what happens somewhere and an attempt to construe what happens more or less everywhere, I do not think he would have hesitated at all. Description was matter for local political history at best. Social statics could only construe.

Here is a recent pronouncement on the nature of obedience in a modern state:

'Obedience is now rendered not to a person but to the political community; and not because of command primarily but by reason of assumed consent. . . . Those who command do so not merely because of their office, or because of their personality, but because of the general recognition that they serve a useful function in the community—a function in terms of the general welfare as interpreted in the last analysis by the generality of the folk in the state.'[1]

Is that interpretation? Or is it generalized description? Or is it a half-conscious attempt to be both?

Austin's analysis seems to me to be purely an interpretation. Acceptance of any régime, he virtually tells us, can in principle be construed as submission to the collectivity in which the constitution vests the ultimate say; and implies an attitude towards all law laid down in a constitutionally operative manner which is the same in effect as if that law were an aggregation of commands emanating from that collectivity. In effect, what the constitutional system amounts to is an attribution of authority to a personified collectivity, the component members of which are themselves determined by the constitution.

Along with other writers, Austin fails in so far as he seemingly supposes himself to be merely observing and describing; but, considered as a piece of interpretation, adopted merely as a basis on which to teach elementary jurisprudence, his sketch of the relation between the communal psychology of habitual acquiescence and the individual psychology of occasionally reluctant obedience seems to me not without value—at any rate as a first approximation.

You will notice I am careful not to claim that he saw what he was after. Starting from the assumed fact of habitual

[1] Merriam, *The Making of Citizens*, p. 282.

submission he ignores the possibility of debate as to who, if anybody in particular, it is that receives it. He does not distinguish the questions—To whom in fact is obedience rendered? (Who ever knows?) and To whom in effect is it rendered? (to which we can more or less universally answer, To that one, or number, in whom the functioning constitution can be construed as vesting the ultimate control).

What Austin does is to marry these two questions and treat the result as if the husband and wife were one person. Our sense of realities, naturally enough, is shocked. 'Surely it strains language,' writes Sidgwick, 'to say that during these sixty years citizens of the U.S. "habitually obeyed" this inert composite entity.'[1] Austin might have retorted, 'It likewise strains language to say you've received a letter from your cousin in Australia, when the truth is that you received it from the postman.' But a better answer would have been, 'In stating what *in effect* happens how is it possible *not* to strain language? The more complicated the position the more "artificial" can any simple construction of it be made to seem.' Sidgwick himself does not object to language being strained provided it be not strained too much. '... the interference of Parliament by new statutes has long been so active in all departments of our law that we may without a very violent fiction regard it as approving of whatever it does not abrogate or modify, and as approving the action of the judges in occasionally modifying it.'[2] Those words 'very violent' are most significant. It appears after all to be merely a matter of differing degrees of violence. Every beginner knows how, although in point of content the bulk of the Roman praetor's edict was 'tralatician', taken over from his predecessor, yet in point of authority it operated under a given praetor as the edict of *that* praetor, as *that* year's edict, in fact. As Austin saw, authority, as opposed to content, was, for social statics, the only thing that mattered. And thus he speaks of a traditional body of law as *being* the command of the

[1] Sidgwick, *Elements of Politics*, 4th ed., p. 27. [2] Ibid., p. 652.

presently obeyed sovereign. 'Being, in effect', one would have preferred.

I do not know how seriously Sidgwick's treatment of Austin is nowadays taken, but it includes one or two further points upon which in passing I cannot forbear to touch.

Compare particularly with Austin's own words Sidgwick's quotation of his passage about the moral, though not legal, trusteeship of Parliament *vis-à-vis* the electorate. The whole passage hangs on a temporary concession which Austin explicitly makes to the popular notion that, in a sense—though, he considers, not at all in a strict sense—Parliament for the time being is possessed of the sovereignty. 'Much to our astonishment,' says Sidgwick, 'Austin calmly adds . . .' and scoffingly exposes the contradiction beween the two views—leaving out the opening words in which Austin expressly explains that one of them is not his view at all.[1]

Again, to show it is misleading to say that there is in Belgium a sovereign with power legally unlimited, Sidgwick points to the fact that a Belgian's right to worship or not . . . as he pleases . . . cannot legitimately be impaired by ordinary legislation.[2] Austin, in reply, would I believe have observed that only through the use of his phrases out of their context could he be represented as having made any attribution of sovereignty at all to the legislature as such. Lastly, as for the point, relied on by Sidgwick and others, that under a rigid constitution there are some things which can only be done cumbrously or slowly, the reasoning here strikes one as worthy of the proposition that, if a man stammers when he is nervous, he is by definition incapable of making an unconditional offer of marriage.

