

Chapter 3 Imperative or command theories of law

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Introduction

This chapter considers what can be regarded as the earliest modern legal theory in England – the imperative or 'command' theory of law, associated with Jeremy Bentham and John Austin. The theory is based in a conception of sovereignty derived from long traditions of political thought to which Thomas Hobbes was a chief contributor, but adapted in significant ways to what Bentham and Austin understood as the political, social and legal conditions of their times. The chapter will first consider the influence of Thomas Hobbes but most attention will be devoted to Austin since his influence on the general course of development of legal theory in the UK has been much greater than that of Bentham, while Hobbes has been strangely neglected.

In reading the material, you are asked to note how Austin's ideas differ from Hobbes' or Bentham's and also to note what each of these writers was reacting **against**. There are also a number of general questions to consider:

- What was it in earlier legal thought that they were so anxious to discard and deny?
- What was the role of utilitarian considerations in their theories?
- Hobbes is considered the father of English political liberalism, while Bentham is usually considered a liberal thinker. How far is this the case with Austin too? Can Austin be considered to offer in some sense an anti-liberal legal theory?
- What is Austin's view of the nature of legal and political authority?
- Why did Austin (as Hobbes before him) consider that international law was not really law but a form of positive morality? Why did he consider constitutional law in a similar way?

- Are there fundamental problems both with the idea of law as a command and with the Austinian theory of sovereignty?
- How apt are Hart's criticisms of the theory he claims to have discerned from Austin?

In addition, you should reflect on the process of reading and understanding a writer's words, particularly those from an earlier historical period. Should we construct a model based on their writings which we take to have trans-historical meaning, or should we seek to understand their theories in the social, economic and political conditions of their times?

Learning outcomes

By the end of this chapter and the relevant readings, you should be able to:

- adopt an effective approach to reading original extracts from key writers
- critically discuss the emergence of legal positivism and the core meaning of legal positivism
- discuss the advantages and disadvantages of a theory of law based on the idea of the commands of the sovereign
- analyse the social and political context in which Austin wrote and how Hart has interpreted his project.

Essential reading

- Penner, et al. Chapter 3: 'Debating with natural law: the emergence of legal positivism'.
- Cotterrell, R. *The Politics of Jurisprudence: a critical introduction to legal philosophy*. (London: Butterworths Law, 2003) second edition [ISBN 0406930554] Chapter 3: 'Sovereign and subject: Austin and Bentham'.
- Morrison, Chapter 9: 'John Austin and the misunderstood birth of Legal Positivism'.

Useful further reading

- Freeman, Chapter 4: 'Bentham, Austin and classical positivism'.
 - Harris, J. W. *Legal Philosophies*. (London: Butterworths Law, 1997) [ISBN 0406507163] Chapter 3: 'The command theory of law'.
 - Davies, H. and D. Holdcroft *Jurisprudence: Text and Commentary*. (London: Butterworths Law, 1991) [ISBN 0406504288] Chapter 2: 'John Austin'.
 - Lloyd, D. (Lord Lloyd of Hampstead) *The Idea of Law*. (London: Penguin Books, 1991) [ISBN 0140138307] pp. 170–90.
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3.1 The birth and development of secular or 'positive' theories of law: the case of Thomas Hobbes

3.1.1 Introduction

The work of Thomas Hobbes¹ (1588–1679) constitutes the founding moment for the stream of political philosophy and political orientation we call liberalism. His work provides a transition from the medieval intellectual synthesis wherein God was seen as the creator of life and God's presence was seen in the organisation and life flows of the earth to a more secular foundation for government. **In many respects Hobbes is the real father of legal positivism, except that he was several hundred years ahead of his time.**

In his famous *Leviathan* (published in 1651, just after the English Civil War) Hobbes sought to convince his audience – the country's ruling elite – of a new structure of legitimation for government. Or, to put it another way, he came up with a new way of describing the nature of government and justifying the need to obey it. This theory of legitimacy, or argument for why we (the 'subjects') should give it our obedience, was founded on a narrative or story of mankind's nature – our position in the world – that gave us an understanding of our basic problems of existence. We were meant to see ourselves as actors in this narrative and be led to agree that we would as rational creatures (calculating individuals) accept the need for a strong government. **His legitimating idea for modernity was a social contract.**

In the midst of a social order facing the chaos of the English Civil War, Hobbes presented a new social ethic, that of individual self-assertion. The world was to become a site for individuals to follow their desires, to plan their personal and social projects, and to realise their power. Whatever the final power in the cosmos, it was certain, Hobbes stated, that as we are in charge of civil society, we could fashion a political instrument to allow us to pursue our ends, our interests. Expansion and progress were possible; but only if we could first create the framework of a stable social order: **the first and greatest enemy was social chaos.** We overcame this through calculation, the rational calculation of individual humans based on their experience and understanding of the human condition.

When we read we are subjected to the rhetorical ploys of the writer. Hobbes is still seen as very important, in part because over the centuries since he wrote many people have considered that he captures certain key aspects of the human condition. In approaching his work, as with that of all the other writers covered in this module, we need to become aware of his foundational assumptions, the way he presents the facts, the often subtle way he leads the audience into his way of appreciating things, and then how they make their conclusions seem to flow logically and naturally from what proceeds.

Hobbes gives a narrative of the 'natural condition of mankind', which, some think, he presented in such a way that almost any government would seem better than the **'solitary, poor, nasty, brutal and short'** life he gave pre-social-contract man. In this respect Hobbes is sometimes regarded as the father figure of

¹ Hobbes was born when on 5 April 1588 the news that the Spanish Armada had set sail shocked the heavily pregnant wife of his father, also called Thomas Hobbes, a rather disreputable and drunkard vicar of Westport, into labour. The new Thomas Hobbes was later to state: 'My mother dear did bring forth twins at once, both me, and fear'. Philosophical liberalism was in a real sense founded upon this emotion, and upon Hobbes' desire to preserve his earthly domain against the prospect of death.

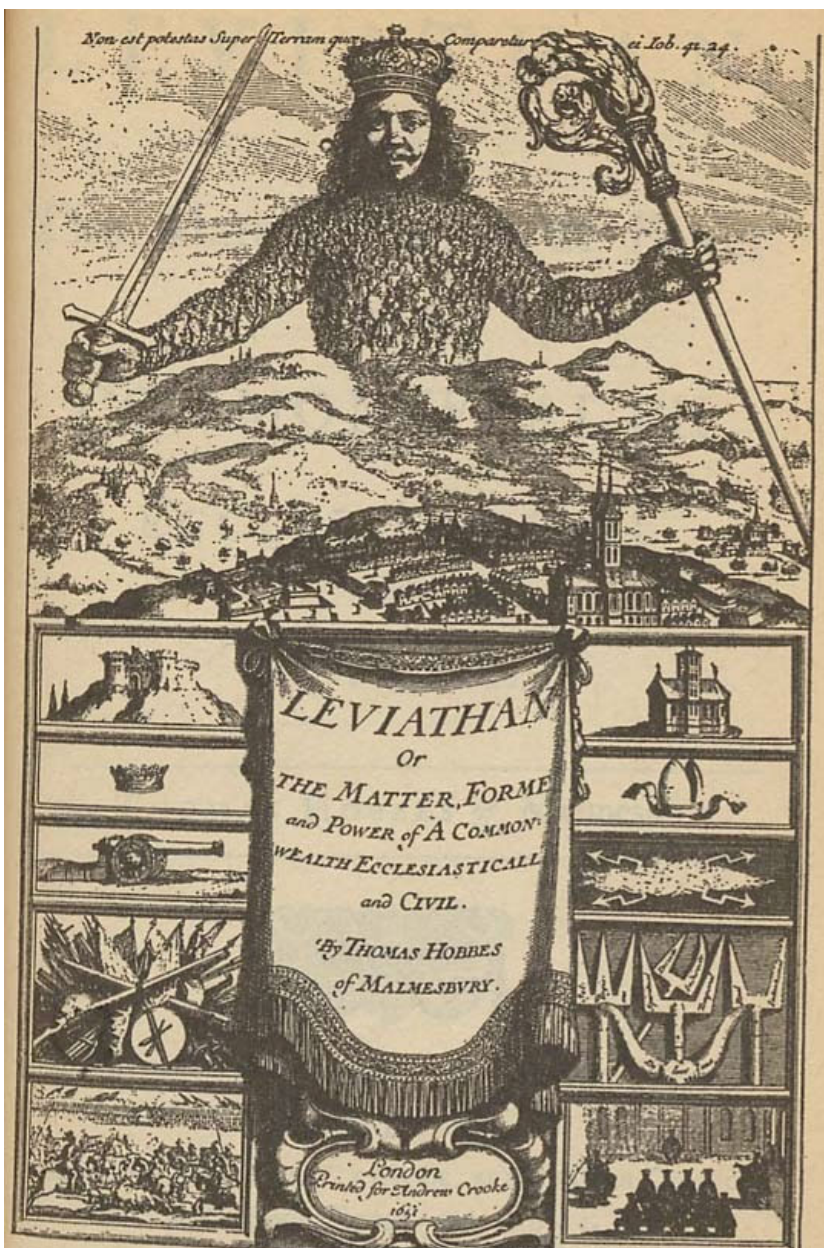
Most of Hobbes' adult life was spent as tutor and secretary to the Cavendishes, Earls of Devonshire. Scholars have noted how the life experiences of Hobbes (as with John Locke) were exempt from the customary familial relationships; Hobbes lived a life more of contract than affection. Although he was courageous in the writing of unpopular ideas, Hobbes took pride in his efforts to escape any form of physical danger. As well as his self-imposed exile in France while the civil war raged in England, he regularly took large quantities of spirits and threw up to 'cleanse the system' (although he despised drunkenness), played tennis, sang at the top of his voice to exercise his lungs and exorcise the spirits, and even washed regularly (a rather unusual habit at the time!). He gave up eating red meat in middle age ... And in an age not noted for the length of the average life expectancy, he lived to be 91. Hobbes believed that through knowledge of the real human condition we could prolong individual and social life. Understanding the role of law was crucial and here Hobbes developed the idea of law as convention, and society as an artefact – ideas rather submerged in earlier writings.

totalitarian government and as presenting an unnecessarily pessimistic and solitary view of the human condition (also feminists do not like his images for he begins with an idea of **solitary men**, not of people living in families; feminists point out that humans do not begin life as individuals – they begin life as dependent babies and are made into individuals by socialisation). Hobbes certainly **highlights the necessity to obey strong government**; he argues for a sovereign authority which wields supreme power, to save men from the evils of the **'state of nature'** in which man's essentially egoistical nature means that life is a 'war of all on all'. Hobbes is also regarded as the first political philosopher who developed his theory on 'materialist' foundations, **which means he took a strictly 'scientific' view of humans and their place in the world.**

3.1.2 Reading a text – *Leviathan* – in context

We say that to study jurisprudence and legal theory you should read the original texts. Following are extracts from *Leviathan*.² But of course simply to present the text is off-putting and difficult to focus upon. What should you be looking for?

² We can not reproduce the experience that Hobbes wanted to achieve from his intended audience. Imagine you are opening the text. The first thing that confronts you is an image. First the 'we' that I am referring to is not the audience that Hobbes had in mind. In fact of course you and I are probably located in different parts of the globe. I (WM) am a white male of New Zealand background living in London; my frame of reference is inescapably global. Given the huge range of people who study law through the external system of the University of London, you may range in age from 21 to 70+, and be of almost any range of ethnicity, location and religious orientation.



