwood points out:

If you cannot tell what a proposition means unless you know what question it is meant to answer, you will mistake its meaning if you make a mistake about that question. One symptom of mistaking the meaning of a proposition is thinking that it contradicts another proposition which in fact it does not contradict. No two propositions ...can contradict one another unless they are answers to the same question. (19)

(a) Power Conferring Rules. Hart begins his discussion of this aspect of law by making an apparent concession in that he acknowledges that there is a strong analogy between the requirements of the criminal law and the 'general orders backed by threats' which, as we have seen, constitutes his view of the Austinian model. He is also prepared to accept that there is some analogy between that model and the law of torts. However, the main thrust of his attack is that the model breaks down entirely when we consider that:

Legal rules defining the ways in which valid contracts or wills or marriages are made do not require persons to act in certain ways whether they wish to or not. Such laws do not impose duties or obligations. Instead, they provide individuals with facilities for realizing their wishes, by conferring legal powers upon them to create, by certain specified procedures and subject to certain conditions, structures of rights and duties within the coercive framework of the law. The Concept p27.

We must look in some detail at this important statement of Hart's in order to evaluate the extent to which it constitutes a valid criticism of Austin.

(1) Building upon his mistaken view of Austin, Hart puts forward the idea that there are rules which operate in a different way to that of the 'order backed by threat' type. The former, which it is claimed Austin has overlooked, are not concerned with the imposition of duties, but with enabling people to create structures of rights and duties within the coercive framework of the law. This type of rule Hart calls a power conferring rule, and he says of it that, "...it is a feature of
law obscured by representing all law as a matter of orders backed by threats." The Concept p28. He even states that," [i]n some cases it would be grotesque to assimilate these two broad types of rule."(20) The implication of this is that Hart clearly takes the view that Austin's position is that of representing all law as a matter of 'orders backed by threats', and that such a representation obscures the important feature of law to which Hart is drawing our attention. It would certainly be the case that if Hart's interpretation of Austin is correct, then his conclusion concerning the gravity of Austin's omission would also be correct.

We Have already looked at Hart's suggestion that Austin is dealing with orders backed by threats, and need say no more about it here. The issue then is the extent to which Austin represents all law by his concept or model. This is clearly not his intention, as I have suggested in chapter one, and to suggest that it was, not only misinterprets Austin, but shows a failure to understand the nature of abstractions. As we have seen already, Collingwood, Toulmin and Baier, Popper and Kline all make the same point in different ways (21); that observations are necessarily limited, and are never complete. We realise then that the concern is not just to make more observations, but to make observations which answer questions, or solve problems which we have. The problem Austin was concerned with was the confusion which had resulted from people misunderstanding each other in discussions concerned with positive law, positive morality and ethics. He provided us with a tool which would enable us to separate, for analytical purposes, these different aspects. Having made this initial discrimination, he then began to build up a more complex picture by filling in 'the outline he had sketched with so masterly a hand'. At no time does he claim that this is a full description of all aspects of a legal order, as Hart would have us believe. As Gibbs states:
Insofar as a coercive definition of law purports to be generic, it is difficult to see how Hart's criticism can be valid. It is as though someone rejects a definition of Equus caballus because it applies equally well to thoroughbreds and Shetland ponies. (22)

Austin's only claim is that the features he indicates are relevant to all laws. That this is so is specifically confirmed by Hart in relation to his power conferring rules when he says that they exist within the coercive framework of the law, and that they are parasitic upon the duty imposing rules. However, the utilisation of this distinction as the basis for a critique of Austin, indicates that Hart neither understands the nature of abstractions, nor the nature of Austin's enterprise. Hart would have done well to heed the comments of Wittgenstein:

Point to a piece of paper - And now point to its shape - now to its colour - now to its number (that sounds queer). - How did you do it? - You will say that you 'meant' a different thing each time you pointed. And if I ask how that is done, you will say you concentrated your attention on the colour, the shape, etc... Suppose someone points to a vase and says "Look at the marvellous blue - the shape isn't the point." - Or: "Look at the marvellous shape - the colour doesn't matter." (23)

Hart's pointing to the power conferring rules, in the context of a discussion on Austin, (especially The Province) is the equivalent of pointing to the colour of the vase when another person is attempting to indicate the shape; it is not that the person is wrong about the colour, 'it doesn't matter'. It is not as if the person indicating the shape is denying that the vase has a colour or even that it is this colour rather than that; just that the colour is irrelevant in the context of his purpose. So with Hart, it is not that Austin would wish to deny that there are power conferring rules; indeed in some contexts it may be an important and interesting observation, but in relation to a critique of Austin, it is quite irrelevant. It would be different if Hart said that he accepted what Austin had to say, and wished to develop that position - but we must evaluate Hart's pronouncements in the context of his purpose. As his purpose here is to lay the foundation for a rejection of
Austin, we can only say that this is not the way to do it. For Austin to be successful in his endeavour, it is only necessary to show that the 'power conferring' rules will be brought within the 'province of jurisprudence' by the conceptual framework which he provides us with. I will discuss Hart's confirmation that this is in fact so in point (iii).

(ii) I shall deal with the merits of Hart's discussion of 'power conferring rules' in the next chapter. For the present, in the context of our evaluation of Hart's critique of Austin, we should note that

Dworkin's view of the matter is that:

H.L.A. Hart's version of positivism is more complex than Austin's, in two ways. First, he recognizes, as Austin did not, that rules are of different logical kinds. (Hart distinguishes two kinds, which he calls 'primary' and secondary'(sic) rules)... Hart's distinction between primary and secondary rules is of great importance. (24)

However, this is to completely ignore what Austin says in his discussion of the Law of Things:

Rights and duties not arising from delicts, may be distinguished from rights and duties which are consequences of delicts, by the name of primary (or principal). Rights and duties arising from delicts, may be distinguished from rights and duties which are not consequences of delicts, by the name of sanctioning (or secondary). (25)

We find then that not only is it incorrect to say that Austin did not recognise that rules are of different logical kinds, but that he actually utilised the very terminology of primary and secondary which Dworkin takes to be such an important contribution of Hart's.

(iii) Hart states that the power conferring laws do not impose duties, but give to private individuals power to create duties within the coercive framework of the law. We must remind ourselves that the question as to whether this is a valid criticism of Austin, is of course a separate consideration from whether or not it is a helpful or useful observation to make. We are only concerned with the former here - the latter will be dealt with in the next chapter. Unfortunately for Hart,
because of his failure to appreciate what Austin is doing, what he puts forward as a criticism of Austin's position becomes in effect a powerful statement in its support. Hart states, in terms, without realising it, the very point which Austin is making. Hart says of the power conferring rules, that they operate within the coercive framework of the law, and that they are parasitic upon or secondary to the duty imposing rules - The Concept pp27, 79. In the former, Hart is accepting that the basic framework of the law is of a coercive nature, and it seems that this is the point which Austin was trying to establish in The Province. In the latter, Hart is accepting the point which we referred to under (i), to the effect that it was only required of the framework that it should bring within it other factors which will later be seen as developments from that basic position. We have seen this already with 'rights' and the same can now be seen to apply to 'power conferring rules'. Austin was neither unaware of their existence, nor unconcerned about them. It simply was not necessary though to include them as part of the criterion of demarcation; although it was important that they should be captured by it. Hart acknowledges that this is in fact the case by stating that they are parasitic upon or secondary to the duty imposing rules.

It is worth noting again at this stage that Hart utilises a fourfold classification of power conferring rules - The Concept p28. Yet there has still been no intervening discussion of what a rule is, since his earlier statement that the concept of a rule is as perplexing as that of law itself - The Concept p15. One of these classifications of Hart's is that of capacity, "[t]hus behind the power to make wills or contracts are rules relating to capacity...which those exercising the power must possess." The Concept p28. There is no reference in Hart's text to the fact that Austin discusses this at some length in his chapter on status - Lectures (XLI and XLII). Hart stresses the rules involved in the delegation of legislative power, and regards the fact
that a decision, which is at variance with those rules, stands until
quashed by a superior court, as being a 'mere complication'. It is
unfortunate that he passes over this so easily, for if the power of the
court is constituted by these rules, there is no satisfactory
explanation of this. The 'complication' can be eased somewhat if one
looks to the question of whether or not the order is enforceable, as
Austin does.

(b) Range of Application: By this, Hart has in mind Austin's
suggestion that:

Now it follows from the essential difference of a positive
law, and from the nature of sovereignty and independent
political society, that the power of a monarch properly
so called, or the power of a sovereign number in its
collegiate and sovereign capacity, is incapable of legal
limitation. A monarch or sovereign number bound by a legal
duty, were subject to a higher or superior sovereign: that
is to say, a monarch or sovereign number bound by a legal
duty, were sovereign and not sovereign. Supreme power limited
by positive law, is a flat contradiction in terms.
Lectures (VI) p263 (emphasis in original).

This is one aspect of Austin's framework which is not subject to
exceptions or limitations, "... the position that 'sovereign power is
incapable of legal limitation' will hold universally or without
exception." Lectures (VI) p264. Hart's response to this clear
statement by Austin is to say that the range of application of a law is
a question of interpretation:

It may or may not be found on interpretation to exclude
those who made it, and, of course, many a law is now made
which imposes legal obligations on the makers of the
law. Legislation, as distinct from just ordering others
to do things under threats, may perfectly well have such
a self binding force. The Concept p42 (emphasis in original).

Hart explains that the problem for Austin, is that he has to resort to
a complicated 'device' to make his system work i.e. whenever the
sovereign consists of more than one person he has to distinguish between
those members when acting in their sovereign capacity and when acting as
private individuals. Hart feels that 'this complicated device' is really
quite unnecessary. It is very surprising for Hart to take this line of criticism. It seems to me that the only situation in which this would really be a complicated device, would be in the primitive societies of which Hart often speaks. The distinction between one's official and personal capacity is appreciated and utilised in all sectors of society. Frequently one hears the caveat, "I am speaking in a personal capacity, not as a member of the ...committee." In fact some trade union leaders are capable, not only of distinguishing official from personal capacities, but of distinguishing a range of official capacities - when speaking as trade union leader, member of the T.U.C., or any one of a dozen committees. The same applies to businessmen, politicians, and even university professors, and the distinction is still utilised by modern writers on matters of constitutional law without apparent difficulty, as it is of course by Hart himself. (26)

The point is of course, that Austin's sovereign is not an empirical entity, but an abstraction, in the same way as one might speak of a corporation. Hart and others like him have simply not been able to do what we referred to in chapter one as being of the essence of philosophy - to suspend the natural attitude. T.M. Benditt, in his recent book, states with Hart, "[i]n most legal systems, including our own, the sovereign is bound by law."(27) Hart states "...there is no reason, since we are now concerned with standards, not 'orders', why he should not be bound by his own legislation."(28) He later states that "...it [a criminal statute] commonly applies to those who enact it and not merely to others."(29) Gibbs puts it in this way:

The Austinian scheme implies that the sovereign is above laws by virtue of having enacted them, but this implication does not square with the obvious fact that in some societies some laws apply both to sovereign and to subject. (30)

Austin's claim is not that the sovereign is above laws 'by virtue of having enacted them', but by virtue of the fact that sovereign authority
is necessary to enforce them (31). This is made clear by the early reviewer of The Province when he states that

"the sovereign may, however, be under moral or religious obligations, because such obligations are enforced either by God or by those whose common sentiment establishes moral rules." (32)

Although the sovereign may act in accordance with self imposed standards, or standards set by the opinion of others, Austin's argument is that such standards are better viewed as matters of positive morality. Self imposed law (and Gibbs, as well as Hart, accepts that we are speaking of coercive definitions of law) makes as much sense as would the idea of self-imposed duress as a defence to murder. Martin Golding comes close to appreciating this point, but errs when he suggests that such a conclusion is required by the theory he is looking at. "On Austin's theory we would have to conceive of the legislators as commanding, ordering, and threatening themselves. But this also seems absurd." (33) Ruben also misunderstands Austin on this point when she states that for Austin, "...the sovereign cannot be limited in any way..." (34)

The legal order indeed cannot be limited.
We are thus back to the original definition of sovereignty: the central authority cannot be limited in any way. To limit the central authority would detract from its sovereignty and thus impair the stability of government. (35)

Austin's only claim is of course that the sovereign is legally illimitable, and this is a necessary consequence of his definition. Those who claim otherwise are working with an unspecified, but clearly non-Austinian definition of sovereignty. Austin, of course, makes it abundantly clear that the sovereign may well be subject to the limitations of positive morality. The reviewer of The Province put it well when he said:

Whenever people associate together for political purposes some one or more of them possess a power of publishing and enforcing commands which is not controlled by any other power of the same kind, though it is restrained by positive moral rules... (36)

Morison also continues this confusion when, after correctly pointing out
that Austin allows the matter of 'capacity' or 'character' in which the sovereign acts to enter into the identification of a command of the sovereign, he goes on to say:

He tells us now that to have a character means to be invested with rights or to be subject to obligations. Austin's identification of sovereign commands is thus apparently dependent on us being able to identify the law already before we are able to use the identifying test. (37)

It is, of course, not difficult for Austin to acquit himself of the charge (and apparently the only charge) of circularity which Morison puts to him. It is perfectly consistent for Austin to say that the rights and obligations, when used in the context of the sovereign, are intended to refer to those rights and obligations which derive from the Divine Law or positive morality. There is no suggestion that they are intended to refer to 'legal' rights and obligations as Morison claims. However, Austin is probably in the unenviable situation of being 'damned if he do' and 'damned if he don't'. Morison has just claimed that Austin was guilty of circularity by defining the sovereign in terms of legal rules. If we are correct in our defence of his position, then according to Morison, Austin is likely to face the same charge at the hands of J.C. Gray:

What we are then to regard as an authentic expression of judicial opinion becomes a vital point for Gray, facing him with the same problems of circularity which Gray tells us Austin failed to surmount when he attempted to define his sovereign without reference to legal rules. (38)

It would indeed be self-contradictory, in Austin's terms, if it were to be as Hart and the others would have it, and this would apply irrespective of any observations we might make. In fact I shall put forward the claim in chapter six that non-contradiction and usefulness are the only proper tests of definitions; that they cannot be refuted by observations as Hart and the others would suggest. If this is correct, then it will be seen that whilst Austin would jump this fence with some ease (if not elegance), the others would certainly fall.
Similar considerations apply to the claims of Hart and Benditt that in Austin's scheme of things the 'laws' governing succession cannot be accounted for. Benditt states that, "...Austin cannot account for laws governing succession, for on his view they, like all laws, cease to exist when the sovereign dies."(39) A sovereign can no more die than a corporation can, although we can have rituals which are suggestive of such a possibility - liquidation is the fate of the company - revolution and flag burning for the sovereign. Even the roadsweeper knows what Benditt fails to see - that although he changes his broom handle every winter, and the head of his broom every summer, he has had the same broom for thirty years. Hart suggests that he also misunderstands Austin on this point when he speaks of, "...laws as orders given by a person habitually obeyed."(40) Whilst it is of course possible for an individual to be sovereign, Austin speaks invariably in the alternative - of the sovereign one or number, of the portion of the society which is sovereign, and of the corporate character of sovereignty. Of course, even in the case of a sovereign individual, Austin would say that he means the sovereign as the holder of an office, rather than the particular individual who happens to occupy that office. Hart's claim to solve a problem, which is largely of his own creation, by choosing to specify his mysterious authorising rule in this way, is no improvement on Austin's specification of the concept of sovereign.

What Hart and Benditt fail to appreciate, is that in utilising and explaining the concepts as Austin does, he is advocating a way of thinking, not a way of being. The same applies to Hart's own rule of recognition, which although a concept, is treated by Hart as an empirical entity, hence his distinction of the difference between primitive and developed societies being the point at which the rule of recognition 'emerges'. The first known sighting of such an emergent entity was in the immediate post-war period in North Oxford (41), and as
A.W.B. Simpson says of positivism, "[t]hough purporting to be an observation, it is best viewed as a dogma,..."(42) It will be discussed in some detail in the next chapter.
In the previous chapter, we noted that for Hart:

"...the concept of a rule as we have seen is as perplexing as that of law itself, so that definitions of law that start by identifying laws as a species of rule usually advance our understanding of law no further. For this something more fundamental is required than a form of definition which is successfully used to locate some special, subordinate, kind within some familiar, well-understood, general kind of thing. The Concept p15."

I have already considered Hart’s use of this last phrase in chapter two, and, it should be mentioned, that the role of definition is further considered in chapters one and six of this thesis. It should however be made clear that whilst Hart focuses his criticisms in The Concept on the form of definition per genus et differentiam, as in the above example, he does suggest in his earlier lecture that his criticism is of a more general nature, "[h]ence though theory is to be welcomed, the growth of theory on the back of definition is not."(1)

So Hart is putting forward the view in the build up to the exposition of his ideas that rules are perplexing and that definition (or at least, one particular form of it) is not adequate to the task. In this chapter I will look at the way in which Hart develops his argument, with particular reference to the way in which he deals with the concept of a rule; I will argue that the same epistemological confusion which led to his misinterpretation of Austin, leads him to develop an account of law which is extremely superficial, and which in terms of the historical development of ideas about law, must be seen as a retrograde step.

That the idea of a rule is central to the development of Hart's argument can hardly be doubted. It is used as the basis for the rejection of Austin:

"The root cause of failure is that the elements out of which
the theory was constructed, ...do not include, and cannot by their combination yield, the idea of a rule, without which we cannot hope to elucidate even the most elementary forms of law. The Concept p78.

It is also, as Hart clearly states, the central feature of his own exposition:

...but we shall make the general claim that in the combination of these two types of rule there lies what Austin wrongly claimed to have found in the notion of coercive orders, namely, 'the key to the science of jurisprudence'...

What we shall attempt to show, in this and the succeeding chapters, is that most of the features of law which have proved most perplexing and have both provoked and eluded the search for definition can best be rendered clear, if these two types of rule and the interplay between them are understood. We accord this union of elements a central place because of their explanatory power in elucidating the concepts that constitute the framework of legal thought. The Concept p79.

Hart is not unaware of the difficulty some theorists have had with the idea of a rule (The Concept pp8, 9, 13) yet the development of his own argument is somewhat confusing. Both before and after his statement concerning the perplexing nature of rules, he utilises the concept with great frequency in the development of his own position as if there were in fact no problems at all in understanding what is meant by it.

The contrast is most obvious on p8 where he follows the question, "[w]hat are rules? What does it mean to say that a rule exists?" (emphasis in original) by saying:

It is of course true that there are rules of many different types, not only in the obvious sense that besides legal rules there are rules of etiquette and of language, rules of games and clubs,...(emphasis added).

These assertions seem to belie any suggestion that the concept of a rule is perplexing. However, Hart's assertions regarding the nature of rules do not stop there. In the same paragraph he goes on to state that rules may originate in different ways and relate differently to the conduct they concern; that within the law some are made by the deliberate act of legislation, and others are not the result of deliberate acts; that some are mandatory and others prescribe procedures, and that games have these two types as well. Later, on the same page of The Concept as his
statement regarding the perplexing nature of rules, he goes on to state that, "...and here perhaps we have a principle similar to that which unifies the different types of rules which make up a legal system." It is obviously being accepted by Hart without any further argumentation or discussion that law is comprised of rules and as he later states that it is in the union of primary and secondary rules that we find 'the key to the science of jurisprudence', it could hardly be doubted that Hart takes the concept of a rule as being a most significant aspect of his understanding of 'law', The Concept p79. That these comments are not isolated or incidental to the development of Hart's argument can be seen when we look at p27 of The Concept and find:

"The criminal law...and what its rules require..."

"Here too [the law of torts] the rules which determine..."

"Legal rules defining the way in which valid contracts..."

On page 28, Hart refers to 'rules' on some six occasions -

"If we look into the various legal rules..."

"Thus behind the power to make wills or contracts are rules relating to capacity..."

"Other rules detail the manner and form in which the power is to be exercised..."

"Other rules delimit the variety, or maximum or minimum duration,..."

"Examples of such rules are those of public policy in relation to contract, or the rules against accumulations..."

All of this takes place before Hart resolves the perplexity which leads him to reject 'the general family of rules of behaviour' as the suitable starting point for a discussion of law.(2)

It can be seen then that Hart clearly makes the concept of a rule central to his thesis whilst at the same time acknowledging its problematic nature. However, if Hart were to go on to provide us with a clear elucidation of what he means by a rule, the fact that he
utilises the concept in advance of such an explanation would then be a criticism of presentation rather than an indication of a fundamental weakness in his position. It is my view that in his ensuing analysis he fails to provide us with a satisfactory explanation of this, therefore the criticism is that there is a serious substantive defect in Hart's position in addition to this defect of presentation. I must now look at the way in which Hart develops the discussion of his central concept.

Social Rules: Hart begins his account of rules by talking, not of rules in their legal context, but the way in which he believes they operate in a broader social context. He commences by drawing a distinction between convergent and ruled behaviour:

Mere convergence in behaviour between members of a social group may exist...and yet there may be no rule requiring it. The difference between the two social situations of mere convergent behaviour and the existence of a social rule shows itself often linguistically. In describing the latter we may, though we need not, make use of certain words which would be misleading if we meant only to assert the former. These are the words 'must' 'should' and 'ought to', which in spite of differences share certain common functions in indicating the presence of a rule requiring certain conduct. The concept p9 (emphasis in original).

Hart is then drawing for us the following distinction -

(a) there is a disjunction between merely convergent and rule oriented behaviour

(b) there is a conjunction between the use of 'must' etc and rule oriented behaviour.

Let us look at these in turn.

(a) Disjunction between merely convergent and ruled behaviour.
Hart expresses the relationship between merely convergent behaviour and rules as if it were a penetrating social observation (convergent behaviour may exist - yet there may be no rule requiring it). However, this form of expression is somewhat misleading, and results from Hart's
attempt unsuccessfully to distance himself from Austin's method. It would 
be better to say that where there is merely convergent behaviour there 
cannot be a rule requiring it. The disjunction is not merely frequent 
as Hart's use of 'may' suggests, but necessary. It is not a matter of 
observation as Hart's use of 'describing' suggests but a necessary 
consequence of the definitions of 'convergent' and 'ruled' which Hart 
accepts, although he does so only by implication, not explicitly. The 
statement is in brief conceptual not empirical, analytic not synthetic. 
Hart's language is frequently deceptive in this way, and it is clear 
that he does not appreciate that many of his apparent observations are 
merely consequences of the concepts which he adopts:

In the case of what may be called mere group habits, like 
that of going weekly to the cinema, deviations are not met 
with punishment or even reproof; but wherever there are rules 
like that requiring men to bare their heads in church, something 
of this sort is likely to result from deviation. The Concept p10. 

To say that deviations from habits are not met with punishment 
appears to be an interesting observation, until we realise that the 
statement would be true independently of any observations which we might 
make. For Hart, a habit is taken to mean 'convergent behaviour, a 
deviation from which is not subject to reproof or punishment' and a rule 
'convergent behaviour, a deviation from which is subject to reproof or 
punishment'. Use of the concepts in this way amounts to disguised 
definitions of the concepts. As Kant would put it:

If I say, for instance, 'All bodies are extended', this is 
an analytic judgment. For I do not require to go beyond the 
concept which I connect with 'body' in order to find extension 
as bound up with it. To meet with this predicate, I have merely 
to analyse the concept. (3)

In other words the terms 'habit' and 'rule' are used by Hart as 
exhaustive but mutually exclusive ways in which to classify behaviour. 
As Hart is therefore putting forward a conceptual framework, his use of 
the terms in this way cannot be tested by observation, as I shall explain 
in chapter six.
There is of course one way in which observation could be relevant, viz. if Hart were to say that the relationship between deviation from a habit (followed by no criticism) and deviation from a rule (followed by criticism) is conceptual not empirical, and that his claim is that these concepts are actually used by people with these discriminations in mind. At the level of a social observation it is of course extremely superficial, and one would be entitled to ask for the evidence from which these conclusions are derived - who, where, when? Evidence against Hart's claim would consist of the following:

(i) The social use of the concept of rule where it is unrelated to the question of whether or not it reflects an existing practice: the concept of legal rule is invariably used in this way, and as we shall see shortly, it is used in just this way by Hart himself. Now Hart might claim that this is an additional use of the concept of a rule and does not strictly contradict the claim which he is making.

(ii) It would be strictly contradicted if we could find examples of the use of the concept of rule in situations where behaviour which is at odds with that rule is justified - justification being the contrary of criticism and punishment. Such evidence is provided by M.R. Kadish and S.H. Kadish in the chapters of their book which deal with justified rule departures by officials, and justified rule departures by citizens.(4)

Hart has to make a choice about the status of the abstractions 'habit' and 'rule'. Either he is defining the concepts, in which case they become a constitutive aspect of knowledge, and their evaluation is not in terms of a correspondence with observations, but whether their explanatory capacity is greater or less than any rival schemata (I shall look at this aspect in greater detail in chapter six). Alternatively, Hart is indicating the way in which the concepts are used socially, in which case he is either wrong, or he has to provide us with criteria relating to time, place and circumstance so as to exclude the evidence
which does not support his claim.

That Hart does not appreciate the nature of this distinction is the cause of much ambiguity and confusion in his work. In the preface to The Concept, pvi - Hart makes two claims - "[t]he lawyer will regard the book as an essay in analytical jurisprudence..." and that, "[n]otwithstanding its concern with analysis the book may also be regarded as an essay in descriptive sociology." My counter-claim is that whilst I am concerned about the failure of people to engage in the appropriate synthesis after distinctions have been made, as I indicated in the introduction to this thesis, I would nevertheless claim that certain distinctions should be made, and that this is the appropriate task for conceptual analysis. The main difficulty with our understanding of Austin, has been the failure to appreciate the way in which analysis and synthesis work together. Austin was aware of this, and actually adopted this approach in his work, as did Aquinas, as I shall also explain further in chapter six.

However, the making of distinctions is not the same as making observations, and whilst these two aspects are therefore necessary to any well-rounded piece of work, as steps they must be distinguishable. We must be able to determine at any stage which approach is being employed - as people concerned with information systems would say, whether it is 'top-down' or 'bottom-up', 'concept driven' or 'data driven'. Hart indicates in the preface that whether his work is seen as analytical jurisprudence or descriptive sociology depends on the perspective of the reader, whereas it should depend on the perspective of the writer.

(b) Conjunction between 'must' etc. and ruled behaviour. When we look at Hart's suggestion that the words 'must' 'should' and 'ought to' share common functions in indicating the presence of a rule requiring
certain conduct we find that similar considerations apply. Hart precedes his expansion of the differences between rules and habits by saying that they have in common the factor that in both cases the behaviour must be general although not necessarily invariable. Both convergent and rule governed behaviour have what he calls an external aspect which consists in the regular uniform behaviour which an observer could record, The Concept pp54,55. Hart then refers to 'three salient differences' which distinguish rule governed behaviour from that which is merely convergent - what I shall call the three factors of rules.

Factor 1 "where there is a rule requiring certain behaviour, deviations are generally regarded as lapses or faults open to criticism, and threatened deviations meet with pressure for conformity..."  

Factor 2 "where there are such rules, not only is such criticism in fact made but deviation from the standard is generally accepted as a good reason for making it." He then goes on to say that criticism for deviation is regarded as legitimate or justified, "...both by those who make them and those to whom they are made".

Factor 3: This is what Hart refers to as the 'internal aspect' of rules:

...some at least must look upon the behaviour in question as a general standard to be followed by the group as a whole.

What is necessary is that there should be a critical reflective attitude to certain patterns of behaviour as a common standard, and that this should display itself in criticism (including self-criticism), demands for conformity, and in acknowledgements that such criticism and demands are justified, all of which find their characteristic expression in the normative terminology of 'ought', 'must', and 'should', 'right' and 'wrong'.

It is difficult to see what is added by this third factor which has not already been introduced by the other two. His claim then is that where there is a rule requiring certain behaviour, deviations are met with criticism and pressure for conformity, and the existence of the rule
justifies that criticism and pressure. We should note here that Hart is
talking of social rules as a general category, and not specifically of
legal rules. However, before we consider Hart's discussion of legal
rules, we must look further at the aspects of criticism, justification,
'ought' 'must' 'should' etc.

If we look at Hart's assertion that the use of these words shares
the common function of indicating the presence of a rule requiring
certain conduct, we find that the conceptual / empirical ambiguity
remains, and for this reason it does not assist us in the clarification
of what is meant by a rule. We know then that Hart is asserting some
association between 'attitudes' 'justified attitudes' and rules, but we
must look closely to determine the nature of this association. After
stating that where there is convergent behaviour it is not enough to
constitute the existence of a rule, we might expect in what follows to
find what does constitute the existence of a rule - a clear conceptual
analysis of a rule. This is why we referred to the three points which
followed as the three factors of rules. However, if we look more
closely at what followed we will find that this is not what we were
provided with.

Factors 1 and 2 can be stated in this form -
where there is a rule - deviations are subject to criticism
where there are such rules - criticism is regarded as justified.
It can be seen in Hart's discussion of factors 1 and 2 that those
elements which are supposed to be constitutive of a rule, can only
themselves be explained in terms of the existence of some prior rule.
This means that in the elucidation of the concept of a rule, we have
to utilise the concept of a rule which it must be supposed has already
been determined although we are not informed as to how this was done.
This ambiguity can be seen quite clearly in Hart's discussion of 'must'
'should' and 'ought to'. They were introduced by Hart (in his discussion
of factor 3) as elements which are involved in the very constitution of a rule. Yet he said earlier that, "...the words 'must', 'should', and 'ought to', ... share certain common functions in indicating the presence of a rule requiring certain conduct" (The Concept p9) or that the words 'must' 'should' and 'ought to' are often a sign of the existence of a rule (The Concept p10). I would claim that there is a great deal of difference between the use of these words as being constitutive of the existence of a rule on the one hand and their being indicative of the presence of a rule or a sign of the existence of a rule on the other. These latter expressions suggest a situation such as that where the person using 'must' thinks (a) there is a rule (b) it applies here (c) therefore 'must' is appropriate. In such a situation, for the speaker, 'must' is a consequence of the existence of the rule; it is necessary for him that the rule was ascertainable in order to know that 'must' applied. This position presupposes the existence of what we now see to be unspecified criteria regarding what constitutes a rule, and these criteria cannot have regard to 'must' if circularity is to be avoided. A piece of litmus paper might be used to indicate the presence of an acid or an alkali, but we would not say that a change in its colour is a constitutive part of what it is to be an acid or an alkali - those changes are consequences of the presence of an acid or alkali. So it is with Hart's rules, for their existence needs to be determined logically prior to the 'must' and we might reasonably ask for a specification of the criteria which constitute the rule as we would still do after assimilating the significance of factors 1 and 2.

So before we can discuss matters of deviation, criticism and justification, or matters relating to 'must', 'should' and 'ought to', we can still - indeed we must - ask the necessarily prior question, "What does it mean to say a rule exists?" So far at least we can see that Hart's apparent elucidation begs the very question which it was
intended to answer. Factor 3 has the appearance of an answer to our question and we should look carefully to see what Hart has to say about this.

Factor 3 - the internal aspect. After utilising the label of the 'internal aspect', Hart states:

...if a social rule is to exist some at least must look upon the behaviour in question as a general standard to be followed by the group as a whole. A social rule has an 'internal' aspect, in addition to the external aspect which it shares with a social habit and which consists in the regular uniform behaviour which an observer could record. The Concept p55.

We remember that Hart started his discussion by asserting that habits and rules have a common feature in that they both concern behaviour which is 'common though not necessarily invariable'. We can see in this extract a repetition of that view - the external aspect which it (a rule) shares with a social habit - but we also find the elusive factor which we have been looking for. The factor which distinguishes a social rule from a habit is the 'internal aspect'. This, as we have just seen, means that some people in the group regard the behaviour in question as a standard to be followed by the group as a whole.

We can see then that for a social rule to exist we need two elements:

(a) A pattern of behaviour - common (though not invariable)
   - regular uniform behaviour.

(b) What I shall call - some regard the behaviour as a standard
   a 'crusading attitude' to be followed by the whole group.

It is clear then that the point which we made in the context of a habit applies equally to Hart's concept of a rule. To say that deviations from a rule are met with criticism is not a matter of social observation, but follows necessarily from the concept of a rule which he adopts. Again, it is analytic not synthetic. It is of course Hart's privilege to define a social rule in this way (and this is undoubtedly what he is doing here - the fact that he might deny that he is doing so merely indicates his confusion as to what he is doing) but is it a useful way of determining
what a social rule is? I would think not for the following reasons.

Let us look again at factor 1. "Where there is such a rule deviations are generally regarded as lapses or faults open to criticism". Hart's position amounts to saying that where there is a pattern of behaviour supported by a crusading minority, (it should be noted that he only requires 'some' to support the pattern for there to be a rule) then behaviour which does not conform to the pattern will be criticised by a larger group of people (i.e. 'generally'). This is of course a genuinely synthetic statement which does require observations to be made, but it is also a complete non-sequitur. There may well be societies in which such a state of affairs exists, where influential minorities are capable of keeping the herd under control, but the opposite is just as likely to be the case. There may be a pattern of behaviour, which 'some' feel should be supported (and therefore there is a rule on Hart's analysis) but this is perfectly compatible with saying that behaviour which does not conform to the pattern is regarded generally as highly desirable - because it has come to be seen that the pattern of behaviour leads to undesirable consequences and is in need of reform.

Recently, in the western world there has been a pattern of behaviour (as regards eating, smoking and exercise) which has led to obesity, heart disease etc. Undoubtedly there are some who look upon the behaviour in question as a standard which all should follow. They may be idle, or have a devil may care attitude and would feel more comfortable if everybody else would do as they do. It does not follow that deviations from the pattern - jogging, healthy eating etc. are regarded as lapses or faults open to criticism. Indeed the reverse may well be the case - it is those who wish to maintain the pattern who are generally criticised and it is the deviants who are encouraged, even by those whose behaviour still conforms to the pattern.

In Hart's terms, it may be said that there now exists a social rule
in favour of fornication, or at least this is suggested by MacCormick (5). There is a general pattern of behaviour which some of the group think should be a standard for the whole group. If this were to be the case, it would by no means follow that monogamy or even celibacy would be regarded as lapses open to criticism.

The extension of the critical attitude from 'some' to 'generally' requires an account of the values of the group. This is not provided for in Hart's concept of a social rule and it is to that extent defective. If Hart were to say that it was not his intention to extend the critical attitude from some to generally, and that he only requires 'some' to regard the deviations as lapses or faults open to criticism, then factor 1 is merely a repetition of the definition found in factor 3, and can be ignored.

When we move on to consider Hart's factor 2, his position becomes even more untenable:

...where there are such rules, not only is such criticism in fact made but deviation from the standard is generally accepted as a good reason for making it. Criticism for deviation is regarded as legitimate or justified...

The Concept p54 (emphasis in original).

In the expanded form compatible with Hart's definition of a rule this reads, 'where there is a pattern of behaviour which some of the group regard as a standard for all, not only is deviation criticised, but the criticism is regarded as legitimate'. The role of legitimacy in this scheme of things is reduced to the intellectual equivalent of banging one's fist on the table to support an argument. We must not forget that the standard referred to in the above extract is merely a pattern of behaviour which 'some' are prepared to support. To say that this 'some' regard it as legitimate without any reference to any independent standard from which this legitimacy is derived reduces to saying that they support it (no more than the fact of support is required) therefore
they and others will criticise non-conforming behaviour and that because they support it their criticisms are justified or legitimate. As we have seen, the extension of the critical attitude to others is a non-sequitur, and we can now see that the concept of legitimacy as thus used is completely empty. The better view might be that we should reserve the use of 'legitimacy' to indicate an independent standard - independent in the sense that it is supported by a line of argumentation which has nothing to do with whether or not the behaviour is actually observed but with whether it ought to be observed. In other words, we need the distinction between 'positive' and 'critical' morality which Hart adopts in his later book (Law Liberty and Morality) but which he fails to adopt in The Concept, and consequently, in my view, is the cause of much confusion in the development of his analysis of legal and social rules. It is a distinction, of course, which Austin observed quite rigorously in his own work and which gives it a degree of clarity which I find lacking in The Concept.

Legal rules: Hart now moves on from this position to consider the position of legal rules. He states that our group may have:

...a rule which provides for the identification of standards of behaviour in a less direct fashion, by reference to the words, spoken or written, of a given person. In its simplest form this rule will be to the effect that whatever actions Rex specifies (perhaps in certain formal ways) are to be done. This transforms the situation which we first depicted in terms of mere habits of obedience to Rex;...The Concept p56.

We are now beginning one of the most important shifts in Hart's argument. It takes place over just four pages of The Concept, but unless we follow him precisely, the transformation will forever remain a mystery to us. It is important to remember that so far, a rule for Hart requires both the elements referred to in factor 3 - the pattern of behaviour combined with a crusading attitude to that pattern of behaviour - and that it is the pattern of behaviour which becomes a
standard, a point he repeats in the paragraph preceding the one we are looking at, "...certain patterns of behaviour as a common standard" (The Concept p56). The difficulty we are faced with is in relating this to what we are told about standards and what Hart means by, "...a rule which provides for the identification of standards of behaviour in a less direct fashion by reference to the words, spoken or written, of a given person." I shall call this a 'rule of authorisation'. What Hart is stating now is that a standard of behaviour is no longer a pattern of behaviour together with the requisite attitude; from now, standards will be whatever Rex specifies, thus detaching these standards from any question of their relationship to patterns of behaviour or attitudes to them. This appears to be what Hart means by stating that standards will be set up 'in a less direct fashion'. This move presents him with a number of difficulties.

The standards which are to be set up in this way will not be rules, in the sense discussed so far, for they have nothing in common with the concept of a rule which Hart has just established. They are constituted as standards because they are specifications of Rex. There is no requirement that such specifications be restricted to those which are in conformity with existing patterns of behaviour. Indeed such a limitation would render the specifications of Rex virtually pointless in that their sole function could only be to place on record the fact that his attitude endorses that pattern of behaviour, and he is therefore one of the 'some' who are required to have the crusading attitude which Hart requires for a rule to be established. We should be mindful of the fact that in connection with particular issues, the obtaining of Rex's endorsement can have great symbolic importance, as J. Gusfield and W.G. Carson have shown (6). However, the symbolic aspect indicates that whilst Rex might be endorsing the attitudes of a particular section of the community, it does not necessarily reflect practice within the
community. Also, the symbolic function could not be true of Rex's standards generally. An important aspect, presumably, of Rex introducing standards of behaviour is not merely to endorse the existing standards (patterns) but to influence them. As Austin says, the development and correction of existing standards is an important function of law in addition to the fact that it is ensured thereby that they are backed by a more cogent sanction, Lectures (XXX) p550. Therefore when the legal rules are introduced, there will be no necessary correspondence between them and an existing pattern of behaviour. This point should be familiar to Hart as it is the basis for his critique and rejection of Austin's habit of obedience, The Concept pp50ff.

If it were to be suggested by those critical of Hart's position that there was an element of inconsistency in this, the response might well be that Hart is working with not just one conception of a rule but with two. The first is the concept of a social rule which Hart has explained in some detail and which we have looked at closely. The second is the concept of a legal rule, which, although it has little in common with a social rule, does have the connection that it has been brought into effect by the existence of a social rule. As Rodger Beehler says:

This shift from obligatory by virtue of being an accepted rule to obligatory by virtue of originating in accordance with an accepted rule is never explicitly announced by Hart. But it is, as I have shown crucial to his argument. (7)

If this is correct, then the standards of Rex are not social rules, but they are made in accordance with a social rule - an authorising rule - the account of which we must now consider.

(a) The Rule of Authorisation. "...this rule will be to the effect that whatever actions Rex specifies..are to be done" The Concept p56. The barely perceptible change taking place here concerns Hart's suggestion that whatever actions Rex specifies are 'to be' done. All
discussion of rules until now has been in terms of convergent, habitual or patterned behaviour combined with the requisite attitude. This firmly locates Hart's rules in historical analysis and clearly indicates how we can determine what a rule is.