Other influential critics were Bryce[3] and Dicey.[4] The main force of the complaint lay, in each case, in the allegation that Austin had confused two 'kinds' of sovereignty, the political and the legal, or the legal and the practical.

[1] Sidgwick, *Elements of Politics*, 4th ed., p. 657. [2] Ibid., p. 655.
[3] *Studies in History and Jurisprudence*, ii, p. 62.
[4] *The Law of the Constitution*, 8th ed., pp. 78–80.

'Where,' proceeds Bryce, 'the Legal is not also the Practical Sovereign, it is obviously a far more difficult task to discover the latter than the former.' The truth is that Austin does not attempt either of these tasks. He concerns himself neither with 'Legal Supremacy' nor with 'Practical Mastery'. Law, for him, logically presupposes pre-legal supremacy and practically presupposes habitual obedience from the bulk. . . . He construes the law of the constitution to find the notional sovereign to whom by implication obedience is paid by those who unquestioningly submit to the system of government. What we may style 'Austinian' sovereignty is neither legal nor constitutional (for both the law and the constitution presuppose it), nor practical (for experience is concrete and particular, whereas he is generalizing and proceeding by deduction). His sovereign is not a sociological reality. It is a concept of abstract social statics.

Professor Hearnshaw is hardly less censorious, referring to 'this sharp and all-important distinction between legal and political sovereignty, which Austin so fatally ignored'.[1] He too assumes that Austin is, or rather that he ought (!) to be occupied, not in looking for the collectivity to which habitual obedience is rendered, but in an attempt to describe the body which enacts the law. '. . . it was essential,' he writes, 'for the completion of his system of thought . . . that he should consider and define sovereignty purely as a legal conception without reference to either politics or ethics. . . . If Austin had confined his attention to his proper task . . . viz., the definition and location of legal sovereignty, he might. . . .'[2] It is rather as if, at a cricket match, Professor Hearnshaw were to say, 'The only question a spectator is entitled to ask is, "Who is captain?" . . .'. Whereas Austin, a student of society, is saying to himself, 'These men in flannels have wills of their own. Why are they behaving like this?'

Yet another 'kind' of sovereignty is put before us in

[1] *Social and Political Ideas of the Age of Reaction and Reconstruction*, p. 186. [2] Loc. cit., p. 182.

two most able and interesting articles by Professor John Dickinson. 'I hope,' he says, 'it will be noted that I do not rest the case for "juristic sovereignty" on the "imperative" theory of law. . . . I rest it on the need for "a single authoritative source of formulation".'[1] The core of Bodin's conception (which he will call the 'juristic conception') is, he says, that logically there must be a last word somewhere. But one wonders if even in this respect 'the life of the law' has been 'merely logic'. You remember the experience of King Canute with the waves. There you had a single source of formulation. Of what use was that? The crux is that the source must indeed be *authoritative*—and Austin's point is that authority is merely the reflex of habitual obedience, that in default of this all is vanity, and that to have grasped this is enough for the law student in his first term. There is not much point in being captain unless the other fellows want to play.

The most interesting of all the distinctions, to my mind, is not that between political and legal sovereignty but that between 'logically pre-constitutional theory' and the unornamented truth. Austin to-day would watch with interest the experiments in Italy and Russia. Where, he might be led to say, the bulk of the people pay habitual obedience to *X*, while *X* allows them to do it under the forms of a constitution which assumes that they are paying habitual obedience to *Y*—then it may for some purposes be of interest to look behind the form at the substance. But this is merely the same as pointing out that a king's favourite may be known to have great influence, or that it is often the secretary of a supine committee whose will prevails. As the committee is deemed in such cases to 'decide', so, in my construction of constitutional processes, the sovereign one or number is deemed to command.

