Some Types of Law (2007)

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Some Types of Law

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Laws can be classified in various ways. They can be classified according to the legal systems to which they belong (English, Roman, International, etc.) or according to the subject-matter that they regulate (contracts, property, torts, etc.) or according to their normative type (duty-imposing, permission-granting, etc.). In this paper I will be concerned with the classification of laws – and hence of law as a genre – in only one dimension. It is the classification of laws according to how they are made. This is already a philosophically partisan and some may say question-begging enterprise. For some laws, say some people, are not made at all. They are not artefacts. They have no agent(s) who serve as their originator or creator or author. By demystifying some of the intriguing ways in which laws are made, I hope to remove some of the appeal of this view.

In my first three sections I consider, respectively, legislated law, customary law, and case law. In the fourth section I discuss common law. How does it fit in? In the final section I conclude that all the types of law discussed here are types of positive law. For there is, I suggest, no other type of law but positive law.

1. Legislated law

In a way (to be explained at the end of this paper) legislated law is paradigmatic law. So it is not surprising that some writers simply

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equate law-making with legislating. For example, Ronald Dworkin reads the claim that judges sometimes make law as the claim that judges are part-time legislators. He therefore treats criticisms of the latter claim as biting no less against the former.[1] Here Dworkin takes his cue from John Austin, whose 'command theory' of law attempted to explain all law-making on the legislative model.[2] As H.L.A. Hart demonstrated, however, Austin's account is seriously impoverished as a general account of law-making.[3] Some non-legislative modes of law-making that we will be discussing below (in sections 2 and 3) cannot be squeezed into Austin's account without considerable artifice.

Indeed, even as an account of *legislative* law-making, Austin's account is distorted. A command always purports to impose a requirement to act; but legislation, as Hart pointed out, often purports to confer a power or grant a permission instead.[4] Austin's attempt to squeeze such non-mandatory legislative acts into the logic of commands is an embarrassment to his thinking.[5] Yet his 'command theory' is in some other ways a decent first stab at a general account of the nature of legislation. For commands do share three important features with legislative acts. First, a command, like a legislative act, is the act of a single agent. Second, a commander, like a legislator, acts with the intention of effecting one or more normative change(s) by that very act of commanding or legislating. Third, a command, like a legislative act, is a way of making normative changes expressly, i.e. by

[1] He treats criticisms of retroactive legislation as criticisms of retroactive law-making more generally; and he treats criticisms of unelected legislatures as criticisms of unelected law-makers more generally. See 'Hard Cases' in Dworkin, *Taking Rights Seriously* (London 1977), 81 at 84-6.

[2] *The Province of Jurisprudence Determined* (ed Rumble, Cambridge 1995), 35-6.

[3] *The Concept of Law* (Oxford 1961), 43-8.

[4] Ibid, 27-33.

[5] Ibid, 33-5.

expressing or attempting to express the normative changes that one intends thereby to make.

Some people remember Hart as having argued that commands should be *contrasted* with legislative acts in respect of the second (and hence the third) of these features. Did Hart not criticize Austin's 'command theory' precisely for losing sight of law's normativity? Did he not object to Austin's representing the legislator as 'the gunman situation writ large'? Yes he did.[6] But he never denied that all commands are express attempts to impose a requirement, and in that respect to effect a normative change. He merely showed by his discussion of the gunman situation that commands need not be attempts to impose *obligations*, i.e. *categorical* requirements.[7] In this respect commands differ even from those legislative acts to which they are most similar, namely legislative acts creating mandatory legal norms, which are all by their nature categorical.[8] Yet this thesis allows (and indeed presupposes) that commands and legislative acts are similar in other salient respects. They are alike enough to be worth contrasting. I just mentioned the three most important features in respect of which they are alike. Commands and legislative acts are norm-changing acts that are alike in respect of their agency, their intentionality, and their expressness.

[6] Ibid, 7.

[7] Ibid, 82. A categorical requirement is one that applies irrespective of the prevailing personal goals of the person to whom it applies. As Hart puts it, 'the conduct required by [rules of obligation] may … conflict with what the person who owes the [obligation] may wish to do' (ibid, 87). The commands of the gunman, in Hart's example, make an implicit appeal to a prevailing personal goal of the person commanded, viz. the goal of staying alive.

[8] Another way to put the point, which Hart avoids but which chimes with his remarks at ibid 112-3: the law claims to bind its subjects morally, whereas many commands speak only to the prudence of the commanded. For more discussion of law's moral claim, see my 'Law's Aim in *Law's Empire*' in Scott Hershovitz (ed), *Exploring Law's Empire* (Oxford forthcoming).

In what follows I shall say no more about these features as features of commands. I will explore them only as features of legislative acts. They turn out to be the three features that give most help in distinguishing legislative law-making from other kinds of law-making. Let me consider them in reverse order.

Legislated law is expressly made. Legislated law includes law contained in written constitutional documents as well as that contained in everyday statutes, regulations, and bye-laws. It also includes law contained in proclamations, edicts, directives, orders-in-council, etc. In some legal systems it may also include treaty law. Its first hallmark is that it is expressly made. Under some conditions, I suppose, legislation might conceivably be expressed in gestures or pictures. But typically legislative law is articulated law. It is expressed in words. Here, for the sake of simplicity, I will talk as if all legislation is articulate legislation, but what I am about to say could readily be adapted to cover instances of inarticulate legislation as well.

Articulate legislation (hereafter simply 'legislation') is articulated by the legislator in the form of a legislative text. The text may be written or oral and may be made up of declarative or imperative sentences or both. One understands legislated law by understanding the legislative text that creates it. Of course, there is a great deal of variation between different legal systems when we come to the question of *how* one is to understand the legislative text. Different legal systems may have dramatically different canons of legislative interpretation. Some may require or permit a more literal approach, others a more 'purposive' approach, to construing the legislative text. Some may require or permit more atomic interpretation of words or sentences or paragraphs in the legislative text; others may require or permit greater attention to the wider textual context in which the words or sentences or paragraphs appear. Some may require or permit the interpreter to seek interpretative help in some or all of the debates that led up to the legislation's enactment, whereas others

may regard this as cheating. All of this concerns the proper *mode* of interpretation for legislated law. None of it should distract us from the fact that, where legislated law is concerned, the legislative text is always the primary *object* of interpretation.[9] Whatever changes to the law one ultimately finds contained in the legislation, and however one sets about finding them, one presents them as contained in the legislation only by presenting them as entailed by an interpretation of the legislative text (or some part of it, such as a phrase or sentence or paragraph).

What one is looking for in interpreting a legislative text are the changes that it makes to the law, which are normative changes. The changes may include the introduction of new legal norms or the modification or elimination of old ones. To simplify, I will restrict my attention to the legislative creation of new norms. But what I will say also applies, *mutatis mutandis*, to the modification and elimination of existing legal norms.

So (to simplify): What one is looking for in interpreting a legislative text are the legal norms that it creates. A common mistake is to confuse a legislated norm with its formulation. Thus a lawyer may refer to 'the words of the rule'.[10] This cannot be taken literally. Rules do not have words. What she really means is the wording of the legislative provision that creates the rule. It is tempting to think of this as the wording of the rule because legislated norms, unlike other legal norms, are canonically formulated. In the event that other purported formulations of the

[9] I am simplifying. Legislation is a speech-act. As J.L. Austin says of speech acts more generally, '[t]he total speech-act in the total speech-situation is the *only actual* phenomenon which, in the last resort, we are engaged in elucidating.' Austin, *How to Do Things with Words* (Oxford 1962), 148. So the ultimate object of interpretation is strictly speaking the act of legislating. My point is that the act of legislating is the act of enacting a text, meaning that the interpretation of the text has primacy in the interpretation of the legislation.

