Chapter 7
Law, Legitimacy and Taxation

§7.1 The Big Stick

Economists like to take an external view of law. Law is just a given, an opaque constraining factor, somewhat similar to geographical factors like climate and fertility, which have a bearing on economic activity, but are not themselves part of economics. The laws enacted by a sovereign State have a great bearing, usually malign, on its economic activity. It is best to have a minimal legal regime, which contents itself simply with the maintenance of law and order and the enforcement of contracts. All else should be subject to the market in which each seeks to obtain the best deal available. Economics is simply the study of voluntary transactions, each individual being free to do whatever he likes, provided it is not forbidden by law.

It is an attractive view. It looks neat to balance the maximising view of the individual with a minimalist understanding of the law. But it fails on two counts: it expects too little of the law, while allowing too much latitude to the law-maker. The businessman does not look to the law only to maintain law and order and to enforce contracts, but to secure a stable currency, to establish and enforce, a system of weights and measures, to maintain roads and to provide sanitation, to enforce standards of hygiene, and much else: most notably to regulate markets and secure openness and fairness by means of Trade Description Acts and take-over rules.[1]

[1] §4.2, p.79.

The businessman also, like everybody else, wants the law not to be arbitrary, corrupt, dilatory, expensive, ineffective or malign.

The law, too, is not an autonomous discipline to be studied in isolation, but is, like economics, a moral science, that can be understood only in human terms and in its social setting. But, again, this is widely denied. Law should be kept separate from morals, and other extraneous ways of thinking, and understood simply as the edicts of a sovereign who has a monopoly of coercive power and will enforce obedience. We have to have law, it is argued, to get us out of the State of Nature, where we were all in a Prisoners' Dilemma.[2] We each would be better off if we all refrained from violence, but each would be better off still if others refrained from violence while he helped himself to his neighbours' goods and chattels. He must be prevented, if need be by force, if we are all to benefit from communal self-restraint. We can escape from the Prisoners' Dilemma only if some sovereign has a monopoly of coercive power, and can punish any law-breaker, and will keep him from brealing the law for fear of the consequences. From this it is easy to extrapolate to a Big Stick theory of law. Hobbes likened the State to Leviathan, in which an all-powerful sovereign could enact whatever laws he liked, and compel his subjects to obey them. We all are tempted, so compulsion is needed to deter us from breaking the law, and punishing us, if we do. More than that, Le3viathan must be strong enough to defeat the Mafia, and stronger still, to defend the realm against foreign foes. We may not like Leviathan, but There Is No Altrnative.

Similalry, John Austin in the Eighteenth Century defined law in terms of commands backed up by force. It was the sovereign that controlled the force who issued the commands, and it was only what he commanded that was genuine law. Herbert Hart understands law as a system of rules, bound together by a fundamental rule of recognition, which provides for courts and legislatures, the latter being free to pass whatever laws they think fit; provided it is effectively in force over some area, whatever the legislature enacts is valid law. This is a correct characterization of law from an external point of view. A regime that can exercise effective control over an area is recognised, *de facto* if not *de jure*, as being its government; and this is a necessary, as well as a sufficient, condition: no matter how good is claims, a legal system that is not able to secure obedience to its decisions, by coercion if all else fails, may be an interesting object of study, but is not a system of law properly so called.

> A system of law that is not enforced, is not in force.

[2] See above, §2.3.

§7.2 Legitimising Leviathan I: Contract

Hobbes' Leviathan terrified people. He might secure law and order for most of his subjects, but could persecute minorities and tyrannize them all. The reign of Charles II may well have been preferable to the disorder of the Civil War, but Hitler and Stalin, Mugabe and Gadaffi have shown how terrible life under an authoritarian dictatorship can be.

Locke and Rawls seek to shackle, at the same time as legitimising, Leviathan by a contract. We strike a bargain with the State, whereby we each agree to obey the law in return for the State protecting us, maintaining law and order, and generally acting for our benefit. My obeying the law is a *quid pro quo* for the protection the law affords me. The Contract Theory articulates the sense of reciprocity—there is *quo*, so some *quid* can reasonably be demanded—but suffers from the fatal defect of there not being an actual contract. Contracts arise from a bargaining process, in which the two parties define the precise outcome that each finds acceptable. Once we abandon actual bargains, and muse about implied bargains, all rigour of thought disappears, and the wildest hypotheses can be canvassed about what terms might have been offered and might have been accepted. Fleeing from a hostile power, I might be ready to accept servitude for life as the price of sanctuary; confident in the possession of my ancestral acres, I might refuse to allow the State to tax me without my explicit consent. Even if the bargainer is supposed to be ignorant of his actual and future position in society (as in Rawls' account), he cannot be ignorant of his own aptitudes and ambitions without ceasing to be a real person; one able and ambitious bargainer would opt for laws that gave him opportunities to excel, where another, stupid and lazy, would want to be given an equal share of the fruits of other men's labours. Contract Theorists meet this objection by abandoning actuality altogether. The bargainer who bargains with a regime to obey its laws is not a real person at all, with particular aptitudes and ambitions, but a hypothetical entity who can be presumed to have certain interests simply by virtue of being a bargainer: whatever his actual interests, he can be presumed to have an interest in staying alive, healthy and safe. That much should be conceded, but with the observation that it opens the door to wide-ranging paternalism. The interests we can ascribe to an imaginary person justify gross restrictions on his freedom in the name of health and safety, and it has often been accepted by the courts that welfare includes moral welfare. Although many thinkers have appealed to Contract Theory to limit State power and secure individual freedom, their arguments do not work. Implied contracts are too elastic. Without an actual contract, Contract Theories are vague vacuities.

§7.3 Legitimising Leviathan II: Democracy

Most modern thinkers seek to legitimise Leviathan by democratic mandate, which, they hope, will also shackle it. If a regime can make out that it is democratic, its right to rule, they believe, is unchallengeable: *quod placuit plebi, legis habet vigorum.* After all, where else can legitimacy some from if not from the people? And there is a built-in safety-valve: in the current understanding, a democracy is one where there are elections every four or five years, In the intervening period, a government may be able, as Abraham Lincoln said, to fool all the people some of the time, and some of the people all of the time, but it cannot fool all of the people all the time, so that if the government misbehaves, it can be voted out.