After all Austin's was hardly a novel point of view. So long as in Rome the bulk of the community paid 'habitual obedience' to a Princeps who nominally derived his authority from the Populus Romanus, Austin's 'construction'

[1] *Political Science Quarterly*, xlii, p. 525.

of the situation must have been the same as that of the Roman jurists themselves, namely, that sovereignty (in his sense, and incidentally also in theirs) lay not with the Princeps but with the people. As a way of construing the facts this should only seem to you specious if you disregard the forms observed: and the observance of a form is itself also a relevant fact—even though the theory underlying the form be what Sidgwick and others would perhaps have been careful to style a fiction.

Discussing, in a charming passage, the China of yesterday, a recent writer says, 'Theoretically China's form of government was an absolute monarchy. Actually it was a locally autonomous democracy. Theoretically the Emperor wielded autocratic power. Actually the Chinese people enjoyed self-government to a degree seldom if ever attained by any other people not primitive.' This, like the example of the Roman Principate, is an extreme case—where, as there, we see what a difference there may be between construing the fact of submission along with the constitutional forms observed, and, finding words for the feeling of obedient masses as to who it is that they are obeying. In English contract law, if a man says one thing, and means another thing, he is usually deemed to have meant what he said. He is not, that is, deemed to have said what he meant. It is the difference between the extrinsic and the intrinsic modes of interpretation.

Observe the contrast. In one case—China—the authority rooted at the circumference is deemed to have oozed out from the centre. In the other, the authority based upon an army at the centre is deemed to have flowed in from the circumference.

'Much confusion', says Professor Dickinson, referring to Bryce and Dicey, 'has been created by using the word "sovereignty" to designate the practical leverage which the electorate . . . has over an elective legislative organ.[1]. . .' You will realize that Austin had no hand in starting this hare. In the later Principate, the Roman Populus had

[1] *Political Science Quarterly*, xlii, p. 532.

little or no practical leverage over the Princeps—but it remained true to say that the bulk of the community tolerated a system by the orthodox theory of which authority was exercised in the name of the Roman people—or, to be more exact, S.P.Q.R. And what Austin construes is the total situation of social fact, including the orthodox theory—and he is simple enough to suppose that for his clue to the orthodox theory he need look no farther than to the constitution. Professor Dickinson notices that 'sovereignty' and all the problems which the word connotes for us were 'conspicuously absent from the political speculations of classical antiquity'. So far as Rome is concerned the reason I think is because everybody took for granted the Austinian view. As Sir Maurice Amos reminded us, 'the things which in common we take for granted are the foundation of our social life'. In Rome, while Rome mattered, it was commonplace that law embodied the will of that collectivity, that sovereign number, the Roman people. As the Republic gradually evolved into an Empire, it became increasingly artificial (if you like that word) to construe the situation in terms of the inherited republican forms rather than the ubiquitous imperial facts. So it was only because the Romans were not much given to political speculation and had thus not developed a sensitivity to the 'artificial', that with them the problem of sovereignty remained so conspicuously absent.

But, whereas I have gladly done my best to defend Austin's conception of the ultimate relation between law and public opinion, wherein he was so near to the Romans, we do not reach the heart of his notion of law until we come to his definition of obligation, in which he is closer to some of the French, and which I am not so ready to defend. So far as any credit is due to him here, it is not so much for the way he answers the question as to the nature of legal obligation as for having recognized that so elementary a question was in need of any answer at all. The inherent rightness of the rule, the direct appeal to reason and

conscience, could not serve, for it surely is not this that we refer to when we say that law is binding even on the exceptionally anti-social individual in the moment of exceptional temptation.

Broadly, Austin's version of the matter is that every prescription or prohibition, every command, is sustained by its own obligation, this consisting in the influence exerted upon a person's desires by the possibility, however slight, of incurring the evil consequences threatened to be annexed to his possible disobedience. Notice how essentially *de facto* the thing becomes.

Duguit, we were told, wanted to build a state concept that was 'free of fictions, untrammelled by metaphysical hypotheses. It was to be realistic and positive . . . and limited by the most rigorous scientific scrutiny that the jurist can attain'.

