

12-1960

## Austin's Theory of the Separation of Law and Morals

Samuel E. Stumpf

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vlr>



Part of the [Natural Law Commons](#), and the [Religion Law Commons](#)

---

### Recommended Citation

Samuel E. Stumpf, Austin's Theory of the Separation of Law and Morals, 14 *Vanderbilt Law Review* 117 (1960)

Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol14/iss1/6>

This Article is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Law Review by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact [mark.j.williams@vanderbilt.edu](mailto:mark.j.williams@vanderbilt.edu).

# AUSTIN'S THEORY OF THE SEPARATION OF LAW AND MORALS

SAMUEL ENOCH STUMPF\*

The lingering influence of the natural law theory in England brought forth a powerful new philosophy of law. The chief features of this new theory were developed by Hobbes and Bentham and found their most compelling formulation in the works of the "analytical" jurist, John Austin. What concerned these men most was how to deal with the existence of morally bad laws. Sir William Blackstone had said in his *Commentaries* that the laws of God are superior in obligation to all other laws; that no human laws should be allowed to contradict them; that human laws are of no validity if they contradict God's laws and that all valid laws derive their force from the Divine original.<sup>1</sup> When Austin confronted these ideas, he immediately focused upon the central issue in legal theory, for he remarked that if these ideas of Blackstone's have any meaning at all it must 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 . . ."<sup>2</sup> The problem, as Austin saw it, was to determine how the authority of a legal order is achieved. Where, in other words, do laws derive their character as law?

What impressed Austin was the fact that there are many rules for human behaviour which are morally desirable but which are not laws. Similarly, there are many laws which violate moral standards but are nevertheless laws. Unlike the natural law school, for which he had only contempt, Austin distinguished two aspects of the inquiry into the nature of law. "The existence of law," he said, "is one thing; its merit or demerit is another. Whether it be or be not is one inquiry; whether it be or be not conformable to an assumed standard, is a different inquiry. 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."<sup>3</sup> To separate the inquiry about what laws exist from the inquiry about what laws are good or bad was Austin's great achievement. But by this separation he also brought about the theoretical separation of law and morals. Whereas Blackstone argued that a rule derived its character as law from its conformity with God's law, Austin developed the point that

---

\*Professor and Chairman, Dept. of Philosophy, Vanderbilt University.

1. 1 BLACKSTONE, *COMMENTARIES* \*42.

2. AUSTIN, *PROVINCE OF JURISPRUDENCE DETERMINED* 185 (Library of Ideas ed. 1954) [hereinafter cited as *PROVINCE*].

3. *PROVINCE* 179.

a rule's conformity with morals was irrelevant in determining whether that rule is law. The "bad" law is as much a law as the "good" law, wherefore goodness or badness is not the decisive element in the authority of a law or of the legal order. Austin thought that by this distinction between what law is and what it ought to be he could clarify the meaning of law which had been obscured by the advocates of natural law who, like Blackstone, had injected the notion of morality as a necessary element in the definition of law. This distinction between law and morals has since Austin's time had a powerful influence throughout the juristic world, and John Chipman Gray has described Austin's great contribution by writing that:

The great gain in its fundamental conceptions which Jurisprudence made during the last century was the recognition of the truth that the Law of a State . . . is not an ideal, but something which actually exists. It is not that which is in accordance with religion, or nature, or morality; it is not that which ought to be, but that which is. To fix this definitely in the Jurisprudence of the Common Law, is the feat that Austin accomplished.<sup>4</sup>

But equally since Austin's time men have been uneasy about this separation of law and morals. There is no doubt that certain legal rules have no moral connotation, as for example, the rule that automobiles should be driven on the right or the left. There are rules, too, that are not at all moral in the sense of being intrinsically moral. That a will should have two or three witnesses can hardly be considered the requirements of God, nature or morality. Similarly, there are rules of law which raise for man a hypothetical question instead of placing him under the pressure of a categorical imperative. Thus, the law of contracts holds that *if* you want a binding contract, you must fulfill certain requirements, or *if* you want to give someone the legal power to act on your behalf, as for example when a broker buys and sells securities for you, these legal arrangements have specific requirements and the law makes specific imperatives; but these imperatives are hypothetical, for a person may very well choose not to enter a contract or may decide not to engage a broker. In this significant sense it is clear that the law governs a man's behaviour only if he chooses to enter these particular spheres of behaviour. There is nothing about these modes of behaviour which any system or morals would include among those things which all men, in order to be men, must adhere to. It is analogous to the case of baseball; *if* one decides to play this game, then he immediately submits himself to the rules of the game, but there is nothing in the moral code of mankind that requires that all people should play

---

4. GRAY, *THE NATURE AND SOURCES OF THE LAW* 94 (2d ed. 1927).

baseball. Because the law contains so many rules, such as traffic laws, which regulate a person's conduct at points where morality is unconcerned, and because other laws raise only hypothetical obligations, pending a person's choice to come under the law's control, positivists have held that law is quite different from the rules of morality.

But not all the rules of law are of this hypothetical nature. The most characteristic thing about laws is that they positively command certain kinds of behaviour, and in these cases the content of the law is frequently identical with a moral rule. The prohibition against the use of child labor is surely an expression of a moral sentiment. Even if the reasons which are used by the moralist for prohibiting child labor are different from the reasons men use for passing a law against that practice, in both cases the reasoning is based upon moral convictions. If, that is, the abuse of children is denounced by the moralist because it represents a tragic exploitation of a defenseless minor and a ruthless denial of the rights of the child to a normal childhood, on the one hand, while the law is justified by the legislator, on the other hand, on the pragmatic grounds that the prohibition will produce healthier adults and a stronger society, these are, nevertheless, *both* moral arguments. The fact that the law in its very inception becomes freighted with moral elements is what causes skepticism in many quarters about the positivistic doctrine of the separation of morals from the law.

Austin did not deny that moral influences were at work in the creation of law, but he allowed nowhere in his *theory* any place for this moral element when defining the nature of law. In order to maintain the sharp distinction between law and morality, he defined law in its most abstract and severe terms as a command of the sovereign. It was Austin's reduction of law to a command which has ever since his time aggravated the debate over the nature of law. This is a difficult debate because whichever way we choose to think of the relation between law and morals we come upon undesirable conclusions. If we identify law with morality, then whatever is commanded by the state would be obeyed not only because it is commanded but also because the command prescribes morally desirable conduct. If we make such a close identification between law and morals, however, we run into the danger of losing the basis for a moral criticism of laws since there would be a confusion between one's moral and legal obligations. An iniquitous law could not on principle be criticized because it would already be identified with morality. The alternative approach is to say that law and morals represent two separate kinds of rules for behaviour and that they have no necessary relation to each other. This is a convincing view, particularly when it is used by those who argue that only by making

this distinction can we preserve the possibility of the moral criticism of law. But this view leaves unsolved the problem of the obligatoriness in law; the positivist view implies that the only element at work in determining our duty to the law is the fact of the state's command and the power the state is able to mobilize to support its command. It really argues for a complete separation of law and morals and the reduction of law to the force of the state. According to this view, the concept of law is formulated without any reference to the law's moral aspects.

The bald identification of law and force in the positivist theory calls for a careful analysis of the argument by which this identification is reached. Conversely, if positivism argues for the separation of law and morals, it is necessary to examine the argument by which this separation is urged. The reconception of the meaning of law which the positivist view leads to is so radical that it is necessary not only to try to come to terms with this point of view but even before that to determine whether in fact it is possible, for the positivists themselves, to achieve what they announce they intend to do. Has Austin really developed a consistent argument in which he demonstrates the separation of law and morals, and is Austin guilty of all that his critics say about his treatment of law and morals? The full anatomy of Austin's thought can be most conveniently unravelled by considering how he treated the problems of the "source," the "validity" and the "ends" of law.

#### POSITIVISM AND THE SOURCE OF LAW

The problem of the source of law dominates the positivist theory because its definition of law is essentially a doctrine of the source of law. When Austin defines law as the command of the sovereign, he is saying that only those rules are laws which emanate from the sovereign. Thus the notion of law is identified with the notion of command. In order to differentiate various possible kinds of commands, Austin specifies that only those commands are law which have their source in the will of the sovereign. Moreover, law is defined as those commands of the sovereign which are based upon a sanction, where the sanction is defined as the threat of evil which the sovereign can mete out upon those who disobey the command. Practically the whole of the Austinian legal theory is found in these three concepts of *sovereign*, *command* and *sanction*, and these terms are defined in terms of each other; they are variations of each other.

The picture one gets from this abstract and severe description of law is one that no positivist really intends to convey, but which Austin's theory certainly suggests. It appears that the sovereign is a

morally indifferent entity, barking out commands after the manner of an animal trainer, directing these commands at persons who are trained to respond the way an animal responds to his master's voice, and who respond only because, like the animals, they know that certain kinds of behaviour bring about painful consequences. This is the interpretation of legal positivism which horrifies the casual observer for it seems to provide the foundation for the most arbitrary kind of ruler. As it stands, the conception of law based upon sovereign, command and sanction has indeed achieved the desired theoretical result, namely, the separation of law and morals: there is the sovereign, who is the undisputed ruler; there is his command which orders man's conduct; and there is the threat of punishment or some form of pain if a person does not obey. Now it is only if this severe statement is left unembellished that there is any successful separation of law and morals. When Austin does elaborate his notion of the source of law, the relation of law and morals turns out to be a rather close one.