> The important thing in politics is not who you are, but who you are not

That is, indeed, a merit, but only a limited merit, and only in a context of many conventions, understandings and principles, which have evolved over centuries, and are at least as important as a parliamentary vote. To vote a government out is to vote another government in. But would that be an improvement? The choice is limited, usually to just two political parties.[3] The choice between the Ins and the Outs is a choice within a duopoly, with the two parties having a lot in common. A ballot paper does not have an box "For none of the above" for a voter to put his cross in. In an election one cannot simply vote *against*: one must vote *for*. It is difficult for candidates to emerge with a serious chance of success, and the voter is left with a Hobson's choice between two members of the political class often pursuing their class interests rather than those of the people who elect them. A French observer once noted

[3] It was noticeable that in 2011 both the Conservative and the Labour parties campaigned vigorously against the Alternative Vote, which would have made it easier for new parties to gain a foothold, and challenge the two incumbents.

that a Socialist Deputy had more in common with a non-Socialist Deputy than either had with their constituents.[4]

Having a vote is a good thing. It is a mark of being a citizen, who has a say in the law, and not just a subject, to be bossed about, and simply told what he must do. But it is a stylized say. At the end of a discussion, if no consensus has emerged, we may take a vote, Which gives each person a voice, but only to answer the question put to him. As the number of voters increases, the opportunity of framing the question decreases. Hence the very limited choice available in a general election.[5] The inverse relation between size and say is of general application. In most families, one has considerable say, and each individual member of a jury has considerable clout. A governing body or cabinet of twenty has less power than one of only twelve, and when the number reaches sixty, most of the power has leaked away into the hands of the chairman and administrative staff. If citizens are to have an effective say on anything, it must be through membership of relatively small bodies—juries, parish councils, Women's Institutes, and the like, where each person's voice can be heard and heeded. Small is participatory, as well as beautiful.

Having a vote is a good thing, but not all that good. The trouble is that other people have them too, and may outvote me. They may think that Jane would be a good wife for me, and that I should marry her. But I don't want to. Although I can live with being outvoted on some public issues—whether to come out of the Common Market or not—I cannot live with a wife not of my own choosing. Of course, I cannot have a complete say—Jean may be wooed, but not won; she must be as much entitled to say "No" as I myself. It is not a sole effective voice I crave, but a one-way veto. I, and Jean—and Jane for that matter—must be allowed to say "No" on things that peculiarly concern us.

[4] In recent years the political elite has resisted public pressure to re-introduce the death penalty, to curb immigration and to leave the European Union. It is arguable that these decisions were right, but difficult to make out that they represent the will of the people.

[5] It is noteworthy that in the United States, which claims to be the most democratic and equal society in the world, Presidential candidates tend to be very rich, and seek large donations from wealthy supporters.

Vetoes are more important than votes,[6] and although having a vote is a good thing, it does not by itself confer legitimacy. Tyrants regularly describe their regimes as "Democratic", and often stage-manage elections. When in the past half century Imperial powers have invaded foreign countries, they have tried to make them into Western-style democracies with real elections; but the results have been disappointing, and dubiously justify the initial incursion. Democracies thus characterized, have no more divine right than kings. A more careful examination is needed of the nature of Civil Power, the conditions of its legitimacy. and feasible safeguards against abuse.

§7.4 Too Big

The Big Stick account fails, because the stick is too big. It is too heavy to wield without a lot of extra help. The task of coercion is greater than any sovereign, unaided by un-coerced supporters, can manage. If the sovereign is a single autocrat, even though as strong as Sampson, he cannot single-handed overcome all his enemies—and has to sleep sometimes. If the sovereign is a sovereign body, such as a Parliament, a cabinet, or a junta, its members must agree un-coercedly on how to do business; In Hart's analysis, although the law is enforced, if necessary, by force, it has to be administered by officials, who are not motivated solely by fear of coercion. The legal functionaries need not all be enthusiastic supporters of the regime, and may, in many cases, be moved by self-interest with regard to salaries and hopes of promotion. But self-interest alone cannot always suffice. Communism collapsed in Eastern Europe in 1989, because the communist regimes had increasingly lacked legitimacy in the eyes of the party, as well as the populace. For a time they were able to maintain themselves with the aid of a minority of party members who either for ideological reasons or for self-interest still supported the regime. Until 1989 enough Hungarian border guards were prepared to shoot dissidents trying to escape into Austria for most Hungarians to feel they had no alternative but to do as they were told. But eventually even border guards found their aversion to shooting fellow citizens too strong to be overcome, and the Iron Curtain became porous, and the flood of people voting with their feet became unstoppable. Although the totalitarian regimes of the Twentieth Century were able to go a

[6] See above, §3.3.

very long way in cowing their peoples into obedience, naked force was in the end not by itself enough. Laws are not just commands backed by force, but need to have some legitimacy in the eyes of at least some of the people neeeded to enforce it.[7]

Not only must a regime secure the loyalty of its *apparatchiks*, but it must have at least a grudging acceptance from its subjects. Unless the subjects minimally acquiesce, they will withhold not only their allegiance, but information, which in the nature of the case is Nearly every regime seeks some form of popular approbation: the coronation ceremonies of mediaeval monarchs included some form of public acclamation that would help to confer legitimacy, as did similarly the salutation of Roman Emperors. From this it follows that some, perhaps only a minimal, measure, of acceptance is a necessary condition of a government's legitimacy. There are, as Plato argued,[8] criteria of good government, as there are of good husbandry. A government needs to recognise that those it is governing are human beings with minds and interests of their own, which it needs to take into account. Its power and very existence depends in part on its being regarded, at least by some, as legitimate, and its legitimacy is conditional.

The conditions for our acknowledging the authority of the Civil Powwer as legitiamte arise from our fear of how unshacled power might be exericised. We have a healthy fear of the State. Quite apart from the terrible examples of the Twentieth Century, we can work out for ourselves the danger inherent in giving any one body a monopoly of coercive power. I can imagine myself the victim of a tyrannical authority, and can empathize with your similar fears, and am hence ready to form an alliance, *vindicia contra tyrannos,* to vindicate the victims of injustice against unjust rulers. It is a defensive league against possible misgovernment; not a carefuly drawn-uo contract with the government, but a general constittutional principle, resulting in definite institutions and procedures We need to establish institutions and promulgate procedures to make abuse of power difficult and well-publicised. An independent judiciary, *habeas corpus,* and the requirement of Due Process give me good reason to think that I cannot be picked upon by the

[7] For fuller argument, see J.R.Lucas, *The Principles of Politics,* Oxford, 1964, §18, pp.75-78.