Rules for Hart are based on social patterns of behaviour — rooted in practice as we might say. What seems problematic for Hart then is how we could have rules with a normative content. If a rule is constituted by an attitude to existing patterns of behaviour, then we cannot formulate a rule with a normative content, because there is then no correspondence between the rule and an existing pattern of behaviour. The idea of the rule being an extrapolation from existing patterns of behaviour together with the requisite attitude has been lost. To move from two observational statements (a) concerning patterns of behaviour (b) concerning attitudes which people have to that pattern — to a normative statement (what Rex specifies is to be done) is to bring in a subtle, although unexplained, shift of emphasis. MacCormick states that:

[Hart disagrees with Kelsen]. To understand the normativity of legal or moral or other social rules we need only reflect on human attitudes to human action. (8)

But this does not make it clear whether MacCormick distinguishes between human attitudes to an existing pattern of behaviour, and human attitudes to a desirable pattern of behaviour. In other words, to utilise the distinction which Hart later adopts in Law Liberty and Morality, it is unclear whether Hart and MacCormick, when they speak of the 'normativity' of social and other rules are referring to the 'positive' or 'critical' morality of the group, or to something else.

If it is said that although much of Hart's earlier discussion of social rules is suggestive of some link between 'attitudes' and an 'existing' pattern of behaviour, he did not intend his concept of a social rule to be so restrictive, and that it might well incorporate
the idea of 'attitudes' to a 'desirable' pattern of behaviour, we would be bound to ask in what way it is an improvement upon Austin. If MacCormick presents Hart's position correctly, when he says that it is important to our understanding of law to appreciate the role of human attitudes to human conduct, then we can see that this is exactly what Austin was talking about when he spoke of his positive morality:

When we speak of a law set by general opinion, we denote, by that expression, the following fact. - Some [indeterminate] body or uncertain aggregate of persons regards a kind of conduct with a sentiment of aversion or liking: Or (changing the expression) that indeterminate body opines unfavourably or favourably of a given kind of conduct. In consequence of that sentiment, or in consequence of that opinion, it is likely that they or some of them will be displeased with a party who shall pursue or not pursue conduct of that kind. And, in consequence of that displeasure, it is likely that some party (what party being undetermined) will visit the party provoking it with some evil or another.(9)

At the very beginning of his Lectures Austin states that:

The positive moral rules which are laws improperly so-called, may be styled laws or rules set or imposed by opinion: for they are merely opinions or sentiments held or felt by men in regard to human conduct. Lectures (Analysis of I-VI) p79.

If MacCormick (and perhaps Hart) is speaking of 'human attitudes to human action' and Austin spoke of 'sentiments and opinions regarding human conduct' then there appears to be no difference. If it were to be said that Hart was invoking this discussion of the rule of authorisation, which is a social rule, but which is at the basis of a legal system, and Austin brings in this aspect in his discussion of positive morality (which, as we will see from the section on Austin in the next chapter, he claims is the basis of the legal system) then again, there appears to be no significant difference. If we remember the argument of the first chapter, to the effect that the separation of law and morality is for the purpose of the orderly assimilation of knowledge - that it does not assert any ontological separation - and that these factors are, as Austin says, inseparably connected, then we might expect to find the same relationship between Austin's positive
morality and positive law as we find between Hart's social rules and law. This is made explicit by Austin when he says:

I determine positively and negatively the appropriate matter of jurisprudence. I determine positively what that matter is, and I distinguish it from various objects which are various related to it, and with which it not infrequently is blended and confounded. I show moreover its affinities with those various related objects: affinities that ought to be conceived as precisely and clearly as maybe, insomuch as these are numerous portions of the rationale of positive law to which they are the only or principal key.

Lectures (Analysis of I-VI) p81. (emphasis added).

Austin also refers to laws which may be positive morality as viewed from one aspect and positive law as viewed from another Lectures (V) p181. He also distinguishes, as we will see in the next chapter, between the attitudes of judges, those of other practicing lawyers, those of other governments and those of public opinion. He shows that positive morality is the natural precursor of much positive law and that it may operate as an effective control upon the judges, and as a powerful factor in the development of the law.

Thus it would appear that Hart's analysis (if one takes MacCormick's broader view of it) has nothing which cannot be found in Austin's. If Hart intends the narrower view then it can be seen that he introduces additional factors without adequate explanation as to how or why those extensions are justified. When Hart moves from his discussion of attitudes to patterns of behaviour to say that "...whatever actions Rex specifies ...are to be done," he introduces a new factor which has yet to be explained. On the basis of a pattern of behaviour one could say that 'what Rex has specified has been done', or even what Rex specifies is done. It gives no warrant for saying that 'the category of behaviour referred to can be extended to 'whatever' Rex specifies, nor even to saying that what Rex specifies 'is to be done'. It may well be the case that 'some' would say that they accept that whatever Rex specifies is to be done. This will not help Hart to establish the rule because they do
not have this attitude to an existing pattern of behaviour but only to a desirable pattern of behaviour. If Hart were to attempt to secure his position by claiming, as MacCormick suggests, that 'pattern of behaviour' does not refer to a pattern which has actually occurred, but indicates a pattern of behaviour which it is thought desirable to bring about, then his previous discussion of patterned / habitual / convergent behaviour is misleading in so far as it suggests that it is different from or is an improvement upon Austin's. If Hart's discussion reduces to the fact that he is talking simply of 'opinions or sentiments held by people in regard to human conduct' (whether or not they reflect an existing pattern of behaviour) then he could have said so more clearly and his position can be seen to be no different from that of Austin.

If on the other hand he wishes to insist upon some correlation between attitudes and existing patterns of behaviour, then his category of normative rules will be much narrower than Austin's and will not do the work which Hart allots to it as we shall see shortly.

Hart continues, "This transforms the situation which we first depicted in terms of mere habits of obedience to Rex; for where such a rule is accepted...". It is certainly the case that where a rule is said to exist we mean to indicate thereby the existence of certain attitudes to patterned behaviour. Hart has used the ideas of convergent / habits interchangably with patterned behaviour, so the difference between a rule and a habit is that the former is in conjunction with attitudes that 'some' have and the latter is not. It is not at all clear what Hart could possibly mean by saying that 'where such a rule is accepted'. However, Hart conveniently indicates on the following page the factors which indicate acceptance of the authorising rule, and conveniently for us, the factors which indicate the existence of the authorising rule - which we must remember has not yet been satisfactorily explained:

[t]he acceptance, and so the existence, of such a rule [the authorising rule] will be manifested during Rex I's lifetime
in part by obedience to him, but also by acknowledgements that obedience is something to which he has a right by virtue of his qualification under the general rule [the authorising rule]. The Concept p57.

Hart's position then amounts to the following sequence of propositions:

The authorising rule provides for the identification of standards;
Its existence is inferred from its acceptance;
Its acceptance is inferred from
(a) obedience to his standards
(b) by acknowledgments that he has a right to this obedience because he is qualified under the authorising rule

As stated, this argument is clearly circular. We cannot have obedience to the standards until we know what the authorising rule is, because its function is to identify those standards. Equally, we cannot know what the authorising rule is until we have obedience to the standards, because acceptance, and so the existence of the authorising rule is inferred from the fact of obedience. Unless Hart can give some account of what it means to say that the authorising rule exists independently of the fact of obedience, he can hardly claim, as he does, that it is a reason for that obedience. He states quite clearly that the authorising rule will specify what is to be done - The Concept p57. He also states that the violation of a rule is not merely the basis for predicting that a hostile reaction will follow, but that it is a reason for that hostility - The Concept p88.

It could be argued that we can determine what putative rules of law are referable to one possible lawgiver and what to other possible competitors. Then a determination can be made as to whose putative rules are followed and whose not, and whether the requisite internal point of view is present. But this is to accept the point of the criticism - that before we can determine the existence of an authorising rule, we have to know of the existence of 'putative rules' and whether
or not they are followed. No assistance is given by referring at one stage to 'putative rules' and at another to 'rules' for the factor which enables us to make this transition is not a 'rule of authorisation' but our observations concerning which rules are followed. This, of course, is not the same as his later claim that to say that a given rule is valid is to recognize it as passing all the tests provided by the rule of recognition and so as a rule of the system - The Concept p100, or that the validity of the other rules are assessed in terms of the rule of recognition - The Concept p112.

Hart was quite correct when he said in his discussion of Austin that, "[t]he idea of obedience, like many other apparently simple ideas used without scrutiny, is not free from complexities." The Concept p50. We might, however, express some surprise when he utilises that same complex term at the very heart of his own theory, without having resolved the complexities which caused him to reject it as appropriate for others. (We have, of course, said much the same regarding his treatment of the concept of 'rules'). If, as we have just seen, the authorising rule is merely an inference from the fact of obedience, it is impossible that it could fulfil the role which Hart allots to it:

[Where the rule of authorisation] is accepted [i.e. where his standards are obeyed] Rex will not only in fact specify what is to be done but will have the right to do this; and not only will there be general obedience to his orders, but it will be generally accepted that it is right to obey him. Rex will in fact be a legislator with the authority to legislate,...The Concept p57 (emphasis in original).

Rex's specification of what is to be done should be prior to the fact of obedience from which the authorising rule is inferred, therefore it cannot be a consequence of it. General obedience is actually the factor from which the authorising rule is inferred, therefore it cannot also be a consequence of it.

The really dangerous part of Hart's philosophy of law concerns what remains in this extract. The authorising rule gives Rex the right to
set forth standards; will result in **general acceptance** that it is right to obey him, and will give Rex **the authority** to set forth standards.

Now that it is clear that the authorising rule is merely an inference from the fact of obedience, Hart's position amounts to the following proposition:

Where Rex's standards are **obeyed**, he will have **the right** to set forth standards, it will be generally accepted that it is **right** to obey him and he will have **authority** to set forth standards.

Hart's interposition of the authorising rule is mere obfuscation. It serves no other purpose than to conceal the fact that Hart asserts a direct correlation between the fact of obedience, and Rex having the right, its being accepted as right, and Rex having the authority to set forth standards. We can see now that 'having the right', it 'being accepted as right' and 'having authority' are as empty as his use of legitimation which we referred to earlier. However, although they are empty, they are not without significance, for they convey the impression that they are judgments which are the result of independent modes of argumentation. For example, we might wish to say that whether Rex 'has the right' and whether it is 'accepted as right' are judgments, each of which involves the consideration of different factors. To utilise, again, the discriminations which Hart adopts in *Law Liberty and Morality*, one is a conclusion of critical morality and the other of positive morality.

Yet there is no room for this in Hart's scheme of things. Affirmative judgments must follow in both cases from the mere fact of obedience to his standards. Ironically, Hart finds himself in a position which has often, although erroneously, been attributed to Austin and which I will consider shortly. It is important that we should note that Hart states:

> [t]he social practices which underlie such legislative authority will be, in all essentials, the same as those which underlie the simple direct rules of conduct,...

The Concept p57.

The social practice he is speaking of is that there should be a pattern
of behaviour to which some have the crusading attitude. His social rule was nothing more than a combination of these two factors. If it is the case that the social practices underlying the rule of authorisation are in all essentials the same as those underlying the social rules, then we can infer authorising rules in all cases which have that combination of factors. There is nothing in what Hart says here to distinguish rules of a company or professional body from those of law, apart from his use of the term 'Rex' which so far has not been explained. In his discussion of social rules Hart moved straight from the combination of patterns of behaviour together with the requisite attitudes, to legitimation. There appeared to be no need there to interpose an authorising rule - perhaps the better view is that Hart should have made the same direct move here as he made in connection with social rules; at least it would have the advantage of clarity.

(b) Restriction of the scope of obedience. Hart still has one more important move to make to complete his position. We have already seen that the rule of authorisation is a construction based solely on the fact of obedience to Rex. However, this was only an intermediate position for Hart; when he comes to discuss the position of a modern state, which is roughly speaking the only sort of situation which Austin concerned himself with (those ampler and maturer societies), we find that for Hart, obedience is reduced to 'acquiescence', "[t]he ordinary citizen manifests his acceptance largely by acquiescence in the results of these official operations." The Concept p60. He later indicates that there is in fact no difference between obedience and acquiescence, and it may be felt that the whole of this discussion has been somewhat misleading:

What makes 'obedience' misleading as a description of what legislators do in conforming to the rules conferring their powers, and of what courts do in applying an accepted ultimate rule of recognition, is that obeying a rule (or an order) need
involve no thought on the part of the person obeying that what he does is the right thing both for himself and for others to do: he need have no view of what he does as a fulfilment of a standard of behaviour for others of the social group. He need not think of his conforming behaviour as 'right', 'correct', or 'obligatory'. His attitude, in other words, need not have any of that critical character which is involved whenever social rules are accepted and types of conduct are treated as general standards. He need not, though he may, share the internal point of view accepting the rules as standards for all to whom they apply. Instead, he may think of the rule only as something demanding action from him under threat of penalty; he may obey it out of fear of the consequences, or from inertia, without thinking of himself or others as having an obligation to do so and without being disposed to criticize either himself or others for deviations. But this merely personal concern with the rules, which is all the ordinary citizen may have in obeying them, cannot characterize the attitude of the courts to the rules with which they operate as courts.

The Concept p112 (emphasis in original).

We saw how the discussion of social rules had limited relevance to the discussion of the authorising rule. We now see that the discussion of internal attitudes, and of acceptance, obedience etc. is quite irrelevant to the generality of the population - they may have any attitude and may act as they do for any reason. There is no need for them to share the internal point of view, and they may regard the rule only as something demanding action under threat of penalty. The above passage is confusing however, because Hart begins by speaking of what 'legislators do' and what 'courts do' as if what followed had some relevance to them, but at the end of the passage Hart indicates that the intervening comments are intended to apply only to the 'ordinary citizen'. In the page following this extract, Hart makes it clear that the officials must have the critically reflective attitude to deviations.

In so far as these comments are intended to apply to the 'ordinary citizen', Beehler has pointed out that this position is quite indistinguishable from that of Austin. "The ordinary citizen needs only to obey from any motive whatever. This is exactly the situation of the population under John Austin's sovereign."(10) However, the above remarks by Hart might well be taken to mean that a complete absence of motive on the part of the ordinary citizen would do - mere inertia being
sufficient. Yet, as Beehler points out at some length, we were given the impression that Hart was to adopt a radically different position. Hart indicated as much when he said:

What, for example, is the relevance of the fact, when it is a fact, that the person ordered would certainly have done the very same thing without any order? These difficulties are particularly acute in the case of laws, some of which prohibit people from doing things which many of them would never think of doing. Till these difficulties are settled the whole idea of a 'general habit of obedience' to the laws of a country must remain somewhat obscure. The Concept p50.

The answer to Hart's question must surely be 'none', for he merely replaces the expression used by Austin with one of his own, to mean quite the same. We can also see that Hart's lengthy discussion of the commander and the commanded, which we discussed in the last chapter, is also totally irrelevant. However, it would perhaps be unfair to say that Hart's discussion of 'attitudes' was totally irrelevant, although quite how it connects with his final position is none too clear. He puts it in this way:

In referring to our simple society we spoke as if most ordinary people not only obeyed the law but understood and accepted the rule qualifying a succession of lawgivers to legislate. [He must of course mean by this an intermediate simple society, because in simple societies simpliciter, they have no authorising rule, hence no law]. In a simple society this might be the case; but in a modern state it would be absurd to think of the mass of the population, however law abiding, as having any clear realisation of the rules specifying the qualifications of a continually changing body of persons entitled to legislate. To speak of the populace 'accepting' these rules, in the same way as the members of some small tribe might accept the rule giving authority to its successive chiefs, would involve putting into the heads of ordinary citizens an understanding of constitutional matters which they might not have. We would only require such an understanding of the officials or experts of the system; the courts, which are charged with the responsibility of determining what the law is, and the lawyers whom the ordinary citizen consults when he wants to know what it is. The Concept p59.

We are still trying to determine what it is for the authorising rule to exist. The road we followed marked 'social rules, acceptance, obedience' etc petered out in acquiescence. We are now following the road marked 'officials'.
The understanding which Hart initially requires of the officials is that they obey the law (the standards) and that they 'understand and accept' the authorising rule. However, as we might well by now expect, Hart informs us that, "...general acceptance is here a complex phenomenon." He goes on to point out that:

The officials of the system may be said to acknowledge explicitly such fundamental rules conferring legislative authority: the legislators do this when they make laws in accordance with the rules which empower them to do so: the courts when they identify, as laws to be applied by them, the laws made by those thus qualified, and the experts when they guide the ordinary citizens by reference to the laws so made. The Concept p59.

The first point to be made is that we are still left with the difficulties we referred to earlier:
- The circularity of Hart's argument in suggesting that the authorising rule could identify standards when it can only be inferred from obedience to those standards.
- How from the mere fact of obedience Hart could arrive at the following conclusions: That the person putting forth the standards would 'have the right' to do so. That 'there will be general obedience' (which must now be regarded as something more than mere repetition now that the group from which obedience has been inferred has been restricted, although the claim still appears to be without merit). That 'it will be generally accepted that it is right', to which similar considerations apply. That the giver of standards will 'have authority'. All of these considerations apply after the existence of the authorising rule has been inferred from obedience to, or acting in accordance with, Rex's standards. However, we are now presented with further difficulties.

If we ask why it is so important to determine the existence of the authorising rule, the answer Hart gives is that it is this factor which enables us to speak meaningfully of the existence and the continuity of
the legal order. Yet if we look a little more closely at the above extract from Hart, we will find some further unacknowledged shifts in his argument. Hart's claim is that, "[t]he officials of the system may be said to acknowledge explicitly such fundamental rules conferring legislative authority." The first thing to note is that we suddenly appear to be talking of authorising rules, not an authorising rule. We are in no position as yet to assess the significance of this move, but it should at least be noted. It also appears that we are on the verge of a breakthrough in that Hart is about to present us with evidence of explicit acknowledgement of this authorising rule(s). This is provided in three ways.

   (i) "Legislators do this when they make laws in accordance with the rules which empower them to do so:..." It is clear by this that the elusive authorising rule(s) is what is referred to more commonly as a matter of constitutional convention. It is difficult to see in what respect this is an improvement on Austin's position. Austin specifically discusses the principles which govern the constitution and procedure of the supreme legislative body. His only insistence is that it would be misleading to call them 'legal' limitations - Lectures (VI) p265ff, because breaches of such requirements are not enforceable in the way in which his definition requires them to be if they are to be regarded as law. This is quite in accordance with modern texts on the constitution:

   The word "convention", as used by constitutional lawyers, refers to rules of political practice which are regarded as binding by those whom they concern - especially the Sovereign and statesmen - but which would not be enforced by the courts if the matter came before them. The lack of judicial enforcement distinguishes conventions from laws in the strict sense.(11)

   Conventions are sometimes called "unwritten laws", but this is very confusing because according to the generally accepted doctrine they are not laws at all. (12)

   Lack of judicial enforcement being the very distinction which Austin made and which Hart confuses. Of course, it may be said that this is
more a Hartian than an Austinian test in so far as it concerns the attitude of the norm-subjects rather than the norm-giver. However, we must remember that for Austin, positive morality or positive moral rules must be distinguished between those which are laws proper and those which are merely laws by analogy. He makes it clear that an opinion or sentiment can be adopted by a determinate person or body whereby it may become a law of that determinate person or body. He also makes it clear that whilst there are similarities between a law set by opinion and a law proper (Lectures I p185), a law imposed by opinion is not a command (Lectures I p194 - see also Lectures Analysis I p79).

Austin, of course, makes it clear that he places the constitutional limitations upon the sovereign in this category of positive morality and MacCormick's conclusion in this regard is that "...Austinian and Hartian theory seem to differ more in point of terminology than in point of substance."(13) An important distinction which Austin does insist upon in this regard is that whilst the principles which govern the legislature must be distinguished from those positive laws of which they are the author and which, it follows, cannot be binding (in a coercive fashion) upon that legislature, the individual members of that body may be bound (in just that coercive manner) by those positive laws. Although, as we noted earlier, Hart regarded this as a resort to a complicated 'device', whilst later using it himself, it is worth noting that on this point also, Austin is still supported by texts on the constitution:

> It is true, as Jennings pointed out, that laws cannot be enforced against the government as a body or against either House of Parliament; but they can be enforced against individual Ministers personally, or...against individual members of either House;... (14)

(ii) Hart claims that explicit acknowledgement of the authorising rule(s) is given by "...the courts when they identify, as laws to be applied by them the laws made by those thus qualified...". We have the same problem with this way of putting it as we had earlier. Hart has
just told us again that the authorising rule is concerned with the existence of a legal system. How do we determine the existence of the authorising rule? It is acknowledged by the court in the identification and application of laws. It is doubtful if this constitutes what Hart promised - explicit acknowledgement of the authorising rule(s). But if we can speak of courts, judges and laws before we know anything about authorising rules (as Hart does) what can we do with an authorising rule that we cannot do without it? (15) The only value it has, presumably, is that it enables us to make the transition from what the judges do, to regarding it as right, accepted as right etc.

(iii) The authorising rule is acknowledged by "...the experts when they guide the ordinary citizens by reference to the laws so made." The same considerations apply here as in the preceding point.

It can be seen then that I do not wish to deny that Hart cites evidence of official use of the rule of recognition, merely that the evidence which he does cite is compatible with alternative, and in my view, better, explanations, and that Hart's explanation conceals more than it reveals. For, as we have seen, he considers the main problem with Austin's theory to be that it fails to take into account the 'internal aspect'. Yet, as we have just seen, the factor of attitudes to patterned behaviour seems to have got lost somewhere between there and his final position which we have just outlined. Probably at the point when Hart reduced his requirement to that of obedience, or willingness to implement the standards, utilisation of the standards, or acquiescence in the face of them. The only factors referred to by Hart in his somewhat confusing account, which Austin did not include in his account of law, was this question of attitudes, and the question of whether 'it is right' 'regarded as right' etc. The important question is whether their inclusion by Hart makes a significant contribution to our understanding of law.
The answer must surely be that Hart's discussion of these factors in
this context indicates again his misunderstanding of Austin. There are,
I would claim, two important confusions running through Hart's
exposition of law. The first is an ambiguity concerning the status of
his concept of a 'rule', and the other is introduced by Hart's discussion
of the internal point of view. I shall look at each of these in turn.

The ambiguous status of Hart's rules: Hart frequently suggests
that laws or rules are reasons for actions, (The Concept p88) yet, as
we have seen, when we follow closely his arguments which are intended to
establish their 'existence' we are met only with the 'argument from
result'.

Hart's account may lead to confusion if, in suggesting that 'the
rule' exists prior to and is a reason for the response we forget that it
is an encapsulation of positive or critical morality, and cannot be more
than a partial explanation of that response. An adequate account
of rules would, in my view, make this more explicit than does Hart - and
I hope to remedy this defect in the final chapter. Although Alan
Paterson takes the view that the findings derived from his research
support Hart's position rather than Dworkin's, I do not find that Hart's
explanation, in terms of the acceptance of a 'rule of recognition' is a
satisfactory explanation of what judges do. (16) All the evidence
which Paterson provides is to the effect that the judges do not spend
their time anguishing over whether there is an authorising rule or what
its content might be but rather, they are involved in a process of social
negotiation, and it is this aspect which Hart's depiction of the
situation fails to make explicit. Christopher Arnold is probably closer
to the truth when he suggests that in cases of doubt we require:

...decisions from officials about their allegiances, about their
need to maintain law and order, about the role of necessity
and about their recognition of new regimes. Such questions
will no doubt be determined by the moral and practical and other outlook of officials. (17)

This is much in line with the view expressed by Austin when he said that the law of the subordinate judges is controlled by the sovereign legislature, by public opinion, by courts of appeal and by the practices and opinions which grow up within the profession, and by the judges' own evaluation of the rationality of the rules which they administer, Lectures (XXXVIII) pp645,646.

It may well be that Hart's account in terms of the 'acceptance of a rule of recognition' is, at the end of the day, quite similar to Austin's, if Hart means to indicate thereby that the limitations which the judiciary experience result from their views as to what is morally or politically acceptable, or what they can manage to persuade their brethren to agree to. In truth, in so far as it is meaningful to talk of an authorising rule, it is better to see it as being constructed after the event, (as an ex post facto rationalisation) in an attempt to give intellectual coherence to the events in which we are interested.

The nature of Hart's mistake is to do what Bohm has warned us against, and which we referred to in chapter one; to suggest that ways of thinking have some autonomous existence independently of the will and desire of their human authors. It is a point which Austin was aware of as is evidenced by the explanation used by the early reviewer of The Province:

That some departments of human conduct are capable of being classified with sufficient exactness to supply the materials of a true science is conclusively proved by the existence of political economy; nor will any one be either surprised or shocked at this who is capable of seeing that a science stands to its subject-matter exactly in the relation in which a map stands to the country which it represents, and that it has no more tendency to govern (as what are falsely called scientific 'laws are sometimes said to do) the conduct to which it refers than the Nautical Almanack has to govern the tides. (18)

We saw in the last chapter how Hart seemed to appreciate this when he said that, "...those who press for a definition need a map...", The
concept p14. the reviewer goes on to speak of an important and widespread confusion which is dispelled by Austin:

of all the cants of the day none is more popular or mischievous than that in which the word 'law' plays a conspicuous part. we hear in every direction of laws of some sort or other. the laws of health, the laws of progress, the laws of physiology, the laws of sociology, the laws which regulate the increase of the species, and all kinds of other laws, are declaimed about as if a parliament of abstractions exercised an iron despotism over the human race.(19)

All of which applies a fortiori to Hart's 'rules'. The importance of Austin's contribution was that he conceived of law as a command, but then when on to make it clear that he meant by this laws set by people to other people (if we are speaking of positive law or positive morality) or, if we are to include Divine Law, laws set by a rational being to other rational beings (20). The significance of such a view is that 'law' (other than Divine Law) is therefore always seen as being concerned with social relationships of superiority and inferiority which Hart, of course, acknowledges at times (although more indirectly than does Austin) but which at other times he appears to overlook. Laws, in the sense with which we are concerned, are always human creations and have no existence independently of the will of their human authors and are therefore, best seen as the outcome of a process of social negotiation. In my view, Austin made the dynamics of this process much more explicit than does Hart, as we shall see in the final section of the following chapter.

The laws with which we are concerned then, must always be located in their human sources. In other words, statements about the existence of laws are always indirectly statements about the relationships between people, as are statements about 'corporations'. On this view, it is always people who impose limitations upon each other, not disembodied laws or rules. Hart's failure to make this sufficiently clear in The Concept returns us to the very grump and mire from which Austin sought to extricate us. Simpson acknowledges this point when he says
that the strong version of positivism accepts the human authorship of
laws whereas the weak version as put forward by Hart continues to
maintain that laws are rules, "...but their status as law does not
necessarily depend upon their having been laid down." (21)

The 'internal point of view': The factors which Hart takes to be
indicative of the internal point of view are matters such as the use of
normative language - 'I ought not...' 'That is right...' The Concept
p56. These would have been regarded by Austin as matters of positive
or critical morality. The question of whether 'it is regarded as right'
is a matter concerning the opinions and sentiments which people have in
regard to human conduct, and would therefore be within Austin's account
of positive morality. The question of whether 'it is right' being
within what he called ethics (or what we have called critical morality')
or concerning the standard which is the test of both positive law and
positive morality. Austin discussed at some length the prevailing
tendency to confuse matters of positive law, positive morality and
that standard which is the test of both Lectures (V) p214.

So, when Hart speaks of what 'ought' to be the case, he is
bringing into the discussion either the opinions which people have (and
which as we have seen Austin would call positive morality), or else he
is referring to the ultimate test of positive law and positive morality
(which for Austin would be Divine Law, or that which is conformable to
the test of utility). It should be pointed out that Austin specifically
avoided the use of 'ought' or of 'morality' without further qualification
as he felt that it was unclear whether one means thereby to refer to
positive morality, or to the ultimate test of positive morality and
positive law. Austin's definition of law does not include the moral
point of view, although he regarded this as being one of his main
concerns as we saw in chapter one. But of course, Austin did not
exclude the moral dimension (whether positive or critical) from his consideration of law as we will see in the next chapter.

Hart could only suggest that his analysis constitutes a 'fresh start' if he insists on looking at one of Austin's classes of abstraction in isolation from the others. But this was not how Austin intended that they should be regarded - for as we have seen, he claimed that each of the classes of abstractions were 'inseparably connected'. Austin must have been well aware of the possibility of his work being taken up in the way in which Hart has done, and attempted to guard against it:

At every step which he takes on his long and scabrous road, a difficulty similar to that which I have now endeavoured to suggest encounters the exposition of the science. As every department of the science is implicated with every other, any detached exposition of a single and separate department is inevitably a fragment more or less imperfect. Lectures (V) p197.

Austin's model of law does not include the moral point of view because he takes as his primary concern the fact that for centuries people have spoken of law and morals in the same breath, and that this has led to no end of confusion, because the reader is never at all clear whether the writer is speaking from the legal or the moral point of view. We saw in chapter one how Austin expressed the view that "...the consequent tendency to confound Law and Morals, is one most prolific source of jargon darkness and perplexity." Austin draws our attention to a problem and tries to draw out the issues involved.

For Austin, the problem was that people often spoke as if their actions were dependent upon the resolution of a technical question as to whether they were governed by a law or not, and so obscured the moral basis of their actions. To avoid further confusion, and to aid the student of jurisprudence, he conducts an analysis of leading terms and separates those factors relevant to the legal perspective in order that they may be discussed separately from those factors relevant to the
moral perspective. We must of course add in passing that such a student will not be disadvantaged by this way of going about things, for as we can see from the plan included in chapter one, jurisprudence will take up only a small part of his curriculum - the remainder being given over to a study of the various branches of politics and ethics. As we have seen, a good deal of Austin's effort was devoted to the construction of the criterion which would enable us to make these discriminations. To point out then, as Hart does, that in Austin's discussion of these matters he 'fails' to include considerations which are relevant to the moral perspective (the attitudes of officials and citizens) he shows a lack of awareness of the dynamic relationship between abstraction and synthesis which is such an integral part of Austin's method. Far from failing to account for the 'internal point of view' Austin does so at great length as we will see in the next chapter - at least in terms of showing the dynamic relationship between positive law and positive morality. When Austin goes on to discuss the relationship between positive law and critical morality, he even apologises for the length of his discussion of the latter:

I made this explanation at a length which may seem disproportionate, [in my second, third and fourth lectures] but which I have deemed necessary because these laws, and the index by which they are known, are the standard or measure to which all other laws should conform, and the standard measure or test by which they should be tried. Lectures (V) p176.

In fact, Austin discusses his programme of action at some length. He states that he must determine positively and negatively the appropriate matter of jurisprudence, to determine what that matter is, and to distinguish it from various objects which are variously related to it, and with which it is not infrequently blended and confounded - meaning by this, of course, amongst other things, positive morality and ethics. He continues:

I show moreover its affinities with those various related objects: affinities that ought to be conceived as precisely and clearly as may be, inasmuch as these are numerous portions of the rationale
of positive law to which they are the only or principal key. Lectures (Analysis I-VI) p81 (emphasis added).

Here then is Austin's explicit acknowledgment that positive morality (or the internal point of view?) is part of the very rationale of positive law and to which it may be the only or principal key. Of course, when this point is appreciated, it throws doubt on the widely accepted view, supported by Hart, that for Austin "...there is no necessary connexion between law and morals." The Concept p253. It can now be seen that the whole basis of Austin's claim is that we should keep the concepts of law, positive morality and ethics separate in order that we might communicate with each other, more clearly and distinctly. He is making it very clear (and we shall see this at greater length towards the end of the next chapter) that any institutionalisation or instantiation of law is necessarily a manifestation of the morality of the legal community and of the wider community. The bald statement, that for Austin, there is no necessary connexion between law and morals can be seen to be erroneous if, and in so far as, it is intended to deny this aspect of Austin's position.

Austin is making it as clear as possible then, that the reason we utilise these separate categories is not because in some empirical sense they are different, but because in doing so we are able to make it clear that we are asking different questions. The criterion of demarcation (i.e. The Province) is not a way of distinguishing different elements of the world in which we live, but is simply a way of determining which question it is that we are addressing our minds to. If this is made clear, then we are less likely to utilise evidence, or a mode of argumentation, which is appropriate to one enquiry, in support of another. If we lump everything together, as Hart does, then intellectually, we have a diminished capacity to understand the world. It is not that 'the world' is thereby different, only that our capacity to understand it has decreased. I shall consider this aspect further,
in the context of the relationship between the work of Aquinas and Austin, in chapter six.

That Hart is required to accept the good sense of this position is made clear by MacCormick:

In his later work Law, Liberty and Morality (1963), Hart revived a usage established by John Austin and other nineteenth-century utilitarians when he chose to call such a morality a 'positive morality'. He did so in order to sharpen up a distinction previously foreshadowed in Concept of Law. To quote from Law, Liberty and Morality:

"I would revive the terminology much favoured by the Utilitarians of the last century, which distinguished 'positive morality', the morality actually accepted and shared by a given social group, from the general moral principles used in the criticism of actual social institutions including positive morality. We may call such general principles 'critical morality'...(L.L.M.,p.20)" (22)

It would, however, have been better to have said that the distinction was not foreshadowed in The Concept, but ignored by it. In other words, the confusions introduced by Hart in an attempt to distance himself from Austin's position, can only be remedied by re-introducing the very distinctions which Austin employed. If Hart is to accept the good sense of distinguishing positive and critical morality from law, then factors relevant to positive and critical morality cannot be utilised in an elucidation of law (otherwise Hart does not take seriously his claim to distinguish them).

MacCormick, unfortunately, is not as clear as he might have been on this point, for he states in his book on Hart, "[p]ositive morality itself is said to require a 'critical reflective attitude to certain patterns of behaviour as a common standard' (C.L.p.56)."(23) It is true that this is probably the best way to reconstruct what Hart says in The Concept in the light of what he says in Law Liberty and Morality, but it has to be recognised that as The Concept stands (and it has been reprinted many times since L.L.M. without amendment) the reference MacCormick refers to is an integral part of Hart's discussion of law, as is made clear in the paragraph following that reference.
In fact, this aspect of attitudes to patterns of behaviour was intended to repair the defect in Austin's discussion of law, in that his idea of a habit of obedience did not capture it, although it is later dropped by Hart for the generality of the population, when he speaks of acquiescence. How far it is intended to be retained in respect of the officials is not clear.

However, if Hart's discussion of the internal point of view is to be evaluated as a part of the discourse appropriate to what we can now see to be the realm of positive morality, then we would be bound to say that it has made little contribution to our understanding. Newman for example distinguished between 'the internal act of holding propositions' and 'the external act of enunciating them' (24). He developed these ideas by speaking of notional and real apprehension and notional and real assent (25). Each of which is dealt with by Newman with great sophistication and subtlety. Now the point of this is not merely to claim that the issue which Hart raises had received better treatment 100 years earlier, but to claim also that Hart's treatment of it is misleading.

In linking his exposition of the internal point of view with his exposition of rules, he thereby confuses the internal with the external. Rules, as abstractions, are an aid to the development of the intellectual understanding of an area of interest. Their domain then is within the area of the notional apprehension or assent, or what Newman calls the external. The real apprehension or assent is to those experiences and that understanding from which the rules are derived and which necessarily goes beyond those rules. This is the internal point of view (26).

Newman explains it in this way - it sometimes happens that those who do badly at school when dealing with abstract subjects, find that when they leave school and become involved in work they seem to have a
Minds of this stamp not only know the received rules of their profession but enter into them, and even anticipate them, or dispense with them, or substitute other rules instead. (27)

These he says are the reformers, systematizers, inventors, in various departments of thought, speculative and practical. They run the risk, he suggests, of going wrong and going wrong badly, but he contrasts them with what he calls, "...the second-rate men who go by rule and come to sound and safe conclusions." (28) This is similar to Austin's comment that:

Nothing indeed can be more natural, than that legislators, direct or judicial (especially if they be narrow minded, timid and unskillful), should lean as much as they can on the examples set by their predecessors. Lecture (XXXVII) p641.

Whilst not wishing to be too hard on those who 'go by the rules' it certainly appears, as I shall argue in chapter six, that those who claim to do so have only a limited understanding of their position, and also that development, progress and change depend on the 'rules' being re-constructed or re-written in accordance with the internal point of view.

If we remove these factors from Hart's elucidation of law in The Concept, then we are left with a statement, which when disentangled has no significant differences from Austin's. His important point of departure was based on the observation that, "...because habits are not 'normative'; they cannot confer rights or authority on anyone." The Concept p58. It is only because Hart ignored the distinctions which he later returns to in Law Liberty and Morality, that he could claim (although unsuccessfully) to have remedied this so-called defect of Austin's. If Hart is to adopt the distinctions which Austin advocated, then he must see that Austin did not claim that there was any correlation between habits and norms, and that Hart's attempt to bridge
this gap by way of an authorising rule is inconsistent with his acceptance of that distinction. Hart sums up the advantage of his contribution by saying that:

The weakness of the doctrine [of habit of obedience] is that it obscures or distorts the other relatively active aspect, which is seen primarily, though not exclusively, in the law-making, law-identifying, and law-applying operations of the officials or experts of the system. Both aspects must be kept in view if we are to see this complex social phenomenon for what it is. The Concept p60.

To suggest that Austin did not deal with those active aspects is entirely misleading. In his Lectures (XXXVII-XXXIX) covering some 60 pages he discussed in detail these active aspects as indicated by the very terms he used - 'judiciary law' and 'judicial legislation', and which I shall discuss in some detail in the next chapter.

However, Hart's account can no longer seriously claim to be a theory of law, far less a more sophisticated version of Austin's as Beehler suggests:

I argue that H.L.A. Hart's The Concept of Law proposes not one concept of law but two, that the two are not compatible; and that the one Hart ends up deploying reduces his legal theory to a more sophisticated version of John Austin. (29)

We must remember that Hart was not merely adapting or improving Austin's model, but had rejected it as a failure. He claimed that what was needed was 'a fresh start'. His theory must therefore stand as a theory of law in its own right, but this it simply cannot do.

Consider the point when Hart moves from the consideration of social rules to the consideration of a legal system; he speaks first of Rex's standards, as if what is meant by 'Rex' was self explanatory, whereas Austin spent 119 pages discussing his inter-related concepts of sovereign, subject and independent political community. Nowhere does Hart discuss what he means by a social group. Again, it must be assumed to be self-explanatory, yet if it cannot be identified independently of his concept of social rule, he cannot speak of those within the group who uphold the rule and pressure others, also within the group, to
conform. Yet as MacCormick points out, "...Hart's crucial conception of a 'group' appears not to be prior to or definable independently of his conception of a rule."(30) Nothing he says, for example, in relation to attitudes to patterned behaviour, would enable us to distinguish laws from the rules of professional bodies. After assuming that we all know what he means by 'Rex' and a 'social group', he then utilises the idea of judges applying law, and other professionals guiding people by reference to those laws, in order to explain his concept of an authorising rule. In other words, he does what Austin warned us against - he utilises in his elucidation of law the very factors which he affects to elucidate.

Before leaving our discussion of Hart's position, it is important that we should give some consideration to his views on the relationship between natural law and positivism, as this will be an important preliminary matter for our discussion in the final chapter.

Hart's view of natural law:(31) As I indicated in chapter one, the Hartian version of natural law has been referred to as 'sociological natural law'. That this would not be objected to by Hart is made clear from his reference to his theory as, "...this empirical version of natural law..." The Concept p254. In this section, I merely wish to indicate the main points of this sociological perspective. It is not until chapter six that I shall put forward what I believe to be a better response to the question of the relationship between Austin's theory and that of natural law. I have adopted this course because the issues involved in my response can be put more clearly in the context of a discussion from general principles, than they can in the context of a detailed discussion of Hart's position.

Hart introduces this question by pointing to the claim that law can be best understood by appreciating its congruence with principles of morality. This, he suggests, is a view characteristically taken by
It might well be added, that as Hart's discussion of law includes references to the 'internal point of view' and to questions of 'right' and 'authority', and as we shall see, he also claims there to be an overlap of some sort between principles of law and morality, that perhaps this congruence is true of his position as well.

However, Hart then goes on to make the somewhat stronger claim that some natural law theories state there to be a necessary connection between law and morality:

The clearest, perhaps, because it is the most extreme form of expression of this point of view, is that associated with the Thomist tradition of Natural Law. This comprises a twofold contention: first that there are certain principles of true morality or justice, discoverable by human reason without the aid of revelation even though they have a divine origin; secondly that man-made laws which conflict with these principles are not valid law. The Concept p152.

