not tell us about the wealth consequences of the assignment of entitlements. Whether the townspeople end up with money in their pockets, or whether that money instead will end up in the pockets of the shareholders of the cement company, is indeed a function of the law's distribution of entitlements.

CHAPTER 3. WHAT IS LEGISLATION?

A. THE POSITIVIST DEFINITION OF LAW

The simplest definition of law that anyone has ever come up with can be found in the writings of the theorists of legal positivism. Positivism defines law as a command that is backed by a sanction, that is, a command that is enforced. In other words, the legislature passes a statute; the statute commands us to do something ("pay your taxes") or refrain from doing something ("don't rob banks"); and the entire military might of the state stands ready in the background to enforce that statutory command if we disobey it.

How do we know that is what the law is? The positivists answer: try disobeying the legislature, and you'll soon see what the law is. Thus, when the legislature commands you to pay your income taxes, if you don't pay your taxes the police will pay you a visit. And if you barricade yourself on your ranch and surround yourself with like-minded armed individuals who refuse to pay taxes, eventually the government will call out the army if necessary to enforce the law. Actually, the government rarely needs to resort to physical power. If you don't pay your taxes, the government simply attaches your bank account and garnishes your wages, and suddenly you find that you don't have any money. And so the government gets its tax revenue, with interest, without using anything more than a notice to the bank and to your employer. If you don't like what the government has done—for example, you say that income taxation is unconstitutional—then you have to bring a lawsuit against the government to get your money back. If you commence the legal action, the legal

realists (whom we'll meet later) will point out that the first thing you will notice is that the judges in the court are themselves government employees who are dependent upon tax revenues for their salaries, and so they're not likely to be especially receptive to your idea that you want your money back.

So much for the "enforcement" part of the positivist definition. The more interesting part is the "command" part. When the legislature enacts a bill into law, it has issued—under the positivist theory we are discussing—a command. To whom is the command addressed? We've been assuming so far that the command is addressed to you and to me. The command can be either that we have to do something, such as pay our taxes, or refrain from doing something, such as robbing banks. In Chapter 2 we went through some of the forms that these commands can take, including the specification of rights and duties, privileges, powers, and immunities. The enactment of a power, for example, is a rather subtle form of command. It doesn't immediately command you or me to do anything. For example, the legislature passes a law regulating wills. If you want to make a will, you do it in a certain way, with two witnesses who are unrelated to the testator, and so forth. Where's the command in that? You don't have to make a will. But the command is there; it is in the form of a conditional statement. It says in effect, "if a person makes a will in the proper form, with the proper witnesses and so forth, and then that person dies, then various state officials are hereby commanded to carry out the provisions of that will by dividing the testator's estate in the manner provided for in the will."

So there is a command lurking there, even when the legislature enacts a power or a privilege or an immunity. But note, the command was addressed not to you or to me but to state officials. It told them what to do IF someone makes a valid will. So we might conclude that although some legislative commands are addressed to you and to me, such as the commands to pay taxes or not to rob banks, other commands are addressed to state officials, taking the conditional form of commands we have called "powers." State officials, in this latter case, only are commanded if you or I do something to trigger their response, such as executing a valid will or entering into a valid contract. Can we therefore conclude that some laws are addressed to you and me and some to officials of the state?

B. KELSEN'S OBJECTIVE VERSION OF POSITIVISM

The commonsense answer would be yes, and it's probably the right answer. However, Hans Kelsen, a prominent twentieth century legal positivist, came up with an extraordinary idea that led him to answer that question in the negative. Kelsen said that there are *no* laws that are addressed to the public; rather, all laws are addressed solely to state officials. Moreover, all laws are conditional laws—not just the laws of wills and contracts, but all laws.

Let's test Kelsen's theory by looking at an actual law of the State of Illinois. According to the Illinois Revised Statutes, Chapter 18 (Criminal Law and Procedure), § 18-1:

> A person commits robbery when he takes property from the person or presence of another by the use of force or by threatening the imminent use of force.
>
> (b) Sentence.
>
> Robbery is a Class 2 felony.

And we find in Chapter 38, § 1005-8-1(a) (5), that a class 2 felony is one in which "the sentence shall be not less than 3 years and not more than 7 years."

Does the language of this law, the chapters, sections, subsections, and so forth, sound as if it is addressed to you and me? The law defines what robbery is, and defines what penalty is attached to it. It seems to be part of a manual for the use of the police, prosecutors, judges, and prison officials. It seems to be addressed to state officials, and not to you or me. Kelsen would translate §18-1 of the Illinois Statutes as follows: "*if* any person should commit robbery as herein defined, *then* the judges are hereby commanded to sentence that person to three to seven years, the marshal is hereby commanded to take that person to prison, and the warden is hereby commanded to lock that person up for three to seven years." According to Kelsen, the law against robbery is not addressed to you and me any more than the law specifying how to make a valid will or contract. All laws are simply commands to state officials. When a member of the public does something to "trigger" the "if" part of the conditional enactment, for instance by robbing a bank, the "then" part of the conditional enactment comes into play in the form of commands to state officials to take forcible action against that person.

If you thought in Chapter 1 that I went pretty far in claiming that law was objective and did not depend on free will or free choice, you now see in Kelsen an extreme objective theory of law. Law is so objective in Kelsen's theory that it isn't even addressed to the public. Kelsen would not even say that the red and green lights at the intersection are beamed into the brains of the drivers of the cars; rather, he would assert that the red and green lights are there simply to inform the traffic police which drivers they should arrest. The red light is simply a signal to the traffic cop to issue a ticket to any driver who fails to stop at the red light. In Kelsen's view, if the driver of a car is alert enough to notice that traffic cops give tickets to drivers who go through red lights, then the alert driver can prevent this assertion of the wrath of the state by stopping at the red signal.

Under Kelsen's philosophy, we will stay out of jail only if we become aware of the patterns of behavior of the police and other state officials. One way of becoming aware of their consistent patterns of behavior is to look up the commands that they themselves follow. These commands are what we call "statutes." They consist of directives to police and other officials. By noticing what these commands tell the police to do, we can avoid getting into trouble. If a command tells the police to arrest robbers, then we can avoid getting arrested by the police if we refrain from committing robbery. The law, under Kelsen's extreme objectivism, doesn't tell *us* to do anything. We are simply the victims of an impersonal legal regime.

We could even improve a bit on Kelsen; we can dispense with the traffic cop. Instead, we mount a machine gun above the intersection, and if any car goes through the red light, a photoelectric cell is activated which is connected to the machine gun. The machine gun then shoots several rounds of steel-penetrating bullets through the roof of the offending vehicle. Now we finally have a purely objective, purely mechanical legal system. Undoubtedly many drivers will learn to stop on the red signal, and those who don't will be eliminated from the system entirely. In Darwinian terms, the nonconformists will be selected out, and we will be left with law-abiding individuals.

There's a real-world example that comes fairly close to the mounted machine gun. Have you seen those curved spikes set in the entrance to some parking lots, where you drive your car over the spikes and nothing happens, but if you try to go in the opposite direction—for example, you've parked and now don't want to pay at the exit gate

so you try to back out through the entrance—the spikes will puncture all your tires? We have here an example of a purely self-enforcing mechanistic system. If suddenly a fire breaks out ahead of you in the parking lot, and you want to back out of there in a hurry, try arguing with those curved spikes.

It would be a mistake to dismiss Kelsen so readily as my rather sarcastic example of the machine gun seems to suggest. His purely objective theory of law is useful in bringing out certain salient features of the legal system and provides a heuristic model for us to question certain of those features.

Most importantly, Kelsen's theory implies that there is no necessary requirement of communication between the legislature and the public in a legal system. Let's consider the traffic signal again as a simple kind of law. Although it looks as if it's a command addressed to drivers, Kelsen says it's a communication from the legislature to the police. In fact, it doesn't even have to be a communication; it can be a kind of program that is itself inaccessible to the public. The legislature simply programs the state computer, and the state computer—which consists of police robots, judicial robots, prison robots, and so forth—simply processes that program. To be sure, in the case of the traffic signal, the public is given a good clue as to what is going on. The public figures out that by stopping on the red and going on the green, the various state officials will not be galvanized into repressive action. And so, a driver stops on the red light and avoids incurring the sanction of the traffic officer. This is a learned response on the part of drivers to state police behavior. Kelsen's approach is not unlike Pavlov's dogs who probably thought that by salivating at the sound of a bell they were signalling Dr. Pavlov to bring in some food.

If we look at some of the complex, convoluted legislation passed by Congress, it might as well be a set of computer commands in FORTRAN or PASCAL. How is any member of the public supposed to understand the complexities of the Internal Revenue Code? The Code, in some of its sections, is so complex that most Internal Revenue *agents* cannot understand it. Eventually someone in the government understands it, and then penalizes the taxpayer for failure to comply with the provisions.

But let us extend the complexity argument a bit. Laws that are apparently simple to understand often turn out to be construed by

the courts in a strange way. We read in the daily papers of "surprising" decisions in cases, where most people thought the law said one thing but the judge said it meant the opposite. What is a member of the public to do in order to adjust his or her life in such a way as to stay out of jail?

Kelsen's answer is simple: hire a lawyer. A lawyer, to Kelsen, is a person who *translates* for clients the commands that Congress issues to the police. Your lawyer tells you what taxes you have to pay on certain kinds of income. Your lawyer tells you, for instance, that the "right turn after stopping on red signal" rule now being adopted by most states can also mean, in your state, that you can make a left turn after stopping on a red signal provided that you are on a one-way street and the street you are turning into is a one-way street. The statute itself may not say exactly that. The statute might be drafted in terms of allowable turns when not crossing an intersection. But that, as far as the public is concerned, is only computer talk between the legislature and the police. It is the attorney who translates that talk so that the public can understand it. For these translation services, the public pays considerable amounts of money to attorneys. The more complicated the rules become, the more money attorneys make. Is it any wonder that the complicated rules are usually *drafted* by attorneys on congressional staffs?

Law, then, is in Kelsen's view a kind of commodity in information. Lawyers manage to get hold of statutes and other sources of law, read them, translate them, and sell the translations to the public. The public will purchase the information from the lawyers because the public wants to know what it should do to stay out of trouble from state officials.