[10] See e.g. *Three Rivers District Council* v *Governor and Company of The Bank of England* [2001] UKHL 16 at para 154 per Lord Hobhouse.

norm would give it inconsistent content (i.e. would point to its being a different norm) the formulation in the legislation prevails in settling what norm it is. Yet still the legislative formulation still should not be identified with the norm that it formulates. For two rival norms can be identically formulated. This is why the legislative formulation often needs to be interpreted to find out which of two rival norms it formulates. Conversely, two rival formulations can be formulations of one and the same norm. Otherwise one could not interpret part of a legislative text by reformulating it consistently with itself, as lawyers often do.

Another way to put this is to say that the legislative text is not the *only* possible object of legislative interpretation. The law created by the statute – the statute's legal effect – is itself a second possible object of interpretation. The two come apart most obviously when intervening interpreters (e.g. judges in the highest court) use their legal power to interpret the legislative text in a way that binds successor interpreters.[11] Then the legal norms created by the statute are rendered more determinate (and in that respect are changed) by an exercise of interpretative authority, even though the formulation in the legislation remains the same. When this is true, a successor interpreter interprets the legal effect of the statute by interpreting the legislative text in the light of the cases that interpret the legislative text, cases which may themselves sometimes call for interpretation. We will discuss the creation and interpretation of case law in section 3 below. For present purposes the only point that matters is this. Even where interpretation of the law in the statute requires

[11] Compare *In re Spectrum Plus Ltd* [2005] 2 A.C. 680, where Lord Nicholls suggests that when courts are interpreting legislation they cannot be bound by the intervening interpretations of other courts. Why not? According to Lord Nicholls: (a) earlier court decisions bind only inasmuch as they effect a change in the law, but (b) interpretation leaves its object unchanged. The error in (b) is exposed in Joseph Raz's 'Interpretation without Retrieval' in A. Marmor (ed) *Law and Interpretation* (Oxford 1995).

interpretation of intervening case law, the legislative text remains the primary object of interpretation in the sense indicated earlier. Whatever legal norm one ultimately finds in the legislation, one still presents it as a norm found in the legislation only by presenting it as entailed by an interpretation of the legislative text, albeit now an interpretation of the text shaped by other interpreters' intervening interpretations of the same text. If the text drops out, so that the cases start to be treated as *independent* authorities for the legal norms they left behind, then those legal norms are no longer legislated legal norms. Then we are dealing with pure case law.[12]

Legislated law is intentionally made. Just as a promise is made with the intention of creating obligations by the very act of promise-making, so legislation is enacted with the intention of changing the law by the very act of enacting it. Witness the 'prayer' at the start of every (United Kingdom) Act of Parliament:

> Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows ...

This prayer removes one possible ambiguity that would otherwise afflict many of the ensuing legislative texts read literally. Declarative sentences in legislative texts (e.g. 'Any person who libels the Prime Minister commits an offence') are often capable of being read literally as reports of legal norms that

[12] Gerald Postema puts the same point thus: 'Some laws [are] valid in virtue of having been explicitly made by an authorised lawmaker.; others [are] valid in virtue of incorporation into the common law. The class to which a given law [is] assigned [is] not determined solely by the way it came into being, but by its present mode of validity.' Postema, 'Philosophy of the Common Law' in *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford 2002). Postema attributes the point to Matthew Hale.

(according to the text's author) already exist. On that reading any legal change effected by the Act would have to be regarded as an accidental legal change, a side-effect of the legislature's attempt to state the law as it is.[13] Thanks to the prayer this reading of the Act is ruled out. 'Any person who libels the Prime Minister commits an offence' means 'It is *hereby made* an offence for any person to libel the Prime Minister'. The Act – as the prayer makes clear – is intended as an act of norm-creation on the part of the legislator, in this case Parliament (or the Queen in Parliament, as the institution is more accurately known).

In the literature on legislation, there is much discussion of whether an institution (for example, Parliament) is capable of having intentions.[14] Doubts about whether Parliament is capable of having intentions often stem from the well-known difficulty of using Parliamentary intentions as a guide to the interpretation of statutory texts. When courts say that they are interpreting statutes according to 'the intention of Parliament' this is widely accepted to be an empty courtesy. Parliament usually had no intentions concerning the meaning, application, use, or effect of the statute in question, because the members of Parliament who debated the statute and voted on it – even those who supported it and voted in favour of it – invariably had diverse and conflicting intentions concerning its meaning, application, use and effect. Indeed some members of Parliament possibly had no intentions at all concerning any of these matters (they were just

[13] Occasionally legislatures do include a provision in which 'for the avoidance of doubt' they attempt to state or otherwise to preserve the law as it is apart from that provision. Consider e.g. the UK's Mental Capacity Act 2005 s62: 'For the avoidance of doubt, it is hereby declared that nothing in this Act is to be taken to affect the law relating to murder or manslaughter or the operation of section 2 of the Suicide Act 1961 (c. 60) (assisting suicide).'

[14] Notable doubters: Ronald Dworkin, *Law's Empire* (Cambridge, Mass. 1986), 336; Jeremy Waldron, 'Legislatures in Legal Philosophy' in his *Law and Disagreement* (Oxford 1999), 21 at 43.

lobby fodder who voted when they were told to by their political masters). All of this is true and important. One could design a constitution for Parliament which would determine whose intentions on matters such as the meaning, application, use and effect of a statute were to be regarded as constituting Parliament's intentions on these matters, in the event of conflicting intentions among ordinary members of Parliament. There has been a halting move in that direction in recent English law.[15] But for the most part there are no such rules, and hence Parliament has no such intentions.

So Parliament often has no intention to make the particular changes in the law that it ends up making when it legislates. What does not follow is that, when it legislates, Parliament has no intention to change the law. Worries about the diverse and conflicting intentions of individual Parliamentarians do not apply to this more humble intention. Barring the occasional misfire (e.g. an accidental stumble through the voting lobby by a drunken Parliamentarian) all of those who participate in Parliament's changing of the law intend to participate in it. Even those who vote against a certain piece of legislation have the intention to participate in changing the law, should they end up on the losing side in the vote. More precisely, they intend that the law be changed if that be Parliament's intention, where what counts as Parliament's intention depends in turn on the actions and intentions of at least some members of Parliament.[16] So (in a way that will be further explained below) the law-changing intentions of individual members of Parliament both constitute

[15] *Pepper (Inspector of Taxes)* v *Hart* [1993] AC 593 was the move; the halting started in *R* v *Secretary of State for the Enivonment, Transport and the Regions ex parte Spath Holme Ltd* [2001] 2 AC 349.

[16] This is sometimes called a 'conditional' intention, suggesting that somehow it is not quite a complete intention. But there is nothing incomplete about it. See John Gardner and Heike Jung, 'Making Sense of Mens Rea: Antony Duff's Account', *Oxford Journal of Legal Studies* 11 (1991), 559 at 567-8.

and refer to the law-changing intention of Parliament itself, Parliament being the institution that does the legislating.

Some people deny that institutions (such as Parliament) can be agents. They insist on reading apparent references to institutional agency (e.g. to Acts of Parliament) reductively, as elliptical references to the agency of the individual human beings who go to make up the institution. On this view it is not the legislative institution, but rather its membership, that does the legislating. We will engage with this thought in a moment. At this point we are tackling a cross-cutting question: Whoever does the legislating, does he or she or it intend to change the law in the process? The answer is clearly yes. An agent acts intentionally inasmuch as it does what it does for (what it takes to be) reasons. Those who legislate, whether they be human beings or institutions, must do so for (what they take to be) reasons for and against changing the law. If they did not there would be no sense in having legislative debates, in which supposed reasons for and against changing the law are presented, weighed, and challenged. Indeed there would be no sense in having wider public debates about legislative policy, nor the general elections in which these debates are brought to a head. Such debates make sense only on the footing that whoever it is that legislates will, in legislating, respond to at least some supposed reasons for and against changing the law. These debates make sense, in other words, only on the footing that legislation intentionally effects legal change, exactly as the prayer in UK Acts of Parliament would have us believe it does.