Under the influence it seems of Hobbes and Bentham, reinforced by the inspiration of Dr. Brown, Austin appears to have set out with a similar idea. Like Duguit he aspired to put the law on a strictly *de facto* basis . . . and in each case this noble ambition was the sin by which the angel fell. To keep strictly to facts is certainly an excellent rule—provided you give heed to all the relevant facts. Both of them appear to miss what seems to me the central and most vital fact of all, namely that, fundamentally, law is not a fact, but an idea. For, surely, when *ius* dissolved its immemorial partnership with *fas*, it will not *eo ipso* have ceased to be a body of doctrine. Austin, however, like Bentham, is unwilling to allow jurists, or psychologists, to introduce 'fictitious entities' of their own.[1] The scientist, he holds, must *find* his data; he must not improvise them.[2] Perhaps because he is a lawyer he does not comfortably accept the thought that his professional stock-in-trade is a mere collection of 'fictitious entities', and, while Bentham seems to have allowed the possibility of an 'ideal object',

[1] 'Factitious', yes, but not 'fictitious'.

[2] Cf. some of his remarks on the alleged 'occult property' known as status.

which was not actually a 'fictitious entity', this subtle distinction does not occur in Austin. So, just as you can imagine Duguit saying, 'If the British Government is anything more than a mere collection of men, then my eyes are deceiving me', so Austin seems to me to say, 'If a legal obligation could not be described in terms of elementary psychology, it could not be real at all, which would be absurd.'

Thus, while his instinct in excluding from jurisprudence any discussion of what men ought to do, and why, may have been sound enough, it led him into such a superficial analysis of the idea of legal obligation as the Romans could hardly have entertained for a moment.

Bentham does not—or does not consistently—conceive of law as a body of doctrine. The Romans, I think, do: though they are not sufficiently interested in law *qua* social phenomenon to arrive at any perfect statement of exactly how they do conceive of it. Austin admired greatly the Romans, as jurists—and the Germans also. But he was too much under the influence of Bentham's pseudo-realistic mystery-dispelling analytical technique ever to accept, or apparently even to comprehend, the definition of obligation as a *vinculum iuris*. The Romans had not caught him young enough. Steeped early in Hobbes and Bentham, he came to the study of law with disabilities analogous to those of a fundamentalist reading, let us say, for a degree in geology (or is it the other way about?). This, I suggest, is why he was capable of completely misunderstanding Blackstone, who, whatever his limitations in other respects, was, after all, a fairly competent lawyer.[1]

If you can forgive a little play upon words we may say that, as between existence *simpliciter* and out-and-out non-existence, Austin does not seem to conceive the possibility of a *tertium quid*, to wit the possibility of an existence *secundum quid*. And yet it is only so, that is to say, in a certain qualified sense, that law can strictly be said to exist at all.

[1] *A.J.* ii, p. 526.

Hence, though retaining the Latin metaphor 'obligation', Austin does not adopt the roughly equivalent English expression 'artificial chain'.[1] Keeping strictly, as he supposes, to the facts, he describes obligation in terms of its sanction. International statesmen to-day, in insisting that obligations rest on signatures, do not admit that sanctions are unnecessary: far from it; but they see that the existence of the obligation is one matter, its possible enforcement another. They would not define obligation in terms of crude psychology—like Austin. It is a question, as the Romans realized, for *La Doctrine*, i.e. *Ius*—to be answered by a *Iuris Prudens*.

Although this is not ostensibly a series on Modern Tendencies in Jurisprudence it will be in conformity with the example set in some of the earlier lectures if I here say a further word about the nature of jurisprudence as 'professed' by Austin, at least in so far as this may tend further to advertise his ideas on the nature of law.

If, keeping in mind the definition of positive law as the command of the sovereign, we return to Austin's own opening statement of the business of jurisprudence, we are likely to be struck at once by the impossibility of reconciling the two. How, except by the purest accident, can we expect to find 'general principles . . . *common* to the ampler and maturer systems of positive law'? A jurisprudence professedly committed to the study of such principles seems to start from an assumption inconsistent with the notion of law as having its content controllable at the sovereign's unrestricted pleasure. Austin seems to admit the difficulty, but does not convincingly meet it, when he says, 'All systems of law have a common foundation in the common nature of mankind; but the principles which pervade them all are fashioned and obscured in each by its individual peculiarities.' He is on this account effectively

[1] Hobbes, on this point, seems inconsistent. In one place he apparently identifies obligation with the event which gives it birth. Elsewhere, however, he speaks of obligations as 'artificial chains due to fear'.

