INTRODUCTION

"Jurisprudence" is the term normally used in English-speaking countries to refer to general theoretical reflections upon law and justice. "Philosophy of law" is an equally good label. Lawyers are mostly down-to-earth types, and mention of "philosophy" is likely to send them rushing for the exit. To most people, philosophers seem to spend their time asking unanswerable questions, or doubting obvious common sense. Why then should a lawyer need to know anything at all about philosophy?

The principal reasons for studying jurisprudence are intellectual: the object of the enterprise is to achieve a clear understanding, not to improve one's professional skills. Since plenty of otherwise intelligent and fairly well-educated people are quite devoid of intellectual interests, one should perhaps not expect them to enjoy studying jurisprudence. Yet, even for them, jurisprudence should occupy a necessary place in their legal education. Even in its most mundane aspects, the lawyer's business is a matter of argument and reasoning. It may be true that one can learn to engage in this practice by immersion and experience, without much intellectual reflection: but one is then simply the conduit for assumptions and understandings that one has never subjected to serious scrutiny. As we shall see in a moment, the taken-for-granted perspectives of practical men and women are sometimes but the residue of yesterday's philosophy.

It is a mistake to ground the importance of jurisprudence upon a set of claims about its practical implications. Nevertheless, the subject can have practical implications, and may even be increasingly likely to assume great practical importance. In periods of settled legal development, lawyers can operate with the assumptions that they absorbed while studying the standard doctrinal subjects. Having been adopted in this non-reflective manner, the relevant framework of ideas may be invisible to those who daily invoke it: it is like the air that they breathe. Even the air may come to occupy one's conscious attention when its supply is disrupted or polluted, however.

When the legal order confronts new challenges in a period of

B. Hooker, *Ideal Code, Real World* (2000).
D. Lyons, *Forms and Limits of Utilitarianism* (1965).
D.H. Regan, *Utilitarianism and Co-operation* (1980).

Chapter 2
RAWLS

INTRODUCTION

In the middle decades of the twentieth century, philosophical reflection upon the nature of justice had fallen into a sad condition of neglect. Many philosophers thought that varying opinions about justice simply reflect differing subjective preferences which do not lie open to rational scrutiny or evaluation. Some even argued that invoking justice is equivalent to banging the table to reinforce one's demands: one thereby adds nothing to the content of one's assertions, but simply indicates the emotional intensity with which they are put forward.[1] Few people believed that disciplined philosophical argument could provide us with reasons for choosing one particular view of justice in preference to rival positions. Scepticism about the possibility of philosophical argument concerning justice was allied to a perception that modern society is marked by a high degree of moral diversity. In a world of radical moral disagreement, there may seem to be little chance that philosophical reflection will lead us to converge upon a single view of justice.

Liberal political thought is inclined to regard moral diversity as a natural, and perhaps even desirable, consequence of freedom and tolerance. A liberal society is expected to establish some shared framework of entitlements that respects the diverse outlooks of citizens and enables them, so far as possible, to live their lives in a manner that is oriented by values that they freely and genuinely endorse. This seems to envisage a society where citizens hold very different moral, philosophical and religious outlooks, yet are united in their support for a shared framework of rights or other standards. But how is this possible? If people hold quite diverse moral and philosophical views, how can they come to agree upon a framework of rights, laws or principles?

[1] A. Ross, *On Law and Justice* (1974), Ch.12.

Will not any such framework necessarily privilege some moral viewpoints at the expense of others? How is one to find a ground or perspective from which a neutral set of rights can be constructed?

One possible option might seem to be offered by utilitarianism. Fundamentally utilitarianism is as vulnerable to scepticism as any other moral theory, but it possesses some features that appear to suggest otherwise. By defining welfare (which is to be maximised) in terms of preference-attainment, the utilitarian can factor diverse moral views into the theory in the form of competing preferences, and can deploy a pliable but orderly intellectual framework drawn from economics. In this way, the approach seeks to convert moral conflicts into technical and instrumental questions of efficiency. Those who oppose utilitarianism often point to alleged discrepancies between the prescriptions of utility and our settled moral convictions, but they generally fail to propose any equally systematic alternative theory, or to offer any similarly plausible way of subsuming and overcoming the diversity of moral outlooks.