Hobbes put this text together in the period 1648–51. His target audience was a very small group of people; in particular, members

of the exiled Royal English Court in France and other leading individuals in England. What was the background to his writing? Hobbes wrote at the time of the **passing of the superordinate authority of the Christian church**, where religious authority, instead of being a binding force, had itself become a major source of conflict in Europe. What should replace the claims to loyalty of religious brotherhood (and religiously orientated Natural Law) or localised feudal relations? The Thirty Years' War, the bitterest European conflict yet seen, had laid waste to much of central Europe and drastically reduced the German-speaking population, among others. Few people thought 'globally' as we mean it today; but, using our current language, the major blocs of that time appear as a divided European Christendom, with the strongest powers being the Chinese Empire, localised in its concerns, and the Islamic Ottoman Empire, somewhat at odds with Islamic Persia. For centuries Islam, not Christian Europe, had been the place of learning, providing a world civilisation, polyethnic, multiracial and spread across large sections of the globe.

This was also a time when the great voyages of European discovery were merging into the imperialist projects that have fashioned much of the political and social contours of the modern world. Christian Spain finally destroyed the last Muslim (Moorish) enclave – the Emirate of Granada – in 1492, in the aftermath of which Columbus was allowed to sail in search of a new route to India. From that time, the ships and military power of Europeans entered into the wider realms of the globe, overwhelming cultures and peoples that could not withstand the onslaught, creating new social and territorial relations in a European image. Driving this world shift in power was an existential perspective on life itself. **Hobbes postulated the basis of the social bond – in place of dynasties, religious tradition or feudal ties – as rational self-interest exercised by calculating individuals. As bearers of subjective rationality, individuals were depicted as forming the social order and giving their allegiance to a government, a sovereign, because it was in their rational self-interest to do so;** thus the metaphor for the social bond he offered was contractual, not an image of traditional or feudal ties. The sovereign was now to have a particular **territory**, which many have rather loosely termed the 'nation-state' – you may note that the Treaty of Westphalia, usually referred to in international relations or political sociology as beginning the era of the nation state, had been concluded in 1648.

Activity 3.1 Reading Hobbes

Read the extract from *Leviathan* that follows. You may find it difficult to begin with, as the English language has changed a good deal in the last 350 years.

- 1 Consider the picture of the human condition that Hobbes presents: do you find it realistic?
- 2 How apt is the idea of a social contract to found the legitimacy of modern government?
- 3 Should ensuring social survival be the basic aim of the law (note how this influences the 'minimum content of natural law' argument used by H.L.A. Hart) or should the law help direct the conditions for human flourishing?

Write notes on these questions as you proceed.

No feedback provided.

Leviathan Extract 1: The introduction

NATURE (the Art whereby God hath made and governs the world) is by the *Art* of man, as in many other things, so in this also imitated, that it can make an Artificial Animal. For seeing life is but a motion of Limbs, the beginning whereof is in some principal part within; why may we not say that all *Automata* (Engines that move themselves by springs and wheels as doth a watch) have an artificial life? For what is the *Heart*, but a *Spring*, and the *Nerves*, but so many *Strings*; and the *Joints*, but so many *Wheels*, giving motion to the whole body such as was intended by the Artificer? Art goes yet further, imitating that rational and most excellent work of nature, *Man*. For by art is created that great LEVIATHAN called a COMMON-WEALTH, or STATE (in Latin, CIVITAS) which is but an Artificial Man; though of greater stature and strength than the Natural, for whose protection and defence it was intended; and in which the *Sovereignty* is an Artificial *Soul*, as giving life and motion to the whole body. The *Magistrates*, and other *Officers* of Judicature and Execution, artificial *Joints*; *Reward* and *Punishment* (by which fastened to the seat of the Sovereignty, every joint and member is moved to perform his duty) are the *Nerves*, that do the same in the body natural; the *Wealth* and *Riches* of all the particular members are, the *Strength*; *Salus Populi* (the *peoples safety*) its *business*; *counselors*, by whom all things needful for it to know, are suggested unto it, are the *Memory*; *Equity* and *Laws*, an artificial *Reason* and *will*; *concord*, *health*; *sedition*, *sickness*; and *civil war*, *death*. Lastly, the *Pacts* and *Covenants*, by which the parts of this body politic were at first made, set together, and united, resemble that *Fiat*, or the *Let us make man*, pronounced by God in the creation.

To describe the nature of this artificial man, I will consider

First, the *Matter* thereof, and the *Artificer*, both which is *Man*.

Secondly, *How*, and by what *Covenants* it is made; what are the *Rights* and *just Power* or *Authority* of a *Sovereign*, and what it is that *preserveth* and *dissolveth* it.

Thirdly, what is a *Christian Common-wealth*.

Lastly, what is the *Kingdom of Darkness*.

Concerning the first, there is a saying much usurped of late, that *wisdom* is acquired, not by reading of *books*, but of *men*. Consequently whereunto, those persons that for the most part can give no other proof of being wise, take great delight to show what they think they have read in men, by uncharitable censures of one another behind their backs. But there is another saying not of late understood, by which they might learn truly to read one another, if they would take the pains; and that is, *Nosce te ipsum*, *Read thyself*: which was not meant as it is now used to countenance either the barbarous state of men in power towards their inferiors; or to encourage men of low degree to a saucy behaviour towards their betters; but to teach us that for the similitude of the thoughts, and passions of one man, to the thoughts and passions of another. Whosoever looketh into himself and considereth what he doth, when he does *think*, *opine*, *reason*, *hope*, *fear*, etc., and upon what grounds, he shall thereby read and know what are the thoughts and passions of all other men, upon the like occasions. I say the similitude of passions, which are the same in all men, *desire*, *fear*, *hope*, etc.; not the similitude of objects of the passions, which are the things *desired*, *feared*, *hoped*, etc: for these the individual constitution and particular education do so vary, and they are so easy to be kept from our knowledge that the characters of man's heart, blotted and confounded as they are with dissembling, lying,

counterfeiting, and erroneous doctrines, are legible only to him that searcheth hearts. And though by men's actions we do discover their design sometimes, yet to do it without comparing them with our own and distinguishing all circumstances by which the case may come to be altered, is to decipher without a key, and be for the most part deceived by too much trust or by too much diffidence; as he that reads is himself a good or evil man.

But let one man read another by his actions never so perfectly, it serves him only with his acquaintance, which are but few. He that is to govern a whole Nation must read in himself not this or that particular man, but mankind: which though it be hard to do, harder than to learn any language or science; yet, when I shall have set down my own reading orderly and perspicuously, the pains left another will be one to consider, if he also finds not the same in himself. For this kind of doctrine admitteth no other demonstration...

...whatsoever is the object of any man's appetite or desire, that is it which he, for his part, calleth *Good*: And the object of his hate, and aversion, *Evil*; and of his contempt, *Vile* and *Inconsiderable*. For these words of Good, Evil, and Contemptible are ever used with relation to the person that useth them: There being nothing simply and absolutely so; nor any common Rule of Good and Evil, to be taken from the nature of the objects themselves; but from the person of the man (where there is no Common-wealth); or (in a Common-wealth), from the person that representeth it, or from an Arbitrator or Judge, whom men disagreeing shall by consent set up and make his sentence the Rule thereof...

So much for the introduction, now for Hobbes' narrative of the natural condition of mankind.

Leviathan Extract 2: CHAPTER XIII

Of the NATURAL CONDITION of Mankind, as concerning their felicity,³ and Misery

Nature hath made men so equal in the faculties or body and mind as that though there be found one man sometimes manifestly stronger in body or of quicker mind than another; yet when all is reckoned together, the difference between man and man, is not so considerable as that one man can thereupon claim to himself any benefit, to which another may not pretend as well as he. For as to the strength of body, the weakest has strength enough to kill the strongest either by secret machination or by confederacy with others that are in the same danger with himself.

And as to the faculties of the mind, (setting aside the arts grounded upon words, and especially that skill of proceeding upon general and infallible rules called Science; which very few have and but in few things; as being not a native faculty, born with us; nor attained (as Prudence), while we look after somewhat else). I find yet a greater equality amongst men than that of strength. For prudence is but experience; which equal time equally bestows on all men, in those things they equally apply themselves unto. That which may perhaps make such equality incredible is but a vain conceipt of ones own wisdom, which almost all men think they have in a greater degree than the Vulgar; that is, than all men but themselves and a few others, whom by fame or for concurring with themselves, they approve. For such is the nature of men that howsoever they may acknowledge many others to be more witty, or more eloquent or more learned; yet they will hardly believe there be many so wise as

³ Felicity = happiness (from Latin *felix* = happy).

themselves: For they see their own wit at hand and other men's at a distance. But this proveth rather that men are in that point equal, than unequal. For there is not ordinarily a greater sign of the equal distribution of anything, than that every man is contended with his share.

From this equality of ability, ariseth equality of hope in the attaining of our Ends. And therefore if any two men desire the same thing,⁴ which nevertheless they cannot both enjoy, they become enemies; and in the way to their end (which is principally their own conservation, and sometimes their delectation only), endeavour to destroy or subdue one another. And from hence it comes to pass that where an Invader hath no more to fear than another man's single power; if one plants, sows, builds, or possesses a convenient seat,⁵ others may probably be expected to come prepared with forces united to dispossess and deprive him not only of the fruit of his labour, but also of his life or liberty. And the Invader again is in the like danger of another.

⁴ 'Desire the same thing': 'thing' in a material sense, such as an object or asset.

⁵ 'Convenient seat': attractive mansion or estate.

And from this diffidence of one another, there is no way for any man to secure himself so reasonably as Anticipation; that is, by force or wiles, to master the persons of all men he can, so long, till he sees no other power great enough to endanger him: And this is no more than his own conservation required, and is generally allowed. Also because there be some that taking pleasure in contemplating their own power in the acts of conquest, which they pursue farther than their security requires; if others, that otherwise would be glad to be at ease within modest bounds, should not by invasion increase their power, they would not be able, long time, by standing only on their defence, to subsist. And by consequence, such augmentation of dominion over men being necessary to a man's conservation, it ought to be allowed him.

Again, men have no pleasure (but on the contrary a great deal of grief) in keeping company, where there is no power able to overawe them all. For every man looketh that his companion should value him at the same rate he sets upon himself: And upon all sign of contempt, or undervaluing, naturally endeavours, as far as he dares (which amongst them that have no common power to keep them in quiet, is far enough to make them destroy each other), to extort a greater value from his contemners by dompage; and from others, by the example.

So that in the nature of man, we find three principal causes of quarrel. First: Competition; Secondly: Diffidence; Thirdly: Glory.

The first, maketh men invade for Gain; the second, for Safety; and the third, for Reputation. The first uses Violence to make themselves masters of other men's persons, wives, children, and chattel; the second, to defend them; the third, for trifles as a word, a smile, a different opinion, and any other sign of undervalue, either direct in their persons or by reflexion in their kindred, their friends, their nation, their profession or their name.

Hereby it is manifest that during the time men live without a common power to keep them all in awe, they are in that condition which is called War; and such a war as is of every man against every man. For war consists not in battle only or the act of fighting; but in a tract of time, wherein the Will to contend by battle is sufficiently known and therefore the notion of Time is to be considered in the nature of war; as it is in the nature of weather. For as the nature of foul weather lies not in a shower or two of rain but in an inclination thereto of many days together, so the nature of war consists not in actual fighting but in the known disposition thereto, during all the time there is no assurance to the contrary. All other time is PEACE.