Let us consider a simple example of this translation process. Suppose a waiter asks a lawyer whether he must report his tips on his income tax forms. The lawyer pulls down from her shelf her massive copy of the Income Tax Code of 1954 as amended. The lawyer reads various sections in the Code that are messages from Congress to the Internal Revenue Service. These messages are written by lawyers in such a way that only lawyers can understand them. The lawyer finds that if an employee fails to report tips each month to his employer, then penalties will be inflicted. There is no penalty if the total amount of tips for the month is less than $20. Otherwise, penalties include an additional 50% of the tax on the tip income, plus $50 penalty for

each month that the employee failed to report the tips. Having read all this, the lawyer informs the waiter that tips are reported not to the I.R.S. but to one's own employer. If the waiter fails to report the tips he received to his employer each month, he can expect to incur those penalties unless he received less than $20 a month. Once the penalties are assessed, the I.R.S. can collect them from the waiter's future wages, from his bank account, or they can force the sale of his personal assets and collect the penalties out of the proceeds of sale. And that's it; that's all the law is. The lawyer doesn't tell the waiter, under Kelsen's theory, to report the tips to his employer; all she tells the waiter is what state officials are likely to do if the waiter doesn't report the tips. This example should raise a number of questions in your mind about the law. Let us consider some of the implications.

1. Ignorance of the Law

What does Kelsen's theory do with the well-known saying about law that the public sometimes finds hard to understand: that "ignorance of the law is no excuse." When you first encountered that phrase, you may have said to yourself, "How unfair! How unjust! I'm supposed to obey certain laws even though I don't even know that they exist." Consider our waiter. I assumed that he knew enough to ask a lawyer the question whether he should report his tips as income. But a lot of people who take a job waiting on tables don't know enough to ask this question. They simply assume that a tip is a gift, a gratuity, something that the customer may give as a kind of thank-you for services that the customer was entitled to receive even in the absence of a tip. These waiters are then surprised when someone tells them, "No, any tips you receive are just like salary, and they have to be reported to the employer."

Let us analyze this situation the way mathematicians work out indirect proofs. We begin with the assumption that we want to disprove, and then show that it ends up in an impossibility or a contradiction.

So, we assume that ignorance of the law *is* an excuse. On that assumption, we can be sure that waiters would be encouraged never to find out about the income tax treatment of tips. There would be

a sort of tacit practice in the waiting profession never to mention the subject, and if an old experienced waiter knows that tips are income he's supposed to keep it to himself and never inform the young waiters. As long as the young ones are never informed, then they can get away without reporting their tip income because they can always say that they were ignorant of the law.

We immediately see that this would put a great premium upon ignorance. Widespread ignorance of the law would become highly desirable. People would avoid asking lawyers for advice, and the income of the legal profession would nosedive—something lawyers certainly would be against. And then Congress would have to run all kinds of commercials on television, informing people about the law. A commercial might show, for example, a waiter pocketing a tip and then a booming voiceover saying "you must report all tips to your employer every month." And then people would retaliate by ceasing to watch television and we might all be better off—except for the general anarchy that would set in because there would be widespread noncompliance with the law. Since no one, least of all the government, wants anarchy, it is unlikely that any legal system in any nation at any time in history would consider ignorance of the law to be an excuse. Hence we've disproven our original assumption, and in fact proven the converse: that ignorance of the law can never legally be an excuse to disobey the law, because that would destroy the legal system itself.

What would Kelsen say about ignorance of the law? Clearly he does not need the formal proof we've just gone through. Under his theory, not only is ignorance not an excuse; it is entirely irrelevant. People only learn what the law is when they discover what actions officials take. And if they fail to learn, they wind up in jail. Kelsen would not even inquire whether people knew what the law was, since the law is not addressed to the people at all.

2. *Secret Laws*

Kelsen's explanation has the virtue of simplicity. By arguing that the law isn't addressed to the public in the first place, Kelsen's theory of law is complete at that moment in time when the legislature tells public officials what to do.

Here's a mental experiment we can make that would test the application of Kelsen's theory. Suppose someday the legislature in your home state decides to turn off all the traffic signals to save money, leaving it to the drivers to guess when to stop and when to go. However, traffic officers at the intersections are beeped on their radios when the lights would have been green and when they would have been red. Then they simply arrest all drivers who guess incorrectly. Should we call this strange and unfair system of traffic regulation "law"? Kelsen would.

A similar example, more outrageous and unfortunately true, concerns the "secret" laws in Nazi Germany, laws that were communicated only to the Gestapo. The Gestapo could arrest people for violating a secret law, a law that the people they arrested had no possible way of knowing. You could commit a crime in Nazi Germany without having any way of knowing that what you were doing was a crime. Of course it gave virtually unlimited power to the Gestapo. Were those "secret laws" deserving of the term "law"?

My use of this example against Hans Kelsen, who was a refugee from Nazi Germany, might be very unfair. Yet his theory, if taken to its extreme, says that secret laws are laws.

Secret laws violate our innate sense of justice. Yet they point out the fact that under positivism a legislative command is a complete law. Positivism has nothing to do with justice. Kelsen insists on a clear intellectual separation of the concept of law from that of justice; the justification of law, according to him, lies not in the law itself but in religion or social metaphysics. Kelsen's philosophy simply underscores the irrelevance of justice to the positivist view of law. A legislature can pass an unjust law; to the positivist, working under the "command" theory of law, an unjust law is still "law." Hence, if positivism admits laws that are substantively unjust, even outrageously unjust (for example, a law removing all political and legal rights of a minority group), then it would seem that a "secret" law is simply another variety of injustice.

3. *Impossible Laws*

If you are not happy with the laws of your state, then, according to Jeremy Bentham—the great positivist of the early 19th century—what

you should do is change the legislature. Bentham felt that since the legislature reacts to popular will, a legislature that enacts outrageous laws is doing what the people want. Bentham would have had no problem with the law Woody Allen proclaimed as soon as he became dictator of the island of Marcos in the movie *Bananas:* from now on, he proclaimed, everyone will speak Swedish. Bentham would go even further. Imagine a legislature commanding that each person must, once a day in the town square, jump unassisted twenty feet into the air. Since the law is physically impossible to comply with, everyone in that town would be guilty of violating it. At least under Woody Allen the people could learn Swedish; but under Bentham, the law is valid even if people cannot possibly comply with it.

Suppose you're in the town square and a police officer comes up to you and says, "well, aren't you going to jump twenty feet high?" You say you cannot do it. The police officer then arrests you for violating the law. You are outraged, but outrageousness does not count as a legal excuse. You say that no one can comply with the law and the police officer answers, "you're right—that's why I can arrest anybody I want."

The positivists, especially including Kelsen, maintain that the twenty-foot command is "law." Does that suggest that positivism may not be a wholly satisfactory account of what "law" is? We will be coming back to this question in succeeding chapters.

4. Retroactive Laws

Can you imagine anything worse than a secret law or an impossible law? Competing with these for top spot on the list of the all-time worst laws are retroactive laws. Imagine a law that is passed today that makes it a crime for having done something that you did yesterday. Suppose if I were dictator, I made it a crime if anyone drank orange juice yesterday. Not only would you not have had any notice of the "crime," but you could not have even guessed at its possible content and avoided it; at least with my traffic signal case, where the signals are shut off and only the police know what they are, you could make a guess, or you could refrain from driving a car at all. You might even guess the secret laws of the Gestapo if you observed their pattern of arrests over a period of time. But a retroactive law is a total surprise because it nails you for something you already did. A retroactive law goes beyond and even contradicts the objective theory of law that I talked about in Chapter 1, because the objective theory presupposes that the legal message will make a difference at some point, we called it t-0, in human behavior. But a retroactive law cannot possibly shape or channel human behavior, because the behavior has already occurred at the moment in time when the law is created.

Nevertheless, positivism says that if a legislature enacts a secret law, an impossible law, or a retroactive law, they are valid laws. There is nothing to stop the legislature from enacting any law it wants, no matter how absurd its content or unfair its enforcement. In my orange juice case, you'd know the law was a valid law when the police throw you into jail.

You might wonder what the Constitution has to say about all of this. In the United States, secret laws or impossible laws would violate the Due Process clause of our Constitution; so would most retroactive laws, although there have been some minor instances of retroactive laws, for example tax laws, that have been upheld by the courts as constitutional. But all that is just an account of the present content of the United States Constitution. Theoretically, a constitution might provide anything. A constitution, which under positivist theory is simply a set of higher commands, could explicitly provide that the legislature may enact retroactive, secret, or impossible laws. If it did, then such laws would be valid under that constitution. So, the presence of a constitution does not affect the theory of positivism we're talking about; rather, it just sets the problem back one step, back from the legislature itself to the constitution under which the legislature is empowered to enact laws. Strictly speaking, under positivist theory the analysis remains unchanged if there is a constitution in the legal system.

Recall the definition of the function of law at the beginning of Chapter 1. How can a retroactive law possibly function to control people's behavior? Perhaps this is another clue that positivism may not be a complete account of what "law" is. In Chapter 4, we will consider whether there is an alternative to positivism. If there is, we will have to go back and reconsider the initial positivist definition of law as a command backed by sanction. We will see what an alter-

native theory would say about secret laws, impossible laws, or retroactive laws.

C. ALLOCATION OF LEGAL POWER BETWEEN LEGISLATURE AND COURT

But for the present, staying entirely within positivist theory, a major problem for the positivist remains to be reckoned with. The problem is that it is all well and good for the legislature to issue commands, but how are the commands to be applied? Commands are not self-executing; they require some sort of machinery to monitor the conduct of individuals and determine whether that conduct is in conformity to the commands. Without such law-applying machinery, the commands are likely to be ignored. Therefore positivism needs a mechanism to determine whether or not people are complying with the law, and to penalize those people who don't comply.

And so, courts come into the picture. The courts are the machinery charged with making sure that the law is applied correctly. And suddenly the picture emerges of a very useful, efficient, and functional partnership between the legislature and the court. The legislature makes general commands; the court applies these general commands to particular instances of conduct. The legislature then doesn't have to worry about the millions of cases of interpretation and application that will come up under any given law it enacts; it can leave that job of particularistic application to the court. And the court, in turn, doesn't have to worry about the content of the law or whether the law is the right law for the society; it simply applies whatever law the legislature enacts.