[8] *Republic* I, 341-347.

powers-tyhat-be, if I happen to get into their bad books, and that if they try to oppress me, all the world will know of it.

In making that demand, I see myself as a subject more than as a citizen, more anxious to have an effective veto on bad behaviour by the government towards me, than on having some small voice in determining public policy. I value freedom from the powers-that-be more than freedom to join them in exercising power. It is a recurrent theme down the ages. Always there have been many people with better things to do than go to meetings and committees, master agenda and argue for or against proposals. And always there have been some—usually a few—who are steamed up on some issue, or have a general urge to run things, and are prepared to give time to, and take responsibility for, public affairs The political elite, whether Lancastrian nobles in the fifteenth century, parliamentarians in the seventeenth century, Whigs in the eighteenth century, or the Westminster villagers of our own time, want to be in on decision-making with their own projects to push, while the rest are only luke-warm on politics, and are content to let the King, or the gentlemen in Whitehall, get on with the job of running the country so long as it is done reasonably well. Provided the realm is defended against our enemies, law and order is maintained, justice administered impartially, public services are efficient and prompt, the currency kept stable, and sensible laws enacted, I shall support the regime gently, or at least acquiesce in its continuance. It is when it fails to deliver good govenrnment that I shall want want a say, in order to get things changed. The present alienation of the people from the politicians is due to their perceived incompetence and wastefulness, ill thought-out legislation, collapsing currency, failure to maintain law and order, and symptoms of sleaze. And correspondingly, one of our most urgent tasks is the reduction of the democratic deficit, so that we have a minimal coercive State, in which power stems almost entirely not from the means of coercion, but from the support of the people.

Politicians and Maths Teachers

Goodmaths teachers are hard to come by because they have to be clever enough to understand mathematics, and stupid enough to find it difficult

Good politicians need to be clever enough to understand the issues they have to decide— and stupid enough to empathize with the less highly gifted who also have votes

§7.5 The Little Stick

The Big Stick is not only unwieldy and ineffective, but unnecessary. Hobbes' argument assumes too little as well as proving too much. It assumes that we are moved only by an individual maximising strategy, and are all the time tempted to break the law. But that is not our only motive. As Protagoras argued,[9] we can see, in the face of the Prisoners' Dilemma, that it is rational to move from a first-person singular to a first-person plural view-point, and go for the collective, rather than the individual, best outcome. Or we may anyhow take a communal point of view for some of the reasons adduced in §2.4. We are not in a State of Nature, brought up under the law of the jungle, and needing to be clobbered into obedience, but already used to Civil Society, accustomed to using a common language, driving on the correct side of the road, and conforming, often without thinking, to innumerable rules and customs. We are, most of us, quite ready to keep the law without having to be coerced to so.

Since coercion is an inadequate basis for Civil Authority, it might seem that our aim should be to have the State a minimally coercive one. But that is unrealistic. The Civil Power is exercised by States, which are unselective communities. If I no longer cherish the values of the train-spotters association, or of the British Society for the Philosophy of Science, I just stop belonging: but if I no longer feel loyalty to the values of Great Britain, I do not thereby cease to be British or to reside in Great Britain; everyone who is in the country can interact with others in his vicinity, whether or not he acknowledges his duty to obey the law. In the Middle Ages deviants could be outlawed or exiled, but these options are no longer available. If someone flouts the law of the land, he cannot be removed. If nothing is done, he gets away with it, and the law becomes for him a dead letter. We cannot afford to do nothing. If there is a victim, we owe it to him to vindicate his rights, and make the law-breaker discover that breaking the law did not pay. And in any case we need to re-assure the public in general that in keeping the law they are not being mugs. They are prepared to refrain, even to their own seeming disadvantage, from breaking the law, if it is evidently a way of extricating themselves from the Prisoners' Dilemma, but not to have their forbearance abused: if the law is a dead letter for him, why should it not be a dead letter for me?

[9] RefReq

And even if I have some compunction in thus readily liberating myself from the law, I can empathize with you, and many other *you*s, and see that you, or at least some of you, will follow the same line of reasoning, and follow his lead, and no longer feel yourselves bound by the law. The reliable enforcement of the law against law-breakers not only deters potential law-breakers, but re-assures would-be law-keepers that their obedience to the law will not be in vain. So in an unselective community, such as the State, we cannot be sure that there will be nobody who is so little imbued with the common values of the State, that he will be minded to break the law. If he is not deterred by the visible coercive machinery of the State, he will have a go; and then either he gets away with it, and the law becomes a dead letter for him, and thus for others too, or he is brought to book in spite of everything he can do—if all else fails, he is coerced by physical force. Some stick, even if only a little one, is needed.

Sometimes, indeed, it needs to be not too little, and on occasion wielded vigorously. If the first atrocities committed by Serbs and Croations, as Yugoslavia broke up, had been promptly punished, communal tensions would not have escalated into civil war. Strong force is required to crush a Mafia or repel an aggrssive neighbout. The needs of national defence often call for a standing army, which greatly increases the State's power to coerce. We need to season our idealist aims with robust realism. The world would be a nicer place if there were no war and no crime, but wanting that to be the case does not mean that it is, and shutting one's eyes to unpleasant facts does not make them go away. On the contrary, it exacerbates the problem, The peaceniks in the 1930s nearly gave Hitler victory, and softness on crime in recent years has encouraged, not discouraged criminal behaviour.[10] We need to be hard-headed, and deal with the world as it is, not as we would like it to be.

All the same, it is important to realise that the coercive power needed for the maintenance of Civil Society may not need to be all that great. Indeed, it may not have to be exercised at all, if would-be law-breakers are sure that they would be apprehended

[10] It is argued that we ought not to be hard on petty crime and vandalism, because those who do it are poor: but the burden of theft and robbery falls more heavily on the poor than the rich: the widow who loses her two mites, loses her all, whereas the modern Islingtonian whose mobile phone is stolen, will get another one, probably paid for by his insurance.

and punished. But we cannot count on it. Some will probably not be deterred, and will have to be forcibly arrested and punished. If they are, others will be deterred: but if they are not, others will be encouraged to have a go, as happened in London in 2011 after prolonged failure on the part of the authorities to punish certain types of wrong-doing.[11] If the authorities are vigilant in putting down crime, and protecting the law-abiding citizen, he will identify with them, and help them in upholding the law. "They protect me," he will say to himself, "so I help them protecting other people." A more self-centred argument would run: "I should be a mug, keeping the law while the criminal got away with it; I don't want to be a mug; so I shall help the authorities to make sure the criminal does not escape unpunished." Law-abiding citizens thus cease to be subjects, and become fellow functionaries of the Civil Power, and supplement the threat of coercion with the pressure of social disapproval.