There are various ways in which the notion of the source of law can be considered, but Austin takes the view that there is only one source of law: the command of the sovereign. No rule has the quality of law except the rule commanded by the sovereign. No law can emanate from any source other than the sovereign, for by definition only the sovereign's commands are law, and the rules he commands are laws *only* because he commands them and for no other reason. Here again, the breach between law and morals appears to be absolute, for positivism allows no other consideration to enter the definition of law than the fact of command. While Austin can differentiate, as we shall see, between what *others* confuse as other sources of law besides the sovereign, he maintains that law does not exist in any fashion as law prior to the sovereign's command; if there is law anywhere, it is the product of that command.

If all that positivism wanted to achieve in this account of the source of law was to specify how the word law is to be used there would be no cause for concern. In that case we would simply agree that we would reserve the word law to apply to the commands of the sovereign. There would be no difficulty in assigning the source of law, for obviously law would emanate only from the sovereign if we have already agreed that only such commands are law. But men raise the question about the source of law precisely because this arbitrary restriction of the use of the term law is not at all satisfactory when we are dealing with human beings. For the law, understood even as simply a command of the state, also implies that the contents of these commands are binding upon those to whom they are addressed. Laws prescribe how men shall act. The notion of law is incompre-

hensible when law is viewed solely as a command; it is always a command directing human behaviour. A theory of law which does not suggest that legal rules concern the behaviour of men is certainly an irrelevant and useless if not dangerous theory. It is precisely because the commands of the law involve the life of man in its most sensitive and intensely human aspect, that men continue to raise the question about the source of law. Even though positivism obviously admits that the sovereign's commands are directed to human beings and that these commands direct human conduct, it leaves the phenomenon of command bare, for it requires of the sovereign nothing else than to be sovereign, to be in the habit of being obeyed, in short, of being the supreme power in society. By making the sovereign's command the sole source of law, positivism is led to its distinctive conclusion which is that whatever the sovereign commands is law, and, more important, that the sovereign is bound by no moral considerations in the process of commanding. Moreover, a subject is bound to obey the sovereign's command for no other reason than that he is commanded.

But the fact that men's lives are ordered by the law has led them to look for the source of the law elsewhere besides only in the commands of the state. Even though men are willing to admit that the word law should be limited to what the sovereign commands, they are not willing to admit out of hand that the sovereign can command whatever he wants. The British Parliament is said to be absolutely sovereign, that it can do anything "except change a man into a woman." But this is certainly an oversimplification of the nature of sovereignty in England as well as other places. Men have been willing to reserve the word law for the commands of the state, but they have never agreed that the commands of the state can be arbitrary. That is, men have never agreed that there should be a separation of law and morals. They have agreed to call bad laws law only because they know that in the process of lawmaking bad laws as well as good laws will be made, *i.e.*, that there will be mistakes. Though men have agreed to obey the laws the sovereign issues, they have invariably set down rules by which the sovereign will fashion or make his commands, his laws. Thus, in the very process of making laws, the sovereign is already bound by the conditions by which he became the sovereign. Men do not agree to form a society for their own destruction but for their preservation, and if we brought in no other consideration than survival, for the time being, we would be compelled to hold that the moral value of preservation of life is already a basic precondition of sovereign power, that in the beginning of lawmaking the relation of law and morals is present. To prove the close relation between law and morals it is not necessary to

prove that every single law is a moral law or in conformity with morality. What relates the phenomenon of law to morality is the law's concern over human behaviour; in the process of creating or fashioning a legal rule, the lawmaker must constantly ask himself what kind of behaviour is appropriate for man in society; that is, he asks how men ought to behave, and the legal rule is frequently made in the light of this "ought." For the sake of conceptual purity, we can divide the full phenomenon of law into two parts; one part has to do with the gestation of the contents of the rule—this process includes the vital moral, religious and general value-convictions a society or legislator wants to express through the medium of law; the second part is the mechanical process of formal promulgation by which these ideas are invested with the form of a statute. If one is to describe the full phenomenon of law, he must include *both* processes. Austin, however, attempted to formulate the concept of law solely in terms of the second aspect of the law-making process. That a meaningful concept of law cannot be achieved this way, that is, by separating technical promulgation from the concerns over the moral direction of human behaviour, was later evident even to Austin. The very concept of law is meaningless until the nature of man is brought into consideration.

#### *The Concept of Law and the Common Nature of Man*

The most important link between law and morals in Austin's system is found in his conception of man's nature. While Austin spoke of natural law as the "veriest foolishness," he nevertheless reiterated one of the most important tenets of that school, namely, that the concept of law rests upon what is "necessary" and what is "bottomed in the common nature of man."<sup>5</sup> With this concern over the nature of man, Austin identifies his system with the tradition of natural law in which the very starting point is the nature and condition of man. What Austin wishes to derive from his conception of man is the obvious point that one can make no sense out of the conception of law until he focuses upon certain features of human nature. Hobbes had painted a gloomy picture of the anarchy of the state of nature and saw in man's selfishness and predatory bent the need for law. Theologians had accounted for the law in the fact of human sin. For Hobbes as well as for the theologians, the breakdown of order through the willfulness of men, and the capacity for man to understand anarchy as less desirable than some form of order, are the pre-conditions for the emergence of law. What Austin says is that the very idea of law is incomprehensible until it is seen in connection

---

5. PROVINCE 373.

with the problem of human evil and is viewed as the correction of evil. He writes:

But the notion or idea of evil or imperfection is involved in the connected notions of law, duty, and sanction. For, seeing that every law imposes a restraint every law is an evil of itself: and, *unless it be the work of malignity, or proceed from consummate folly, it also supposes an evil which it is designed to prevent or remedy.* Law, like medicine, is a preventive or remedy of *evil*: and, if the world were free from evil, the notion and name would be unknown.<sup>6</sup>

It becomes at once clear that Austin is far from considering law in the arbitrary terms which his technical formulation would suggest. While his theory of command sounds as though law is something arbitrary, he said this would be the case only if it were "the work of malignity" or proceeded "from consummate folly." Law is at the very first seen as a corrective of evil and as such proceeds upon some conception of what is the opposite of evil, namely, good. And this "good" is to be seen as "bottomed in the common nature of man." Without this conception of good and evil the notion of law would be "unknown." There can be no more forceful identification of the ideas of law and morality than this, although Austin does provide even more illuminating illustrations of this connection.

Bentham, to whom Austin is most deeply indebted for his positivistic views of law, had the same contempt for natural law as Austin.<sup>7</sup> But in a revealing passage he, too, made a very close identification between the concerns of law and morals when he said that the function of law "is to increase the efficacy of private ethics, by giving strength and direction to the influence of moral sanction."<sup>8</sup> This passage comes from that part of Bentham's analysis of law where his specific concern was "to ascertain what sort of thing a law is . . . what it must contain in order to be *complete*."<sup>9</sup> While Bentham too would identify law as a command, he would not consider this the complete idea of law, for lurking in the back of his mind was a constant concern over the moral content of the law, where good is determined by the good of the community. To be sure, Bentham said that a law is whatever the community decides to punish as an offense, but he immediately adds that: "The good of the community cannot require . . . [the punishment of] any act . . . which is not . . . in some way or other detrimental. . . . [and] an act cannot be detrimental to a *state*, but by being detrimental to some one or more of the *individuals* that compose it."<sup>10</sup> Thus, unless an act is detri-

---

6. PROVINCE 85. (Emphasis added.)

7. BENTHAM, LIMITS OF JURISPRUDENCE DEFINED 84 *passim* (Everett ed. 1945).

8. 1 WORKS OF JEREMY BENTHAM 146 (Bowring ed. 1843).

9. *Id.* at 142.

10. *Id.* at 97.

mental there should be no law against it, "for in the case of such an act, all punishment is *groundless*."<sup>11</sup> It appears then that the notion of law is not only that law originates in the command of the sovereign, but that such commands must threaten punishment, and therefore should be commands only in those cases where there are grounds, that is, moral grounds, for such a command. What develops from this analysis is that though there seems to be a sharp distinction between what the law "is" and what it "ought to be," between what laws sovereigns actually make and laws they ought to make, Bentham urges that the very completeness of the idea of law requires the recognition that the commands of law emerge in the context of the moral concern of the legislator and society.