It is of particular interest to the present thesis to see that Hart is setting up his treatment of the natural law question by way of contrast with the Thomist tradition. For just as Hart develops a theme specifically rejected by Austin - that of sociological natural law - we shall later develop the Thomist view of natural law which is specifically rejected by Hart.

We can also see that Hart specifically adopts the view which we referred to earlier regarding the essential incompatibility between positivistic and natural law theories. He refers to this as "...the issue between Natural Law and Legal Positivism,..." The Concept p181.

Positivism is taken to mean that it is not a necessary truth that laws reproduce certain demands of morality. This, Hart says, has been rejected by the classical theory of natural law which claims that there are certain principles of human conduct, discoverable by human reason, with which man made laws must conform if they are to be valid.

Hart suggests that much confusion has been based on the failure
to distinguish between the laws of science (being descriptive, factual and discoverable by reason) and the laws of morality (being prescriptive and not necessarily related to any observable state of affairs). However, having noted this distinction, he claims that there are certain elementary truths underlying the natural law position which can be appreciated if they can be detached from their metaphysical trappings, which few, nowadays, would be inclined to accept. The Concept p184

Rather than think of the end, or optimum state, of a thing's development (what is called the teleological point of view), we should, in the human context, lower our sights and see, "...in the modest aim of survival the central indisputable element which gives empirical good sense to the terminology of Natural Law." The Concept p187.

...we can, in referring to survival, discard, as too metaphysical for modern minds, the notion that this is something antecedently fixed which men necessarily desire because it is their proper goal or end. Instead we may hold it to be a mere contingent fact which could be otherwise, that in general men do desire to live, and that we may mean nothing more by calling survival a human goal or end than that men do desire it. The Concept p188.

However, Hart's position on this matter is none too clear for he does say later on the same page that, "[t]here are, however, simpler, less philosophical, considerations than these which show acceptance of survival as an aim to be necessary,..." (emphasis added). It is important for us to note that Hart is only asserting the existence of survival 'as an aim'. Although it is put forward as an empirical claim, we should be clear as to the nature of the claim that is being made. It is for example compatible with the view expressed by Albert Camus - "One might think that a period which, in a space of fifty years, uproots, enslaves, or kills seventy million human beings should be condemned out of hand."(32)

Hart's claim is also compatible with evidence which indicates that certain individuals or groups of individuals do not have survival as an aim, at least, not if survival means to indicate their desire to
continue their physical existence. Evidence of people's willingness to accept death, whether as christian martyrs, political revolutionaries, or those who claim the right to 'self-deliverance'(33) would not count as evidence against Hart's claim, for he only makes the claim 'generally speaking', or with regard to the 'overwhelming majority' of people. Unfortunately, Hart never really makes it clear whether he is claiming that the individual has as his goal the survival of the group, in which case Hart's failure to determine how 'the group' is to be identified becomes a factor of major importance. If Hart merely wishes to claim that the individual has as his goal his own survival, 'generally speaking', then we may note that the claim is limited and inherently vague.

Hart continues from this position to develop his view of the 'minimum content of natural law'. The argument is that given survival as an aim, people have reasons to compromise and co-operate with each other, and this gives Hart his important link between natural facts and legal and moral rules. "It is important to stress the distinctively rational connexion between natural facts and the content of legal and moral rules." The Concept p189.

The facts with which he is particularly concerned are stated in terms of five 'truisms'. Human vulnerability leads to the need for rules which restrict the use of violence. Approximate equality in terms of physical strength and intellectual capacity leads to the need for compromise. Limited altruism means that people, being neither devils nor angels have an interest in mutual forbearance. Limited resources give rise to the need for some rules concerning the ownership and use of property (which Hart again refers to as minimal forbearances). Limited understanding and strength of will gives rise to the need for 'sanctions' to ensure that those who would obey voluntarily are not taken advantage of.
It must be said, of course, that these five truisms give the impression of saying the same thing five different ways. It should also be noted that in his discussion of four of these points Hart refers to these rules as being in some way 'necessary' without making it at all clear what he means by this. It must of course be said in passing that the claim which Hart makes in connection with his last point is to concede the point of Austin's claim:

We can say, given the setting of natural facts and aims, which make sanctions both possible and necessary in a municipal system, that this is a natural necessity. The Concept p195 (first emphasis added, second in original).

It should also be said that Austin might well have agreed with the substance of the point being made by Hart although he might well have taken issue, as I have done, with the manner in which it is expressed. However, the more important point is to attempt to appreciate the rationale behind Hart's treatment of the 'minimum content' point. It should, most probably, be seen as a response to those suggestions in Kelsen, Austin and other positivists, that a system of law can have just any content and still be law. But what is the nature of Hart's response? If it is intended as a denial of their claim, then of course it must fail. The short point, in so far as we are concerned with Austin, would be that Austin specifically accepts the point which Hart makes, although instead of saying that there is, empirically, a minimum content to any legal system, he indicates that he accepts the idea that there have been rules which have obtained in all nations and ages. Lectures (Analysis of I-VI) p82.

The question is, of course, whether there is any inconsistency in Austin's claim that there should be a separation of law and morals, or that a legal system may exist and have any content, and the point which is now being made. The answer is that there is not. We should remind ourselves of the point made earlier by Collingwood, that statements are answers to questions, and that statements cannot be contradictory unless
they are answers to the same question. Austin advocates a conceptual separation between law and morals to avoid confusion, but well accepts that human activity necessarily has legal as well as moral implications and observes, much as Hart does later, that there appear to have been rules which obtain in all nations and ages. That these should be reflected in the legal systems of those nations would be regarded by Austin as a matter of commonsense, and this will appear more clearly when we see his depiction of the dynamic relationship between law and morals in the next chapter.

However, Hart now moves on to an aspect which makes the 'empirical' nature of his claims appear somewhat dubious. Having stressed the factors which give rise to the need for mutual forbearances, he now indicates that this is only intended to apply between individuals and not between groups. His foregoing claims, he makes clear, are not inconsistent with the acknowledgement that 'often' the law or morality of a particular society has not extended these minimal protections to all 'within their scope'. Hart's observations regarding the 'necessity' of mutual forbearances are not falsified by the existence of slave classes and, to cite his examples, the circumstances which have prevailed in Nazi Germany or South Africa. What he does to maintain the viability of his system is to restrict its 'range of application':

These painful facts of human history are enough to show that, though a society to be viable must offer some of its members a system of mutual forbearances, it need not, unfortunately, offer them to all. The Concept p196 (emphasis in original).

Because Hart has no concept of a political community, independently of his concept of a rule, as Austin has, it can now be seen that the reductio ad absurdum of Hart's claim is to assert what no person has ever doubted for a moment, and that is that the whole of the human race is not in the condition of having a war of each against all. One only requires for Hart's claim to be 'true' the existence of two or more
people who are, in respect of each other, in a system of mutual forbearance or compromise. Thus in the context of human society there is a society where some are engaged in mutual forbearances although this does not extend to all. If Hart were to say that 'society' is not intended to mean the whole of the human race, we might reasonably ask for an alternative specification of the concept. But as MacCormick has already pointed out, Hart does not specify this concept independently of the concept of a rule and, as we have already seen, Hart defines the concept of a rule in terms of an accepted practice, and that practice is, of course, one of compromise and mutual forbearance. It thus becomes unclear how Hart can maintain this view of 'society' and 'rules' and at the same time accept the view that there are societies which exclude some of their membership from this system of mutual forbearances. It would appear that Hart is working with two conceptions of 'society', although this is nowhere made explicit. It can thus be seen that contrary to Hart's claim that he is providing us with an empirical version of natural law, the relationship which he asserts to exist between a society and the existence of mutual forbearances is true analytically, and we do not have to go beyond his specification of 'society' in order to find the idea of 'mutual forbearance' as inextricably bound up with it, and this would be true independently of any observations we might make. (34)

Now that we have seen the limited nature of Hart's claim we can see why Harris might, with some justification, regard it as sociology fit for Martians. Although in the next chapter I shall consider some of the implications of a Hartian view of law, I shall, as I have already indicated, return to re-consider the relationship between positivism and natural law, particularly in their Austinian and Thomist forms, in the final chapter.
In the previous chapters, I put forward an argument to the effect that on careful analysis, Hart's view of law as expressed in *The Concept of Law*, is fundamentally misconceived. The argument so far is that the problem to which Hart responds is largely one of his own making. Hart claims that Austin fails to make due allowance for the rich diversity of laws and the way in which they work. *The Concept of Law* is his response. We must remember that *The Concept* is not an attempt at compromise or accommodation with the theory put forward by Austin, but sweeps it entirely from the table of jurisprudence.

I have argued that Hart did not understand the problem with which Austin was dealing, nor did he appreciate the need for such an understanding as a necessary precondition for the proper evaluation of Austin's work. Consequently, Hart failed to understand the purpose for which Austin's conceptual system was designed. As a result, many of the negative effects which Hart attributes to Austin's theorising are a direct consequence of placing Austin's statements in an inappropriate context (or language game). So Hart, in his dealings with Austin, misunderstands the problem, the response and the effects of the response.

In the Introduction I indicated, in a reference to Eysenck, that the way in which a problem is depicted will have a profound effect upon the formulation of the response. It may equally be said that to ignore the problem with which a person is dealing, or to misunderstand it, will have a profound effect upon the evaluation of the response. Indeed, it is quite likely that it will render the response quite unintelligible. R.D. Laing has demonstrated this effect, powerfully but simply, in his discussion of a psychiatric patient.
Laing cites the example of Kraepelin who brings a psychiatric patient into a lecture hall and upon asking the patient a simple question is faced with a veritable flow of 'incomprehensible' utterances. For Kraepelin, the patient has not given him a single piece of useful information. Yet, says Laing, if we attempt to understand the patient's statements, it can be seen that he is carrying on a dialogue between his own parodied version of Kraepelin, and his own defiant rebelling self. He is driven into a situation where he 'acts out' both roles because:

...he [the patient] deeply resents this form of interrogation which is being carried out before a lecture-room of students. He probably does not see what it has to do with the things that must be deeply distressing him. But these things would not be 'useful information' to Kraepelin except as further 'signs' of 'disease'. (1)

In this simple illustration, Laing has demonstrated how we can regain an understanding of the supposedly unintelligible statements made by such a patient by placing them in the context of the problem with which the patient was dealing. In other words, statements are merely one form of abstraction, and, as I shall show more fully in chapter six, abstractions are constructed in a particular context. To take an abstraction from the context in which it was formulated and to place it in an alien environment will inevitably lead to misunderstanding if this change of context goes unnoticed.

The effect of such a shift is to assert that others hold there to be connections between ideas which they do not in fact hold, or that the abstractions are intended to serve a purpose which was not intended by the person formulating them. To claim then that an abstraction which has been formulated is no good because it does not serve the attributed purpose can be seen as the intellectual equivalent of the fitter who claims that his monkey wrench is no good because it is not suitable for banging in nails. The response of course is that nobody but he thought that it would be. In other words, Hart's findings may well refute his own expectations of the use to which Austin's abstractions can be put,
but this is not, as is claimed, a refutation of expectations held by Austin.

Having argued that Hart's failure to understand Austin tells us more about Hart and very little about Austin, just as the psychiatrist's failure to understand his patient may tell us more about the psychiatrist than it does about the patient, we have to be careful not to do to Hart what he has done to Austin. We have to assess the adequacy of Hart's own positive contribution to jurisprudence in the light of the problem with which he was concerned.

In the last chapter we looked to the internal structure of Hart's account and argued that in certain fundamental respects he failed to state a clear and consistent position. Concepts quite central to his exposition were inadequately explained or used in a systematically ambiguous fashion. The persuasiveness of Hart's work actually depends therefore on the assumption that the reader will not adopt what was referred to earlier as being essential to the philosophical approach, i.e. the suspension of the 'natural attitude'. At times, of course, Hart explicitly incorporates into his theory what people naturally or characteristically think. At others, he depends upon the natural attitude to facilitate the acceptance of the conceptual transitions which are apparent on a close reading of his text, but which have not hitherto rendered his work any the less digestible. Thus whilst we have seen that Hart's account of his most basic concept - that of a rule - is used with a shifting and variable content, it does not appear to many, to have been a problem in arriving at an understanding of Hart's position. This is, I would claim, because the reader is inclined to remedy this defect, almost without realising it, by relying on his own unarticulated assumptions of what a rule is. The defects only become apparent upon a close and careful reading of Hart's text.

However, it may be said that whilst this amounts to a defect of
style and expression it does not reflect any fundamental inadequacy of the approach. After all, any theory will have to rely at some point on a whole range of unarticulated assumptions, and whilst it is unusual to find the need for such a reliance at the very centre of a theory, it would only be improved (but not changed) by their incorporation. What is needed is an assessment of the theory in terms of the extent to which it actually provides a solution to the problem, in the context of which, it was formulated.

We have already seen that Hart's theory is not as he portrays it - a response to the inadequacy of Austin's theory - but it nevertheless can be seen as an attempt to deal with the question of the complexity and wide-ranging functions of law. In this chapter I begin an evaluation of his position in these terms. I do so by first stating Hart's view of the way in which the law changes which, it will be seen, is closely dependent upon his slightly elaborated view of a legal rule. In the remainder of this chapter I will show how Hart's position has influenced a major area of debate in the sociology of law - the role and function of the judiciary. In doing so I will of course be confirming that Hart's contribution to this debate has been extremely influential. In the chapters that follow, I will be questioning whether Hart's theoretical position merits the adulation which it has brought forth.

Hart's view of legal change: Hart depicts a rule as having a core of certainty and a penumbra of doubt. This suggests that each rule has a central, indubitable aspect and also a peripheral but more questionable aspect, and that if there is to be growth, development, or differences of opinion, they will be restricted to this peripheral area. "...they [rules and standards] will have what has been termed an open texture... uncertainty at the borderline...(2). Hart's work is an attempt to "...characterize briefly...the area of open texture and the creative
judicial activity within it."

(3) Talk of clear rules and core of certainty on the one hand, and open texture and penumbra of doubt on the other, make us think of:

...those wide areas of conduct which are successfully controlled ab initio by rule, requiring specific actions, with only a fringe of open texture instead of a variable standard. (4)

The two aspects then of Hart's view of the way in which rules work are:

(i) The element of control by a rule (which is a non-variable standard) requiring specific actions.

(ii) The rule having a fringe of open texture.

If we want to know what is meant by 'open texture', we see that the explanation is as follows:

The open texture of 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 both of officials and private individuals by determinate rules which, unlike the applications of variable standards, do not require from them a fresh judgment from case to case even though uncertainties may break out as to the applicability of any rule...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... (5).

Perhaps we might call these the aspects of control and discretion. This latter aspect will always be with us it is said, because of the inability of legislators to have knowledge of all the possible combinations of circumstances which the future may bring, combined with their relative indeterminacy of aim (6). This view leads us on to an appreciation of the way in which the law develops - that if we take a rule extracted from precedent:

...it is compatible with the exercise by courts that are bound by it of the following two types of creative or legislative activity. On the one hand courts deciding a later case may reach an opposite decision to that in a precedent by narrowing the rule extracted from the precedent, and admitting some exception to it not before considered, or, if considered, left open. This process of
'distinguishing' the earlier case involves finding some legally relevant difference between it and the precedent case, and the class of such differences can never be exhaustively determined. On the other hand, in following an earlier precedent the courts may discard a restriction found in the rule as formulated from the earlier case, on the ground that it is not required by any rule established by statute or earlier precedent. To do this is to widen the rule (7).

Change then comes about by the exercise of choice in marginal areas, to bring the doubtful case within the compass of the rule, or to exclude it, thus extending or narrowing the ambit of the rule in a gradual way. Hart refers to this exercise of choice as a form of legislative activity.

The problem arises in the conclusion that such a depiction leads to:

[T]he result of the English system of precedent has been to produce, by its use, a body of rules of which a vast number of both major and minor importance, are as determinate as any statutory rule. They can now only be altered by statute, as the courts themselves often declare in cases where the 'merits' seem to run counter to the requirements of established precedents (8)

So we have a system in which decisions of the courts give rise to precedents, rules extracted from the cases, which bind the courts in similar future cases. These precedents are as determinate as any statutory rule, and can therefore only be altered by statute. So at the end of the day, we find that this approach to the legal system has implications for the respective roles of the judiciary and the legislature. Statutory rules are determinate and rules of precedent can be as determinate - in both cases, change is for the legislature, and as we noted earlier, the application of such rules does not require a fresh judgment in each case; they control by requiring specific conduct. Each rule has an indeterminate outer edge (fringe of open texture - penumbra of doubt) and here the judge comes into his own. He can expand the rule by adding a little to it, or contract the rule by chipping a piece from it.

However, there is often, as we shall see, a tension within the ideas expressed by such people - for Hart, the idea of a determinate rule
which controls by requiring specific conduct and without the need for a fresh judgment in each case, is compatible with the view that:

Particular fact situations do not await us already marked off from each other, and labelled as instances of the general rule, the application of which is in question, nor can the rule itself step forward to claim its own instances. (9)

This important statement makes it clear that there is always a judgment to be made as to what the applicable rule is in any case, and even where this has been determined and the rule is clear, further judgments are required in order to determine what are to count as the relevant facts. This position sits rather uneasily with the idea of a determinate rule controlling ab initio, by requiring specific action without the need for further judgment. The tension seems to result from the desire to avoid the unacceptable position of 'mechanical jurisprudence' (10), and to allow that judges have some discretion and ability to develop or shape the law. The tension is resolved by adopting this rather unsatisfactory compromise which states that discretion is restricted to 'marginal' areas. Yet, although this has the appearance of explaining the nature of control of the judiciary, it has none of the substance which we might require of such an explanation. Does it enable us to do any more than say retrospectively that what the judges change must be regarded as 'marginal', and what they leave alone is 'core'? If not, the element of control is reduced to vanishing point. If it does do more than this, then we should expect to be able to determine the extent of the controlling factor, independently of and prior to a decision in a particular case.

Here we are faced with the same difficulty as we found in the last chapter with Hart's authorising rule. If the marginal and core elements referred to by Hart are merely an extrapolation from the practice of the courts, then they are too vague to be helpful, as it only amounts to saying that by and large judges change the law gradually. However, his
idea of a vast number of rules, controlling without the need for further judgment, requiring specific action, which are changeable 'only' by the legislature, seems to suggest more than this. On one view, it clearly indicates that so far as the judiciary are concerned with this 'vast body of rules of both major and minor importance', they have no scope for the exercise of their discretion, for these rules are changeable only by the legislature. The creativity of the judges must then be confined to the marginal areas of the remaining rules. At other times, Hart appears to take the view that all rules have marginal areas which would mean that there are no rules which are changeable only by the legislature and they are all, to some extent, capable of being changed or developed by the judiciary.

However, on either view, it is clear that Hart regards there as being a vast number of rules which in the main (within their core of certainty) are not susceptible to change by the judiciary. If this can be seen as representing the 'core of certainty' within Hart's ideas, and it is this aspect which I will challenge in the remaining chapters of this thesis, then it is not essential to determine in what way Hart could best deal with the inconsistency to which we have just referred.

In the next section, I will show how Hart's views are reflected in the work of recent commentators on the judiciary, and thus illustrate that a proper understanding of his position as expressed in The Concept is of far more than mere historical interest. In doing so, I do not mean to suggest that Hart would endorse everything they say. It is difficult to know from Hart's account quite how much scope for creativity he would allow to the judiciary, but that it would probably fall somewhere in the spectrum between 'greater than minimal' and 'less than substantial'. It may be said, depending on which view of Hart one takes, that the legal commentators we look at are closer to the former than Hart. However, the more important point for present purposes, is
that both of them regard the element of control by rules as central to their position, and it is this aspect which will be the focus of our attention in later chapters.

Hart's theory as a presupposition of legal commentators: In this section I look at the work of Peter Robson, Paul Watchman and their co-contributors as expressed in their recent book on the judiciary - Justice Lord Denning and the Constitution (11). I have selected this work as a focus for attention because it is a recent work which brings together a number of academics who have adopted a united and critical approach to a wide range of recent judicial decisions. However, they have also been brought up in the atmosphere of Hartian jurisprudence, and this they have adopted uncritically. The authors, unfortunately, do not specifically refer to the theoretical basis from which they are working and our conclusions in this regard are inferential (12). However, such inferences are quite irresistible when we see that Robson, for example, uses language which could have been drawn only from the well of The Concept of Law:

The open textured nature of the rules which the judiciary work with,...mean that their support cannot be certain... within the relatively marginal areas of disputed legal rights and obligations the most 'desirable' decision for the present or future may not be clear. (13)

The fact that Hart is not specifically referred to by any of the contributors underlines, rather than undermines, our comments regarding his influence. His view of law has become accepted as the prevailing common-sense in discussions on law, even amongst the self-proclaimed radical commentators, and as Kuhn points out:

When the individual scientist can take a paradigm for granted, he need no longer, in his major works, attempt to build his field anew, starting from first principles and justifying the use of each concept introduced. (14)

The acceptance of such a view is an important step towards the claim that
the judiciary are subject to major limitations upon their power - that
their capacity for innovation is restricted to 'relatively marginal
areas'. It is most surprising that writers who accept this paradigm do
not appreciate that instead of enabling us to appreciate the subtlety
and complexity of the law, it is bound to lead to 'intellectual and
emotional confusion'. At least Louis Jaffe, unlike the writers we are
looking at, appreciated this (15). We will now look at the position of
the writers of this series of articles under headings which indicate the
more important aspects of their position and which are only credible
within the view of law which Hart supports.

Precedent: Watchman states his view of the judicial function in
the clearest possible terms at the outset of his introductory article.
"The function of the judiciary is to do justice according to the law.
This entails the interpretation of laws passed by Parliament and the
adherence to precedent."(16) It seems that the basic postulate
underlying this view is as sweeping and as questionable as that which
was adopted by Eysenck and which we referred to earlier. If it does not
totally exclude the common law, then it certainly limits it to the
application of precedent. A.W.B. Simpson has said of such a view:

To a historian at least any identification between the common
law system and the doctrine of precedent, any attempt to
explain the nature of the common law in terms of stare decisis,
is bound to seem unsatisfactory, for the elaboration of rules
and principles governing the use of precedents and their status
as authorities is relatively modern, and the idea that there
could be binding precedents more recent still. (17)

In the context of his discussion of a case concerned with the
interpretation of a testamentary disposition, (Re. Jebb) Watchman
indicates that the previous cases have shown that once an interpretation
of a word or phrase has been laid down, later courts will follow it.
However, in the case to which he refers, the Court of Appeal took a
different approach in the hope that this would enable them to remain
more faithful to the intentions of the testator. Watchman, in commenting on this, cites with approval J.H.C. Morris's criticism of Denning and Danckwerts LJJ. to the effect that, "by departing from the established rules of law the Court of Appeal seems to have usurped the function of the legislature." (18)

As the 'established rules of law' were laid down in earlier decisions of the court and were not statutory rules, Watchman (and Morris) must agree with Hart that some rules laid down in the decisions of the courts are as determinate as any statutory rule and can only be altered by statute. Yet, as William Twining has pointed out, the presupposition that there is a fixed prior position, an identifiable starting point, is false in any case which gives rise to doubt (19). If these authors had not been so restricted by their Hartian paradigm, they would be better able to appreciate that the dynamic aspect of law has much to do with the creation of doubt where previously there was thought to be none. We will look at this aspect in more detail in the next chapter in considering the cases of Vestey and Ramsay (20). An awareness of this issue would then have led them to an appreciation of the fact that:

...the main initiative often does not lie with the judiciary. Who, for example, were the bolder spirits in Donoghue v Stevenson and Gideon v Wainwright - the litigants (and their lawyers) who challenged accepted notions or the judges who responded to the challenge? (21)

It is ironic that on the page immediately facing that from which Watchman takes the above quotation in the Law Quarterly Review, Rupert Cross opens his article on "Stare Decisis in Contemporary England" with the following words:

In 1948 the editor of this review said: "The doctrine of precedent is more rigid today than ever before." He was commenting on Police Authority for Huddersfield v Watson, and there is no doubt that his words could have been abundantly justified when they were written. Since then, however, there has been a considerable relaxation in the rigour with which the rule of stare decisis is applied in this country. Although there is still much uncertainty in matters of detail, the process of
relaxation has, it is submitted, gone far enough to call for a radical restatement of the English doctrine of precedent. (22)

After reviewing a number of cases, Cross expressed his conclusion in these terms:

...it must be admitted that the foregoing summary makes one wonder whether the spectacle of an English judge labouring under brutal fetters of a rigid doctrine of precedent is not something which, if it exists at all, exists only in the minds of academic lawyers. (23)

However, instead of pursuing any of these questions which would have led to a more sophisticated understanding of the legal order, Watchman's response is to agree with Morris when he says that chapters on gifts to children in textbooks on wills require to be re-written, unless the editors have the courage to say that the decision of the court is wrong. It is surprising that academics who have such a strict view of the judicial role should accept the idea of textbooks being an extra-legal source of legal validity in the face of a decision of the Court of Appeal to the contrary. Undoubtedly some decisions have required the textbooks to be revised and undoubtedly some important decisions have even required whole chapters to be re-written. One can of course make no inference as to the validity of a legal decision from the extent of the revisions which have to be made to the textbooks. Perhaps we should bear in mind what de Smith had to say with regard to the case of Roberts v Hopwood (24):

Most of the commentators agreed that this decision exceeded the proper limits of judicial review and that it was likely to be distinguished if relied upon as an authority in future. Yet thirty years later it was followed by the Court of Appeal in a somewhat similar case... (25)

The more recent case of Cutts v Head and another (26) is particularly interesting in this context. It concerns the 'without prejudice' rule which, it was argued, involved a formula which, since at latest 1889, has a fixed and well-understood meaning (27). The previous case of Calderbank v Calderbank (28), had appeared to modify the rule in relation to financial aspects in matrimonial proceedings.
Fox L.J. in Cutts noted that "...one thing that was quite absent from Calderbank v Calderbank was a Calderbank offer" (29), and Oliver L.J. noted that Calderbank was not mentioned in current editions of Cross on Evidence (5th edn. 1979) and Phipson on Evidence (13th edn. 1982) and that Halsbury's Laws (4th edn.) stated that Calderbank was restricted to matrimonial proceedings relating to finance (30) which was not the issue before the court in Cutts. He further noted that "...we have not been referred to any reported case in this court (other than a matrimonial case) where the procedure has been approved" (31), although he noted that Denning M.R. had approved of it in one non-matrimonial case. It was also noted that the statements in Calderbank had been made without the issue having been argued before the court.

All of these factors would presumably lead Watchman to conclude that Calderbank had been wrongly decided (32). Yet happily for the appellant in Cutts, they had obviously been advised by 'bolder spirits' and the court was happy to take up and extend the principle which had been there set forth as it was so obviously in accordance with public policy, and it was noted, legal practitioners had greeted and utilised Calderbank with obvious enthusiasm despite its pedigree (hence the term 'a Calderbank offer'). Watchman's solution has all the appeal of an ostrich burying its head in the sand.

Parliament and the Judiciary: According to these authors, the relationship between parliament and the judiciary depends on fundamental constitutional principles. Their claim is that because parliament is the duly elected body, it is for parliament and not the judiciary to develop the law, and they even go so far as to say that "[t]he remedying of defects and the filling of gaps in the law are tasks more properly for Parliament than the courts." (33) Social policy should be shaped by the elected representatives in Parliament, not by the unelected judiciary.
Of course, the authors have some difficulty in pursuing this line consistently. Young refers to the fiction that judges merely declare the law, and Kenneth Miller refers to the "...crucial distinction between judicial creativity and political decision-making." The distinction may well be crucial, but unfortunately the authors make no attempt to clarify it for us. Some such attempt was made by Lord Reid in *Pettitt v Pettitt* when he said:

> We must first have in mind or decide how far it is proper for the courts to go in adapting or adding to existing law. Whatever views may have prevailed in the last century, I think that it is now widely recognised that it is proper for the courts in appropriate cases to develop or adapt existing rules of the common law to meet new conditions. I say in appropriate cases because I think we ought to recognise a difference between cases where we are dealing with "lawyer's law" and cases where we are dealing with matters which directly affect the lives and interests of large sections of the community and which raise issues which are the subject of public controversy and on which laymen are as well able to decide as are lawyers. On such matters it is not for the courts to proceed on their view of public policy for that would be to encroach on the province of Parliament.

Lord Reid went on to say that he could not accept the introduction of the notion of 'family property' into English law, for that would be to introduce a new conception, rather than being a development of existing principles. However, the position of the authors in *JDC* is far more conservative than this. Their claim is not just that the judiciary should not develop the law, but that they should not even correct defects. If this view were to be accepted, the burden thus imposed on the legislature would be monumental, and as presently constituted, quite impossible for it to deal with. The point is of course that constitutional principles do not lead to such an absurd conclusion. The view put forward by Austin was that the judiciary can be seen as exercising functions delegated to it by the legislature, and in this way judicial activity can be reconciled with legislative supremacy. Even Hart, as we have seen, allows for judicial creativity within the margins of the rules. What the authors in *JDC* and Hart have in common is the
view that in the main, in non-mariginal areas, change is the responsibility of the legislature.

It seems that such a view can be challenged in two main areas:

(i) If it could be established that the courts have introduced new rights and remedies where previously there were none, it could hardly be claimed that such adjustments were marginal. After all, to talk of the margin of a rule requires the existence of some rule, and here we are dealing with a situation where there is said to be no rule. Of course one can always find both judicial and extra judicial statements to support the view that it is not for the judges to provide new remedies for new wrongs. Lawton L.J. in RCA Corp v Pollard made this very point, "...but I remind myself that it is for Parliament, not the judges, to provide new remedies for new wrongs."(39) The authors in JDC make this point repeatedly.

However, it seems that it must be accepted that historically the judiciary have done just this and that they continue to do so. The series of decisions from Langridge v Levy (40) to Heaven v Pender (41) which subsequently led to the establishment of the general principle of negligence in Donoghue v Stevenson (42) must surely be seen as the judicial establishment of new rights. More recently there have been clear examples of the establishment by the judiciary of new remedies. The 'Anton Piller' order (as it has become known) is a substantial departure from previous practice. Denning M.R. opens his judgment in Anton Piller with the following words:

During the last 18 months the judges of the Chancery Division have been making orders of a kind not known before. They have some resemblance to search warrants. Under these orders the plaintiff and his solicitors are authorised to enter the defendant's premises so as to inspect papers, provided the defendant gives permission.

Now this is the important point: the court orders the defendant to give them permission. The judges have been making these orders on ex parte applications without prior notice to the defendant. (43)
Then, after stating that their lordships had no wish to whittle down the principle of Entick v Carrington (44) to the effect that every man's home is his castle, Denning M.R. went on to state:

[The order sought in this case] does not authorise the plaintiff's solicitors or anyone else to enter the defendants' premises against their will.... It only authorises entry and inspection by the permission of the defendants. The plaintiffs must get the defendants' permission. But it does do this: it brings pressure on the defendants to give permission. It does more. It actually orders them to give permission - with, I suppose, the result that if they do not give permission, they are guilty of contempt of court. (45)

Interestingly, Lawton L.J. who as we have just seen in RCA Corp, took the view that it is not for the judges to develop new remedies, refers in his judgment, on the page immediately preceeding that cited, to an 'Anton Piller' order, without any suggestion that it is illegitimate because it is the product of judicial innovation (46).

Another remedy recently developed by the courts has become known as a 'mareva injunction'. In The Mareva, the shipowners applied for an injunction restraining the charterers from removing or disposing out of the jurisdiction moneys standing to the credit of the charterers' account at a London bank (47). As Roskill L.J. observed:

...it is right to say that, as far as my own experience in the Commercial Court is concerned, an injunction in this form has in the past from time to time been applied for but has been consistently refused. (48)

However, this did not prevent the court from issuing such an injunction in this and subsequent cases.

In the case of Stoke on Trent Council v B & Q (Retail) Ltd (49), the council applied for an injunction to prevent a retailer opening for trade in defiance of the provisions of the Shops Act 1950. Templeman L.J. noted that:

The right to invoke the assistance of the civil court in aid of the criminal law is a comparatively modern development. Where Parliament imposes a penalty for an offence, Parliament must consider the penalty is adequate and Parliament can increase the penalty if it proves to be inadequate. It follows that a local authority should be reluctant to seek and the court should be reluctant to grant an injunction which if disobeyed may
involve the infringer in sanctions far more onerous than the penalty imposed for the offence. (50)

However, having said that, the court did of course allow the injunction to continue in this case. It need hardly be said that this modern development was entirely a matter of judicial innovation. The replacement of the statutory penalties with those consequent upon a contempt of court could hardly be regarded as a marginal change.

The cases looked at in this section are only a few examples, selected almost at random, from among the vast number of recent cases in which the judges have taken it upon themselves to introduce new rights and remedies. To assert that it is not the function of the judges to develop the law, or to remedy defects, or that such activity is limited to the margins of the rules totally fails to capture this capacity for judicial innovation. If all legal advisers and potential litigants were prepared to accept such a view, the rate at which the law develops would be significantly impaired. Lord Wilberforce in Lynch v DPP makes the point that:

The judges have always assumed responsibility for deciding questions of principle relating to criminal liability and guilt and particularly for setting the standards by which the law expects normal men to act. In all such matters as capacity, sanity, drunkenness, coercion, necessity, provocation, self-defence, the common law, through the judges, accepts and sets the standards of right-thinking men of normal firmness and humanity at a level which people can accept and respect. (51)

If the judges had refused to accept the responsibility for determining these matters could it have been assumed by the legislature as the authors in JDC state? The answer must of course be 'no!' The reason being made clear by Lord Wilberforce (in the somewhat different area of tax avoidance) when he pointed out that if the courts were to stand still the most likely result would be Parliamentary congestion (52). This was reinforced by Lord Scarman when in Furniss v Dawson he stated:

The limits ...remain to be probed and determined judicially. Difficult though the task may be for judges, it is one which
is beyond the power of the blunt instrument of legislation. Whatever a statute may provide, it has to be interpreted and applied by the courts; and ultimately it will prove to be in this area of judge-made law that our elusive journey's end will be found. (53)

The nature of this creative judicial role, even in the presence of legislation, is a point which I will be demonstrating in some detail in the next chapter in the discussion of Davis v Johnson. It only remains to be observed that these comments were made in the context of criminal law and tax law, where the approach of the judiciary has traditionally been more conservative than in other areas. (54)

(ii) The second way in which the Hartian view can be challenged is by looking to cases where what must have been regarded as part of the core of certainty of a rule, and thus on Hart's account only susceptible of change by the legislature, is in fact altered by the judiciary. However, as this discussion will require a more extended treatment of the cases than is possible here, we can combine it with our extended analysis of the cases for other reasons in the next chapter.

Statutory interpretation: Eric Young, another contributor to this series of articles, takes a similarly conservative view. In his discussion of administrative law he states that the justification for judicial intervention in some cases and not in others, is not to be found in differences of statutory language:

There does not, therefore, appear to be any clear legal basis for holding in some cases that Parliament intended the Minister to be left as judge of his own powers and for holding in other cases that the exercise of ministerial powers is to be judged by objective standards. (55)

So for Young there are to be no excursions outside the statutory language, for, "[o]nce a judge goes beyond the actual words of a statute, he becomes, in effect, a legislator and the only basis on which he can legislate is his own conception of what the 'public interest' demands." (56) Watchman might allow the judges marginally more latitude than
would Young, but he nevertheless takes the view that the power of the
judges to go beyond the words of a statute are very limited. He cites
with approval the words of Lord Simonds in Magor and St. Mellons R.D.C.
v Newport Corporation to the effect that:

The duty of the courts is to interpret the words that the
legislature has used; those words may be ambiguous, but,
even if they are, the power and duty of the court to travel
outside them on a voyage of discovery are strictly
limited... (57)

Unfortunately, whilst we are informed that there are strict limits, we
are not told what they are. In the next chapter, in the discussion of
Davis v Johnson, I will show that the suggestion that statutory
provisions can be applied without going beyond the words of the statute
will simply not stand up to scrutiny.

Yet the strict approach to interpretation is often not consistent
with many of the authors' criticisms. Of De Falco v Crawley Borough
Council (58), for example, the authors state:

Here, again we find the use by Lord Denning of a version
of the purposive approach to legislation...Lord Denning
chooses to throw over the advice offered in the Department
of Environment Code of Guidance as to the test to be applied
in determining whether or not an individual is intentionally
homeless. (59)

This, unfortunately, fails to take account of the nature of the action
in which this question was raised. Bridge L.J. makes the point clearly
in his judgment that:

It is common ground and clearly right that the court's power
to review any decision of a local authority under this Act
is not appellate but supervisory. The court can only
interfere in accordance with the well-known principles which
find their classic expression in the judgment of Lord Greene
M.R. in Associated Provincial Picture Houses Ltd v Wednesbury
Corpn. (60)

Denning M.R. took the view that none of the grounds for judicial review
had been made out in this case. The relevant Act only requires that the
local authority should 'have regard' to the advice given by the
Secretary of State in the form of the Code. It is most surprising that
people who have such a strict view of the requirement to adhere to the
words of an Act should arrive at these conclusions. The local authority and the Court of Appeal took the view that to have regard to something means that it should be considered, but this does not mean that it must necessarily be followed—after all, the issue concerns a 'Code of Guidance' not a statute. The local authority did consider the Code, but thought that because of the particular circumstances of this case, it would be an appropriate situation in which to depart from the Code. Denning M.R. thought that there was nothing in what the authority did which would allow him to interfere with that decision by way of judicial review. When Robson and Watchman state that, "Lord denning avoided this problem by denying any value to the Code,"(61) we can see that this was not so. It was for the local authority to attribute value to the Code, not Denning M.R., and this they did do, although not, it is to be admitted, the same value as the authors would have them do. To suggest that Denning M.R. had adopted a version of the purposive approach to legislation is incorrect, and if the Court of Appeal had acted as Robson and Watchman advocated, it would be at odds with their view of the strict approach to statutory interpretation.

The authors express clearly the dichotomy between the strict or literal approach to interpretation, which they advocate, and the purposive approach of which they disapprove (62). However, this distinction is only tenable if it is accepted that it is possible for rules to be applied without further judgment. In subsequent chapters I will argue that the distinction between the literal and the purposive approach is a false distinction based on a theoretical misunderstanding.

The political dimension: The position of these authors concerning this issue gives rise to possible contradiction. Robson, for example
notes with approval that:

In a series of articles leading up to his Politics of the Judiciary book in 1977, Professor Griffith has commented through the late sixties and seventies on the political nature of apparently technical decisions in such arcane fields as administrative law. (63)

However, it is clear that Griffith does not reject the distinction between technical and political law as this may suggest (64). Nevertheless, if political decisions can masquerade as technical decisions, then it follows that political change can masquerade as technical improvements. Watchman draws the inevitable conclusion for us by adopting that of Morris in his discussion of Re. Jebb, "[i]t is submitted that rules of law binding on the court cannot be evaded merely by calling them 'tech/rs of political opinion should not be the basis of judicial decision making (66). What he means by continuing in the very next sentence to say, "[w]ithout denying the political function of the judiciary or the interdependence of judges and the state..." is not at all clear. He has just stated that judges should not be political, therefore to be consistent his position would have to be that at present judges are political, but they ought not to be. In which case we might expect an account of how judges could act non-politically. Unfortunately we are not provided with this and can only infer that it must be in accordance with the Hartian view of applying rules without further judgment.

However, if this comment by Watchman is taken as suggesting that judges are necessarily political, then his position would be internally contradictory. Robson states that the problem in his view is that, "[h]itherto most critical accounts of the role and function of the judiciary today have failed to confront the images and myths of the impartial independent judiciary."(67) However, he goes on to say that:

The question of impartiality is quite irrelevant to any claim that judges are political animals making political decisions favouring a particular socio-economic philosophy and practice. In the words of a distinguished former judge, Lord Devlin,
"Judges are inevitably part of the establishment and the establishment's ideas are those which are operating in our minds'."