Whatsoever therefore is consequent to a time of war, where every man is enemy to every man; the same is consequent to the time wherein men live without other security, than what their own strength and their own invention shall furnish them with. In such condition, there is no place for Industry because the fruit thereof is uncertain and consequently no culture of the earth; no navigation nor use of the commodities that may be imported by sea; no commodious building; no instruments of moving and removing such things as require much force; no knowledge of the face of the earth; no account of time; no arts; no letters; no society; and which is worst of all, continual fear and danger of violent death; And the life of man, solitary, poor, nasty, brutish, and short.⁶

It may seem strange to some man that has not well weighed these things that nature should thus dissociate and render men apt to invade and destroy one another: and he may therefore, not trusting to this inference made from the passions, desire perhaps to have the same confirmed by experience. Let him therefore consider with himself when taking a journey, he arms himself and seeks to go well accompanied; when going to sleep, he locks his doors; when even in his house he locks his chests; and this when he knows there be laws and public officers, armed, to revenge all injuries shall be done him; what opinion he has of his fellow subjects when he rides armed; of his fellow citizens when he locks his doors; and of his children and servants when he locks his chests. Does he not there as much accuse mankind by his actions, as I do by my words? But neither of us accuse man's nature in it. The Desires, and other passions of man are, in themselves, no sin. No more are the actions that proceed from those passions, till they know a law that forbids them: which till laws be made they cannot know, nor can any law be made till they have agreed upon the person that shall make it.

It may, per adventure,⁷ be thought there was never such a time nor condition of war as this, and I believe it was never generally so, over all the world: but there are many places where they live so now. For the savage people in many places of America, except the government of small families, the concord whereof dependeth on natural lust, have no government at all; and live at this day in that brutish manner, as I said before. Howsoever, it may be perceived what manner of life where would be, where there were no common power to fear; by the manner of life, which men that have formerly lived under a peaceful government use to degenerate into, in a civil war.

But though there had never been any time wherein particular men were in a condition of war one against another; yet in all times, kings, and persons of sovereign authority because of their independence, are in continual jealousies and in the state and posture of gladiators; having their weapons pointing, and their eyes fixed on one another; that is, their forts, garrisons, and guns upon the frontiers of their kingdoms; and continually spy upon their neighbours which is a posture of war. But because they uphold thereby, the industry of their subjects, there does not follow from it that misery which accompanies the liberty of particular men.

To this war of every man against every man, this also is consequent; that nothing can be unjust. The notions of Right and Wrong, Justice and Injustice have there no place. Where there is no common power, there is no law: where no law, no injustice. Force, and fraud are in war, the two cardinal virtues. Justice and injustice are none of the faculties neither of the body nor mind. If they were, they might be in a man that were alone in the world as well as his senses and passions. They are qualities that relate to men in society, not in solitude. It is consequent also to the same condition, that there be

⁶ 'Solitary, poor, nasty, brutish, and short': these are perhaps the most famous words in the history of English political philosophy.

⁷ 'Per adventure' = perhaps.

no propriety, no dominion, no *Mine* and *Thine* distinct; but only that to be every man's that he can get; and for so long as he can keep it. And thus much for the ill condition, which man by mere nature is actually placed in; though with a possibility to come out of it, consisting partly in the passions, partly in his reason.

The passions that incline men to peace, are fear of death; desire of such things as are necessary to commodious living; and a hope by their industry to obtain them. And reason suggests convenient articles of peace, upon which men may be drawn to agreement. These articles are they, which otherwise are called the laws of nature: whereof I shall speak more particularly, in the two following chapters.

In the subsequent chapters Hobbes sets up his key figure of the **sovereign**, who lays down the conditions for human flourishing, or individual pursuit of desire by a set of rules or commands which were laws. But note: Hobbes does not say that the sovereign makes laws because of power alone: 'law, properly, is the word of him that **by right** hath command over others' (*Leviathan*, Chapter 15, emphasis added). Hobbes' narrative of the human condition and the need for man to set up a common authority leads to the social **contract which authorises the sovereign**. Hobbes combated divided attention; he argued that people had come to obey too many factors and were swayed by various customs, traditions, religious beliefs, visible powers of their immediate secular rulers, feudal ties and numerous fears. Since these pulled in different directions, chaos resulted. Having given his narrative of the state of nature, Hobbes has us set up a sovereign, a 'mortal God' out of our **commonly agreeing to a social contract**. The sovereign – or as some more loosely call it, the state – was to make possible the emergence of a new community, **one of rational individuals agreeing upon a common power to set the rules of the social games of individualist pursuit of desire and rational self-interest**.

3.1.3 Hobbes: context and influence

In Hobbes we have many of the basic characteristics of legal positivism. Law is something posited by man, it does not flow from God's creation. Therefore the relationship between a legal enactment and morality is not straightforward. Does an enactment or decision by judges need to be moral for it to be accepted as valid law? Hobbes would appear to say no: it is a matter of sanctions, of the power to enforce the positively laid down legal statement (in his lifetime the great common law judge Sir Mathew Hale tried to defend the traditions of the common law against Hobbes by arguing, in part, that the common law contained accumulated wisdom, while the image of law as the commands of the sovereign would encourage *ad hoc* decision-making or grand political agendas. **The power of legislative reason emerged really in the nineteenth century when Bentham and others saw in the law an instrument of rational rule, to be used by the political masters and guided by a secure ethical philosophy – utility**).

Many commentators have put the 'Hobbesian problem' as the basic question of social organisation in the 'modern' era. As Stephen Collins⁸ puts it:

Hobbes understood that a world in flux was natural and that order must be created to restrain what was natural ... Society is no longer a transcendently articulated reflection of something predefined,

⁸ Collins, S. *From Divine Cosmos to Sovereign State: An Intellectual History of Consciousness and the Idea of Order in Renaissance England* (Oxford: Oxford University Press, 1989) [ISBN 019505458X] pp. 28–29).

external, and beyond itself which orders existence hierarchically. It is now a nominal entity ordered by the sovereign state which is its own articulated representative...

[Forty years after the death of Queen Elizabeth I] order was coming to be understood not as natural, but as artificial, created by man, and manifestly political and social... Order must be designed to restrain what appeared ubiquitous (that is flux)... Order became a matter of power, and power and matter of will, force and calculation... Fundamental to the entire reconceptualization of the idea of society was the belief that the commonwealth, as was order, was a human creation.

But how is the state going to rule? What should guide the state?

This is the continuing problem of establishing a rational political philosophy. Note that Bentham – and Austin after him – thought they had found the answer in utilitarianism. The question was not so easily solved, however, and is a fertile ground for theorising.

Activity 3.2

Reading a contemporary theorist: H.L.A. Hart

In the extracts from Hobbes we have looked at his version of the natural condition of humanity. Hobbes presents a strictly materialist conception of mankind and then a narrative of the ‘natural condition of man’ that served to found his political philosophy. H.L.A. Hart develops a modern version influenced by Hobbes (and also the eighteenth-century Scottish philosopher David Hume) in Chapter IX of the *Concept of Law*.

Read Hart, *The Concept of Law*, Chapter IX, particularly pp. 193–200, and make notes on the following questions as you do so:

- 1 How successful is Hart’s invocation of the minimum condition of natural law?
- 2 How convincing do you find his ‘truisms’?
- 3 To what extent does Hart simply follow Hobbes and where does he add to Hobbes’ narrative of the human condition?

Feedback: you will find all the feedback you need in section 3.1.4 below.⁹

⁹ **Do not read on** until you have finished reading Hart’s chapter and making the notes for this activity.

3.1.4 Understanding Hart’s analysis of the human condition

Many have offered their own narratives of the basic human condition. An early version is in Plato’s dialogue *Protagoras*. Plato includes references to a god (Zeus, the principal god of the Greeks) and a lesser god (Hermes), which is not made by Hart. (The writing is deliberately allegorical, and the references to the then conventional gods were meant to be demythologised.)

Men lived at first in scattered groups ... They were devoured by wild beasts, since they were in all respects weaker ... They sought to protect themselves by coming together and building fortified cities; but when they began to gather in communities they could not help injuring one another in their ignorance of the arts of co-operative living. Zeus, therefore, fearing the total destruction of the race, sent Hermes to impart to men the qualities of respect for

others and a sense of justice ... (Hermes asks whether justice and respect should be imparted unequally, like the skilled arts, or equally to all alike.) Equally (said Zeus). There could never be societies if only a few shared these virtues. Moreover, you must lay it down as my law that if anyone is found incapable of acquiring his share of these virtues he shall be put to death as a disease in society.

By contrast to the way Hobbes is often read, Protagoras makes it quite clear that the story about primitive men coming together in a 'social contract' is **only a story**. He is not implying for a moment that there ever actually was Hobbes's nasty, brutish and short-lived savage (or a noble one, for that matter); whether he believed in the Homeric Gods is another matter. It is an orientating narrative, an intellectual device used to get a basis for further discussion.

Note that Hart follows Protagoras and Hobbes putting the survival of human society as the necessary and basic aim: 'Our concern is with social arrangements for continued existence, not with those of a suicide club.' He continues:

We wish to know whether, among these social arrangements, there are some which may be illuminating ranked as *natural laws discoverable by reason*, and what their relation is to *human law and morality* ... Reflection on some very obvious generalisations – indeed truisms – concerning human nature and the world in which men live, show that as long as these hold good, there are certain rules of conduct which any social organisation must contain *if it is to be viable*. Such rules do in fact constitute a common element in **the law and conventional morality of all societies** ... where these are distinguished as different forms of social control. With them are found, both *in law and in morals*, much that is peculiar to a particular society and much that may seem arbitrary and a mere matter of choice. Such universally recognised principles of conduct which have a basis in elementary truths concerning human beings, their natural environment, and their aims, may be considered the *minimum content of Natural Law*.' (*The Concept of Law*, pp. 192–93)

There are a number of interesting points in this passage:

1 Hart constantly (three times in this quotation) brackets law with ('conventional') morality, meaning by morality here what Austin called positive morality.

2 Having indicated conventional morality logically he assumes that there is an unqualified Morality, and this Hart calls natural law, and it is the **common content** (i.e. a common factor) both of the various positive moralities and of the various systems of law.

3 Hart tells us that there is this common content, and tells us what it is; he also offers an **explanation** of how he knows what it is. (It is 'discoverable by reason'.)

4 His explanation (or discovery) of the connection between the basic and necessary aim, the truisms and his conclusions is founded upon two fundamental principles, namely:

- that societies **survive** (they are not 'suicide clubs')
- that there are certain characteristic features of human beings as a species of organism on the earth, and certain features of our **earthly environment, that we all share (the 'truisms')**.

5 His conclusion, or justification of the necessity for rules, takes the form of a logical demonstration, such that, given those features of

human beings and the environment, human society **cannot survive unless** human beings accept certain constraints on their behaviour. These constraints are what Hart terms **minimum content of natural law**. Given the truisms, certain restraints and rules are a necessary condition of the survival of human society.

What of the so-called truisms themselves – what is meant by calling them truisms? Three things: (1) they are true; (2) they are self-evidently true; but (3) they may be either so obvious that we simply take them for granted and do not see their significance, or they are not at first sight **obvious**; in both cases we need to state them clearly.

The truisms which lead to Hart's 'minimum content of natural law' can be classified as biological, behavioural and environmental. Hart lists five, but only two of these lead to any particular **content** in morals; the other three lead to various other features of morality which may be called 'formal' for the present. The two which lead to a specific content are human vulnerability and limited resources.