There is another difference that we can add to the one just mentioned (legislatures pass laws of general application, courts apply them to specific instances). It is that legislatures, for the most part, look forward while courts look backward. The legislature can enact any law it wants, but most laws that it enacts will take effect from the moment of their enactment and extend their effect into the indefinite future, until some later legislature changes the law or abolishes it. The legislature is not bound by any previous laws, because the legislature at any time can change or abolish previous laws. So

the legislature, contemplating the future and deciding to alter it, enacts laws that have prospective effect only.

I've been qualifying my statements by saying "for the most part," because as we have seen, it is possible for the legislature to enact a retroactive law. But usually legislatures don't do this, and many countries have constitutions prohibiting it. Even if a country has no constitution, however, the legislature is unlikely to pass retroactive legislation. Such legislation is invariably perceived by the public as being grossly unfair, and it may lead the public to revolution or at least to voting out of office those legislators who supported the retroactive legislation. More than that we can see a systemic reason why legislatures tend to stay away from retroactive legislation. They find that a considerable source of their power to enact whatever laws they desire comes from a general public perception that it's all right for the legislature to change a law provided that everyone has notice of the change and can change their conduct accordingly. Take for instance the traffic rule allowing a right turn on red signal, which Woody Allen described as California's sole contribution to our culture. If Illinois, which presently has that rule, wants to abolish it, people won't be overly upset as long as the legislature gives everyone notice that the rule will be changed as of a certain date. People would get very upset, however, if the legislature changed the rule retroactively or secretly. Thus, a large part of the legislature's political power to enact whatever laws it desires to enact exists because the legislature does not attempt, or at least does not attempt very often, to change the law retroactively or secretly. Indeed, it is so commonplace for legislatures to change the law from the present to the future that we normally think of legislation as having only prospective effect.

In contrast to the legislature, the court—like the famed dodo bird—only looks backward. It applies the law retroactively to situations that have already occurred. The litigating parties before the court have already done whatever they've done, and now they are disagreeing as to the legal implications of what they've done.

Some readers will know that there are a few exceptions to the dodo-bird principle. Courts may act prospectively in those infrequent cases when it issues an injunction or makes a declaratory judgment, but even then, the injunction and declaratory judgment are based primarily on established facts and not speculative future facts. But let's put aside injunctions and declaratory judgments just as we put

aside retroactive legislation, and say that for the present purpose courts are in the business of applying law to facts that have already occurred. They are supposed to look backwards, not forwards. Once somebody has already acted, the courts tell him whether what he did was legal or illegal.

Thus, the legislature legislates for the future, and the judiciary adjudicates for the past. Which has more power? At first blush, it might appear that the legislature has more power; after all, they are dealing with what's going to happen and therefore they can make a difference as to what people do, whereas the courts are dealing with what has already happened and which cannot be changed. More than that, the legislature can do whatever it wants with respect to the future; it can enact any law it wants to enact, as if writing on a clean slate. The court, on the other hand, has no power to change the law; the slate is full when the courts looks at it. The court must simply apply existing law to the past facts in each case.

So, if you had to pick, which institution would you say has more power—the legislature or the court? Bishop Hoadley said, "Nay whoever hath an absolute authority to interpret any written or spoken laws it is he who is the lawgiver to all intents and purposes and not the person who first wrote or spake them." Maybe the good bishop was thinking of the laws of the church, but what he said applies to the laws of the state. The legislature might enact whatever statutes it cares to enact, but the courts can say what the statutes mean.

Suddenly we see that the courts, in principle, have unlimited power. Bishop Hoadley used the phrase "absolute authority." If courts can interpret without limit what a statute means, then the power of the legislature can be reduced to zero. The courts could say that statute X means Y, and the legislature would be powerless to prevent that radical reinterpretation because *whatever* the legislature might say—including statutes that remove from office all those judges who said that X means Y—would also have to be interpreted by the courts. If courts have the power to say that any legislation means whatever the courts want it to mean, and if courts exercised that power without limit, courts would have absolute power over the law and legislatures would have no power at all.

You can make a very practical objection here. You can say that courts do not typically act in such a way as to thwart the legislature. There is hardly any evidence of willful judicial behavior that radically

reinterprets statutes, changing their plain meaning. So maybe there is no practical problem. Courts simply interpret statutes in good faith. They simply ascertain the legislative intent and go ahead and interpret the statute according to that intent. Hence, the positivist theory is saved; legislatures do issue commands, and courts effectuate those commands in good faith.

Is that the end of the story? Can we be sure that courts effectuate the legislative meaning? We can be fairly sure that courts act in good faith. What we now have to investigate is whether a court, acting in good faith, can possibly figure out what the legislature intended its statutes to mean. And *that* is a very practical problem indeed, because it goes to the heart of what the practicing lawyer does for a living—the interpretation of statutes and the practice of convincing courts as to the meaning of statutes.

Consider the Illinois statute I quoted earlier about robbery: "A person commits robbery when he takes property from the person or presence of another by the use of force or by threatening the imminent use of force." Let's just take one of the many possible ambiguities in this statute: the word "property." Here's a case where the word "property" becomes ambiguous.

Suppose someone steals my bicycle, and the next day I see that person riding the bike and I threaten to hit him with a stick. He jumps off the bike and I take it and start to ride away when a police officer arrests me. I am taken before a magistrate, and I say that it was my own bicycle. But the magistrate looks at the statute and says that the word "property" is unqualified. The statute doesn't say that the property has to belong to the victim of the robbery; it doesn't say anything about ownership of the property. The magistrate then rules that I have committed a three-to-seven year felony in robbing my own bicycle.

Why can't the court, or in my case the magistrate, go back to the legislature and ask whether they meant to include as robbery a case where the robber robs back his own property? Let's look closely at this question. Would the legislature be the same legislature that enacted the robbery statute? Suppose Illinois enacted the statute three years before the incident with my bicycle; if the magistrate now asks the legislature, there will be legislators there who were not present three years ago, so the legislature itself wouldn't be the same. But,

then, what if the legislature had just enacted the robbery statute one week before the bicycle incident? Let's look at some of the difficulties.

One legislator might say, "of course I didn't mean that the statute I voted for should apply when someone takes back his own property." But another legislator says, "I've seen the newspaper reports of this bicycle case, and let me say here and now, I am in favor of law and order, and I don't want any criminal to take advantage of any loophole, so I voted for the statute with the idea in mind that it would cover every conceivable case of robbery regardless of who owned the property, even if the robber himself owned the property." Can we really be sure that both legislators are telling us exactly what was on their minds when they voted for the statute?

Here's another complication. What if the majority in one house of the Illinois legislature thought that "property" included the robber's own property but the majority in the other house thought it didn't include the robber's own property? How do we then decide what the legislature as a whole meant? And what about the governor, who could have vetoed the legislation? Should the governor's thoughts on what the statute meant be more important than the legislature's?

A third problem is whether legislators might respond to the magistrate's question by saying how they would interpret the statute now, rather than accurately reporting what they meant when they passed it. Sometimes a person cannot honestly remember whether a particular thought came to mind in the past, but probably most legislators would have clear positions about the robbery statute once the case came up and became a matter of public and political interest.

Suppose then that instead of the court asking the legislators what they had in mind when they enacted the robbery statute, the court asks the legislators right now to define, in the present, what the word "property" means, by passing a new bill defining that word. Now recall that our initial premise is that the court wants to know what the word "property" means because of my bicycle case. So I can expect my attorney to object to the idea of the legislature passing a new law in the present to define what the word "property" in the statute means as applied to my own case. My attorney might say, "Wait a minute, the alleged crime has already occurred, and you can't ask the legislature now to define the crime. Either it was robbery or it wasn't robbery at the time D'Amato snatched his bicycle back, but we can't determine what it was in the past by asking the legislature

in the present to pass a definitional statute. Indeed, there's a term for what the court is proposing. It is a 'bill of attainder.' Any present legislative determination of the criminality of conduct that has already occurred is a bill of attainder, prohibited by the U.S. Constitution."

Indeed, my attorney's argument should be persuasive in the United States. The U.S. Constitution does prohibit bills of attainder, which are a form of retroactive legislation. But we should leave the constitution out of it, since positivist theory can't depend for its validity upon whether any particular country has a particular constitution. Yet my attorney's argument ought to be persuasive in any country regardless of the constitution, because she is claiming that what the legislature says in the present might unfairly change what it meant in the past, and this would be the sort of injustice that should deter a court from applying to the legislature for a definitional statute.

In short, since the legislature deals prospectively, it cannot normally define crimes retroactively. On the other hand, the court only deals retroactively; it only deals with facts which have already occurred. So we conclude that the court cannot ask the legislature for guidance on what the word "property" means in the Illinois robbery statute, or ask any legislature anywhere what any of its words means.

This could strike you as a rather surprising result. Recall that we have posited a situation where the court desires to interpret the statute the way the legislature wanted it to be interpreted. But we now see that there are insuperable barriers to ascertaining how the legislature wanted the robbery statute to be interpreted. And these barriers always apply to every case. No court can "know" or even find out what the legislature truly intended a statute to mean.

What the court typically does is ask the attorneys in the case to argue about what the legislature must have intended. And this often calls for considerable imagination on the part of the attorneys. In my bicycle case, the magistrate might ask the attorneys why the legislature failed to qualify the word "property" in the robbery statute. The prosecutor speaks first. He argues that the legislature's failure to specify who owned the property when it could easily have done so indicates that the legislature intended to cover even the case where a person steals his own property.

