

## **A Critical Review of John Austin's *The Province of Jurisprudence Determined***

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This critical review provides an analytic summary of John Austin's *The Province of Jurisprudence Determined*, focusing in particular on Lectures I and II, and concludes by developing two critiques of Austin's theory of law. Specifically, in the summary I review the conceptual foundations of Austin's command theory and the two types of law "properly so called," namely the general commands that men impose upon other men to regulate their conduct, and the divine laws that are revealed either through scripture or by applying the principle of utility to the analysis of social practice. In my critical interjection, I raise two objections to Austin's theory: First, that Austin fails to persuasively consider the prospect of a conflict between divine natural law and state-sanctioned positive law, along with the consequences of the application of the principle of utility to adjudicate such a conflict; and second, that despite the claims to general applicability implied throughout Austin's framework, his conceptualization of the law remains a prisoner of both time and place, collapsing in the face of Montesquieuan systems of separation of powers or contemporary constitutional practices.

### **Part I: Austin's *The Province of Jurisprudence Determined***

John Austin's stated purpose in *The Province of Jurisprudence Determined*<sup>1</sup> is to "distinguish positive laws (the appropriate matter of jurisprudence) from [...] objects by which they are connected by ties of resemblance and analogy," namely by determining "the essence or nature which is common to all laws that are laws properly so called" (pg. 2). As such, Austin's is a conceptual enterprise – to precise the definition of the "law" in contradistinction to cognate concepts, and to subsequently proclaim its study to be the province of legal analysis. To this end, Austin promotes a command theory of law: "A law is a command which obliges a person or persons, and obliges generally to acts or forbearances of a *class*" or a "*course of conduct*" (pg. 24).<sup>2</sup> Yet the law is not equivalent to any command, but constitutes a

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<sup>1</sup> Austin, John. 2000 [1832]. *The Province of Jurisprudence Determined*. Amherst, NY: Prometheus.

<sup>2</sup> Austin notes a few exemptions from his command theory – laws that do not constitute commands that are nonetheless an appropriate object for jurisprudential inquiry: "Laws to repeal laws," which he terms "permissive laws," and "imperfect laws" – namely laws that are not coupled with a sanction (the threat of punishment) to

subtype of the concept of ‘command’: only when the command “obliges generally” – usually by possessing both *ergo omnes* effects (synchronic generality) and by obliging its audience to a particular conduct into the future (diachronic generality) – rather than in an *ad hoc* fashion vis-à-vis a “specific act or forbearance,” does it constitute a law (pg. 19; 23).

A command, furthermore, always “express[es] or initiat[es] of the wish being presented” by a superior to his inferiors – it, in other words, demands a theory of sovereignty, or of legal personality (ibid). By “superior,” Austin does not understand some form of “precedence or excellence” – but a more raw notion of domination: “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” (pg. 24). This is a highly hierarchical conception of law, which suggests the impossibility of properly legal horizontal agreements amongst equals (say, between private parties of equal social status) absent a superior authority sanctioning the agreement and possessing the power to punish non-compliance.

So who, or what entity, is endowed with the authority to legally bind subordinates – to, in Austin’s words, impose upon them an “obligation” to obey the command or face the threat of “sanction”? First, Austin reasons that “ laws set by men to men” are embraced within his command definition of law (pg. 10). In recognizing the sovereign authority of a “monarch, or sovereign number” to lay a general command “to a person or persons in a state of subjection to its author” (pg. 9), Austin follows in the Hobbesian tradition of conceptualizing the state as possessing a corporate personality (*universitas*) whose legal basis is not contingent *a priori* upon the consent of its subordinates or encompassed in complying with a social contract (see Runciman 1997).<sup>3</sup> As such, Austin traces the

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compel compliance (pg. 27). The inclusion of the latter appears a pragmatic concession, for Austin highlights that these are laws merely in the “sense wherein the term is used by the Roman jurists” – many of which may well have populated the halls of the University College, London at the time of his writings (ibid).