In this same vein, Austin identified the areas of law and morals through a very careful analysis of the kind of acts the law should consider as offenses. He said, "every act . . . that ought to be an object of positive law, ought to be an object of the positive morality. . . ."<sup>12</sup> Even more interesting is Austin's notion that every act that ought to be an object of morality "is an object of the law of God."<sup>13</sup> The object of the positive law is therefore the same as the object of the law of God, the only difference being that the law of God is concerned with a wider area of offenses than the positive law. At this point Austin speaks not so much of the intersection of law and morals but what is even more intimate, their concentric relation: "[T]he circle embraced by the law of God . . . is larger than the circle which can be embraced to advantage by positive law. Inasmuch as the two circles have one and the same centre, the whole of the region comprised by the latter is also comprised by the former. But the whole of the region comprised by the former is not comprised by the latter."<sup>14</sup> When Austin speaks of law as a command, he is assuming that in its formation the sovereign has in mind the moral nature of man, so that the very "is" of law contains some feature of moral "ought" the moment the law is born. It is not entirely correct to say that the concern over the "ought" is the concern only of the legislator and not the legal scientist. Austin explicitly says that "it was not a deviation from my subject to introduce the principle of utility."<sup>15</sup> This supreme principle of ethics, both in Bentham and in Austin, has an intrinsic relation to the very notion of what law is, for as Austin points out, "I . . . should often be unable to explain distinctly and precisely the scope and purport of a law, without having brought

---

11. *Ibid.*

12. PROVINCE n.163.

13. *Ibid.*

14. *Ibid.*

15. PROVINCE 59.

the principle of utility directly before you."<sup>16</sup> The idea of command, apart from some conception of how someone ought to behave is so abstract that it can hardly have any meaning by itself. Only as the act of articulating directions to action does command take on meaning, and such directions carry moral implications. For the moment it makes little difference whether the particular moral content of the law is acceptable or not, because what needs only to be said here is that both Bentham and Austin see an intimate relation between the ideas of morals and of law because they see the intimate relation between the moral nature of man and the moral concern of law.

The notion of a command cannot be understood apart from one other way in which law is "bottomed in the nature of man." For Austin emphasizes that law "in its literal meaning" is a rule laid down "for the guidance of an intelligent being by an intelligent being having power over him."<sup>17</sup> It must be observed that the political superior from whom a positive law flows is one who not only possesses power but one who has intelligence, and the person whose conduct is to be ordered is not simply an entity capable of receiving signals in the way animals do but has the capacity of intelligence. By intelligence Austin means the faculty of *reason*. Thus, the idea of law is intimately connected with the faculty of reason, both in its creation and in the object to which it is directed. Law can exist only where there are intelligences, for as Austin says, "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."<sup>18</sup> This suggests that one of the "necessary" aspects of law is its rational character and its inevitable connection with purposes, and especially human purposes. It cannot be assumed that when men deal with laws their reasoning is different from the way they reason over moral duties. Nor do we need to think that when their lives are ordered about by the laws men cease to reflect over the moral defensibility of the law. The law does not in every case have to be identical with or in conformity with the rules of morality in order to show the relation between the two. Austin showed that the law flows, in an important sense, from human reason which is also the source of morality. It is not simply that law and morality have the same source that is important here but, again, that they flow from the same kind of reasoning, frequently over the identical kinds of behaviour. Thus, while Austin wished always to say that a law is a law whether it is good or bad, he certainly did not contemplate

---

16. *Ibid.*

17. *Id.* at 10.

18. *Id.* at 12.

that law had no moral characteristics. And what we have tried to show is not simply that here and there one can find a moral element in the law but that the law is "bottomed" in the nature of man and is the extension of his moral nature, therefore reflecting both man's strengths and weaknesses.

#### *The Moral Basis of Sovereignty*

When we analyze Austin's notion of sovereignty, again we find a far more intimate relation between law and morals than positivists usually admit. The stark theory that there are no legal limitations to the power of the sovereign was stated in its sharpest modern form by Hobbes. His notion that "there could be no unjust law" was the logical outcome of his account of the source of law. When he wrote that "laws are the rules of just, and unjust; nothing being reputed unjust, that is not contrary to some law,"<sup>19</sup> he insisted that it was impossible for any statute to be unjust. The theoretical basis of this notion is that for Hobbes there are no moral principles which precede the law; the creation of law and of morality occur simultaneously. There is no perspective from which to criticize law, for there is no law of nature behind the positive law, only the law of preservation. There is in Hobbes' theory, moreover, a pessimistic view of man which is far less creative than the theological doctrine of sin, for it considers man so irretrievably selfish and predatory that he must be restrained by the absolute authority of the state. Hobbes' account of the lawlessness of the state of nature is the decisive element of his account of the source of law, for by lawlessness in this state he means not only the absence of positive law but the absence of man's awareness of an order of right. Thus, as Hobbes traces back the source of law to its origin, he arbitrarily stops with the fiction of the social contract as the starting point of all law.

Although Austin has written one of the most brilliant refutations of the social contract theory,<sup>20</sup> he nevertheless follows Hobbes by reiterating in his own argument that "the power of a sovereign is incapable of legal limitation."<sup>21</sup> He comes to this conclusion because of the way he has defined both positive law and the nature of the sovereign. Having said that the sovereign is the individual or group of individuals who are political superiors who are habitually obeyed by political inferiors, and having said that laws emanate only from a sovereign, he thought it followed that the sovereign cannot bind himself by his own laws. Because Austin thought chiefly in terms of English monarchy and aristocracy, he made the mistake of thinking

---

19. HOBBS, *LEVIATHAN* 173 (Blackwell ed. 1946).

20. PROVINCE 306 *passim*.

21. *Id.* at 245.

that in all governments the sovereigns are not bound by the laws they make. In America the rulers are bound by the laws they make and even more significant is the fact that the lawmakers are also bound by the fundamental law of the Constitution. Austin emphasized that there is no *legal* limitation to the sovereign's power. This is simply a play on words because it means that there are no *laws* when the sovereign *begins* being a sovereign. First there is a sovereign and then his commands become the law, so it may be theoretically correct that there are no legal limitations to the sovereign. But again, in constitutional government the constitution is the basic law and it limits the powers of the sovereign, so that in this case not even the verbal symmetry in Austin's argument will hold.

Austin's theory of the sovereign is not as bald as his original statement leads one to suppose. We get the picture of the sovereign without any *legal* limitation issuing commands and threatening evil pains and punishments. In the best criticism of Austin's theory, Sir Henry Maine writes that Austin's "theory of Sovereignty neglects the mode in which the result has been arrived at . . . . And thus it is that, so far as the restrictions contained in . . . [his] definition of Sovereignty . . . [is] concerned, the Queen and Parliament of our own country might direct all weakly children to be put to death . . . ."<sup>22</sup> Surely this is the first impression one gets from the short version of Austin's theory. But upon a closer look at his theory we find that the acts of the sovereign, though capable of no *legal* limitation,<sup>23</sup> are certainly hemmed in by *moral* limitations.<sup>24</sup> The way in which these moral limitations affect the sovereign comes out in Austin's careful analysis of the meaning of the phrase "the source of law."

There is a "loose" way and a "strict" way of defining the word *source*, and Austin's view of the sovereign's legal status depends upon this distinction. For the loose meaning of the source of law is that whatever influences the shaping of a law is a source of law. But in the strict sense there is only one source, namely the command of the sovereign. Again, in the loose sense one can refer to the *remote* causes of the law whereas in the strict sense we must look only to the *proximate* source of law. Behind the distinction between the loose and strict interpretation of the source of law lies the even more important distinction between the "cause" and the "source" of law. Austin's contention is that there has been a confusion between those influences which have "caused" a law to be formed and the actual "source" from which the law, as law, springs. This confusion, he feels,

---

22. MAINE, EARLY HISTORY OF INSTITUTIONS 360 (American ed. Henry Holt & Co. 1875).

23. PROVINCE 230-31, 245, 255-56.

24. *Id.* at 258-59.

is what complicates, or distorts, all discussions about the nature of the sovereign. For if law has its source in nature, or God, or custom, then it could rightly be said that the sovereign is under *legal* limitations, since there are laws "prior" to or "above" the sovereign. These rules which emanate from nature or custom are for Austin not laws in the strict sense of the term, they are only positive rules of morality. "God or nature," writes Austin, "is not a source of law in the strict sense. . . . God or nature is ranked among the sources of law, through the same confusion of the source of law with its remoter causes . . . . But . . . [law] is law, strictly so called, by the establishment it receives from the human sovereign. . . . God or nature is the remote cause of the law, but its source and proximate cause is the earthly sovereign, by whom it is *positum* or established."<sup>25</sup>

To say that the proximate source of law is the sovereign does not in any sense mean that on that account there is a separation of law and morals. It only means that the process by which moral convictions become transformed into law has been clearly exposed and analyzed. But, for the present, Austin's most important point is that the very way in which the sovereign is constituted already means that the sovereign works under moral limitations, or as Austin says in a significant passage:

The law of England, for example, cannot be understood without a knowledge of the constitution of Parliament, and of the various rules by which that sovereign body conducts the business of legislation: although it is manifest that much of the law which determines the constitution of Parliament, and many of the rules which Parliament follows in legislating, are either mere law imposed by the opinion of the community, or merely ethical maxims which the body spontaneously observes.<sup>26</sup>

While it is true therefore that the sovereign cannot be limited by "strictly legal" boundaries, his authority is nevertheless constituted upon a moral foundation. To say that the sovereign has no legal limitations is therefore a misleading notion, insinuating that the sovereign could do anything it wished. But even Austin saw the absurdity of that conclusion and felt it quite necessary to indicate

---

25. 2 AUSTIN, LECTURES ON JURISPRUDENCE 548 (Murray, 5th ed. 1885) [hereinafter cited as LECTURES]. "Taking the term 'source' in a loose signification, customs may be styled *sources* of laws. For the existence of a custom, with the general opinion in favour of it, is the cause or occasion, or is one of the causes or occasions, of that legal rule which is moulded or fashioned upon it. But taking the term 'source' in the same loose signification, the causes of the custom from which the law emerges are also a source or fountain of the law itself: and, generally, any cause of any law must be ranked with its sources or fountains. . . . Hence certain writers have ranked experience and reason, together with external circumstances wherein mankind are placed, amongst the sources of the laws whereby mankind are governed."