taken to task, in an article published in 1890, by Professor (at that time Mr. W. W.) Buckland.[1]

My own suspicion is that Austin had borrowed his description of the scope of jurisprudence from some German context in which it was less of a misfit. Be that as it may, we should at all events not exaggerate the practical influence of this formula upon his teaching. In his comparative treatment of Roman and English legal ideas, he does tend, it is true, to assume that they will prove on examination to be like one another, but he is just as capable of dwelling on a difference as on a point of similarity, and, since his main anxiety is merely that the student shall be enabled to grasp clearly and accurately the relevant concepts in either case, the apparent non-success of his search for uniformities does not affect the real utility of the search. (He may make some mistakes of detail, but then, after all, he never was much more than a novice at his job.)

Having already noticed his vagueness as to the distinction between truth and doctrine, I have not far to look for a possible explanation of his curious formula. The assumption about *common* 'general principles, notions, and distinctions' rests, I conjecture, on a confusion, which seems more excusable in him when found surviving full of life in Mill's well-known article in 1863, and even in some writers of much more recent date. Though the dividing line may in places be difficult to draw, I think it is not hard to conceive the distinction between two sorts of lawyerly thinking, namely, legal thinking proper (in terms, so to say, of the law's *own* ideas) and thinking in regard to law (in terms of what are merely ideas of the jurist). In particular places it is, as I say, difficult and, happily, not important to make out the exact position of the line; and possibly there will occur to you some especially familiar, although technical, notion, such as crime, or obligation, which with appropriately differing definitions will appear to be equally at home on both sides of the border. Take, for example, the English notion of a tort. The common law is cognisant of

[1] *Law Quarterly Review*, vi, p. 436.

trespass, of conversion, of libel. The law, as it stands, could, I submit, scarcely get along without these. But about the notion of tort I am not quite so sure. The English jurist, in a scientific spirit, perceiving certain common characteristics, subsumes the three specific notions under the generic heading of tort. I have purposely selected a difficult example: and it may be that you are not satisfied that the law as it stands could think clearly about its detailed categories without going in for a certain element of scientific generality. You may consider that the idea of tort is primarily a legal and only secondarily what I will call a juristic idea. It certainly is very near to the border; and at this moment all I care about is to insist that the primarily legal, and the primarily juristic, are theoretically distinguishable fields of lawyerly thinking. If we turn from discussing notions to discussing generalizations the distinction between the fields should surely be patent enough. Valid propositions *of* law, however general, are one thing. Sound generalizations *about* law, I submit, are another.

There is a good deal more to be said on this distinction between technically legal thinking, and merely juristic thinking about law. The former is always, essentially, and necessarily, doctrinal: the latter may be in terms of fact or it too may be doctrinal, but if doctrinal it is in terms not of legal but of some sort of extra-legal doctrine—of political doctrine, for example. That a simple contract requires 'consideration' is, I take it, a proposition of law. That law rests upon the will of the people, is, I suggest, a proposition of political doctrine. And, finally, when I say that law is in essence a body of doctrine I put it forward as a proposition of objectively apprehensible fact.

There are notions and distinctions, and there are generalizations, to be found both in the juristic and in the technically legal fields of thought. It is, however, worth while to notice that in practice Austin works not as either an English lawyer or a Roman lawyer trying to clear up difficult points of law (indeed it is only very rarely that he cites by name an English case) but as a jurist extracting

what he can of more or less tentative generalization *about* his subject-matter. What, he asks himself, can be soundly said about titles in general? About codification in general?[1] Not very much, he confessedly finds. But here and there he becomes as sweeping, and, I fear, as presumptuous, as Maine in certain of his best remembered dicta. 'Accordingly,' says Austin, after a comparison of the Roman and the English rules on the point, 'inevitable ignorance or error in respect to matter of fact is considered, in every [*sic*] system, as a ground of exemption.'[2] The inquiry at all events is full of instruction and zest.