A number of factors though obscure this reality. (68)

Robson then states that judicial politics become permissible because of the divorce between politics and law which is fostered by our constitution of checks and balances (69); a divorce which is obviously encouraged by Watchman, and as we shall see shortly, by Robson himself. Robson clearly agrees with his colleague that judges act politically, although it is more difficult to determine whether he takes the view that they can avoid doing so. As with so many discussions of this type, the authors employ terms such as 'impartial' and 'political' without making it at all clear in what particular sense they are being used (70). However, if political decisions concern the distribution of power and resources within a community, then the conclusion of the joint article by Robson and Watchman indicates that they are in agreement about the desirability of the de-politicisation of the judicial role, "...the task of power allocation is more properly a Parliamentary one, rather than a judicial one." (71)

Miller clearly agrees that judges should not be political, and indicates that 'impartiality' is more important than does Robson:

As Lord Diplock put it '...it is for Parliament not for the judiciary to decide whether any changes should be made in the law as stated in the Acts...'. The reason why the House of Lords favoured this approach is that to act in any other way would be to involve the judges in 'political controversy'. Such an involvement would endanger '...continued public confidence in the political impartiality of the judiciary, which is essential to the continuance of the rule of law...'

These opinions expose the fundamental weakness of Lord Denning's approach. regardless of how beneficial or otherwise the results of Lord Denning's judgments in this field may be, they do tend to blur the crucial distinction between judicial creativity and political decision making. This point has clear and obvious dangers for the neutrality and independence of the judiciary. (72)

An important strand running through the work of these authors is based on the view that although judges claim to be impartial guarantors
of liberty and human rights, they can give the lie to that view by pointing to cases where individual interests do not fit into the judicial notion of 'desirable rights'. Thus the selectivity and hence the politics of the judiciary are exposed. For those who start with the view that the judges should be non-political, the day's work is done. Others might regard it as something of an unfinished symphony.

We are nowhere told how the judges could be non-political, and presumably, non-selective. To talk of the protection of 'individual rights' or 'freedoms' does not commit the speaker to supporting every appeal which is made in their name. Those on the political left may be much concerned with individual or collective rights - but this will not include the 'right' of the entrepreneur to conduct his business with a view to maximising profit without regard to the health and safety of the workers. Neither will it include the 'right' of the workers to negotiate away, or exchange for cash, the protection of the health and safety regulations. All who speak of rights and freedoms will have some way of distinguishing between those which they recognise or regard as legitimate and those which they do not. The criterion may be built into the specification of the right or freedom itself, or it may be regarded as a way of determining the range within which rights and freedoms are recognised.

These authors are indeed correct when they suggest that the mapping out of the criteria of demarcation utilised by Lord Denning (and, I would add, any other judge) makes manifest the political (and, I would add, moral) basis of his decision making. Where the authors fall into error is in their suggestion that the judiciary could conduct themselves without resorting to any such criterion. I will show in later chapters that this is not possible. For the present I merely wish to show that these authors wield their own implicit criteria. Eric Young, for example, states:
...Lord Denning has stretched the meaning of 'right' to include for the purpose of deciding whether natural justice is applicable, the 'right to work'. This 'right' the court will then protect by requiring the trade union to observe the principle of natural justice before taking action. (73)

The criticism has now been turned round. It is not the failure to recognise a right but its recognition which is seen as the problem. The protest is not that the courts have a criterion but that its boundaries should be drawn more narrowly. The interesting aspect of this statement is the implicit recognition of the fact that where the boundary is drawn depends on the purpose one has in mind in deciding either way. Young, presumably, would only regard the notion of a right as having been 'stretched' to include the right to work in the context of a trade union situation where its recognition and the consequence of requiring the trade union to observe the principles of natural justice is seen as the court imposing limitations on the union. One would imagine that in other circumstances or for other purposes, Young would utilise the concept of a right to work without any feeling of artificiality.

Interestingly, Ian Duncanson, although he accepts that judges have a limited capacity to change things, does not suggest that this capacity should be limited by excluding political considerations from their remit. In fact, the other contributors to this series of articles would have done well to note his point that:

Social democratic tradition criticises the judiciary for exercising political authority without being under the obligation to answer to an electorate....

In truth the argument is a limited device, for the critic wields his own definition of what is political and therefore outwith the competence of the judge. (74)

It may well be doubted whether the other authors have a definition of 'political', for if they have, is it possible that they would fail to give articulate expression to this most important concept? Unfortunately they appear to be indulging in the mirror image of the judicial rhetoric which they dislike so much and which might well be called 'academic rhetoric'. In chapter six I will attempt to explain why it is that
Duncanson is on the right lines when he states that, "... it should not be thought that the level of judicial law-making is a level which is capable of being relatively autonomous of the level of politics." (75) Although the authors in this series of articles claim to be carrying on the line of criticism put forward by Griffith, it should be noted that their conclusions in this regard are significantly different. The authors in JDC, apart from Duncanson, clearly take the view that the judges should be apolitical. Griffith states:

[j]udges are part of the machinery of authority within the State and as such cannot avoid the making of political decisions. What is important is to know the bases on which these decisions are made." (78)

Impartiality: We have already noticed in the previous section how the various authors link the desirability of impartiality with the undesirability of political activism. However, some further observations need to be made regarding their position on this important point. It is difficult, for example, to know what Robson means when he suggests that impartiality is irrelevant to the political role of the judge. The examples he uses as illustrations clearly indicate that the appearance of impartiality is essential to the judges' political effectiveness.

In support of the irrelevance of partiality view he says:

[t]he point really though is not that the judges are partial. They do not find against organised labour out of dislike or antipathy towards workers or trade unionists, but out of antipathy towards their goals and methods. (77)

This appears to have all the qualities and confusion of a distinction without a difference, in that to have the goals and methods of trade unionists may be said to be part of the defining characteristics of a trade unionist. To be opposed to those goals and methods is then necessarily to be opposed to trade unionists.

In his article on 'Problems of Judicial Study', Robson clearly takes the view that independence and impartiality are essential to the judge's
legitimating function, which necessarily has a political aspect to it. Unfortunately, the concept of legitimation (like so many of the other key terms the authors' employ) is referred to but not discussed by Robson. The most important statement by Robson, and mentioned more in passing than as a particular focus of attention, is that, "[n]otions of judicial independence and impartiality only have an existence within a shared world of goals and values, within a shared belief in the economic and social order."(78) On this view, if people who come before the courts share the moral and political perspectives of the judiciary, those people will be more likely to accept determination of their disputes by the judiciary and to regard those determinations as being impartial. However, where this shared perspective does not exist, unfavourable decisions may be attributed to the differences in these perspectives, rather than being seen as based on 'legal' grounds, and the person against whom the decision is made will feel that the issues have been loaded against him, because of the judge's partiality. This is an extremely interesting point, and it is unfortunate that the implications of the position which he has just outlined are clearly not appreciated either by Robson himself, or by his co-authors.

This view implies that when one asserts the impartiality of the judiciary, one is thereby indicating that the moral or political perspectives of the speaker and the judiciary are in harmony. It follows that the reverse is also the case - that when one asserts the existence of partiality, one is indicating thereby that the perspectives of the speaker and the judiciary are not in harmony. If this is the case, then if the authors in this collection of articles were to cite cases to indicate the existence of judicial partiality, and were then to claim that the judiciary should be impartial, their claim would amount to no more than saying that the political and moral views which the judiciary have at present should be exchanged for the political and moral views of
A further important implication concerns the question stated by I.D. Willock in the foreword to JDC. "The authors pose like Hans Christian Anderson's embarrassing child, the awkward question, does this judicial monarch wear any conceptual clothes?" If it is correct that to assert the impartiality of the judiciary is to assert the existence of a shared framework, and a finding of partiality indicates the existence of different frameworks, then it is clear that a finding of either is incompatible with there being no framework. So, on the Robson view of impartiality, it may come as some surprise to the authors in this collection to realise that in establishing the partiality of Lord Denning, as they claim to be doing, they are thereby answering the question set by Willock in the affirmative.

It is important to appreciate that the terms 'partiality' and 'impartiality' are terms which refer to the relationships between individuals or groups, and the acceptance or rejection of them has much to do with the power of the individuals or groups concerned. Much the same has been said in a somewhat different context, "I suggest, therefore, that sanity or psychosis is tested by the degree of conjunction or disjunction between two persons where the one is sane by common consent."(79) The claim of partiality then is to claim that in significant respects people are members of different groups. The counterclaim of impartiality is that in significant respects the people are members of the same group. The underlying difference can then be seen, not as a question of partiality or impartiality which is part of the rhetoric, but in the different criteria which are being utilised in determining membership of a group. The importance of the distinction can be seen in the competing claims of the judiciary and of members of certain political groups in places like Northern Ireland.
Subjectivity: The authors in these articles are obviously concerned to limit, so far as possible, anything which might give the judges an opportunity to exercise their 'subjectivity'. Their aim is of course based on the premise that the severe restriction of subjectivity, if not its entire removal is both desirable and possible. Hart provides them with the necessary tools when he states that the life of the law consists to a very large extent in the guidance of officials by determinate rules which do not require a fresh judgment from case to case, and in his suggestion that rules can control by requiring specific action without the need for further judgment. What more can then be required of our commentators than to hunt down subjectivity and castigate it wherever it is found? They are assisted in this endeavour by the realisation that subjectivity is often made manifest by the use of certain key terms.

Watchman for example notes in connection with 'justice' that:

The requirements of justice are notoriously subjective and any individual's opinion on justice, if not the law, can claim to be as valid as that of the Master of the Rolls. ....For, if judicial decision-making was merely a matter of applying justice, legal learning would be irrelevant and political appointees would be better qualified for the task than the judiciary. (80)

Our authors are then led to the view that judges must give effect to the law irrespective of the fact that the consequences may be unjust or immoral (81). They thus approve of the decision of the majority of the Court of Appeal in Sydall v Castings Ltd.(82), in which a three year old girl is deprived of the benefit of a group life insurance scheme because of her illegitimacy, even though they accept that such a result is unjust (83). The better view, they argue, is to tolerate the injustice. This is because of the requirements of due process and the rule of law, and the need to avoid the possibility that the outcome will be influenced by the 'personal idiosyncracies' of the judge. Of course the authors do not spend time explaining how injustice or immorality
are necessitated by the requirements of due process or the rule of law, and neither do they deal with the point made by MacCormick at the outset of his discussion of consequentialist arguments:

Is Austin right and am I right in thinking that decisions are 'commonly determined' by such considerations? The answer must be Yes; to dip into the Law Reports is to be confronted at every turn with such arguments. (84)

The authors may well be right when they suggest that considerations of justice are related to matters of political opinion (85). However, they are wrong to suggest that the political aspect of judicial decision making will be avoided if the judges ignore questions of justice and morality, and they are also wrong if they believe that unjust or immoral decisions are any the less subjective.

In this chapter I have argued that those who adopt a Hartian view of law are inclined to give an account of the proper judicial function by utilising a conglomeration of ideas which have a certain popularity amongst both academic and practicing lawyers. These include the claims that the proper function of the judge is to apply precedent, to take a literal approach to interpretation, to be apolitical, to be impartial and to avoid allowing their own subjectivity to intervene in the decision making process, even when they are of the view that decisions may be unjust or immoral. The judiciary are not to change and develop the law or to remedy what in their view may be defects or omissions, for this is the function of Parliament. Each of these ideas when simply stated may appear to have a degree of plausibility. The purpose of this chapter has been to show that this range of ideas appears to hang naturally together, and my claim is that they do so because they have a common if seldom articulated basis. This common basis depends upon a theoretical view of law and the way in which it changes.

The claim is that the theoretical view of law which Hart puts forward in The Concept of Law gives intellectual respectability to
this range of ideas. It is not that they originate with *The Concept of Law*, but merely that it encourages them by attempting to articulate a theoretical view which provides them with the necessary underpinning and which demonstrates their common ground. It must be remembered that Hart's stated purpose is to give a better appreciation of the complexity of law and the way in which it works. In this chapter I have begun to demonstrate that for someone working with this model of law, whole areas of judicial activity become incomprehensible. We have seen how someone adopting such a view would be required to state that some of the most important decisions in modern jurisprudence are either aberrant or wrong. To put it in Kuhn's terms, a paradigm directs the attention of the group which embraces it, and my claim is that for those who embrace the Hartian paradigm, their attention is directed away from those important judicial decisions which have a significant bearing on the direction of law. Just as the natural scientist will fail to observe facts which fail to fit the theory with which he is working, so the legal scientist will either fail to see or will in some other way marginalise those cases which fail to conform to the paradigm with which he is working.

So, as we have seen, the legal commentators working within the Hartian paradigm come to the conclusion that the cases in which the judges change and develop the law are either anomalous or wrong and that in important areas, prior to change coming about, the Hartian view would lead us to believe that change is not possible, at least, not by the judiciary. In so doing, they tear the very heart from jurisprudence, and should not be disappointed if we find the lifeless husk with which they are left a singularly unattractive and unpersuasive option.

Followers of Griffith? Before we move on to evaluate this position by a detailed consideration of some of the cases, the relationship
between the views of the authors of the articles in JDC and those of Griffith, should be clarified. It is clear that they all look at a similar range of cases—those involving trade unionists, students and issues of housing, state security etc. They all take the view that they are thereby indicating 'the politics of the judiciary'. The authors of the articles in JDC suggest that they are following the Griffith line. Yet I would like to suggest that there is a fundamental difference between the presuppositions of the authors in JDC and those of Griffith.

The main line of argument which I have pursued in this chapter is that the presuppositions of the authors in JDC are of a distinctly Hartian hue. So, whilst these authors make very similar observations to those of Griffith, their conclusions are quite different. When they find judges making adjustments or in any other way changing or developing the law, they conclude that such activity is wrong, because of their presupposition, based on Hart, that the judges are to apply the rules without further judgment. Clearly Griffith does not accept such a view—or at least—not in the wholehearted way in which these other authors do. Griffith states at the very beginning of his introduction that, "[n]ot only therefore do the judges 'make law' through the development of the common law. They also do so by this process of statutory interpretation."(88) "It is the creative function of judges...that makes their job important..."(89) As he points out in his chapter on 'judicial creativity', "creativity or its opposite is not the issue."(90)

So Griffith clearly accepts that the judges have a creative and political role, although he appears to be reluctant to follow the argument through. In stating that, "[w]here technical law ends and political controversy begins is not always easy to determine"(91) he appears to be accepting that there are distinct areas which are either 'technical' or 'political'. Now the weakness in Griffith's position is in some ways the same as that of the authors in JDC. Whilst happy to
state their conclusions, they neither state nor explain the theory which
those conclusions presuppose. Whilst Griffith is prepared to accept that
the judges are both political and creative, he appears to suggest that
such activity is restricted to certain areas of the law. His basis for
this distinction appears in some way to be linked with whether or not
the issue is one which gives rise to public controversy. "By political
I mean those cases which arise out of controversial legislation or
controversial action initiated by public authorities or which touch
important moral or social issues." (92) Now it is perfectly acceptable
for Griffith to restrict the focus for his discussion in any way he
chooses. However, by linking 'political' with 'controversy' and using
'technical' to describe the remainder, he appears to be suggesting
that there are areas of the law in which the judiciary can get on with
their job without being called upon to make the same sort of judgments
as they are required to make in the areas which he looks at. This
appears to suggest that even Griffith has a limited commitment to the
Hartian view that there are areas of law where the rules are clear and
can be applied without further judgment.

It is, I believe, as misleading to restrict the use of political in
this way as it is to use 'moral' to refer mainly to matters of a sexual
nature as is often done in discussions on the relationship between
the law and morality (93). If 'political' is taken in the wider sense
to refer to the allocation of power and resources within a community,
and moral to refer to the values which people hold or should hold, then
it can be seen that some political matters may well be controversial
and others not. That whilst peoples' values are indeed made manifest
in the way in which they regulate their sexual activity, so are they in
the way in which those people conduct their business affairs. In other
words, if we wish to understand the values and the politics of the
judiciary, we need not (although of course we may), restrict the focus
of our attention to those cases involving students and trade unionists, or those involving homosexuals and prostitutes.

There are many important cases in all areas of law which can be utilised to demonstrate the values and politics of the judiciary. Because this aspect is not sufficiently appreciated, I attempt to utilise in this thesis cases which are drawn from areas of law which might fall within the 'technical' category which Griffith employs. However, this enterprise can only hope to be successful if it deals with the issue which I claim has been ignored by the authors of JDC and by Griffith - the theoretical status of rules. In the chapters which follow, I look first at a number of cases to give an indication of the range within which the judiciary have room for manoeuvre, and then I attempt to establish a proper theoretical perspective which allows us to appreciate the role and function of rules.

It only remains, before concluding this chapter, to give some brief consideration to the significantly different approach which Austin took to the matter of judicial reasoning. The first point to note is that Austin does not accept the usual dichotomy between a sovereign who legislates and subordinate judges who apply the rules. For Austin, each may undertake both tasks, for, as he puts it:

The distinction between law established directly and law obtaining obliquely, depends not on a difference in the sources from whence the law emanates, but on a difference in the modes in which it originates. When the law or rule is established directly, the proper purpose of its immediate author or authors is the establishment of a law or rule. When the law or rule is introduced obliquely, the proper purpose of its immediate author or authors is the decision of a specific case or of a specific point or question. Lectures (XXIX) p531.

So, one may legislate directly by specifically setting forth a rule, or one may do so as a by-product, as it were, of deciding a particular case. But Austin makes it clear that the power of determining cases resides in the sovereign, although it is, as he points out, invariably delegated to subordinate tribunals.
Equally, the power of legislation may be expressly or tacitly entrusted to the judiciary, and the modern examples of the issuing of 'Rules of Court' and 'Practice Statements' might well be instances of the sort of thing Austin had in mind. Indeed, he goes so far as to say that:

Provided it be made in the direct or in the legislative manner, law, established immediately by subject judges, is just as good as law emanating immediately from the sovereign. Nay, judges legislating avowedly in the manner of the Roman Praetors, might do the business better than any of the sovereign Legislatures which have yet existed in the world. Lectures (XXIX) p533 (emphasis in original).

Perhaps the greatest difference between the authors we have looked at in this chapter, and Austin, is that Austin has a much keener appreciation of what is involved when judges are acting to determine specific cases. He makes it clear that in his view the difference between legislating and deciding cases is that whereas a statute is expressed in general terms and wears the shape of a law or rule, the rule or law established by the decision of a case exists nowhere in general terms, and has to be derived from the case (or cases) by a process which Austin refers to variously as abstraction or induction:

In short, although a rule or principle is established by the decision or decisions, and is applicable and actually applied to subsequent and resembling cases, that rule or principle lies in concreto and must be gotten from the decisions by which it was established, through a process of abstraction and induction. Lectures (XXXVII) p622.

A process which he indicates will become more difficult depending on the number of cases from which the rule has to be abstracted. Lectures (XXXIX)p650.

Austin has little time for those who wish to deny the creative role of the judiciary. In his view, when changes are brought about in the law, in the course of determining specific disputes, 'the show of legislation is avoided' and the new rule, "...is considered as evidence of the previous state of the law; and the new rule, thus disguised under
the garb of an old one, is applied as law to new cases." Lectures (XXIX) p531. This he referred to as:

...the childish fiction employed by our judges, that judiciary or common law is not made by them, but is a miraculous something made by nobody, existing, I suppose from eternity, and merely declared from time to time by the judges. Lectures (XXXVII)p634 (emphasis in original).

Austin was critical of his contemporaries, for example, Sir Samuel Romilly, for failing to realise this, and he also indicated how so-called 'declaratory law' might similarly mislead. If Austin accepted then, that the judges, in the course of determining disputes, will exercise a law - creating power, then there are really four questions to which we could expect an answer - (1) How extensive is this power? (2) How is it exercised? (3) How desirable is it that it should be exercised? (4) How is the exercise of this power to be controlled?

(1) How extensive is this power? It is clear that Austin saw it as being much more than merely filling in the gaps left by legislation. Unlike the authors we looked at earlier, Austin clearly accepted that if there was not already a rule to apply to the case, then it is the job of the judge to make one. "Where there is no rule in the system applicable to the case, the judge virtually makes one..." Lectures (XXXVII) p638. But he was well aware that this was not the end of the story. As well as acknowledging the judicial role in the development of the case - law, he also accepted that the judges have a similarly creative role when dealing with statute law. As he gave little succour to those who would claim that the judges are merely declaring the law, so he would to those who claim that they are merely interpreting statutes:

By extensive or restrictive interpretation the judge may depart from the manifest sense of a statute... But, in these cases, he is not a judge properly interpreting the law, but a subordinate legislator correcting its errors or defects... This, however, is not interpretation, but a process of legislative amendment, or a process of legislative correction, which lays all statute law at the arbitrary disposition of the tribunals. Lectures (XXXVII) p629 (emphasis in original).
We shall see shortly how Austin regards this arbitrary power as being controlled. But before we move on, we should note that he does not avoid the issue as to whether law made by judges in deciding cases, is ex post facto. He is critical of Blackstone for failing to recognise that on occasions the judge will introduce a new principle, which, in regard to the case being decided, is an ex post facto law, Lectures (XXXVII) pp633, 634. He also makes the rather perceptive comment that in "...relation to the case by which the rule is introduced, a rule of judiciary law is always (strictly speaking) an ex post facto law, but where it has been well anticipated by the practitioners, it may not have this effect." Lectures (XXXIX) p651.

(2) How is this power exercised? Austin recognises a clear difference of approach between the application of a statutory provision and the application of precedent, as we have already seen. The statutory provision, as it were, exists in abstract form already, whereas the rule of precedent does not and has to be constructed from the relevant cases:

Hence it follows, that the interpretation or construction of a statute law widely differs from the analogous process of induction, by which a rule made judicially is collected from decided cases. Lectures (XXXVII) p628.

There is then this additional stage with regard to the application of precedent - that the rule of precedent has to be found by abstracting the 'reasons' 'ground' or 'principle' of the case from the plethora of individual circumstances with which it is found, Lectures (XXXVII) p622. With a statutory rule, the reasons for it are ancillary to the rule, whereas in the case of precedent, Austin claims, the reasons are constitutive of the rules:

For in statute law, the law is one thing, the reason another; the law, as a command, may continue to exist, although its reason has ceased, and the law consequently ought to be abrogated; but there it is, the solemn and unchanged will of the legislator,...But in the case of judiciary law, if the ground of the decision has fallen away or ceased, the ratio
decidendi being gone, there is no law left. Lectures (XXXVII) p631.

However, at other times, Austin explicitly recognises that the differences are not so great as this passage might suggest:

For assuming that the statute law is well constructed, and is also approved of by the bulk of the community, it is absolutely certain until it is repealed.

If indeed, it be obscure, or if it be generally disliked [because its 'reason' has ceased?] it is not more certain than judiciary law...if it be generally disliked, although it be perfectly perspicuous, it probably will be abrogated by the tribunals at the instance of public opinion. Lectures (XXXVIII) p656.

Now although Austin uses 'dislike' here rather than 'sentiment' or 'opinion', I think it is clear from what follows that passage that he intends to indicate those factors which constitute positive morality and that what he is saying is that where statute law diverges from positive morality, it becomes less stable and thus more likely to be subjected to that power which he has described as 'legislative amendment' or 'legislative correction'. But he does give us an indication of a further factor which enables the judiciary to avoid being too explicit about the fact that this is being done:

[T]he judiciary law is, as it were, the nucleus around which the statute law is formed. The judiciary law contains the legal dictionary, or the definitions and expositions (in so far as such exist) of the leading technical terms of the entire legal system...

Wherever, therefore, much of the law consists of judiciary law, the statute law is not of itself complete, but is merely a partial and irregular supplement to that judiciary law which is the mass and bulk of the system. Lectures (XXXIX) p659 (emphasis in original)

The next chapter will illustrate the flexibility which the judiciary have when they determine (as they must) the various cases, and other legislative provisions which are to determine the context for the legislative provision under discussion. It need only be said here that if this line of argument is correct, and that both positive morality and the common law provide the context which is essential for our understanding of any statutory provision, then it is hard to see how
we could have such a thing as a clear rule which is applied without further judgment. For at the very minimum, where there is the power to correct or change and that power is not exercised, then at least there has been the further judgment that this is not a suitable case in which that power is to be exercised.

An important factor in the exercise of this creative power is indicated by what Austin refers to as a difference in the emphasis on the words used:

For, owing to the abstract form of a statute law, the very terms in which it is expressed are necessarily the main index to the legislator's purpose.

But in the analogous process of induction, by which a rule of law is extracted from judicial decisions, that scrupulous attention to the language used by the legislating judge would commonly defeat the end for which the process is performed. Lectures (XXXVII) p630.

Austin goes on to point out that part of the reason for this is that the general propositions which the decision contains are not, in the nature of things, expressed with much premeditation. However, he does allow for the exception that, "This objection does not apply to all judiciary law; for when made on appeal, after solemn argument and deliberation, it may be made with as much care and foresight, perhaps, as any statute law." Lectures (XXXIX) p651.

The other factor which Austin thinks to be important, and that legislation and case-law have in common, is what he refers to as their development by consequence based on analogy or the competition of opposite analogies, and here he shows his appreciation of the dynamics of the legal process:

Subjects calling for a rule, may be like, in some respects, to subjects of anterior rule A; but, in other respects, to subjects of anterior rule B, which is essentially different from A.

The two likenesses are competing analogies. One inviting the judge to model the rule in projection on A; and the other inviting him to model it on B:... Lectures (XXVII) p940.

Austin distinguished between the competition of analogies which is involved in the creation (or development) of the law, with a
similar competition of analogies which is involved in the application of the law, and he was again critical of Sir Samuel Romilly, because:

He falls into the mistake of confounding the competition incident to the application, with the competition incident to the creation, of law. This arose from his assuming unconsciously at the moment ... that common law or judiciary law, when virtually made, is only administered or applied. Lectures (XXXVII) p641.

In my view, Austin makes too much of the creation / application distinction as I hope to show in the next chapter, but what is important is the way in which he argues in support of the necessity for judges to make judgments at all stages of the judicial process.

(3) How desirable is it that this power should be exercised? Much of Austin's argument, like my own, is not about whether or not the judges should exercise their creative capacity, (for this would imply that they could successfully do their job without doing so). Rather, it is to support the view that they can hardly do otherwise.

I by no means disapprove of what Mr Bentham has chosen to call by the disrespectful, and therefore, as I conceive it, injudicious, name of judge-made law. For I consider it injudicious to call by any name indicative of disrespect what appears to me highly beneficial and even absolutely necessary ... I cannot but think that, instead of blaming judges for having legislated, he should blame them for the timid, narrow, and piecemeal manner in which they have legislated, and for legislating under cover of vague and indeterminate phrases, and which would be censurable in any legislator. Lectures (V) p219 (emphasis added).

In other words, confusion becomes worse confounded because some members of the judiciary feel unable to acknowledge explicitly (perhaps even to themselves) the dynamics of the process in which they are engaged. Austin was critical of those members of the judiciary who would introduce new law under the guise of expounding the old, and made it clear that the motivation is sometimes to pass on to others, issues which one is uncertain how to deal with:

The conceptions entertained of a Code in modern times have generally been as indistinct as Justinian's. And this is the chief cause of the imperfections of all recent attempts at codification, and the cause by reason of which the codifiers
have left to be covered by judiciary law the wilderness which they knew not how to deal with. Lectures (XXXVII) p636.

One might think of the example of the use of 'maladministration' in recent times, which, like an elephant, is hard to describe, but you know it when you see it. Austin was well aware of the reasons as to why a judge might wish to adopt a 'low profile':

Nothing, indeed, can be more natural, than that legislators, direct or judicial (especially if they be narrow-minded, timid and unskillful), should lean as much as they can on the examples set by their predecessors. Lectures (XXXVII) p641.

His estimate of the position at the time he was writing was that there had been too great a respect for established rules, and that it was much to be regretted that judges of capacity, experience and weight had not seized every opportunity of introducing a new rule which would be beneficial for the future whenever its introduction would not have the effect of interfering with interests and expectations which had grown out of established ones, Lectures (XXXVIII) pp646, 647.

Austin thought that the whole origin of the distinction between law and equity was 'a striking example of this backwardness of judges to innovate' and arose, he thought, because the judges of the Common Law Courts would not do what they ought to have done, which was to model their rules of law and procedure to the growing exigencies of society, instead, as he put it, 'of stupidly and sulkily adhering to the old and barbarous usages'. Lectures (XXXVII) p647.

Austin did appreciate that there were inherent difficulties with reforms by way of precedent, due to the enormous bulk of the documents in which the law is to be found and the difficulty of extracting the law (even if one were to suppose that the relevant decisions were known) from the decided cases in which it lies embedded. In fact, his view of what was possible was based on a consideration of this very fact, which indicates that the use of language which has a certain lack of clarity about it, was not a strategy which was
confined solely to judges and legislators. In his view, because of the enormous bulk of the documents in which the law is contained, and because of the difficulty of extracting the law from the particular cases, it followed as a consequence that a system of judiciary law is virtually unknown to the bulk of the community, although paradoxically, they are expected to adjust their conduct to the rules or principles of which it consists.

In fact, Austin went a good deal further than this in suggesting that the great body of the legal profession, when resorted to for advice, were considered to 'divine' the law rather than to 'ascertain' it. The problem which this gave rise to was seen in his observation that:

...whomever has seen opinions even of celebrated lawyers, must know that they are often worded with a discreet and studied ambiguity, which whilst it saves the credit of the uncertain and perplexed adviser, thickens the doubt of the party who is seeking instruction and guidance. *Lectures* (XXXIX) p652.

Austin uses the examples of marriage and the purchase of property to point out that not one in a hundred will have a distinct notion of the consequences which the law annexes to the transaction, and therefore, in regard to the bulk of the population, judiciary law has all the mischievous effect of *ex post facto* legislation. The problem is, of course, that people enter into transactions unaware of the consequences of doing so, and then find themselves saddled with duties which they never contemplated. Austin did not think that the law could be so simplified that many of those in the community could know the whole, or much of it, but he did think that it could be so simplified that *lawyers* might know it, and that as a result, people might be able to learn beforehand the legal effect of the transactions in which they are about to engage. The modesty of Austin's expectations was indicated by his claim that this much did not appear to him to be romantic or extravagant, but that anything further certainly appeared to him to be 'visionary', *Lectures* (XXXIX) p654.
(4) How is the exercise of this power to be controlled? This is the very point on which Austin is quite clear and yet has been invariably misunderstood by his critics. We have just seen in some detail, how Austin saw the judicial development of case-law, and indeed, of statute law, as an integral part of the judicial task. We saw earlier in this chapter how Robson and Watchman argued that the law should only be changed by those who are democratically elected i.e. by Parliament. Interestingly, Austin addressed himself to this very question some 150 years earlier and came to a conclusion which, if it had been properly understood, would have avoided much confusion in jurisprudence since then. He put the question in this way:

It is objected to judicial legislation, that where subordinate judges have the power of making laws, the community has little or no control over those who make the laws by which its conduct must be governed. Lectures (XXXVIII) p642.

The very point which Robson, Watchman et. al. make at great length - the undemocratic nature of judicial action. But as Austin went on to point out, this is not an objection to judiciary law, but an objection to the exercise of any legislative or judicial power by people not sufficiently responsible to the community. The consequence of an acceptance of that view entails that those who do exercise such power should be responsible to the community. Given, as we have seen, that Austin accepts that the exercise of such power is not just an 'optional extra', but is a necessary aspect of the judicial task, then his conclusion follows with the same degree of inevitability as does the conclusion of the syllogism follow from its premises:

...the objection in question, as aimed particularly at English judiciary law, is not an objection to judicial legislation, but an objection to the manner in which the judges are appointed. Lectures (XXXVIII) p643.

In other words what we are dealing with is the question of accountability. Now of course one might attempt to deal with the question by denying that there is, or should be, anything for which the
judge could be held accountable, as Robson and Watchman do when they
deny that it is any part of the judge's job to make law. Then all they
have to do is to protest when the judge is found to be doing that which
they claim to be improper. We have already seen that Austin viewed this
as a childish fiction, and much of the next two chapters is to support
the view that in this judgment he was quite correct. If so, then the
question shifts from whether this power should be exercised to
'how is it controlled?' Austin's answer to this question must be one
of the most universally ignored, but most important passages in
jurisprudence of all time.

Austin considers this point by way of another current and ground-
less objection to judiciary law which he regarded as being based upon
a complete misapprehension of its nature (the same misapprehension which
has subsequently been attributed to Austin himself by most of those who
write on this matter). The objection follows on from the one which has
just been considered, and claims that in so far as judges legislate,
they do so arbitrarily, and that the law of the community is, to that
extent at least, varying and uncertain. Austin's response was that:

To judiciary law made by subordinate judges...the objection
in question will hardly apply at all. For the arbitrium
of subordinate judges...is controlled by public opinion
Lectures (XXXVIII) p644 (emphasis added).

He continues to point out that they are also controlled by the sovereign
legislature which has the capacity to reverse decisions or punish
misconduct, and by the courts of appeal who may also reverse or point
them out to general disapprobation. Here one might think of the
speech of Lord Hailsham in the House of Lords in Broome v Cassells.
Of course, as we have seen previously, Austin is aware of the
opposite side of the coin which is to the effect that, "where
subordinate judges subvert existing law, they commonly are doing that
which the opinion of the community requires;..." Lectures (XXXVIII)
p645 (emphasis added).
However, Austin has a further, and in my view, extremely important observation to make - to the effect that another factor which controls the arbitrium of judges, and makes the rules which they establish by their decisions consonant with the existing law, and with one another is:

...the influence of private lawyers, with the authority which is naturally acquired by their professional opinions and practices. The supervision and censure of the bar, and of other practitioners of the law, prevent deviations from existing law, unless they be consonant to the interests of the community, or, at least, to the interests of the craft...

The judiciary law made by the tribunals, is, in effect, the joint product of the legal profession,... In the somewhat disrespectful language of Mr. Bentham, it is not the product of judge only, but it is the joint product of Judge and Co. Lectures (XXXVIII) p645.

Here we can see then, that after recognising that the positive morality of the community has both a controlling and developmental influence upon the judiciary, he further recognises that the positive morality of their particular professional grouping has perhaps a more significant influence. Often, Austin points out, the difference is not important, for the two sets of interests 'do, in the main chime', but the interests of the craft may, not unfrequently, be opposed to the interests of the community. There are several points which might be noted here. It can be seen that Austin is fulfilling the promise which we looked at in the first chapter. There we were primarily concerned with 'the separation of law and morals'. For many commentators since Austin's time, this was the key to the positivist position. But Austin did say that law and morals were 'inseparably connected' but that for a programme to assist understanding they had first to be separated, and then, and perhaps only then, could their relationship be properly understood. Here we see him in the second phase of his programme, showing the dynamic interaction between the two. That this dynamic interaction between the law and positive morality is not occasional or incidental can be seen from Austin's discussion of the causes of judiciary law. Here he refers (1) to the positive morality of the wider community as being the
base from which the law develops,

(2) to the positive morality of the judicial community
(3) to the positive morality of the wider legal community
(4) to the positive morality of the international community.

Lectures (XXVII) p634.

In his discussions of (2) and (3) Austin makes it clear that he was well aware of the influence of 'peer-group' pressure long before it became such an important topic in sociology and psychology. In each of these discussions, he makes it clear that he is referring to both the opinions and the practices which prevail. In fact, at one stage he points out that these opinions and practices of the wider legal community may well have the effect of forcing the judge's hand - he might well have used a case such as that of Cutts v Head which we look at in the next chapter.

It can thus be seen that so much of modern jurisprudence, which is concerned to demonstrate the falsity of the claim of the positivists that law has no essential, or particular concern with morals - either positive or critical - can be seen as no more than tilting at windmills. Austin did say that they were inseparably connected and demonstrated this. It can also be seen that much of Hart's discussion concerning social rules and internal attitudes has more in common with Austin than is often imagined, and is a long way from being a 'fresh start' or showing that Austin's account was 'a record of a failure'.

Perhaps, if there is a difference between Hart and Austin, it is one of emphasis. Hart emphasizes the stability of law at the expense of adequately accounting for its development. Austin places greater emphasis on the creative capacity of the judicial role. It must be said, before leaving this section, that Ronald Dworkin would take issue with this analysis and say that it is not that the judges have a greater scope for creativity than Hart allows for; rather, they
have less. When the rules run out the judges do not have 'strong discretion' as Hart suggest, but only 'weak discretion' in that they are inhibited in their scope for creativity by their consideration of policies and principles.

However, the point of my thesis is not to take sides regarding the points of the respective arguments over which they might differ, but rather to suggest that where they are in agreement, they both fall into error. Just as Hart states that in general the legal system operates by the application of rules which apply 'without further judgment', so Dworkin refers to the fact that "[r]ules are applicable in an all-or-nothing fashion." As Hart depicts the situation in terms of a core of certainty and a penumbra of doubt, so Dworkin refers to the 'all-or-nothing' way in which rules operate as compared to the area of policies and principles which lies beyond the rules and involves the consideration of many other factors. Hart and Dworkin have in common the fact that they accept the evaluative / non-evaluative dichotomy within the judicial role (as do Robson, Watchman, Griffith etc.). In the following chapters I shall argue that this is a false dichotomy, and it is my view that this line of argument is consistent with the greater part of Austin's writing.
CHAPTER FIVE  RULES - THEIR APPLICATION AND DEVELOPMENT.

Having considered Hart's view of legal theory, and how it provides theoretical support for a conservative account of the judicial role, especially with regard to the ability which judges have to change the law; then having seen in the last chapter how this fits in well with the medley of views held by judicial critics who, although coming from a very different background, similarly take a limited view of the capacity for judicial change, I must now begin to lay the basis for an assessment of the adequacy of this approach.

This will be done by looking at a series of cases, each dealing with the same statutory provision, and all decided within a few weeks of each other. I will, by engaging in a proper analysis of the reasoning in the cases, attempt to develop an understanding of why it is that senior members of the judiciary can so fundamentally disagree with each other. This account will avoid the liberal use of words such as 'prejudice' 'impartial' etc., because the concern is to develop a better understanding of what is going on, not to evaluate it.

It is my hope that when we have this better understanding, we will see that the use of such words will be seen to obscure our view, and hence our judgment, rather than assist it. We need to get away from situations in which the pot calls the kettle black, and to develop informed and constructive criticism. A proper view of the judicial role will show the traditional view which suggests that a judge has a choice, either to apply the rule or to develop it, to be false. It will also make clearer the nature of the choices which are available to the judge.

The provision with which we will be concerned in this chapter is the
Domestic Violence and Matrimonial Proceedings Act 1976 S1 (1). I will not deal here with the social circumstances which gave rise to it, or with its passage through Parliament, in order that we may so far as possible avoid evaluating the judgments in advance of our understanding of them. I will first set out the statutory provision, and then deal with each of the cases in turn:

S1(1) Without prejudice to the jurisdiction of the High Court, on an application by a party to a marriage a county court shall have jurisdiction to grant an injunction containing one or more of the following provisions, namely,-

(a) a provision restraining the other party to the marriage from molesting the applicant;
(b) a provision restraining the other party from molesting a child living with the applicant;
(c) a provision excluding the other party from the matrimonial home or a part of the matrimonial home or from a specified area in which the matrimonial home is included;
(d) a provision requiring the other party to permit the applicant to enter and remain in the matrimonial home or a part of the matrimonial home; whether or not any other relief is sought in the proceedings.

(2) Subsection (1) above shall apply to a man and a woman who are living with each other in the same household as husband and wife as it applies to the parties to a marriage and any reference to the matrimonial home shall be construed accordingly.

Prima facie, it might appear that this is an example of a clear rule, having in Hart's terms a fairly large core of certainty and not much in the way of a penumbra of doubt. However, as we shall see, one only has to scratch the surface to reveal complexities of staggering proportions. The first of the cases with which we will be concerned is that of B v B.

B v B [1978] 1 All E.R. 821: Here, the Court of Appeal was comprised of Bridge, Megaw and Waller LJJ., and we will commence our analysis by looking in detail at the leading judgment of Bridge L.J.

The Facts: Bridge L.J. began by reviewing the facts of the case and the trial judge's decision. Mr and Ms B (2) had lived together for some eleven years, but they had not married. They had a girl of ten and
a boy of nine. Mr B had been the tenant of the house throughout this period. Matters deteriorated between the couple and on occasions there was some violence between them. Eventually, Ms B left and went to stay with a friend - leaving the children with Mr B. She applied to the County Court for a non-molestation order, and for an order requiring Mr B to leave the house. The judge took oral evidence from both parties and formed the view that it would be unreasonable to expect the couple to continue living together, and that it would be in the best interests of the children that they should remain with their mother. The judge therefore ordered Mr B to vacate the premises within 14 days. It is worth noting at this stage, the somewhat detached and superficial manner in which Bridge L.J. related the facts:

In the last year or two the relationship between these parties has seriously deteriorated. There have undoubtedly been incidents of violence between them. Mrs B had gone to live with a friend in accommodation where she could not in any event have made provision for the children.

