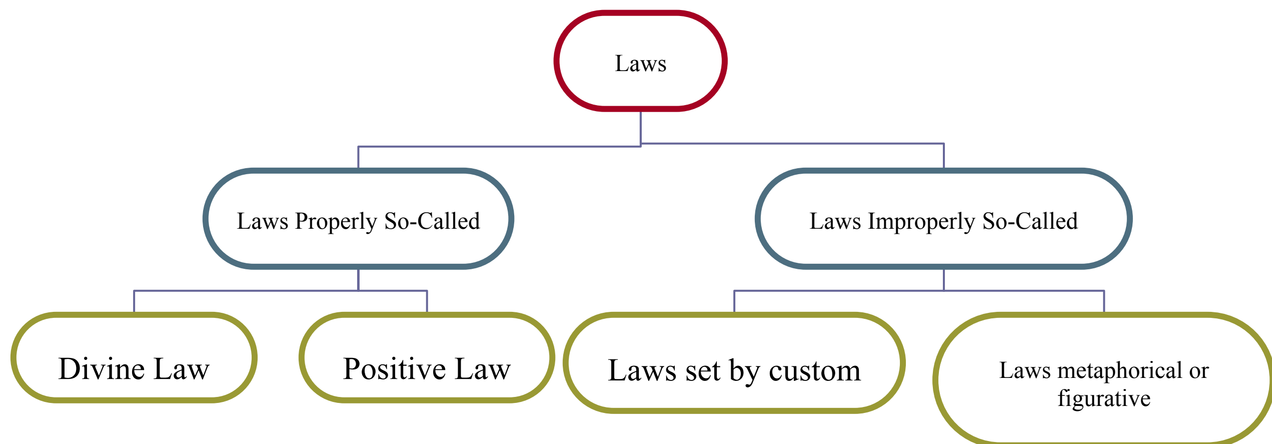
Don Hubin

HANDOUT ON JOHN AUSTIN'S: *THE PROVINCE OF JURISPRUDENCE DETERMINED*

I. Austin's Conception of the Province of Jurisprudence

A. Jurisprudence is concerned with the study of positive law (positive law is called 'positive' because it is posited—or laid down—by one person or group of persons to another; it does not exist expect as it is so posited.)

B. Positive Law is related to other things called 'law' in the following manner:



C. Study Questions

1. What sorts of "laws" does Austin have in mind as "laws metaphorical and figurative"?
2. Why are those things Austin considers "Laws improperly so-called" not properly called laws?
3. What distinguishes positive law from divine law?

II. The Structure of Austin's Analysis of Legal Concepts

A. Positive Law (in general)

1. The elements of the analysis:

a) Command $=_{df}$ 'A wish conceived by one, and expressed or intimated to another, with an evil to be inflicted and incurred in case the wish be disregarded."

b) Political Superior $=_{df}$ (s) he who has the power of affection others (political inferiors) with evil or pain and forcing them, through fear of that evil, to fashion their conduct to his/her wishes.

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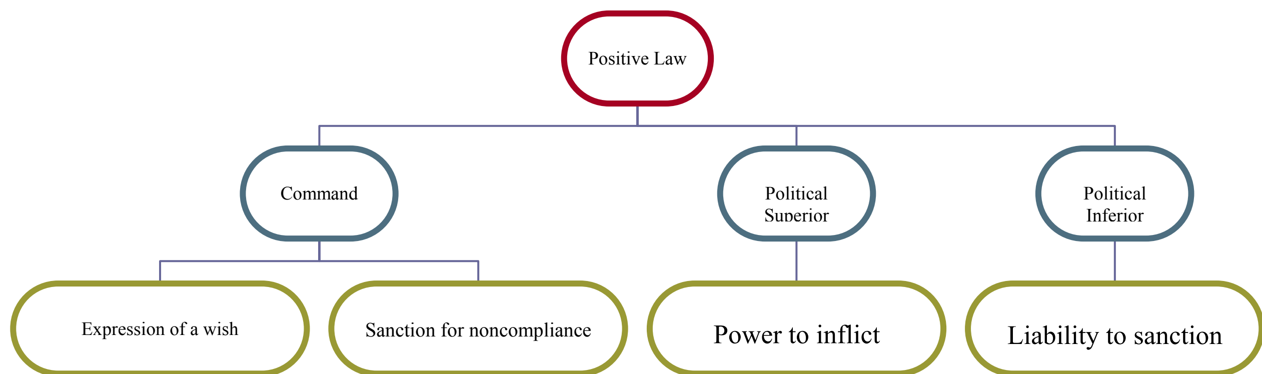
c) Political inferior $=_{df}$ (s) he who is liable to the evil inflicted by another for non-compliance with that person's wishes.

2. The analysis:

a) positive law $=_{df}$ A command from a political superior to a political inferior.

3. The Structure of the Analysis:



4. Comments on the Analysis:

a) The attempt is to analyze the complex legal notion of positive law into simpler non legal notions like those at the bottom of the above chart.

B. Legal Obligation

1. The analysis:

a) legal obligation $=_{df}$ The liability to an evil for failure to comply with the expressed wishes of the a political superior.

