Lecture Notes: Austin's Legal Positivism and Analytical Jurisprudence

- We're starting with a foundational question: what is a law?
  - How should we even begin answering such a question?
    - We seem to want something like a definition of law; if we have that, we should be able to determine for any given thing whether that thing is a law or not
    - We'll have identified necessary and sufficient conditions for a thing's being a law.
    - So, how should we go about settling on a definition of law?
    - There are two broad strategies we might adopt. I'll introduce them by way of example.
      - 1) What is a heart?
        - We can think in terms of function – what Aristotle would have called 'final cause'. What is the thing for?
        - The function a thing is for will require that it have certain structural characteristics…a block of lead, no matter how much we want it to be, could not be a heart.
        - Yet, there are no firm limits on how those characteristics are instantiated just so long as the thing, in the end, fulfills that function.
        - It doesn't matter what the heart is made out of or exactly how it gets the job done; all that matters is that it fulfills the function.
        - Whatever fulfills the function of law is a law.
      - 2) What is a dog?

- We can thing in terms of form or structure.
- Another critter that acted dog like wouldn't be a dog, even if it became your constant companion.
- A robotic dog isn't a dog.
- It matters that it's instantiated in flesh and blood, that it has a certain evolutionary history deeply tied up with human beings, that it has fur and is quadrupedal and so on.
- Not all dogs are pets or would be good pets…
- Whatever has the structure or form of law is law. Not everything that has this structure necessarily serves the same function.
- Which of these paths to take is a contentious question, as we'll see as we progress through the first half of the semester.
    - It's not clear exactly how to decide which path to take or what will settle the question of which is best suited to give us a proper understanding of what law is. Much will hang on other commitments that the theorist has as well as on the aim of the theory that is presented.
    - Austin, though, is squarely in the second camp. His aim is to identify what structural features some thing has to have in order to count as a law… He does this by identifying law as a species of command and identifying what features something must have in order to be a command.

- Austin was the first writer to approach the theory of law analytically
  - Contrasted with approaches to law more grounded in history or sociology, or arguments about law that were secondary to more general moral and political theories
  - Analytical jurisprudence emphasizes the analysis of key concepts, including "law," "(legal) right," "(legal) duty," and "legal validity."
- Austin was the first systematic exponent of a view of law known as "legal positivism."
  - Theoretical work on law prior to Austin treated jurisprudence as though it were merely a branch of moral theory or political theory: asking how should the state govern? (and when were governments legitimate?), and under what circumstances did citizens have an obligation to obey the law?
  - Austin's was instead a *descriptive enterprise*: Austin specifically, and legal positivism generally, offered a quite different approach to law: as an object of "scientific" study (Austin 1879: pp. 1107–1108), dominated neither by prescription nor by moral evaluation.
  - **Legal positivism** asserts that it is both possible and valuable to have a morally neutral descriptive theory of law.
    - Legal positivism does not deny that moral and political criticism of legal systems is important, but insists that a descriptive or conceptual approach to law is valuable, both on its own terms and as a necessary prelude to criticism.
- Austin's is one of the first, and one of the most distinctive, theories that views law as being "imperium oriented"—viewing
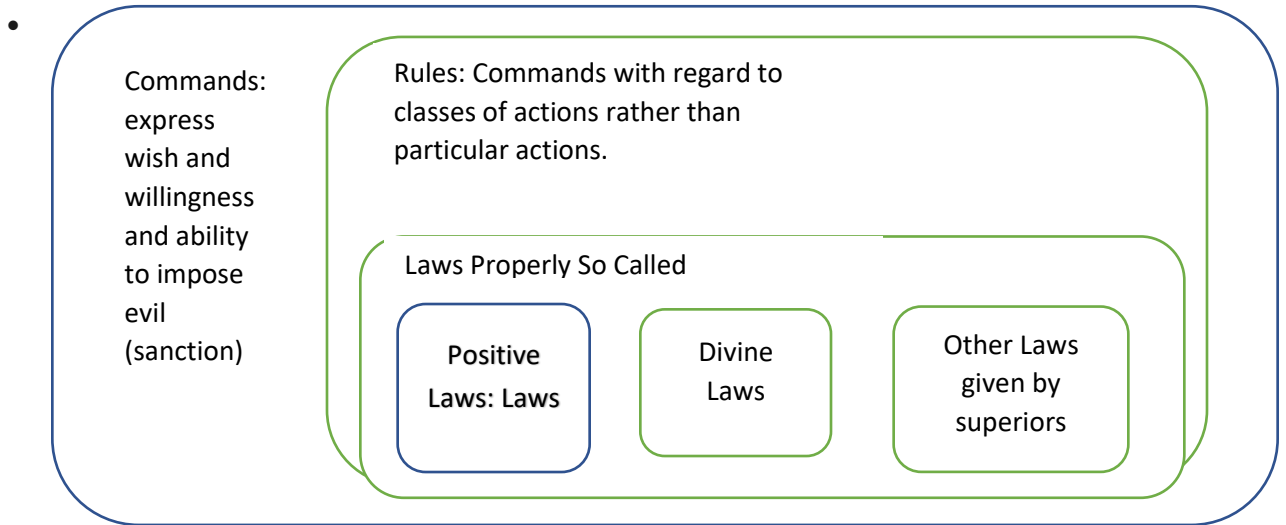
law as mostly the rules imposed from above from certain authorized (pedigreed) sources.