<sup>3</sup> Runciman, David. 1997. *Pluralism and the Personality of the State*. New York, NY: Cambridge University Press. *Nota bene*, however, that unlike Hobbes, whose *Leviathan* was, first and foremost, an appeal against civil war, Austin does suggest that the sovereign authority of the state is not always independent from the consent of its subjects. He does so when he transitions from the sentiment that “disobedience to an established government, let it be never so bad, is an evil: For the mischiefs inflicted by a bad government are less than the mischiefs of anarchy,” a belief which Hobbes would have fully shared, to the conclusion that “[s]o momentous, however, is the difference between a bad and a good government, that if it would lead to a good one, resistance to a bad one would be useful” (pg. 53). Such a case would, however, prove to be the exception, and the uncertainty regarding whether revolutionary energies could replace a bad government with a good one decrease the value of relying upon the principle of utility. In such an “eccentric and anomalous case,” writes Austin, who is reticent to take a firm position, a “Milton or Hampden might animate their country men to resistance, but a Hobbes or a Falkland would counsel obedience and peace” (pg. 54).

authority of a command to its apex – in the British case, to the sovereign Parliament. It is for this reason that Austin defends judicial commands as laws properly so called, for a “subordinate or subject judge is merely a minister. The portion of the sovereign power which lies at his disposition is merely delegated” (pg. 31). “[A]ll judge-made law,” in other words, “is the creation of the sovereign or state” (ibid). And since judges are public officials endowed with delegated sovereign authority, when they draw from social practices – customs – and codify them “into legal rules [...] the legal rules which emerge from the customs are tacit commands of the sovereign legislature” (pg. 32). As a final point of clarification, note that Austin rejects the notion that some laws merely bestow rights without any corresponding duties or obligations, for by endowing an individual with the ability to seek out a remedy from public officials for the violation of their rights, the law imposes a duty upon the perpetrator of the violation to provide restitution or to face the state’s sanction, depending on the transgression (pg. 29).

Second, Austin reasons that “[l]aws set by God to his human creatures [the law of nature],” are also embraced within the command definition of law (pgs. 10; 34). These may either be “revealed” via “the word of God [...] the medium of human language [...] uttered by God directly, or by servants whom he sends to announce them,” or they may be “unrevealed” (pg. 34). Austin devotes most of his second lecture to proclaiming the principle of utility as the necessary conduit for unearthing unrevealed natural laws: “the benevolence of God,” he writes, “with the principle of general utility, is our only index or guide to his unrevealed law” (pg. 37). In this endeavor, Austin takes a rather empirical approach: the object of jurisprudence is to leverage our God-given intellectual faculties for observing individual behavior to subsequently answer the following question: “If acts of the class were generally done, or generally forborne or omitted, what would be the probable effect on the general happiness or good?” (pg. 38). When the effects would be “pernicious, we must conclude that he enjoins or forbids them, and by a rule which probably is inflexible” (pg. 41). As such, the calculus promoted by Austin is one that takes social behavior, rather than individual action, as the requisite signal to reveal the natural law. The logic, as applied to a contemporary example, would unfold as follows: to evaluate, say, whether homosexuality is against the natural law, we should not apply the principle of utility to assess

the proper treatment of a gay person in a single case;<sup>4</sup> rather, we should ask whether the general welfare would be improved or depressed by endowing LGBT persons with equal treatment. If the latter is the case, then the prohibition of homosexuality is revealed to be part of God's law.