26. 2 *id.* at 746.

in detail how the Parliament works. He was concerned with the workings of the sovereign chiefly because it was in this activity that he centered all his theory about the law. The most decisive feature about the sovereign, for Austin himself, was not the fact that it was curbed by no *legal* limitations, but that in fact it was curbed by "moral" laws. This led Austin to say that without understanding these moral limitations upon the sovereign, one could not really understand what positive law is. The moral limitations upon the sovereign had the effect, too, of joining the moral and legal elements in the positive law, which means that instead of achieving a separation of law and morals, which positivism is reputed to do, Austin's analysis reveals just the opposite, namely, the conjunction of law and morals. Referring to these moral laws in the structure of constitutional law-making, he regrets that he has found them there because they upset the *logical* rigor of his system, but with admirable candor he writes, "though, in logical rigour, much of the so-called law which relates to the Sovereign, ought to be banished from the *Corpus Juris*, it ought to be inserted in the *Corpus Juris* for reasons of convenience which are paramount to logical symmetry. For though, in strictness, it belongs to positive morality or to ethics, a *knowledge of it is absolutely necessary in order to a knowledge of the positive law* with which the *Corpus Juris* is properly concerned."<sup>27</sup> Austin next indicates the indissoluble relation between law and morals when he says that "the case which I am now considering is one of the numerous cases wherein law and morality are so intimately and indissolubly allied, that, though they are of distinct natures and ought to be carefully distinguished it is necessary nevertheless to consider them in conjunction."<sup>28</sup> Thus he reiterates here in detail what he had expressed earlier when he spoke of "the compound of positive morality and positive law, which determines the character of the person, or . . . persons, in whom, for the time being, the sovereignty shall reside . . ."<sup>29</sup> The sovereign must not be looked upon, even in theory, as independent of the moral law, for the sovereign's activities transpire under the constant influence of the moral law wherefore there is a constant relation between law and morals.

There may be serious questions over whether anything can be gained by demonstrating that there is such an intimate connection between law and morals. Bentham wondered just what Blackstone had achieved by arguing that the natural law places limits upon what the positive law can control.<sup>30</sup> Bentham's objection was that if it is

---

27. 2 *id.* at 745-46.

28. *Ibid.*

29. PROVINCE 259.

30. 1 BLACKSTONE, COMMENTARIES \*38 *passim*.

held that there is a close connection between law and morals, the effect will be for people to identify their moral obligation with their legal duties.<sup>31</sup> And to say that the law already contains its moral justification is to stifle any serious criticism of the law. But everything depends upon which end of the argument we are considering. When law is considered at the point of its creation, the very idea of law requires that it bear some relation to moral standards. But after the law has been made, it is still necessary to consider whether it is morally justifiable. The pressure of moral criticism of law exists at both points. To argue for the relation of law and morals does not mean that morality must be or will be reduced to the commands of the law. But even such an effect is not totally undesirable, for it is one of the functions of law to urge those moral actions which men in their selfishness will not voluntarily undertake, or as Bentham put it, "to increase the efficacy of private ethics." What is gained by this analysis is a demonstration that the sovereign cannot separate the act of making law from a consideration of the requirements of morality.

#### *The Problem of the Validity of Law*

The positivist has a simple formula for legal validity, for he argues that whatever the sovereign commands is valid law. We have already seen in our analysis of Austin's theory of sovereignty that this simple formula is far more sophisticated than it appears at first. This is true also in the positivism of Hans Kelsen, for what at first appears to be a self-sufficient account of legal validity turns out to be a natural law-like grounding of the legal order. The key to Kelsen's system is the word "normativism."<sup>32</sup> To this word he gives a novel meaning which is not to be confused with moral norms. A norm is "an impersonal and anonymous 'command'."<sup>33</sup> All laws are norms. If what we call a law is not a norm then it is not a law. Whence does this norm come? Every norm derives from another norm. Kelsen is not concerned with the problem of the source of law which leads other jurists to discuss the role of custom, morality, nature and God as sources of law. For him there can be no entity different from or existing independently from the law as the source of law. "[T]he 'source' of law," he says, "is always itself law."<sup>34</sup> All laws are related to each other and are created in relation to each other. Here Kelsen is reiterating Austin's theory for he, too, is saying that there

---

31. BENTHAM, *THE PRINCIPLES OF MORALS AND LEGISLATION*, II (Blackwell ed. 1948).

32. See Kelsen, *The Pure Theory of Law*, 50 L. Q. REV. 474 (1934).

33. KELSEN, *GENERAL THEORY OF LAW AND STATE* (20th Century Legal Philosophy Series 1945) [hereinafter cited as *GENERAL THEORY*].

34. *Id.* at 132.

is only one true source of law in the juristic sense, namely, the sovereign, or a superior norm. The legal system is a hierarchy of norms whose regress can be traced back finally to the "basic norm," beyond which there is no other norm or law. The "basic norm" is ultimately the source of all laws; it is the starting point of the norm-creating process. The basic norm is a hypothetical assumption lying behind the first legislator, the assumption that he is legislating validly; the basic norm is the norm which authorizes the historically first legislator. The function of the basic norm is to confer law-creating power upon the first legislator and on all the other acts (of legislation) based upon the first act. In Kelsen's theory, everything depends upon this last statement; for every norm, *i.e.*, every law, is valid only insofar as it is based upon the basic norm, or, subsequently, upon some other norm which issued from the basic norm.

Kelsen likens the basic norm to the transcendental logical principles of cognition which are not empirical laws but merely the conditions of all experience. So, too, the basic norm is itself no positive rule because it has been made, but is simply presupposed as the condition of all positive legal norms. The final presupposition is not, for example, the first constitution, but the validity of that constitution. The final postulate is that at a given time in history there existed a condition which validated the first constitution—that condition, not itself an act or statute, is the basic norm. Thus from the basic norm there emerge types of law, for example, the civil and criminal law. The criminal law in turn produces a specific statute; and from that statute specific decisions are arrived at by the court affecting individuals. The sequence here is from norm to norm, from law to law. For the constitution, criminal law, statute and decision are each norms and constitute the hierarchy of norms. These positive laws become valid only on one assumption, namely, that there is a basic norm which establishes the supreme law-creating authority. But this does not mean that the basic norm itself can in any way be proved to be valid. "The validity of this basic norm is unproved and must remain so within the sphere of positive law itself."<sup>35</sup> Moreover, this does not mean that the system of laws is a closed logical system,<sup>36</sup> for the laws in this hierarchy are not deduced logically but are in conformity with the higher norms. Kelsen simply makes the point that just as one cannot know the empirical world from the transcendental logical principles but merely by means of them, so positive law cannot be derived in its content from the basic norm but can merely be understood by it. Fundamentally, this means that norms do not in any way correspond to Reality but derive their

---

35. *Id.* at 395.

36. Cf. STONE, *THE PROVINCE AND FUNCTION OF LAW* 141 (1950).

ultimate validity simply from proper enactment. Kelsen puts this central point in these words:

The norms of positive law are valid, that is, they ought to be obeyed, not because they are, like the laws of natural law, derived from nature, God, or reason, from a principle of the absolutely good, right or just, from an absolutely supreme value or fundamental norm which itself is clothed with the claim of absolute validity, but merely because they have been created in a certain way or made by a certain person. This implies no categorical statement as to the value of the method of the law-making or of the person functioning as the positive legal authority; this value is a hypothetical assumption.<sup>37</sup>

Also, this basic norm "is presupposed to be valid because without this presupposition no human act could be interpreted as a legal, especially as a norm-creating, act."<sup>38</sup>

This intricate argument for a "science of law" which attempts to separate law and morals turns out in the end to be neither science nor successful in separating law and morals. If anything, Kelsen's system greatly clarifies the relation between law and morals, for he makes it unmistakably clear just where the moral element enters the system of law. The two avenues through which morals pass into the law are through the basic norm and at the occasion on which each new norm is created. It is quite true, as Kelsen argues, that law proliferates within the structural framework of civil government, that laws proceed from laws. But he has made it clear that norms do not in fact, nor do they need to, proceed logically from one norm to the other. This means that at most the hierarchy of norms provides the mechanism or procedure by which the laws are created. But at each point in the hierarchy, the laws become imbued with morality as they are fashioned into statutes. "It is possible for the legal order," says Kelsen, "by obliging the law-creating organs to respect or apply certain moral norms or political principles or opinions of experts, to transform these norms, principles, or opinions, into legal norms and thus into true sources of law."<sup>39</sup> The validity of a law rests only upon its proper enactment; in this view positivism seems to say nothing about the law's content. But it is precisely because the basic norm does have the effect of directing the sovereign in its act of law-making to consider the requirements of morality that in the end the positivistic system takes on some of the characteristics of natural law theory. Austin modified his theory when he elaborated the context within which the sovereign formulated his command, a context which included particularly the dimension of moral im-

---

37. GENERAL THEORY 394.

38. *Id.* at 116.