It is unnecessary to go into the matter at any length. In short, Mrs B's case was that Mr B had behaved so badly towards her that the relationship between them was at an end and there was now no prospect of reconciliation. Mr B gave evidence admitting certainly some of the incidents of violence of which Mrs B had made complaint, but seeking, if not to excuse, at all events to explain the circumstances in which those incidents had occurred, so as to minimise their significance. The judge clearly took the view, on the merits, that it would not be reasonable to expect Mrs B to continue to live under the same roof with Mr B. (3)

All we know from Bridge L.J.'s judgment is that there was violence between the parties sufficient to make the mother leave without the children, and concerning which the judge 'clearly took the view' that it would be unreasonable to expect the parties to continue living together. We are told nothing more about the nature of the violence, or its effect upon the parties. We might infer that the violence was fairly significant if it induced the mother to leave without her children, and the judge to order the father out of a house of which he was the tenant,
but obviously, the nature of the violence was not regarded as material by Bridge L.J. He then recites the terms of S1 of the Violence Act and looks at some technical difficulties which arise from the wording of the judge's order. However, he concludes that the appeal is to be decided on a more fundamental issue - the proper construction of S1.

The Law: Bridge L.J. decided that the order of the trial judge requiring Mr B to vacate the premises could not stand. He gave three main reasons.

1. If the [County Court] judge's view, and that for which counsel for Mrs B has contended, is right, that this section alters the substantive law affecting parties' rights to occupy premises, then it produces the quite astonishing result that the substantive law in the county court is different from the substantive law to be applied in the High Court. (4)

The clear inference to be drawn is that this could not of course be the case.

2. A distinction is to be drawn between two senses in which the word 'jurisdiction' might be used.

(a) 'The narrow and strict sense' which refers to the subject matter of the issue, the persons between whom issue is joined or the kind of relief sought.

(b) 'The wider sense' which refers to the settled practice of the court as to the way in which it will exercise its power to hear and determine issues which fall within its 'jurisdiction' (in the strict sense) or as to the circumstances in which it will grant a particular kind of relief.

The factor determining the choice between these two was that the County Court Act 1959 does not in terms give the County Court jurisdiction to grant injunctions, therefore it can only do so where the injunction claimed is ancillary to a claim for some other relief. That was a clear indication, to Bridge L.J.'s satisfaction, that jurisdiction
was here intended in the narrow and strict sense. On this view, the intention of S1 of the Violence Act, was merely to avoid the necessity of the woman having to obtain a summons for divorce in a hurry, merely to act as a vehicle to bring the request for an injunction before the court.

3. A distinction was drawn between the earlier treatment of spouses and non-spouses. Perhaps it should be made clear that the cases with which we are concerned, in relation to this provision, all involve non-spouses i.e. people who are living together as man and wife, but who are not married to each other. Also, that each of the cases concerns an attempt by one of the parties to remove the other from the matrimonial home, and that the party whose removal is sought is either the sole tenant or owner of the home, or at least a joint owner or tenant of it, and consequently, has at common law a right to remain in occupation of the home.

Bridge L.J. pointed out that if S1 applies to both spouses and non-spouses, then it would of course override the common law property rights of both. If one looks at those categories independently of this section, then one finds that the position of non-spouses is still dealt with by the common law, yet the position of spouses has been changed by statute - the Matrimonial Homes Act 1967 S1.(5) Two decided cases were regarded as authoritative in this area.

Gurasz v Gurasz [1969] 3 All E.R. 822. In this case it was decided that S1(1) of the 1967 Act "...only operated to protect a wife who had no proprietary contractual or statutory right to remain in the matrimonial home."

Tarr v Tarr [1972] 2 All E.R. 295. In this case it was decided that S1(2) of the 1967 Act "...should not be construed as empowering a court to evict from a dwelling house of which he was the tenant the party to a marriage against whom the other spouse sought such an order."
At this stage, both Gurasz and Tarr appear contrary to the order sought by Ms B. Gurasz would exclude a plaintiff with a tenancy or joint tenancy from obtaining such an order, and Tarr would prevent an order being obtained against a defendant who had a tenancy or joint tenancy. However, Bridge L.J. then went on to point out that in the statute with which he was concerned (the Violence Act) S3 overruled the decision in Tarr and S4 overruled the decision in Gurasz. In other words, the Violence Act specifically gives power to the court to enable an order to be obtained against a spouse who is a tenant or joint tenant, and it can be obtained by a spouse who is tenant or joint tenant. This appears to be in line with the order sought by Ms B.

However, we must remember that these cases and the 1967 Act which they interpret are concerned with spouses and Ms B is a non-spouse. How then does Bridge L.J. apply these cases to the case before him? He took the view that if Ms B’s argument with regard to the meaning of S1 of the Violence Act was correct, then S3 and S4 (which amend the 1967 Act) would be otiose. If S1 of the Violence Act was to amend the substantive law, then it must do so for spouses and non-spouses. If the substantive law for spouses is amended by S1, then the amendments of S3 and S4 would involve unnecessary duplication. Therefore Bridge L.J. concludes, it is impossible to construe S1 of the Violence Act as altering substantive rights.

Of these three arguments of Bridge L.J.:

The first is based on the premise that a symmetry is to be maintained between the substantive law in the County Court and that which obtains in the High Court.

The second is based on the premise that a complementary relationship exists between the 1959 County Court Act and the Violence Act. If the former is only concerned with the manner in which relief is obtained and not the grounds (i.e. it only allows the County Court to issue an
injunction as ancillary to a claim for some other relief) then it follows that the Violence Act must also be concerned with the manner and not the grounds of relief.

The third argument is based on the premise of no duplication of expression between sub-sections. Where any duplication of meaning is suggested, then that meaning is to be accepted which avoids it.

Of the other two judges who considered this case, Waller L.J. took an even more cursory view of the facts:

The relationship of the parties has for some time not been a happy one. After some 11 years of living together, on 2nd August 1977, Mrs B left the house and left the children, she says for the first time; and two days later she consulted solicitors. (6)

The couple here lived together for eleven years, had children aged ten and nine and the woman after being subjected to violence leaves the house and the children, and the judge takes the view that the situation is not a happy one. It hardly conveys much of the reality of being subjected to violence, then rendered homeless and forcibly separated from children.

He then found that Bridge L.J.'s third argument was not conclusive as Parliament might have wanted to be very specific about overruling the decisions of the House of Lords. He did however feel that Bridge L.J.'s first argument was conclusive. He therefore concluded that:

The 1976 Act does not provide a remedy; and if it be thought right to equate more clearly the position of unmarried persons living as man and wife with persons who are in fact married, then in my view it must be for Parliament to legislate to that effect. (7)

If S1 of the Violence Act was Parliament's attempt to do just that, then presumably he also means that it should do so more clearly. So, Waller L.J. follows Bridge L.J. in terms of his style and line of argument, with just a slight difference of emphasis with regard to one point.

The final judge to consider this case - Megaw L.J. - referred to the
grave doubts and difficulties to which S1 of the Violence Act gave rise, and that the issue must be decided with some urgency. He continued:

I think that the parties, and the learned judge, are entitled to all sympathy in finding themselves concerned in a dispute, of great moment to both the parties, which requires a decision on legislation which is, unfortunately, in various respects not clear. (8)

This represents his only discussion of the circumstances of the case, and is similar to the two previous judgments we have looked at in that he does not spend much time in discussing the facts which gave rise to the matter before him. He states his general agreement with Bridge and Waller LJJ. on most matters of construction, and he mentions that he would have liked to be able to find short term relief for unmarried persons, especially where there were children involved, but in his view it could not be done:

I do not think that it could have been intended to provide that the property rights of persons who are not married to each other should, when the relationship between them breaks down, be dealt with on the same criteria or by the same procedural provisions as apply in relation to the property rights of persons who have been married; ... (9)

He, like Waller L.J., found the provisions of S1 (on their own) to be quite clear. He then outlined a position similar to Bridge L.J.'s first and third arguments, after which he stated that he agreed so fully with the other conclusions of Bridge and Waller LJJ.

One emerging aspect of this case is that in none of the judgments do we find any consideration of the social impact of the decision.

Bridge L.J. noted:

The judge clearly took the view, on the merits, that it would not be reasonable to expect Mrs B to continue to live under the same roof with Mr B. He further took the view that it was in the interests of the children that they should be with their mother rather than with their father. (10)

He was also aware that Ms B had gone to live with a friend in accommodation where she could not in any event have made provision for
the children. Yet his decision was to allow Mr B to remain in the matrimonial home and as a consequence to require Ms B to make what must have been a very difficult decision. It appears that she would as a result have had the choice to return to the matrimonial home in order to be with the children, and risk being subjected to further physical abuse; or not to return there, and because of her present accommodation problem, lose the day to day care of her children. The risk, of course, is that the partner who loses care for a short while may well end up losing custody in the longer term. The nature of this very difficult choice which would result from his decision, was not brought out by Bridge L.J., and he merely referred the matter of the children back to the trial judge.

Waller L.J. similarly failed to discuss the consequences of his decision for the family as did Megaw L.J. It is of course accepted that they looked at the legal consequences of differing interpretations of the law - if the injunction were to be granted, in what circumstances could or would it be terminated? If the phrase 'are living together' is given some retrospective effect, how much? The point which I am concerned to emphasize here is the failure to evaluate the social consequences.

We can summarise the position in the following manner:

(i) All three judges are in agreement on the main points, there are no points of disagreement, although there are slight differences of emphasis.

(ii) Any references by the judges to the facts of the case are extremely brief and superficial and give us little understanding of the nature and extent of the violence used.

(iii) The approach to construction involves what some might call a technical / legal approach. This is not intended in a pejorative sense- it is to indicate a style, not whether such a style is
approved of.

In this case three comparisons were found to be of assistance - a comparison between the jurisdiction of the High Court and the County Court-
" " the Violence Act and the County Court Act -
" " the different sections of the Violence Act.

(iv) There is a complete failure to consider the social consequences of such an interpretation.

**Cantliff v Jenkins [1978] 1 All E.R. 836.**

This case came before the Court of Appeal in the week after the judgments were delivered in *B v B*. It again concerned an unmarried couple; the woman had a child of two and she was pregnant again, nearly full term, although the paternity of both children was disputed. The man with whom she had been living had behaved violently towards her - the headnote of the reported case states that 'she fled' to her parents home, taking the child with her. The trial judge was satisfied that the man had caused actual bodily harm to Ms Cantliff (or the child) and that he was likely to do so again. He therefore attached a power of arrest without warrant to his order.

In the Court of Appeal, the only judgment to be delivered was by Stamp L.J. - Orr and Ormrod LJJ. merely stated their agreement with it. The recital of the facts by Stamp L.J. was very brief. The only reference by him to the violent circumstances was as follows:

Early in June 1977 there was serious trouble between the parties. Mr Jenkins concedes that he behaved with some degree of violence and Miss Cantliff, taking the child with her, on 4th June sought refuge in her parents' house, which she asserts is seriously overcrowded.

Stamp L.J. indicated at the beginning of his judgment that because both parties are joint tenants, neither has the right to exclude the other from the premises. He also indicated that the law regulating joint
tenancies was laid down in Bull v Bull (11), and that because of the
decision in B v B, the Violence Act cannot be seen to alter the law
in this regard. He mentioned the three main arguments of Bridge L.J.
and concluded:

There is the clearest possible decision of this court,
which of course is binding on us, to the effect that S1
is procedural only, and that really is the end of the
matter. (12)

He also added that there were extensive legislative provisions governing
the respective rights of parties to a marriage in the event of a
break-down of the relationship, and that if Parliament had intended to
affect the proprietary rights of non-married people in such
circumstances, then it would surely have given guidance to the judges
on the principles to be adopted.

Stamp L.J. acknowledged that the trial judge found that Mr Jenkins
had caused bodily harm to Ms Cantliff (or the child) and that he backed
the injunction by adding a power of arrest without warrant. He noted
that the judge had the power to require Mr Jenkins to allow Ms Cantliff
to return to and live in the home by virtue of her right as joint tenant.
He did not comment on the fact that the right to return home without the
right to require Mr Cantliff to vacate the home faced Ms Cantliff with
the same very difficult choice that Ms B had been faced with.

However, Stamp L.J. concluded, the Act as so construed is not without
effect. It enables a person who has another living with them in their
home to have them excluded in certain circumstances without the
necessity of bringing an action for trespass. It does not allow a person
to be excluded from his own home or where the parties are joint owners:

No doubt the power conferred is to be exercised in the
context of violence; but if an injunction is to be
granted excluding one of the parties to a union from a
house belonging to that party...such an injunction,
unlimited in point of time, would be equivalent to a
transfer of property order, continuing as long as the
other party was living. (13)
The Violence Act, then, although concerned with the context of violence, is only effective against a person with no right or interest in the property, otherwise it would have a transfer of property effect. Although a person with no right or interest in the property could be excluded, apart from the provisions of this Act, the Act does enable the procedure to be carried through in a marginally more efficient manner. Where the aggressor has an interest in the property, the aggrieved party has the choice of returning to share the use of the property with the aggressor, or staying away. We can see then that the concern of Stamp L.J. is with legal consequences, not social consequences. Stamp L.J. feels that he is bound to follow B v B, but he also makes it clear from his additional comments that he supports the content of that decision. His additional point regarding property rights of married and non-married persons is entirely in line with that of Megaw L.J. in B v B.

At the end of this second case, we can see how the features identified at the end of the first have been continued:
(i) brief reference to the facts,
(ii) technical-legal approach to construction,
(iii) failure to consider the social consequences of the decision,

Davis v Johnson [1978] 1 All E.R. 841

Within a month, the matter was back before the Court of Appeal, due to some behind the scenes work by Lord Denning (14). In this case, a woman aged twenty one with a child of two was living with a man twice her age who subjected her to violence. Ms Davis obtained a court order requiring the man to leave the house (although he was a joint tenant) and he did so. After the decisions of B v B and Cantliff, he applied to have the order lifted, and it was. He returned home and Ms Davis went back to the women's refuge.
Denning M.R. said of those decisions:

The two decisions aroused consternation. Protest were made in responsible quarters. It was said that Parliament had clearly intended that these women should be protected; and that this court had flouted the intention of Parliament. So much concern was expressed that we have called together a full court - a court of all the talents - to review those two decisions; and, if satisfied that they were erroneous, to correct them. (15)

The court in Davis comprised Denning M.R., Sir George Baker, President of the Family Division of the High Court and Goff, Shaw and Cumming-Bruce LJJ. It is worth saying at this stage that the court in Davis did find by a majority (Cumming-Bruce L.J. dissenting) that the decision in B v B which was followed in Cantliif was erroneous.

However, there was an additional problem. There is what may be called a secondary rule governing the Court of Appeal, which says that where a matter has been authoritatively determined by the Court of Appeal, that decision will bind it in subsequent cases, unless the matter comes within certain clearly defined exceptions, none of which appeared to apply in this case. Suffice to say that the Court of Appeal in Davis did not feel precluded from being able to reconsider the case. In order that we should not lose track of the development of the substantive issues I will look to the Court's treatment of them first, and then return to its treatment of the rule of precedent.

First, I will look at the response to Bridge L.J.'s statement of the law. We saw in Cantliif how Stamp L.J. described the decision in B v B as "...the clearest possible decision of this court." (16), reflecting the views expressed in B v B to the effect that an interpretation of Sl of the Violence Act, led to only one possible conclusion. We now see similarly clear statements by the Court of Appeal in Davis in support of the opposite interpretation. "To my mind the Act is perfectly clear...No one, I would have thought, could possibly dispute that those plain words by themselves cover this very case", per Denning M.R.(17). Sir George Baker P. thought them to be 'as plain as a
pikestaff' (18). Goff L.J. thought that the words were 'plainly capable' of covering the mischief aimed at (19). Shaw L.J. thought with regard to the words "[o]n their face it would seem plain ..." (20), and that the considerations which led Bridge L.J. to an alternative view in B v B "...should not prevail against the plain language of a statute..." (21).

Looking particularly at the first point made by Bridge L.J. — that there should be no difference between the jurisdiction of the High Court and that of the County Court, Denning M.R. said of this, "I am afraid that the judges sitting in B v B must have misunderstood the law as it is applied in the Family Division."(22) He went on to explain that the High Court can grant injunctions in a wide range of matrimonial situations, including those where they are being sought against an owner or joint owner. Sir George Baker P. referred to the way in which the injunction had been developed in the last two decades in the cause of matrimonial justice and that, "I can only conclude that the Court failed to appreciate or to remember the vital role of the injunction in the application of modern family law..."(23). Goff L.J. accepted that there would be a difference between the County Court and the High Court, at least, in the case of a non-spouse, and he said of this, "...I ask myself respectfully: is it so extraordinary?"(24).

The second and third lines of argument in Bridge L.J.'s judgment (referring to the 'piggy back' nature of injunctions, and duplication) were not clearly separated in the Court of Appeal judgments in Davis, although in so far as they were referred to, they were strongly disapproved of. Denning M.R. pointed out that "...when pressed as to its consequences, it soon became clear that, if this view were correct, it would deprive S1 of any effect at all."(25) It means, he went on, that only a woman who is sole owner or tenant of the property can claim any protection under the Violence Act; but she is not helped by the Act, as she could rely on her legal right to exclude. As far as a man and woman
living together are concerned, in practice, the woman never is the sole owner or tenant (25). In his view, the concept regarding property rights was quite out of date, and he took the opportunity to point out that although the House of Lords in *Tarr* and *Gurasz* had reversed the Court of Appeal and given priority to property rights, Parliament had by legislation restored the decisions of the Court of Appeal. He preferred to go by the principles underlying the enactments, rather than outdated notions of the past.

Goff L.J. agreed with the ineffectiveness point and Shaw L.J. said much the same, albeit in rather stronger language - that if the effect of the Act was to do no more than provide a dispensation from a mere formality - the asking for other substantive relief such as damages for assault or trespass:

...in the context of domestic violence, the section would be reduced to contemptible ineffectuality. To those victims of violence in matrimonial situations who may have hoped to find in its provisions the smallest measure of relief from their tribulations, it would appear as no more than a portentous and pretentious fraud on their expectations. (26)

Sir George Baker P. asked himself the question, "...is this provision only a tiny miserable mouse incapable of even a nibble at the evil of domestic hooliganism? I do not think so." (27) Cuming-Bruce L.J. said:

The argument, and really the only argument of counsel for the applicant which appeals to me, is that if B v B and Cantliff v Jenkins are right there are hardly any women in the class of unmarried, battered co-habitees who can avail themselves of the protection of the Act. (28)

He thought that this amounted to a forceful argument which appealed to him, but he found it unnecessary to pronounce on its conclusiveness.

So, of the five Court of Appeal judges who considered the matter in *Davis*, only one of them was prepared to agree that the exposition of law of Bridge L.J. was right, or possibly right (Cuming-Bruce L.J.). The other four thought that it was clearly incorrect, and some of them, as we have seen, took the opportunity to say so in the strongest of
terms. The judgment of Cuming-Bruce L.J. is similar in form and content to those in B v B and Cantliff - he says nothing about the particularly violent facts of this case, and sees great advantages in the procedural reform which his brethren think would be a total waste of time (no need to delay to seek legal aid to petition for divorce) although he admits that the High Court and the County Court will grant relief on an undertaking to seek substantive relief later. He accepts that at common law an unmarried man can put out the mistress and children when he likes, and that S1 of the Violence Act is very oddly drafted to bring about the change suggested. He felt that judges would find it difficult to restrict the change to a temporary, short term one, and he saw the law as not merely protecting the property rights of the husband, but his right to accommodation as well. One might well ask, of course, about the rights of the woman and children to accommodation. He was therefore unable to find that the decision of the Court in B v B was wrong.

So, of the seven judgments in favour of the narrow view, there are still no expressions of disagreement and a great measure of similarity in approach. When we look at the four judgments in favour of the broader view, we find a similar homogeneity.

The facts: All those in favour of the broader view discuss in much greater detail the developments leading up to the enactment and the facts of this particular case. Denning M.R. tells us for the first time something of the appalling circumstances of the cases:

The judge said there were two instances of extreme violence of a horrifying nature. On one occasion the man threatened her with a screwdriver. He said he would kill her and dump her in the river. He kept a chopper under the bed and threatened to chop her body up and put it into the deep freeze. (29)

He then went on to refer to the awful conditions of her present accommodation. Sir George Baker P. similarly referred to the history,
the violence and the present living conditions (30). Goff L.J. referred to the predicament that women who live with violent men find themselves in, and of the conditions to be found in the women's refuge (31). Shaw L.J. said there was a great public concern to protect women and children from domestic violence which was:

...one of the ugliest features of the contemporary social scene...If there is a need for the law to provide protection for victims of violence in a family relationship, the relief to be made available must be urgent, radical and incisive. A remedy which was restricted to granting an injunction against molestation while offering the victim the alternatives of continuing to live under the same roof as the aggressor on the one hand, or being rendered homeless on the other, could only be regarded as futile and pusillanimous. (32)

Our analysis reveals then, that for those who take the broader view, the factual but 'non-legal' antecedents of the case are given a greater role to play. The extent of this role is yet to be determined, but it should at least raise in our minds the possibility that the relationship between these observations and their legal findings is more than one of coincidence; that possibly the former were a decisive influence on the latter.

Social Consequences: We saw earlier how those taking the narrower view avoided nearly all discussion of the social consequences of their findings. Cuming-Bruce L.J., the only one in Davis to take the narrow view, mentioned the permanent transfer of property effect, (i.e. he emphasized the legal consequences of the alternative view) in line with the others who had taken this approach. He said that he appreciated that if the man acts like a brute and the woman and children are homeless then perhaps she is more deserving than him. However, he found this argument unpersuasive, as the problem for the man was not one of property, but also one of accommodation and that, "...he may have sacrificed much in order to have the accommodation which is his own". (33) If this distinction between 'property' and 'accommodation' is to be
regarded as a real distinction, then it is surprising that Cumming-Bruce L.J. decides it in favour of the person he has just referred to as a 'brute'. For on the question of accommodation, it is equally a question of accommodation for the person who has been subjected to the violence, and it is clearly possible that such a person may have sacrificed as much, if not more, than the property owning aggressor. However, we should remember that the question to be decided here, is whether or not the court is to have the jurisdiction to grant an injunction. Whether it is actually issued in any particular case, would always be within the discretion of the court, and the respective sacrifices of the parties could be taken into account at that time. This distinction between the jurisdiction to grant an injunction, and the discretion in the way in which that jurisdiction should be exercised, was referred to by Goff L.J. in the context of his discussion as to whether B v B and Davis could be distinguished (34).

If we look at the judgments of those taking the wider view, we see a great difference of emphasis. Denning M.R. said that, "[i]f he were allowed to remain, it would be useless simply to allow her to return, because, as soon as she got in, he would turn her out again. So the court must be able to order him out" (35). Shaw L.J. referred to the choice left open to the woman as futile (36). Denning M.R. rejected the 'protection of property rights' argument on the basis that if the Act only provides protection when the woman is the sole owner, that limited protection does not give her any further rights beyond those she has already, and in practice the woman never is the sole owner. Sir George Baker P. took a similar view and said that the effect of the property right argument renders the proposed remedy, in the context of horrifying violence, useless (37).

Goff L.J. commenced his judgment by looking at the woman's alternatives - to stay and be beaten, or to go and live in squalid
accommodation. Having indicated the problem, he then said that the section could be expected to cover it, without being too much concerned with ownership of the matrimonial home. He thought it difficult to restrict the injunction to a short term remedy and said that if it must endure for an indefinite period, or a very long time, so be it. In his view, if the man violently attacks his partner, he cannot complain if he is met with a Draconian remedy. He appreciated the practical problem regarding rent and mortgage payments, but felt that these should not frustrate the Act. The total ineffectiveness of the narrow view held great sway with him.

Shaw L.J. took the view that, "...the construction of a statute dealing with a morbid aspect of society must, it seems to me, be pursued in the practical context of the evil sought to be remedied rather than with analytical detachment"(38). He looked at the effect of the narrow view which he saw as legalistic and requiring people to make a choice between submitting to the risk of further violence or being rendered homeless, and we noted earlier his comment to the effect that this would amount to a fraud on people's expectations and that it would do nothing of any consequence or effect. This persuaded him that the section must be construed irrespective of property rights. He referred to the practical difficulties and the way in which the judge could get round them, and noted that the judges before B v B, in applying the Act did not seem to be beset with problems.

By way of review of the situation, we could say that:

(i) Before B v B we are concerned with a statutory provision which on its face appears to be clear and comprehensible (at least to non-lawyers) and it would appear that an injunction should issue in cases such as those we have looked at.

(ii) After Cantliff, the provision has been considered twice by the
Court of Appeal within two weeks. All of the six judges who considered the matter are in agreement that the injunction should not issue and that the rule is clear.

(iii) The matter is further considered by a specially constituted Court of Appeal of five, who decide that the rule is clear, but different from that in (ii), and that the injunction should issue.

There are now seven judgments in favour of the narrow view and four in favour of the broader view. If the speeches in the House of Lords are to be included, then the balance alters to 8:8. Lord Diplock was the only one amongst them in favour of the narrow view, although unlike all the others who had taken this approach he felt that even on the narrow view, the County Court judge was entitled to make the order which he made (39). So although an analysis of the judgments by way of approach leads to a balance of views, when seen in terms of results, it divides into nine who support the grant of the injunction and seven who were against it.

It can be seen that at each of the above stages it is possible to speak of a clear rule (perhaps with a large core of certainty), but if we are not to be blinded to the possibility of there being subsequent stages (and who knows how many more there might be), then we must be aware of what is presupposed in saying that we have a clear rule.

Clearly there are two distinct approaches involved in this series of cases. One we have depicted as being a 'legalistic' view, because it places the statutory provision which is being interpreted in the context of other aspects of the legal framework. The other approach pays very little regard, if any, to this aspect, but places great stress on the social implications of the cases. It considers the social factors which gave rise to the case, and also the social consequences of the court's decision.

- 193 -
We can see, by looking at the cases in this way, that although a statutory provision may appear to be as clear as a bell at first sight, this is not simply a result of what 'the words mean', but is because we are, almost without realising it, providing the general words of the statute with a context which we regard as suitable. If a judge should place that statutory provision in a different context, then we can see, as a result of this analysis, that the meaning to be attributed to the provision can be radically transformed. Of course, it hardly need be said, that the context is for the judge to determine. Even Hart admitted that the rule cannot come forward and (in our words) claim its own context.

What is also plain to see, is that whilst it might be thought useful to categorise the different ways in which a judge might select the appropriate context, what we are (and must) be doing, is to compare the selection of one context with the selection of another context. In other words, although we might attempt to give an account of the reasons for the selection of one context as opposed to another, what seems altogether impossible, is that a judge could give meaning to the general words of a statute without establishing its context at all. If this is so, then the application of any statutory provision requires the establishment of the appropriate context. In which case, all applications require assumptions to be made regarding the purpose which the statutory provision is designed to achieve. Thus, the distinction between a 'literal' approach, and a 'purposive' approach presents us with a false dichotomy.

Similarly, the suggestion which was raised in chapter four, to the effect that the judges should not go 'beyond the words of the statutory provision', must now be seen as an attempt to demand the impossible. Whilst we may attempt to restrict the range of available contexts within which a statutory provision can be placed, and the exclusion of

- 194 -
travaux préparatoires and parliamentary reports may be regarded in this light, what surely cannot be done is to say that the statutory provision cannot be placed in any context. What is probably intended then, when it is said that a rule is clear, is that there is a large measure of agreement regarding the appropriate context. However, to indicate that there is a certain measure of agreement with regard to a particular judgement should not be confused with the denial of the fact that a judgement is being made. This is the confusion which Hart and the authors in the previous chapter fall into when they suggest that a rule can be applied 'without further judgement'.

Having attempted to illustrate the great flexibility which the court has with regard to the meaning of a statutory provision, we can now look at the secondary rule (the rule of precedent) in this case, to see what the court can do with a common law rule.

Now we shall look at what was referred to earlier as the secondary rule in Davis - the rule of precedent. This received its classic formulation in the opinion of Greene M.R. in Young v Bristol Aeroplane Co., Ltd (40). In delivering the judgment of the court, he said:

On a careful examination of the whole matter we have come to the clear conclusion that this court is bound to follow previous decisions of its own as well as those of courts of co-ordinate jurisdiction. The only exceptions to this rule (two of them apparent only) are those already mentioned which for convenience we here summarise: (i) The court is entitled and bound to decide which of two conflicting decisions of its own it will follow. (ii) The court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot in its opinion stand with a decision of the House of Lords. (iii) The court is not bound to follow a decision of its own if it is satisfied that the decision was given per incuriam (41). It should be noted that Young first came before the Court of Appeal consisting of three members, but because it concerned an important
question concerning the jurisdiction of the court, directions were given for the appeal to be heard before the full court. This obviously raises the question as to whether the full court has any greater powers than a division of the court. Greene M.R. answered this by saying:

...we can find no warrant for the argument that what is conveniently but inaccurately called the Full Court has any greater power in this respect than a division of the court consisting of three members only....the full court has no greater powers or jurisdiction than any division of the court." (42)

If there were any doubt about this, then as the decision in Young was a decision of the full court, it is as authoritative as a decision of the Court of Appeal can be. In addition, although there were six members of the court, its decision was delivered in the single judgment by Greene M.R. There were therefore no differences of opinion or alternative formulations of the principles concerned to take into account. The rule governing the Court of Appeal in this matter was conveniently summarised by the Master of the Rolls in the penultimate paragraph of his judgment, and so we have a concise formulation of the rule concerned in the judgment.

We saw in chapter four that for both Hart and Watchman, it is possible for precedents to be as determinate as statutory rules and alterable only by statute. If it is possible for such things to be, then the rule expressed by Greene M.R. in Young governing the jurisdiction of the Court of Appeal to depart from its own previous decisions, must be as clear an example of such a rule as we are likely to find.

Where Young has been raised in the cases, the issue has not been any lack of clarity concerning greene M.R.'s formulation of the rule, but whether it constitutes a complete or incomplete formulation of the rule - whether exceptions other than the three mentioned can be allowed. Let us consider how a judge would normally approach the matter:

(i) Counsel for one of the parties would state in argument that a principle laid down in a previous case, by a court of co-ordinate or
superior jurisdiction, applies to the instant case and the court is therefore obliged to apply that same principle. It should be noted that this rule of precedent might well be different for different courts e.g. it is suggested that the High Court is not bound by previous decisions of the High Court (43). The present discussion concerns the position of the Court of Appeal and we have the clearest possible judicial statement in Young to support the view that it is bound by its own previous decisions.

(ii) The judge must determine 'the facts' of the instant case i.e. those facts which are regarded by him to be 'legally relevant'.

(iii) The judge must then determine whether the material facts of the present case (those 'legally relevant' facts) are so similar to those of the previous case that no material distinction can be drawn between them. We can see of course how opinions might differ on this.

In Davis, Sir George Baker P. held that Davis could be distinguished from B v B on the basis that the welfare and safety of the child was a greater consideration in the former than in the latter, although he acknowledged that this basis was somewhat narrow. Goff L.J. held that B v B and Cantliff were not in any way distinguishable from Davis and that although there were differences, they were not material. Cumming-Bruce L.J. agreed with him on this. It may also be noted that the three Lords Justices in Cantliff held that case to be indistinguishable from B v B. Yet when Davis reached the House of Lords, Lord Diplock held that it was the mistress's legal right under a joint tenancy which distinguished Davis from B v B and that, "[t]he same distinction could have been drawn in Cantliff v Jenkins, which, for this reason, I think was wrongly decided." (44)

(iv) If this similarity of material facts is found to exist, and the other case is one which has the status of enabling it to be regarded as a precedent, then the judge in the instant case is bound by the rule
of law in the previous case. Here again there is obviously scope for
differences of opinion as to what exactly the rule of law in the
previous case was. Just how great these differences may be, we shall see
in the next section. However, before we move on to that we should
clarify one preliminary point.

Watchman expresses the view that "...it is important to point out
that within the formal limits of the rules of precedent there exists
considerable discretion whereby a judge can distinguish precedent which
he believes to be mistaken."(45) This is not so. It should be made
clear that as a matter of practice, it is possible for a judge, where
he believes the rule which was applied in a previous case (and which is
otherwise binding upon him) to be mistaken:

(i) To find some difference between the facts of the present and
previous cases

(ii) To hold that this difference is material

(iii) As a result it would follow that the present case does not fall
under the rule of the previous case.

There is judicial support for the view that in some cases the distinction
drawn is merely to evade what is regarded as an unsatisfactory rule; the
distinction would not otherwise have been regarded as legally
significant (46). It is important to be clear then that when Watchman
says that within the rules of precedent there is discretion for a judge
to distinguish precedent which he believes to be mistaken, that 'mistake'
itself does not feature as part of the rules, or at least it did not do
so prior to the consideration of Davis in the Court of Appeal. The
difference can be seen more clearly if we paraphrase what Watchman has
said by putting it into two separate statements rather than one.

(a) There exists considerable discretion as a matter of practice
whereby a judge can distinguish a case, which would otherwise be
regarded as a precedent, but where the distinction is motivated by the
fact that the judge believes the rule of law in the previous case to be mistaken (or unacceptable). I would prefer to say that the rule in the previous case is 'unacceptable' rather than 'mistaken', as the former indicates substitution in a matter of judgment, and the latter, failure to conform to a technical standard of competence. We should also note that the judge does not 'distinguish a precedent' in that if a case is properly said to be distinguished, we mean thereby that the case is not a precedent.

(b) Within the formal rules of precedent there exists no discretion for a judge to distinguish, or depart from a case, which is held to be a precedent, on the basis that it is mistaken. Or at least this appeared to be the position prior to Davis. We must bear in mind that if Davis represents the view to the contrary, it would represent a fundamental undermining of the doctrine of precedent. If a judge who had formed the view that the rule laid down in a previous case was mistaken, were allowed to disregard it for that reason, then precedent would amount to no more than saying that a judge is bound to follow a previous case of a court of superior or co-ordinate jurisdiction when a similar case arises - except when he does not approve of it. The idea of bindingness here has lost much of its meaning. It is only where a judge does not approve of the rule in a previous case, but nevertheless feels constrained to follow it that we can say he is acting with regard to precedent. Where he does approve of the previous rule, it can be seen that the rule of precedent is irrelevant, for he would be inclined to come to that conclusion, irrespective of the rule of precedent.

In this we can follow Kant when he suggests that only those acts which are against inclination and in conformity with duty, have genuinely moral worth. He points to the distinction between acts 'in conformity with' and acts done 'from the motive of' duty (47). So we may say that where judicial acts are in conformity with both precedent and
inclination, they cannot be said to be done from the motive of conformity with precedent. Only where a judicial act is in conformity with precedent, and contrary to inclination, can it be said to be done from the motive of conformity with precedent.

We will now relate these observations to Davis, and in order to do so we will first take each of the judgments in turn and analyse the response to the clear secondary rule of precedent. As we already know, the majority of the court were prepared to hold 'on the merits' that the rule laid down in B v B and followed in Cantliff, was wrong.

Lord Denning M.R. He first considered that as a matter of principle, the court should regard itself as normally bound by a previous decision of the court, but that it should be at liberty to depart from it if convinced that it was wrong. Although it may be said against this that the House of Lords should correct any errors, it might well be the case that they will not have the opportunity, or if they do, it may involve considerable delay and confusion in the interim which in a case such as this, involving violence, would itself be a denial of justice.

Having considered the principle, the question of Young's case was discussed. Before Young's case, according to Denning M.R., the Court of Appeal had power to reconsider its decisions and when found to be wrong could correct them. Denning M.R. cited some eleven cases from 1852 to 1941 in support of this, and made it clear that this was a selection of cases from among a wider number. Young then, in his view, overruled the practice of a century.

However, it must be said that it is clear from the judgment of Greene M.R. that he saw himself as acting in conformity with a clear and established practice in deciding as he did in Young. Denning M.R. then pointed out that Brett M.R. had regarded the matter as one of judicial comity in a case in 1884 and that Greene M.R. had obviously regarded it
as a rule of law. Denning M.R. said that he preferred Brett M.R.'s view, and felt that he was supported in this by the fact that in London Street Tramways in 1898 (48), the House of Lords had held itself bound by its own previous decisions as a matter of law, but that in 1966 it had discarded that rule (in what was referred to as a Practice Statement (49)). This, Denning M.R. regarded as conclusive evidence that a rule as to precedent is not a rule of law, but simply a practice or usage laid down by the court for its own guidance. The court can then change that practice (as the House of Lords had done) and nothing said in the House of Lords on the matter can prevent it, for anything said about it there must necessarily be obiter. So new guidelines should be laid down and these were expressed by him in the alternative

(a) "Whenever it appears to this court that a previous decision was wrong, we should be at liberty to depart from it if we think it right to do so".

(b) The exceptions stated in Young's case should be extended. New exceptions had been created to deal with criminal matters, contempt, when the court is sitting as a court of last resort, when the court was faced with conflicting principles as opposed to conflicting cases, the notion of per incuriam had been extended and there had been exceptions in cases dealing with children. Denning M.R. would then add a further exception to deal with a case which is in conflict with the plain words of a statute. He then added that the list of exceptions to the rule in Young was in danger of eating up the rule, therefore it would be better to follow the same practice as the House of Lords.

Sir George Baker P. The question asked at the outset of the section of his judgment dealing with Young was:

...whether this court can and should refuse to follow B v B, an earlier decision of its own, which it is satisfied is not only wrong but clearly contrary to the plain terms and
intent of a recent Act of Parliament which it refused to apply, or whether this court is bound by what was said in Young v Bristol Aeroplane Co Ltd, in this court and in the House of Lords, about this court being bound to follow its own previous decisions. (49)

As we have already noted, Baker P. said he could distinguish B v B albeit on a narrow basis, but that this was unsatisfactory as it still left B v B as authoritative, although he thought it to be wrong. If his distinction was not accepted, then he thought that the court should not be bound by B v B. Although he accepted that certainty was a vital factor he pointed out that neither judges in the High Court, nor those in the House of Lords are bound by their own previous decisions.

He did not think that Davis could be brought within any of the existing exceptions in Young (including those which came later in the criminal cases). He accepted that Young was binding upon the court but thought that there should be another carefully limited exception based on the second exception in Young:

The court is not bound to follow a previous decision of its own if satisfied that that decision was clearly wrong and cannot stand in the face of the will and intention of Parliament expressed in simple language in a recent Act passed to remedy a serious mischief or abuse, and further adherence to the previous decision must lead to injustice in the particular case and unduly restrict proper development of the law with injustice to others. (50)

He based his further exception on three reasons:

(i) The practice statement of the House of Lords which recognises the danger of injustice.

(ii) The conflict between a statute and a decision which has completely misinterpreted it, and failed to understand its purpose.

(iii) The most compelling, Baker P. found was that by his oath a judge binds himself to do 'right to all manner of people after the laws and usages of this Realm' and that if he followed a decision which he firmly believed not to be the law, he would be doing a great wrong; the statute being for him the law and the final authority. He indicated, as Denning M.R. had done, that there was no way one could be sure that the
case would reach the House of Lords, and it would therefore be an uncertain means to effect change.

Goff L.J. At the very outset of his judgment he made it clear that Davis was not distinguishable from B v B or Cantliff. That there was no jeopardy to the children in B v B was a distinction on the facts, but not, he thought, a relevant one for present purposes. He also rejected the denial of paternity in Cantliff as providing any relevant basis for distinguishing that case from Davis. Also, the invocation of the Guardianship of Minors Act 1971 in B v B, was equally irrelevant, as that did not affect the interpretation of the Violence Act.

He referred to the argument that the Court of Appeal should exercise similar power to that of the House of Lords to go behind its own decisions, or extend the exceptions to the general rule, or that a Court of Appeal of five could disregard a decision of a Court of Appeal of three. He was unable to accept those arguments - or that in B v B and Cantliff the Court of Appeal had acted in ignorance of the Violence Act. On the contrary, he said, they construed it.