The more this happens, the smaller the stick need be, which is *per se* a good thing. Force is expensive, not only in financial costs, but in the un-cooperativeness it tends to engender. It is wise to regard it as an expedient of last resort. Although it is true that an unselective community may contain a Bad Man, who is deaf to all reasoning, and is determined to get his own way if he can get away with it, we are mostly only half-bad: we may be tempted to try it on, if the enforcement seems only half-hearted, but we are also sometimes open to reason and to psychological sentiments of togetherness which urge obedience. Other means than crude coercion are often available, and it is not only wise for the rulers to avail ourselves of them as much as possible, but reassuring to the ruled.

We need law. Law to be in force must be enforced, by coercion if need be, Although a totally non-coercive State is unrealistic, only a little stick is necessary, since for those not persuaded by rational argument, the mere threat is often enough, there being a high ratio of deterrence to actual prevention in any system of punishment. Although the ideal of the minimally coercive State is,

[11] In 207 one young man of my acquaintance was mugged in a bus. The bus had CCTV, and the bus-driver gave details of the record, which clearly showed the faces of the two assailants. But when the victim rang the police, he ws told that they would not follow up the crime.

like the ideal of a minimally heteronomous economy,[12] an exercise in the optative mood, It is none the less important. The arguments involved illuminate the nature of the State and the logic of the law.

Threats alone cannot do more than cow the populace into obedience, and cannot win their willing cooperation, Other reasons are needed if people are to obey the law willingly. Many different reasons can be given why one ought to obey the law. None of the reasons is completely conclusive, but together they present a compelling case. Many presuppose a theory of man or a theory of the State at odds with what many other people take as obvious, yielding divergent views on the conditions required for laws to be legitimate. The strengths and weaknesses of the different arguments for political obedience reveal an untidy but robust view of the State, which bears on the concept of law and the logic of its procedures.

§7.6 The Logic of Law

Law *is* a moral science. The alternative view, that it is an autonomous discipline, to be studied on its own from outside, fails to accord legitimacy to legal regimes, provides inadequate safeguards against abuse, and fails to fit the fact that subjects are also, to lesser or greater extent, fellow functionaries in supporting and helping to enforce the law. If we are to understand the law aright, we must enter into the minds of those involved, regarding them as individuals, capable of making up their minds for themselves, and responsive to reason in deciding what to do.

Law is action-guiding, like morality, custom and etiquette. It differs most obviously in the sanctions at its disposal. If I am immoral, I may suffer pangs of conscience, and be condemned by other people. If I breach the customs of my society, I may be ostracized. If I fail to observe the niceties of etiquette, I may be regarded as not being quite quite. But that is all, whereas if I break the law, I may be hauled off and put in prison. But that is only a *may be*, to be used reluctantly as a last resort. We do not, for the most part, keep the law just because we are afraid that we shall go to prison if we do not: I refrain from murdering people because I think it is wrong; I give way to 0n-coming traffic at a roundabout, because that is what the highway code says I should do, and I don't want to have an accident by not observing it. There

[12] See below, §8.4.

is a large overlap between law and morality, and between law and custom. And it is not just an overlap, but deep interpenetration. The law depends on witnesses telling the truth, jurors seeking to return a true verdict, and judges being incorruptible, impartial and honest; and we believe that we have a moral duty to obey the law.

A less obvious but more far-reaching difference is that judges adjudicate disputes, and are the adjudicators of last resort. Many disputes are settled by negotiation and compromise, but sometimes these fail, and rather than coming to blows, we go for arbitration.[13] Arbitrators need to listen to both sides, if their decision is to be respected, and legal argument therefore acquires in the course of litigation the two-sided nature of claim and counter claim, objection and rebuttal,[14] Moreover, since States are unselective communities, judges are the adjudicators of last resort, and cannot rule out in advance any consideration as irrelevant. All sorts of disputes may arise, and while for many there are standard decision-procedures, which limit the sort of consideration that may be adduced, the law may be invoked in cases where some new factor cannot be excluded from consideration. Justice requires that all the relevant factors be considered, and the decision taken on the merits of the case. Adjudication is thus a balancing act, taking into account many considerations, some supporting a decision one way, others the other way. General principles may articulated and accepted as guide-lines: greater weight is given to liberty than to justice in the burden of proof that requires it to be proved beyond reasonable doubt before a man can be convicted of a crime. Many criminals go free, which is a bad thing, but not so bad, we think, as for anyone to be convicted of a crime he did not commit. The logic of these principles is not well understood. They are guide-lines not

[13] The possession of means of coercion is not a necessary condition of effective adjudication. Often in the Middle ages, and recently in a dispute between Chile and Argentina over the division of Tierra del Fuego, the Pope has been the adjudicator, even though, as Stalin remarked, he has no divisions.

[14] W. D. Ross, *The Right and the Good,* Oxford 1930, pp. 19ff.; H. L. A. Hart, "The Ascription of Responsibility and Rights," *Proceedings of the Aristotelian Society,* 1948, pp-171-94; reprinted in A. G. N. *Flew, Logic and Language,* vol. 1, Oxford 1951, pp. 145 - 65; J.R.Lucas, "The Philosophy of the Reasonable Man," *Philosophical Quarterly,* 1963, pp. 97 - 106; J.R.Lucas "Not 'Therefore' but 'But"', *Philosophical Quarterly,* 1966, pp. 289 - 307; S.E.Toulmin, *The Uses of Argument,* Cambridge 1958, pp. 57ff.

hard-and-fast rules. We do not say that the freedom of the individual should always over-ride other consderations, and that to put a convicted criminal in prison is a violation of his human rights; but in balancing freedom against other considerations, we tend to come down in favour of his being free to speak his mind, or choose his associates, even though we are affronted by what he says, and disapprove of the companions he goes out with.[15]