Legislation is the act of one agent. The preceding remarks already foreshadow what comes next. Legislation is always the act of one agent. The agent may be a human being (e.g. Big Brother) or an institution (e.g. Parliament). The actions of an institution like Parliament depend on, but are not reducible to, the actions of those human beings who go to make it up. Thus an institution with no human beings in it (with no human members and no

institutional members that in turn meet this condition) cannot act. Yet when an institution does act through its members, its acts are distinct from those of its members. Members of Parliament argue their points, table amendments, and cast votes. These are things that Parliament as an institution cannot do. On the other hand it is Parliament, not its membership, that legislates. Analogously, the members of an orchestra play their instruments, watch the conductor, and follow the score. But only the orchestra – concertedly – plays the symphony.

What turns a mere collection of human beings (musicians, politicians) into a concerted agent (an orchestra, a legislature), the actions of which depend on, but are not reducible to, the actions of those human beings who go to make it up (its members, officials)? We can distinguish natural concerted agency from artificial concerted agency. Natural concerted agency is the same as what I have elsewhere called 'teamwork'.[17] In teamwork, each team-member adapts her intentions to the actions and intentions of the others so as to avoid frustrating each other's intentions. But that is not all. Each team member also adds an extra intention, that of contributing to the work of the team as a whole. She intends not only that she (and each of the others) should make their complementary efforts, but that this should also be part of a team effort. So her own intention makes an essential reference to the intention of the team. When it does so, it also helps to constitute the intention of the team. The team is then a further agent distinct from the human beings who go to make it up. It too does things and tries to do things and intends to do things – things that are distinct from, albeit dependent on, the things that its individual members do and try to do and intend to do. In the orchestra, for example, each player intends to play her part. But she also intends that, by all together playing their parts, the orchestra as a whole should play the symphony. That feature

[17] 'Reasons for Teamwork', *Legal Theory* 8 (2002), 495.

turns orchestral performance into teamwork. There may be only 105 human beings but there are at least[18] 106 agents involved in the performance. The 106th is the orchestra itself.

In natural concerted agency (teamwork) there may be norms that assign and regulate leadership and other special roles in the team (e.g. the role of the orchestra's conductor, its lead violinist, and so on). But in natural concerted agency there is no need for nor any possibility of a norm that assigns to anyone the role of *representing* the concerted agent. Nobody in the orchestra, for example, is its representative for the purpose of playing a symphony. The orchestra itself plays the symphony. At the same time somebody in the orchestra (or more likely in its management) is probably its representative for the purpose of booking concerts, hiring musicians, and so on. Such actions of the orchestra belong to the realm of *artificial* concerted agency.

Artificial concerted agency is strictly speaking a form of vicarious agency, the possibility of which depends on the existence of norms that empower one agent (e.g. a chief executive) to act in the name of another (e.g. a charitable organization). Such norms are needed when a concerted agent needs to (be able to) perform an action (e.g. entering into a contract or making a promise) that can only be performed by the further action of a single human being (e.g. by signing a name or shaking a hand). Such single-human-being actions cannot even in principle be performed by teamwork, and so require representation. But norms to empower representation can also be used more widely to enable teams to perform actions that could in principle be performed by teamwork, but only with excessive cost or difficulty. They can also be used to confer a capacity for concerted agency on a bunch of interacting human beings (e.g. a nation, a local community, a government) whose interactions do

[18] I say 'at least' because maybe there are some intermediate agents between the individual human beings and the whole orchestra. Possibly the string section is agent 107, the wind section is agent 108, and so on.

not naturally qualify as teamwork because one or both of the intentions required for teamwork is absent.

Modern legislative institutions typically work by a combination of natural and artificial concerted agency. There are officials (and committees and separate legislative chambers and so on) whose actions are treated for certain purposes as actions of the legislature. They may have powers to act in the name of the legislature for some parts of the legislative process. But the institution's ordinary members also work on legislation as a team, in natural concerted agency. Barring the occasional drunken accident, the members intend to participate in the legislative process whenever they do so. They not only intend to vote and to adjust their voting to the votes or intended votes of other members. They also intend that their votes contribute to legislative action or inaction on the part of the institution itself. The constitution of the institution must of course determine which human beings count as members of the institution for this purpose, and how their votes will be counted, and so on. So the agency of the institution still depends on norms determining who may be part of the team and what roles they will have. Nevertheless there is genuine teamwork. The relevant members act as a team in debating and approving legislation. When they do so, within the rules, it is the institution itself that legislates.

Can there be legislation without any concerted action, either natural or artificial? Of course there can, for in the Great Dictatorship, the Great Dictator legislates all by himself. The live question is only whether there can be legislation *involving multiple human beings* without concerted action, either natural or artificial, on the part of those multiple human beings. The answer is that there cannot. To interpret what one has before one as legislation one must interpret it as an attempt by someone to effect normative changes expressly. One therefore needs to think of the text (or the word or sentence or paragraph etc.) as having an author who was trying to convey a meaning. One therefore needs to think of its creation as either an individual action or a

concerted action. There must have been an action of legislating and hence an agent (an individual agent or a concerted agent) who legislated. Most anxieties about this conclusion come of the thought that the concerted agency in question is a legal fiction. There are two responses to this thought. First, the concerted agency is not completely fictitious; the members of legislative institutions do typically perform much of their work as a team, and in that respect they are to be regarded as natural concerted agents akin to orchestras and football teams. Second, there is nothing wrong with a legal fiction of concerted agency, if by that phrase we mean simply that the law attributes actions by one agent (an official) to another agent (an institution) under norms that make the former a representative of, and hence an agent who acts on behalf of, the latter. For there are artificial concerted agents, and many of them are creatures of law. It does not follow from the fact that they are creatures of law that they do not exist or that they are not agents. On the contrary, it follows from the fact that they can perform actions with legal effect, such as legislating, that they do exist and that they are agents.

2. Customary law

Legislated law may of course be influenced by custom. It may also refer to custom, giving it legal recognition, for example by saying that the statutory standard to be applied in judging the conduct of an electrician is the standard of conduct that is customary in the electrical trade. This is not customary law. The customary norm in this case is not, even after its legal recognition, a legal norm. It is merely a legally-recognized norm. It is the same situation as obtains when English law refers to some norm of French law in settling some family law problem arising out of a marriage conducted in France. This does not make the norm of French law into a norm of English law. Likewise a

legislative reference to a customary norm does not make the norm into a norm of customary law.[19] Customary law, rather, is made up of customary norms that are *ipso facto* legally binding, that are part of the law without further ado.

Bentham distinguished two different kinds of custom that may constitute customary law: custom *in pays* (the custom of a population of legal subjects) and custom *in foro* (the custom of a population of legal officials).[20] In the complex legal systems that law school professors are used to dealing with, there is little customary law that is made *in pays*. A possible exception is in International Law. In International Law states constitute the population of legal subjects. Arguably some customs that hold in the relations between states are *ipso facto* part of International Law. But the example is made problematic by doubts about International Law itself. It is an anomalous legal system in which the distinction between officials and subjects is blurred. Arguably this even makes it a borderline case of a legal system.[21] In what follows I will therefore be thinking mainly about municipal legal systems and hence about custom *in foro*: about customary law that is constituted as law by the customs of legal officials such as judges, police officers, and bailiffs. Again I will consider the distinguishing features of this kind of law under three headings, to facilitate a contrast with legislated law. First, customary law is not made by articulating (or otherwise expressing) its content. Second, customary law is not intentionally made. Third, customary law is not made by one agent but by many.