The work of John Rawls fundamentally rejects utilitarianism, while seeking to address the problems of moral diversity in a different way. He tries to show us how reasoned argument concerning matters of justice is possible, and how it is possible to develop an ordered body of principles that accommodates the most telling criticisms of utilitarianism. His object is to arrive at a systematic theory of justice for the "basic structure" of a society. Such a theory might, he believes, serve as a public conception of justice, capable of governing the major institutions of a liberal democracy.

At the core of Rawls' work is his massive book *A Theory of Justice*, which was first published in 1971. In this book, Rawls seeks to demonstrate that a shared understanding of justice can be arrived at if we set on one side our diverse conflicting opinions about what counts as a good or flourishing life. Rawls tries to negotiate the problem of diversity, in other words, by distinguishing between two realms of ethical thought: one concerning the goals and ideals ("conceptions of the good") that we should seek to realise as individuals, and the other concerning the framework of justice and rights within which such "conceptions of the good" are to be chosen and pursued. The theory appears to suggest that our most fundamentally important aspect, from the viewpoint of justice, is our capacity to choose and pursue our own conception of the good. The principles of justice express and embody the intrinsic moral value of that capacity.[2]

After the publication of *A Theory of Justice*, however, Rawls began significantly to modify and extend his views. In a series of later books and essays, he argues that his account of justice should be understood as setting on one side, not simply our diverse conceptions of a good life, but our most fundamental moral, philosophical and religious views quite generally. Rather than embodying a contentious conception of moral autonomy (the moral value of our status as beings capable of choosing a conception of the good), the theory is to be viewed as a self-standing position that does not rest upon any such deep philosophical claims. Even those who reject any idea of moral autonomy (perhaps believing, for example, that a good life requires unreflective submission to the duties of a traditional role) will nevertheless have good reason to support the theory as a public conception of justice for their society. Indeed, the theory is said not to rely upon any thesis concerning our fundamental nature or status as moral beings, but upon ideas drawn from the "public culture" of a liberal democracy: the theory is to be understood as "political" not "metaphysical", and capable of being supported by an "overlapping consensus" of diverse philosophical and religious outlooks.

The bulk and complexity of Rawls' contribution, combined with these shifts in position, make the task of an expositor and commentator very difficult. We can, however, trace some of the major themes and issues in a way that will assist the reader in his or her efforts to study Rawls' work.

REFLECTIVE EQUILIBRIUM

How can one construct a philosophical theory that will yield conclusions about justice? And how can any such theory hope to command widespread support within a modern society characterised by a diversity of moral outlooks? On one approach we might try to deduce conclusions about justice from a starting point from which rational agents could not dissent. Suppose, for example, that we could be shown to be committed to standards of rationality that one could not coherently deny or reject; and suppose that we could demonstrate that certain principles of

[2] J. Rawls, *A Theory of Justice*, revised edn (1999).

justice were entailed by the standards so established. We would then have produced a very powerful and well-grounded philosophy of justice. Some philosophers have pursued this ambitious course, but it is unclear whether any of them have succeeded.[3]

Rawls does not seek to deduce a set of conclusions about justice from some incontestable bedrock in this way. It is probable that he would regard such approaches as unable to overcome the problems that they set themselves. For it is likely that any set of premises that is sufficiently rich to form the starting point for a compelling argument about justice will also be open to reasonable dispute. Instead of seeking an uncontentious starting point for argument that is more fundamental than our existing moral beliefs, we should proceed upon the same intellectual plane as those beliefs: the object is to exhibit the mutual supportiveness of our existing moral convictions.