Human vulnerability

This exists in a dialectical relation with a complementary feature, namely **destructive power**: a human capacity and readiness to hurt. Thus the truism is that man is by nature capable of receiving, and of inflicting, serious bodily injury and death. This is said to be connected with the universally prevalent prohibitions on killing and injuring, except in closely specified circumstances. The necessity for the connection can be understood if we imagine a very different natural condition for man: if, for instance, we were heavily armoured, and so incapable of being damaged; or if we were immobile, like plants, and so incapable of wielding weapons or moving to attack. Rules against killing or maiming might still exist in these altered conditions, but they would no longer be **necessary**.

Limited resources

The fact that the basic necessities of life are always in short supply makes inevitable some form of property institution (not necessarily, of course, an individualist or capitalist property system), together with a set of rules governing the exchange of property, that is, contracts and promises. Again, the necessity of this can be understood by imagining natural conditions in which human beings never needed to labour to produce and conserve their resources in order to survive: if, for instance, they could extract their food from the air (like the Biblical 'lilies of the field').

The other three truisms

Hart's other truisms do not lead to any particular content:

- **Approximate equality** (no man is enormously stronger than another) which makes generally acceptable a common system of mutual forbearances and compromise. (Morality does not operate between nations, just because nations are not even approximately equal; and it operates very imperfectly in political relations, for the same reason: as in the case of electoral promises.)
- **Limited altruism** (men are not devils, but neither are they angels) explains the necessity of restraints, and at the same time their possibility.

- **Limited understanding and strength of will** makes it necessary to apply sanctions, including here the informal sanctions of moral disapproval, as an artificial incentive to conformity for those whose own reason or self-control are insufficient.

To evaluate Hart's thesis of a minimum content to natural law, one must be careful to see just what it is claiming. In one respect it is quite modest, in another ambitious. It is modest in scope, because it is explicitly concerned only with what it calls the **minimum** content of morality; as far as we have seen, it seems to be restricted to rules governing matters of life and death, injury, property and contracts. Further, these rules are all **prohibitive**: there is no positive inducement to act in virtuous ways, only inhibitions against wrongdoing. Thirdly, only **primary** rules are dealt with; nothing is said about those special circumstances in which it may be permissible, or even mandatory, to destroy life, inflict bodily harm, deprive of possession or break a promise; and all or most of these things are generally sometimes held to be morally justifiable.

The reasons for these limitations are fairly obvious. The first limitation – the restricted range of topics – is explained by the fact that only one basic aim – that of survival – is considered. (Even this concept was one of **social**, not individual, survival, as we see from the end of the quotation from Plato's *Protagoras*. Perhaps the two are sufficiently close for us to downplay the distinction for these purposes.) So any moral rules which are not directly concerned with survival will not be covered. And this is exactly what we should expect – after all, survival is the **basic** aim, because if this aim is not achieved, no others can be. Only survivors can be do-gooders. But it is quite open to the natural law theorist to introduce other, less basic aims, to explain other areas of moral control – and still remain within the area of universally recognised principles, rather than regional variations. An obvious case would be the moral (and legal) controls on mating and procreation. It is noticeable that there are no sexual restraints in Hart's list, even though such restraints are in fact universal in all societies. The reason why they are not in Hart's list is because such things as sexual promiscuity, incest or adultery are not **obviously** incompatible with survival, as promiscuous killing would be.

However, this may be a reflection of the limited sociology of Hart's account in the *Concept*. Most anthropologists have put the incest prohibition at the foundation of 'natural' morality. From Levi Strauss to the reflections of Freud, the prohibition is seen as the starting point of social organisation, trade and inter-group interaction.

Activity 3.3

At this stage, try drafting an answer to this past examination question:

'Hart says that all legal systems will contain a "minimum content" of morality. Why did he think it was necessary to concede this to the natural lawyers? Are his arguments for the minimum successful?'

Feedback: see page 59.

Useful further reading on Hobbes

- Morrison: *Jurisprudence: from the Greeks to Post-modernity*, Chapter 4: 'Thomas Hobbes and the origins of the imperative theory of law: or *mana* transformed into earthly power'.

3.2 Jeremy Bentham

If Hobbes had argued for the idea of legislative rationality – the government taking responsibility for organising the nature of civil society and the structures of everyday interaction and using the law to do so – Bentham assumed both that this was possible and that it was the **responsibility and the duty** of government.

Jeremy Bentham was the son of a London attorney and was first educated at the elite Westminster School before being sent off – at the age of 12! – to Oxford University (Queen's College) where he attended lectures on the English common law given by William Blackstone, a noted university teacher, lawyer, sometime MP and later judge. From 1763, he studied law at Lincoln's Inn and was called to the Bar in 1772. Bentham later stated that he instantly recognised Blackstone's mistakes in his lectures when Blackstone claimed that the common law reflected the liberties of the English subject and was founded upon ideas of natural rights; these Bentham called 'nonsense on stilts'. Bentham's major writings on law begin with criticism of the approach taken by Blackstone which Blackstone had published in his *Commentaries on the Laws of England* (first edition published 1765–69). Blackstone hoped the *Commentaries* would provide a map for studying the common law and whatever the criticisms of his logic he was correct as to the influence of his work: the *Commentaries* were a fantastically successful text going through over 40 editions, and were largely responsible for the USA remaining a common law country after independence in 1776. Bentham thought Blackstone's analysis was deficient, as it portrayed the common law as growing organically, containing the wisdom of past decisions and not did not consider the social impact of the law nor did it offer an image of the law as an instrument of governmental power (he considered that Blackstone was an apologist for the *status quo*).

Bentham was a reformer¹⁰ and to this end he differentiated the question of what the law was from the question of what the law ought to be. The 'ought' part was answered by the key criterion of judging – or as he put it, the 'sacred truth' – that **the greatest happiness of the greatest number is the foundation of morals and legislation**. 'Enlightened self-interest' provided the key to understanding ethics, so that a person who always acted with a view to his own maximum satisfaction in the long run would always act rightly.

In his *Introduction to the Principles of Morals and Legislation* (1789), Bentham strove 'to cut a new road through the wilds of jurisprudence' so that the greatest happiness of the greatest number was to govern our judgment of every institution and action.

You may also note that Bentham was the proponent of a total institution called the *panopticon*. This was to be an institution of perfect control and visibility; the inmate was to be constantly under the gaze of the overseer. To many this was the perfect emblem of

¹⁰ In his later life a group of people around Bentham tried to create a university to adopt the utilitarian stance and provide a counter to Oxford and Cambridge. These 'Godless heathens of Gower street' as one critic labelled them, were refused permission, although they founded University College London. In his will Bentham left his body to the institution, on condition that after it was publicly dissected and used for medical display; it would form an 'auto-icon' to be permanently displayed.

the dangers of the modernist obsession with legislating, defining, structuring, segregating, classifying and recording.

That the modern city of reason would end in a living prison would certainly not have been Bentham's desire, but the reality of the holocaust and the great imprisonments of the Soviet Union, the re-education camps used elsewhere in the world testify to the dark side of the attempts to define chaos out of social life and define in order with the aim of creating a utopian society. The marriage of modern state power and the claim of acting in defence of the truth needs constant attention (as Weber argued: see Chapter 12).



Jeremy Bentham, as he can be seen today.

3.3 John Austin

3.3.1 Background

As a young man, John Austin's family bought him a junior commission in the army and after five years' service he began to study law in 1812. From 1818 to 1825 he practised, rather unsuccessfully, at the Chancery Bar. Austin was never a practical man but he impressed the circle of people (at the time viewed as philosophical radicals, in part for their programme of reform and

their belief in utilitarianism) around Jeremy Bentham with his powers of rigorous analysis and his uncompromising intellectual honesty. In 1826, when University College London, was founded, he was appointed its first professor of jurisprudence; at the time legal education was almost entirely practical and it was not possible to pursue a university degree in English law. The common law had been the subject of the lectures of William Blackstone at Oxford, which had resulted in his massive *Commentaries on the Law of England*, but even as late as 1874 Dicey could give his inaugural lecture on the theme of 'was English law a fit subject for University education'! To prepare for the classes Austin spent time in Germany studying Roman law and the work of German experts on modern civil law, whose ideas of classification and systematic analysis exerted an influence on him second only to that of Bentham.

Both Austin and his wife Sarah were ardent utilitarians. While much younger, they were friends of Bentham and of James Mill, whose son John Stuart Mill was a student of Austin and later wrote a large review of the full set of lectures Sarah published after Austin's death. The review argued that Austin achieved the application of utilitarianism to law and set out the path for legal reform. A key point for Austin is that to achieve legal reform (and reform of government and social institutions through law) one has to have a very clear understanding of the nature of law itself. The first task was to rid our understanding of law from the confusions and 'mysteries' of the common law tradition. Austin tried to do this by putting 'positive law' into a political framework, taken in considerable part from Hobbes: law was part of the political relations of sovereign and subject. Austin's first lectures, in 1828, were attended by several distinguished men, but he failed to attract students and resigned his chair in 1832. In 1834, after delivering a shorter but equally unsuccessful version of his lectures, he abandoned the teaching of jurisprudence. He was appointed to the Criminal Law Commission in 1833 but, finding little support for his opinions, resigned in frustration after signing its first two reports. In 1836 he was appointed a commissioner on the affairs of Malta. The Austins then lived abroad, chiefly in Paris, until 1848 (when a revolution took place, and they lost most of their money through having to sell their house quickly), after which they settled in Surrey, where Austin became a much more conservative thinker; he died in 1859.

Austin found little success during his life: recognition came afterwards, and in large part is owing to his wife Sarah who gave him great support, both moral and economic (during the later years of their marriage, they lived primarily from her labours as a translator and reviewer); she edited his notes to publish a more complete set of his *Lectures On Jurisprudence* (Austin, 1873). As for his style, read on...

Lecture I

The matter of jurisprudence is positive law: law, simply and strictly so called; or law set by political superiors to political inferiors. But positive law (or law, simply and strictly so called) is often confounded with objects to which it is related by resemblance, and with objects to which it is related in the way of analogy: with objects which are also signified, properly and improperly, by the

large and vague expression *law*. To obviate the difficulties springing from that confusion, I begin my projected Course with determining the province of jurisprudence, or with distinguishing the matter of jurisprudence from those various related objects: trying to define the subject of which I intend to treat before I endeavour to analyse its numerous and complicated parts.

A law, in the most general and comprehensive acceptation in which the term, in its literal meaning, is employed may be said to be a rule laid down for the guidance of an intelligent being by an intelligent being having power over him. Under this definition are included and without impropriety, several species. It is necessary to define accurately the line of demarcation which separates these species from one another, as much mistiness and ...

The whole or a portion of the laws set by God to men is frequently styled the law of nature, or natural law: being, in truth, the only natural law of which it is possible to speak without a metaphor, or without a blending of objects which ought to be distinguished broadly. But, rejecting the appellation Law of Nature as ambiguous and misleading, I name those laws or rules, as considered collectively or in a mass, the *Divine law*, or the *law of God*.

Laws set by men to men are of two leading or principal classes: classes which are often blended, although they differ extremely; and which, for that reason should be severed precisely and opposed distinctly and conspicuously.

Of the laws or rules set by men to men, some are established by political superiors, sovereign and subject: by persons exercising supreme and subordinate government, in independent nations, or independent political societies. The aggregate of the rules thus established or some aggregate forming a portion of that aggregate, the term law, as used simply and strictly is exclusively applied. But, as contra-distinguished to natural law, or to the law of nature (meaning by those expressions, the law of God), the aggregate of the rules established by political superiors is frequently styled *positive law*, or *law existing by position*. As contra-distinguished to the rules which I style *positive morality*, and on which I shall touch immediately the aggregate of the rules, established by political superiors, may also be marked commodiously with the name of *positive law*. For the sake then of getting a name brief and distinctive at once, and agreeably to frequent usage, I style that aggregate of rules or any portion of that aggregate, *positive law*: though rules which are not established by political superiors, are also positive, or exist by position; if they be rules or laws in the proper signification of ...