Customary law is not expressly made. Customary law is, of course, communicated. It is disseminated by example, and dissemination by example is a kind of communication. However, customary

[19] Joseph Raz, *Practical Reason and Norms* (London 1975), 152-4.
[20] Jeremy Bentham, *A Comment on the Commentaries and A Fragment on Government* (ed Burns and Hart, London 1977), 182-4.
[21] As Hart argues in *The Concept of Law*, above note 3, ch 10.

law, unlike legislated law, is not *made* by any acts of communicating it. It is made by acts of conforming to it. It is created and changed, not by what people say is to be done, but by what they actually do. So no formulation of a customary legal norm is ever canonical. Once a legal norm acquires a canonical formulation, any other way of settling its content answers to the canonical formulation in the event of conflicting interpretations of the norm. But where a customary legal norm is concerned, any other way of settling its content (including by formulating it) answers to the behaviour of the relevant population.

Customary law is created and changed, not by what people say is to be done, but by what they do. What kind of doing is required? Is it enough that a population's behaviour converges? Is it enough that mowing the lawn is what people round here do every Sunday morning? Or must the population's behaviour also converge *around a norm*, such that they are attempting to follow the norm when they act? Must it be the case that mowing the lawn is what people round here regard as the done thing on a Sunday morning, and that is why they do it? The first case is that of a social habit. The second case is that of a social norm. Here is a simple argument for thinking that customary law must be constituted by a social norm rather than a social habit. If a custom is to form part of the law it must be normative in the eyes of the law. It must constitute a legal norm. So there must be someone who, on behalf of the law, regards the custom as normative. That someone could, of course, be someone other than the population whose custom it is. It could be, for example, a legislature or a court. But in that case it is the fact that the legislature or the court regards the custom as normative that gives it whatever legal effect it has. This is not customary law. Rather, it is custom that is legally recognized in legislation or case law. This leaves as a case of genuine customary law only the case in which the someone who regards the custom as normative, on behalf of the law, is the very same population whose custom it is. Therefore convergent behaviour across a population is capable of constituting

customary law only if the convergence takes place under a social norm. A mere social habit does not suffice.

H.L.A. Hart argued that every legal system must have at least one norm of customary law, which he called a rule of recognition. A rule of recognition is a norm that identifies some person or institution as an ultimate (=non-delegated) maker of law.[22] Why must every legal system have such a norm? Hart's argument proceeded from his criticisms of Austin. As well as claiming that all laws are commands, Austin claimed that every legal system has an ultimate legislator (or commander), whom Austin labeled its 'sovereign'. The identification of the sovereign, said Austin, is not a legal matter. There is no law on the subject. For if I make law under a law identifying me as a legislator, there must be someone above me in the system who in turn makes that higher law identifying me as a legislator. In which case I am not after all the sovereign: I am not an ultimate, but only a delegated, legislator. It follows that the sovereign cannot be identified by a legal norm.[23] Rather the sovereign must be identified by conforming behaviour. The sovereign is the person or institution to whose commands people round here habitually conform. Sovereignty is efficacy.[24]

Hart agreed with Austin in holding that a legal system is in force only if it is efficacious.[25] The efficacy condition is met so long as legal subjects largely abide by the laws, but irrespective of whether they know the legal basis on which they do so (i.e. what makes these laws into laws). Yet, argued Hart, there must be such a legal basis. Within each legal system the identification of the ultimate legislator is itself a legal question. It is a question of constitutional law. How can this be? Austin was right to think that a legislature cannot possibly be identified as an ultimate

[22] Ibid, 92-3.
[23] *The Province of Jurisprudence Determined*, above note 2, 212, 239.
[24] *Lectures on Jurisprudence*, (5th ed, London 1885), 220-1.
[25] *The Concept of Law*, above note 3, 100-1.

legislator by further legislation so identifying it. His mistake, thought Hart, was merely to conclude that a legislature therefore cannot be identified as an ultimate legislature by *law* so identifying it. This holds true only if, as Austin thought, all law is legislated. But in fact it is not. There is also the possibility of customary law. Customary law is capable of identifying a legislator (as it were) from below, not from above. The law identifying the ultimate legislature – the rule of recognition – is constituted by other people's conformity to the legislation.[26] The legislature's power to make law is not delegated by these other people. For these people are *ex hypothesi* not legislators and so they have no legislative powers to delegate. In fact they do not delegate any powers at all. Rather, by their custom they create a legal duty, a legal duty to treat the ultimate legislator's word as law, a law which in turn may create legal powers for others.[27]

Whose custom? Which custom? It is tempting simply to follow Austin and say: the social habit of the wider population of legal subjects. But Hart notices that this answer is not adequate to the task at hand. The task at hand is not only to point to the conforming patterns of behaviour but also to explain how it is that they constitute legal norms. What makes the conforming behaviour normative from the legal point of view? For the law to have a point of view there must be people who represent the law in the identification of norms. These people are legal officials. To be more exact they are law-applying officials. They not only do what, according to the ultimate legislature, is to be done. They also treat adherence to the word of the ultimate legislature as the done thing. They regard the norms created by the ultimate legislature as norms for them to apply, because there is a norm under which, as officials, they have a duty to apply norms created by the ultimate legislature. So conformity to the word of the

[26] Ibid, 98-9.

[27] This aspect of the rule of recognition was clarified by J Raz in *Practical Reason and Norms*, above note 19, 146.

ultimate legislature is a social rule among the officials, not just a social habit. For Hart, this social rule is what constitutes the rule of recognition of the legal system. The rule of recognition is therefore an example of customary law *in foro*.[28]

One may quibble with various aspects of Hart's account. Some of his arguments are incomplete. But one major insight cannot be denied. Especially but not only where a legal system has no canonical constitutional text, it is common to say that ultimate constitutional questions are questions of practice (or *realpolitik*), not questions of law. Hart exposed this as a false contrast.[29] That a question is one of practice does not mean that it is not one of law. For some law is made by what people do, not by what they say. Much constitutional law is made in this way. What Hart calls 'rules of change' and 'rules of adjudication' are often but not always found in customary, as opposed to legislated, constitutional law.[30] But if Hart is right, every legal system has at least one constitutional law – a rule of recognition – that is customary rather than legislated. The rule of recognition belongs to the unwritten part of the constitution even in legal systems with so-called 'written constitutions'. A rule of recognition may of course come to be articulated by some legal officials, maybe even in a constitutional document. But the articulation is never canonical. Inasmuch as the norm as articulated departs from the norm as practiced by law-applying officials, the practice of the officials is what fixes the content of the rule of recognition. Do as we do, not as we say.

Customary law is not intentionally made. Unlike legislated law, customary law is not intentionally made. Of course the actions by which it is made are almost always intentional actions. The officials who create Hart's rule of recognition, for example,

[28] *The Concept of Law*, above note 3, 113.
[29] Ibid, 108.
[30] Ibid, 93-6.

clearly intend to follow (what they take to be) a rule when they do so. What they do not intend to do is to *create* or *change* a rule in the process. Their law-making is usually an accidental by-product of their intended law-applying. For example, by treating an Act of Parliament as valid law – by raising no questions about its validity and interpreting its contents as law – judges contribute to making it the case that Acts of Parliament in general are valid law. They contribute to making the rule of recognition what it is. But that is not what they usually intend to do. What they usually intend to do is to apply a legal norm that, so far as they are concerned, exists quite apart from their action of applying it, because it is a norm found in an Act of Parliament. And in a way they are right. The norm is in the Act and it is part of the law of the land according to a rule of recognition of the legal system, which is a customary norm that no single judge is in a position to change. Moreover, because any change in this rule depends on the usually unforeseeable actions of many other law-applying officials, usually no single judge is in a position to *intend* to change it either.[31] And yet as a law-applying official each single judge is part of the official population whose social rule constitutes the legal rule, and as part of this population he can contribute to changing the rule. It follows that a single judge can readily be an accidental participant, but only rarely an intentional participant, in a change of customary law.