39. *Id.* at 132.

peratives. Similarly, Kelsen's system takes on a different mood when he distinguishes between the validity of an ordinary legal norm and the validity of the basic norm. The validity of an ordinary norm rests solely on proper enactment and not upon the validity of the content of the norm. But with the basic norm the situation is just the opposite, for when he speaks of the validity of the basic norm he says it "is not valid because it has been created in a certain way, but its validity is assumed by virtue of its content. *It is valid, then, like a norm of natural law, apart from its merely hypothetical validity. The idea of a pure positive law, like that of natural law, has its limitation.*"<sup>40</sup> Neither Austin nor Kelsen succeed in producing a coherent account of the separation of law and morals for they both inject a moral element just where their system would have led us to believe that validity is totally independent of morality. One cannot therefore take Kelsen literally when he writes that "law has no moral connotations whatsoever."<sup>41</sup>

#### *Morality and the Judicial Process*

The impossibility of separating law and morals is frequently argued by referring to the judicial process.<sup>42</sup> The argument here is that the judges frequently make the law and when they do this they invariably inject their own or the society's moral standards into their decisions and thereby bring about a union between law and morals. We need to consider how the positivist meets this argument. Austin was aware that much law comes from the activity of the courts.<sup>43</sup> Not only was he aware of the practice of judicial legislation, he even urged judges to engage in it.<sup>44</sup> But what Austin and Kelsen do reject in this argument is that judicial activity represents a novel or unique source of law. For them, the fact that the courts engage in moral reasoning in arriving at their decision and therefore in their act of creating law does not mean that these courts are an entity independent of the sovereign. "Sovereignty," says Austin, "includes the judicial as well as the legislative power."<sup>45</sup> When the courts make law, this is the sovereign making law, for the courts are part of the sovereign and unless the supreme sovereign revokes the act of the subordinate sovereign, there is the "tacit" assumption that it is the sovereign itself which is legislating when the court makes a decision.<sup>46</sup> Judicial law-making is for Austin one of the recognized

---

40. *Id.* at 401. (Emphasis added.)

41. *Id.* at 5.

42. See, e.g., VINOGRADOFF, *COMMON SENSE IN LAW* 150 (2d ed. 1946).

43. 2 LECTURES 612.

44. PROVINCE 191.

45. 2 LECTURES 520.

46. 2 *id.* at 512.

ways in which law gets made. But what needs to be understood here is that this demonstrates not only the logical symmetry of his argument, where the supremacy of the sovereign as the only source of law is preserved; it also illustrates that it is in the constant attempt to implement the moral norms of a society that judges make the law, or at least that moral rules are constantly being transformed into legal rules. Austin is very explicit on this when he writes:

Now a merely *moral*, or merely customary rule, may take the quality of a *legal* rule in two ways:—it may be adopted by a sovereign or subordinate legislature, and turned into a law in the direct mode; or it may be taken as the ground of a judicial decision, which afterwards obtains as a precedent; and in this case it is converted into a law after the judicial fashion. In whichever of these ways it becomes a legal rule, the law into which it is turned emanates from the sovereign or . . . judge, who transmutes the moral or imperfect rule into a legal or perfect one.<sup>47</sup>

But Austin adds immediately, with respect to these moral rules, that "Those who maintain that it existed as a law before it was enforced by legal sanction, or that it was established as law *consensu utentium* confound law with positive morality."<sup>48</sup> And while he will admit that "courts of justice are a source of law, insofar as law consists of judicial decisions," he nevertheless places the courts into the direct line from the sovereign as "legislating in subordination to the sovereign" and that therefore the courts are only "reservoirs . . . fed from the source of all law, the supreme legislator, and again emitting the borrowed waters which they receive from that Fountain."<sup>49</sup> But surely behind this metaphorical diction there resides more than a conception of an arrangement of superior and subordinate sovereigns, for the quality of rule, whose content is fashioned for the direction of human conduct, comes out of the moral sentiment of the law-maker and not the abstract recesses of the sovereign. Moreover, if the law does not represent a self-contained or closed logical system, then it must follow that the judges are not tied to the specific implication of a prior statute or even of a precedent. Courts are always "distinguishing" new cases for the purpose of taking them out of the restrictive bounds of previous cases and precedents. When judges distinguish cases in this manner they are expressing their urge to achieve "justice" which might not be achieved by a mechanical application of a previous decision.

The central philosophical question raised by this activity of the judge is whether in distinguishing cases and interpreting statutes he

47. 2 *id.* at 536.

48. 2 *id.* at 537.

49. 2 *id.* at 510-11.



is creating new law based on moral considerations, independent of the supreme sovereign. Professor Hart has made the distinction between the *core* of a law and its *penumbra*, suggesting that it is indeed necessary for judges to interpret the meaning of statutes in those rare cases where an unexpected example comes before them.<sup>50</sup> Thus, a statute regulating the interstate traffic of "vehicles" may become obscure when the case involves an airplane. Did the legislators have in mind only automobiles, trucks, trailers and motorcycles? Or did they have in mind the maintenance of the safety of people against the danger of improperly operated vehicles, in which case the emphasis shifts from the limited list of vehicles to the more basic question of the danger to people from mechanically operated vehicles whatever their nature. But to put the problem in that form suggests that it is only in the penumbral situation that questions occur and only on these occasions that there is an extension of an otherwise clear core of law. To speak of a core of a law implies that once a law is made there is only the problem of applying it, that the core has a permanent life, and that all decisions based upon it must in some way be tightly tied by logic to it. If we were to look at decisions in this manner we would have to hold that every interpretation of a law is already contained in the law as it is. The most this would do is preserve the fiction that law is a command of the sovereign and this would be stretched to include the judicial interpretations of statutes. It would also mean that judges are concerned only with the law as it *is* and not as it *ought to be*. When judges have to deal with a penumbral situation, they are, it is held, dealing only with an exceptional situation. But do laws have such a core? Does the fourteenth amendment have a specific core? Is the problem of racial segregation part of the core or penumbra? Is the ruling of the Supreme Court that it is unlawful to segregate the races in schools part of the core or the penumbra? Is the interpretation of the fourteenth amendment to be tied rigorously to the intent of the framers of that amendment? Should the judges' opinion rest on an historical study of whether the framers had in mind the segregation of schools or not? Or, is it possible that the fourteenth amendment is the expression of the sovereign, in this case the people, that the law "ought to be" such as to conform to the moral dimension which that amendment expresses? There can hardly be any question that in the process of making a decision, judges must refer not only to the premises of the "core" of the law but to the circumstances of the particular case and to the general question

---

50. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 607 (1958); cf. Holmes' dissent in *Schlesinger v. Wisconsin*, 270 U.S. 230, 241 (1925): "[T]he law allows a penumbra to be embraced that goes beyond the outline of its object in order that the object may be secured."

of the justice of the decision. It is clear that the "slot machine" concept of the law is far too great an oversimplification of what law is. But are we, then, justified in saying that the activity by which judges seek to arrive at a decision and their consideration of what ought to be the purposes and aims of the law in terms of social policy are part of the law? To this question the positivists have always replied in the negative, for they have based their science of law on the description of the "is" and not the "ought to be."

But, again, in terms of the argument of positivism itself, the judicial concern over what a law is or ought to be and his concern over the justice of the decision is part of the phenomenon of the law. Moreover, since the positivist holds that the court is the sovereign then what the court says and does is the law. The meaning of the term law therefore includes what the judges do in formulating their "command," that is, their decision. It is not accidental that the judges constantly strive to achieve justice (what the law ought to be). The judge's engagement in weighing the requirements of justice and thereby going beyond the mechanical approach of the machine is an intrinsic part of what the law is. The fact that the judge engages in these activities is far more intimately related to what law is than that he writes his opinions with a pen or with a pencil, or that he walks to the court or drives in a car. All these activities are involved in the process of rendering a decision, but only the activity in which he is concerned with the right decision is, among these examples, truly part of the law. Again, this would have to follow from the view of sovereignty offered by Austin, for the law is the command of the sovereign directing the conduct of those in the habit of obeying. And just as we saw that Austin's primary legislator was not free to make laws in any arbitrary manner, that he was under moral limitations; so also the judge, still under the influence of that original moral constraint, is engaged in the activity of realizing the whole intent of the law—justice. This process is very subtle and is attended with many dangers. But the dangers suggested in this procedure indicate something about the nature of law which would otherwise be overlooked in the interests of having a neat theory. The danger is, of course, that this interpretation of the judicial function might open up the courts to the subjective whims of individual judges. But this danger has to be put over against the danger that the law will become irrelevant and that fictions will constantly have to be invented in order to give the semblance of continuity and certainty in the law. Certainty in law must collide with the quest for justice, and this collision ought to indicate that the nature of law is misconceived if it is treated as a static structure; for such a static form cannot reflect the subtle variations in which human beings confront

each other, nor does it recognize that human life is dynamic and cannot be contained in any partially conceived framework of behaviour. The judicial process is an intrinsic part of the law because it is the means by which the stabilities of the rules are applied to the dynamic behaviour of men, and this process operates under the aëgis of the quest for justice. In this sense, what a philosopher thinks the law ought to be might not be part of the law in the strict positivistic sense of the word, but what the judge thinks it ought to be is part of the law. And since the judge is part of the sovereign, the judicial process must be contained in the definition of law. In this sense, too, what the law "ought to be" is already an aspect of or is contained in what the law "is."