Two concluding points of clarification are in order. First, the principle of utility is treated by Austin as a more consistent revealer of God's law than "common sense," for "we are not gifted with that peculiar organ," and hence we "must gather our duties, as we can, from the tendencies of human actions [...] with the help of a glimmering light [the principle of utility]" (pg. 46). Secondly, Austin makes clear that social norms concerning ethical principles – what Austin terms "positive morality" to distinguish it from the "law of God" – are only "improperly but by close analogy" related to law (pg. 12). This logic suggests that should the principle of utility reveal a particular public conduct as benefitting the public welfare, then that conduct, even if manifestly constituting a set of popular moral understandings, would latently reflect divine natural law, and would derive its proper legal status from the latter rather than the former.

## **Part II: A Critical Interjection**

There is much to value in Austin's audacious work, for not only does he fruitfully call upon his readers to build greater conceptual clarity regarding what the law is, but he equally manages to weave in the utilitarianism of his friends Jeremy Bentham and James Mill and to temper the inherent secular positivism of the approach via an analysis of unrevealed divine natural law. Perhaps most telling of the significance of his achievement is the fact that *The Province of Jurisprudence Determined* constitutes part of the intellectual heritage of a large number of legal scholars. Echoes of Austin's discussion of the treatment of 'rights' by legal scholars (specifically his critique of their inability to recognize that rights bestow duties and legal remedies) can be found within Karl Llewellyn's work when he notes that "it takes more careful self-analysis than most have been interested in giving to keep the non-legal "right" (which was a reason for claiming or striving toward or awarding a legal right) distinguished

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<sup>4</sup> Austin does acknowledge that there may some situations whereby the principle of utility would have to be overridden by case-specific considerations, namely where "the specific consequences" emanating from "the evil of observing the rule might surpass the evil of breaking it [...] We should, therefore, dismiss the rule; resort directly to the principle upon which our rules were fashioned; and calculate specific consequences to the best of our knowledge and ability" (pg. 53).

from the “legal right” which was conceived, I take it, as something not quite a mere description of an available remedy, but at least an official recognition that some kind of remedy could be had” (Llewellyn 1930: 440).<sup>5</sup> We can equally trace the influence of Austin’s command theory of law in Oliver Wendell Holmes’ proclamation that “a legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court” (Holmes 1997 [1897]: 992).<sup>6</sup> If only by its ability to influence a number of eminent legal scholars,<sup>7</sup> Austin’s work is meritorious of serious study. Nevertheless, two non-exhaustive critiques in particular are worth mentioning.

First, although Austin characterizes the principle of utility as a searchlight to unearth God’s unrevealed laws in the absence of public common sense, he slowly slips, by the conclusion of the second lecture, into suggesting that the principle of utility should underlie all lawmaking – even the positive law of the sovereign. Austin does so when, in decrying the ill-fated attempts of the British Empire to suppress the revolutionary spirit of its American colonies, he suggests that had the public internalized the principle of utility then that blunder would have been avoided: “If these and the like considerations had determined the public mind, the public would have damned the project of taxing and coercing the colonies [...] For, it is only in the ignorance of the people, and in their consequent mental imbecility, that governments or demagogues can find the means of mischief” (pg. 57). In other words, where Austin begins by naturalizing the principle of utility – implying that its ability to reveal the divine law may well raise even *it* to a natural principle favored by God – he concludes by suggesting that even the sovereign, whom he had suggested previously could deliver any general command given his superior authority, should follow the principle of utility. This normative interjection suggests that the application of the principle of utility may surface occasions when the positive law may clash with the utility-maximizing natural law – as, perhaps, was the case in the

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<sup>5</sup> Llewellyn, Karl N. 1930. “A Realistic Jurisprudence – The Next Step.” *Columbia Law Review* 30 (4): 431-465.

<sup>6</sup> Holmes, Oliver Wendell. 1997 [1897]. “The Path of the Law.” *Harvard Law Review* 110 (5): 991-1009. Perhaps most tellingly, just as Austin locates within universal human practices that promote the public welfare under the principle of utility the revealed presence of divine command, Holmes concludes that “the remoter and more general aspects of the law are those which give it universal interest. It is through them that you [...] connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law” (Holmes 1997 [1897]: 1009).