In the scenario just sketched the intentional application of one legal norm (a legislated norm) potentially makes an accidental contribution to change in another legal norm (a customary norm). In a different scenario, the legal norm that the judge accidentally helps to change is the very same customary legal norm that she intends to apply without changing it. This possibility helps us to see a way forward with an old and tiresome debate. We all know that the law can be changed by the actions

[31] See R.A. Duff, *Intention, Agency, and Criminal Liability* (Oxford 1990), 56.

of judges. That is what gives the law a history that can be studied by studying judicial decisions. Yet judges almost always talk as if all they are doing is applying the law unchanged. Should we regard this self-presentation as a mere pretence, a spin that judges put on their arguments to shore up their legitimacy? Sometimes, no doubt, we should. But sometimes we should regard it more generously as an innocent slip on the part of the judge. Such slips are particularly easy to make where customary law is concerned, thanks to the indeterminacy of customary norms. Of course, all legal norms have their indeterminacies. In the case of legislated norms these typically include indeterminacies of language and indeterminacies of intention.[32] But customary law is subject to another kind of indeterminacy which comes precisely of the fact that it is neither articulately nor intentionally made. When a new situation emerges that is close to one that is already regulated by a customary norm, what determines whether it is or is not regulated by the norm? In the case of customary norms (or more generally norms that are made by their use) there is nothing that determines this except what people do next by way of supposed application of the norm. The norm is indeterminate in its application until actually applied. This makes for a characteristic kind of slip in the application of customary law. Overlooking tiny differences between the present situation and past situations that were admittedly regulated by the norm, it is easy to jump to the conclusion that the norm already regulates the present situation when in reality it is still indeterminate in respect of its regulation or non-regulation of the present situation. This represents a tiny mistake of law. But such mistakes can contribute gradually to changes in the custom, and hence to changes in the law. Over time the customary law comes into line with its own hitherto mistaken applications. Officials who intended only to apply the norm without changing it contributed accidentally to

[32] Hart, *The Concept of Law*, above note 3, 124-6.

this normative change. This, it strikes me, is the usual way in which customary law *in foro* changes.

Customary law is not made by one agent. Again the next step has been anticipated. The making of customary law requires multiple actions by multiple agents. There must be widespread convergence of actions before we have a custom, and hence before we have customary law. What is not required is any kind of joint agency, any kind of teamwork on the model of an orchestra or Parliament. Joint agency is possible only when the participants in it are aware of each other's actions, and intend their actions to contribute to the same project as the actions of others. In the case of Parliaments this is how the intention to make law takes shape: the various members and officials of Parliament do not merely happen to go through the lobbies together. They do it in the awareness that others are doing it and intending their actions to contribute, together with the actions of others, to the making of law. Custom is very different. Participants in customs are, as we saw, sometimes acting with the intention to follow a social rule (to do the done thing). But their intentions here are not joint intentions. They are merely intentions in common. They do not require mutual awareness nor an intention to participate in a common project. And sometimes – when a custom is constituted by social habit – not even an intention in common is needed. It is enough that behaviour converges, never mind the reasons.

A great deal of ink has been spilt on the question of what kind of interaction among law-applying officials is required to constitute Hart's famous rule of recognition. Hart originally took the minimal view described above. Law-applying officials need only regard it as the done thing for law-applying officials like themselves to treat the word of the ultimate legislature (and other authorities of inherent jurisdiction) as law. But under pressure from Ronald Dworkin, Hart later allowed that the rule of recognition is perhaps not just a social rule but a *conventional*

social rule.[33] This opened the way to elaborate discussions of Hart's 'conventionalism' about law. In particular Hart's thinking came to be linked with a body of philosophical literature on convention which gave a highly technical sense to the term, in which conventional rules are only those social rules that serve coordinating social functions.[34] From here it was a surprisingly short step to the idea that the officials whose actions add up to constitute the rule of recognition of each legal system are engaging in something close to teamwork, intentionally coordinating with each other in the manner of an orchestra playing the symphony of law.[35] It seems to me that all of this extra baggage is not only misguided and unnecessary but contrary to the tenor of Hart's original proposal.[36] It brings the rule of recognition ever closer to the model of legislated law, a creation of many working as one. But Hart's whole point was that a different kind of law is needed before legislated law is possible. It is needed to create legal institutions of the kind that can pass undelegated legislation. This customary law is not the work of many working as one. It is the work of many acting as many. They create new law collectively as an accidental by-product of

[33] *The Concept of Law* (2nd ed, Oxford 1991), 267.

[34] Jules Coleman, 'Negative and Positive Positivism', *Journal of Legal Studies* 11 (1982), 139; Gerald Postema, 'Coordination and Convention at the Foundations of Law', *Journal of Legal Studies* 11 (1982), 185; Andrei Marmor, *Positive Law and Objective Values* (Oxford 2001), 10-24. Marmor makes an important change to the relevant explanation of convention.

[35] Jules Coleman, *The Practice of Principle* (Oxford 2001), 98; Scott Shapiro, 'Laws, Plans, and Practical Reason', *Legal Theory* 8 (2002), 387; Christopher Kutz 'The Judicial Community', *Philosophical Issues* 11 (2001), 442. Each of these writers understands 'intentionally co-ordinating' slightly differently.

[36] Other doubters: Joseph Raz, 'On the Authority and Interpretation of Constitutions: Some Preliminaries' in Larry Alexander (ed), Constitutionalism (Cambridge 1998), 161-2; Leslie Green, 'Positivism and Conventionalism', *Canadian Journal of Law and Jurisprudence* 12 (1999), 35; Julie Dickson. 'Is the Rule of Recognition Really a Conventional Rule', forthcoming.

their individual efforts to follow the law as it is. Each intends in her own case to follow the rule of recognition, not to change it.

3. Case law

It is essential to the nature of law that all legal systems have law-applying officials who make legal rulings. A legal ruling is a legally binding decision on the application of a legal rule to what lawyers call a 'case': to a situation-token rather than a situation-type. In the case of *Barnewall* v *Adolphus*, for example, there may be a legal ruling that Barnewall now owes Adolphus $50. An official who has the power to make such a legal ruling – typically a judge – also has the power to change people's legal positions. He has the power to change Barnewall's legal position and Adolphus's legal position and the legal position of the bailiffs who execute the debt and the legal position of newspapers who report the decision and so on. But he does not necessarily have the power to change the law itself in the process. He has the power to change the law itself in the process only if, by making the legal ruling, he can also change the legal rule under which he makes it, thereby affecting its application in cases other than the one before him. We have already seen how a judge might contribute to doing this by contributing to a change in official custom. But in some legal systems some judges also have the power to change legal rules *solo* by making legal rulings. This is not customary law because no convergence of official behaviour around the new rule is required to make it part of the law. This type of law is known as case law.

Typically judges set about adding to case law by applying existing law, i.e. by applying law that exists apart from their act of applying it. Typically they argue that a certain ruling, even if not required by existing law, would be consistent with existing law and a sound development of existing law. They proceed in this way this because they have a professional moral duty (usually crystallized in their oath of office) to keep faith with whatever

existing law there is on any subject on which they make a ruling. But this professional moral duty need not and often does not circumscribe the legal power of judges to make law. In many legal systems, judges with the ability to add to case law do so even if they do so *per incuriam*: even if they ignore and contravene existing law in doing so. When that happens other judges may have extra powers to overrule the errant decision when it comes to light in later cases. But this confirms, rather than challenges, the claim that the law was changed by the errant decision in the meantime. If the law was not changed, overruling would not be necessary. Such judicial law-making without the support of existing law is in one respect akin to legislating. It is an activity of making law *de novo*. Yet it is not legislating. For legislators do not make law *de novo* by applying law. *Qua* legislators they make legal rules but no legal rulings. Whereas judges, even when they make legal rulings without the support of existing law, always make law by applying it. Whenever they make case law, they make law by the act of applying the very same law that they thereby make.