Had Austin perceived the ambiguity which I consider to have been latent in his words he would, I believe, have admitted the logical force of Professor Buckland's criticism, and contented himself with a programme of searching for 'juristic' as distinct from 'purely legal' generalizations. Owing to the common nature of mankind, he would claim, we may expect to find at any rate a certain number of notions, distinctions, and generalizations congenial to a discussion *about* positive law in general. This you will remember is one of the main contentions in Professor C. K Allen's 'Jurisprudence: What? and Why?'[3]

Passing now to more familiar ground, it remains for me to mention, though everybody knows it, that Austin is classed as a member of the so-called Analytical School. Perhaps partly because both names begin with an A you will find, indeed, that in many minds, he and it are so closely associated that each must take a share of any disfavour incurred by the other. Thus on the one hand it is commonly forgotten that Austin in any way recognized the value of historical jurisprudence: and on the other hand it seems widely supposed that analytical jurisprudence must necessarily lead to that imperative theory of law from which Austin began. It therefore seems proper that an attempt should be made to view Austin's method in relation to those of certain other jurists.

[1] *A.J.* ii, p. 666. [2] *A.J.* i, p. 481. [3] *Legal Duties*, p. 9.

In Berlin, I am told, if you go there to study music, the professor will begin by informing you that 'Die Musik ist eine Kunst . . .', and so on. That is, before they teach you music they teach you *about* music. Now Maine and Austin were alike, and were different from, say, Blackstone and Dicey, in that they were jurists rather than lawyers, so that their interest in the teaching *of* law was as it were subordinate to their interest in teaching *about* law. While Maine, however, attacked social science in its widest extension, and taught about law only as incidental to teaching about mankind, Austin saw it as his special function to furnish what would serve to fertilize the professional cabbage-patch of the law-student. The major difference between them related, however, not to the scope of their teaching but to the method.

Law, needless to say, is a social institution. Like any other social institution it evolves, but on the whole rather slowly—so slowly that Maine, you will remember, applied to it the simile of the glacier. Still, in teaching about the glacier, he chiefly dwelt upon the fact that it was moving and the way in which it moved. Austin, while far from denying the movement, spent all his moments in dissecting its particular features, much in the same way as he might have done had it been standing still.

Some of us have lately seen a moving picture of the Derby. That film of course is just a series of connected pictures, any one of which, studied by itself, suggests an illusion of fixity snatched by photographic magic from a world of movement, thereby enabling us to make out how matters 'stood' in the race at some particular stage. Being thrown in quick succession on the screen that series of pictures results in a compensating illusion, an impression of continuity, one and the same pictorial horse seeming to gallop alive across the field of vision. Here, I suggest, we see the relation between historical and analytical jurisprudence. As the truthfulness of the moving picture of a moving world depends upon the quality of the instantaneous photograph, so must sound historical jurisprudence,

though dealing with evolving law, pre-suppose reliable evidence as to how that law 'stood' at any given time. Analytical jurisprudence aims at providing a clear if static picture.

Nor is it without importance to notice that even should the glacier break into a gallop, the doctrine which any court of justice will have in practice to discover and apply will always be the law as it must be held to have 'stood' at some particular time. The individual snapshot, if insufficient, is at any rate indispensable. Neither Austin nor Maine would, I think, have admitted that there was any conflict between analytical and historical jurisprudence.

How then about modern sociological jurisprudence? Is there any essential conflict here?

You will realize, of course, that not every use of the ordinary English word 'analytical' has any intended reference to the type of jurisprudence taught by Austin. Professor Laski, for instance, has lately pleaded for a 'more functional' and 'less analytical' method of statutory interpretation.[1] I feel sure he is here referring, not particularly to the authentic tradition of the so-called 'analytical' school, but rather to the de-humanized 'jurisprudence of conceptions'.

However, as Sir Maurice Amos reminded us, there does in some quarters exist a tendency to speak of the 'jurisprudence of conceptions' as 'a type of legal reasoning closely allied to that of the analytical school'. I myself can find in Austin's work no ground for inferring that he would have been an enemy of the 'more functional' tendency of which we have lately been hearing. Only I think he would had urged that even the most progressive sociological jurisprudence should start from the sharp instantaneous picture. No one more than he would have liked to see the judges permitted, and trained, to exercise a very considerable quasi-legislative discretion.[2] But I fancy he would have borne in mind that, deprived of an absolute

[1] *Report of Committee on Ministers' Powers*, Cmd. 4060, p. 137.
[2] *A.J.* ii, p. 533.

standard of reference, the very notion of relativity itself comes not to mean much.