He held then that the Court of Appeal was bound by Young and that the class of exceptions was closed. His reasons were threefold:
(i) The need for certainty.
(ii) The need to ensure that hard cases do not make bad law.
(iii) That Young has often been approved on the highest authority.

The argument from comity, which Denning M.R. accepted, was rejected by Goff L.J. He felt that the principle enunciated by Brett M.R. in The Vera Cruz (No 2) was not persuasive as there was no prior binding decision, and also that it had been fully deployed in Young and rejected by Greene M.R. Goff L.J. pointed out that Young had received express approval in the House of Lords - and that the challenge to it by Dening M.R. in Gallie v Lee (51) had been unsuccessful. He further
pointed out that the court as presently constituted was not a full court, even if it were possible for change to come about in that way, which he questioned. He then reviewed other cases both of the Court of Appeal and the House of Lords, and concluded:

Such being the state of the authorities, I cannot for my part doubt but that we are bound by B v B and Cantiliff v Jenkins and, therefore, I would dismiss this appeal on that short ground; but with great reluctance, since, and with humble respect to the members of the two powerful divisions who decided those cases and with no small trepidation in the presence of so great a cloud of witnesses, I venture to say that I do not agree with their conclusions, although in many respects I feel the force of their careful reasoning. (52)

This is clearly an instance of the situation we referred to earlier when we said that only where a judicial act is in conformity with precedent, and contrary to inclination, can it be said to be done from the motive of conformity with precedent.

Shaw L.J. He expressed the dilemma in which he found himself clearly enough:

Accordingly, if this court can properly take the course of allowing this appeal, I would readily concur in so doing. But is this court not inhibited by the principle of stare decisis as expounded in the judgment of the court delivered by Lord Greene M.R. in Young v Bristol Aeroplane Co Ltd? (53)

He pointed out that there was no statutory provision precluding a departure from earlier decisions. Certainty, he felt was important, but not in itself, the ultimate ideal. "One has to ask in a particular case whether a rigid adherence to what appears to be plainly wrong conduces to the purity of justice or respect for its administration" (54). Young itself showed that stare decisis cannot be of universal application, so why should that judgment have closed the door on other special, but deserving cases - an appeal to the House of Lords depending on certain fortuitous circumstances. In financial matters there is a greater chance that the litigant can afford to go to the House of Lords, and he can
have his just deserts back-dated. But a situation which allows victims of violence to be driven from their homes is a very different matter.

If the House of Lords eventually decides B v B is wrong, it will be of no benefit to all those who have been treated in accordance with it in the interim. Yet if they eventually support B v B its temporary eclipse will, comparatively, have done much less harm. The inflexibility of precedent would cast a greater slur on the administration of justice than would some relaxation of it. If such a case as the present had been considered in Young, Shaw L.J. said that a further exception might have been allowed, in the following terms:

...that the principle of stare decisis should be relaxed where its application would have the effect of depriving actual and potential victims of violence of a vital protection which an Act of Parliament was plainly designed to afford to them, especially where, as in the context of domestic violence, that deprivation must inevitably give rise to an irremediable detriment to such victims and create in regard to them an injustice irreversible by a later decision of the House of Lords. (55)

Shaw L.J. therefore adopted and adapted what had been said in Wynne-Finch v Chaytor (56) and which Greene M.R. in Young acknowledged as being an authority in favour of the proposition that the court has power to overrule its previous decisions. Shaw L.J. preferred to say 'departed from' rather than 'overruled', and continued, "I do not for myself read the rest of that judgment of Greene M.R. in Young as doing more (indeed the court had no power to do more) than 'offer guidance' ...". Thus he concludes, because of the decisive effect which the court's decision would have on the applicant and many others, the court should act decisively in pursuance of its view of the proper construction of the Act.

Cumming-Bruce L.J. He indicated at the beginning of his judgment that he agreed with Goff L.J. that B v B and Cantliff cannot be distinguished. He then turned to question whether a court of five judges
was free to depart from those decisions. He referred to counsel's argument that as the jurisdiction of the Court of Appeal is based on the Supreme Court of Judicature Act 1873, which empowers it 'to grant all such remedies as any of the parties may be entitled to', then if it felt that the previous cases were clearly wrong, no previous case or practice can prevent the court from doing right and granting the remedy sought.

However, Cuming-Bruce L.J. thought that the practice since 1944 was clear, although he rather seemed to gloss over the difference referred to by Denning M.R. and Goff L.J. in the views of Brett M.R. and Greene M.R.:

[The previous practice] is explained in 1884 as based on comity; it was affirmed in Young v Bristol Aeroplane Co Ltd in 1944 when the court stated the exceptional situations in which it would not regard itself as bound by its previous decisions."

Goff L.J. said that Greene M.R. had rejected the view of Brett M.R. Cuming-Bruce L.J. then asserts that it was further affirmed in Morelle v Wakeling (57), and he cites a lengthy extract from the judgment of Evershed M.R. which deals with the question of when a decision may be said to be given per incuriam, the first part of which must be set forth, in view of its significance for the later expression of opinion of Cuming-Bruce L.J.:

As a general rule the only cases in which decisions should be held to have been given per incuriam are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned: so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong. (57)

Cuming-Bruce L.J. then goes on to say:

In connection with the construction of new statutes, I accept that if it is shown to this court that the meaning attributed to the statute was plainly wrong this court can refuse to be bound by the previous decision. There is authority for that in the judgment of the court in Morelle Ltd v Wakeling. (58)

It should be said that the section cited from Morelle cannot be that
which gives this support, as the second part is limited by the class referred to in the first part which refers to 'ignorance or forgetfulness of a statutory provision'. However, for present purposes it is the conclusion of Cuming-Bruce L.J. which is significant, and he clearly accepts a category which would enable the court in this case to depart from the earlier decisions. He goes on, of course, to say that in substance, the previous decisions were correct, therefore he still dismisses the appeal.

This judgment then is interesting in that his lordship holds that he could depart, when it would have been both easy and agreeable to hold to the contrary. He further refers to differences which have arisen on this matter between members of the Court of Appeal, but that the House of Lords gives emphatic support to the present practice which Cuming-Bruce L.J. also supports - "I would think that the present practice holds the balance just about right."(59) He also points out that the temptation to depart from it would be less if there were readier access to the House of Lords, with the court having power to order that costs of meritorious appeals be paid from public funds. It is interesting to see how he regards a departure from B v B and Cantliff as being in accordance with the current practice of the Court of Appeal.

We can now summarise the main provisions of the five judgments:

Denning M.R. As a general principle, the court is normally bound by its own previous decisions. Precedent is a matter of practice not of law. If errors are made and it appears to the Court of Appeal, on further consideration, that a previous decision was clearly wrong, then the court can depart from it, either by adopting guidelines similar to those of the House of Lords, or by an additional exception to the rule in Young - where a case is in plain conflict with the words of a statute.
Sir George Baker P. The previous cases of B v B and Cantliff should be distinguished, or there should be a further exception to the rule in Young - the Court of Appeal is not bound to follow a previous decision of its own if satisfied that the decision was clearly wrong and cannot stand in the face of the will and intention of Parliament expressed in simple language in a recent Act passed to remedy a serious mischief or abuse, and further adherence to that previous decision must lead to injustice in the particular case and unduly restrict proper development of the law with injustice to others.

Shaw L.J. There should be a further exception to the rule in Young - the principle of stare decisis should be relaxed where its application would have the effect of depriving actual and potential victims of violence of a vital protection which an Act of Parliament was plainly designed to afford to them, especially where, as in the context of domestic violence, that deprivation must inevitably give rise to an irremediable detriment to such victims and create in regard to them an injustice irreversible by a later decision of the House of Lords. He further stated that Young could only be regarded as a guide.

Goff L.J. The previous cases of B v B and Cantliff cannot be distinguished, and although those cases were wrongly decided, we cannot depart from them as we are bound by Young's case to follow our own previous decisions.

Cumming-Bruce L.J. The previous cases of B v B and Cantliff cannot be distinguished - the present practice of the Court of Appeal is about right and allows the court to depart from those cases.
It can be seen that in dealing with this common law rule, the judges adopted several different responses. In determining the status of the provision which is being dealt with, the judge can alter its effect. In regarding it as a rule of practice rather than of law, it can be claimed that it merely reflects the practice of the court but cannot be said to determine it.

An alternative response, and one favoured by several of the judges here, is to claim that the provision has not been properly or completely formulated, as yet. As was pointed out at some length at the beginning of this section, if this rule is regarded as incompletely formulated, what more could be done to render a common law rule determinate? The answer is, of course, nothing - they simply are not determinate. Any common law rule is constantly open to re-interpretation by the court. Unlike the statutory rule, there is not even an authoritative text, and any statement by a judge as to the content of a particular rule can always be seen for what it is; a statement of the rule in the light of the circumstances with which he was dealing at the time. It is always open to a judge on a subsequent occasion, as indeed happened here, to say that if the previous judge had been aware of, or presented with, a different set of circumstances, the rule would have formulated differently.

The other strategy which is always open to the court, and which commended itself to one or two of the judges in this case, is to re-interpret the circumstances of the case in the light of the available rule. It must not be thought that there is anything underhand in this. Any attempt by a judge to determine the 'facts' of the case will presuppose some understanding of the sort of rule which is likely to be employed. In fact, at any stage of the legal process, this will be the case. Even when a person is giving the initial statement to a solicitor, regard will be had to relevance, and this will be based upon an
understanding of the rule which is likely to be utilised. Of course, as one gives a clearer profile to the rule, one can also give a clearer profile to the facts, and depending upon the desired result, (having regard to the consequentialist view), one can so determine the relationship between the rule and the facts, that the latter fall within, or outside, the scope of the former.

The situation which is most difficult to account for is the one where a judge states that although the result is unacceptable, it is not possible to come to any other conclusion. This can only mean that, for whatever reason, the judge concerned is prepared to accept the formulation of the rule by others as authoritative, and that whether it is realised or not, a judgment has nevertheless been made regarding the context and purpose of the rule (as I shall attempt to make clearer in the next chapter). To be oblivious to the fact that certain judgments are being made does not alter the fact that they are nevertheless being made.

Before moving on to discuss the position from a more theoretical basis in the next chapter, I wish to introduce two further cases which will serve to illustrate the extent to which the courts are willing to go in order to transform the legal landscape. I have deliberately selected them from an area which many would regard as 'technical' to show that the same factors are at work there as in the more 'political' cases. I shall discuss them only so far as is necessary to indicate the extent of the judiciary's capacity for change.

**Vestey v Inland Revenue Commissioners (Nos 1 and 2)**

[1979] 3 All E.R. 976: This case concerned the taxation of the income of a foreign-based trust. It was thought that the law had been settled by the earlier case of *Congreve v Inland Revenue Commissioners*
All E.R. 948 which interpreted the relevant statutory provision. On the basis of this and subsequent cases, the Crown claimed that where an individual had either received, or had power to enjoy, the income of such a trust fund, that person became liable to taxation on the whole of the income of the trust fund irrespective of the actual amount which had either been paid or earmarked for that person. The Revenue authorities, being reasonable people, had as a matter of practice restricted the amount actually claimed by them to a proportion of the income of the trust fund, but because of the method of calculation, the appointee was still liable to be taxed on an amount greater than that which had been received by him.

After discussing an interpretation of the provision which he found to be reasonably agreeable, Lord Wilberforce stated that:

We now have to face the fact that this House decided otherwise, unanimously, and affirming the Court of Appeal. [In Congreve] That was 30 years ago; the decision has been followed in reported cases ... and no doubt many persons have been taxed on the basis of it, without resistance. (60)

He considered whether the court should depart from an interpretation which he admitted to be tenable, and which the previous court had reached deliberately. However, he thought that such an interpretation would lead:

... to a situation involving results which are arbitrary, potentially unjust, and fundamentally unconstitutional. If these had been seen in 1949 (within the ambit of proper argument they could not reasonably have been seen) I cannot believe that the eminent Lords who decided the case would have been willing to ascribe to Parliament an intention to produce such results. (61)

Here we can see Lord Wilberforce doing what was suggested in our discussion of the rule of precedent in the previous case. He is introducing new factors which he is claiming should affect the interpretation and standing of the rule and suggesting that if they had been before the court in the previous case they would have formulated the rule differently. He did acknowledge that, "[o]f course it is
generally true that when a decision of principle is given, the fact that those who gave it did not have every possible situation in mind does not prevent the decision being applied to new and unforeseen facts." (62) Yet despite this, there is always an infinite range of possible additional factors which might arise for consideration. Here, the issue stressed was that of constitutionality. "The word 'constitutional' appears again and again in their Lordship's judgments which seems curious to a generation which has long since accepted that this country has no constitution in the sense of overriding constitutional principles which have the force of law." (63)

Thus, change was called for, and if there was any doubt that the change was substantial, rather than marginal, it would probably be dispelled by the opening words of the article by Anthony Sumption in the British Tax Review:

Congreve v Inland Revenue Commissioners had stood for nearly 32 years as one of the great landmarks in the development of the law enacted by [the relevant section of the Act]....Now Vestey v Inland Revenue Commissioners (Nos 1 and 2) has come like an atom bomb to blow Congreve away and obliterate all the fortifications in defence of the Revenue which had been constructed upon the foundation of that case. (64)

We all know that atom bombs are not used to make minor adjustments. It may of course be said that the House of Lords is entitled to bring about change by virtue of the 1966 Practice Statement, but this would only serve to shift the discussion, and we would then have to ask how the House of Lords was able to free itself from the decision which had stood for over 150 years to the effect that the House of Lords was bound by its own previous decisions (65). In Vestey we have a departure from a case, which in terms of pedigree, has everything that could be desired - a unanimous House of Lords upholding a unanimous Court of Appeal, and relating to 'technical' matters of taxation upon the basis of which people had for over thirty years planned their affairs. Yet, as we saw in relation to Cutts v Head in chapter four,
the case of Calderbank which had virtually no pedigree at all, was taken up by the court. All of which casts serious doubt on the claims of those who seek to establish that there are some authoritative criteria in accordance with which the judiciary determine what is to count as law. (66)

W.T. Ramsay Ltd v Inland Revenue Commissioners
[1981] 1 All E.R. 865: The type of situation which arose for consideration in this case was well summarised in the speech of Lord Wilberforce, and the following narrative is taken from it. (67)

It concerns a case in which a taxpayer has made a quantified gain, and upon consulting a specialist, he is provided, for a fee, with a scheme which will produce an equivalent and allowable loss:

In each case two assets appear, like particles in a gas chamber with opposite charges, one of which is used to create the loss, the other of which gives rise to an equivalent gain which prevents the taxpayer from supporting any real loss, and which gain is intended not to be taxable. Like the particles, these assets have a very short life. Having served their purpose they cancel each other out and disappear. At the end of the series of operations, the taxpayer's financial position is precisely as it was at the beginning, except that he has paid a fee, and certain expenses, to the promoter of the scheme. (68)

Of course it need hardly be said that he also hopes that his assets will as a result avoid the net of taxation. Lord Wilberforce went on to point out that:

...although sums of money, sometimes considerable, are supposed to be involved in individual transactions, the taxpayer does not have to put his hand in his pocket...The money is provided by means of a loan from a finance house which is firmly secured by a charge on any asset the taxpayer may appear to have, and which is automatically repaid at the end of the operation. In some cases one may doubt whether, in any real sense, any money existed at all. (69)

Lord Wilberforce thought that the proper approach to interpretation was fairly straightforward:

What are 'clear words' is to be ascertained on normal principles; these do not confine the courts to literal interpretation. There may, indeed should, be considered the context and scheme of the
relevant Act as a whole, and its purpose may, indeed should, be regarded. (70)

In the following chapter, I shall argue that the court in applying any statutory provision must necessarily provide it with some context, and similarly attribute to it some purpose. It may be an interesting question to ask whether the particular context and purpose which are utilised by the court are the same as were utilised by those who were involved in the passage of the legislation, but if the reference to the literal approach is intended to suggest that the court could 'apply' the provision without having regard to any context or purpose, then I would claim that this is mere obfuscation.

However, Lord Wilberforce went on to look at some recent cases, and expressed the view that the 'emerging principle' and these judgments commended themselves to him (71). He considered the question as to whether the court should wait for change to be introduced by Parliament, but took the view that the courts are not obliged to stand still whilst techniques of tax evasion improve, and that were they to do so, such inaction would result in loss of tax to the prejudice of other taxpayers, and to Parliamentary congestion (72). After looking at some American cases which he thought supported the line he was taking, Lord Wilberforce stated:

'It is probable that the United States courts do not draw the line precisely where we with our different system, allowing less legislative power to the courts than they claim to exercise, would draw it, but the decisions do at least confirm me in the belief that it would be an excess of judicial abstinence to withdraw from the field now before us.' (73)

This is interesting because we can see that although a distinction is drawn between the American system and our own, the difference is assumed, but not explained. The important question is of course whether the difference is merely a question of who is involved in staffing the system, or whether there is an important difference in the system itself. To what extent does 'the system' account for the more
conservative approach in this country and to what extent is it a matter of self-imposed limitations being adopted by a more conservative judiciary. In whatever way this question is answered, it is significant that Lord Wilberforce clearly accepts that the judiciary have some legislative powers, and that they are prepared to exercise them in an area which has been regarded by some as free from such incursions:

Such views ignore traditional wisdom on taxation matters. The imposition of taxes has been a matter for Parliament alone since the late 17th century, whilst the approach of the judiciary to revenue statutes has been to require an express charging provision before accepting that tax is due. (74)

It is clear from the speech of Lord Brightman in Furniss v Dawson that other members of the judiciary were not prepared to give up their traditional role so readily:

It is difficult to escape the impression that the High Court and the Court of Appeal were determined at all costs to confine the Ramsay principle to the sort of self-cancelling arrangement which existed in that case, and to resist what they conceived to be a deplorable inroad into the sacred principles of the Westminster case. (75)

However, it is clear from the other speeches in Ramsay and in Furniss that Lord Wilberforce was in good company. Lord Scarman, in particular, stated in Furniss that:

What has been established with certainty by the House in Ramsay's case is that the determination of what does, and what does not, constitute unacceptable tax evasion is a subject suited to development by judicial process. (76)

If there are those who are still inclined to take a Hartian view, that judicial activism is restricted to the marginal areas of rules, then if they are engaged as tax advisers, they would surely regard the statement by Lord Diplock in I.R.C. v Burmah Oil Co Ltd as a shot across the bows:

It would be disingenuous to suggest, and dangerous on the part of those who advise on elaborate tax-avoidance schemes to assume, that Ramsay's case did not mark a significant change in the approach adopted by this House in its judicial role to a pre-ordained series of transactions...(77)
In our discussion of the cases in this chapter, the intention has been to consider a number of cases in both the Court of Appeal and the House of Lords which deal with both common law and statutory rules in an attempt to see how far the courts can go in their handling of them. Whilst on the one hand we wish to challenge the Hartian view of the way in which change comes about within the legal system, we wish to do more than just that. The detailed analysis of Davis, in the earlier part of this chapter, enabled us to see how the court dealt with a common law rule and a statutory rule, both of which must be regarded as amongst the clearest available to us. This enabled us to appreciate how doubt can be created, and resolved. In the latter part of the chapter, we saw how it was possible for the judiciary to challenge the 'traditional' approach in an area which might be regarded as both conservative and technical, and which also requires the consideration of both common law and statutory rules.

It is clear from what we have seen so far, that our experience of the legal system bears little relationship to Hart's account of it, and I presume that our legal commentators would merely add that the judges in these cases really should not do such things. In the next chapter, I shall consider the matter from a more theoretical perspective, and attempt to work through some ideas which will help us towards a better understanding of the legal order, and towards a better understanding of some of the legal theorists which Hart has unfortunately rejected.
We have seen in chapter four how the authors of *Justice Lord Denning and the Constitution* refer to the political role of the judiciary and then, because of the model of law which is implicit in their position, conclude that the proper role for the judiciary is to be amoral, apolitical and to have no regard to questions of justice. Subjectivity is an impurity in a properly ordered legal system - to be avoided at all costs. So, whilst explicitly rejecting mechanistic jurisprudence, they advocate a form of jurisprudence which is non-subjective, non-moral, non-political and not connected with justice; which if not mechanical must be quite close to it. In their critique of present practice the authors refer only indirectly and incompletely to what they consider to be an acceptable model of judicial activity.

Having made this model more explicit in chapter four, and shown in chapter five how even the firmest of rules are constantly open to reconstruction by the courts, I will now argue that this aspect of construction and reconstruction is a necessary feature of rules, not occasional; that the conclusions which Hart and the others draw from their model are erroneous because the model is epistemologically unsound. Our critics of Denning, having misread the health of the patient, prescribe treatment which is more likely to kill than cure.

Because they believe in a theory of law which tells them that law is a system of rules with hard centres and fuzzy edges, they believe that the proper role of the judge is to apply those hard centres to cases 'without further judgment'. In the marginal areas, judgments are called for, but they should not go beyond this limited area, for to do so would be to encroach upon powers more properly belonging to others. The
authors parade cases where they claim that the judges have stepped beyond their neutral role, and grasped power not properly theirs. Although we have looked at their arguments in some detail and demonstrated that they do not stand close scrutiny, it may be felt that it is still open to them to respond by saying that if the cases are selected with greater care, and the arguments made with more precision, then their approach is still tenable.

The nature of this problem has been well indicated by Thomas F. Torrance who pointed out that:

...the problem must be traced to the fact that a legal positivism has been so deeply built into our British constitution that courts of law are regularly constrained to yield decisions in conformity to formal parliamentary enactments, in detachment from what may be considered to be inherently just or right reasons. That is to say, what needs to be changed is the basic philosophy of law that underlies our constitution together with the constitutional justification for that philosophy of law. (1)

As I have argued in the last chapter, that view of legal positivism certainly needs to be changed. Torrance appears not to appreciate the extent to which that view of positivism gives a distorted view of the legal process, and I hope to have illustrated that it is still adaptable and adapted by the judiciary despite the view of some legal theorists that it is not and should not be.

The view to be developed in this chapter is that it is the approach itself which is fundamentally misconceived, and what the authors we have looked at in chapter four believe to be corrigible error is in fact central to the judicial role. The authors cite Ewing with approval when he refers to "[t]he development of narrow and difficult distinctions and the gratuitous qualification of the statutory language by concepts of reasonableness, directness and remoteness..."(2). What is taken by them to be 'gratuitous' will be shown here to be part of the very life of the law, and in a sense, this chapter is a step towards changing that philosophy of law of which Torrance disapproves.
We saw in the last chapter, how with both statutory and common law rules, subjective judgments are necessary in the determination of those rules in at least one important respect. They always have to be put into a context, which cannot be controlled by the rule itself, and that context is all important in the determination of the meaning of the rule. Of course, one may attempt to save an inadequate theory by suggesting that the cases which have been looked at are unrepresentative and are not of general application. It is necessary for us then to look in a more fundamental way at the nature of rules and the way in which they operate, to show that far from being exceptions to the general run of things, they in fact exhibit more clearly than usual an underlying feature of this area of activity.

The status of abstractions: We saw in chapter one that Austin was concerned with rules as they are abstracted from positive systems of law. But what is entailed or presupposed in making these abstractions? If we understand this, we will gain a valuable insight into Hart's misunderstanding of Austin, into Hart's system itself, and why the authors of Justice Lord Denning and the Constitution come to such contradictory conclusions. We must look first at a general view of the way in which abstractions are made (before we look specifically at the legal context) in order to understand a number of other ideas with which they are intimately associated.

One way to approach an appreciation of the role of abstraction is to strive towards an understanding of the world without it. There would of course be an absence of 'thought' insofar as it involves the use of concepts, because the generalisations upon which those concepts depend have not yet been made. It follows that it would not be possible to distinguish between aspects of that experience which we normally refer to as visual, audible, tactile etc. This state of perception unmediated
by thought does not have to be attainable for our purposes, although for some it can be experienced in part:

The [scholastic] authors mean...that a thing can be perceived in and through the medium of the love-attraction or the love-possession, as well as in and through the concepts formed by the mind;...

[Understanding, Knowledge and Wisdom] all three operate through love, and reach a perception unlike that of purely speculative knowledge in not being mediated by concepts (3).

It is clear that experience without abstractions would inevitably mean that the distinction between self and other would disappear. This idea has been regarded as having fundamental significance for many thinkers ranging from those who were concerned with a religious way of life to those interested in modern scientific theories. The commentator on the work of Aquinas tells us that:

As for the first, St. Thomas accepted a tension between knowledge in its purity and knowledge in combination with other factors. To know as such and essentially is to be the thing that is known, for subject and object are identified in that one act; so in God the knower, the knowing, the knowledge and the known are completely the same. But as we descend the scale of being so we descend the scale of mind, the simplicity of being becomes more partial, and so also correspondingly the total grasp of mind (4).

David Bohm, a modern theoretical physicist expresses a similar thought in his recent book, Wholeness and The Implicate Order:

Thus, one can no longer maintain the division between the observer and the observed...Rather, both observer and observed are merging and interpenetrating aspects of one whole reality, which is indivisible and unanalysable (5).

The position of someone like Ayer is a little more difficult in that whilst he accepts it as an empirical fact that there exist genuine or organic wholes, he later takes the view that it is vain to attempt to dissociate the world as it is in itself from the world as we conceive it. That whilst we may utilise different conceptual systems we cannot detach ourselves from all of them and compare them with a world which we envisage from no conceptual standpoint at all (6). This is very similar
to the point which is later put forward by Kuhn. However, I would prefer to speak in terms of an organic whole, as the plural seems to miss the point which is intended when speaking of the singular. Also, I take the view (in line with such people as Aquinas, Kant, Bohm and others) that it is not vain to distinguish 'the world as it is' from 'the world as we conceive it', so long as we understand the meaning of the distinction. Its purpose is merely to indicate that the human intellect is actively engaged in the latter in a way in which it is not in the former.

Certainly, an awareness of the capacity to understand in a way not limited by the human intellect is a powerful driving force in the philosophy of Aquinas.

When we come to consider the nature of thought and perception, it would appear that consciousness presupposes both demarcation within and generalisation from the flux of phenomena, which in turn presupposes motivation. To think and experience would seem to require the ability to break down the otherwise undifferentiated mass of sensation into discrete parts or to focus the mind on some aspects rather than others in order to provide our thought with some object. We noted in chapter one, that in common with others, Popper points out:

Observation is always selective. It needs a chosen object, a definite task, an interest, a point of view, a problem. And its description presupposes ... similarity and classification, which in its turn presupposes interests, points of view, and problems. (7)

To be conscious then is necessarily to use organising principles to group the phenomena into that which constitutes a unit and that which remains part of the undifferentiated mass, or residue of the as yet unorganised phenomena, which remains 'in the background' and of which we can become aware by shifting the focus of our attention; which is another way of saying that we invoke the use of a different organising principle. The intermediate stage is that to which the mind has given some shape or form, but of which we are not at present thinking. In
other words, the products of consciousness are not limited to what the mind can hold in immediately accessible form, like the random access memory of the modern computer. It includes also the areas which we know to have shape, which are not immediately present to us, but which nevertheless inform and give security to the working of the conscious mind, and which can be recovered when the need arises. Consciousness, rather like a psychic chisel, can only work on a small part of the statue at any one time, but the work that it does there requires an understanding of that part in its relationship to the statue as a whole.

George Miller, in his interesting discussion of the selective function of consciousness from the point of view of psychology, distinguishes between the conscious and the pre-conscious; Polanyi, in his discussion from the point of view of science distinguishes focal from subsidiary awareness, and R.A. Nisbett in sociology assumes a very similar position:

An idea is a perspective, a framework, a category (in the Kantian sense) within which vision and fact unite, within which insight and observation are brought together. An idea is, in Whitehead’s word, a searchlight; it lights up a part of the landscape, leaving other parts in shadow or darkness (8).

In what follows, I shall attempt to indicate what I take to be three related and inseparable aspects of thought or consciousness.

Demarcation: The criterion of demarcation presupposes the ability to see certain qualities in the mass of stimuli to which we are subject and in accordance with which they can be grouped, and without which they would remain an incomprehensible engulfment. It is a criterion of relevance. This criterion allows us to put some distance between ourselves and the flood and this criterion is presupposed in any attempt at generalisation. It is a factor which is not sufficiently brought out by MacCormick in his discussion of legal reasoning (9). Whilst he is quite correct to point to the need for coherence and consistency, one always needs to determine the framework within which
one seeks that coherence and consistency.

In chapter five, in the discussion of Davis v Johnson, we saw how two groups of judges, each appealing to these values can come to very different conclusions, because each group is utilising a different criterion of demarcation or relevance - in one case procedural, in the other substantive. As Peter Goodrich has pointed out in his discussion of Home Office v Harman (10), the criterion of demarcation may simply be asserted without attempt to support it with argumentation, and it may be thought to be unpersuasive, but it is nevertheless of profound significance as an indicator of argumentative intention and of argumentative effect and has the authority of the law (11). We can see now, that the difference between Austin and Hart is not that one appeals to some rule of recognition and the other does not. They both see the need for such a rule, or 'criterion of demarcation'. The difference is that Austin sets it out clearly in The Province in a way in which it can be used. Hart merely infers its existence from practice and claims that the practice is evidence of the fact that it has been used. It is Austin, not Hart, who in fact gives an elucidation of this concept.

Generalisation: Being human, our minds are incapable of apprehending the mass of sensation undiluted by generalisation. We therefore attempt to formulate our knowledge by giving expression to those factors in knowledge which have significance for us and we allow them to represent, as it were, the totality of sensation which it may be supposed is present, but which cannot be 'known'. The cognitive faculty focusses on those significant factors and becomes or remains unaware of other factors which are assumed not to be significant. Again, the commentator on Aquinas states:

Rational discourse and conversation proceed when from the welter of individual experience we abstract general meanings and ideas of species or kinds...In their state of generality they exist only in the human mind,...(12)
Truth follows the intake of things by mind, and is, therefore, subject to the limitations of the knower. Because of the limitations attending the human mind in its present condition truth is directly expressed as general, not particular; as abstract, not concrete; ...(13)

The point is well made in the legal context by Julius Stone in his discussion of Goodhart's theory of the ratio decidendi. MacCormick sums up the views in this way:

[Stone's] argument is that Goodhart's theory of the ratio decidendi yields wholly indeterminate results because the 'principle' derivable from a case by the Goodhart method of 'material facts plus decision' ...is entirely dependent on the level of generality at which one chooses to describe the facts. (14)

This is why we accepted in chapter one that descriptions are never complete.

Must all 'expressions' be general? Yes. In the situation of phenomenal flux, expression would be otiose. Even at the level of the most unsophisticated perceptions, if we could imagine the possibility of a unique expression being attached to every instance of perception, having once attributed an expression to it, there would never be cause to use that expression again - unless it were an attempt at recollection; but unless we were able to recall that perception in its totality, i.e. experience it again, then the recollection would only be in terms of its significant features - and this is what we mean by calling it an abstraction. However, demarcation and generalisation are not sufficient on their own, and a further factor needs to be introduced to give motion to the system.

Purpose: Generalisation and demarcation presuppose the motivation we have to orientate ourselves towards the 'external world'. It is the answer which is given to the question, 'why do we make these generalisations in this context?' We can see why it is that
Collingwood takes the view that every statement is made in answer to a question (15). It is this purpose which makes us realise that statements concerning significance are not statements about the stimuli pure and simple, but are the outcome of an interaction between the stimuli and ourselves, and are therefore a product of the two and not an attribute of either. They become statements about the stimuli in the context of our need and purpose. In the theological context, this motivation or drive that we have is called love. "...knowing and loving are not twin things or acting causes, but a doubled expression of one and the same thing..."(16). "...for part of the knower is unexpressed in knowledge and part of the known remains opaque..." (17).

It is not possible to say of demarcation, generalisation and purpose, which comes first. Each presupposes the other two. They can be separated for purposes of analysis, but any abstraction is a manifestation of all three; and thought necessarily presupposes the use of abstractions. Perhaps we could adopt the careful formulation of this sort of relationship by John Austin, and say that each of the three terms signifies the same notion; but each denotes a different part of that notion and connotes the residue.

Much of the earlier part of this thesis was taken up in arguing the point that Hart fails to understand the element of purpose when considering the abstractions of Austin, and therefore, in much of what he says, he fails to join issue with him. Simon Roberts provides us with an example which illustrates a failure to take account of another aspect of this process:

It has come to be recognized as a central problem of the social sciences that in any inquiry the observer is prone to fit the material under investigation, consciously or unconsciously, into a conceptual and institutional framework of his own, distorting the material as he does so. (18)

The suggestion of distortion appears similar to the reference by Hart to 'distortion as the price of uniformity' (19). I should clear up one
preliminary point which is suggested by the ambiguity of the clause 'of his own'. The view being put forward in this thesis is that all knowledge requires the use of conceptual frameworks which shape our knowledge of the world but are not derived from it. To this extent all knowledge requires the observer to fit the material into conceptual frameworks 'of his own' (meaning by this the conceptual frameworks 'which he uses') and as the utilisation of all conceptual frameworks must be seen as answers to questions, they will be distorting in the sense that they are a moulding (or construction) of the world (with these concerns in mind) rather than mere reflections of it.

On this view, 'distortion' is an inevitable feature of knowledge, and cannot therefore have the pejorative connotations which may initially be suggested by the use of this word. The observer is not merely 'prone' to do this but inevitably does so. We can also see that the suggestion of Roberts that the observer starts with materials free from distortions and then builds in these distortions as he fits them into his conceptual frameworks, is also inappropriate. The utilisation of conceptual frameworks and consequent 'distortions' apply as much to the source materials themselves as they do to anything which flows from them.

Another aspect of this view of Roberts', and one with which I agree, is based on an alternative view of what is meant by 'of his own'. On this view, the observer constructs a conceptual framework in the context of an understanding of a particular society of which he regards himself as being part. He then extends this framework to assist his understanding of another society, and fails to appreciate that whilst he shares this framework with the members of his own society, he does not share it with the members of the alien culture to which he has now shifted his attention. What the observer does in such situations is to fail to have proper regard to what we have called the factor of
demarcation - he has failed to realise that these frameworks are constructed with particular questions and contexts in mind, and that when they are applied beyond their proper context, they are likely to mislead.

Bohm puts it that, "...we say that all theories are insights, which are neither true nor false but, rather, clear in certain domains, and unclear when extended beyond these domains."(20) However, the point I am making here is that if an abstraction is applied beyond its proper context, it does not necessarily become less clear, but it may mislead if it is not realised that the factor of demarcation, utilised in the construction of the abstraction, limits its application. For example, if I were to apply Austin's model to a primitive society, I might be accused of having a distorted view of it, or I might reject the model as having been falsified. The better view would be that I have simply attempted to utilise the model in an inappropriate context, in that it was only designed to apply to those 'ampler or maturer societies'.

We could say then that demarcation generalisation and purpose are simply the basic tools which are necessary for the mind to obtain any purchase on the world of sensation:

Einstein...took the total field of the whole universe as a primary description. This field is continuous and indivisible. Particles are then to be regarded as certain kinds of abstraction from the total field (called singularities). As the distance from the singularity increases...the field gets weaker until it merges imperceptibly with the fields of other singularities. But nowhere is there a break or a division. Thus the classical idea of the separability of the world into distinct but interacting parts is no longer valid or relevant. Rather, we have to regard the universe as an undivided and unbroken whole. Division into particles, or into particles and fields, is only a crude abstraction and approximation. (21)

We are now closer to seeing that rules are to the world of legal experience what particles are to the world of scientific experience; certain kinds of abstraction or generalisation from the total field. We can extend the analogy further and say in a very Hartian sense (bearing
in mind his distinction between the core of certainty and the penumbra of doubt) that as the distance from the core of certainty of the rule (the singularity) increases, the field gets weaker until it merges imperceptibly with the fields of other rules. Thus we are led to conclude that the division of the world of legal experience into separate and interacting parts (rules) is no longer valid or relevant, and that the division into particles and fields (rules) is only a crude generalisation and approximation.

So it appears that Hart's formulation of the anatomy of a rule in terms of its having a core of certainty, has to be evaluated in terms of its status as a crude generalisation and, as we have seen above, generalisations involve a concomitant judgment as to the appropriate line of demarcation together with a similarity of view as to the appropriate purpose. We can see then why it is that Polanyi depicts the construction of a scientific rule as the exercise of artistic flair rather than the mere exercise of technical skill. His comment is particularly apposite in the light of Goodhart's attempt to reduce the ratio to the product of formal procedures and should be regarded as a note of warning to anyone who would claim that the function of the judge is merely 'to apply the law':

Theories of the scientific method which try to explain the establishment of scientific truth by any purely objective formal procedure are doomed to failure. Any process of enquiry unguided by intellectual passions would inevitably spread out into a desert of trivialities. (22)

MacCormick claims it as a virtue for Hart that whilst on many personal, moral and political issues he is a man of commitment, as an academic he is the "disinterested scholarly observer" (23), and that "[w]hilst much of his work aims to be descriptive or purely analytical, and thus requires a deliberate disengagement from issues of personal commitment in matters of morals and politics,..." (24). We saw in chapter four the results of this detached and non-subjective approach. The view being developed in
this chapter is that both Hart and MacCormick mislead themselves if they believe that detachment in any field of scholarly endeavour is either possible or desirable. Rather, I prefer the view expressed by Polanyi:

I start by rejecting the ideal of scientific detachment. In the exact sciences, this false ideal is perhaps harmless, for it is in fact disregarded there by scientists. But we shall see that it exercises a destructive influence in biology, psychology and sociology [and I would add jurisprudence], and falsifies our whole outlook far beyond the domain of science. (25)

We can see that the views put forward by MacCormick and by Lord Devlin of the proper role of the English lawyer or judge are remarkably similar. MacCormick states that "[t]heir proper role is wise and faithful application of the law", and that "...the law, once made, is binding law which the courts just have to apply..."(26). Lord Devlin states that:

It is their job to apply the law and they must try to make it fit; but new suits and new fashions should be designed by legislators. In this respect English judges seem to differ from American. (27)

In so far as there are differences in the rules of the English and American systems, the view being put forward in this chapter is that they are reflections of the different approaches taken by the judges, not the cause of them, as some would have us believe. Whilst Devlin is correct to point to the fact that the English judges may be different from their American counterparts, this would not be relevant if their job was merely to 'apply the law'. My argument is that this difference is of course relevant because judges cannot simply 'apply the law'.

Thus the claim by Lord Denning that the lawyer should strive to be an architect and not a technician becomes more supportable (28), and the depiction by Hart in terms of core of certainty and penumbra of doubt, less useful. Kline points out in Mathematics - The Loss of Certainty, that for nearly 2000 years people were misled in mathematics by failing to understand the nature of their abstractions. It seems to me that the 'loss of certainty' applies equally well to Hart's 'core of certainty' and for the same reasons.
The claim being made here is that to be conscious of anything necessarily implies a whole range of judgments; to be conscious, one must be conscious of something, and the objects of consciousness, which I have here called abstractions, presuppose the factors of demarcation generalisation and purpose. Thus our knowledge of the world is irreducibly selective and this selective awareness of the world is always capable of correction, development or improvement i.e. we can always see better, more, or differently (29).

Scientific, or rational methods of enquiry seem to proceed on this assumption - repetition of experiments, checking etc. all seem to be based on an assumption regarding the possibility of something other than our present perceptions. Whilst the possibility of this other - the world 'as it is' - is present as a basic postulate of many of the activities of our secular and religious life, a complete knowledge of it is incompatible with individual consciousness. "To know as such and essentially is to be the thing that is known."