<sup>7</sup> Note that Austin’s work, while praised by the likes of Bentham and John Stuart Mill, was not warmly received at the time that Austin was lecturing at the University College, London. Its influence grew largely following his death.

British treatment of the American colonies. How, exactly, would Austin adjudicate this conflict? If the conflict is to be settled in favor of the positive law, how can this be reconciled with the implication that the principle of utility seems to be favored by God, who is the ultimate sovereign? And if the conflict is to be settled in favor of the natural law, how can Austin reconcile this occurrence with his predominantly Hobbesian sensitivities? Austin seems aware of the contradiction, suggesting that in such cases the principle of utility may be relegated to the position of constituting an “intelligible test, and a likelihood of a just solution” (pg. 58). Yet he dismisses the significance of this eventuality, positing that such “anomalies, after all, are comparatively few. In the great majority of cases, the general happiness requires that rules shall be observed” (pg. 58). But this dismissal surfaces yet another contradiction, derived from Austin’s rather low opinion of the “dull taste of the stupid and infuriate majority”:<sup>8</sup> If the public, with its “muddled brains,” cannot be trusted to possess much common sense, and if it is in their “mental imbecility” that “governments or demagogues can find the means of mischief” (pg. 57) – what confidence can Austin have that the positive laws of the state would not frequently violate the principle of utility and the divine law that its application would reveal? In other words, although Austin incorporates both the divine natural law and the state’s positive laws within his command theory of law, he fails to persuasively address the prospect of their conflict, or to consider the consequences, both empirical and for the validity of his own theory, that would result from applying the principle of utility to adjudicate the conflict.

Second, the hierarchical structure of a command theory of law seems unable to persuasively accommodate Montesquieuan systems characterized by separation of powers, revealing the context-specificity of a theory that is instead extolled as possessing general applicability. By this critique, I mean that in a balanced constitutional structure, where there is no apex of sovereign authority and the the Weberian monopoly over the legitimate use of force is either disaggregated or subjected to horizontal check by cognate branches, it would appear that many laws may not strictly distill to general commands backed by coercion. Take, for example, the US Supreme Court striking down a federal statute passed by Congress. Here, the subject of the Court’s ‘command’, as it were, is the legislature, which stands alongside the judiciary not as a subordinate but as a constitutional equal. Further, as

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<sup>8</sup> One may even venture to ask, as an aside, how someone capable of shedding so much venomous contempt for the common man would nonetheless extoll promoting the general welfare as the cornerstone of his theory.

Hamilton perceptively noted, the Supreme Court in such a case would possess “neither force nor will, but merely judgment”<sup>9</sup> – and hence by Austin’s command theory its proclamation would not constitute law.<sup>10</sup> One may come to Austin’s defense by positing that he could not conceive of such an eventuality because he defines the judicial power as delegated by the legislature, but this only serves to underscore the context-specificity of his command theory to a constitutional structure that concentrates sovereign authority – as in the British system of Parliamentary sovereignty. One may then object that the Supreme Court’s ability to strike down congressional statutes constitutes a negative power – a type of “permissive law” that Austin explicitly highlights as an exception to his command theory. But it could be retorted that there exist several Supreme Courts – India’s being an obvious example – that possess the power to establish commissions and compel the legislature into positive action. Of course, there is something ahistorical and somewhat unfair about assessing Austin’s theory by the standards of modern constitutional practice. Yet the point still stands: despite the general logic employed, and the supposedly divinely favored universal principles solicited (namely the principle of utility) by Austin in constructing his theory, both he and his intellectual offspring remain prisoners of their times and place.

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<sup>9</sup> Hamilton, Alexander. 1961 [1788]. *Federalist No. 78*. In Rossiter (ed.), *The Federalist Papers*. New York, NY: The New American Library.

<sup>10</sup> Unless it is perhaps woven into the Roman legal conception of an imperfect law.