My lawyer now will have to come up with a plausible reason why the legislature did not specify who owned the property. My lawyer could of course look at the debates in the Illinois legislature to see

if the legislature might have alluded to this problem, but she will probably discover that, as in most ordinary criminal statutes, the legislative history is thin or nonexistent. So she will have to resort to creativity. She might say something like this: if the legislature had specified that the property had to belong to the victim of the robbery, then what would happen if A robbed B, a bank, and upon being arrested A claimed that the money he took was not the bank's own property at all, but belonged to C, the customers of the bank? Then A would claim that the robbery statute did not apply, because the statute specified that the property had to belong to B, the victim, in order for there to be robbery. So, my attorney argues, maybe the legislature deliberately chose to avoid this kind of complication; maybe it did not want the prosecutor to have to discover whose specific property it was in order to indict A for robbery; and maybe that's why the legislature didn't identify the ownership of the property in the robbery statute. But, she concludes, it is highly unlikely that any legislator ever thought of the possibility that a person might be indicted for stealing back his own property. The statute failed to qualify the word "property" because the legislature was only thinking about the complications that would be involved in every robbery indictment if the prosecutor had to prove whose property it belonged to; but the legislature never intended to suspend the ordinary meaning of words, which as everybody knows, rules out robbery if the robber robs his own property. In sum, my attorney argues, since there is a perfectly adequate reason for the legislature's having failed to specify whose property it was—the bank robbery hypothetical case—that answers the court's question without forcing the court to construe the statute to apply to the case where the robber steals back his own property.

Note that we have had to rely upon the imagination of attorneys and arguments in a courtroom about what, objectively, the legislature might have intended, while disallowing any attempt by the court to go back and ask the legislature what it actually had in mind. And in this sense, Bishop Hoadley is right in saying that the courts have "absolute authority" to interpret the laws.

But this conclusion is very troubling for positivists. How do they deal with it? How do they reestablish legislative supremacy in a system where the courts have the ultimate authority to interpret statutes enacted by the legislature? If "law" is a command by the legislature, we've now seen that the "command" can be changed or thwarted by the interpreter—even if the interpreter acts as fairly and rationally as possible to ascertain what the legislature might have meant.

1. Bentham's Solution

We start with the father of positivism, Jeremy Bentham, a tireless advocate of law reform in England at the beginning of the nineteenth century. Bentham's writings are so voluminous that they haven't yet been entirely collected and published. Bentham must have seen the courts in England in much the same light as Dickens did in the novel *Bleak House.* Dickens had described a probate court case involving the supervision and distribution of the assets of the Jarndyce estate. The case had dragged on over one hundred years. New beneficiaries were born, grew up, and died, and still the distribution of the assets was not resolved. Indeed, with each new potential beneficiary that was born, the case itself was rejuvenated because all the pleadings had to be changed to take into account the new heir. As Dickens observed, the day the case would finally come to an end would be the day when all the money in the estate would be used up in paying lawyers' fees and court costs.

Bentham believed, with good reason at his historical time, that the courts were playthings of the rich, and that the only way to bring justice to all the people was through Parliament, because Parliament at least responded to the power of the vote. Bentham realized that courts were needed to apply the law that Parliament enacted. So what he tried to do was to systematically cut away the discretion the courts enjoyed by making legislation more and more comprehensive.

In particular, Bentham advocated the enactment of civil codes, and his pleas for codification enjoyed enormous success around the world. In Latin America, in particular, most countries have civil codes that owe their origins to the advocacy of Jeremy Bentham. For Bentham, a civil code was a clear, comprehensive, and dense statement of all the law. A citizen could just look up the law in the statute books, and not have to speculate upon what a court might decide. The more particularistic and dense the legislation, the less room there would be for judicial creativity and judicial discretion.

But no matter how brave, bold, and fresh Bentham's views were—and his writings are as lively and interesting today as they were in his day—his scheme did not work. Legislators make mistakes; the statutes they pass contain ambiguities; statutes sometimes conflict with one another; and the certainty of statutes has turned out to be an illusion. Even if we look at a dense and comprehensive piece of legislation—the Internal Revenue Code—we find sections of extreme complexity that are almost impossible to interpret. What looks like a detailed prescription for taxing everything the government can think of turns out to befuddle even the officials who are supposed to scrutinize tax returns. Or look at any of the massive sets of regulations in any law library. Any given building in any given city at any given time is undoubtedly in violation of hundreds of building codes. There probably is no one who can identify what all of these violations are or access the appropriate language in the appropriate regulations and codes. We get by because city officials don't have the time or the money to track down every possible violation.

What if officials somehow were able to memorize, internalize, scrutinize, and enforce all existing regulations? That wouldn't work either. Several years ago the New York police went on "strike" by deliberately enforcing every traffic regulation on the crowded Long Island Expressway. They ticketed motorists for every infraction: failing to signal when changing lanes, driving one mile per hour above the speed limit, driving too slowly on an expressway, driving too close to the car in front, passing on the right, failing to give the right of way to automobiles on the entrance ramps, and so forth. There was a great public outcry. While much of the public wrath was directed against the police tactic of calling attention in this manner to their union and their wage demands, the public understood quite well the fact that the rigid laws on the books required discretion and common sense in their enforcement. By acting mechanically and rigidly, the police actually failed to do their assigned job of law enforcement.

The preceding examples incorporate the rules on the law books as one set of factors, and real-world actions as another set. But there's yet another way that legal systems can go awry—the actual invention and creation of new situations that would not have existed but for the presence of certain rules on the books. Tax shelters are a prime example. Taxpayers have found it possible, on the advice and ingenuity of their tax attorneys, to create new situations that seem to

fall exactly within the language of the Internal Revenue Code yet lead to results that are totally at variance with the purpose of that Code. Many tax shelters have been created that fit exactly the provisions of certain sections of the Internal Revenue Code, but escape taxation. These sheltered situations would never have sprung into existence but for the stimulation provided by the tax laws. In response, some courts have begun to impose a "business purpose" rule on these shelters, saying that if they are created for no purpose other than to comply exactly with the tax code and thus avoid taxation—in short, if they have no real business purpose—then they are taxable anyway. Thus, even if you comply 100% with the statute the way Bentham hoped everyone would, a court might deny you the statutory protection you thought you had achieved.

Truth is stranger than fiction, and the real world is stranger than the laws that try to keep up with it. Situations always arise that are outside the contemplation of the lawmakers. Even if legislators were uniformly as intelligent as Bentham himself, they would not be able to foresee the diverse and ingenious real-world "tests" of their legislation.

Thus, creating ever denser and tighter codes and regulations is not a practical way of governing by rule of law. The more complex the regulations, the more courts will be called upon to interpret them. And judges have no better inherent ability to understand complex regulations than lawyers or legislators; hence even when acting in good faith a court may fail to ascertain what the legislature wanted simply because the legislature said too much on the subject.

2. Austin's Solution

A contemporary critic of Bentham took a quite different view. John Austin charged that legislators are negligent and lack the intelligence and capacity to write comprehensive laws that are free from gaps and ambiguities. Yet Austin was a positivist; indeed, he and Bentham are considered the fathers of positivism. Bentham and Austin were the major positivist theorists of the nineteenth century, they were both unabashed utilitarians, and they both agreed that law is a command backed by a sanction. But on the question of courts, their view diverged sharply.

Austin saw that the role of courts could not be just that of applying statutes, because there were gaps between statutes, ambiguous holes within statutes, and new situations coming up all the time in daily life that were totally unanticipated by past legislators who wrote the statutes. Austin would not have been at all surprised, if he were alive today, at the judicial problems created in lawsuits involving surrogate mothers, a scientific development wholly unanticipated by any legislature. We always seem to have new kinds of cases that are not covered by statute.

Austin's solution was to say that judges of course make up plenty of law; they are, in fact, legislators. Thus, Parliament legislates in broad, sweeping terms; and courts legislate on narrow points in the gaps between statutes or to clarify ambiguities. Austin's approach, therefore, falls in line with Bishop Hoadley's insight. Not only are courts more powerful than legislatures because they interpret legislation, but Austin adds that courts are themselves mini-legislatures.

Austin's solution violates the functional differences between legislatures and courts that I talked about earlier. That in itself would be trivial; Austin is entitled to theorize any way he wants to. But here's what happens when the functional difference is violated. A litigant loses a case in court, and the judge explains why the litigant lost. The judge, using Austin's theory, explains to an accident victim that since no statute directly covered her case, the judge simply legislated some new law that absolves the defendant from paying damages. But the litigant is outraged by this explanation. "You were supposed to apply the law as it was when the accident occurred," she says, "and not invent it now out of whole cloth. To legislate now, when the accident occurred a year ago, is to legislate retroactively. It is totally unfair to me."

The force of this argument, I believe, is why Austin's theory that judges are mini-legislators has largely been rejected. There are many people today who say that, realistically, judges legislate. To this extent, there are Austinians among us. But their theory is no better than Austin's. However, there is a contemporary theorist who has attempted to offer a synthesis between Bentham's and Austin's theories in order to explain the law-finding or law-making role of the court. His theory is worthy of careful consideration.

3. Hart's Version of Positivism

Professor H.L.A. Hart is professor emeritus at Oxford University. Hart's theory is that every word in a statute, as well as the statute as a whole, consists of a core and a penumbra. The core meaning of a word is that which the word clearly signifies; it is entirely unproblematic, definitive, and denotative. For instance, the word "vehicle" in the statute, "All vehicles shall stop at the red light," clearly applies to automobiles and trucks. Hart would say that there is just no way that the driver of an automobile or a truck could argue that his vehicle is not covered by the terms of the statute. However, every word also has a penumbra, a shaded area of meanings within which reasonable people could disagree whether the word covers any of those meanings. Taking the same example, does "vehicle" include bicycles? Motorized wheelchairs? Skateboards? Baby carriages? How about a helicopter that is flying very close to the road; is it a "vehicle" that has to stop and hover just above the red light? In some cities such as Boston there are intersections where all the lights turn red (and yellow) at once, stopping all traffic and allowing the public to cross the intersection in any direction. Would the word "vehicle" apply to bicycles or motorized wheelchairs in Boston, so that they can only cross the intersection when the automobiles and trucks cross, or does it not apply to bicycles and motorized wheelchairs so that they can cross the intersection when all the pedestrians cross it? Hart says that it is very hard to find the answer to these questions in the statute, because these examples come within the penumbra and not the core of the statute.

As a positivist, Hart believes that law consists of commands by the legislature. The command is expressed in a statute. The statute has two parts: a core and a penumbra. The core is a direct, irrefutable, clear command. Hart says that a court has no discretion with respect to the core of the statute. If something is an automobile, then it is a vehicle, and hence it falls within the core of the statute about vehicles. A court must apply the statute regulating vehicles at red lights to the automobile. A court cannot exempt an automobile from the statute because it's a Cadillac or a Mercedes; any make or model of car comes within the core of the statute, and that's it. To this extent, Hart completely agrees with Bentham.