Closely analogous to human laws of this second class are a set of objects frequently *but improperly termed laws*, being rules set and enforced by *mere opinion*, that is, by the opinions or sentiments held or felt by an indeterminate body of men in regard to human conduct. Instances of such a use of the term law are the expressions – ‘The law of honour;’ ‘The law set by fashion;’ and rules of this species constitute much of what is usually termed ‘International law.’

The aggregate of human laws properly so called belonging to the second of the classes above mentioned, with the aggregate of objects *improperly but by close analogy termed laws*, I place together in a common class, and denote them by the term *positive morality*. The name *morality* severs them from *positive law*, while the epithet *positive* disjoins them from the *law of God*. And to the end of obviating confusion, it is necessary or expedient that they should be disjoined from the latter by that distinguishing epithet. For the

name *morality* (or *morals*), when standing unqualified or alone, denotes indifferently either of the following objects, namely, positive morality *as it is*, or without regard to its merits; and positive morality *as it would be*, if it conformed to the law of God, and were therefore deserving of *approbation*.

Besides the various sorts of rules which are included in the literal acceptation of the term law, and those which are by a close and striking analogy, though improperly, termed laws. There are numerous applications of the term law, which rest upon a slender analogy and are merely metaphorical or figurative. Such is the case when we talk of laws observed by the lower animals; of laws regulating the growth or decay of vegetables; of laws determining the movements of inanimate bodies or masses. For where *intelligence* is not, or where it is too bounded to take the name of *reason* and, therefore, is too bounded to conceive the purpose of a law, there is not the *will*, which law can work on or which duty can incite or restrain. Yet through these misapplications of a *name*, flagrant as the metaphor is, has the field of jurisprudence and morals been deluged with muddy speculation.

[Having] suggested the *purpose* of my attempt to determine the province of jurisprudence: to distinguish positive law, the appropriate matter of jurisprudence, from the various objects to which it is related by resemblance, and to which it is related nearly or remotely by a strong or slender analogy: I shall [now] state the essentials of a *law* or *rule* (taken with the largest signification which can be given to the term *properly*).

Every *law* or *rule* (taken with the largest signification which can be given to the term *properly*) is a *command*. Or rather, laws or rules, properly so called, are a *species* of commands.

Now, since the term *command* comprises the term *law*, the first is the simpler as well as the larger of the two. But, simple as it is, it admits of explanation. And, since it is the *key* to the sciences of jurisprudence and morals, its meaning should be analysed with precision.

Accordingly, I shall endeavour, in the first instance, to analyse the meaning of '*command*': an analysis which I fear will task the patience of my hearers but which they will bear with cheerfulness or, at least, with resignation, if they consider the difficulty of performing it. The elements of a science are precisely the parts of it which are explained least easily. Terms that are the largest and, therefore, the simplest of a series are without equivalent expressions into which we can resolve them *concisely*. And when we endeavour to *define* them or to translate them into terms which we suppose are better understood, we are forced upon awkward and tedious circumlocutions.

If you express or intimate a wish that I shall do or forbear from some act, and if you will visit me with an evil in case I comply not with your wish, the *expression* or *intimation* of your wish is a *command*. A command is distinguished from other signification of desire, not by the style in which the desire is signified, but by the power and the purpose of the party commanding to inflict an evil or pain in case the desire be disregarded. If you cannot or will not harm me in case I comply not with your wish, the expression of your wish is not a command, although you utter your wish in imperative phrase. If you are able and willing to harm me in case I comply not with your wish, the expression of your wish amounts to a command, although you are prompted by a spirit of courtesy to utter it in the shape of a request. '*Preces erant, sed quibus contradici*

non posset.' Such is the language of Tacitus, when speaking of a petition by the soldiery to a son and lieutenant of Vespasian.

A command then is a signification of desire. But a command is distinguished from other signification of desire by this peculiarity: that the party to whom it is intended is liable to evil from the other, in case he complies not with the desire.

Being liable to evil from you if I comply not with a wish, which you signify, I am *bound* or *obliged* by your command, or I lie under a *duty* to obey it. If, in spite of that evil in prospect, I comply not with the wish which you signify, I am said to disobey your command, or to violate the duty which it imposes.

Command and duty are, therefore, correlative terms: the meaning denoted by each being implied or supposed by the other. Or (changing the expression) wherever a duty lies, a command has been signified; and wherever a command is signified, a duty is imposed.

Concisely expressed, the meaning of the correlative expressions is this. He who will inflict an evil in case his desire be disregarded, utters a command by expressing or intimating his desire: He who is liable to the evil in case he disregard the desire, is bound or obliged by the command.

The evil which will probably be incurred in case a command be disobeyed or (to use an equivalent expression) in case a duty be broken, is frequently called a *sanction*, or an *enforcement of obedience*. Or (varying the phrase) the command or the duty is said to be *sanctioned* or *enforced* by the chance of incurring the evil.

Considered as thus abstracted from the command and the duty which it enforces, the evil to be incurred by disobedience is frequently styled a *punishment*. But, as punishments, strictly so called, are only a *class* of sanctions, the term is too narrow to express the meaning adequately.

It appears from what has been premised that a law, properly so called, may be defined in the following manner.

A law is a command which obliges a person or persons.

But, as contra-distinguished or opposed to an occasional or particular command, a law is a command which obliges a person or persons, and obliges generally to acts or forbearances of a *class*.

In language more popular but less distinct and precise, a law is a command which obliges a person or person to a *course* of conduct...

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In language more popular but less distinct and precise, a law is a command which obliges a person or persons to a *course* of conduct.

Laws and other commands are said to proceed from superiors, and to bind or oblige inferiors. I will, therefore, analyse the meaning of those correlative expressions; and will try to strip them of a certain mystery, by which that simple meaning appears to be obscured.

Superiority is often synonymous with precedence or excellence. We talk of superiors in rank; of superiors in wealth; of superiors in virtue: comparing certain persons with certain other persons; and

meaning that the former precede or excel the latter in rank, in wealth, or in virtue.

But, taken with the meaning wherein I here understand it, the term **superiority signifies might**: the power of affecting others with evil or pain, and of forcing them, through fear of that evil, to fashion their conduct to one's wishes.

For example, God is emphatically the superior of man. For His power of affecting us with pain and of forcing us to comply with His will is unbounded and resistless.

To a limited extent, the sovereign One or Number is the superior of the subject or citizen: the Master of the slave or servant, the Father of the child.

In short, whoever can oblige another to comply with his wishes, is the superior of that other, so far as the ability reaches: The party who is obnoxious to the impending evil, being to that same extent, the inferior.

The might or superiority of God, is simple or absolute. **But in all or most cases of human superiority, the relation of superior and inferior, and the relation of inferior and superior, are reciprocal.** Or (changing the expression) **the party who is the superior as viewed from one aspect, is the inferior as viewed from another.**

For example, to an indefinite, though limited extent, the monarch is the superior of the governed: his power being commonly sufficient to enforce compliance with his will. But the governed, collectively or in mass, are also the superior of the monarch: who is checked in the abuse of his might by his fear of exciting their anger; **and of rousing to active resistance the might which slumbers in the multitude.**

A member of a sovereign assembly is the superior of the judge: the judge being bound by the law which proceeds from that sovereign body. But, in his character of citizen or subject, he is the inferior of the judge: the judge being the minister of the law, and armed with the power of enforcing it.

It appears, then, that the term superiority (like the term's duty and sanction) is implied by the term command. **For superiority is the power of enforcing compliance with a wish:** and the expression or intimation of a wish, with the power and the purpose of enforcing it, are the constituent elements of a command.

'That laws emanate from superiors' is, therefore, an identical proposition. For the meaning, which it affects to impart, is contained in its subject.

If I mark the peculiar source of a given law, or if I mark the peculiar source of laws of a given class, it is possible that I am saying something which may instruct the hearer. But to affirm of laws universally 'that they flow from superiors,' or to affirm of laws universally 'that inferiors are bound to obey them', is the merest tautology and trifling.

According to an opinion which I must notice *incidentally* here, though the subject to which it relates will be treated *directly* hereafter, **customary laws must be excepted from the proposition 'that laws are a species of commands'.**

By many of the admirers of customary laws (and especially of their German admirers), they are thought to oblige legally (independently of the sovereign or state), *because* the citizens or subjects have observed or kept them. Agreeably to this opinion, they are not the *creatures* of the sovereign or state, although the

sovereign or state may abolish them at pleasure. Agreeably to this opinion, they are positive law (or law, strictly so called), inasmuch as they are enforced by the courts of justice: But, that notwithstanding, they exist as *positive* law by the spontaneous adoption of the governed, and not by position or establishment on the part of political superiors. Consequently, customary laws, considered as positive law, are not commands. And, consequently, customary laws, considered as positive law, are not laws or rules properly so called.

An opinion less mysterious, but somewhat allied to this, is not uncommonly held by the adverse party: by the party which is strongly opposed to customary law; and to all law made judicially, or in the way of judicial legislation. According to the latter opinion, all judge-made law, established by *subject* judges, is purely the creature of the judges by whom it is established immediately. To impute it to the sovereign legislature, or to suppose that it speaks the will of the sovereign legislature, **is one of the foolish or knavish fictions with which lawyers, in every age and nation, have perplexed and darkened the simplest and clearest truths.**

I think it will appear, on a moment's reflection, that each of these opinions is groundless: that customary law is *imperative*, in the proper signification of the term; and that all judge-made law is the creature of the sovereign or state.

At its origin, a custom is a rule of conduct which the governed observe spontaneously, or not in pursuance of a law set by a political superior. The custom is transmuted into positive law, when it is adopted as such by the courts of justice, and when the judicial decisions fashioned upon it are enforced by the power of the state. But before it is adopted by the courts, and clothed with the legal sanction, it is merely a rule of positive morality: a rule generally observed by the citizens or subjects; but deriving the only force, which it can be said to possess, from the general disapprobation falling on those who transgress it.

Now when judges transmute a custom into a legal rule (or make a legal rule not suggested by a custom), **the legal rule which they establish is established by the sovereign legislature.** A subordinate or subject judge is merely a minister. The portion of the sovereign power which lies at this disposition **is merely delegated.** The rules which he makes derive their legal force from authority given by the state: an authority which the state may confer expressly, but which it commonly imparts in the way of acquiescence. For, since the state may reverse the rules which he makes, and yet permit him to enforce them by the power of the political community, its sovereign will 'that his rules shall obtain as law' is clearly evinced by its conduct, though not by its express declaration.

The admirers of customary law love to trick out their idol with mysterious and imposing attributes. But to those who can see the difference between positive law and morality, there is nothing of mystery about it. **Considered as rules of positive morality, customary laws arise from the consent of the governed, and not from the position or establishment of political superiors. But, considered as moral rules turned into positive laws, customary laws are established by the state: established by the state directly, when the customs are promulgated in its statutes; established by the state circuitously, when the customs are adopted by its tribunals.**

The opinion of the party which abhors judge-made laws, springs from their inadequate conception of the nature of commands.

Like other significations of desire, a command is **express or tacit.** If the desire be signified by *words* (written or spoken), the command

is express. If the desire be signified by conduct (or by any signs of desire which are *not* words), the command is tacit.