- o "top-down" theories of law, like that of Austin, better fit the more centralized governments (and the modern political theories about government) of modern times (Cotterrell 2003: pp. 21–77).

- To help us keep our bearings as we develop Austin's account, it might be useful to keep in mind three theses that the Legal Positivist is committed to:

  - **Conventionality Thesis**: That *legal validity* ultimately rests on social convention, i.e., that it is to be explained in terms of criteria that are authoritative by virtue of a social convention of taking them to be authoritative.
    - For Austin, this is the convention of deference to the sovereign.

  - **Social Fact Thesis**: *Legal validity* is a function of certain social facts, not to be derived from some moral principles or axioms.
    - Austin: a rule R is legally valid (that is, is a law) in a society S if and only if R is commanded by the sovereign in S and is backed up with the threat of a sanction.

  - **Separability Thesis**: Law and morality are conceptually distinct.
    - "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 1832: Lecture V, p. 157)"

- As to what is the core nature of law, Austin's answer is that
  - **Law is** "a rule laid down for the guidance of an intelligent being by an intelligent being having power over him."
  - laws ("properly so called") are commands of a sovereign.
  - He clarifies the concept of positive law (that is, man-made law) by analyzing 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, combined with a willingness and ability to impose "an evil" if that wish is not complied with.

- Rules are general commands (applying generally to a class)

- Rules are always given by a superior:

  - By a superior to an inferior

    - Superiority is might, the ability and willingness to sanction.

- Positive law consists of those commands laid down by a sovereign (or its agents), to be contrasted to other law-givers, like God's general commands, and the general commands of an employer to an employee.

- The "sovereign" is defined as a person (or determinate body 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.

- - - Conventionality Thesis: For Austin, this is the convention of deference to the sovereign.
- Positive law should also be contrasted with laws improperly so called
  - "laws by a close analogy" (which includes positive morality, laws of honor, international law (law of nations)], customary law, constitutional law) and
    - Positive morality does not count as law proper because the wish or desire is not properly "signified" and the people who provide the sanction have no formed intention on inflicting evil or pain upon those who may break or transgress the law.
  - "laws by remote analogy"
    - Figurative laws.
      - e.g., the laws of physics
      - laws that bind god to act
  - Austin also wanted to include within "the province of jurisprudence" certain "exceptions," items which did not fit his criteria but which 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 1832: Lecture I, p. 36).

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  Commands: express wish and willingness and ability to impose evil (sanction)

  Rules: Commands with regard to classes of actions rather than particular actions.

  Laws Properly So Called

  | Positive Laws: Laws | Divine Laws | Other Laws given by superiors |

- Return to the Social Fact Thesis:
  - Austin: a rule R is legally valid (that is, is a law) in a society S if and only if R is commanded by the sovereign in S and is backed up with the threat of a sanction.
- Return to the Separability Thesis:
  - Discussion of Blackstone on P. 26.
    - "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.
  - On first interpretation: all human law *ought* to conform to divine laws.
    - 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 in our interest to choose

the smaller and more uncertain evil, in preference the the greater and surer.

- o On second interpretation: that no human law which conflicts with the divine law is obligatory or binding.
  - STARK NONSENSE – pernicious laws are enforced as laws by judicial tribunals.
    - Suppose a beneficial act is prohibited by the sovereign. If I commit this act, I'll be tried and condemned. If I object to the sentence that it is contrary to God's law "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."
    - "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."
- Criticisms:
  - o Command model:
    - As regards Austin's "command" model, it 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 legal rules to one type. For example, rules that empower people to make wills and contracts perhaps *can* be re-characterized 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-characterization misses the basic purpose of those sorts of laws—they are arguably about granting power and autonomy, not punishing wrongdoing.

- o Sovereign:
  - First, in many societies, it is hard to identify a "sovereign" in Austin's sense of the word (a difficulty Austin himself experienced, when he was forced to describe the British "sovereign" awkwardly as the combination of the King, the House of Lords, and all the electors of the House of Commons). Additionally, a focus on a "sovereign" 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.
- o Rules of Terror:
  - A different criticism of Austin's command theory 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 (or at least as reasons for action) by their own citizens.
- o Fuller
  - Finally, one might note that the constitutive rules that determine who the legal officials are and what procedures must be followed in creating new legal rules, "are not commands habitually obeyed, nor can

they be expressed as habits of obedience to persons"
(Hart 1958: p. 603).