But what about the second part of the statute? Hart says that the

court is free to decide what instances come within this second part, or penumbra, of the statute. Thus if a judge wants to decide that a motorized wheelchair is a vehicle for the traffic-control statute, the judge has the discretion to make that decision. Indeed, Hart says that the legislature has delegated to the judge the discretion to make that decision.

Thus Hart's theory of the penumbra is that it is a command to a judge saying, in effect, "you decide what comes within the penumbra. We are giving you legislative power to make that decision—but only as to the penumbra, not as to the core." So in this respect, Hart agrees with Austin.

Thus Hart has split the difference between Bentham and Austin. He agrees with Bentham's idea of total legislative control over courts, but only as to the core portion of a statute. And he agrees with Austin's idea of total court control over legislation, but only as to the penumbral portion. Only Hart doesn't put it the way Austin does. Instead of speaking of court control over the legislature, he theorizes that it is the legislature that has delegated partial legislative competence to the court. It is the legislature, under Hart's theory, that has made the court into a mini-legislature with respect to the penumbra, and the penumbra only.

Let's consider the court's mini-legislative power to interpret the penumbra. What if two courts disagree with each other? What if one judge decides that a motorized wheelchair has to cross with the automobiles, and another judge decides that it has to cross with the pedestrians? We'd have real confusion at that intersection in Boston. (As a matter of fact, there is always real confusion at any intersection in Boston.)

But positivism has no room for any such confusion. Indeed, we can logically derive from positivism the answer to the question of judges differing on the issue whether a wheelchair is a vehicle. Remember that the legislature has delegated legislative power to the judge to make decisions in the area of the penumbra. This means that the very first judge to deal with the motorized wheelchair case will be legislating within the area of the penumbra. Thus, if in that first case the judge decides that a motorized wheelchair is not a vehicle in the traffic-control statute, that decision constitutes a legislative determination—although we can call it a "judicial precedent." All future judges will be bound by the decision in the first

case just as if the legislature itself had put it in the statute. All future judges are bound to follow precedent. So there won't be any disagreement among judges about motorized wheelchairs. Under Hart's theory, it is only the *first* judge who gets to exercise the mini-legislative competence.

Of course, we're talking about the first judge with respect to any given interpretation of the penumbra. Thus, even though we've had a "wheelchair" precedent, another case, that of "bicycles," also has to be initially interpreted. If the first judge to get the bicycle case decides that a bicycle is a "vehicle" within the meaning of the traffic-control statute, from then on bicycles have to stop at red lights or be subject to the statutorily prescribed penalties. The word "vehicle" in the statute takes on the additional meaning "including bicycles."

You can see how the legislature would be quite happy with this approach. A legislature can use any words it wants in the statute. If it wants to make a list, such as motorcycles, scooters, horses, and hydrofoils—as well as automobiles, buses, trucks, and bicycles—it can certainly do so. Then all of these vehicles would become part of the "core" of a lengthy statute. On the other hand, the legislature may simply not want to expend the time necessary to think about all these possibilities. In that case they simply write a statute using the word "vehicles" and leave it up to the court to fill in the penumbra. Then, if the legislature is ever dissatisfied with a judicial interpretation—for example, if the legislature feels that motorized wheelchairs should not have been excluded by the judge—the legislature can amend the statute and plug in the term "motorized wheelchairs." Of course, that would only have prospective effect; it can't relate back to the first motorized wheelchair case that was previously decided. But the inability to legislate retroactively is a very small price to pay from the legislature's point of view, because if it ever really cared about—or even thought about—any particular penumbral application, it could have mentioned it explicitly in the statute in the first place.

On the other hand, courts are bound by the precedent laid down by the first judge. So it is not entirely accurate to say that Hart regards courts in general as mini-legislatures. Only the first court to get a particular problem of application has mini-legislative competence; all subsequent courts are bound by the first court's decision. In this respect courts are quite unlike legislatures, for it is a universal feature

of statutory legislation that subsequent legislatures are not at all bound by existing statutes; they can revise them at their pleasure.

Hart's position therefore is an intriguing attempt to solve the question of allocation of power between legislature and court. It gives the legislature overwhelming power; the courts must do exactly what the legislature says. It gives the courts only delegated legislative powers in the penumbral areas, which perhaps are those areas where the legislature did not feel it was worth the bother to specify more comprehensively what the statute should cover. But does Hart's analysis really work?

D. CRITICISM OF POSITIVISM

Let's revisit the word "vehicle" in the traffic control statute. Under Hart's theory, a court has absolutely no discretion when the vehicle is an automobile or a truck, because these come within the core meaning of the statute. But now suppose that the automobile is a special kind of automobile—a police car. Suppose the truck is one particular variety of truck—a fire engine. Must all these vehicles stop at the red light? Hart's theory absolutely compels an affirmative answer, because to Hart they are "automobiles" and "trucks" and hence must come under the term "vehicles." Courts would have no discretion to hold to the contrary.

Now you might say that in the real world these cases don't come up, because the police aren't going to arrest themselves for going through a red light, and they aren't going to stop fire engines. But if you look hard enough, the real world will surprise you. One of the fascinating features about law is that you can almost always find a case on just about anything. And so here is a case about fire engines going through red lights.

The case came up in London.[8] Fire engines routinely went through red lights and the police never stopped them for it. But then the members of a union, the Fire Brigade Union, brought a lawsuit to force the drivers of fire engines to stop at the red signal. The union said that it was a dangerous practice for their members to be on fire trucks that went through red lights, and besides their members did

[8]Buckoke v. Greater London Council, 2 All England Reports 254 (1971) (Court of Appeal, Civil Division).

not want to violate the law. The chief officer of the London Fire Brigade replied that the union's position was absurd; the duty to put out the fire transcended the obligation to stop at traffic lights. But the union was able to cite in its favor the exact words of the statute, the terms of which applied to any "person driving or propelling a vehicle."

This is a problem for positivism. According to Hart, the core of the statute is perfectly clear; it admits of no exceptions. All that the judge has to do is to determine whether the fire engine is a vehicle. The answer is clearly yes. Therefore, the vehicle must stop at the red light. This is an extremely literal reading of the statute. It is literal because Hart does not want to give judges any leeway in overriding the legislature; he is concerned about Bishop Hoadley's observation, and wants to make sure, at least in the core cases, that judges have absolutely no discretion. And so in the core instances, positivism is like a computer program; the programmer puts in the commands, and the computer, like a judge in a court, literally obeys the commands without exception. It's also like the curved spikes at the entrance to the parking lot; every vehicle that runs on tires, without exception, will have its tires punctured if it tries to exit over those spikes. Positivism is the theory of curved spikes.

But then doesn't positivism strike you as a rather primitive view of what communication is all about? If the legislature is trying to communicate with the court, the court does not serve the legislature well by taking every word literally. If we look at the statute reasonably, we can't really think that the legislature meant that police cars, fire engines, and ambulances must stop at every red light. Of course, maybe the question of fire engines and ambulances never occurred to the legislators when they put the word "vehicle" in the statute. You'll find in the law that millions of possibilities never occurred to millions of legislators when they drafted millions of statutes. Life is simply too rich and complex for legislators to envisage all the weird situations that can come up if statutes are applied literally.

So, how did the British court handle the fire-engine case? The judge looked through all the statutes, but found that they were no help. There was one statute specifically exempting police cars, ambulances, and fire engines from obeying the *speed limit*, but there was no similar exemption with respect to *traffic signals*. The firefighters union was therefore able to argue, "The idea about fire engines

nd ambulances did in fact occur to the legislature. We know they hought about fire engines and ambulances because they specifically xempted those vehicles from obeying speed limits. Thus, the legislature must have specifically decided *not* to exempt fire engines vith respect to traffic signals. And if the legislature meant to include ire engines in the traffic signal regulations, then what right does a ourt have to exclude them?"

But the court was realistic too. The court knew that different statutes re enacted at different times, and that the legislature in thinking bout fire engines when it enacted one statute wasn't necessarily inking about fire engines when it enacted a different statute.

The court also must have reasoned that if it adopted a strictly ositivistic approach, the result would be that fire engines would top at red lights, there would be deaths from fires that the engines id not get to fast enough, the public would yell and scream about ie absurdity of the law, and Parliament eventually would pass a tatute exempting fire engines from stopping at red lights. The court aw no reason to render a decision that Parliament would have to orrect later. The court saw no reason to contribute to deaths resulting om fires until the public got so exasperated with the absurdity of ie result that they would put pressure on their representatives to orrect the statute in the next Parliamentary session. Indeed, we can peculate that the court itself did not want to look foolish in the eyes f the public.

Yet the court had no theory to counteract the positivist theory. The ourt wanted to support the fire chief's position that fire engines can shoot the lights." But it did not know how to justify its result.

What did the court do? It simply held that the fire chief was right. he court failed to come up with a reason. It said that it was grafting n exception on to the strictness of the law so as to mitigate its rigor. also expressed a wish, in the official opinion of the court, that arliament should amend the law. The court said, "By making the affic-signal rule an offense without exceptions, Parliament has pened the way to endless discussion in fire stations." The court was viously bothered by the idea of firefighters endlessly debating the w.

Legal philosophy ought to do better than that. An alternative to ositivism should be found. For courts will always be uneasy if they ive no justification to back up their decisions. And while the Fire

Engine Case came out the sensible way, other cases involving other literal interpretations of statutes might not come out sensibly, in the absence of a good theory of justification.

Because British courts have so thoroughly absorbed the positivist philosophy that has largely been an English contribution to jurisprudence, the court in the Fire Engine Case decided to hand down an unprincipled decision. But that path is a dangerous one. If the courts can "graft an exception" onto the law in the Fire Engine Case, they can do so in all cases. The result would be to vindicate Bishop Hoadley with a vengeance! And it certainly wouldn't make Hart very happy.