We may well assert the existence of that which we cannot experience directly by showing it to be a presupposition of that which we can experience. This distinction between 'the world' and 'experience' is intended to be in line with Kant's distinction between noumena and phenomena. The former in both cases being a necessary presupposition of much of our thought and action. It is in Kant's terms a 'negative limiting factor' upon the phenomenal (31). It is well to appreciate that the underlying reality (the noumenal) insofar as it can be depicted is better seen as being in a state of flux - continuous movement and development as Bohm suggests, but to admit that this can only be known inferentially not experientially. We can then see that our 'intellectualising', our attempts to understand the world in which we live, are not intended to be like snapshots or a still frame of a moving film, but a drawing on and transformation of
reality, into a form which the mind can comprehend. Any static quality
is introduced by us simply to enable that assimilation by the mind and
is not to be regarded as a quality of the object of our concern. We are
reminded by the commentator on the Summa Theologiae that:

...the continuity between acting and being is never lost
sight of, despite the style of Scholastic Latin which uses
the language of 'reification' and gives the impression
of moving counters about in argument, of solidifying modes
of being, and of treating substance as something static to
which a dynamism is only adventitiously attributed. (32)

Conceptual expressions: The account given so far might suggest a
rather individualistic view of knowledge, but of course our knowledge
does not develop in isolation. From the moment of birth we are
continually reminded of the discriminations which others make and which
we fail to make. It may be that many of our earlier years are involved
in internalising these discriminatory frameworks of others (33). Thus
the criteria we use for demarcation and the generalisations which are
made become an automatic and sub-conscious process. This whole system
of criteria I have called a conceptual framework. So far as people are
able to communicate with each other without problems, they are liable to
assume that they are using the same conceptual framework. It seems to
me to be an inadequacy of a view such as Morison's, which we looked at
in chapter one, that it fails to appreciate that any understanding of
the phenomenal involves the utilisation of such a framework.

There are several claims which I wish to make in connection with the
conceptual.

(1) Although it is essential to any understanding of the phenomenal, the
conceptual is not derived in a logical manner from observation or
experience.

We have seen that there exist therefore no explicit rules
by which a scientific proposition can be obtained from
observational data, and we must therefore accept also that
no explicit rules can exist to decide whether to uphold or
abandon any scientific proposition in face of any particular new observation. (34)

Insofar as we attempt to give articulate expression to the frameworks which we employ, we do so in an attempt to capture, by way of definition, an insight which has not previously been recognised or understood. Contrary to the claim made by Hart which we referred to in chapter two, that theory should not develop on the back of definition, I wish to claim that definition is essential to our theoretical developments. Theory develops by way of analysis for which definition is an indispensable tool. Polanyi, after stating that definition is a formalization of meaning, continues:

Such definitions (like 'causation is necessary succession', 'life is continuous adaptation') are, if true and new, analytic discoveries. Such discoveries are among the most important tasks of philosophy. (35)

A. J. Ayer, a philosopher much closer to Hart's own position, than Polanyi, links analysis and definition when he states that:

When we consider, also, that Hobbes and Bentham [the latter has been a focus for much of Hart's writing in recent years] were chiefly occupied in giving definitions, and that the best part of John Stuart Mill's work consists in a development of the analyses carried out by Hume, we may fairly claim that in holding that the activity of philosophizing is essentially analytic we are adopting a standpoint which has always been implicit in English empiricism. (36)

For the philosopher, as an analyst, is not directly concerned with the physical properties of things. He is concerned only with the way in which we speak about them.

In other words, the propositions of philosophy are not factual, but linguistic in character - that is, they do not describe the behaviour of physical, or even mental, objects; they express definitions, or the formal consequences of definitions. (37)

Later, he states that, "...to ask what is the nature of a material object is to ask for a definition of 'material object',..." and presumably the same would apply if the object of interest was 'law' (38).

(ii) The definitional part of conceptual development is not capable of being confirmed by experience, and this is an important point which Hart, Morison and a multitude of others have failed to appreciate. Polanyi
states that "[v]erification, even though usually more subject to rules than discovery, rests ultimately on mental powers which go beyond the application of any definite rules."(39) In his later work he explains the situation in this way:

...definition is a formalization of meaning which reduces its informal elements and partly replaces them by a formal operation (the reference to the definiens). This formalization will be incomplete also in the sense that the definiens can be understood only by those conversant with the definiendum. (40)

He then clarifies what he means by being conversant with the definiendum:

The formalization of meaning relies therefore from the start on the practice of unformalized meaning. It necessarily does so also in the end, when we are using the undefined words of the definitions. Finally, the practical interpretation of a definition must rely all the time on its undefined understanding by the person relying on it. Definitions only shift the tacit coefficient of meaning; they reduce it but cannot eliminate it. (41)

Any understanding of rules then has to appreciate that they are an attempt to formalize meaning, but that this attempt takes place within and is guided by an unformalized context. The important point to appreciate is that action is not dependent upon the prior formalization of meaning as Hart seems frequently to suggest. Kuhn puts it this way:

Lack of a standard interpretation or of an agreed reduction to rules will not prevent a paradigm from guiding research ....Indeed, the existence of a paradigm need not even imply that any full set of rules exists (42).

Simpson puts forward a somewhat similar view in connection with his discussion of the common law when he states that formulations of the common law in terms of rules are an attempt to systematize and order the practice of the judiciary (43). Simpson clearly accepts, in connection with the common law, the point which has been made by Polanyi and Kuhn in their own field of science - that a particular practice does not depend on the prior formalization of meaning - in terms of rules - (44) but that if we begin to think in terms of rules, we may be able to introduce a greater sense of order and systematic development, than we could without them.
It is only when we begin to 'think' in terms of rules that MacCormick's ideas of coherence and consistency have any meaning. But when Simpson says that formulations of the common law in terms of rules are an attempt to introduce system and order, it also seems to be implied that it does more than merely reflect the pre-existing practice; the suggestion seems irresistible that it is also an attempt to alter it. Simpson actually says that the rules 'describe' the practices, that they 'attempt to systematize and order them', and that they serve as 'guides to proper practice'. This of course returns us to the issue which we looked at in the context of our discussion of Austin - whether these formulations are mere reflections of the reality with which they are concerned, as Morison suggests, or something more. It will be seen that the view being developed here, is that they are always 'something more'.

Kadish and Kadish make a similar point in the context of legal and moral rules when they say that, "[e]verything depends on what may be expected in the moral climate - those expectations can never be completely formulated"(45). Stone indicates his appreciation of this point when he says that vast areas of legal relations are not determined by rules at all. They involve principles incorporating standards such as 'good faith' and 'reasonableness'. They should not be seen as defective rules (or gratuitous as Ewing suggested ) for as Stone puts it:

They attempt to 'determine' legal relations only in the paradoxical sense of providing an indeterminate guide to the task of fixing them. They operate in the legal process only by the aid of other parts of the legal order, namely, the received ideals of lawyers and especially of judges, which, together with their own personal experience of the world, largely control the way in which they apply such standards.(46)

We certainly seem to have come a long way from the view that the legal system consists by and large of determinate rules which apply without further judgment. Here, we are looking at rules in their wider context. Shortly, I shall focus, as Hart did, on the aspect of rules,
and I will argue that, even there, they cannot be applied without
further judgment. However, before we leave Stone on this point, it
should be observed that whilst he points out that this aspect was not
catched by the Austinian view, that factor is not necessarily a criticism
of Austin:

It is certainly more just and more fruitful to understand him
as presenting an apparatus for seeing as clearly as possible
the aspect of a legal order with which his analytical system
was concerned. That is the susceptibility of its rules in a
certain degree ("more...than is imagined") to logically
coherent arrangement on the basis of definitions and classifications
which can be supplied. (47)

We are now in a position to appreciate the significance of saying
that definitions depend on 'undefined understanding'. They require an
appreciation of the context in which the definition is intended to
operate. We saw in chapter five how a shift in context from a procedural
one to a substantive one has major implications for interpretation.
Earlier we saw how the definitions of Austin had been rendered
meaningless by Hart's failure to appreciate their proper context.
However, what I am now drawing attention to is a distinction between the
differences which appear between the two groups of the judiciary in
chapter five, and the differences which appear between Austin and Hart.

We can see that the two groups of the judiciary differ in that they
provide a different 'contextual' framework within which the Violence Act
is to be interpreted. Both groups give reasoned explanations within the
perspective which they adopt, and we can see that given the purpose
which they believe the Act to serve, and given the criteria they adopt
for determining which of the vast array of legal materials (cases,
statutes etc.) are relevant to their considerations, both groups make
sense of the statutory provision. It can be seen then that to claim that
one view is right and the other wrong is to do nothing more than to
endorse one view and to fail to endorse the other. As Summers correctly
points out, the appropriate metaphor is not "following" but
"supporting" (48). It can also be seen that the dichotomy between a 'literal' and a 'purposive' application of the provision is misleading. In both cases the judges had regard to the purpose of the provision with which they were faced. In any situation where a general provision has to be related to more specific factors, a judgment is needed, and this will necessarily involve the attribution of some 'purpose' to that general provision.

However, the position is different with regard to Hart and Austin. It is not just that Austin intends his definitions to be placed in one context and that Hart places them in another. The difference is that Hart believes Austin to be putting forward statements of fact when he is actually putting forward definitions and he is thus led to the erroneous view that Austin's claims can be refuted by facts, which for Hart take the shape of claims about what people say and do. This represents a failure to appreciate the conceptual - empirical distinction, and attempts to set up an inconsistency between logically different modes of discourse.

Ayer appreciated this distinction when he referred to the relationship between definitions and conventions (by conventions, I take him to mean the practice which obtains within a particular social group). Whilst he refers to the fact that the utility of definitions bears a direct relationship to the extent to which they correspond with such conventions, "...it is a mistake to suppose that the existence of such a correspondence is ever part of what the definitions actually assert." (49). He continues in a footnote on the same page to state that if one wants to refute a philosophical opponent (who for Ayer is necessarily concerned with definition) the way to proceed is not to argue about habits, but to demonstrate that the definition involves a contradiction. We can see then that Ayer is concerned to make three connected points:

- the utility of definitions depends on their correspondence with
conventions;
- definition does not however assert such a correspondence;
- the test of definition is non-contradiction.

The good sense of this position was well accepted at the time that
Austin was writing, as we can see from the comment in the early review
of the Lectures:

Mr. Austin always recognises, as entitled to great consideration,
the custom of language - the associations which mankind already
have with terms: insomuch that, when a name already stands for
a particular notion (provided that, when brought out into distinct
consciousness, the notion is not found to be self-contradictory),
the definition should rather aim at fixing that notion, and
rendering it determinate, than attempt to substitute another
notion for it. (50)

Here we have a clear indication that Austin could see the benefits to be
obtained in keeping his definitions, as far as possible, in harmony with
prevailing usage, but that he did not, as Hart did, believe that usage
could be a test of a definition. It is clear from the comment by the
reviewer, that both he and Austin regarded 'non-contradiction' as being
the only appropriate test. I am encouraged in this view when I find the
expression of opinion on this matter by Cardinal Newman (a contemporary
of Austin's) which indicates an approach which Austin would happily
endorse:

I have defined a straight line in my own way at my own
pleasure; the question is not one of facts at all, but
of the consistency with each other of definitions and their
logical consequences. (51)

(iii) If a conceptual framework put forward by definition is neither
derived logically from experience nor tested by its compatibility with
the facts, how then is it to be evaluated? Not in terms of its being
right or wrong, because this suggests it has empirical validity and this
we have argued involves logical error. The framework is evaluated by a
combination of persuasiveness and relevance, and leads to a conclusion
as to whether it gives a better understanding of the world than we were
able to obtain previously without it. There is obviously nothing
'objective' in the nature of this assessment. Relevance invites the question 'to what?' The answer must be 'to matters with which we are concerned at any particular time'. Persuasiveness invites comparison with the frameworks which we have utilised previously, and is obviously relevant to the level of development of our thought in relation to the issues concerned.

We pointed out in the Introduction that in Kline's view, many mathematicians have become so specialised that it is frequently the case that only a small group of people are capable of understanding each other i.e. find some value in utilising the same framework as a helpful way of understanding the world. However, it must be said that for others, the uninitiated, they cannot say that those perspectives are wrong, unless they contain internal contradictions or inconsistencies. It follows from this that one cannot distinguish that which has no sense from that which has sense but has not as yet been understood. The old problem of distinguishing the profound from the pretentious. The danger of making positive assertions on the basis of such a distinction, is apparent when one considers that Horrobin's definition of schizophrenia would be sufficient to discourage all but the most hardy intellectuals from ever publishing their thoughts, especially if their work has elements of originality,(52) and this consideration formed something of an obstacle to Popper in his discussion of Hegel (53).

We can now see why it is that we would need to employ two types of expressions:
(a) to reflect the organisational aspects of our experience;
(b) to reflect the observational aspects of our experience.
We can also see that whilst we can separate these two aspects for the purpose of analysis, neither of them can be experienced separately or have any independent existence (54). Any understanding of organisation presupposes the existence of some material to be organised, and equally,
material cannot exist unless it has already been organised. Kant's intuitions of space and time presuppose an awareness of events, i.e. demarcation and change, without which 'time' would be a meaningless noise.

Empirical expressions: It is within this category of expressions that we normally find those referred to as 'descriptive'. However, we have already seen that although these terms refer to something within the cognitive field, they must also refer to something other than a unique act of perception. Thus it must be seen that when the empirical aspect is to the fore, it must be assumed that the aspect of demarcation and that of the appropriate level of generalisation is not at issue (55). In other words, these expressions depend, as we have seen, on a conceptual framework, and an understanding of the purpose or motivation giving rise to the use of those particular expressions. A shift, change or difference between people in these background assumptions will of course be reflected in their evaluation of the significance of the empirical expressions being used. The normal way of resolving differences in the assessment of the empirical expressions is by testing or repeating the observations. Now if people make a different assessment of significance regarding an empirical expression, and the difference is due to these background or conceptual matters, then an attempt to resolve them by checking the observational aspects would obviously be the wrong way of going about it; for any differences there will only reflect the non-observational matters.

It must be emphasised here, that although the empirical terms have the observational aspects to the fore, they are, as we have mentioned, the result of generalisation. It is always possible therefore to replace a descriptive term(s) with more specific terms at a lower level of generalisation. There is obviously no question of correctness
in terms of the appropriate level at which the abstractions are made—only what is sufficient for the purpose in hand. It is now clear why it is that Toulmin and Baier are right when they say that descriptions are never complete. It is always possible by adjusting the conceptual framework which we are using to allow for descriptions at a lower level of generality.

If the foregoing is correct, then it can be seen that any suggestions in the work of Hart, or of the authors we looked at in chapter four, to the effect that the judges are controlled or restrained by the rules or by precedent, must be incorrect, otherwise we could never give an adequate account of change and development in the law. As Simpson correctly points out in connection with the common law, there is no way of establishing a decision as 'authoritative'. "Nor does the common law system admit the possibility of a court, however elevated, reaching a final, authoritative statement of what the law is in a general abstract sense." (56) In other words, there are no authoritative rules in the common law:

Nor does it seem to me to be true, as positivists must have us believe, that once a rule satisfies the tests it can only be altered by legislation. The reality of the matter is that well settled propositions of law—propositions with which very few would disagree—do suffer rejection. The point about the common law is not that everything is always in the melting-pot, but that you never quite know what will go in next. (57)

We saw in chapter four that the claim that 'common law rules can be as determinate as statutory rules and therefore are only alterable by legislation', represented a view which Hart and our legal commentators had in common. Although we accepted that their agreement was substantial rather than complete, our concern is with that which they have in common, rather than that about which they differ. However, in chapter five, we found that when we looked at some of the rules which we might have expected to be amongst the most secure, we found that they were subject
to change by the judiciary. Although it might be claimed that with regard to the way in which the law changes, the legislators and the judiciary have their respective spheres of influence, the judges give the impression that this is a self-imposed limitation which can be thrown over in appropriate circumstances. Simpson is right to reject 'authoritative' in favour of 'well-settled'.

Our examination of the cases, and our theoretical discussion so far, appears to support the conclusions of Simpson in his questioning of the positivist position in relation to the common law. However, Simpson too, appears to underplay his hand when he distinguishes between statutory and common law provisions, suggesting that the former are in some way more determinate than the latter (58). This does not take account of the subtle relationship between the two. Whilst it may be the case that where we have a statutory provision we have 'an authoritative text', this is not the important factor. What is important is the 'meaning' of that text. What I hope to have demonstrated in the discussion of Davis in chapter five, is that whilst the courts may be provided with the text, they remain in control of the context, and it is the latter which is all important in the determination of the meaning of the former. This context will of course include 'the common law' as well as all those factors which Simpson indicates are an influence on the common law.

That this is so is made clear for us by L.C.B. Gower in his discussion of an area of law which would be regarded by many as 'technical'. In his discussion of the Companies Acts, he states, "[b]ehind the Acts is a general body of law and equity applying to all companies irrespective of their nature, and it is there that most of the fundamental principles will be found." (59) So even in an area such as company law, we find that the most important principles are not found in the legislation itself, but in the general body of law and equity 'behind the Acts.'
We are now in a position to evaluate the claims of the authors we looked at in chapter four - that judges can and should be amoral, apolitical etc. When we speak of moral, legal and political actions, we are not talking of different actions but of alternative ways of looking at actions. The error here is common and pervasive. We frequently hear people debating the question whether judges or religious leaders should be concerned with politics, as if they could by an act of will, avoid dealing with issues deemed to be 'political'. The point is though, that when we speak of actions as being legal, political and moral, we are not speaking of different actions, but actions seen from three different perspectives. We might borrow the expression of the commentator on Aquinas in his discussion of the Gifts, and say that when we extend our knowledge from the legal to the political and the moral, "[i]t is not that more things are known, but that things are better known."(60) So when we say that a decision is political, we are doing one or both of two things.

(i) We are saying that the decision can be viewed and evaluated from the political perspective - in which case we are stating what is obvious and necessary.

(ii) We are saying that the judge was aware of the political dimension and that this influenced his determination of the case. We must note here that merely to bring together a number of cases in which a particular judge was involved and to read off as it were political conclusions from the decisions as do Robson, Griffith etc., is only to do what was referred to in (i). Of course it is arguable that when a number of cases are viewed from the political perspective, they present such a clear profile, that they give rise to an almost irresistible inference that the only satisfactory explanation of such cases was that the judge was aware, or that he he must be extremely unthoughtful not to
have been aware, of his political predispositions. This is presumably
closer to the line which these authors wish to take, although without
notable success.

We can say then that **all** cases can be viewed from the political and
moral perspective. As Aquinas points out, "...all activity of human
beings which proceeds from deliberate reason must needs be good or bad
in the individual case"(61), and the reasons he gives also apply to
the political perspective - that any action will necessarily take us
closer to, or further from, our political or moral goals. The mere fact
that actions can be evaluated in these different ways does not of course
tell us that a particular actor had those views in mind when acting as
he did. The question as to whether he ought to take those perspectives
into account in coming to his decisions is one which for the moment
should remain open. All that we are concerned to do at the present stage
is to counter the claim that there are political and non-political (or
technical) cases.

The claim that judges should be apolitical or amoral (qua judges of
course), amounts to saying that they must adopt Nelson's approach and
turn a blind eye to the political and moral perspectives in which the
cases can be placed. We can see some difficulty of course for the person
who sets out to give an account of the way in which a judge could
perform his task without being able to refer to these excluded criteria.
The 'consequentialism' which MacCormick speaks of would not, presumably,
be available to such a judge, for how would he evaluate the various
alternatives? There is, perhaps, no internal contradiction in such a
position, and we may even be able to see an analogy in the attitude of
the courts to *travaux preparatoires*. However, it may be said that
a morally and politically blind judge is a far more dangerous beast than
one who is merely left in the dark as to the legislative intent. The
alternative for a proponent of such a view is to give an account of the
judge's task based on a 'professional / technical' account of the way in which rules work. We can see how Hart's account of rules with a core of certainty, which do not require further judgment in their application, provides the necessary theoretical backing for such a view. This unfortunate marriage of convenience, like most shotgun weddings, brings about strange alliances based on convenience rather than any natural affinity, and has little prospect of success.

The view taken here is that whilst it is useful, even essential, to distinguish between the moral, legal and political perspectives (in fact, as we saw earlier with Hart's discussion of Austin and the internal point of view, much confusion is due to a failure to make these distinctions) the mistake is in regarding them as having as their object separate or mutually exclusive events in the world. We noted in chapter one, the danger referred to by Bohm, when 'man ceases to regard the resulting divisions as merely useful or convenient and begins to see and experience himself and his world as actually constituted of separately existing fragments.' It is better to regard them (the moral, legal and political perspectives) as conceptual tools, which if used properly will enable us to develop a better understanding of our actions. Each perspective has its own rationale or purpose, and relevant considerations from the point of view of one perspective may not be relevant to the other. This is to say that the criteria we use in arriving at a conclusion in terms of one perspective, cannot, without more, be imported into the other perspective because the criteria being used only make sense in terms of the rationale and purpose of the perspective in which it is being employed. The commentator on Aquinas makes this point clearly when he says:

The relationship between theology and the positive sciences of law and politics is like that between general philosophy and the particular sciences, or between the first principles of thought and scientific conclusions in any field. Theology provides law and politics with an 'outside' test for what
may be held and done, or more pointedly, for what may not be held or done in accordance with men’s eternal destiny. It does not provide them with information within their own proper fields nor dictate their own proper methods. (62)

So it is with the present discussion. Insofar as it is a discussion of rules, it attempts to show how people working in different disciplines have a common view of the nature of rules and the way in which they work and how a perspective such as this is a far more fruitful way forward than the rather bland view of rules which Hart gives us. This alternative is more fruitful because it leads us on to ask new and more interesting questions. Rather than stamp our feet and proclaim against all the odds that the tide should not ebb and flow or that judges should not change the rules, we look at the situation in a new light and ask rather, why it is that such a change should be made at any particular time, or why in one direction rather than another.

What were the factors at work in *Vestey* which brought about the change of direction? The taxpayers certainly had substantial resources at their disposal, but this on its own would not have been sufficient. Who thought of placing the case in the context of the constitutionality of the claims by the Revenue? Why was it that after having upheld countless numbers of extremely artificial tax avoidance schemes by refusing to look at the rationale of the arrangement as a whole the courts suddenly changed their criterion of demarcation, and in *Ramsay* and *Furniss* considered themselves able to consider this very factor? Hopefully, and of equal importance, this view of rules requires us to give an account of stability as well as change. We can no longer say that the rules required a particular outcome without the interposition of any further judgments, or that they were applied in a literal or technical sense. As must now be clear from the previous chapter and the present discussion, there is always a gap between the formulation of a general rule and the decision in a particular case, and that gap has to be bridged by a judgment of the living mind, not the dead hand of the
past. If such a judgment cannot be avoided, surely it is better to face up to it and to attempt to indicate the factors which may be involved, rather than to deny its existence. In appreciating that such a judgment has to be made, it enables us to see that it is not contradictory to appeal on the one hand for a separation of law and morals, and on the other to see the necessary relationship between law and morals.

Several matters need to be clarified before we move into the final phase of our argument. The first is the very general point that I make no apologies for utilising arguments and points of view from the areas of the physical and social sciences, or from theology. I agree with the point made by Torrance when he said:

My general argument is to the effect that if we are to find a stable and enduring foundation for juridical law, we can hardly do better than take our cue from the astonishing advance of physical science in our times, as it has had to throw off positivist and conventionalist notions of physical law for a profoundly realist while dynamic conception of law...(63)

I hope, in the argument which I have put forward, to have attacked one view of positivism in law for the very reason that it does not allow us to appreciate the dynamics involved in the legal process, and I hope to have shown that it is very far removed from the positivism of John Austin. But why should discussions in the physical sciences and theology be of any interest to jurisprudence? Well, there are several points to consider:

The first is that suggested in the preface to this thesis and which has become a recurrent theme in the course of it. That each area of specialisation is our attempt to answer a different type of question - that the abstractions formulated in each of these areas are limited in their very nature by the criterion of demarcation (or relevance) being utilised, and which has been fashioned in the light of the question being asked. But of course, the answers which are developed in each
specialisation, being answers to their own particular type of question, are not contradictory to, or exclusive of, the answers formulated in answer to other questions. In fact, quite the reverse. Each specialisation is often a presupposition of work being done in another area. The theologian must live in the same world as the rest of us, and therefore needs to know as much about the physical sciences as anyone else. Just as the scientist may well have a spiritual, or religious aspect to his being:

There is a common setting for all the sciences, in which the special interest of each is held distinct, yet from which it cannot be pulled out without dislocating the body of human knowledge. Because of this common setting all the sciences are kin...[and one should] hold them together by a 'civil' and not 'despotic control', and to watch lest they become merely specialist disciplines without relevance to one another and the rest of life. (64)

But I want to claim more than that the various specialisations are simply complementary to each other. If it were just this, then it would be hard to see how they could interact with each other in the way that they do.

It is my view that they have something in common - a shared view of epistemology which is, as it were, their shared currency. For the purposes of the present thesis, I merely wish to argue that law, science and theology, or rather some lawyers, scientists and theologians, have a common perspective on the status and function of rules and which is based on a common view of epistemology. Further, that this view, which I find to be persuasive, is straining in the very opposite direction to that of much modern jurisprudence, especially that of Hart and Dworkin.

Much of this thesis has been an attempt to demonstrate that Hart failed to understand that abstraction and synthesis must go hand in hand. It has been a continuing part of my argument that this was not only appreciated by Austin, but essential to his position. It will be part of the argument which follows that Austin and Aquinas were involved in answering different questions, therefore their different
answers to those questions cannot be contradictory. Here, I merely wish to illustrate one aspect of their common ground - of the view of epistemology which they had in common. I have argued on many occasions that Austin's claim that law and morals have to be separated, and yet they are inseparably connected, depends upon an understanding of the nature of abstraction and synthesis and the need for both stages to be completed to obtain any understanding. That Austin has been misunderstood because the first phase of his work has been taken in isolation from the second. It is not that the nature of the relationship between abstraction and synthesis is new, but that the failure to appreciate the nature of this relationship is new. If we go to Aquinas, and his discussion on the nature of human intelligence, we can see a clear statement of just this sort of relationship. The commentator is discussing, "...the 'mode and order' according to which human knowledge unfolds, in which all the conclusions flow from the premise of the abstractive mode of human knowledge." He continues by giving a useful overview of the process as depicted by Aquinas:

The intellect has to combine and separate because its first apprehension is imperfect or incomplete. The incompleteness of abstractive knowledge is explained in article 1 and clarified in article 2. Next, article 3, the implication is drawn that the abstractions must begin with the most general, each successive one adding detail to ones that have gone before. Then, turning to the composition that puts together again what abstraction has separated,...(65)

As we have seen, what is referred to by Aquinas as 'the incompleteness of abstractive knowledge' is specifically referred to by Austin when he also indicates broad agreement with the point being made here regarding the complementary nature of the various sciences:

At every step which he takes on his long and scabrous road, a difficulty similar to that which I have now endeavoured to suggest encounters the expositor of the science. As every department of the science is implicated with every other, any detached exposition of a single and separate department is inevitably a fragment more or less imperfect. (66)

The other aspect which it seems to me is appreciated both by Austin and
Aquinas is what might be called 'the status and function of rules.' I have sought to argue that the position put forward by Hart, Robson, Watchman etc, cannot be helpful, for it supports the view that the judiciary either do (or should) apply the legal rules 'without further judgment.' But, it seems to me, that any adequate view of epistemology would be bound to lead to the view that such a thing is not possible. This, of course, is based on an appreciation of the nature of rules as abstractions.

Aquinas, constantly appreciated that rules are required to give form and shape to our understanding, and just as Austin emphasized that the legal rules always have to be constructed and extricated from the particularities of the individual cases, so does Aquinas appreciate that the application of any moral (or legal) rule always requires an understanding of how the rule fits back into the particularities of the individual cases:

Moral rule and law touch only part of the situation. Nevertheless they provide a certain necessary severity of outline, which so long as it is acknowledged to be only an outline is for the good. (67)

The commentator then points out that this attempt to construct 'the rules' is an important and necessary step, for without it, we are left only with a collection of case histories which may appear to us as no more than patterns of incidents. This is much like the view of law which Austin had (as we saw earlier) and which gave rise to the need for his outline. The commentator then goes on to make it clear that in the application of these rules, the particularities of the cases become all important again:

...well aware that general rules cannot meet individual cases entirely and that there is no foolproof mechanism for the operation of laws either human or divine, it is confident that conscience is sincere and trusts that it is well-informed. (68)

The commentator points to the Eternal law being, "...mediated to
us through natural law, given artificial shape by the positive laws of Church and State, and applied to particular issues through the voice of conscience."(69) He goes on to indicate that Aquinas admits that there is no escaping the control of conscience but that he accepts the logical consequences of such a position, "...nevertheless, in cases, not rare, where the conscience is mistaken it is never defensible to act against it."(70)

In other words, rules can never be applied 'without further judgment'. Rules always have to be applied to particular cases and this means unavoidably the involvement of judgment which is why Aquinas refers to 'conscience' 'prudence' 'love' as being indispensable guides to conduct (71). The same point is made by Torrance when he says that:

It was something pointed out by Kant in another connection, when he showed that no system of rules can lay down the procedure for the application of the rules themselves, and where we have to rely on what he called 'mother wit'.(72)

Or as he put it on the following page, "But no legal system of formal rules ... could be consistent and complete in itself at the same time, that is, if it claimed to contain its own justification within itself as a legal system." The only point at which I would take issue with Torrance is when he refers to Austin and Dicey and, "...the rigorous formalisation of law they advocated by reference to statute imparted not a little formal clarity and facility to its functioning in the courts. This is at the expense, however, of a serious dichotomy between the law as it is and the law as it ought to be..." (73); which hopefully we can now see to be a failure to appreciate the subtlety of Austin's position. Whilst the legal commentator can meaningfully make the distinction, it is much harder for the judge, as an active participant in the legal order, to make this distinction between law and morals. Because each of the disciplines exists as an abstraction with its
own particular rationale and purpose, each is, in the end, dependent on the others. The commentator on Aquinas expresses it well when he states that, "[m]oral answers may sometimes depend on medical answers, and moral science itself needs to be well-grounded on non-moral sciences, physical, philosophical, and theological." (74)

As the legal science which is beholden to social and political ethics recognizes that its precepts do not comprehend their purposes;... So also moral science recognizes that it must look beyond itself for justification. 'Subordination' may suggest a greater subservience in modern English than it does in Latin; all that is meant is that moral science is not independent and self-supporting, but holds a place in the company of the other sciences. It is part of the general reading of the world of nature... (75)

We have already seen in this chapter how Polanyi claims that science itself is based on matters which are unscientific, such as 'intellectual passions'. We can see then that the conclusions derived from one perspective may be relevant to another, and again we can turn to the commentator on Aquinas to help us see the nature of this relationship:

It is not for the moralist to decide what is the ultimate good, either in itself or for man. This is a question for the metaphysician and the dogmatic theologian. The conclusions they come to serve as the premises of the moral science that depends on them and is co-ordinated with other disciplines. (76)

So, we can see that having determined that an action is in accordance with or at odds with the moral point of view, this may then be relevant to a consideration of its legal status. Equally, having determined whether an action is legal or illegal, that conclusion may be relevant to a consideration of its moral status. A conclusion then from one perspective may be a relevant criterion in another perspective.

It is at just this point that Hart's claim to understand and accept 'the separation of law and morals' becomes unclear. We have already seen that in his elucidation of law he speaks at length of what Austin would have regarded as factors of positive morality and ethics, and that Hart, in his later work, is obliged to re-introduce this distinction. The separation is a separation purely for intellectual purposes, and is
intended to facilitate a more sophisticated appreciation of our environment (taken in its broadest sense). In other words, a conceptual framework which allows us to ask three different questions is better than one which allows us to ask only one question. Suppose I only had the ability to distinguish between 'big' and 'small'. I would have to use the same word without being able to distinguish the dimension which was extended or reduced. However, if my framework allowed me to distinguish between different dimensions, I could convey information separately regarding height and width. This was all that Austin was trying to do in *The Province* - to provide a framework which would clarify which particular dimension was being considered at any one time, and thus, what criterion of demarcation was being employed. This would avoid the utilisation of a criterion which was relevant to one factor, in the consideration of another. It allows, in other words, an ordering of our thoughts. He avoided any charges of fragmentation of his ideas, by stating clearly that each was part of an organic whole.

However, there is one situation in which the language being employed suggests a multi-dimensional framework, where in reality, there is only a single dimensional framework. This is where the conclusions from one perspective are dependant on, or have a necessary correlation with, the conclusions from another perspective. Herein lies the reasons for Hart's misunderstanding of both Austin and Aquinas, and hence the apparent justification for his limited view of natural law.

That Aquinas is often thought to be an adherent of the position which says that moral principles are an integral part of the criteria for legal validity can be seen in the recent exposition of Benditt on this point:

Natural law theorists have held that there is a connection between natural law and human law (which is the fourth kind
of law distinguished by Aquinas). The connection is that if something is a genuine human law it will not violate the natural law. That is, however much something might appear to be law (that is, positive law, or human law), it is not law at all if it violates natural law. This point is sometimes put by saying that an unjust law is no law at all. Or to express it in more modern terminology: being in conformity with correct moral principles is one of the criteria for the validity of law, for being part of a legal system. (77)

A common view of the perspectives of Austin and Aquinas is put by Benditt in a way similar to that of Harris which we looked at earlier:

But the most important critique of natural law theories, for our purposes, has to do with the connection between natural law and human law. The natural law view, we saw, is that human law must comply with natural law, and that whatever does not comply with natural law is not law. This position is denied by a great many writers on law, and this denial constitutes the basis of legal positivism...What the law is, the positivists say, and what it ought to be are two distinct questions that must not be confused with one another. (78)

We have seen in chapter two how Ruben misunderstands the nature of the relationship between law and morality in Austin's scheme of things, and can refer to, "...the emphasis on the subject's duty to obedience in his legal theory."(79) I now wish to claim that Benditt's interpretation of Aquinas, amounts to a popular misconception of his view of the relationship between natural and positive law, and that contrary to the claims of both Hart and Benditt, he is in fact much closer to Austin.

One of the difficulties expressed by Benditt is that whilst some legal principles can be drawn demonstrably from Aquinas's principle of natural law 'that good is to be done and promoted, and evil is to be avoided', this clearly enables us to say that we should not murder people, but is killing in self defence in accordance with or at odds with that principle? To suggest that for Aquinas, all principles of law are drawn demonstrably or deductively from the natural law, is incorrect and fails to take account of his view which we noted earlier in this chapter. Human laws may be drawn deductively like conclusions from premises from the natural law, but others (the second process he refers to) may be more like the practice of an art. He says of this:
Commands, however, that issue according to the first 
[deductively from the natural law] have part of their force 
from natural law, and not only from the fact of their 
enactment. Whereas commands that issue according to the second 
have their force only by human law. (80)

However, the misunderstanding of Aquinas is based on another important, 
but frequently overlooked factor. The term 'law' can have different 
meanings according to the context in which it is used. When the lawyer 
reads the texts of Aquinas, he may well assume that 'law' has the same 
meaning in both cases, and that if Aquinas were to say that something at 
ods with natural law is not law, then he must necessarily be denying 
the positivist thesis. This is to commit the error which I referred to 
earlier. To utilise a criterion taken from one context in another, 
without appreciating that part of the meaning of that criterion depends 
on its context. As the commentator on Aquinas tells us:

To be lawful is to be free, for to be lawful in the proper 
sense of the term is to act with responsibility in accepting 
the law and making it your own; to be under a law otherwise 
is to have law only in an extended sense, and in man is to 
suffer its force or to be punished. This thought runs 
throughout the treatise. (81)

If Aquinas intended the first use of law in the positivist sense, then 
he would be denying the possibility of positive law. The point is that 
Aquinas is aware of this dual meaning of the term 'law' and uses it in 
both senses. Any interpretation of his work which does not allow for 
this is likely to mislead. An important thread running through this 
thesis is the point of view expressed by Collingwood - that statements 
are answers to questions, and that for statements to be contradictory, 
they must be answers to the same question - that we misunderstand a 
writer if we fail to understand the question he was intending to answer.

Nowhere could these considerations be of more importance than in 
this area of conflict between advocates of natural law and positivism. 
Simply put, Aquinas and Austin were attempting to answer different 
questions, and nothing which either says in his attempt to deal with his 
respective task can be seen as contradicting the claims of the other.
The apparent contradiction is merely superficial, and stems from a failure to appreciate the different contexts within which each was working. The commentator on Aquinas makes this clear when he states that:

The sciences of law and politics are not merely extensions or prolongations of moral and social philosophy and theology, but deal with fresh and additional evidences;... So then when the positive disciplines of law and politics, ...discuss legality and the effective possession and performance of governmental powers they are not dealing precisely with the lex and dominium of the Summa.... While admitting the difference of meaning between law for the jurists and for the theologians, it should be acknowledged that both have earned their rights to the term;...Had the formal difference between their concepts been better recognized, then each side might have been less invasive and contemptuous of the other. (82)

To say that law and theology utilise fresh and additional evidence is to say that they utilise different criteria of demarcation or relevance, and they approach that evidence with different purposes in mind. "...the double meaning of law tends to be forgotten. Nevertheless it is always there, an ambiguity that arises from the differences of interest in the disciplines engaged,..." (83). When Aquinas speaks of natural law, he is not speaking of the matter with which Austin was concerned in The Province - the institution of law within the modern state. He is speaking rather of man's spiritual source and his standing in the context of his eternal destiny:

Unless the natural-law doctrine of the Summa is seen in the light of this origin and this end, it loses its theological force and becomes a matter of philosophy, which may well be defended, but as something less than the meaning set forth in the Summa. (84)

However, it is not as though in any situation one can ask first what is necessary in the context of man's eternal destiny, then what is required by the law of the State, and compare the two for compatibility:

...the rule and measure of natural law is not to be pictured as though it were a kind of grid that could be laid on the plan of human life. (85)

The precepts of natural law are, because of their generality and purpose, difficult for the mind to grasp, and one needs therefore the skill of
statesmanship to provide a more explicit code.

The inspection of the moral law does not furnish the method for making positive laws, nor does an appeal to natural law legally settle a case. Positive laws have their peculiar force, vigor, from the fact that they have been instituted by human authority, not from natural and moral law; they are arbitrary in the sense that they could have been different, but the fact that they have been enacted is the immediate reason why they are obeyed. (86)

Benditt's suggestion that natural law provides criteria of validity for positive law is to misunderstand the nature of this relationship - it is better seen as one of partnership rather than one of competition for power.

So the relationship of positive and natural law is a complementary one (87). Each has its proper function. For Aquinas, his main concern is with theology of which his natural law is a part. So far from being hostile to positive law he shows the need for it. In the event that a sovereign commanded that to be done which was wicked, both Aquinas and Austin would give the same answer. The important question to be determined is what is to be done. What one should call the sovereign's command is merely a terminological dispute - for Aquinas the answer is that one must always act in accordance with conscience, even going so far as to say that a mistaken conscience binds, "[t]he ruling principle is clear; a man who acts against his conscience is always in the wrong, even if his conscience is mistaken." (88) Austin would say that the matter is determined by considering which is the greater sanction - that of the earthly or heavenly power. Obviously his allegiance would be to the latter rather than the former.

Both Austin and Aquinas have a conservative view as regards the duty of obedience to the positive laws of the State, but in an appropriate situation, both would advocate acting in accordance with conscience or that standard which is the test of positive law. Neither would see any value in denying the title of positive law to that which was commanded - because for neither would an answer either way be significant. Both
would surely regard it as a sterile terminological dispute.

It this thesis has any value, it is hoped that it will be seen as an attempt to explain why we should reject Hart's invitation to make a fresh start. Austin has made a lasting contribution to the development of our ideas, and this should be acknowledged. When we see that the views of Austin and Aquinas are compatible, we find that instead of the meagre diet of ideas which would appeal only to Martians, we have rich resources in both moral and legal theory to draw on. Instead of accepting the confusing account of the internal point of view which Hart puts forward, we can derive far greater benefit from that put forward by Newman. Instead of minimising or denying the role of judgment in the development and application of rules we instead point directly to it. In appreciating that different disciplines have more in common than is often imagined, we appreciate that the scientist has as great a need to learn from the moralist and the lawyer as the lawyer has from the scientist and the theologian. For they are in truth, like the members of the committee which we spoke of earlier, and each is engaged in a different aspect of the one project.
APPENDIX 1

INTRODUCTION - NOTES.

(1) Ota Weinberger expresses a view similar to that taken in this thesis. He asks why it is that people keep searching for the philosophical underpinnings of the various disciplines when they keep coming up with such diverse views. Would it not be better, he asks, to devote time exclusively to one of the more specialised disciplines which offer the possibility of more tangible results? He then answers the question in the following manner:

I believe that such hostility towards philosophical brooding is both misguided in itself and is moreover inimical to the development of the individual specialised disciplines. The human mind is philosophical, it has to understand, to grasp and to grow acquainted with the fundamentals as well as surveying the epistemological and methodological interconnections within a particular discipline....Solutions to the problems of the specialised disciplines and divergent opinions on individual questions both depend to a large degree upon the philosophical foundations of the rival conceptions.