Now when customs are turned into legal rules by decisions of subject judges, **the legal rules which emerge from the customs are tacit commands of the sovereign legislature.** The state, which is able to abolish, permits its ministers to enforce them: and it, therefore, signifies its pleasure, by that its voluntary acquiescence, 'that they shall serve as a law to the governed.'

My present purpose is merely this: to prove that the positive law styled *customary* (and all positive law made judicially) is established by the state directly or circuitously, and, therefore, is *imperative*. I am far from disputing, that law made judicially (or in the way of improper legislation) and law made by statute (or in the properly legislative manner) are distinguished by weighty differences. I shall inquire, in future lectures, what those differences are; and why subject judges, who are properly ministers of the law, have commonly shared with the sovereign in the business of making it.

I assume then that the only laws which are not imperative, and which belong to the subject-matter of jurisprudence, are the following: 1) **Declaratory laws, or laws explaining the import of existing positive law.** 2) **Laws abrogating or repealing existing positive law.** 3) **Imperfect laws, or laws of imperfect obligation (with the sense wherein the expression is used by the Roman jurists).**

But the space occupied in the science by these improper laws is comparatively narrow and insignificant. Accordingly, although I shall take them into account so often as I refer to them directly, I shall throw them out of account on other occasions. Or (changing the expression) I shall limit the term law to laws which are imperative, unless I extend it expressly to laws which are not...

Lecture V

... **Positive laws, or laws strictly so called, are established directly or immediately by authors of three kinds: by monarchs, or sovereign bodies, as supreme political superiors: by men in a state of subjection, as subordinate political superiors: by subjects, as private persons, in pursuance of legal rights.** But every positive law, or every law strictly so called, **is a direct or circuitous command of a monarch or sovereign number in the character of political superior:** that is to say, a direct or circuitous command of a monarch or sovereign number to a person or persons in a state of subjection to its author. And being a *command* (and therefore flowing from a *determinate* source), **every positive law is a law proper, or a law properly so called.**

Besides the human laws which I style positive law, there are human laws which I style positive morality, rules of positive morality, or positive moral rules.

The generic character of laws of the class may be stated briefly in the following negative manner: No law belonging to the class is a direct or circuitous command of a monarch or sovereign number in the character of political superior. In other words, no law belonging to the class is a direct or circuitous command of a monarch or sovereign number to a person or persons in a state of subjection to its author.

But of positive moral rules, some are laws proper, or laws properly so called: others are laws improper, or laws improperly so called.

Some have all the essentials of an imperative law or rule: others are deficient in some of those essentials of an *imperative* law or rule: others are deficient in some of those essentials, and are styled *laws* or *rules* by an analogical extension of the term.

The **positive moral rules which are laws properly so called**, are distinguished from other laws by the union of two marks: **1) They are imperative laws or rules set by men to men. 2) They are not set by men as political superiors, nor are they set by men as private persons, in pursuance of legal rights.**

Inasmuch as they bear the latter of these two marks, they are not commands of sovereigns in the character of political superiors. Consequently, **they are not positive laws**: they are not clothed with legal sanctions, nor do they oblige legally the persons to whom they are set. But being *commands* (and therefore being established by *determinate* individuals or bodies), **they are laws properly so called: they are armed with sanctions, and impose duties, in the proper acceptation of the terms.**

The positive moral rules which are laws improperly so called, are laws set or imposed by general opinion: that is to say, by the general opinion of any class or any society of persons. For example, some are set or imposed by the general opinion of persons who are members of a profession or calling: others, by that of person who inhabit a town or province: others, by that of a nation or independent political society: others, by that of a larger society formed of various nations.

A few species of the laws which are set by general opinion have gotten appropriate names – For example, there are laws or rules imposed upon gentlemen by opinions current amongst gentlemen. **And these are usually styled *the rules of honour, or the laws or law of honour*** – There are laws or rules imposed upon people of fashion by opinions current in the fashionable world. And these are usually styled *the law set by fashion*. There are laws which regard the conduct of independent political societies in their various relations to one another: Or rather, there are laws which regard the conduct of sovereigns or supreme governments in their various relations to one another. And laws or rules of this species, which are imposed upon nations or sovereigns by opinions current amongst nations, are **usually styled *the law of nations or international law*.**

Now a law set or imposed by general opinion is a law improperly so called. It is styled a *law* or *rule* by an analogical extension of the term. When we speak of a law set by general opinion, we denote, by that expression, the following fact: Some *indeterminate* body or *uncertain* aggregate of person regards a kind of conduct with a sentiment of aversion or liking: Or (changing the expression) that indeterminate body opines unfavourably or favourably of a given kind of conduct. In *consequence* of that sentiment, or in consequence of that opinion, it is likely that they or some of them will be displeased with a party who shall pursue or not pursue conduct of that kind. And, in *consequence* of that displeasure, it is likely that **some party (what party being undetermined) will visit the party provoking it with some evil or another.**

The body by whose opinion the law is said to be set, does not *command*, expressly or tacitly, that conduct of the given kind shall be forborne or pursued. For, since it is not a body precisely determined or certain, it cannot *as a body* express or intimate a wish. *As a body*, it cannot *signify* a wish by oral or written words, or by positive or negative department. The so called *law* or *rule* which its opinion is said to impose, is merely the *sentiment* which it feels,

or is merely the *opinion* which it holds, in regard to a kind of conduct.

In the foregoing analysis of a law set by general opinion, the meaning of the expression '*indeterminate* body of persons' is indicated rather than explained. To complete my analysis of a law set by general opinion (and to abridge that analysis of sovereignty which I shall place in my sixth lecture), I will here insert a concise exposition of the following pregnant distinction: namely, the distinction between a *determinate*, and an *indeterminate* body of single or individual persons – If my exposition of the distinction shall appear obscure and crabbed, my hearers (I hope) will recollect that the distinction could hardly be expounded in lucid and flowing expressions.

I will first describe the distinction in general or abstract terms, and will then exemplify and illustrate the general or abstract description.

If a body of persons be determinate, all the persons who compose it are determined and assignable, or every person who belongs to it is determined and may be indicated.

But determinate bodies are of two kinds.

A determinate body of one of those kinds is distinguished by the following marks: (1) The body is composed of persons determined specifically or individually, or determined by characters or descriptions respectively appropriate to themselves. (2) Though every individual member must of necessity answer to many generic descriptions, every individual member is a member of the determinate body, not by reason of his answering to any generic description but by reason of his bearing his specific or appropriate character.

A determinate body of the other of those kinds is distinguished by the following marks: (1) It comprises *all* the persons who belong to a given class, or who belong respectively to two or more of such classes. In other words, *every* person who answers to a given generic description, or to any of two or more given generic descriptions, is also a member of the determinate body. (2) Though every individual member is of necessity determined by a specific or appropriate character, every individual member is a member of the determinate body, not by reason of his answering to the given generic description.

If a body be indeterminate, *all* the persons who compose it are not determined and assignable. Or (changing the expression) *every* person who belongs to it is not determined and therefore cannot be indicated – For an indeterminate body consists of *some* of the persons who belong to another and larger aggregate. But *how many of those persons* are members of the indeterminate body, or *which of those persons in particular* are members of the indeterminate body, is not and cannot be known completely and exactly...

Lecture VI

... I shall finish, in the present lecture, the purpose mentioned above, by explaining the marks or characters which distinguish positive laws, or laws strictly so called. And, in order to an explanation of the marks which distinguish positive laws, I shall analyse the expression *sovereignty*, the correlative expression *subjection*, and the inseparably connected expression *independent political society*. With the ends or final causes for which

governments ought to exist, or with their different degrees of fitness to attain or approach those ends, I have no concern. I examine the notions of *sovereignty* and *independent political society*, in order that I may finish the purpose to which I have adverted above: in order that I may distinguish completely the appropriate province of jurisprudence from the regions which lie upon its confines, and by which it is encircled. It is necessary that I should examine those notions, in order that I may finish that purpose. For the essential difference of a positive law (or the difference that severs it from a law which is not a positive law) may be stated thus. Every positive law or every law simply and strictly so called, is set by a sovereign person, or a sovereign body of persons, to a member or members of the independent political society wherein that person or body is sovereign or supreme. Or (changing the expression) it is set by a monarch, or sovereign number, to a person or persons in a state of subjection to its author. Even though it sprung directly from another fountain or source, it is a positive law, or a law strictly so called, by the institution of that present sovereign in the character of political superior. Or (borrowing the language of Hobbes) ‘the legislator is he, not by whose authority the law was first made, but by whose authority it continues to be a law.’

The superiority which is styled sovereignty, and the independent political society which sovereignty implies, is distinguished from other superiority, and from other society, by the following marks or characters: (1) The bulk of the given society are in a habit of obedience or submission to a determinate and common superior: let that common superior be a certain individual person, or a certain body or aggregate of individual person. (2) That certain individual, or that certain body of individuals is not in a habit of obedience to a determinate human superior. Laws (improperly so called) which opinion sets or imposes, may permanently affect the conduct of that certain individual or body. To express or tacit commands of other determinate parties, that certain individual or body may yield occasional submission. But there is no determinate person, or determinate aggregate of persons, to whose commands, express or tacit, that certain individual or body renders habitual obedience.

Or the notions of sovereignty and independent political society may be expressed concisely thus – If a determinate human superior, not in a habit of obedience to a like superior, receive habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society, and the society (including the superior) is a society political and independent.

To that determinate superior, the other members of the society are *subject*: or on that determinate superior, the other members of the society are *dependent*. The position of its other members towards that determinate superior, is a *state of subjection*, or a *state of dependence*. The mutual relation which subsists between that superior and them, may be styled *the relation of sovereign and subject*, or *the relation of sovereignty and subjection*.

Hence it follows, that it is only through an ellipsis, or an abridged form of expression, that the society is styled *independent*. The party truly independent (independent, that is to say, of a determinate human superior), is not the society, but the sovereign portion of the society: that certain member of the society, or that certain body of its members, to whose commands, expressed or intimated, the generality or bulk of its members render habitual obedience. Upon that certain person, or certain body of persons, the other members of the society are dependent: or to that certain person or certain body of persons, the other members of the society are subject. By ‘an independent political society’, or ‘an independent and sovereign

nation', we mean a political society consisting of a sovereign and subjects, as opposed to a political society which is merely subordinate: that is to say, which is merely a limb or member of another political society, and which therefore consists entirely of persons in a state of subjection.

In order that a given society may form a society political and independent, the two distinguishing marks which I have mentioned above must unite. The generality of the given society must be in the habit of obedience to a determinate and common superior: whilst that determinate person, or determinate body of persons must not be habitually obedient to a determinate person or body. It is the union of that positive, with this negative mark, which renders that certain superior sovereign or supreme, and which renders that given society (including that certain superior) a society political and independent.

In order that a given society may form a society political and independent, the positive and negative marks which I have mentioned above must unite. The generality or bulk of its members must be in a habit of obedience to a certain and common superior: whilst that certain person, or certain body of persons, must not be habitually obedient to a certain person or body.

But, in order that the bulk of its members may render obedience to a common superior, how many of its members, or what proportion of its members, must render obedience to one and the same superior? And, assuming that the bulk of its members render obedience to a common superior, how often must they render it, and how long must they render it, in order that that obedience may be habitual? Now since these questions cannot be answered precisely, the positive mark of sovereignty and independent political society is a fallible test of specific or particular cases.

Note* – on the prevailing tendency to confound what is with what ought to be law or morality, that is, first, to confound positive law with the science of legislation, and positive morality with deontology; and secondly, to confound positive law with positive morality, and both with legislation and deontology.