2. Comments on the Analysis:

a) In effect, to lie under a legal obligation is simply to be a political inferior (in a given situation) who has been commanded to do something by a political superior.

C. State Law

1. The analysis of positive law and legal obligation applies to any legal system. This includes church law, the laws of clubs, etc. Though all of this is properly within the purview of jurisprudence, legal philosophers have been interested primarily, perhaps without warrant, in the legal systems of political states. For this reason, Austin addresses himself to the analysis of the state law.

2. The elements of the analysis:

a) Command $=_{df}$ (see definition on preceding page)

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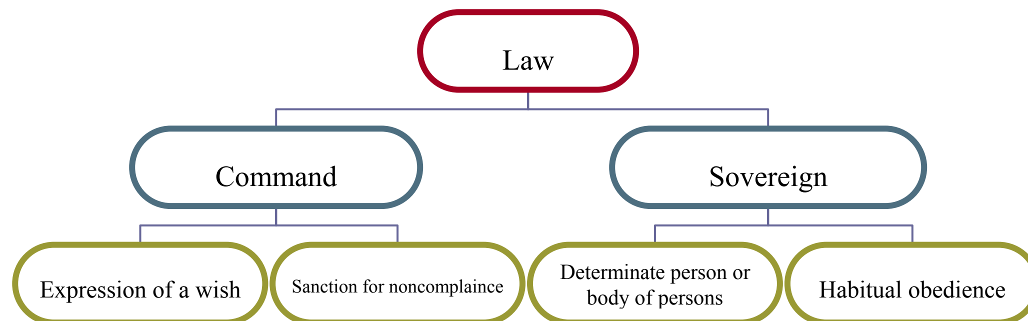
b) Sovereign $=_{df}$ That determinate person or body of persons who is habitually obeyed by the bulk of a given society and does not habitually obey anyone else.

3. The Analysis:

a) State Law $=_{df}$ The commands of the sovereign.

4. The Structure of the Analysis:



5. Comments on the Analysis:

a) As with the other legal concepts Austin discusses, the attempt is to reduce them to simpler non-legal notions.

b) Austin is forced to offer a de facto (factual/nonlegal) definition of "sovereign" although it is probably better understood as a legally defined political role.

D. Study questions:

1. What is meant by describing Austin's approach to analytic jurisprudence as reductive?

2. Why is Austin required to give de facto analyses of the concepts of political superior, political inferior, and sovereign?

3. In analyzing legal obligation, what does Austin mean by "liability to an evil"?

III. Criticisms of Austin's analysis of legal Concepts

A. *Positive Law:* Austin's analysis of positive law is subject to various criticisms. Resting, as it does, on his analysis of commands, it encounters the various problems we have discussed for the analysis. Furthermore, criticisms analogous to those raised to his analysis of sovereignty can be made of his de facto analysis of political superior and political inferior. Rather than discuss these points here, I will discuss them and their analogues later in considering Austin's analysis of state law.

B. Legal Obligation

1. *Hart's Criticism:* Though Austin's analysis has the virtue of clearly distinguishing between being legally obligated and being morally obligated (as any positivist would), he makes this distinction by confusing being legally obligated with being obliged. (Hart, The Concept of Law, pp. 80-1)

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a) *Response:* Hart's criticism is question-begging. Austin is well aware that his conception of legal obligation is just that of being obliged. Hart's point constitutes a criticism only if we assume that there is a distinction between being obliged and being legally obligated. According to Austin there is none.

2. *Kelsen's Criticism:* A person's being likely to experience a penalty for noncompliance is neither a necessary nor a sufficient condition for that person to have a legal obligation. It is not a necessary condition because even the person who commits the perfect crime (has no chance of being caught) has violated a legal obligation in committing the crime. It is not a sufficient condition because there may be great likelihood of incurring a penalty within a legal system when there is no legal obligation to refrain from the action in question. (For example, it may be the judges are consistently misinterpreting the law.)

C. State Law

1. In criticizing Austin's analysis of state law we will begin with the analysis he offers of commands and sovereignty. Since state law is analyzed in terms of commands and sovereignty, criticisms of his analysis of these terms will (typically) constitute criticisms of his analysis of state law.

2. Command

a) Not all commands are expressions of desires. (That is to say, Austin's analysis is too narrow or, equivalently, being an expression of a desire is not a necessary condition for being a command.)

(1) *Example #1:* A military drill instructor may command a new recruit to do one hundred pushups with no desire that the person succeed, but rather, hoping that he will fail so that the drill instructor can make the point that the recruits are not in good shape.

(2) *Example #2:* Austin says that laws are commands. If he is correct in that, then it is implausible that all commands are expressions of some person's desires. After all, with regard to much legislation in complex legal systems, legislators don't even understand, let alone, desire the legislation they approve.

3. Sovereignty

a) The notion of habitual obedience is misleading and unclear.

(1) It is misleading because it suggests that the general compliance must be an unreflective tendency.