So case law is neither legislated law nor customary law. It has some features in common with each. To see the similarities and differences more clearly, I will ask the same questions about case law that I asked about legislated law and customary law. Is case law expressly made? Is it intentionally made? Is it made by one agent or by many?

Case law is not expressly made. Case law is a kind of law made by judges. It is to be found in the judgments that judges give when they decide the cases brought before them. These judgments take the form of texts, which (like legislated law) may be either written or oral, which may be expressed in declarative or (rarely) imperative sentences, and which call for interpretation. These latter features may encourage the thought that case law is a kind of legislated law. But a major difference lies in *how* the judgment of a judge creates whatever new law it creates. Case law, unlike

legislated law, is not made by being articulated. It is made by being used in argument. In this respect case law, in spite of its delivery in textual form, has more in common with customary law than it has in common with legislated law. Recall that customary law is made by (social) rule-following. Using a rule in argument is also a kind of rule-following, even though the rule in question need not be a social one.

An argument is made up of at least two premisses and a conclusion. For simplicity let's imagine a very simple two-premiss legal argument that could be made by a judge.

Rule: Any person who calls another person a liar has a duty to pay $50 to that other person.

Fact: Barnewall (a person) called Adolphus (another person) a liar.

Ruling: Thus, Barnewall has a duty to pay $50 to Adolphus.

Of course, arguments made by judges are often much more complicated than this. The facts of the case are often much more arcane. There are often subsidiary arguments that bear on the interpretation of the rule, or the interpretation of the facts. And the main argument often runs through a series of interim conclusions which are then used as premisses in the next stage of the argument. But none of this makes any difference to the point about case law that concerns us now. So let's focus on the simple, pared-down case of *Barnewall* v *Adolphus*.

To do her judicial work in the case of *Barnewall* v *Adolphus*, the judge must express at least one legal norm: she must express her ruling. Until she has ruled, she has not judged, and until she has expressed her ruling, she has not ruled.[37] Judging in the sense of making a ruling on a case may be thought of as akin to a

[37] As with legislation, this expression is typically in words but it could be by symbol or gesture (e.g. a thumbs-down).

legislative act, since the ruling is not only expressed but expressed with the intention of binding the parties legally by that very act of expressing it. But unlike legislation, the ruling by itself does not make new law. The law is made up of legal rules, legal norms that apply to more than one case. Legal rulings are legal norms that apply only to the case in which the ruling is made, and hence do not form part of the law.

So if the judge in *Barnewall* v *Adolphus* does make new law, that law lies not in her ruling but in the rule she uses to make it. Yet she might not attempt to formulate her rule. She might only state the facts and the ruling, leaving the later interpreter of the case to work out the rule that she is using. The rule she is using is one that, combined with the facts of the case, suffices to yield the ruling. So in interpreting the case one begins by working back to the rule from the facts and the ruling. This may be what prompts some people to say that judges decide cases, and hence make case law, by reasoning 'on the facts' rather than by the use of rules.[38] The contrast here is false and the suggestion, taken literally, is baffling. No number of facts can ever yield any legal ruling except in combination with a legal rule which renders those facts legally pertinent. What makes it seem otherwise is merely that, where case law is concerned, the rule being used belongs to what David Lyons aptly calls implicit (or implied) law as opposed to explicit (or express) law.[39] The rule is implicit because it is made

[38] See e.g. Bruce Chapman, 'The Rational and the Reasonable: Social Choice Theory and Adjudication', *University of Chicago Law Review* 61 (1994), 41 at 66–7. The view is echoed in Gerry Postema's contribution to this volume.

[39] Lyons, 'Moral Aspects of Legal Theory' in M Cohen (ed), *Ronald Dworkin and Contemporary Jurisprudence* (London 1984), 49 at 58. The expression 'implicit law' was first used by Lon Fuller in *The Anatomy of Law* (New York 1968), where it was contrasted with 'made law'. Since implication is one way of making law, Fuller's contrast is unfortunate. Lyons improves upon it by contrasting 'implicit law' with 'explicit law' but strangely still tends to talk as if those who believe that law is made can recognise only explicit law.

by being used in the case, rather than by being expressed. It is the rule as used rather than the rule as stated.

I said that the rule for which a case stands is one that, combined with the facts of the case, suffices to yield the ruling. But surely, in any given case, there are many possible rules that meet this specification? Surely the rule could always be rendered more general and still combine with the facts to yield the ruling? Perhaps the rule in *Barnewall* v *Adolphus* is not the narrow

Rule 1: Any person who calls another person a liar has a duty to pay $50 to that other person.

Perhaps it is the broader

Rule 2: Any person who calls another person an insulting name has a duty to pay $50 to that other person.

Or perhaps it is the even broader

Rule 3: Any person who calls another person a name has a duty to pay $50 to that other person.

Any of these three rules (and countless others) can be combined with the fact as found in *Barnewall* v *Adolphus* to yield the same ruling. So how do we know which of these many rules the case stands for? Which is the *ratio decidendi* of the case? Perhaps there is no answer. In which case we have some seriously indeterminate case law before us. It may be indeterminate which of these three rules (among countless other possibilities) is the rule in *Barnewall* v *Adolphus*. The effect of the case on the law is then arguable, and the case could therefore be relied upon in later cases to support various rival arguments and hence incompatible rulings.

In practice, however, such legal indeterminacies tend to be mitigated in a number of ways. Let me mention four.

First, a legal system that makes extensive use of case law may have closure rules to help render its case law more determinate.

There might, for example, be a rule of law according to which (subject to indications to the contrary in the judgment) the *ratio decidendi* of a case is the narrowest rule that suffices, in combination with the facts of the case, to yield the ruling in that case. In which case, all else being equal, rule 1 in would beat rules 2 and 3 to qualify as the rule in *Barnewall* v *Adolphus*.

Second, the rule that a case stands for must be consistent not only with the ruling in that case but also with the rulings in any other cases on which the judge relied in arriving at his ruling (for these rulings too form part of the argument in the case). In legal systems that depend heavily on case law for their development, there are often long lines of cases that combine to lend increasing determinacy to the rule for which the last of them stands. This is the main way in which case law gradually crystallizes over time, sometimes referred to as its 'organic' quality.

Third, the arguments presented by judges often include not only the application of a rule but also a rationale for the rule as applied. If so, this rationale also forms part of the *ratio decidendi* and constrains the range of possible interpretations of the rule in the case. The rule in the case must then be one capable of being supported by its rationale, as well as one capable, in combination with the facts of the case, of yielding the ruling.

Finally, judges often do formulate the rule, or aspects of the rule, for which they regard their case as standing. In such a case, subject to the previous three points, the judicial formulation of the rule helps us to narrow down the range of possible rules for which the case stands. Of course, the rule so narrowed down must still suffice to yield the ruling in the case – and otherwise be compatible with the argument in the case – or else it is not the rule for which the case stands. In the terms I used before, the argument in the case is still the primary object of interpretation. Interpreting the formulation is merely a way of aiding the interpretation of the argument. This marks a key difference between case law and legislative law. Where legislative law is concerned, as we saw, the legislative formulation is canonical. So

long as one is applying the legislation one may not abandon the legislative formulation as an object of interpretation, even if it cannot be reconciled with a certain ruling or a certain rationale. With case law the reverse is true: the rule that a case stands for is a rule that supports the ruling in the case, and is supported by the rationale in the case, even if these cannot be reconciled with the judge's attempted formulation of the rule.