All intelligent and reflective individuals will, under normal circumstances, have developed what Rawls calls "a sense of justice". That is to say, they will have come to hold a variety of views about specific issues of justice; they will have learnt how to frame reasons for those judgments; and they will have acquired a sense of the types of considerations that are relevant to judgments of justice. But they will probably not have considered the deeper relationships of principle that may or may not obtain between their various specific views. We should therefore explore the extent to which our considered judgments about justice are capable of being subsumed under an ordered set of principles. The starting point is within our existing convictions about justice. We try to develop a set of principles under which those convictions can be subsumed, so that the principles provide a general justification for the convictions. The attempt to find such a set of principles will almost inevitably require us to reconsider and revise some of our initial convictions about justice: but when we reconsider them, we do so in the light of our other convictions and the principles that they seem to assume or require. We must work backwards and forwards: revising our specific convictions when, on reflection, we judge that they may not be compatible with any set of principles to which we would be prepared to subscribe; and considering modified sets of principles that might better serve to capture our considered judgments. When we have attained a situation where our considered convictions about justice are subsumable under an orderly set of principles that we are prepared to endorse, we have attained "reflective equilibrium" in our convictions about justice.

[3] For an example that approximates to this approach, see A. Gewirth, *Reason and Morality* (1978).

In the process of seeking reflective equilibrium, Rawls tries to work, so far as possible, from premises that are weak and widely shared. But the ultimate test for his conclusions is the test of reflective equilibrium: the conclusions to which we are led must be ones that we are prepared, on reflection, to endorse. The test is one of coherence or mutual supportiveness: convictions about justice are judged to be sound when they support and are supported by our other moral beliefs and our beliefs more generally. This does not mean, however, that the Rawlsian approach is wholly lacking in critical leverage: the process of seeking reflective equilibrium does not merely "rubber-stamp" our existing convictions about justice as they stand, for the very effort to attain reflective equilibrium within those convictions will require us to reconsider and revise many of them. Rawls regards the search for reflective equilibrium as the method that has underpinned most of the work that makes up the tradition of moral philosophy: at one point he observes that the approach goes back in its essentials to Aristotle.[4]

There is a problem here, however, for Rawls accepts that a high degree of moral diversity is characteristic of modern society and will always be found within a liberal society that accords people a degree of freedom. Basic moral, religious and philosophical questions will be answered in somewhat different ways by different individuals: they are matters on which reasonable people may disagree. Consequently, any society that accords to individuals a degree of freedom will be likely to generate a diversity of moral opinions. Rawls intends his theory to reveal the possibility of a public conception of justice that might receive the support of citizens within a liberal polity, even given this degree of moral diversity. Yet how can this be, when Rawls' argument must of necessity rely upon our existing moral beliefs? Surely (we might think) the argument's dependence upon existing moral beliefs will preclude any attainment of convergent support for a conception of justice, given the degree of moral diversity that is characteristic of a free society.

Rawls perceives this problem and addresses it in *A Theory of Justice* and also in his later writings. In *A Theory of Justice*, the

[4] J. Rawls, *Theory of Justice*, p.45.

Chapter 6
DWORKIN

In the introduction to Part 2, I explained that legal theorists disagree not only about the nature of law, but also about the nature of legal theory. What exactly is one doing in constructing a theory of law's nature? Should such a theory be a conceptual analysis devoid of contentious moral presuppositions and implications (as Hart would say)? Or should a theory of law be grounded in a deeper moral philosophy, and be aimed at revealing (or denying) law's moral claims upon us, and perhaps at prescribing the conduct of judges and citizens?

Jurisprudence is often seen as divided into "normative jurisprudence" and "analytical jurisprudence". For those who accept this distinction as a fundamental watershed, theories of justice of the type that we examined in Part 1 would be seen as falling within "normative jurisprudence", because they seek to offer normative guidance as to what ought be done. Theories of law such as that offered by Hart would be seen as falling within "analytical jurisprudence" in so far as they aim to clarify our understanding of the concept of "law", without offering any normative guidance as to how we ought to behave or what institutions should be supported as just and right. Several theorists regard the analytical/normative distinction as misleading, however. They believe that an understanding of law's nature will inevitably be bound up with moral and political understandings that have normative implications. Indeed, they may take the view that, if detached from such a normative project, legal theory would be a pointless activity.