(2) It is unclear because while it is clear that obeying a person involves more than merely action in accordance with their wishes (this could result by coincidence or for some other reason), it is not clear exactly what more is required. Austin should have offered an analysis of habitual obedience.

b) *Existence of Sovereign:* On Austin's analysis, it is not clear that any complex legal system has a sovereign. It is certainly difficult to find such a person or body

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of persons in our own legal system. This is a problem for Austin because if there is no sovereign in our society, he is committed to saying, in obvious contrast with reality, that we have no legal system.

c) *Identity of Sovereign:* We can imagine societies in which Austin's analysis of Sovereignty would lead us to pick out the wrong person or body as holding legal sovereignty.

(1) *Example:* Imagine that the monarch of an absolute monarchy were in the habit of obeying his/her lover and the lover obeyed no one. On Austin's analysis, the lover is the sovereign. (He can avoid this by saying that the bulk of the society does not habitually obey the monarch's lover—even indirectly—but then he must admit that the society has no sovereign.)

4. The analysis of state law in terms of the commands of the sovereign is incorrect because not all commands of the sovereign are state law and not all state laws are commands of the sovereign. (*I.e.*, the analysis is both too broad and too narrow; being commanded by the sovereign is neither a necessary nor a sufficient condition for being state law.)

a) Not all commands of the sovereign are state law.

(1) *Example:* If the sovereign of a state goes home from a hard day at the throne commanding and sanctioning and commands his/her spouse to take out the garbage each night from now on, s/he has not thereby enacted state law.

(2) Austin could avoid this objection if he required that laws be addressed to a general audience rather than to specific persons (as Blackstone does). But Austin specifically denies this.

(3) Austin could also avoid this objection if he made a distinction between the sovereign acting in his/her official capacity and his/her acting in an unofficial capacity. This option is not available to him since he would then have to give a legal definition of sovereignty. He cannot do this because he has defined law in terms of sovereignty—to define sovereignty in terms of law would, then, be circular.

b) Not all state laws are commands of the sovereign. (Hart, C of L, pp. 26-76)

(1) To view all state laws as the commands of the sovereign overlooks the variety of law—variety in terms of content, mode of origin, and range of application.

(a) *Variety of Content:* Laws granting legal powers are not easily understood as commands in Austin's sense. (Hart, Cof L, pp. 27-41) It is difficult to see what desire is being expressed and what the sanction is.

(i) *Nullity as a sanction* (Hart, C of L, pp. 33-5): Hart says that nullity of a contract or some other legal power conferred by law is not to be seen as a sanction for two reasons:

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(a) Nullity may not be an evil to someone who has not fulfilled the requirements for legal validity. (Hart, C of L, pp. 33)

(i) This is a specious criticism: A person may not see imprisonment as an evil under certain conditions. Clearly a sanction need only be something typically seen as an evil or as a deprivation of a good. Nullity probably is such.

(b) Nullity is logically connected to violation of power conferring law but sanctions are only contingently connected to violations of laws proscribing behavior.

(i) Austin could avoid this criticism by denying that a sanction needs to be connected to violations contingently or by claiming that the sanction is not nullity but the absence or judicial backing. Since judges make mistakes this would be only contingently tied to violations of power conferring laws.

(b) *Variety of Mode of Origin:* Legal rules originating from the decisions of judges and from custom are not easily seen as commands of the sovereign. (Hart, C of L, pp. 73-8)

(i) Austin responds that judicial law is tacitly commanded by the sovereign and customary law is not law until enforced by judges—at which time it is tacitly commanded by the sovereign.

(a) This notion of a tacit command is a difficult one. Often the sovereign would not know what judges have decided in particular cases. It would have been better had Austin responded by claiming that judicial law is a derivative command of the sovereign on the grounds that the sovereign delegates some of his sovereign power to the judge.

(c) *Variety of Range of Application:* Understanding laws as commands of the sovereign makes it difficult to understand how laws can apply to the sovereign him/herself. (Hart, C of L, pp. 41-3)

(i) It is not entirely clear that it makes sense to command yourself in Austin's sense. (You would have to threaten yourself with a sanction.) Furthermore, it is expressly ruled out by his definition and discussion of commands.

(ii) Since state law is a species of positive law, the sovereign must be the political superior (in Austin's sense of the subjects). But is the sovereign is subject to the law then s/he must be his/her own political superior. This seems to violate the logic of "superior".

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(2) If all state law is viewed as commands of the sovereign then the continuity and persistence of legal systems cannot be accounted for. (Hart, C of L, pp. 49-64)

(a) *Continuity of Legal Systems:* Austin's theory cannot explains why the first commands of a new sovereign are law. Being the first commands, there is as yet no habit of obedience to this person. (Hart, C of L, pp. 50-60)

(b) *Persistence of Legal Systems:* Austin's theory cannot explain why laws remain after the death of the sovereign who commanded them.

(i) If the notion of a tacit command makes sense, this objection can be handled by viewing the commands of dead sovereigns as being tacitly commanded by living sovereigns.

(ii) Even if tacit commands aren't employed, Austin could defend himself by viewing commands of dead sovereigns as on a par with customary law and claiming that the judge's enforcement constitutes a command derived from the sovereign.

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