Case law may be intentionally made. Case law differs from customary law in that the act of making it may be intended to make law. But case law differs from statutory law in that the act of making it is not *necessarily* intended to make law. To put it simply: the act of making new case law may be either intentional or accidental. The judge may either mistake the rule he is applying for the existing rule of law, and hence not intend to add anything to the law by applying it, or he may realize that the rule he is applying is a departure from the existing rule of law, and hence intend to change the law by applying the rule he is applying. Which path the judge is taking is rarely apparent from the judge's own arguments. This is because, even when a judge is intentionally changing the law, he or she has a professional moral duty to do so on legal grounds, i.e. by pointing to existing legal rules that, when soundly developed, would justify a departure from, and hence change in, the particular legal rule that is now under consideration. When she changes the law on legal grounds the judge often is not sure, and does not need to be sure, whether what she is doing counts as changing the law. It often strikes the judge only as a matter of reconciling two apparently conflicting rules of law. It often does not matter to her whether these rules of law are only apparently conflicting (in which case neither of the rules need be changed in order to reconcile them) or whether they are really conflicting (in which case at least one of the rules needs to be changed in order to reconcile them).

In English law (and in many other legal systems of English descent) judges sometimes have the power to overrule previous

judges on points of law, something which cannot be done (knowingly[40]) without intending to change the law. But judges also often have the power to do something more modest, which is to *distinguish* cases decided by earlier judges. One distinguishes a case by narrowing the rule used in an earlier case so that it still yields the original ruling in that case (and is otherwise still consistent with the *ratio decidendi* of that case) but does not regulate the case now being decided, leaving the court in the present case free to rely on a different and apparently conflicting rule. There is no doubt that the judicial power to distinguish is a power to change the law.[41] But is the law changed every time the power to distinguish is ostensibly exercised? Surely not. There are surely many cases in which the rule in a previous case already does not extend to the case at hand and so does not need to be narrowed to secure its non-application. The 'distinguishing' of the case is then a precaution devoid of legal effect, or an explanation by the judge of why the case does not need to be distinguished. It is rare that judges need to know whether they are distinguishing a case (using their power to narrow the rule so as to disapply it) or merely 'distinguishing' it in this inert way (pointing out that it is already narrow enough not to be applicable). So it is rare that judges need to form an intention to change the law when they are engaged in adding to the stock of case law by distinguishing earlier cases.[42] Since a

[40] So-called 'implied overruling' – where the overruling court is unaware of the case it is countermanding – need not be intended to change the law.

[41] For discussion, see A.W.B. Simpson, 'The *Ratio Decidendi* of a Case and the Doctrine of Binding Precedent', in A.G. Guest (ed), *Oxford Essays in Jurisprudence* (Oxford 1961); Joseph Raz, 'Law and Value in Adjudcation' in his *The Authority of Law* (Oxford 1979); Frederick Schauer, 'Precedent' *Stanford Law Review* 39 (1987), 571.

[42] Grant Lamond, 'Do Precedents Create Rules?', *Legal Theory* 11 (2005) 1 at 13-4. Lamond contrasts distinguishing a case with interpreting its *ratio*. But one may do both at once: one may narrow the rule in a case on the ground

great deal of the stock of case-law in England and in cognate jurisdictions is furnished by distinguishing, a great deal of case law is likely to have been unintentionally made.

Case law is made by one agent. Like legislators, the makers of case law may be human beings (individual judges) or institutions (courts made up of a number of judges). In some legal systems both individual judges and the courts they belong to are capable of contributing to the stock of case law. Individual judges have a certain authority when they deliver their own judgments. But when they agree with each other in such a way that their judgments add up to the judgment of the court, their authority is augmented and the rules they agree on become harder for later courts to disregard or overrule. To understand this one needs to understand courts as having artificial personalities akin to those of legislatures. There are rules about how the actions of the members of the court come together to constitute actions of the court itself. It matters who is in the majority, and failing that who is in the plurality, etc. At the same time, many judges (unlike ordinary members of the legislature) have some legal powers as natural persons and can affect the content of the law by what they do and intend to do even when they are at odds with the decision of their court (for example, when they are dissenters in respect of the judgment of the court, or they are concurrers who arrive at the same ruling as the court but using different rules). One may be tempted to conclude from this that case law can either be made by many agents or by one. But in fact it is always made by one. The agent is either a single human being (a judge) or a single institution (a court populated by judges).

Of course, since the authority of case law may vary, it may be to one's legal advantage to have a lot of case law on one's side.

that the rule in that case was wider than was needed to do justice to the rationale that was given for it in that very same case.

When one cites a long line of cases dating back for centuries it may seem as if one is really relying on customary law, not case law. But in three ways what one is relying on differs from customary law. First, the authority of the line of cases rests on an aggregation (quite a complex aggregation) of the authority of the courts and judges whose decisions are included in the line. With customary law, by contrast, there is no legal force to these individual decisions until they are aggregated. The second is that the cases need not include any real convergence on the law. Perhaps no two cases in the line apply exactly the same rule. They may instead tell a story of continuous legal change, with a series of acts of distinguishing that gradually and inexorably turn the law in one's favour. The third, implicit perhaps in the second, is that even to the extent that the cases in the line do converge, they need not include any simultaneous convergence. It is part of the nature of custom that there should be a measure of simultaneous convergence. Even two hundred reputable nonconformists do not constitute a custom of nonconformity if there was never more than one nonconformist at a time; if there was at no time a social rule of nonconformity. Whereas two hundred reputable nonconformists on the judicial bench do constitute a huge weight of authority in case law even if they all engaged in their nonconformity at quite different times, and merely passed the baton of their nonconformity along against a backdrop of completely countervailing custom. Case law, to put it simply, may readily conflict with customary law *in foro*.

The following table summarizes the classification of types of law that we have encountered so far:

	Expressly made?	*Intentionally made?*	*By what kind of agency?*
Legislated law	Express	Intentional	Individual
Customary law	Not express	Unintentional	Multiple
Case law	Not express	Either	Individual

4. Common law

Common law is not another type of law to be added to the above table in addition to legislated law, customary law, and case law. The Common Law (with capital letters) is a legal tradition marked by a number of different and only contingently related features. The tradition is polytypic: most but not all of its distinguishing features are present in each legal system belonging to the tradition. Some of these features do not concern the way the law is made. So, for example, the following are characteristic features of Common Law legal systems:

1. Common Law legal systems employ a distinctive 'adversarial' fact-finding process, of which trial by jury is the epitome.

2. Common Law legal systems embody a distinctive doctrine of the rule of law, according to which officials of the system are, with specific exceptions, subject to the same legal rules as non-officials.

3. Common Law legal systems make use of certain distinctive legal categories, such as trustee, consideration, and estoppel.

When referring to common law without capital letters, however, many lawyers working in the Common Law tradition are referring to only part of the law of their own systems. Often they are drawing a contrast with legislated law. Common law, one may glean, is law that comes into being in a different way from legislated law. But how does it come into being? Is it case law or is it customary law? The founding myths of The Common Law as a legal tradition tend to present it as a system of custom *in pays*.[43] It is law that rises up from the general population, as opposed to statute law which descends upon the population from the King. This founding myth is in many ways ridiculous. The

[43] Postema, 'Philosophy of the Common Law', above note 12, 590-2.

law in question was mostly the work of the King's judges. But even if this were not the case in the twelfth century, it is surely the case now. The common law doctrines in use now are the creatures of judicial use. Yet this leaves open the question: What kind of judicial use? Is it judicial use in one case at a time, constituting case law? Or is it concurrent and convergent judicial use, constituting customary law *in foro*?

It seems to me that common law, as contrasted with legislated law, contains elements of both case law and customary law. In England, where we have an almost entirely unwritten constitution, there is probably more common law that is custom *in foro* than in some legal systems belonging to the Common Law tradition that have a canonical constitutional document. This is because in the English setting, not only the rule of recognition, but also many other constitutional rules are made and sustained accidentally by the judicial custom of following them. When at long last these rules are explicitly challenged in court, there is often no previous case law on the point. No pertinent case has ever been argued before any court. And yet many judges and other officials have been quietly following the same rules over hundreds of years. So here we have judicial customary law, as opposed to case law, that is part of the common law of England.