Ronald Dworkin began by offering a critique of Hart's account of law's nature that did not fundamentally call into question Hart's conception of legal theory; but he was ultimately to deepen his position into a critique of Hart's entire conception of the enterprise of jurisprudence. To understand how this came about, it will be helpful to begin by describing Dworkin's earlier writings, before going on to a discussion of his later, and more fully developed, theory.

RULES AND PRINCIPLES

Hart claims that we can work out what the existing law is by reference to the basic rule of recognition. The rule of recognition identifies certain sources, such as statutes and judicial decisions, as sources of law: a rule counts as "law" if it emanates from such a source. Sometimes it will be unclear whether or not a rule applies to a given case. This is because of the "open texture" of language. For example, it may be unclear whether a rule relating to "vehicles" should be applied to a milk float, a pedal car, or a pair of roller skates, since it is not clear whether these count as "vehicles". In such cases, the court has to exercise its discretion, and will have regard to policy considerations (including the presumed policy objectives of the rule in question) and to considerations of fairness. But in the majority of cases, no such exercise of discretion is necessary: a motor car, for example, is clearly a "vehicle".

Dworkin challenges this general picture of law and legal reasoning. He discusses a United States case, *Riggs v Palmer*, although he tells us that almost any case in a law-school casebook would serve his purpose equally well. In *Riggs v Palmer*, a murderer claimed that he was entitled to inherit under the will of his victim. The will was valid, and was in the murderer's favour. The existing rules of testamentary succession contained no exceptions relating to such a case. The court decided, however, that the application of the rules was subject to general principles of law, including the principle that no man should profit from his own wrong. They held that the murderer was not entitled to the inheritance.

Riggs v Palmer shows us, according to Dworkin, that the law does not consist entirely of rules: it also includes principles. Principles differ from rules in a number of related ways:

1. Rules apply in an "all or nothing" fashion. If a rule applies, and it is a valid rule, the case must be decided in accordance with it. A principle, on the other hand, gives a reason for deciding the case one way, but not a conclusive reason. A principle may be a binding legal principle, and may apply to a case, and yet the case need not necessarily be decided in accordance with the principle. This is because principles conflict and must be weighed against each other: see points 2 and 3 below.

2. Valid rules cannot conflict. If two rules appear to conflict, they cannot both be treated as valid. Legal systems have doctrinal techniques for resolving such apparent conflicts of valid rules, e.g. the maxim "*lex posterior derogat priori*". Legal principles, on the other hand, can conflict and still be binding legal principles.

3. Because they can conflict, legal principles have a dimension of weight which rules do not have. Rules are either valid or not valid: there is no question of one rule "outweighing" another. But principles must be balanced against each other.

This analysis may at first seem hard to square with Dworkin's own discussion of *Riggs v Palmer*: for was that not a case where a principle came into conflict with a rule (the statutes regulating testamentary succession)? And does not Dworkin's analysis suggest that principles conflict only with other principles, and not with rules?[1] The answer would seem to be that *Riggs v Palmer* is in fact, despite appearances, a clash between principles, not between rules and principles. The rules of testamentary succession were binding on the court by virtue of certain underpinning principles, such as the principle that "the enactments of the legislature should be enforced according to their clear wording". This principle (or one like it) came into conflict with the principle that "no man shall profit from his own wrong". The court, in deciding that the latter principle was decisive, was not deciding that that principle would always outweigh the principle about enforcing statutes. Rather, they were deciding that the effect of allowing a murderer to inherit from his victim would be such a serious infringement of the values protected by the "no profit" principle, that that principle should prevail in those circumstances. In consequence, the statutory rules on succession were to be construed as subject to an implicit proviso, rather than being enforced according to their surface meaning.