The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law which actually exists, is a law, though we happen to dislike it or though it vary from the text by which we regulate our approbation and disapprobation. This truth, when formally announced as an abstract proposition, is so simple and glaring that it seems idle to insist upon it. But simple and glaring as it is, when enunciated in abstract expressions the enumeration of the instances in which it has been forgotten would fill a volume.

Sir William Blackstone, for example, says in his 'Commentaries' that the laws of God are superior in obligation to all other laws; that no human laws should be suffered to contradict them; that human laws are of no validity if contrary to them; and that all valid laws derive their force from that Divine original.

Now, he *may* mean that all human laws ought to conform to the Divine laws. If this be his meaning, I assent to it without hesitation. The evils which we are exposed to suffer from the hands of God as a consequence of disobeying His commands are the greatest evils to which we are obnoxious; the obligations which they impose are consequently paramount to those imposed by any other laws, and if human commands conflict with the Divine law, we ought to disobey the command which is enforced by the less powerful sanction; this

is implied in the term *ought*: the proposition is identical, and therefore perfectly indisputable – it is our interest to choose the smaller and more uncertain evil, in preference to the greater and surer. If this be Blackstone's meaning, I assent to his proposition and have only to object to it, that it tells us just nothing. Perhaps, again, he means that human lawgivers are themselves obliged by the Divine laws to fashion the laws which they impose by that ultimate standard, because of they do not, God will punish them. To this also I entirely assent: for if the index to the law of God be the principle of utility, that law embraces the whole of our voluntary actions in so far as motives applied from without are required to give them a direction conformable to the general happiness.

But the meaning of this passage of Blackstone, if it has a meaning, seems rather to be this: that no human law which conflicts with the Divine law is obligatory or binding; in other words, that no human law which conflicts with the Divine law is a law, for a law without an obligation is a contradiction in terms. I suppose this to be his meaning, because when we say of any transaction that it is invalid or void, we mean that it is not binding: as, for example, if it be a contract, we mean that the political law will not lend its sanction to enforce the contract.

Now, to say that human laws which conflict with the Divine law are not binding, that is to say, are not laws, is to talk stark nonsense. The most pernicious laws, and therefore those which are most opposed to the will of God, have been and are continually enforced as laws by judicial tribunals. Suppose an act innocuous, or positively beneficial, be prohibited by the sovereign under the penalty of death; if I commit this act, I shall be tried and condemned, and if I object to the sentence that it is contrary to the law of God, who has commanded that human lawgivers shall not prohibit acts which have no evil consequences, the Court of Justice will demonstrate the inconclusiveness of my reasoning by hanging me up, in pursuance of the law of which I have impugned the validity. An exception, demurrer, or plea, founded on the law of God was never heard in a Court of Justice, from the creation of the world down to the present moment.

But this abuse of language is not merely puerile, it is mischievous. When it is said that a law ought to be disobeyed, what is meant is that we are urged to disobey it by motives more cogent and compulsory than those by which it is itself sanctioned. If the laws of God are certain, the motives which they hold out to disobey any human command which is at variance with them are paramount to all others. But the laws of God are not always certain. All divines, at least all reasonable divines, admit that no scheme of duties perfectly complete and unambiguous was ever imparted to us by revelation. As an index to the Divine will, utility is obviously insufficient. What appears pernicious to one person may appear beneficial to another. And as for the moral sense, innate practical principles, conscience, they are merely convenient cloaks for ignorance or sinister interest: they mean either that I have the law to which I object and cannot tell why, or that I hate the law, and that the cause of my hatred is one which I find it incommensurable to avow. If I say openly, I hate the law, ergo, it is not binding and ought to be disobeyed, no one will listen to me; but by calling my hate my conscience or my moral sense, I urge the same argument in another and more plausible form: I seem to assign a reason for my dislike, when in truth I have only given it a sounding and specious name. In times of civil discord the mischief of this detestable abuse of language is apparent. In quiet times the dictates of utility are fortunately so obvious that the anarchical doctrine sleeps, and men habitually admit the validity of laws which they dislike. To prove by pertinent reasons that a law is

pernicious is highly useful, because such process may lead to the abrogation of the pernicious law. To incite the public to resistance by determinate views of *utility* may be useful, for resistance, grounded on clear and definite prospects of good, is sometimes beneficial. But to proclaim generally that all laws which are pernicious or contrary to the will of God are void and not to be tolerated, is to preach anarchy, hostile and perilous as much to wise and benign rule as to stupid and galling tyranny.¹¹

Austin always said that his work in *The Province* was ‘merely prefatory’ to a much wider study of what he termed ‘general jurisprudence’: this was to be the exposition and analysis of the fundamental notions forming the framework of all mature legal systems. The main part of his full lectures (as said above, they were only published after his death in 1863) was given to an analysis of what he called ‘pervading notions’, such as those of right, duty, persons, status, delict and sources of law. Austin distinguished this general, or analytical, jurisprudence from the criticism of legal institutions, which he called the ‘science of legislation’; he viewed both the analytical and the critical exposition as important parts of legal education. He is largely remembered, however, for the analytical heritage and his critical exposition (largely influenced by notions of utility) is usually skated over.

¹¹ Do Austin’s lectures seem rather dry stuff? It is important to read this material in conjunction with Roger Cotterrell’s Chapter 3: ‘Sovereign and Subject: Austin and Bentham’ and Morrison’s Chapter 4: ‘Thomas Hobbes and the origins of the imperative theory of law: or *mana* transformed into earthly power’ to see the location and meaning of Austin’s project.

3.3.2 Austin and utilitarianism

The young Austin once declared himself to be a disciple of Jeremy Bentham, and utilitarianism is a continuing clear theme (though Austin was a believer in God and made utility the index of God’s will or plan for creation, while Bentham was secular) in the work for which Austin is best known today. Austin interpreted utilitarianism so that Divine will is equated with utilitarian principles: ‘utility is the index to the law of God... To make a promise which general utility condemns, is an offense against the law of God’ (Austin, 1873: Lecture VI, p. 307; see also Austin, 1995: Lecture II, p. 41). This reading of utilitarianism has had no long-term influence, though in his nineteenth-century review of Austin’s *Lectures*, John Stuart Mill was at pains to say that his work represented the application of utilitarianism to law and largely ignored the religious aspects. According to Rumble, most contemporaries saw Austin as a utilitarian and the young Austin certainly shared many of the ideas of the Benthamite philosophical radicals; namely notions of progress, rule through knowledge, political economy, as well as accepting the ideas of Thomas Malthus (see Rumble, 1985, pp. 16–17; Morrison, 1997, Chapter 9).

Austin made a lasting impact for at least two reasons.

1 Analytical jurisprudence

Austin argued for an **analytical** analysis of law¹² (as contrasted with approaches to law **more grounded in history or sociology**, or arguments about law which were secondary to more general moral and political theories). Analytical jurisprudence emphasises the analysis of key concepts, including ‘law’, ‘(legal) right’, ‘(legal) duty’, and ‘legal validity’. Analytical jurisprudence became the dominant approach in analysing the nature of law (see Cotterrell, 2003, for an explanation for this). However (and this is crucial to acknowledging what his project was to correct the misunder-

¹² There is some evidence that Austin’s views later in his life may have moved away from analytical jurisprudence towards something more approximating the historical jurisprudence school. (Hamburger, 1985, pp. 178–91).

standing of many commentators), it is important to appreciate that in Austin's hands analytical jurisprudence was only one part of an overall project. Many later writers have confused the aim of being analytical with the notion that this is all one has to say about law and thus that law is simply what you can formally reduce it to (this idea is sometimes called 'legal formalism', a narrow approach to understanding the role of law). It is a mistake to see either Austin in particular, or analytical jurisprudence in general, as opposing a critical and reform-minded effort to understand law and its social, political and economic effects. The approach to understanding law that is loosely grouped under the title 'legal realism', for example, argued that law could only be understood in terms of its practical effects (so for example, law was what the courts actually did...). But realists tended to downplay doctrine and legal categories, seeing them as irrelevant. By contrast, Austin saw analytical jurisprudence as attaining clarity as to the categories and concepts of law, as for the morality of law, its effectiveness, its use and abuse, or its location in historical development...these were different questions (and clearly also important to understand how to use law as a technique of rational government!).

2 Legal positivism

Austin tied his analytical method to a systematic exposition of a view of law known as 'legal positivism'.¹³ Austin, as we have seen in looking at Hobbes, was not the first writer to say that the law of the legal system of a nation state should be seen as something 'posited' by human judgments or processes, but most of the important theoretical work on law prior to Austin had treated jurisprudence as though it were merely a branch of moral theory or political theory: asking how the state should govern (and when governments were legitimate), and under what circumstances citizens had an obligation to obey the law. For Austin, however, and for legal positivism generally, law should be an object of 'scientific' study, the identification of something as law or legally valid was determined neither by prescription nor by moral evaluation; law was simply law, and its morality was another issue. Austin's subsequent popularity among late nineteenth-century English lawyers stemmed in large part from their desire to approach their profession, and their professional training, in a more serious and rigorous manner (Cotterrell, 2003, pp. 74–77). Legal positivism asserts (or assumes) that it is both possible and valuable to have a morally neutral descriptive (or perhaps 'conceptual', to take Hart's term) theory of law.

It is always a simplification to generalise;¹⁴ however, it can be maintained that those who adhere to legal positivism do not deny that moral and political criticism of legal systems is important; instead they insist that a descriptive or conceptual approach to law is valuable, both on its own terms and as a necessary prelude to criticism. The similarities between Austin and Thomas Hobbes have been stressed, but David Hume, with his argument for separating 'is' and 'ought' (which worked as a sharp criticism for some forms of natural law theory, which purported to derive moral truths from statements about human nature), should also be mentioned as sharing in the intellectual framing of this division. The common theme to Hobbes, Hume, Bentham and Austin is the demand for clarity of conception and separation of different discursive realms.

¹³ The main competitor to legal positivism, in Austin's day as in our own, has been natural law theory. Austin can also be seen as clarifying the study of the common law from the traditional ideas of timeless sources and other vague notions he considered mystifications.

¹⁴ Remember Austin's famous formulation of the distinction: 'The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation and disapprobation.' (Austin 1995: Lecture V, p. 157)

Summary

Today we remember Austin for his particular version of legal positivism, his ‘command theory of law’. However, it should be remembered that he clearly stated that his theory drew upon Hobbes and Bentham – both of whose theories could also be characterised as ‘command theory’. Austin’s work was more influential in this area, partly because Bentham’s jurisprudential writings did not appear in even a roughly systematic form until well after Austin’s work had already been published (Bentham, 1970, 1996; Cotterrell, 2003, pp. 52–53).

3.4 Appreciating Austin’s command theory

Both the common law tradition and natural law theories gave an image of law as something that was not at the government’s behest to use as the government desired. Instead law was ‘other’ than governmental power. By contrast, Hobbes, Bentham and Austin identified (positive) law as the creation of government (the sovereign) and as part of government’s instruments to achieve (rational, coherent and defensible) rule.

There are always at least two things going on that we can learn from the writers we have looked at in this chapter. Take Austin: he tried to find out what can be said generally, while still capturing the basic form, about all laws and this was a necessary step for those interested in law (and power) to understand the nature of the instrument that could be used to shape relations in a modern society. Later commentators have concentrated upon his work as an example of analytical philosophy and have seen it either as a paradigm or a caricature of the analytical method. We have seen from the extracted sections that his lectures were dryly full of distinctions, but are thin in trans-historical argument. To some contemporary critics, his work is very limited and the modern reader is forced to fill in much of the meta-theoretical, justificatory work, which cannot be found in the text. But is this a problem of the text or of our historical appreciation? Austin wrote for an audience; his *Lectures* were simply that – lectures – and thus principally orientated to that purpose.