One nice example, in England at least, is the doctrine of *stare decisis*, which regulates the extent to which and the ways in which later courts may overrule earlier courts. In large measure this doctrine entered the common law of England as a kind of judicial custom. But notice that it is not a doctrine concerned with the development of customary law. It is a doctrine concerned with the development of case law. Indeed comparative lawyers sometimes talk as if only legal systems with a doctrine of *stare decisis* can include case law. This is a mistake. For the decisions of earlier courts may add to the stock of case law even though there is no protection against these decisions being superseded by the decisions of other courts. Where there is no such protection it is tempting to say that there is no 'binding'

precedent, but only 'persuasive' precedent. But this is strictly speaking incorrect. Courts may change the law on Tuesday even though other courts may change the law back again on Wednesday. When legislators do such things we do not deny that the legislated law made on Tuesday is binding, albeit only briefly. After all, if such legislated law were not binding there would be no need for it to be changed back again on Wednesday. Instead it could be disregarded. We should say exactly the same thing with case law. The decision of an earlier court must be binding in law for it to be necessary for a later court to overrule it. So a doctrine of *stare decisis* does not alter the power to make binding law. It only alters the power of later courts to change the binding law that was thereby made. It follows that one may have case law in a legal system without having a doctrine of *stare decisis*. On the other hand one may not have a doctrine of *stare decisis* without having case law.

In spite of that, the doctrine itself need not be created by case law. It could in principle be created by statute. More to the point it could be created by judicial custom. That is the position, it seems to me, in England. So it would be a mistake to think of common law as case law alone. Common law is probably better thought of as case law combined with judicial customary law concerning the reception and use of case law. In both respects it can usefully be contrasted with legislated law.

Yet the contrast with legislated law is also impure. When common law is contrasted with legislated law it is almost always contrasted with legislated law as developed by case law. Common law, we could say, includes only that part of case law which is not concerned with the interpretation of legislation. Of course, even in Common Law jurisdictions, there is a great deal of case law concerned with the interpretation of legislation. The point is only that one could equally have a legal system with a great deal of case law but no common law. There would be no common law because all the case law would be case-law concerning the interpretation of legislation. Legislation –

including the legislation of the written constitution – would be regarded as the primary object of interpretation, with the interpretation of case law required only as part of the process of interpreting the legislation. What seems most special about Common Law jurisdictions is that they have a great deal of case law that is not about the interpretation of legislation. It is only about the interpretation of other case law.

5. Positive law

All three of the types of law I discussed here are types of positive law. They are all made by somebody and we know that they count as law only when we know who made them. Legislated law is made by legislators. Case law is made by judges. Customary law is made by (official or non-official) populations. Case law and customary law – 'non-legislated law' for short – is sometimes represented as non-positive law, simply because it is not made expressly or intentionally. Thanks to these features it is easy to make it seem as if non-legislated law is not really made at all. Ronald Dworkin, for example, relied on these features of case law in arguing that at least some of it exists without anyone's ever having made it. The implicit law to be found in the cases exists, according to Dworkin, in virtue of the fact that it provides a sound moral justification for whatever explicit law there might be in those same (and other?) cases. So it can be made without any kind of engagement with it by anyone. It exists even before it is cited or used by anyone.[44] My discussion has suggested that this is a mistake. It is true that case law is implicit law in the sense that it is not made by being expressed. Nor is it always made intentionally. The rule in the case has to be worked out by examining the judge's argument, to see what rule he implicitly, and maybe accidentally, relied upon. Nevertheless, the judge

[44] 'Hard Cases', above note 1, 110-8.

brings the rule into existence by relying on it. So implicit law, like explicit law, is still brought into existence by someone. It is still positive law. For there is no such thing as non-positive law. There are no legal norms that come into existence without being brought into existence by someone. It is merely that there are several ways of bringing them into existence.

As mentioned at the outset, Dworkin errs in thinking of all law-makers as legislators. This leads him to think that any law that is not legislated does not have a law-maker. The error is dramatic. Yet it is readily understandable. For there is a sense in which legislative law-making is paradigmatic law-making. How so? Several times in this paper I have referred to the *authority* of legal officials. I have also referred to the authority of the law itself, e.g. the authority of case law. You may understand this to be no more than another way of referring to the positivity of law, i.e. to the fact that all legal norms are made by someone. But my references to authority suggest a stronger thesis. For, while all exercises of authority are acts of changing the norms that apply to others, not all acts of changing the norms that apply to others are exercises of authority. To exercise authority is to change the norms applicable to others by the very act of attempting to change them. It is a definitionally intentional action. So, of the types of law we have identified, only legislative law need be made by an exercise of authority. Case law may but need not be made by an exercise of authority. Customary law, meanwhile, is not made by an exercise of authority at all.

This need not, however, inhibit us from referring to customary law as authoritative. Nor does it stop lawyers from referring to cases as authorities even when the only law-making they involve is accidental. The explanation is given by Raz:

> [An analysis of law-making as an exercise of authority] could in principle apply to a legislator and his acts of enactment. But not all law is enacted. Customary rules can be legally binding. Can they be authoritative despite the fact that they are not issued by authority? It is possible to talk directly of the authority of the law itself. A person's

> authority [is] explained by reference to his utterances: he has authority if his utterances are protected reasons for action, i.e. reasons for taking the action they indicate and for disregarding (certain) conflicting considerations. The law has authority if the existence of a law requiring a certain action is a protected reason for performing that action.[45]

Legislating is the paradigm of law-making because it involves an exercise of authority: an attempt to change another's normative position by that very act of attempting to change it. Customary law, and accidentally-made case law, is also authoritative but only in a derivative sense. It is not made by an exercise of authority. But in respect of its normative force, it is treated as if it were. It is authoritative in reception albeit not in creation. One can understand what it means to receive something as authoritative only by understanding what it means to exercise authority. So, inasmuch as the authority of law is central to its nature, one naturally understands law by working out from legislative law to other types of law. One understands other types of law by grasping how they differ from legislative law.[46]

Why should we think of the authority of law as central to its nature? Here is the answer suggested by Raz himself:

> [To play] a mediating role between ultimate reasons and people's decisions and actions ... the law must be, or at least be presented as being, an expression of the judgment of some people or of some institutions on the merits of the actions it requires. Hence, the identification of a rule as a rule of law consists in attributing it to the relevant person as representing their decisions and expressing their judgments. Such attribution need not be on the ground that this is what the person or institution explicitly said. It may be based on an implication. But the attribution must establish that the view expressed

[45] 'The Claims of Law' in Raz, *The Authority of Law* (Oxford 1979), 29.

[46] Compare Jeremy Waldron, 'Legislative Intent and Unintentional Legislation' in his *Law and Disagreement*, above note 14, who unexpectedly sacrifices the paradigmatic status of legislative law by attempting to explain the nature of authority without any mention of intentionality.

in the alleged statement is the view of the relevant legal institution. Such attributions can only be based on factual considerations. Moral argument can establish what legal institutions should have said or should have held but not what they did say or hold.[47]

On this view, it is the role that law plays in coordinating and otherwise assisting our rational agency that explains why law must be thought of as authoritative. And it is the need for law to be thought of as authoritative that explains why all law is positive law, why all law needs its law-maker(s). I have not defended this line of thought here. I have limited myself to the more modest task of showing how customary law and case law, no less than legislative law, qualify as types of positive law in spite of distracting features which may lead one to think otherwise.

[47] 'Authority, Law and Morality' in Raz, *Ethics in the Public Domain* (rev ed, Oxford 1995), 210 at 321.