Legal argument is dialectical in procedure and holistic in aspiration. It proceeds by claim and counter-claim, objection and rebuttal, but aims to take everything into account, without being able to be absolutely sure that there will not be some novel fact or argument which would change the whole aspect of the case. There is thus an awkward tentativeness at the heart of the law: awkward because the law needs reach firm and final conclusions and to be reasonably predictable in its decisions, if it is to be effective in resolving and avoiding disputes, while being felt to be just, if its decisions are to be respected by those disappointed by them. We are driven on the one hand to say that like cases should be treated alike, and on the other to recognise that circumstances alter cases. Aristotle discusses the discrepancy between what the law allows and justice requires. He thinks in terms of laws having been laid down by a law-giver, and says that the equitable judgement is the one the law-giver would have pronounced, if he had been aware of he particular circumstances of that case.[16] Lawyers tend to favour laws being explicitly formulated in words and laid down by a legislature, acknowledging that there will be cases of which it will be said *durum, sed ita scriptum est*—it is hard, but that is what has been laid down", justifying it with the adage, "hard cases make bad law", but leaving it to the legislature to put things right. But always there has been some unease at not doing *justice* according to law, and in days long gone by the Court of Equity attempted to do just that. But the need for predictability won out. Lawyers wanted to be able to advise their clients what the law was, and felt

[15] Some of the difficulties with the Convention on Human Rights is due to the different views of law taken by their original drafters and their present interpreters. The principles laid down are very much those of the Common Law, which need to be balanced against one another in deciding particular cases, but they have been interpreted as statutes, with cases either falling under some provision or not doing so.

[16] *Nicomachean Ethics*, V, x, 1137b-1138a3.

that cases decided by a judge "on their merits" would depend on what the judge had had for breakfast. Precedents were collected and categorized, and Equity became a branch of law like any other. But judges still feel the promptings of justice, and the need to take into account relevant changes in the customs and expectations of society. Precedents *are* important, but both the House of Lords and the Supreme Court of the United States have ruled that they are not all-important.[17]

That makes sense if we take the Little Stick view of the law. If law is a social phenomenon, along with morality and custom, guiding the actions of reasonable men, who are not merely subjects, but fellow functionaries in upholding and administering the law, then then they will have a rough and ready idea of the law, which is sufficient to guide them in most of their day-to-day activities. The need for predictability will be in large measure already satisfied. The more exact delimitation that those learned in the law can provide will not be available to laymen anyhow, unless they go to the expense of consulting a lawyer. It is not predictability as such that is abridged, if courts are permitted to depart from following precedents in order to reach equitable judgements, but the extra predictability that would be available to lawyers, if courts were obliged to follow precedents more rigidly. It is tempting to schematize, though with great imprecision on both sides, the two ways of looking at the law.

The contrast is too extreme. Although there are occasions when legality yields conclusions which are clearly unjust, justice is not a simple concept that can be contrasted with legality to the latter's uniform disadvantage, but is a multifaceted concept, whose different faces are often at odds with one another. If justice according to desert is in issue, the labourers who had borne the heat of the day were being unjustly treated in being given no more than the late-comers who had worked for only one hour.[18] But they had agreed their pay, and were not being unjustly treated in being paid exactly that. And if people are allowed to be free, the master may decide to give late-comers what he will, without any injustice to the others, because justice does, according to another understanding, which was adopted by Justinian, assign to each that which is his own. We cannot simply appeal from legality to justice, but must

[17] For fuller discussion of the underlying issues, see below, §8.2.

[18] St Matthew 20, 11,12.

Two Views of Law

	Roman (Big Stick)	Common (Little Stick)
Symbol	Baton	Scales
Exponents	Austin	Coke
View Point	External	Internal
Structure	Hierarchical	Shared Understanding
Purpose	Coercion	Adjudication
Source	Legislature *quod placuit principi*	Morality, Custom and Consensus
Judicial Activity	Subsume	Balance

say which aspect of justice we are appealing to, and may then be told that it is not the one appropriate to the case. Often, indeed, it will emerge that legality *is* the relevant aspect of justice. Rule-of-the-Road arguments show that often if we are dealing with other people, who have minds of their own, we must rely on conventions to coordinate our actions. So important is it that we conform to what other people expect, that established usage regularly overrides obvious sense. English spelling abounds in absurdities: it is obviously sensible that the letters *wo* should be pronounced in one uniform way, and that they should not be pronounced differently in *women*, *won*, *woo* and *wood*, or that *wor* should be pronounced differently in *Worcester*, *word* and *sword*; but we do. Similarly in the law, clear conventions enable both parties to decide what to do in the knowledge of what the other will and will not do, , and are thus of great utility, and being well known, constitute legitimate expectations, which it would be unjust to disappoint. The presumption in favour of legality is strong.

In practice the two paradigms come together and merge. It pleases legislators to lay down laws that are regarded as just; and those who insist that the legislature should not be *legibus solutus*, come to realise that Natural Law is not opposed to Positive Law, but positively needs it, to flesh out guidelines that citizens can actually know and use. Never the less, tension remains. Cases do arise where a decision according to the relevant statutes and precedents would be manifestly unjust, and resort to some equitable remedy needed. It has been met, up to a point, in modern times by the distinction between law and fact. Questions of law are subject to the rule of precedents, and when decided become precedents themselves: questions of fact are neither. Justice can sometimes be done by a suitable finding of fact, which cannot be challenged as being out of line with leading cases, and cannot be quoted afterwards as an authority. But it is an awkward subterfuge, which obscures clarity of thinking. Often justice can be done through judicial interpretation. Applying the law is not always a mechanical exercise, a simple matter of subsumption, but much more a balancing of one possible characterization against another, and a sense of justice can tilt the scales one way or another. The boundary between judicial interpretation and judicial innovation is indeterminate, and some judges have been more innovative in their interpretations than their brethren. The Common Law should be chary about innovating. Its concern is with particular cases, not general issues, which can be debated more widely in Parliament. It should adjust to social changes in society, but only slowly, so as not to disappoint established expectations unfairly. Where there is a major change, it should be well advertised in advance, as will happen if promulgated by a legislature after proper debate, in which further consequences and wider considerations can be brought to bear.