This analysis enables us to see how the courts can change the law while applying the law. At first this seems paradoxical: one might argue that if the courts change the law they must do so by deviating from the strict application of the law. However, we can see from the example of *Riggs v Palmer* that a court may create a new exception to the established rules, but do so on the basis of legal principles. Thus, *Riggs v Palmer* created a new exception to

[1] See the objection put by Hart, *The Concept of Law*, 2nd. edn, p.262.

the general rules on testamentary succession ("a murderer may not inherit under the will of his victim") but justified that exception by a legal principle ("no man shall profit from his own wrong").

PRINCIPLES AND POSITIVISM

Suppose that we accept Dworkin's analysis of *Riggs v Palmer*. What does this have to do with legal positivism? It is not enough merely to point out that Hart does not mention legal principles, for that does not show that they are in any way inconsistent with his theory. Why shouldn't we treat Dworkin as simply making a useful addition to Hart's theory?

One might at first think that *Riggs v Palmer* would not even qualify as a hard case in Hart's theory. Hart's discussion of the "open texture" of language can give the impression that he thinks all legal uncertainties flow from such indeterminacy in the meaning of words; but *Riggs v Palmer* was not concerned with any uncertainty about the exact range of applicability of the concepts "valid will", "profit", "wrong" or anything else. We need to remember, however, that Hart is concerned with necessary features of law, not contingent features that may be exhibited by this or that legal system. Indeterminacies stemming from the open texture of language are viewed by Hart as necessary features of law that could not conceivably be avoided; but a focus on such necessary features does not deny the possibility of other, contingent, sources of indeterminacy that may or may not be present in a particular system. Thus, Hart could acknowledge that it is possible for some legal standards to conflict with each other, and that, when this occurs, it produces a type of uncertainty in the law not encompassed by his discussion of the "open texture" of language. There seems to be nothing inconsistent with legal positivism here.

The importance of the analysis as an attack on positivism can be appreciated only when we come to Dworkin's account of how legal principles are identified as part of the law: for he claims that legal principles cannot be identified by anything resembling Hart's rule of recognition. A principle may already be a legal principle although no court has ever formulated it or laid it down as a principle. For example, suppose that no lawyer or judge has ever mentioned the principle that no man shall profit from his own wrong. It might still be possible to demonstrate

that that principle is an existing legal principle (Dworkin tells us) if one could show that the principle provides an appropriate justification for a range of established black-letter rules and decisions (e.g. a gambler cannot sue for his winnings; a prostitute cannot sue for her earnings; a person injured in an illegal enterprise cannot claim compensation; a party cannot rely on a mistake induced by his own fraud in order to avoid or enforce a contract). Thus we cannot identify principles simply by consulting certain sources, but only by engaging in a moral or political discussion of what principles should be invoked to justify the black-letter rules of law.

Two strategies for reconciling principles with positivism may be contrasted. On the one hand, the positivist may argue that principles are indeed a part of the law, but that they can be identified by some version of the rule of recognition. On the other hand, the positivist may concede that principles cannot be identified by a basic rule of recognition, but may argue that this is because they are not in reality a part of the law: they are extralegal moral considerations that are applied by the courts, in the exercise of their discretion, when the legal rules fail to give a clear and determinate answer. We shall examine each of these two responses in turn, starting with the latter response.

DISCRETION AND RIGHTS

Positivists could claim that Dworkin's "principles" are simply moral considerations that the judge may have recourse to, in the exercise of his or her discretion, in cases where the law does not give a clear answer. It could then be argued that an inability to identify principles by a basic rule of recognition does not refute legal positivism in general or Hart's theory in particular. To produce a refutation of positivism, Dworkin must offer compelling reasons for treating principles as a part of the existing law.

Dworkin does endeavour to produce such reasons. To understand the strongest of those reasons fully, let us begin by noting one initial difficulty for the positivist. If we treat principles as a part of the law, we can see why *Riggs v Palmer* was a hard case. This was not because of any vagueness or "open texture" in the relevant rules, but because it involved a conflict between different legal standards: the principles requiring the enforcement of statutes according to their clear wording conflicted with the principle that no man should profit from his own