I have been fortunate to obtain this note from the manuscript of the forthcoming translation of "Die Norm als Gedanke und Realitat" Osterreichische Zeitschrift sur Offentliches Recht vol 20 1970 pp203-216.

(2) "...the particular formulation of a question conditions the form and the content of the answer, and also that what we find is inevitably influenced by what we are looking for." J.D.Finch Introduction to Legal Theory Sweet & Maxwell 1974 p16.

Thomas S. Kuhn also indicates the importance of asking the right questions in The Structure of Scientific Revolutions 2nd ed. University of Chicago 1970 pp2, 54. He also makes the point rather nicely when he states:

Instructed to examine electrical or chemical phenomena, the man who is ignorant of these fields but who knows what it is to be scientific may legitimately reach any one of a number of incompatible conclusions. Among those legitimate
possibilities, the particular conclusions he does arrive at are probably determined by his prior experience in other fields, by the accidents of his investigation, and by his own individual makeup. What beliefs about the stars, for example, does he bring to the study of chemistry or electricity? Op. cit. pp3,4.


(3) Paladin 1977 pl11. Later, at p152 he cites D.J. West in support of the view that 90% of the offspring of habitual prisoners "...turn out to be good, decent, solid citizens who do not commit crimes of any kind." (Emphasis added)

(4) Tom Bingham (Formerly H.M. Principal Inspector of Taxes) Tax Evasion - The Law and The Practice, Alexander Howden Financial Services Ltd, 1980 p7. The 123rd Report of the Board of Inland Revenue states, "[i]t is noteworthy that omissions are currently being found in over 80 per cent of the cases being taken up for investigation,..." H.M.S.O. 1981 p30.


(6) I have taken this comment from the open letter by A. Harari "H.L.A. Hart and his The Concept of Law (1961)" 1972 p2.

(7) Oxford University 1961. Hereinafter referred to as 'The Concept'.


(10) This phrase is taken from Morris Kline in his discussion of mathematical theories of the 18th and 19th centuries in Mathematics- The Loss of Certainty Oxford University 1980 p166:

What d'Alembert said in 1743, "Up to the present...more concern has been given to enlarging the building than to illuminating the entrance, to raising it higher than to giving proper strength to the foundations," applies to the work of the entire 18th and early 19th centuries.


P. Robson and P. Watchman eds. Justice Lord Denning and the


Davis v Johnson [1978] 1 All E.R. 841.

(13) Kline op. cit. p283.

(14) id. p286.


(16) J.H. Newman makes a similar point when he says, "...supposing one of us had only the sense of touch, and the other only the sense of hearing?" A Grammar of Assent University of Notre Dame 1979 p96. It should be noted that Newman's Grammar was first published in 1870.
CHAPTER ONE - NOTES.

(1) The lectures comprising The Province were re-published as the first six lectures of Austin's Lectures on Jurisprudence or The Philosophy of Positive Law (hereinafter referred to as 'Lectures '). The edition used here is the 5th ed. revised and edited by Robert Campbell, 1885. References to The Province or any other of Austin's Lectures will be to this edition, and to avoid unnecessary proliferation of footnotes, references to these Lectures will, where convenient, be included in the text. I will continue to refer to the first six lectures compendiously, as 'The Province'. In all references to the Lectures, the appropriate section will be indicated in brackets thus: Lectures (III) - to indicate lecture III, 'Uses' in brackets will refer to the essay entitled 'On the Uses of the Study of Jurisprudence'.

(2) This is evidenced by the fragment of the letter which remains, from Austin to Sir William Erle, Chief Justice of the Common Pleas, and which is contained in Sarah Austin's moving preface to Austin's Lectures:

I intend to show the relations of positive morality and law (mos and jus), and of both, to their common standard or test; to show that there are principles and distinctions common to all systems of law (or that law is the subject of an abstract science); to show the possibility and conditions of codification; to exhibit a short scheme of a body of law arranged in a natural order; and to show that the English Law, in spite of its great peculiarities, might be made to conform to that order much more closely than is imagined.
Lectures (Preface) p17.

(3) The main re-statements of Hart's position are found in

Law Liberty and Morality Oxford University 1963
Essays on Bentham Oxford University 1982
Essays in Jurisprudence and Philosophy Oxford University 1983.
The main discussion of these adjustments to Hart's views will take place in chapter three.


(6) On the former, see his interesting discussion of this position at Lectures (VI) p284, 285:

It has often been affirmed that 'right is might' or that 'might is right'. But this paradoxical proposition (a great favourite with shallow scoffers and buffoons) is either a flat truism affectedly and darkly expressed, or is thoroughly false and absurd... If it mean that might and right are one and the same thing, or are merely different names for one and the same object, the proposition in question is also false and absurd.

The latter point will be taken up in chapter six.

(7) In the first sentence of this extract, the word 'text' is used in the original. However, I suggest that it should read 'test' of both, and for this view I seek confirmation later on in the same advertisement where it is said that:

He (author) had thought of entitling the intended essay, the principles and relations of law, morals, and ethics: meaning by law, positive law, by morals, positive morals, and by ethics, the principles which are the test of both. Lectures (Preface) p17 (emphasis in original).

Further confirmation is, of course, provided by the letter to Sir William Erle, cited supra p12.


(9) For some glaring examples of this see W.L. Morison "Some Myth About Positivism" (1959–60) 68 Yale L.J. 212, especially pp 214,215. Here I am reminded of Laslett's comments regarding the quality of scholarship concerning Locke:

How is it possible that a work of such importance can have been treated with such looseness of thinking, such insouciant carelessness about evidence, such extraordinary credulity?

John Locke Two Treatises of Government Cambridge University 1960 Introduction by Peter Laslett pxi.
Austin's contemporary, John Henry Newman, who first published *A Grammar of Assent* in 1870, and who is referred to at various stages in this thesis fared little better. The literature which developed around his work has been described as a "morass of misunderstanding". Op. cit. p8.

(10) Op. cit. p38. Ruben would have been assisted by turning to the index in Austin's Lectures where she would have found the following entries:

"Test of positive law and morality"

"Divine Law, the ultimate test of **positive law** and **positive morality**". (Emphasis in original).

Her comment is all the more surprising in that the first paragraph of her article contains this comment:

Every jurisprudence student knows of his definition of law as command, duty and sanction, of his definition of sovereignty and independent political society, of his efforts to separate law as it is from law as it ought to be, or in Austinian terms, the province of jurisprudence from that of legislation, ethics, religion and political economy. (Emphasis added)

(11) Raymond E. Brown S.S. "Hermeneutics" in *The Jerome Biblical Commentary* Prentice-Hall 1968 p614 para 49. It will become clear as this thesis develops that an important distinction between Hart's position and my own is that he rejects the methodology of the empirical sciences as useless and stresses the value of the approach which he later calls the hermeneutic a approach. I believe that his outright rejection of the former is based on a too narrow view of what is involved in the scientific approach and it is will be clear from this thesis that I find t that it has more to offer than does Hart. See his comment in *Essays in Jurisprudence and Philosophy* Oxford University 1983 p13.

Although as we can see from the preface, this plan was found on a loose sheet of paper, and has been included at the very end of the Lectures for convenience. In this context it is interesting to note that Austin's approach is endorsed by modern writers on information systems. Margaret Boden, for example, states:

One of the most effective problem solving strategies... is planning, in which a simplified version of the problem as a whole is used as a model for solving the problems, details being filled in later as necessary. Artificial Intelligence and Natural Man Harvester 1977 p354.


Lectures (Uses) p1072. See also the citation in note 2 supra, '..law is the subject of an abstract science...'

Hart makes it clear that he accepts the distinction and appreciates the reasons for it in "Positivism and the Separation of Law and Morals" (1958) 71 Harvard Law Review 593 at 598. However, the argument of this thesis is that he confuses this distinction in The Concept of Law, and then has to re-introduce it in Law Liberty and Morality.

The volume now republished includes the first ten of the Lectures read at the London University; which, though divided into that number for delivery, were (to use the author's expression) 'in obedience to the affinity of the topics', reduced by him to six. Lectures (Preface) p23.

See Lectures (Outline) p33 and Lectures (I) p100, where he points out that all rights have corresponding duties, although he does allow that there are 'absolute' duties i.e. duties with no rights. Cf W.N. Hohfeld Fundamental Legal Conceptions 1919 Yale University, for an important development of this view. It is perhaps worth adding that the development by Hohfeld of the Austinian approach is in line with T.S. Kuhn's view of science:
In a science, on the other hand, a paradigm is rarely an object for replication. Instead, like an accepted judicial decision in the common law, it is an object for further articulation and specification under new or more stringent conditions. The Structure of Scientific Revolutions 2nd ed. University of Chicago 1970 p23.

(20) Ruben speaks of Austin's theory of law, "...which he wants to be scientific and descriptive...". Op.cit. p30.

(21) We can see this particularly clearly in his treatment of 'right'. Austin clearly regards the notion of right as part of the necessary features of law:

Of these necessary principles, notions and distinctions, I will suggest briefly a few examples 1. The notions of Duty, Right, Liberty...Lectures (Uses) p1078.

We can also see that he does not regard the elucidation of the notion of 'right' as an important part of The Province:

The meanings of the term right, are various and perplexed; ... It is not, however, necessary, that the analysis should be performed here. I purpose, in my earlier lectures, to determine the province of jurisprudence ...And this I may accomplish exactly enough, without a nice enquiry into the term right. Lectures (I) p100 (emphasis in original).


(23) Stone makes it clear that Austin's formulae for 'independent political society' and 'sovereignty' cannot be regarded as descriptions, and were not so regarded by Austin otherwise he would not have regarded them as a 'fallible' test. Op. cit. p71.

(24) Kline also refers to the idea of a definition being a description of a concept: "Now Aristotle had pointed out that a definition must describe the concept being defined in terms of other concepts already known". Mathematics - The Loss of Certainty Oxford University 1980 p101.


(27) Popper Conjectures and Refutations Routledge and Kegan Paul
4th ed. 1972 p46. See also Kuhn op. cit. p16; and at p17 he makes
the point that, "[t]o be accepted as a paradigm, a theory must
seem better than its competitors, but it need not, and in fact
never does, explain all the facts with which it can be confronted."

(28) Jack P. Gibbs "Definitions of Law and Empirical Questions" Law
and Society Review 1968 p429.


(30) As we shall see in chapter six, I explain this by stating that
any abstraction requires or presupposes a criterion of demarcation.

(31) Boden op. cit. p188.

(32) Id. p220 (emphasis added).

(33) MacCormick Legal Reasoning and Legal Theory Oxford University

(34) Bohm Wholeness and The Implicate Order Routledge and Kegan
Paul 1980 p2.

(35) Lectures (Uses) p1076.

(36) Ibid. It will be clear from the view which I am putting forward
here, that I dissent from the view expressed by W.L. Morison
when he says that:

"Austin does indeed say that some legal terms will not
admit of definition in the formal or regular manner in his
introductory remarks in Uses of the Study of Jurisprudence,
probably just retailing recollected Bentham. But then
proceeds to his work on the opposite basis."

John Austin Edward Arnold 1982 p60. I think it is clear from
the passage I have cited in the text that Austin is comparing
definition in the 'formal or regular' manner which involves an
abridged and concise definition, or 'short and disjointed'
definitions as he says in the next paragraph with the approach he
adopts himself in The Province, which is to provide a dissertation,
"...long, intricate and coherent." Morison's interpretation can
be dispelled by a careful reading of the passages concerned - Lectures (Uses) p1076, first two paragraphs. Hart also arrives at a similar misunderstanding, see Essays on Bentham Oxford University 1982 p130.

(37) The reviewer of The Province expresses the nature of this relationship in the following words:

The arguments hang together like the links of a chain cable, or like the scales of leviathan. They are 'shut up together as with a close seal; one is so near another that no air can come between them. They are joined to one another, they stick together that they cannot be sundered'. Edinburgh Review 1861 vol. CXIV p467.

(38) J.W. Harris Legal Philosophies Butterworths 1980 p16.

(39) Id. at p24.

(40) Id. at p21.


(42) Id. p461 (emphasis in original).

(43) Ibid.


(45) John Finnis Natural Law and Natural Rights Oxford University 1980 p18. There are comments to similar effect by Morison, "... a historical account of law could, for example, be written from a natural law point of view, in which case it would come into conflict with Austinian theory just as much as any other natural law interpretation of any facts." Op. cit. p150. Stone also fails to make this distinction, "...like Bentham, he [Austin] regarded natural law not as a powerful instrument of such change, but as the arch-example of such looseness." Legal System and Lawyers Reasoning Stevens 1964 p65.

(46) Harris op. cit. p21.

(47) Morison op. cit. pp92, 154, 166 and many others.
(48) Id. p173.

(49) Gerard Maher "Analytical Philosophy and Austin's Philosophy of Law" 1978 Archiv fur Rechts-und Sozialphilosophie 401.

(50) Morison op. cit. p178.

(51) Id. p169.

(52) Id. pp180, 181. A little earlier, Morison refers to Austin's solution as "...no doubt inept and absurdly simple..." Id. p145.

(53) Id. p182.

(54) Lectures (Uses) p1072 (emphasis added).

(55) Lectures (Preface) p17.

(56) Morison op. cit. p166.

(57) Id. p207.

(58) Lectures (Analogy) p1012.

(59) Edinburgh Review 1861 vol. CXIV p457

(60) Ibid.

(61) Stone op. cit. pp66, 67. Stone expresses a similar view at p90, to which he adds in a footnote, "W.L. Morison op. cit. 221, 224, writes as if these assumptions by the present writer were not clear to him." The reference is to Morison's article "Some Myth About Positivism," (1959-60) 68 Yale L.J. 212.

(62) Morison op. cit. p125.

(63) Id. p59.

(64) Id. p149.

(65) Id. p141.
CHAPTER TWO - NOTES.


(2) Lectures p89.

(3) Hart acknowledges the generality of law in his backnote p236.

(4) For a more detailed discussion of Austin's 'habit of obedience', and a prevalent misunderstanding of it which Hart continues, see the following chapter.

(5) Harris Legal Philosophies Butterworths 1980 p29 (emphasis added).

(6) Ibid. (emphasis added). In a similar vein, Gibbs points out:

...criticism of a coercive definition because it does not explain conformity to laws is simply irrelevant, and all the more so since such definitions do not, in fact, necessarily assert that coercion explains conformity.

J.P. Gibbs "Definitions of Law and Empirical Questions" Law and Society Review 1968 429 at 435. Stone op. cit. p76 makes a similar point. It is certainly the case that nothing in what Austin says can be taken as an explanation of why people obey the law, although he is often criticised by Hart and others for giving an inadequate explanation of this phenomenon.

(7) George A. Miller Psychology Pelican 1966 pp67,70.


(10) Boden Artificial Intelligence and Natural Man Harvester 1977 p275.

(11) E. Gellner Words and Things Routledge and Kegan Paul 1979 p111. Hart fails to appreciate this and frequently opposes the 'natural view' to the new perspective as though the former were, without
more, a repudiation of the latter - which of course it is not.


(13) Polanyi Personal Knowledge p162.

(14) I have taken this comment from Harari's discussion of this matter, op. cit. pp36, 37.

(15) Hart's development of norms by way of extrapolations from practice is considered in some detail in the next chapter.

(16) W.N. Hohfeld Fundamental Legal Conceptions Yale University 1919 Foreword by Arthur L. Corbin ppvii - viii. At p35 Hohfeld refers to "chameleon hued words".


(18) Stone Legal System and Lawyers' Reasonings Stevens 1964 pp70,71.


(20) The Concept p31. See also Hart's comments in his backnotes:

The pursuit of a general definition of law has obscured differences in form and function between different types of legal rules. The argument of this book is that the differences between rules which impose obligations, or duties, and rules which confer power, is of crucial importance in jurisprudence. Law can best be understood as a union of these two diverse types of rule. The Concept p237.

In considering the criticism in the text of the various attempts to eliminate the distinction between these two types of rule or to show that it is merely superficial...

The Concept p238 (emphasis added).

It is worth considering how far the reductionist legal theories, criticised in this chapter, similarly obscure the diverse functions which different types of legal rules have in the system of social activity of which they form part. The Concept p239.

Hart's reference to "...the itch for uniformity." The Concept p32.

A full detailed taxonomy of the varieties of law comprised in a modern legal system, free from the prejudice that all must be reducible to a single simple type, still remains to be accomplished. The Concept p32 (emphasis in original).

(21) See further discussion of this point at the beginning of chapter six.
(22) Gibbs op. cit. p443.


(25) Lectures (Outline) p43, and which he repeats at Lectures XLV p761. I do not mean to suggest that the distinction means the same thing to Austin and Hart, but merely wish to refute the suggestion that Austin did not distinguish between different types of rules (or duties) or that the distinction into primary and secondary is original with Hart. For the present purposes I do not regard it as a significant difference that Austin's discussion is in terms of primary and secondary rights or duties and Hart's is in terms of primary and secondary rules, as is made clear by the following comment in the early review of The Province:

> These are illustrations of legal rights, or rights answering to laws in the full sense of the word. Moral rights stand in precisely the same relation to moral rules as legal rights to laws, and they differ from legal rights in particulars correlative to those in which moral rules differ from laws. Edinburgh Review 1861 vol. CXIV p469.


The reference to Hart is to The Concept p113:

> [o]f course it is also true that besides these there will be many primary rules which apply to officials in their merely personal capacity which they need only obey. (Emphasis added).


(29) Id. p77.

(30) Gibbs op. cit. p440.
There is a similar misplacement of emphasis in the account of Austin given by Simpson:

In its strong form, as presented by Austin, it claims that the common law consists of rules which owe their status as law to the fact that they have been laid down.

"The Common Law and Legal Theory" in Oxford Essays in Jurisprudence second series Oxford University 1973 p84. However, he puts this point forward later when he states that the rules enjoy their status not because of the circumstances of their origin, but because of their continued reception. Id. p86.

Edinburgh Review 1861 vol. CXIV p471 (emphasis added).


Id. p36 (emphasis added).

Edinburgh Review 1861 vol. CXIV p470 (emphasis added).

Morison John Austin Edward Arnold 1982 p92 (emphasis added).

Further difficulties are provided for us by Morison's failure to distinguish between rules of different types when he adopts Salmond's correction of Austin in relation to custom. Op. cit. p156.

Id. p162.

Benditt op.cit. p67.

The Concept p60.

This comment is intended to reflect the following remark by Gellner op. cit. p261:

In its preference for and vindication of the simple unspoilt popular view against the reasoned subtleties of the ratiocinator, Linguistic Philosophy is a kind of Populism. The folk whose simple but sound folk-culture is being defended and preserved against corruption by specious, theoretical philosophy is the folk of North Oxford, roughly.

Simpson op. cit. p80.
CHAPTER THREE - NOTES


(2) Harari makes a similar point, op. cit pp32, 67.

(3) I. Kant Critique of Pure Reason (Kemp-Smith ed) MacMillan 1929 p48.


(8) MacCormick H.L.A. Hart pp25, 26 (last emphasis in original others added).

(9) Lectures (V) p183. In the edition of the Lectures used here the first use of 'indeterminate' actually reads 'intermediate', but it is clear from the remainder of the paragraph that this is merely a typographical error.

(10) Beehler op. cit. p127.


(12) Id. p104.

(14) Hood Phillips op. cit. p106.

(15) Hart's use of the authorising rule in this way might best be regarded as a 'retrospective fallacy'. In other words, one can always say that a rule exists, but this can only be known after we know of the behaviour which the rule is supposed to determine. See M.R. Kadish and S.H. Kadish op.cit. p69ff. I do not use this term in a perjorative sense. If one appreciates that the 'understanding' invariably works backwards, then there is no misunderstanding. "Newman's analysis of assent is, as Coulson says, 'retrospective'; he is 'trying to understand backwards what has been lived forwards.'" Nicholas Lash Introduction to A Grammar of Assent University of Notre Dame 1979 p18.


(19) Id. p467.

(20) Lectures (I) pp86-92.

(21) A.W.B. Simpson "The Common Law and Legal Theory" in Oxford Essays in Jurisprudence second series Oxford University 1973 p82. Although Simpson states that Kelsen adopts a similar position to that of Hart, he provides no reference to support this contention, and it is arguable that Kelsen was in fact a strong positivist.

(22) H.L.A. Hart p47.

(23) Id. p50.


(25) Id. chapters three and four.

(26) Id. p69.

(27) Id. p77.

(28) Ibid.
Op. cit. p120. R.S. Summers makes a similar point when he depicts the analytical jurists as falling into two groups. In comparing the old group (which includes Austin) with the new group (which includes Hart) he states that, "[t]he new is broader in scope, more sophisticated in methodology, less doctrinaire and positivistic, and more likely to be of practical utility." "The New Analytical Jurists" N.Y.U.L.R. 861 at 863. It will be clear that my view is almost the reverse of Summers.

H.L.A. Hart p43.

Hart points out that there is a vast literature of comment on theories of natural law, and that because of the ambiguities in the expressions involved in the debate between positivism and natural law, "...very little can be gained from a discussion of this subject if only secondary sources are read."

The Concept p253. This touches on an issue which has been of much concern in the development of this thesis. Many of the issues which are considered do give rise to a considerable literature. The role of definitions, descriptions or concepts; the nature of precedent and the role of the judiciary concerning statutory interpretation, are but some examples. As the overall argument of this thesis is a matter of some complexity, and it is important that the overall argument be kept in view as it is developing, I have attempted to restrict my focus of attention to what may be regarded as primary materials, and to refer to the secondary sources only where they provide support or comment on particularly important points, or where an illustration which is appropriate assists in the assimilation of the argument.


See Attorney General v Able and others [1984] 1 All E.R. 277.

For a somewhat similar suggestion that legal and moral rules are
necessary to group identity and survival, and which was first published around the same time as Hart's *Concept of Law*, see Szasz *The Myth of Mental Illness* Paladin ed. 1972 p167, first published in the United States in 1961.
CHAPTER FOUR - NOTES


(3) Id. p131.

(4) Id. p130.

(5) Id. p132 (first emphasis added, second in original).

(6) Id. p125. This is reflected by J.A.G. Griffith *The Politics of the Judiciary* Fontana 1977 p194:

> ...in modern industrial society, it is impossible to avoid vesting considerable discretionary power in public officials if only because laws cannot be adequately framed to cover every eventuality.

(7) Id. p131.

(8) Id. p132 (emphasis added).

(9) Id. p123.

(10) Id. p125.

(11) Robson and Watchman eds. Gower 1981 hereinafter referred to as 'JDC'.

(12) Robson points out that much of the work in academic legal philosophy has been conducted at a largely abstracted level and that much of the empirical work which has been done has been highly simplistic. Op.cit. p62. However, it must be said that the work of the authors in this collection is a clear indication of the dangers of conducting a critique of the judiciary without attempting to articulate the theoretical basis from which they are working.

(13) Id. p45. See also the comment by Eric Young in a recent book review in The Journal of the Law Society of Scotland vol. 29 no. 7 p265 where he refers to, "[t]he open texture of the
statutory definition..."


(15) Louis Jaffe *English and American Judges as Lawmakers* Oxford University 1969

(16) JDC. p4.


(18) Id. p12. The case was Re Jebb 1966 Ch. 666 and the comment by J.H.C. Morris "Palm Tree Justice in the Court of Appeal" (1966) 82 L.Q.R. 196 at 202.


(20) Vestey v Inland Revenue Commissioners (Nos 1 and 2) [1979] 3 All E.R. 976 and W.T. Ramsay Ltd v Inland Revenue Commissioners [1981] 1 All E.R. 865.

(21) Twining op. cit. p400. See also the comment by Denning M.R. in Anton Piller KG v Manufacturing Processes [1976] 1 All E.R. 779 at 781 when he states, "[o]n appeal to us, Mr Laddie appears for the plaintiffs. He has appeared in most of these cases, and can claim the credit - or the responsibility - for them." The role of the various plaintiffs (many of them in the recording and computer industry) in their determination to protect their materials from 'piracy' has been particularly significant in the development of this draconian remedy (as it was referred to by Templeman J. in the earlier case of EMI Ltd v Panditt [1975] 1 All E.R. 418 at 421).


(23) Id. at p214.
Presumably Watchman would be critical of the judgment in *Cutts* because of the lack of authoritative support, as he was of the decision in *ASLEF (No 2)* op. cit. p16.

The idea of a judge who dispenses justice in preference to law and regards himself as free to 'iron out the creases' in legislation sounds fine as a piece of rhetoric, but in practice it represents a challenge to the supremacy of Parliament.

Per Young *JDC* pp167 and 179.

(1837) 2 M & W 519.

(1883) 11 Q.B.D. 503.

(1932) A.C. 532.

*Anton Piller KG v Manufacturing Processes Ltd and others* [1976] 1 All E.R. 779 at 781.

(1765) 2 Wils 275.


*RCA Corp and another v Pollard* [1982] 3 All E.R. 771 at 777.
(47) **Mareva Compania Naviera SA v International Bulkcarriers SA**

[1980] 1 All E.R. 213. Despite its citation, judgment was delivered by the court on 23 June 1975.

(48) Id. at 215.

(49) [1984] 2 All E.R. 332.

(50) Id. at 341.

(51) **Lynch v Director of Public Prosecutions for Northern Ireland**


(52) **W.T. Ramsay Ltd v Inland Revenue Commissioners**


(53) **Furniss (Inspector of Taxes) v Dawson** [1984] 1 All E.R. 530 at 533. A similar point is made by Waller L.J. in the context of matrimonial property when he states that the matter with which he is dealing is not one which could readily be dealt with by legislation - **Burns v Burns** [1984] 1 All E.R. 244 at 250.

(54) For other cases where the courts have determined issues where there has been no pre-existing rule see:

**Home Office v Harman** [1982] 1 All E.R. 532, especially per Lord Scarman at 542, 543.

(55) Id. p170.

(56) Id. p162.


(58) [1980] 1 All E.R. 913.

(59) **JDC.** p122.

(60) [1980] 1 All E.R. 913 at 923.

(61) **JDC.** p122.

(62) Id. pp20ff. It should be said that the authors disapprove of the purposive approach on most occasions, although they are also occasionnally critical of Denning when he takes the approach which they advocate:
Yet, it is one thing for the judiciary to restrict the ambit of social policy by adopting a literal and formalistic approach to statutory interpretation, and quite another for a judge to refuse to implement the will of the legislature. Id. p187.

(63) JDC. p88. It is surprising that in the discussion which refers to the political basis of technical decisions, Robson goes on to say in the very next paragraph - "Griffith's work has been subject to a variety of 'technical' comments...", and Watchman refers to "...technical issues of legal method..." op. cit. p4.

(64) Griffith op. cit. p49:

Where technical law ends and political controversy begins is not always easy to determine. It is clear, however, that Law Lords while for the most part restricting themselves to the obviously technical are not averse from speaking on social questions...

(65) Id. p12, per Morris op. cit. at p202.

(66) Id. p34.

(67) Id. p46.

(68) Id. p52.

(69) Id. p56.

(70) Twining refers to the multiplicity of uses of 'impartial', op. cit. p402.

(71) JDC. p208.

(72) Id. p146. See also Watchman at p18.

(73) Id. p158.

(74) Id. p216.

(75) Id. p221.

(76) Griffith op. cit. p190.

(77) Id. p52.

(78) Id. p58.

(79) Laing op. cit. p36.

(80) JDC. p34.

(81) Id. p18.
(82) [1966] 3 All E.R. 770.

(83) JDC. pp 13, 14.


(85) JDC. p33.

(86) T.S. Kuhn  *op. cit.*  p64.

(87) Id. p24.

(88) Griffith  *op. cit.*  pp15,16.

(89) Id. p17.

(90) Id. p183.

(91) Id. p49.

(92) Id. p52.

(93) See Hart  *Law Liberty and Morality*  Oxford University  1963 and  
Patrick Devlin  *The Enforcement of Morals*  Oxford University  1965.
(1) Hereinafter referred to as the Violence Act.

(2) Here and throughout these cases I will refer to the women by the designation Ms, although where an alternative has been used in citations, I will leave it unamended.

(3) [1978] 1 All E.R. 821 at 823,824.

(4) Id. at 825.

(5) Hereinafter referred to as the 1967 Act.

(6) [1978] 1 All E.R. 821 at 830.

(7) Id. at 832.

(8) Id.

(9) Id. at 834.

(10) Id. at 824.


(12) [1978] 1 All E.R. 836 at 840.

(13) Ibid.

(14) Davis v Johnson [1978] 1 All E.R. 841 at 856:

In the present case the applicant, Miss Davis, was at first refused legal aid for an appeal, because the point was covered by the two previous decisions. She was only granted it afterwards when it was realised by the legal aid committee that this court of five had been specially convened to reconsider and review those decisions. So, except for this action of ours, the law would have been regarded as settled by B v B and Cantliff v Jenkins.

(15) [1978] 1 All E.R. 841 at 846.

(16) Id. at 840.

(17) Id. at 847.

(18) Id. at 860.

(19) Id. at 871.

(20) Id. at 875.

(21) Id. at 876. Similarly clear views were expressed when Davis
reached the House of Lords - Lord Salmon specifically agreed with Sir George Baker's 'plain as a pikestaff' statement, [1978] 1 All E.R. 1132 at, 1150. Viscount Dilhorne thought that,"[h]ere the language is clear and unambiguous and Parliament's intention apparent" at 1145. Lord Kilbrandon, "[t]he intention of the legislature is plain from the language used" at 1149. Lord Salmon further added that,"I do not consider there is any ambiguity about the Act" at 1149.

(22) [1978] 1 All E.R. 841 at 847.
(23) Id. at 861.
(24) Id. at 872.
(25) Id. at 849.
(26) Id. at 876. For a similar comment in the context of race relations in India, "[i]f therefore the only bar that ever opposed the entrance of natives into office exists now, in as much force as ever, the passing of the enactment was positively mischievous in as much as it tends to create expectations which never can be realised." Letter by member of Legislative Council, Madras, in Lester and Bindman Race and Law Longman 1972 p392.

(27) [1978] 1 All E.R. 841 at 860.
(28) Id. at 884.
(29) Id. at 846, 847.
(30) Id. at 857 - 859.
(31) Id. at 871.
(32) Id. at 875.
(33) Id. at 883.
(34) Id. at 864.
(35) Id. at 850.
(36) Id. at 875.
(37) Id. at 860.
Id. at 876.


[1944] 2 All E.R. 293.

Id. at 300.

Id. at 298.

"Great weight is given, and rightly given, by every puisne judge to the decisions of his brethren, but in the last resort they do not bind him." Per Sir George Baker P. in Davis [1978] 1 All E.R. 841 at 862.


JDC at p27.

W. & J.B. Eastwood Ltd v Herrod (Valuation Officer) [1968] 3 WLR 593 at 600.


[1978] 1 All E.R. 841 at 862.

Id. at 863.


[1978] 1 All E.R. 841 at 870.

Id. at 877.

Id.

Id. at 878.

[1903] 2 Ch. 425.

[1978] 1 All E.R. 841 at 879.

Id. at 881.

Id. at 880.

[1979] 3 All E.R. 976 at 987.

Ibid.
In this connection it should be mentioned that this case gives rise to an extremely interesting problem - both at first instance and in the House of Lords, the judges were severely critical of what are known as 'extra-statutory concessions'. These concessions are published on a regular basis - see for example [1980] B.T.R. "Current Tax Intelligence" p811 - "Foreign child benefit: extra statutory concession." As Sumption points out:

[t]he existence year after year of concessions now held by the House of Lords to be "unconstitutional" and certainly to have no legal basis is surely now a matter requiring the attention of Parliament. Op. cit. p11. It certainly seems a strange situation where the House of Lords declare a course of conduct to be unconstitutional, and yet publicly appointed officials continue to publish the fact that they are continuing to behave in this unconstitutional fashion. Are the Inland Revenue acting illegally?

[67] [1981] 1 All E.R. 865 at 870.
[68] Ibid.
[69] Ibid.
[70] Id. at 871.
[71] Id. at 872.
[72] Id. at 873.
[73] Ibid.
[75] [1984] 1 All E.R. 530 at 542.
(76) Id. at 533.

(77) [1982] S.T.C. 30 at 32.
CHAPTER SIX NOTES.

(1) Juridical Law and Physical Law Scottish Academic Press 1982 px

(2) *JDC. P147.*

(3) Summa Theologiae Blackfriars 1966 volume 1 Appendix 10 pp130,131. (hereinafter referred to as S.T. - all references will be to this edition).

(4) Id. Appendix 7 p89.

(5) Wholeness and The Implicate Order Routledge and Kegan Paul 1980 p9. See also his comments on the Indian philosopher Krishnamurti:

...he referred to the observer and the observed, which is of course the thing in quantum theory. He said there is no distinction between the observer and the observed, which quantum theory is always saying, which really I felt was one of the essential new features of quantum theory. New Scientist Nov '82 p363.

For an interesting discussion of the common ground in modern physics and Eastern Mysticism see Fritjof Capra *The Tao Of Physics* Fontana 1976.


(7) Popper *Conjectures and Refutations* Routledge and Kegan Paul 4th ed. 1972 p46, and from Katz he cites with approval the view that, "[g]enerally speaking, objects change...according to the needs of the animal" in the sense that a hungry animal divides the environment into edible and inedible things, one in flight sees roads to escape and hiding places.
George A. Miller *Psychology* Pelican 1966, especially chapter four. At p54 he states:

Consciousness is selective. We are constantly swimming through oceans of information, far more that we could ever notice and understand; without some effective way to select what is important, we would surely drown.

At p55 he uses the example which I have adapted, "[t]he mind in short, works on the data it receives very much as a sculptor works on his block of stone."


MacCormick *Legal Reasoning and Legal Theory* Oxford University Press 1978 chapters VII and VIII.


S.T. volume 18 Appendix 11 p168.

S.T. volume 1 Appendix 10 p127.

MacCormick *Legal Reasoning* p117, and his comment at p83. At p226 he states:

To attempt, as Dr. Goodhart appears to have attempted, a doctrine of ratio which includes both the least a case must be followed for and the greatest point to which it can be extended is to essay the impossible.


(16) S.T. volume 1 Appendix 10 p127.

(17) Id. Appendix 7 p90.

(18) Simon Roberts Order and Dispute Penguin 1979 p17.


(20) Bohn op.cit. p4.

(21) Id.p124.

(22) Michael Polanyi Personal Knowledge pp193-202, and p135. He speaks of the role of passion in the development of knowledge in a way similar to that of Aquinas - Polanyi says that "...into every act of knowing there enters a passionate contribution of the person knowing what is being known, and that this coefficient is no mere imperfection but a vital component of his knowledge." Op. cit. preface pviii. Aquinas says that "...knowing and loving are not twin things or acting causes, but a doubled expression of one and the same thing..." S.T. volume 1 Appendix 10 p127.


(24) Id. p12.

(25) Polanyi Personal Knowledge pvii. He continues to say:

Hence the wide scope of this book and hence also the coining if the new term I have used for my title: Personal Knowledge. The two words may seem to contradict each other: for true knowledge is deemed impersonal, universally established, objective. But the seeming contradiction is resolved by modifying the conception of knowing.

Unknown to Polanyi, this phrase had already been used by Newman, op. cit p95, "Can I enter with a personal knowledge into the circle of truths which make up that great thought."


(27) Devlin The Judge Oxford University 1979 preface pvii.

(28) Lord Denning drew this analogy in his address at the 1983 Press Awards. This way of putting it mirrors exactly the expression of Aquinas:
...commands can be traced to natural law in two ways; one, drawn deductively like conclusions from premises; two, grounded on it like constructional implementations of general directives. The first process is like that of the sciences where inferences are demonstratively drawn from principles. The second process is like that of the arts where a special shape is given to a general idea, as when an architect determines that a house should be in this or that style. Question 85 art 2  S.T. volume 28 p105.

(29) See Bohm op. cit. chapter 1.

(30) S.T. volume 1 Appendix 7 p89.

(31) Kant  Critique of Pure Reason  First Division  Book 11
Chapter 111.


(33) See George A. Miller  Psychology  Pelican  1966 chapter 19,

Certain philosophers have assumed that, because these concepts are so important, they must be given immediately to all minds by a kind of a priori intuition. The fact is, however, that the concepts are acquired rather slowly during childhood...

(34) Polanyi  Science Faith and Society  University of Chicago 1964 p29. T. S. Kuhn makes a similar point when he says that philosophers of science have repeatedly demonstrated that more than one theoretical construction can always be placed on a given collection of data, or that one can handle the same bundle of data as before but see them in a new system of relations by utilising a different framework, The Structure of Scientific Revolutions University of Chicago 1970 pp76 and 85. He also points out of course that a scientist may well ignore or not see at all those factors which do not fit his theory, op. cit p24.

(35) Polanyi  Personal Knowledge p115.

(36) Ayer  Language Truth and Logic  Pelican ed 1971 p74. Ayer clearly takes the view that the position of the linguistic philosophers was a gradual development from the earlier position of the logical positivists. See his The Central Questions of Philosophy Pelican ed. 1976 p22.
(37) Ayer Language, Truth and Logic p76.

(38) Id. p78. A similar comment is made by Raymond Aron in the first paragraph of his Main Currents in Sociological Thought 1 Pelican 1968 p7, "Indeed, one cannot undertake the history of any historical entity - whether a nation or a scientific discipline - without establishing its definition, without fixing its limits." (Emphasis added).

(39) Polanyi Science Faith and Society p25. At p14 he states, "The application of rules must always rely ultimately on acts not determined by rule."

(40) Polanyi Personal Knowledge p115.

(41) Id. p250 (emphasis in original).

(42) Kuhn op. cit. p44, where he also refers to Polanyi's development of this point as 'brilliant'.


(44) Id. pp 88-91.


(47) Ibid.


(49) Ayer Language, Truth and Logic, p94.


(51) Newman op. cit. p59.

(52) D. Horrobin states that quite a common indication of schizophrenia is 'knights move' thinking - linking concepts whose connection is not immediately obvious. In its more florid varieties, this type of thinking leads to bizarre and useless speculations, often of a religious or incomprehensible philosophical nature. (emphasis added)
New Scientist vol 85 p642.

(53) Popper  The Open Society And Its Enemies Routledge and Kegan Paul 5th ed 1966 volume 2 chapters 11 and 12. See also Polanyi's acknowledgment of this problem in Science Faith and Society, "How can we tell what things not yet understood are capable of being understood?" p14.

(54) "But if both observation and conceptualization, fact and assimilation to theory, are inseparably linked in discovery..." Kuhn op. cit. p55.

(55) Popper states that:

Wittgenstein's original view in the Tractatus can only be explained by the assumption that he overlooked the difficulties connected with the status of a scientific hypothesis which always goes far beyond a simple enunciation of fact; he overlooked the problem of universality or generality. Op. cit. p298.

(56) Simpson op. cit. p90.

(57) Id. p91.

(58) Id. pp76, 85.


(60) S.T. volume 1 Appendix 10 p131.

(61) S.T. volume 18 p37 (1a2ae 18, 9). See also volume 28, Appendix 1 p159.

(62) S.T. volume 28 Appendix 1 p159.


(64) S.T. volume 18 Appendix 11 p169.

(65) S.T. volume 12 Appendix 2 p171.

(66) Lectures (V) p197.

(67) S.T. volume 18 Appendix 1 p126.

(68) Id. p125.

(69) Id. p128.

(70) Ibid. (emphasis added).
From the point of view of theology there is no law that bids a man to be morally wrong, but there can be a law that bids a man to be illegal within the system of reference defined by State-lawyers, and to take the consequences. Contrariwise, from the point of view of positive legality there is no law that bids a man to be morally virtuous, but there can be a law that bids a man to be wrong within the system of reference defined by theologians, and expects him to take the consequences if he disobeys. Id. Appendix 7 p182.
present purposes, Hart continues to say, "[t]he chief and very great merit of this natural law approach is that it shows the need to study law in the context of other disciplines..." id. pl1. Although I have approached this task in a rather different manner, this has been one of the important aims of this thesis.

(88) S.T. volume 18 Appendix 15 p182.
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