This has not happened. In the 1870s a private bill was passed by Parliament extending the London and South Western Railway in Devonshire. Some of its provisions were manifestly unjust, and a law suit ensued. But the courts disclaimed all jurisdiction. Although it was obvious that there had been a mistake in formulating the Act, it was not for the courts to presume to question the actual words of the High Court of Parliament.In the middle of the Twentieth Century a landlady was convicted of permitting drug-taking in a house she had let to students. The landlady had been at the time on holiday in Spain, but the Act had imposed “strict liability”

which allowed of no excuse. She appealed, and the House of Lords allowed her appeal, on the grounds that the words of the Act were so unconscionable that Parliament could not have meant them. In effect the House of Lords was taking to itself the same power that the Supreme Court of the United States had exercised, of declaring measures enacted by Congress to be unconstitutional and therefore invalid. In Sir Edward Coke's words: "It appears in our books that in many cases the common law will control acts of Parliament, and sometimes adjudge them to be utterly void: for when an act of Parliament is against common right or reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such act to be void."[19]: What has been happening is that popularly elected legislatures are subject to other pressures than the disinterested desire to enact good laws, with the consequence that people have looked to judicial law-making. instead. The Supreme Court has become a third House of Congress, fulfilling functions the Senate was originally intended to perform.

Although the two paradigms come together and merge in practice, and neither can offer a neat resolution of the perpetual possibility of a conflict between legality and justice,[20] important differences remain. The democratic mandate is ceasing to confer on legislatures a right to enact any legislation it pleases—an issue likely to become increasingly contentious in time to come—-and the correlative claim that only enactment by the legislature can create valid law, seems less plausible, if law is less centred on coercion than on adjudication, For if coercion is not the central feature of law, but only a regrettable sanction occasionally resorted to, most people must be obeying the law for other reasons than the prospect of being compelled to do so. The law needs to be substantially in line with public morality and custom, and hence it makes sense that, conversely, public morality and custom should be sources of law, as traditionally they have been.[21]

[19] Taken from Dr. Bonham's case (1610).

[20] Seee further below, §8.* [Freedom and Reason]

[21] P.Vinogradoff, *Common Sense in Law,* Oxford, 1946, p.13.

§7.7 Law, Legislation and Liberty

Such a view of the law has been challenged. It may secure security from an overweening legislature, But what about liberty? If the law is closely attuned to the customs and public morality of an unselective community, it may bear heavily on those unselected members, who happen to disagree with their fellow countrymen. Mill complained bitterly about the pressure of public opinion on the individual.[22] Britain makes considerable provision for conscientious objection, even for conscientious objection to military service in time of war, but clearly could not extend that latitude indefinitely. Just as law, enforced by coercion, is a limitation on individual freedom inevitable in any unselective community, so custom, etiquette, public opinion, social and moral norms, are also limitations on individual freedom inevitable in any community whatsoever. But legal pressure is different from social pressure. Social pressure, however irksome, is resistible: Mill managed to survive un-prosecuted and un-imprisoned. If the law enshrines custom and public morality, the conscientious objector has no protection,

Although in practice judges have recognised custom and morality as sources of the law of England, it has been argued that this ought not to be the case, because the freedom of the individual is too much circumscribed thereby. There is force in this argument. Law should not enshrine custom and public morality as a matter of course. It is a blunt instrument, lumping together significantly different cases; it contaminates motives, encourages hypocrisy, may give opportunities for blackmail, and is costly to enforce. The response "There ought to be a law against it" to some bad behaviour recognises the difference, but also expresses the *prima facie* argument for the law to enshrine custom and public morality in the absence of countervailing considerations. That, according to one influential authority,[23] should be done only through explicit legislation by the legislature, in order that it should be definite and publicly ascertainable, and not, like custom and public morality, vague, idiosyncratic, and unpredictable. But often it is easier to know what custom and public morality require than to predict

[22] J.S. Mill, *Liberty,* London, 1859; reprinted in many editions. (The fundamental weakness in Mill's argument is its reliance on the concept of harm, which is an indeterminate concept, not limited to physical hurt, but extending to moral welfare.)

[23] H.L.A.Hart, *Law, Legislation and Liberty,* Oxford, 1963.

what the courts will decide. All that the argument from certainty requires is that the citizen can know his legal position well enough to keep on the right side of the law, not that he should be able to work out exactly how close to the wind he can sail without getting into trouble. So too with respect to other guide-lines, they do not have to be so precise that the malcontent can calculate to a nicety what he can get away with, but only indicate how he can be safely in the clear. This was the situation in Shaw v. Director of Public Prosecutions (1961) 2 A.E.R. Shaw had published a directory of prostitutes. In his defence it could be argued that there is in England no law against publishing a directory of prostitutes, although there are many laws against procuring and the like. The court found him guilty none the less, citing precedents establishing that public morality could be a source of law. Shaw's own moral principles might differ, but he was in a position to know that what he was doing was contrary to public morality. He was sailing close to the wind, and could not claim to have been steering clear of trouble.

Still, the liberty of the individual *is* important, and needs protection both against the State and against other citizens. As regards the law, he is presumed innocent until he has been proved guilty beyond reasonable doubt. We often let the guilty go free for fear of convicting the innocent unjustly. Freedom of worship, freedom of expression, even freedom to marry, are protected by law. What cannot be conferred is an absolute freedom to do what one likes, or what one's conscience dictates. Liberty is inherently limited in any community. Communities are based on shared values, and if I find myself in an unselective community whose shared values I do not share, I may try to persuade my fellow citizens to change their minds, but if they persist in their wrong opinions, I must respect their right to be wrong, and conform my behaviour to their prescriptions.

§7.8 Bearing on Economics

By understanding law as a moral science, we come to understand economics better. Law is not just a fact of life, which the economist must simply recognise and obey. It is not an autonomous discipline to be studied in isolation from all others, but, like economics, is a moral science, with an inner logic of its own, to be understood in accordance with the canons of humane understanding,

Since law belongs with custom and public morality, recognising them as sources of law, it is natural that there should be a succession of laws enforcing contracts, providing standard weights and measures, establishing rights under Sales of Goods Acts, allowing cooling-off periods, regulating company take-overs. What had already been recognised as fair, and had crystallized out as good practice, was made mandatory. And just as the law develops by having regard to prevailing good practice, so economic decision-making should not be confined to financial considerations alone, but should also have regard to wider social and moral concerns.