#### FORCE, REASON AND THE LAW

Positivism identifies law with force. It could be no other way if law is to be defined in the narrow sense as the command of the sovereign. Justice Holmes frequently spoke of the *ultima ratio* of law as force. When it comes to the development of a *corpus juris*, he said, the fundamental question is: "What do the dominant forces of the community want and do they want it hard enough to disregard whatever inhibitions stand in the way."<sup>51</sup> He argued that the most fundamental of the supposed pre-existing rights, the right to life, is sacrificed whenever the interest of society, "that is, of the predominant power in the community is thought to demand it."<sup>52</sup> The fact that the state forces the conscript with bayonets to die for a cause in which he does not believe gave Holmes no scruples, not because the safety of the state required such sacrifice, but because he did not feel that there was any defensible concept of justice or morality which could overcome the supremacy of force which he therefore raised to the highest principle of law. "Our morality," he said, "seems to me only a check on the ultimate domination of force, just as our politeness is a check on the impulses of every pig to put his feet in the trough."<sup>53</sup> This rhetorical connection between force and the skepticism about morality is not fortuitous but is the technical doctrine of positivism. Force becomes the ultimate principle of law simply because there is no other alternative once the notion of justice is removed as the ground of law.<sup>54</sup>

We have already seen that Austin's theory of sovereignty is rigorously limited to the fact of command, and in this regard he is

---

51. LERNER, *THE MIND AND FAITH OF JUSTICE HOLMES*, 432 (1943) (letter to J. C. H. Wu); cf. 1 *HOLMES-POLLOCK LETTERS*, 163 (Howe ed. 1941); POUND, *SOCIAL CONTROL THROUGH LAW* 107 (1942).

52. Holmes, *Natural Law*, 32 *HARV. L. REV.* 42 (1918).

53. LERNER, *THE MIND AND FAITH OF JUSTICE HOLMES* 431.

54. *GENERAL THEORY* 18-21.

restating the conclusions of Hobbes and Bentham. It would be difficult to sustain the notion that these men singled out force as the central characteristic of law because they did not admit the possibility of any moral truth. Indeed, a careful reading of their works reveals that they all utilize the language of natural law.<sup>55</sup> But what can be said about them is that they did not believe that there was any universal validity to moral systems nor did they believe that moral ends could be "proved" by natural reason. The scope of reason is for them limited to the empirical world and they all wished to employ the methods of empirical science in developing their theory of law. Because they saw such a severe limitation to the scope of rational competence, they refused to conceive of law in such non-empirical terms as "justice." The most fundamental characteristic of law which the method of science was able to reveal was the element of coercion or force. The whole concept of law therefore revolved for them around the notion of sanction, or threat of evil or pain. The "essence" of law therefore becomes force, for not only does "the idea of coercion . . . become inseparably connected with that of a law," but even more specifically "it is upon punishment that every thing turns."<sup>56</sup>

It does not help us in this problem to remind ourselves of the truly deep moral sensitivity of men like Holmes, Bentham and Austin, for it is with the consistency and accuracy of the theory that we are concerned. To point to their moral insights, particularly in the judicial capacity, as we frequently do in Holmes' case, is to point to that very quality in the jurist which we all instinctively look for, which is the opposite of arbitrariness. The fact of force is without doubt a substantial element in law, but to define law in terms of force is not to define law but force. When we come to the defense of such men as Holmes by saying that he would be incapable of using the power of his position without regard to moral considerations, we are in effect saying that a judge, or the sovereign, "ought not" to disengage the fact of his power from the requirements of justice. If this were not the case, there would really never be any debate about the nature of law, for if indeed the essence of law is its coercive element, if the sovereign is defined solely in terms of power, then men would not be so exercised over the question whether might is right. Is it not rather the case that by the idea of law is meant the domestication of force by morality? Does not constitutional law indicate that what is binding upon the subject by the threat of ultimate physical coercion is binding on the sovereign by a moral

---

55. Pollock, *The History of the Law of Nature: A Preliminary Statement*, 1 COLUM. L. REV. 30-31 (1901).

56. BENTHAM, LIMITS OF JURISPRUDENCE DEFINED n.227 (Everett ed. 1945).

sanction?<sup>57</sup> Yet Austin stripped all other considerations from his definition of law except force, or as Maine has said, "Sovereignty, for the purposes of Austin's system, has no attribute but force, and consequently the view here taken of 'law,' 'obligation' and 'right' is a view of them regarded exclusively as products of coercive force. The 'sanction' [force] thus becomes the primary and most important member of the series of notions and gives its color to all the others."<sup>58</sup> This exclusive preoccupation with force is what renders Austin's theory of law inaccurate, for it puts the center of gravity in the wrong place in the phenomenon of law. "A certain behaviour is not lawful," says Radbruch, "because it is commanded or enforced, but it is commanded or enforced because it is law, because it is just and socially necessary in the opinion of the law giver. . . . To see the essence of law in command and sanction is therefore a falsification of the reality of law."<sup>59</sup>

The separation of law and morals in positivism is the understandable result of the attempt to differentiate between a legal order, a system of morality and a set of religious beliefs. But it does not follow from any kind of logic that the legal order does not contain elements of moral and religious beliefs. Indeed, our argument has been that it is because positivism has tried to urge that law has "no moral connotations whatsoever" that it has obscured the meaning of law. To be sure, the object behind the formulation of, say, Kelsen's "pure" theory of law is to rid the definition of law of all political and subjective ideological ingredients. That ideology moves into the content of law cannot be questioned. For example, Professor Panunzio declared in his inaugural lecture that "we must 'fascicize' the instruction of law. . . . *Instruction in the theory of the law is like instruction in religion.*"<sup>60</sup> Even the Marxists, whose chief criticism of bourgeois law is that it is simply the instrument of ideology, have begun to reconstruct law along ideological lines: "The Soviet Courts," writes Gintsburg, "were designed to render specific 'class justice'. . . . [They] are called upon to carry out the policy of the soviet government and communist party as well as the Marx-Lenin Doctrine."<sup>61</sup> Recognizing that a system of law can embody ideology in its most pathological form, does it follow that legal theory must isolate the phenomenon of law from moral and religious elements? Is it even theoretically possible to define law accurately without taking into consideration its moral aspects? It is important, to be sure,

57. VINOGRADOFF, *COMMON SENSE IN LAW* 29 (2d ed. 1946).

58. MAINE, *EARLY HISTORY OF INSTITUTIONS* 363 (1875).

59. Radbruch, *Anglo-American Jurisprudence Through Continental Eyes*, 52 L. Q. REV. 530, 534 (1936).

60. Steiner, *Fascist Concept of Law*, 36 COLUM. L. REV. 271 (1936).

61. Gsovski, *The Soviet Concept of Law*, 7 FORDHAM L. REV. 4 (1938).

for scientific reasons, to be able to distinguish law from other modes by which human conduct is controlled; still, the jurist's chief concern should not be the preservation of certain "scientific" presuppositions if this makes it impossible to render a faithful analysis of the total phenomenon of law. If it is a presupposition of the science of law that only what can be physically observed<sup>62</sup> will have a rightful place in the construction of a theory of law, then obviously there will be no place in legal theory for the concept of justice. But this does not prove that justice is not an essential element of law; it proves only that legal science has no way of handling the question of justice—that is, that the science of law is incapable of dealing with the total phenomenon of law. By virtue of its methodological premises the science of law is forced to distort the meaning of law because it does not ask: "What is the full nature of law?" but asks instead: "With what aspects of the phenomenon of law can scientific method deal?" In this case, the scientific method is like a net which catches only some fish, while the rest escape. That the ideological content of law may be "subjective" or "relative," and on that account not acceptable to everyone, does not alter the fact that there can be no law at all without the presence of "value content." An adequate theory of law must be broad enough to deal with all the facts in the phenomenon of law including the fact of value.