But in a way it's Hart's own fault. His theory of the core and the penumbra leads to absurd results because it requires literal interpretation of the "core" parts of statutes. More than that, his theory is essentially an empty one in that it is not itself based on reason or reasonableness but rather upon the dictates of words. The enactment of a statutory word, like the emplacement of curved spikes in front of a parking lot, is merely a brute fact. Such a theory of law fails to be persuasive because it does not, and cannot, take into account the nuances of human personality, the varieties of human conduct, and the legitimate purposes people may have to do the things that they have to do.

Yet positivism is the dominant Anglo-American theory of jurisprudence. You will find that its influence in the law is pervasive. I've tried in this Chapter to get down to the core meaning of positivism, and to show that it is, ultimately, a failure. But we learn a great deal in finding out exactly how and why it is a failure. On the basis of what we have learned in attacking positivism, we can lay the foundations for an alternative approach to the law.

In Chapter 4 we will look at an alternative to positivism. But I want to end the present Chapter by mentioning a solution to the London fire-brigade case that did not occur to any of the lawyers for the union or the fire chief, or to the English court, or to anyone who has commented on this case in the law journals. What is remarkable about this solution is that it is a solution *within* positivistic theory. The person who came up with it was a student in my class in Jurisprudence at Northwestern Law School in 1987. On the final exam, I summarized the facts of the Fire Brigade Case and the various English statutes and asked if anyone could find a solution within positivist

soned, fire engines did not have to obey any speed limits at all. But isn't a traffic signal a form of speed limit? Doesn't the traffic signal mean that you must reduce your speed to zero miles per hour? Ms. Maisel argued that we should interpret the red traffic signal as a speed-limit regulation that imposes a zero speed on all traffic for the duration of the red light. Since fire engines are exempted from obeying speed limits, they can proceed at a speed in excess of zero miles per hour through the red traffic signal!

CHAPTER 4. WHAT IS COURT-MADE LAW?

A. DEFINITION OF LAW AS A PREDICTION

In Chapter 3 we saw some of the things that went wrong with the positivist definition of law. To point the way toward an alternative view of law, I'd like to begin with what I think is the most accurate definition of law, and then defend that definition: Law is a prediction of what courts will decide. Or as Justice Oliver Wendell Holmes put it, "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." The definition is associated with the school of thought known as legal realism.[1]

Suppose you ask a lawyer whether a person you want to call a "liar" can sue you for defamation. You would not be happy if the attorney hands you eight thick volumes on the law of defamation and says that the law is somewhere inside. Nor would you be edified if the lawyer produces a thin volume on "calling people liars." You would still want to know whether, *in your particular case*, the person you name can successfully sue you. A good lawyer, after doing the law research, would simply tell you what your chances are. If the lawyer tells you that in your particular case on your particular facts and on what you can prove about the person you want to call a liar,

[1]Many legal realists, for example Karl Llewellyn, use a more expansive view of law: what officials do about disputes is the law itself. "Officials" in this formula include sheriffs, clerks, the police, and lawyers, as well as judges. But the problem with this definition is that courts can review the acts of officials. If you are beaten up in a police station, you have the possibility of going to court and suing the police for violating the law. But if Llewellyn were right the law is what officials do, then the beating administered to you by the police would constitute the law itself and you would have no basis for complaining about it in a court.

you have a 90% chance of winning in court, then you will have learned something of value. If you don't want to risk the 10% chance that you would lose a legal action against you for defamation, then you won't go ahead and call that person a liar.

Now this may seem straightforward, but many people are bothered by the idea of expressing the content of law as a probability. They want to know *whether or not* calling that person a liar is actionable. They expect the "law" to be a yes-or-no statement. They would want to know, for example, whether the fire engine must legally stop at the red light or whether it may legally ignore the red light. They don't like probabilities.

Because they *assume* that the law is a matter of yes or no, they will interpret the lawyer's estimate of 90% as reflective of the lawyer's degree of ignorance about the law! They would say, "if you really knew what the law was, you wouldn't be giving us a guess or a percentage." Yet they would be wrong, because law can never be certain.

Let me give an example of a law that one might think was 100% certain. My son came home with two traffic tickets. He was charged with going through a stop sign and with speeding. The same officer had ticketed him for going through the stop sign and for speeding. I asked him if he did those things and he said yes. But if he pleaded guilty to both of them, he would have his license suspended, and he needed the car to drive to school. His license wouldn't be suspended if he was convicted of only one of the charges. So I said I would go to court and defend him.

Before the case came up in the crowded traffic court, I talked with the prosecutor. I pointed out to her that my son would lose his license, that the infractions were not serious, and that we would be willing to plead guilty on one of the two offenses if the state would drop the other one. "Nothing doing," she said.

As I thought about the situation, I knew that my case was a loser on the facts as well as on the law. My son had gone through the stop sign, and he also drove faster than the speed limit. The stop sign was a valid stop sign, and the speed limit was a valid speed limit. One might say that on either of these two charges, there was 100% certainty of conviction for traffic violations.

The judge took up the "failure to stop at a stop sign" violation first.

He asked me how I would plead for my client, and I replied "not guilty."

The prosecutor then swung into action. She asked the arresting officer a series of questions. He explained that he saw my son's car fail to stop at the stop sign, what the date and time of the offense were, the community in which it occurred, and so forth. Then it was my turn. I asked the policeman whether he was also the arresting officer for the speeding offense, which was coming up next, and he replied that he was. Then I said,

"Did you turn on your siren and Mars lights as soon as my son went through the stop sign?"

He said, "no, not right away."

"In fact," I said, "you kept your distance and followed him for a while, waiting to see whether he would commit any more violations, and in fact he started to speed, and then you turned on your siren and stopped him, right?"

"Yes, that's what I did," he said.

"But if he violated the stop sign, wasn't it your duty to arrest him right then and there, and not wait and see whether he would do something else that was illegal?"

At this point the judge interrupted with words that I was glad to hear: "I'm dismissing this charge. If there was an infraction, the officer should have acted. The officer did not act, and therefore lost the opportunity to arrest the driver for the stop sign violation. The next charge is speeding. How do you plead?"

"Guilty," I said.

We paid the fine and my son got his license back. There was no doubt whatsoever that he had violated the stop sign, and yet any prediction of certainty that he would be convicted for it would have been wrong.[2]

Law is a matter of probabilities the same way that the basic constituents of the universe—electrons, protons, neutrons, quarks, leptons, muons, and so forth—exist only as probabilities. Quantum theory has shown that we cannot ascertain the exact position and momentum of these elements that make up all matter. Heisenberg's

[2]What about a prediction that it was 100% certain that my son would have been convicted on the second charge, that of speeding? After I left the courtroom, an argument occurred to me that would have also acquitted my son on the second charge! Can you figure out what that argument would be?

"uncertainty principle" reflects the fundamentally probabilistic nature of our universe. I mention this to say that law is in good company when we call the law uncertain.

Before the quantum theories were established in the late 1920s, Einstein had speculated that the probabilities assigned to quantum events were simply a measure of the observer's ignorance. For instance, it may be observed that there is a 10% chance of an orbiting electron being found outside the potential energy sphere of a hydrogen atom (proton). Einstein felt that the electron was either inside or outside the potential energy sphere, and only human ignorance and the crude limits of our macroscopic measuring devices stood in the way of determining the precise location of the electron. But quantum theory disproved the Einsteinian analysis. We now know that the individual electron's position is in fact and by its nature indeterminate, and that its real position is precisely calibrated by a probability function. Thus the 10% figure actually measures the location of an individual electron; the electron is somehow 10% outside the potential energy sphere and 90% inside. This is impossible to visualize if we think of the electron as a particle, but the electron isn't quite a particle, it's a wave-particle. If we were to make aggregate statistical measurements, we would find that roughly 10% of all electrons of hydrogen atoms are located outside the sphere. But the intellectual challenge of quantum theory consists of the fact that what statistically is true of an aggregate of electrons is somehow also true of an individual electron.

You don't need to understand quantum theory to understand law, but I do want to point out that what seems mysterious or strange about the prediction theory of law is actually analogous to the microscopic constituents of matter in the real world. Thus when the attorney says that your chance of winning is 90%, that is an *exact* number. It does not mean that the attorney is only 90% sure of what the law is. It means that the attorney is 100% sure of what the law is, and the law itself is a 90% probability.

One might object that at least any case that has actually been decided is crystal clear; the law is exactly what that case said it was. Even this is analogous to quantum mechanics: we can tell with certainty where an electron *was* by looking at the path it traced in a Wilson cloud chamber. But we cannot tell with certainty where an electron *is* any more than we can tell with certainty what the law *is*.

A case that was decided last year, then, is a measurement of what the law was a year ago. At the time the case was argued, the law could only be expressed as a probability. But once the court decided the case, then the law became a past fact. That past fact cannot determine what the law will be in the future; even a clear judicial precedent can be "overruled." Moreover, no case is exactly like any past case. If you want to know whether you can get away with calling someone a liar, you might read 100 "liar" decisions but they cannot tell you with certainty about your own case. After all, the person you want to call a liar is not the same person as the cast of characters in those 100 previous cases, the facts are not exactly the same, the circumstances are different, and so on. There is, and must be, an element of legal uncertainty in any case.

One might well ask why in some cases the legal uncertainty is so high. An attorney might say that your chances of winning are 40% or 50% and right away you think that you could have flipped a coin and gotten the same result. But very few situations out of the thousands of everyday law situations that we encounter have such a high degree of indeterminacy as 50%. Most of the time, when the law is as highly determinate as 99%, people simply don't ask attorneys about it. You don't need to ask an attorney to interpret a stop sign for you. You know that if you're driving a car and fail to stop at the stop sign, there is more than a 99% chance that you've committed a traffic violation (and you could be arrested if a police officer sees it). Attorneys get most of their business in the areas of lower predictability, where the law isn't clear.

In addition, there are some laws that always seem indeterminate. Consider the laws against "vagrancy" or being a "public nuisance." These are very hard to define, and yet we seem to recognize clear cases when they occur. But there is a more general point to be made about indeterminate laws, and that is, the closer you look at *any* law the more indeterminate it becomes "around the edges." Consider the "clear" law of stopping at a stop sign. What constitutes a "stop"? Is a "rolling stop" a stop? If you observe any given stop sign, you will see some cars come close to stopping but never stop; others will clearly stop; a few might simply slow down a little. The degree of variability between slowing down and stopping is so great that it would be impossible to specify exactly what constitutes stopping in those borderline cases. A police officer might or might not arrest

[illegible] for making a "rolling stop," and that person might or might not be able to convince the traffic court judge that it was truly a stop.