The little stick account of law gives the basis of economic activity. Certain vetoes, it shows, are more important than votes, but other people's vetoes may restrict my freedom of action so much that I am left with few alternatives, none of them at all what I really want. If all the other girls turn me down, I may have to marry Jane or be a bachelor for the rest of my life. Similarly with the exchange of goods and the provision of services, I may have no alternative to taking an unattractive job, if I am to be able to buy my daily bread. Vetoes, like votes, have the disadvantage that other people have them too, and may exercise them to pressure me to do what they want, not what I would like. It is against this legal background of limited choice and the pressure of other people's choices, that money comes into existence, and economic activity takes place. Although law and economics occupy opposite ends of the social spectrum, law providing authritative adjudication of disputes, backed by coercion if need be, and economic transactions being aranged by negotiation and essentially voluntary, both are social activities, and subject to the constraints arising from their social setting.

§7.9 Taxation and Contributive Justice

The Big Stick theory of law leads governments ro suppose that they have an unfettered right to tax their subjects, in line with their unfettered right to tell them what to do and make them do it. But, as we have seen, it is not an unfettered right, either in principle or in practice. The same holds good for taxation. Fiscal justice is a requirement of constitutional government in the same way as the requirement that subjects should not be liable to arbitrary arrest, that they should be able to have a reasonable idea of what the law is, and that if they keep it they should not be punished.

Historically, it was over taxes that resistance to absolute power arose. The Sovereign needed to engage with his subjects, and persuade them of the need to contribute to the national exchequer. Taxing bills are still enacted with a different formula *La Reyne remercie ses bons sujets, accepte leur benevolence, et ainsi le veult,* (The Queen thanks her good subjects, accepts their bounty, and wills it so) instead of *La Reyne le veult* (the Queen wills it) which is used for other public or private bills. It suggests—falsely—that taxes are voluntary gifts, and thus gives support to the doctrine that there is no equity in taxation. But taxes are not voluntary. What has happened is sovereignty has leaked away from the Monarch to Parliament, and more recently to a government supported by a majority of MPs. The Prime Minister is becoming increasingly presidential, and the House of Commons an Electoral College (though with powers of recall). Instead of a constitutional requirement to engage in a dialogue with taxpayers about the contribution they should make to the costs of running the country, the government reckons that because it is elected, it has a mandate to tax and spend as it thinks fit.

A dangerous rift is opening up in the United States betrween the taxpayers and the soverign. Those who feel themselves to be contributing more to the Federal government than they are getting out of it, vote Republican and hold that taxes should be cut. Those who get more, in benefits or salaries, tan they put in, vote Democrat, and hold that government expenditure should not be cut. A similar polarization is occurring in reat Britain. The result is a ballooning budget deficit, which cannot be long sustained. The underlying cause, it will son emerge, lies in the different applications of the Prisonneers' Dilemma to the maintenance of law and order and abd securing collaboration in achieving less mandatry good. The former requires the government to have a bif stick: the latter requires the exercise of only a little stick. But those in possession of a big stick are tempted to wield it without restraint.

Once we realise that not even a democratic majority can give a government an unfettered right to do what it likes, we need to examine the logic of contributions, and the guidelines it gives for fiscal justice. There is considerable opposition to this, for fear that it might result in the rich getting away with having to pay lower taxes. But that may not be the case: in August 2011 Mr Warren Buffet, an American billionaire, said he ought to be taxed more, and in France Mme Liliane Bettencourt, together with 15 other

French billionaires, signed a petition calling for higher taxes on the most wealthy. What has happened is that governments, appeasing the politics of envy, have enacted very heavy taxes on the wealthy, and then, facing economic realities, have made numerous exemptions, which have become loopholes whereby those rich enough to employ clever accountants, can, quite legally, avoid paying the taxes enacted. And because there is no public discussion of contributive justice, this is felt to be perfectly acceptable. Long ago it was regarded as reprehensible to avoid paying one's taxes: now national newspapers carry advertisements for tax-avoidance schemes, labelling them as "tax-efficient". If there is no fairness in taxation, and the Inland Revenue sets out to extract from you every penny they can, it is natural to try in return to use every trick available to thwart them.

Fiscal justice is a special case of contributive justice. The logic of contributive justice is a dialogue between *me* and *us,* arising from the Prisoners' Dilemma, following the logic of Protagoras rather than that of Hobbes, like the logic of Civil Obedience, though differing in two important respects. In our rational moments *we* understand that some public benefit is available **if** everyone contributes. But *I* can figure out that *I* would be better off still, if everyone else made a contribution, and *I* did not. Yet if everybody adopts this reasoning, the public good will not be available, and everybody will be worse off. *I* can work this out for myself, and see that really *I* would be better off, if *I* went along with *our* rational arrangement. But *I* do not entirely trust *us*, or at least *I* do not entirely trust *you*, because *I* know in *myself* the promptings to be selfish, and so do not trust *thee*, and generalising, do not trust *you*, and it is then irrational for me to contribute. and the enterprise fails. Joint enterprises only work if we all do our bit. It is rational for me to play my part, if but only if, I can be reasonably sure that others will play their part too. Else I am a mug. In Civil Society external pressure needs to be available to make sure I contrimbute to our enterprise by refraining from violence and law-breaking, since the damage done by law-breakers is great but with other joint enterprises the damage done by any single individual's not contributing is small and generalised; if I manage to get into the concert without paying, there is no victim whose rights need to be vindicated, and the financial loss will be relatively small. We can be less extreme to mark what is done amiss, so long as we can prevent avoidance becoming general.

A second difference is in the selection of contributors and the number of contributions required. For Civil Society it has to be everyone refraining from violence, but many public goods can be financed by only a few benefactors. We may buy up an open space to save it from being developed and spoiling our view. Our neighbours benefit too, but we do not grudge them their good fortune. Indeed, many benefactors benefit others with no advantage to themselves. In Ancient Greece, rich citizens would undertake a λειτουργία (*leitourgia*), rendering to the public a service at their own expense, simply as a gesture of good will. Somewhat similarly the city fathers in some English town would club together to provide an amenity, primarily for their own benefit, but happy for others to benefit too. A municipal park greatly benefits us and our families, but we have no objection to free riders coming in too, even though they were not subscribers. Likewise on a transport system, we can carry some free riders—pensioners, war wounded, school children, and even the poor and unemployed—and may make this an explicit policy. But at some stage free riding becomes fare dodging, which we cannot condone for fear that the revenue needed to run the system will dry up completely.