To say that the essence of law is force is to say that law is essentially a *technique* of social control. And to call law a technique is to disengage it from any particular ends, from its moral purposes. Kelsen argues that to analyze the law as it is, is to free the law from "the metaphysical mist" with which it gets covered by speculations about justice.<sup>63</sup> But the error Kelsen seems to make is to think that if he "declines to give a moral judgment on the positive law,"<sup>64</sup> he has thereby eliminated from the phenomenon of law the value content that is *already* there. It is not the scientific jurist's moral judgment about the law that is decisive here, it is the moral concern of the legislator which produces the law's moral element. Even as a "scientific" observer, the theorist should see that law is not just abstract force, it is always force in conjunction with "ends." Yet Kelsen argues that the only way to distinguish the legal order is to see it as a technique of force:

What distinguishes the legal order from all other social orders is the fact that it regulates human behaviour by means of a specific technique.

---

62. GENERAL THEORY 79.

63. Kelsen, *Function of the Pure Theory of Law*, in 2 LAW: A CENTURY OF PROGRESS 237 (1937).

64. *Ibid.*

If we ignore this specific element of the law, if we do not conceive of the law as a specific social technique, if we define law simply as order or organization, and not as coercive order (or organization), then we lose the possibility of differentiating law from other social phenomena.<sup>65</sup>

Nowhere do we see the radical reconception of the meaning of law so vividly as in this attempt to "reduce" law to force. For along with this identification of law with force comes a new meaning to the word "ought" or to the whole notion of obligation. The command theory of law would say that men should obey the law simply because they are commanded to do so. They "ought" to obey the law not for any moral reasons but solely because there is a threat of force. This is what the separation of law and morals entails. From this positivistic view the law does not prescribe ways in which men "ought" to behave; it simply prescribes norms for behaviour, and if men do not comply with these rules, then the officials of the government "ought" to bring down the sanction upon such non-conforming persons. The concept of "ought" is therefore quite radically reconceived. As Kelsen says: "That somebody is legally obligated to certain conduct means that an organ [of the state] 'ought' to apply a sanction to him in case of contrary conduct."<sup>66</sup> This is truly the negation of whatever men have heretofore thought to be the meaning of law, for while at all times jurists have seen the importance of the sanction behind a legal rule, there has rarely been such a decisive separation of morals or justice from the structure of law. This has the effect, again, of making force the *principle* of law.<sup>67</sup> But as Radbruch writes: "The legal principle cannot . . . have the character of a command, but must be a judgment of values. Its primary form is not: Do this! or: Forbear from doing that! but: This is necessary for the sake of justice and the general good."<sup>68</sup> What is behind this persistent identification of law with force and the apparent horror of finding the value element in law? One answer seems to be that ever since Hobbes sought to establish legal theory on a scientific basis, force has displaced justice as the essence of law. The problem has to do with the theory of knowledge. Kelsen phrases the problem in very sharp terms by saying: "Positivism and (epistemological) relativism belong together

---

65. GENERAL THEORY 26; cf. pp. 21, 22, 438.

66. *Id.* at 60. "The concept of legal duty also implies an 'ought.' That somebody is legally obligated to certain conduct means that an organ 'ought' to apply a sanction to him in case of contrary conduct. But the concept of legal duty differs from that of moral duty by the fact that the legal duty is not the behavior which the norm 'demands,' which 'ought' to be observed. The legal duty, instead, is the behaviour by the observance of which the delict is avoided, thus the opposite of the behavior which forms a condition for the sanction. Only the sanction 'ought' to be executed."

67. *Id.* at 58-59.

68. Radbruch, *Anglo-American Jurisprudence Through Continental Eyes*, 52 L. Q. REV. 534 (1936).

just as much as do the natural law doctrine and (metaphysical) absolutism. Any attempt to push beyond the relative-hypothetical foundation of positive law . . . means the abandonment of the distinction between positive and natural law."<sup>69</sup>

As one pursues Kelsen's positivistic separation of law and morals, it becomes clear that he is concerned not merely with separating these two modes of ordering behaviour nor even with distinguishing them. His argument is rather that the difference between law and morals is that while we can "know" something about law, we cannot have any "cognition" of value or moral terms. The impact of his scientific method is therefore not simply to say that the contents of legal science are different from legal *philosophy*, but that we can get reliable knowledge about law only through empirical description. Over against the classical view about law as announced, for example, by Plato, who said that "no law or ordinance whatever has the right to sovereignty over true knowledge,"<sup>70</sup> Kelsen radically rephrases legal theory by saying that "cognition can grasp only a positive order evidenced by objectively determinable acts. This order is the positive law," and is known only by positivism, which is "a radically realistic and empirical theory. It declines to evaluate positive law."<sup>71</sup> The separation of law and morals is therefore an attempt to conceive of law independently of morals precisely because moral discourse is "subjective" and incapable of objective proof. But it does not follow logically that, just because we cannot furnish the same *kind* of proof for the concept of justice which the law contains as we can about the mechanism of force involved in law, this value element is not there as a most significant part of law. What would follow logically would be to admit the presence of value elements and then reserve the problem of dealing with the "measure" of values as a significant part of the study of jurisprudence. The law is always employed at that point where men confront real alternatives in their behaviour, and the law is used for signifying which direction they must take in the face of several other possible ways of action. To be involved in fashioning such decisions for the direction of behaviour is precisely the concern of morality and at this point the function of law and morals becomes the same. The law could have no other meaning, could not indeed be "thought" if it were not seen as the agency by which men were confronted by an imperative to choose an "ought." The fact that the "ought" and the "is" are two different realms is what makes law possible in the first place. It is true, as Bentham says, that "every legal command imposes a duty,"<sup>72</sup> but is this duty

---

69. GENERAL THEORY 396.

70. PLATO, LAWS IX, 875.

71. GENERAL THEORY 13.

72. BENTHAM, LIMITS OF JURISPRUDENCE DEFINED, 142 (Everett ed. 1945).

simply the consequence of the "fact" that it was commanded? Can legal duty be based simply upon the command without any reference to its moral defensibility? No more difficult question can be raised in legal theory because here again we come face to face with the problem of the "bad" law. But we need to ask whether the duty to obey the law is generated by the law itself or whether it would be more accurate to say that the law's command is the mode and means by which men are reminded or recalled to a duty which exists prior to the law in a moral form. Austin said the latter when he pointed to men's evil tendencies as the very cause for law; wherefore it must follow that law is engaged in the consequences of men's evil and its correction, and there must always lurk in the law some conception of what the law is trying to achieve. It would make no sense to say that the law attempts to overcome the evil of human nature by perpetrating its own fresh evils. Whether the law succeeds or not in this attempt to rectify human evil is one question, and the fact that this attempt to rectify evil is what characterizes the regime of law is another. The more we consider the characteristics of law the more it becomes evident that the law is a matter of "thought" or of "consciousness." It represents the capacity men have of transcending, that is, stepping back from and looking at their own and other's behaviour and "evaluating" or "judging" that behaviour as desirable or undesirable and then "thinking" of alternative ways of behaviour which would be "better" and would more adequately lead to the "greater good" or "happiness" of the "greatest" number. This is what in fact lies behind all law, and to hold that men do not have the capacity to achieve a perfect knowledge of the absolutely and eternally good does not change this characteristic of law. Nor are men relieved of the necessity of grappling with what the law "ought" to be just because such discussions have to transpire under the cloud of subjectivism. In spite of the difficulties of epistemological relativism, the persistence of the question of moral ends suggests that such ends cannot be separated from our understanding of what law is. And nobody was more aware of this than those who sought to fashion the positivistic separation of law and morality, namely Bentham and Austin.

#### THE ENDS OF LAW

Positivism raises doubts about the possibility of finding trustworthy guides in human nature for the ends of law. Nevertheless, Austin had focused upon the significant fact that all legal systems embody certain fundamental notions which are "necessary" and "bottomed in the common nature of man." Austin's thought nowhere resembles the natural law mode of reasoning more than at this point when

he looks to man's nature for the ends of law and indeed for the understanding of the fuller meaning of law. His severe and cryptic conception of law as a command is greatly modified when the meaning of law is connected with those fundamental notions which are "bottomed in the common nature of man."<sup>73</sup> So significant did Austin hold these notions which go into the making of laws to be that he said that "it is impossible to consider jurisprudence quite apart from legislation," and that "if the causes of laws . . . be not assigned, the laws themselves are unintelligible."<sup>74</sup> The rather large section devoted to ethics in his *Province of Jurisprudence Determined*, about which he said that "it was not a deviation from my subject to introduce the principle of utility," certainly shows how close Austin conceived the relation of law and morals to be. Thus, the principles of legislation turn out to be fundamental also in understanding the prior question of the nature of law.