Since all laws are necessarily indeterminate, and since the very best lawyers will always speak of the law in percentage probability terms, why are lawyers so highly paid in our society? It may seem paradoxical, but the general success of lawyering as a profession has a lot to do with the fact that any client's situation can only be assessed in terms of probabilities and not certainties. Consider: a lawyer tells you that your chances of winning the previously mentioned "liar" case are 90 out of 100. Suppose the case is filed, you hire that lawyer, and you lose the case. You confront him with his prediction of 90% and he replies, "exactly right; you had a 10% chance of losing and, unluckily for you, you lost." *No* prediction of the outcome of a case can ever itself be *falsified.* Just as you can bet on all the red and black outcomes of the spin of a roulette wheel and still lose because the ball improbably lands on the green number, so too any assertion of law has a finite probability of either prevailing or being defeated. In short, in any single given case, a lawyer cannot be wrong! And that, I submit, has a lot to do with the success of the profession as a whole.

But I'm not saying that some lawyers aren't better than others. A lawyer who loses a *series* of 90% cases perhaps should go into a different line of work. Even though an attorney's reputation cannot be broken (or made) as the result of a single case, how well the lawyer does over a range of cases is indeed the determinant of the lawyer's reputation. The situation is not qualitatively different from the meteorologist on television. The weatherperson might predict an 80% chance of sunshine tomorrow, and yet the next day there is a downpour. No problem; there was after all a 20% prediction of rain, and that's what occurred. So we "forgive" the bad weather prediction. However, if we observe over the course of several weeks that most of the above 50% predictions by that meteorologist turn out to be wrong, we will consider switching to a different channel. ("I always watch channel 7; they give better weather.")

1. Subjective Probability?

I have been trying to defend a wholly objective definition of law as a prediction of judicial decisions. Let me suggest four problems

with my approach and try to deal with those problems. First—and this is a fairly recondite problem—every prediction of what a court will decide is, of course, a prediction of a unique event. The facts in any given case can never be exactly the same as the facts in any other case (at minimum, the *time* that the case comes up has to be different). Thus, a lawyer's percentage prediction of the result of a judicial decision must be, like a meteorologist's, the prediction of a one-time event. Sometimes this is called, in the mathematical literature, "subjective probability." Our first problem, then, is how can I reconcile my "objective" view of law when it depends on something called "subjective probability"?

The term "subjective probability" was coined in order to distinguish it from the notion of probability over many occurrences of the same thing. Probability originally was conceived as the number of times a certain event would occur out of a long run of similar events, such as the number of times heads would come up if you tossed a coin a thousand times.[3] But if you toss a new coin once, a coin that has never been tossed before, advocates of the "long run" probability notion say that you can only measure your *degree of confidence* that the coin has a 50% chance of coming up heads, and this is called "subjective probability." It is based, they say, on one's ignorance of the true factors (wind currents, gravity, molecular motion, energy imparted to the toss itself, the angle of toss, and so forth) that determine how the coin is going to come up.

Even if these advocates of "subjective probability" are correct about a unique coin toss event—and so far there's no consensus among mathematicians about this—my model for law is not like this "subjective probability" notion, but rather is analogous to quantum theory where the individual event being predicted is itself spread over a range of probabilities. In my definition of law, as in quantum theory, the probability is not at all subjective. It is not a measure of the degree of the observer's ignorance. Rather, it is an exact measure of the degree of indeterminacy of the thing being measured.

2. Self-Prediction by Judges?

A second problem, somewhat building upon my answer to the first one, has proved to be a real mind-twister. It may be presented in the

[3]One of the earliest philosophers of probability, the great mathematician Poisson, actually used for much of his data the outcomes of numerous civil lawsuits in the French courts.

following question: If law is a prediction of what courts will decide, how can my theory of law be used by a judge? A judge needs to know what the law is. If a judge uses my theory to decide what the law is, doesn't that require him to predict what a judge would decide? More pointedly, doesn't it require him to predict what he himself is going to decide? If the answer is yes, doesn't that leave him total discretion to decide anything he likes on the ground that such a decision is exactly what he predicted he would decide?

Let's put this question into concrete terms that could come up in the course of a legal argument. If the judge asks you what is the law in your case, and an attorney responds, "your honor, the law is whatever you predict you will decide," then my definition would break down. It would fall into a paradox of self-reference. More than that, it would become totally subjective, depending upon the whims of the judge. However, the fallacy lies in the attorney's response. She should not have responded in that manner.

The attorney should have responded to the judge's question as follows, "your honor, the law is what you would predict a judge would decide who knew as much as you do about the facts of this case." And the judge then asks, "What judge—me?" The attorney replies: "Not necessarily. I am talking about the average judge sitting in the courts of this jurisdiction, which includes your honor to the extent that you participate in this average."

"How can I possibly predict what an average judge would decide if I'm one of the judges that make up the average?"

"By simply excluding from your deliberations whatever factors might enter into your deliberations that are peculiar to you as an individual that you know about. You should abstract yourself, so to speak, from whatever personal characteristics, or perhaps I could use the term idiosyncrasies, that you might have, and decide the case the way the average judge in this jurisdiction would decide it. The other judges don't have your personal characteristics; each may have his or her own, but all idiosyncracies should cancel out, and you should apply only those thought processes used in deciding cases that you know are common to all of you."

That answer, I submit, contains no circularity nor subjective element. It may not give a judge a clue as to the content of the law (how could any *definition* of law generate *content?)* but it does tell

the judge what to exclude. The judge should exclude all biases, prejudices, and idiosyncracies of which the judge is aware.

My suggestion that a judge should decide the case the way an average judge would decide the case coincides with the conclusion that the attorneys on both sides of the case should come up with after they study the law of the case. The attorneys, not knowing which judge will be assigned to their case, must research the law with an eye toward predicting what *any* judge, *any average* judge, might decide. That is the standard the attorneys use, and therefore it should also be the standard the judge uses, because the law as laid down by the judge should not come as a surprise. Law itself may be indeterminate, but when a judge finds what the law is in a given case, that finding should not come as a surprise to the parties. (If it did, then law would hardly be able to channel our conduct, which is its function as I claimed at the beginning of Chapter 1.)

3. Judicial Decisions Based on Probability

But this raises a third problem: what does the judge do when he measures the law according to the definition I have given, and concludes that his best prediction of what a judge would decide in the present case on the present facts is 60% in favor of the plaintiff? The judge only has one decision to make. Does he now have a 40% width of discretion to award the decision to the defendant?

My answer is clearly no. The judge, in this example, has no discretion; he must award the decision to the plaintiff. Picture a judge as deciding on the law the same way a jury decides on the facts. If at the close of a civil case (I'll leave criminal cases out of it because of the higher standard of proof[4]), the jury finds that 51% of the weight of the evidence favors the plaintiff, then the jury should (and is instructed to) award the decision to the plaintiff. For any whole percentage point less than that, the plaintiff has not proven her case and therefore the decision should go to the defendant. Specifically, at 50-50, the weight of the evidence is evenly balanced and therefore the status quo should not be disturbed; the decision should go to the defendant.

[4]But the mathematics is exactly the same. If the state has to prove beyond, say, 70% that the defendant is guilty, then any proof less than or equal to 70% should result in acquittal.

the law is so uncertain that a prediction of what an average judge would decide comes out only to the figure of 51% in favor of the plaintiff, nevertheless the judge should award the decision to the plaintiff invariably and without exception.

But then, you might ask, doesn't this make the law a lot more certain? If an attorney researches the law and finds that it is 60% in the plaintiff's favor, shouldn't the lawyer be 100% confident that the plaintiff will win, and not just 60% confident? No, because the 60% figure represents the attorney's best estimate of what will happen. The attorney cannot be certain that a judge will arrive at the same figure. The degree of the attorney's uncertainty that a judge will arrive at the same figure is, precisely, 60%.[5] As desirable as it would be to make the law in general more certain, the fact is that some law is inherently indeterminate and the best we can do is to allow it to shape our lives as a probability risk factor rather than as a certainty. And maybe this is better. Since we live in a dictatorship of law anyway, it may be preferable to serve under a dictator who is not rigorously and mechanistically determinate.

4. *Divergence of Predictions Among Attorneys*

In what ways can an attorney be wrong in calculating a figure of, say, 60%? This is our fourth problem in considering the theory of law that I have been advocating. To introduce it, let's again consider a comparison with the meteorologist.

In our comparison between forecasting the weather and forecasting judicial decisions, consider the following major difference. Suppose the meteorologist on channel 2 predicts that there is an 80% chance of rain tomorrow, and the meterologist on channel 5 predicts a 60% chance of rain. Both cannot be right. If we find that one prediction is based on a study of satellite photos and reports of weather conditions around the country, and the other is based upon whether a certain stick held in both hands is bent toward the ground at a certain angle, we might have a higher degree of confidence in the first one.

[5] Indeed, the lawyer's figure of 60% already takes into account, and thus discounts, the ground rule that if the judge finds the figure to be 60% the judge will be certain to rule for the plaintiff.

Now compare that situation with two lawyers who give you a prediction whether you're going to win your case against your landlord. Lawyer A says you have an 80% chance of winning, and lawyer B says 60%. Can they both be right? It's possible that, like the meteorologists, one lawyer has studied the problem and the other is simply guessing without doing any research. But let's make it harder by supposing that both lawyers have studied the problem very carefully.

Here's how they can both be right. Lawyer A is an expert in landlord-tenant law. He knows that if he takes your case, he will personally argue the case in court and, on the facts as you have recounted them, he has an 80% degree of confidence in winning. Lawyer B is a securities-law expert. She knows that if she takes your case, she knows so little about landlord-tenant law that, at best, she will have only a 60% chance of winning. Therefore, she is correct in predicting 60%, and lawyer A is correct in predicting 80%. The law is actually different for you depending upon whom you engage to represent you.