Many issues are involved: the possible motivations of different individuals, the need for revenue, the characterization of different groups. Many individuals are moderately altruistic or public spirited, and will pay their way uncomplainingly, even if others do not. National Trust car parks often have an "honesty box" for parkers to put their money in when there is no attendant. Money is put in though not by all who use the facility. Where public spirit fails, shame may motivate. Left to my own devices, I would not subscribe to the appeal, but I do not want people to know that I had not done so, and so I cough up to ensure my name is on the list of subscribers. There is a fairly strong and widespread desire to be, and to be known to be, a fully participating member of society in good standing. But which society? There is much ambiguity and dispute. Many of the arguments about who should bear the burden of paying for a facility enjoyed by many, turns on which society is the relevant one, and who its members are. Often we can pick out a core group whose members benefit, and where any argument for exempting any particular member from contributing would apply to everyone else. If I am an old age pensioner, an old soldier wounded in the war, or a pregnant mother, I may be able to make a case for my not having to buy a ticket when I ride on

the bus; But if I am just an ordinary member of the public, I am open to the argument that if I did not have to buy a ticket, nobody should have to, and the bus service would cease. Other arguments come into play, notably considerations of feasibility and size. If pregnant mothers are to be allowed to travel free, how would we tell? Any moderately youthful girl could claim to be in the early stages of pregnancy. Again, there are so many old age pensioners that if they were exempt, tickets for non-oldies would have to be disproportionately expensive. There are endless opportunities for questioning the fairness of any system for raising contributions, and therefore there has to be some bias in contributive justice against nice distinctions, and in favour of simple, and possibly crude, classifications, that cannot take into account the special circumstances of each individual case. The principle that there is no equity in taxation exresses this insight, although it has often been misconstrued ar saying that there is no justice in taxation. Equity—Aristotle's ἐπιείκεια (*)epieikeia*) expresses justice's concern with the individual case in all its individuality. But contributive justice is about the sharing of burdens, which must be done colletively. So, although there may be exemptions for special classes—the only sons of widowed mothers wre sometime exemped from conscription—individuals cannot plead a special case for them as individuals. Not only in order to be practicable, but as an inherent principle of justice, contributive justice has to be rough.

Rough justice is better than no justice, and when it comes to taxation, where Hobbesean considerations again become relevant, we can discern some general principles of contributibe justices that ought to apply Although the Treasury is deeply hostile to hypothecated taxes, hypothecated arguments apply. With some public goods, the group of beneficiaries is co-extensive with the group of subjects: we all benefit by being defended from enemies abroad—in times of war, people are much more willing to pay taxes and to do war work; and similarly it is reasonable to ask everyone to pay his share of the cost of maintaining law and order. In Britain the National Insurance contributions reflect the same principle: we all benefit from the National Health Service and from having pensions, so we should (more or less) all contribute (to some extent) towards the cost. For other benefits the group of beneficiaries is smaller. Very poor people do not go abroad, and do not benefit from consular services. Rich people go more to museums and picture galleries, and so should pay more for amenities, They have a

larger stake in the country,, and thus benefit more from the maintenance of law and the protection of property, and so should pay more for it.

The argument from benefits is weightier than the argument from burdens. All contributions are burdensome, and it will always possible to plead inability to bear the burden of contributing as a reason for exemption. But to be exempted is to be not a fully participating member of society. Although Mrs Thatcher's poll tax was overwhelmingly unpopular, a poll tax set at a rather low level does meet the requirement of enabling everyone to feel a full member of the social enterprise, and if there is income tax, a low initial rate is better than a higher cut-off point below which no tax is levied.

Taxes should be simple, non-punitive, and hard to avoid. The tax systems in Britain and America fail on all three counts. They are extremely complicated, often driven by envy and social disapproval, and largely avoided. The weaknesses are interconnected. They are set at too high rates in order to manifest the social aspirations of legislators, and then have to have numerous exceptions in order to remain practicable, which results in great complexity, thereby providing those able to employ accountants with legal ways to avoid them. At the time of writing (2012) a carbon tax would be as unpopular as the poll tax was. But it would be simple and hard to evade or avoid, and if it came in slowly with predictable increases and corresponding tax cuts elsewhere, it would bring many fiscal benefits.[24] If VAT were reduced, fewer people would evade it, and more would disapprove and create a climate of opinion against evasion. If rates of income tax were reduced, it could be much simpler, with many fewer allowable expenses. In the golden age of yesteryear income tax was low, and people met their expenses out of their own pockets, which meant that they exercised prudent economy in running up expenses. If expenses escape taxation altogether, the temptation to spend more than is necessary is great; hence the many people travelling business class on air lines, who would make do with economy class if they had to pay out of their own pockets. Hence also the modern practice of remunerating people by means of expenses, instead of a taxable income. In recent years legislators have levied high income tax on the populace generally, but have exempted themselves by

[24] See more fully, §8.4.

supplementing their relatively modest incomes with generous expenses. Not only transparency, but integrity would be served, if they awarded themselves the income they thought they needed or deserved, and met all their expenses, as the Victorians did, out of their own pockets. The history of how this came about is illuminating. Some years ago there was a movement among Members of Parliament to increase their salaries. A good case was made, but the government did not want to be seen to be condoning a pay rise, and through the Whips offered instead a more generous set of allowances. Many MPs were scrupulous in not claiming more than was strictly justified, but others, encouraged by the Whips, regarded their expenses as remuneration in *lieu* of a boost to their income, and some were simply dishonest. A general distrust of the political elite has resulted, and great damage to the standing of Parliament,

Many will disagree with the previous paragraph. That will be good, if they articulate their objections. By viewing the different arguments, *pro* and *con* we can discern the considerations relevant to contributive justice. They will not by themselves yield one definitive conclusion. Just as Natural Law arguments did not produce a single correct system of law, but only guide lines which could be fleshed out in different ways to produce different systems of positive law, so canons of contributive justice give only guidelines, and particular systems of taxation will embody the political and economic pressures of their particular societies. But taxes that conform to the canons of contributive justice secure legitimacy and public support, in the same way as governments do that respect the rights and interests of the governed.