Not one of the early positivist jurists ever disengaged the idea of law from the notion of the ends of law successfully. They all begin by announcing that law and morals are two distinct subjects, that law is simply a command. But within the same treatise they deal with the ends or purposes of law. And they deal with the problem of ends in such a way as to indicate that without such a connection between "ends" and command, there can be no full understanding of what is meant by law. Hobbes had raised order or security as the minimum end and Bentham had pushed far beyond this minimum to the much wider end of "happiness" or the greatest good for the greatest number, and Bentham took his cue from "the natural constitution of the human frame."<sup>75</sup>

Whereas present day positivists recoil from discussions of morals and on that account wish to disengage the law from moral concerns, the founders of this school discovered that they could not sustain this separation. Even though Bentham and Austin were particularly concerned to rest their theories on scientific and empirically verifiable information, they soon found themselves, and with no apology, dealing with morals just the same. Their initial impetus to work out a new system of jurisprudence had come from their dissatisfaction over Blackstone's theological conception of man and his attempt to relate law to these characteristics of human nature. A good idea of the paradoxical attitude the utilitarians showed on this matter is found in Gibbon's note on Blackstone's *Commentaries*. When he came to that part which deals with "The Nature of Laws in General," Gibbon wrote:

---

73. See the lecture, "Uses of Jurisprudence," in PROVINCE 365, 367, 369.

74. 2 LECTURES 1113.

75. BENTHAM, *THE PRINCIPLES OF MORALS AND LEGISLATION* 4 (Blackwell ed. 1948).

I have entirely omitted a metaphysical enquiry upon the nature of Laws in General . . . and a number of sublime terms, which I admire as much as I can without understanding them. Instead of following this high a priori road, would it not be better humbly to investigate the desires, fears, passions and opinions of the human being, and to discover from thence what means an able legislator can employ to connect the private happiness of each individual with the observance of those laws which secure the well being of the whole.<sup>76</sup>

In one stroke Gibbon rejected one system of morals underlying the law and offered another system, namely, utilitarianism. Bentham, too, had raised the principle of utility to the center of attention in defining the ends of law. Although Bentham wanted to rest jurisprudence upon science, he nevertheless made the art of legislation part of that science, thus indicating that jurisprudence is also concerned with what the law "ought to be." John Stuart Mill said about Bentham that he "expelled mysticism from the philosophy of law, and set the example of viewing laws in a practical light, as means to certain definite and precise ends."<sup>77</sup> But "ends" have to do with values and these are not capable of the kind of proof the scientist looks for, not even when based upon the principle of "utility." Bentham was aware of this for he wrote: "Is it [*i.e.*, the principle of utility] susceptible of any proof? it should seem not: for that which is used to prove everything else, cannot itself be proved: a chain of proofs must have their commencement somewhere. To give such proof is as impossible as it is needless."<sup>78</sup> Yet he clearly specified the principle of utility, the idea of the greatest good of the greatest number, as the measure for the ends of law: "The common end of all laws as prescribed by the principle of utility is the promotion of the public good."<sup>79</sup> This could be looked at from the reverse side too, that is, looking not only at the common good, but also listing the offenses which subvert the common good: "By classing offenses . . . according to their mischief, laws have already been classed according to their ends: so that in giving an analysis of offenses, we have given, as far as it has gone, an analysis of legal *ends*."<sup>80</sup> Bentham has, then, pursued the matter of ends far more extensively than those positivists who suggest that we can agree only upon a few minimum notions about the requirements of society,<sup>81</sup> for Bentham goes far beyond

76. Holdsworth, *Gibbon, Blackstone and Bentham*, 52 L. Q. REV. 46, 50 (1936).

77. *Id.* at 51.

78. BENTHAM, *THE PRINCIPLES OF MORALS AND LEGISLATION* 4 (Blackwell ed. 1948); cf. BENTHAM, *LIMITS OF JURISPRUDENCE DEFINED* 115-16 (Everett ed. 1945).

79. BENTHAM, *LIMITS OF JURISPRUDENCE DEFINED* 115 (Everett ed. 1945).

80. *Ibid.*

81. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 621 (1958).

the mere notion of order for physical security, provision for keeping promises and contracts, and the security of possessions. For Bentham, the principle of utility was a radical, creative and "dangerous" principle, dangerous precisely because it would call for vast reform not only in the laws but in the actual behaviour of the society.<sup>82</sup> Thus, Bentham brought into the law the moral principle of behaviour, the moral "ought." Since law and morality were for him concerned with the same conduct, they had to be based upon the same principle. Since the law was concerned with the behaviour morality labeled as "ought" to be done, this same principle thereby also determined what the *law* ought to be. When jurisprudence studies a system of laws, according to Bentham's analysis, it is also studying in "that branch of jurisprudence which contains the art . . . of legislation" what the laws ought to be.<sup>83</sup> Thus what starts in Bentham as an attempt to separate law and morals, ends with a most intimate, natural law-like identification of law and morals. This was also the case with Bentham's illustrious predecessor, Hobbes, who when he considered the ends of law went far beyond the original empirical analysis of man's nature when he said:

[T]he duty of a sovereign consisteth in the good government of the people; and although the acts of sovereign power be no injuries to the subjects who have consented to the same by their implicit wills, yet when they tend to the hurt of the people in general, they be breaches of the law of nature, and of the divine law; and consequently the contrary acts are duties of sovereigns, and required at their hands to the utmost of their endeavour, by God Almighty, under the pain of eternal death.<sup>84</sup>

Bentham's conception of "ends" is far more profound than just any ends men might agree upon: he wrote that: "[B]y *end* is here meant not the eventual end, which is a matter of chance, but the intended end, which is a matter of design."<sup>85</sup> This was why Bentham felt that "the limits of the law seem . . . to be capable of being extended a good deal farther than they seem ever to have been extended hitherto."<sup>86</sup> What Bentham had in mind here is the very kind of case Ames had talked about, namely, whether the law could compel one to be "the good Samaritan."<sup>87</sup> Whereas Ames concluded that "the law does not compel active benevolence between man and man," Bentham came to quite a different view of the matter, asking, "why should it not be made the duty of every man to save another from

82. BENTHAM, *THE PRINCIPLES OF MORALS AND LEGISLATION* at xi-xiii (Blackwell ed. 1948).

83. 1 *WORKS OF JEREMY BENTHAM* 148 (Bowring ed. 1843).

84. HOBBS, *ELEMENTS OF LAW* 142; cf. 22, 71, 72-73 (Tönnies ed. 1928).

85. BENTHAM, *LIMITS OF JURISPRUDENCE DEFINED* 113 (Everett ed. 1945).

86. 1 *WORKS OF JEREMY BENTHAM* 148 (Bowring ed. 1843).

87. Ames, *Law and Morals*, 22 *HARV. L. REV.* 97, 112 (1908).

mischievous?"<sup>88</sup> Then he goes on to indicate the kind of situation the law, following the lead of morality, should incorporate into its "ends":

A woman's head-dress catches fire: water is at hand: a man, instead of assisting to quench the fire, looks on, and laughs at it. A drunken man, falling with his face downward into a puddle, is in danger of suffocation. Lifting his head a little on one side would save him: another man sees this, and lets him lie. A quantity of gunpowder lies scattered about the room: a man is going into it with a lighted candle: another, knowing this, lets him go in without warning. *Who is there that in any of these cases would think punishment misapplied?*<sup>89</sup>

Thus, whereas Kelsen, limiting himself strictly to a description of the ends of law, can only say that the end of law is to bring about certain reciprocal behaviour of human beings, "to make them refrain from certain acts which, *for some reason*, are deemed detrimental to society, and to make them perform others which, *for some reason*, are considered useful to society,"<sup>90</sup> the natural law theory always implies that this phrase, "for some reason," can be drawn from the nature of man, and in this respect Bentham followed the pattern of natural law.

Similarly, Austin was bound to consider the ends of law for although he defined law as an aggregate of commands, he was also aware of the fact that "commands . . . proceed not from abstractions, but from living and rational beings."<sup>91</sup> As such, those who set the commands were bound to consider the proper ends which human beings should pursue in their behaviour. At this point, Austin emphasized the close relation between the law of God and the positive law. While he never confused the two, he did argue that the positive law must be fashioned in accordance with the law of God. The law of God, he said, could be known in one of two ways, namely, either by direct revelation or through the "index" of utility. Since God intends the well-being of all his creatures, it is possible to determine the goodness or the rightness of a law by simply applying the test of utility: does the law increase the happiness or the good of the society? The ends of the law are therefore to be derived from the nature of man as understood in a theological sense. Commenting on the careful analysis he had made of the principle of utility in the previous three chapters, he goes on to say: "I made this explanation at a length which may seem disproportionate, but which I deemed necessary because these laws [of God], and the index by which they are known, are the standard or measure to which all other laws should conform, and the standard measure or test by which they should be

---

88. 1 WORKS OF JEREMY BENTHAM 148 (Bowring ed. 1843).

89. *Ibid.* (Emphasis added.)

90. GENERAL THEORY 15. (Emphasis added.)

91. PROVINCE 43.

tried.”<sup>92</sup> To be sure, although the sovereign “ought” to shape his commands with these laws of God in mind, it is nevertheless the sovereign who issues the command, and his command is not identical with the law of God but is at most a “copy . . . of the [divine] model.”<sup>93</sup> But the importance of this passage is that Austin conceived of law as springing from something essential in the nature of all men and all societies, as if to say that the basis of law, and therefore ultimately the basis of obedience, is not simply the fact of command but rather the universal perception by men of the utility of government. But by this he also meant that there are certain ends which the law must seek—ends which the very notion of law entails.<sup>94</sup>

---

92. *Id.* at 131.

93. *Id.* at 163.

94. *Id.* at 301.