A similar distinction obtains between law and quantum theory. In the latter field, two physicists looking at the same data will apply the same formula and come up with the same statistical probabilities. However, two lawyers looking at the same factual data might come up with different estimates of success. In physics, we do not say that the knowledge and personality of the individual physicist can have any effect upon the probability of an electron orbiting outside the usual range of orbit for a hydrogen atom. But in law, we can and do say that the knowledge, personality, ability, and talents of the individual attorney can have a dramatic effect upon the outcome of the case. Defense attorney Perry Mason usually wins and prosecutor Hamilton Burger usually loses. Of course, the author, Erle Stanley Gardner, takes pains to show us that it is not Perry's rhetorical brilliance alone that does the trick, but rather his dogged pursuit of the truth. But even if it's just the latter, the fact remains that a good attorney who will personally track down all the clues and personally read the relevant cases and do the relevant LEXIS searches, would probably have a better chance of winning a case than an attorney who leaves these critical matters to a junior associate in the law firm or, worse, ignores them entirely.

The difference is encapsulated in Mark Twain's lament, "every-

body talks about the weather but nobody does anything about it." A meteorologist cannot intervene in the weather to safeguard the accuracy of his prediction. But a lawyer can participate in the very case that she predicts, so as to change the odds. This fact about the legal profession has a creative side and also a darker side. On the creative side, we can say that law is not the cut-and-dried reporting of facts and the mechanical classification of such facts under so-called relevant legal principles. Rather, its outcome depends in large part on who the players are, and one of the chief players is the attorney.

But on the darker side, we must acknowledge that the law can be different depending upon the quality of the lawyers. On the average it means that rich people get a better deal from the law than poor people, because they can afford to hire better lawyers. It means that justice is, to some extent, dependent upon what you can afford to pay for justice. And that is not the way things should be. The legal profession in my opinion is not doing enough collectively to improve the quality of justice for people who cannot afford it. Certainly a vast improvement must be made in the delivery of quality legal services to poor or disenfranchised people. The Hippocratic oath in medicine requires doctors to care for the sick, regardless of whether they can afford it; the legal profession needs a similar commitment to care for the needs of those in legal trouble, irrespective of pay. The ethical principles are there, but there must be a greater willingness to act upon them. The idea of devoting oneself to serve those who need help, in my opinion, is what it really means to be a member of a profession.

B. THE PREDICTIVE THEORY AND POSITIVISM

I've now presented and tried to defend an objective theory of law. How does it relate to the theory of positivism that we discussed in Chapter 3? Specifically, how can a positivist interpret the fact that a lawyer can make a difference in determining what the law is?

1. Indeterminacy of Statutes

There seems to be no room for it in Hart's theory of positivism. We now see that a statute—which the positivists thought was the

very definition of law as the command of the legislature—becomes only a partial predictor of judicial decisions. The predictive power of the statute depends on several factors, prominent among which is how close the statute fits the facts of the case. A statute making gambling a crime may directly apply to off-track betting on horses, but does it apply to friendly card games, or to pin-ball machines? Does it apply to investing in the stock market, which many people say is a gamble? Does it apply to accident insurance or medical insurance? Isn't the insurance company gambling on your continued good health? We are getting farther and farther away, in these examples, from the most direct application of the statute to off-track betting on horses. The statute sort of spreads out over these other possible applications, impacting upon them in a glancing manner. I'm not talking here about core and penumbra, which to Hart is a well-defined concept; rather, I'm talking about direct and indirect, about more and less, like a wave front across a spectrum of possibilities. And there will be a lawyer on one side arguing that it's more, and the lawyer on the other side arguing that it's less, and the quality of their arguments and their research and preparation will make a difference.

If we're going to be intellectually rigorous, we will have to conclude that statutes do not mechanistically apply to real-world situations. A statute may be like a computer program, but the real world is not, or at least so far hasn't been, programmable. The real world presents an array of problems, some of which seem to fit the descriptions in certain statutes, some of which fit the statutes only ambiguously, and many of which appear to have nothing to do with any given statute.[b] Since statutes do not dictate results in particular cases, we have to allow some room for the argumentative ability of attorneys.

This argumentative ability that I'm talking about, that can sometimes make a difference in the probability assigned to any given statement of the law, is only one of the kinds of inputs into judicial decision making. It's just a little window that looks beyond positivism into a fuller theory of adjudication. There are other windows, and

[b]This is indeed the fundamental problem with current research in artificial intelligence. How can a computer be designed to recognize things the way a brain does? And if such a computer is eventually achieved, how can it then be made to *evaluate* what it sees?

they may be a lot more important than the argumentative skills of attorneys.

2. The Function and Force of Judicial Precedent

A very large and well decorated window is the doctrine of judicial precedent. If you are suing your landlord, and a previous case dealt with the same issue as the one you're suing about, the judge in your case will undoubtedly cite that precedent and decide your case the same way as the previous one was decided. We all know about judicial precedent, but as soon as we begin to examine it closely, we find some very intriguing and puzzling questions.

Why do courts feel compelled to follow precedent? One possibility is laziness: the judge says that since a previous court has already looked into this issue, why bother doing it all over again? Another reason is to promote certainty and predictability in the law: if you find that the issues in your case have already been decided in previous cases, you can rely that those previous cases accurately stated "the law." Perhaps a third reason is that judges collectively want to avoid criticism. The more they back each other up, and the more they follow each other's decisions, the less room seems to exist for someone to complain that judges are acting arbitrarily or don't know what they're doing.

On the other hand, blind adherence to precedent can lead to great public criticism of judges. In recent years, many state courts have deliberately overruled nineteenth century precedents that uniformly held that wives cannot sue their husbands for assault or battery. The old cases went on the view that wives had no business going to court complaining about anything their husbands did to them. In recent years, as one court after another has overruled those old precedents, very few people were heard to complain that the courts were abandoning certainty and predictability in the law. Indeed, the courts would have been in for enormous public criticism if they had not overruled the old decisions.

But we often have cases of first impression, where there are no direct precedents on the books. We saw in Chapter 3 that when a case of first impression comes up within what Hart calls the penumbra of a statute, then the first court to deal with it acts as a mini-legislature.

Let's consider now whether this Austinian aspect of Hart's theory is persuasive. Suppose a person in a motorized wheelchair is given a ticket in Boston for crossing the intersection with the pedestrians instead of with the automobiles, and the case goes to court; we'll call it Case I. The judge holds that the motorized wheelchair is a "vehicle" under the traffic control statute, and hence the defendant has to pay a fine for violating the statute. Hart's theory is that that decision becomes an authoritative interpretation of the statute, as if the legislature itself had mentioned motorized wheelchairs, and therefore the decision is binding upon all future courts.

Now we have Case II; another person in a motorized wheelchair is ticketed for crossing the same intersection with the pedestrians instead of with the automobiles.. The judge asks the person in court, "weren't you aware that a previous ruling in this jurisdiction held that motorized wheelchairs were subject to the vehicular traffic regulations?" and the defendant answers, "Yes, I have seen a story about that case in the Boston Globe." And the judge asks, "Then, why didn't you cross with the traffic?" And the defendant's attorney at this point cuts in and says, "Your honor, the defendant is a handicapped person. His life would be in danger if he tried to cross with the trucks and buses and sports cars."

But the judge says that there is a precedent and the court is bound by precedent. The attorney replies, "Not if the precedent is clearly erroneous. Case I was wrongly decided. Case I jeopardizes the lives of handicapped persons."

Well, since these are hypothetical cases, I am free to invent my own verdicts. I hereby order the judge in Case II to overrule the precedent and decide that a motorized wheelchair is not a "vehicle" within the meaning of the Massachusetts traffic control statute.

If you agree with my preferred solution, then you have to disagree with Hart's theory that the judge in Case I was a mini-legislator. The judge in Case I was simply a judge deciding a case. The judge in Case II was also just a judge deciding a case. What the judge in Case II decided was that the previous judge's decision was in error.

And if this analysis works with penumbral cases like motorized wheelchairs, it should work equally well with core cases like our fire-engine case. If Case III holds that a fire engine has to stop at red lights, Case IV might very well decide that it's ridiculous to have fire engines, on their way to prevent a fire from spreading, stop at stop

lights. If so, the judge in Case IV will overrule the precedent of Case III. The English court that I cited in Chapter 3 reached the conclusion that fire engines did not have to stop at red lights, but could come up with no plausible reason; it simply said that it had to mitigate the harsh rigor of the law. And so it carved out an exception for fire engines, but it was an unprincipled exception.

We saw that Hart's theory failed in the fire-engine case. The exact case where the statute must apply, namely, in its core, was one in which it was held not to apply. If all you had was Hart's theory, you'd have to say that it was 100% certain that a fire engine is a vehicle and that it must stop at the red light. But we all know that a court is not likely to go along with that result. Hence, Hart's positivism, in this case at least, would be a very poor guide to our ability to predict a judicial result. And if law is nothing other than a prediction, then Hart's theory of positivism fails to help us determine law itself.

But under the alternate theory that I'm suggesting here, the court simply takes the statute into account as one very important input into its decisional process. For most cases, the traffic-control statute will work pretty well. But where there are other factors which recommend themselves to the court, the statute might possibly be eclipsed in an unusual case.

What are these other factors that might recommend themselves to the court? I mentioned judicial precedent. Like a statute, it is very strong; but also like a statute, there are some cases where the court might overrule a precedent. I also mentioned the persuasive ability of an attorney arguing a case. But now that we're considering it more closely, we begin to see that the attorney has to have some good arguments to be persuasive about. It won't work for the attorney just to have a good courtroom style, clear enunciation of words, and a winning personality. What are the kinds of arguments that work? This is a restatement of my earlier question as to what windows can be opened up to help us predict judicial decisions.

In the next two chapters, we will see an array of legal arguments and strategies all addressed to the resolution of a single fascinating case. You will recognize arguments based upon positivism, legal realism, natural law, and justice. You will see their interplay in a manner that cannot be conveyed by expository writing. For you will see the clash of arguments as positions that judges and decision-

makers take in deciding a case and then attempting to be persuasive about how they've decided it.

My own position is a bias in favor of justice. It comes out in the professors' opinions I recount in Chapter 6. And I will deal with i more directly, as an explicit component of what we mean by "law," in Chapter 7.