Thus we may appreciate that where Austin articulated his methodology and objectives he gave them expressions drawing upon the accepted discourses of the times: he ‘endeavoured to resolve a law (taken with the largest signification which can be given to that term properly) into the necessary and essential elements of which it is composed’ (Austin, Lecture V, p. 117).



Austin had been appointed the first professor of law at a body which was attempting to be called the University of London in 1928. This body, which is now University College London (the largest College of the Federal University of London), was founded on secular and utilitarian lines. It was opposed by many, including a rival King's College founded in 1828. In this anonymous cartoon of the time, a clutch of bloated bishops, including the Archbishop of Canterbury, with the added weight of money and interest, are pitted against Brougham (waving the broom, the government minister supporting the proposal for the new university) and Bentham (clad in dressing gown), supported by Sense and Science.

(Image: courtesy of the University of London).

In another cartoon of the time, King's College was represented as a huge palace with, however, very small windows, since 'no new light is required'. Austin expressly stated his aim was to bring light to the chaos of legal thought.

3.4.1 Austin's analysis of law

As to what is the core nature of law, Austin's answer is that laws ('properly so called') are commands of a sovereign; they exist in a relationship of political superiority and political inferiority. He clarifies the concept of positive law (that is, man-made law) by analysing the constituent concepts of his definition, and by distinguishing law from other concepts that are similar:

- **Commands** involve an expressed wish that something be done, and 'an evil' to be imposed if that wish is not complied with.
- **Rules** are general commands (applying generally to a class), as contrasted with specific or individual commands.

Positive law consisted of those commands laid down by a sovereign (or its agents), to be contrasted to other law-givers, such as God's general commands, or the general commands of an employer. The 'sovereign' was defined as a person (or collection of persons) who receives habitual obedience from the bulk of the population, but who does not habitually obey any other (earthly) person or institution. Austin thought that all independent political societies, by their nature, have a sovereign. Positive law should also be contrasted with 'laws by a close analogy' (which includes positive morality, laws of honour, international law, customary law, and constitutional law) and 'laws by remote analogy' (e.g. the laws of physics) (Austin, Lecture I).

Austin also wanted to include within 'the province of jurisprudence' certain 'exceptions' – items which did not fit his criteria but should nonetheless be studied with other 'laws properly so called': repealing laws, declarative laws, and 'imperfect laws' (laws prescribing action but without sanctions, a concept Austin ascribes to 'Roman [law] jurists') (Austin 1995: Lecture I, p. 36).

In the criteria set out above, Austin succeeded in delimiting law and legal rules from religion, morality, convention and custom.¹⁵

However, also excluded from 'the province of jurisprudence' were customary law (except to the extent that the sovereign had, directly or indirectly, adopted such customs as law), public international law and parts of constitutional law.

Within Austin's approach, whether something is or is not 'law' depends on which people have done what: the question turns on an empirical investigation, and it is a matter mostly of power, not of morality. Of course, Austin is not arguing that law should not be moral, nor is he implying that it rarely is. Austin is not playing the nihilist or the sceptic. He is merely pointing out that there is much that is law that is not moral, and what makes something law does nothing to guarantee its moral value:

The most pernicious laws, and therefore those which are most opposed to the will of God, have been and are continually enforced as laws by judicial tribunals. (Austin 1995: Lecture V, p. 158)

While Bentham was an opponent of judicial lawmaking, Austin had no objection to it, describing it as 'highly beneficial and even absolutely necessary' (Austin, 1995: Lecture V, p. 163). Austin simply incorporated judicial lawmaking into his command theory: by characterising that form of lawmaking, along with the occasional legal/judicial recognition of customs by judges, as the 'tacit

¹⁵ These exclusions alone would make Austin's theory problematic for most modern readers.

commands' of the sovereign, with the sovereign's affirming the 'orders' by its acquiescence (Austin, 1995: Lecture 1, pp. 35–36).

3.4.2 Criticisms of Austin

Many readers come to Austin's theory mostly through the criticisms made of it by other writers (prominently, by Hart).¹⁶ **As a result the weaknesses of the theory are almost better known than the theory itself** (many answers to examination questions on the command theory or the work of John Austin are full of the criticisms but leave the examiner uncertain as to whether the student knows the theory about which he or she has just listed the criticisms!).

Some of these criticisms only make sense when we apply an analytical critique to Austin; thus it is often claimed that in many societies, it is hard to identify a 'sovereign' in Austin's sense of the word (a difficulty Austin dismissed when discussing Mexico, for example, by saying it was a matter of factual analysis; but we may note that he had to describe the British 'sovereign' rather awkwardly as the combination of the King, the House of Lords, and all the electors of the House of Commons). In other places Austin talked even more loosely about using 'sovereign powers'. Putting the focus on **a 'sovereign' as the source of law makes it difficult to explain the continuity of legal systems**: a new ruler will not come in with the kind of 'habit of obedience' that Austin sets as a criterion for a system's rule-maker. However, one could argue (see Harris, 1977) that the sovereign **is best understood as a constructive metaphor**: that law should be viewed as if it reflected the view of a single will (a similar view, that law should be interpreted as if it derived from a single will, can be found in Ronald Dworkin's work (1986)). It is also a common criticism that a 'command' model seems to fit some aspects of law poorly (e.g. rules which grant powers to officials and to private citizens – of the latter, the rules for making wills, trusts and contracts are examples), while excluding other matters (e.g. international law) which we are not inclined to exclude from the category 'law'. More generally, it seems more distorting than enlightening to reduce all law to one type. For example, rules that empower people to make wills and contracts perhaps can be re-characterised as part of a long chain of reasoning for eventually imposing a sanction (Austin spoke in this **context of the sanction of 'nullity'**) on those who fail to comply with the relevant provisions. However, such a re-characterisation as this misses the basic purpose of those sorts of laws – **they are arguably about granting power and autonomy, not punishing wrongdoing**.

A powerful criticism is that a theory which portrays law solely in terms of power **fails to distinguish rules of terror from forms of governance sufficiently just that they are accepted as legitimate by their own citizens**. (Austin was aware of some of these lines of attack, and had responses ready; it is another matter whether his responses were adequate.) Austin also did not go into a discussion of his methodology; he was rather concerned to get his message across to his audience. Austin, however, laid out the structure for modern legal positivism and when Hart revived legal positivism in the middle of the twentieth century (Hart, 1958, 1994), he did it by criticising and building on Austin's theory. In some respects he followed the legal pluralism obvious from Austin's first lecture: for example, Hart's theory did not try to reduce all laws to one kind of rule, but emphasised the varying types and functions of legal rules.

¹⁶ Many of the current textbook references to Austin appear to accept the validity of Hart's criticisms developed against a model of the imperative theory of law based on Hart's reading of Austin and presented in the first four chapters of *The Concept of Law*. Both Cotterrell and Morrison, conversely, argue that Hart's treatment may be analytically pleasurable, but is based on a abstracted model and not in keeping with an historical understanding of Austin's project.

Moreover, he was still conscious of the varying relationships between individuals and the legal order, for his theory, grounded partly on the distinction between ‘obligation’ and ‘being obliged’, was built around the fact that some participants within legal systems ‘accepted’ the legal rules as reasons for action, above and beyond the fear of sanctions; others, however, obeyed because of sanctions or simply habit

3.4.3 A contemporary view?

Austin’s work was highly fashionable in the late nineteenth century and for part of the twentieth. Then came a period of deprecation. Today he is reassessed. Put in his historical context, Austin can be seen as all too trusting of centralised power and his writing as a strange mixture of analyticism and realism. Certainly Austin kept the political nature of law and the connection of law and power at the centre of his analysis. When circumstances seem to warrant a more critical, sceptical or cynical approach to law and government, Austin’s equation of law and force will be attractive, as with Yntema, who simply stated in 1928 (at p. 476): ‘The ideal of a government of law and not of men is a dream.’ Such a reading may today be from Austin’s own mixture of liberal/conservative-utilitarian views at the time of his writing, and his even more conservative political views later in his life. In our contemporary times, as we see the failed states of Iraq and various other nations, the message of Hobbes that security comes before all else is treated as a common-place. Whether law could be used as a rational instrument of government is another matter.

Reminder of learning outcomes

By this stage you should be able to:

- adopt an effective approach to reading original extracts from key writers
- critically discuss the emergence and core meaning of legal positivism
- discuss the advantages and disadvantages of a theory of law based on the idea of the commands of the sovereign
- analyse the social and political context in which Austin wrote and how Hart has interpreted his project.

Sample examination questions

Question 1 Has Austin’s theory contributed to our understanding of law?

Question 2 What are the advantages and disadvantages of seeing law as a set of commands?

References

- Austin, J. *The Province of Jurisprudence Determined*, 1832 (other editions, e.g. H.L.A. Hart, 1954, also 1995).
 - Austin, J. *Lectures on Jurisprudence or the Philosophy of Positive Law*. Edited by Robert Cambell. 2 vols. (1863; fifth edition, 1885).
 - Cotterrell, R. *The Politics of Jurisprudence*. (London: Butterworths Law, 2003) second edition.
 - Dworkin, R. *Law's Empire*. (London: Fontana Paperbacks, 1986).
 - Hamburger, L. and J. Hamburger *Troubled Lives: John and Sara Austin*. (Toronto: University of Toronto Press, 1985).
 - Harris, J. *Legal Philosophies*. (London: Butterworths, 1997) second edition.
 - Morrison, W. *Jurisprudence: From the Greeks to Post-modernism*. (London: Cavendish, 1997).
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Feedback to activities: Chapter 3

Activity 3.1 No feedback provided.

Activity 3.2 No feedback provided.

Activity 3.3 This is a good example of an examination question which has a core subject matter that comes from one section of the module but in which to answer the question properly you need to draw upon your understanding gained from the module as a whole. You need to understand what sort of claims were made in the name of natural law and the aim of the positivist project. How far do you agree with the student who commented towards the end of their answer:

Living in a Muslim country where parts of our law are Sharia laws that come from the Quran [sic], I find it difficult to accept Hart's theory of the minimum content of law, and like Finnis, I feel that his theory is too minimal. The overlaps in law and morals stated are too little. Since some of our laws are divined from religious sources which not only states laws but also gives guidance on moral conduct, there is a lot of overlap between laws and morals and a lot of laws can be said to have a moral content. Even though the five truisms given by Hart are true for my society and I can relate to them, there are many others that are ignored by Hart and not covered in his theory...

Here is yet another from the same batch of scripts:

Reading about the minimal content of natural law as a woman in a Muslim society I find the emphasis on a shared minimum the only realistic answer for interacting between cultures and different social groups. I am a sincere Muslim but when I read the Quran I can not often see all the rules imposed on Woman that male interpreters claim are there...

I think that the Prophets were concerned to give both a minimum and then guidance for the times they appeared. I understand that there have been others in the English history that have said similar things to Hart – Hobbes, Hume and Adam Smith (?) – and there are many who say that one has to include more – Fuller and Finnis (?). So we see the same thing. Do we accept the minimum or are we told what to accept to become the bigger thing? The better Muslim, the better Christian the flourishing legal order... But when we put all the rules in and say that all these rules are backed by true morals then we get a powerful group imposing their image on us. It is better if we can agree on a minimum and then leave it up to each group to voluntarily accept the more rules, that way different groups can live side by side...

Notes