May I to reinforce this point caricature very crudely what I gather is rather the position of the sociological school? It is, I suggest, somewhat as if a mathematics professor, concerned about his country's bridges, were to start his lectures thus: 'Mathematics, you should know, embraces sundry elements, the chief of which are arithmetic, geometry, metallurgy, architecture, and town-planning. We mathematicians are here to form the advance guard in the march of creative engineering. The time has gone by when under Austin's influence it was supposed that mathematics could properly concern itself with numbers and with space-relationships, conceived in abstraction from those "other things" which never in real life *are* "equal". The mathematician is a citizen of a changing world, and, not even in the presence of his first-year students can the professor put aside his portion of responsibility for the shaping of to-morrow's changes.'

An unfair picture, perhaps, for it implicitly begs, as it were, in Austin's favour the question as to what matters are properly to be understood as coming within the notion of law. One ought not to forget Humpty-Dumpty.

Mr. Ramsay MacDonald recently said of the journalists at an international conference that their activity, unlike that of mere seismographs, whose only function it was to *register* earthquakes, extended further, so as to include the creating of earthquakes at the same time. Austin, while he might have wanted the judge to play the statesman, and be trained for it, would not I think have wished the law-professor to blur the line between jurisprudence, in, if you like, the narrow sense, and the philosophy of judicial legislation.

You will remember Dr. Lauterpacht's passage about the sciences of 'the soul without the soul' and 'the state without the state'. You may have noticed that he did not canvass the possibility of a science of the law 'without the law'. One of the 'lesser breeds' of science I imagine Kipling would call it.

However far the judge may by constitutional practice be authorized to go in his social engineering, the notion of law, I submit, should continue to serve him as a datum line and not simply as a screen. Otherwise we may find mere human justice being administered in so-called courts of law, in the same way as law without justice may have sometimes prevailed merely because administered in so-called courts of justice.

It is precisely because jurisprudence cannot be finally segregated from the other social sciences that it seems to me propitious to begin it in an analytical way.

'If a man goes into law it pays to be a master of it, and to be a master of it means to look straight through all the dramatic incidents and to discover the true basis for prophecy. Therefore it is well to have an accurate notion of what you mean by law, by a right, by a duty, by malice, intent and negligence, by ownership, by possession, and so forth. I have in mind cases in which the highest courts seem to have floundered because they had not clear ideas on some of these themes.'[1]

This particular quotation is not of course from Austin, but from Mr. Justice Holmes; but I really do not see that that matters.

However, as Professor Hearnshaw is careful to point out, Austin, in what he had hoped would be his life-work, proved a failure. Nowadays we pick holes in his definition of law, but you will note that at that time he failed not because flaws were discerned in his political theory but because the London law-student felt no need for his jurisprudence. In some continental universities the subject had an unquestioned place, but in England a sort of voluntary boycott had been in operation against it. Austin set up a jurisprudence-factory on British soil, to exploit foreign technique; but found no market for the stuff. It was partly, of course, a matter of 'get-up'.

In those days the professor's salary was found directly out of the fees collected from his students.[2] In a system

[1] *Harvard Law Review*, x, pp. 474–5.

[2] *A.J.* i, p. 9.

which supports only those scientists for whose output there continues to be an effective demand there is no doubt a certain rough economic justice; but, in the course of that sort of justice, my colleagues will certainly not resent my putting it to them—Which of us should see salvation?

Austin's work, then, however we may judge it to-day, was not at the time rejected as inherently unsound. We can only wonder how he would have answered his detractors had he lived to hear them. In the long interval between his retirement and his death, two voices only, so far as I have been able to learn, were raised in criticism of his work. One was Austin's own. He declared that 'the book must be entirely recast and rewritten, and that there must be at least another volume.'[1] The other critic was Lord Melbourne, who complained that the book was not sufficiently interesting.

What was it in essence that Austin had been trying, in his lectures, to do? For reasons at which I have already offered a guess his own answer to this question was confused; but I think his objectives included the one advocated by Professor Buckland in the article I have already referred to, namely, a more consciously directed attention to the specifically theoretical element in law. The task *par excellence* of legal education is, I take it, to impart the ability to view situations of fact through 'the eye of the law'. The eye of the law is not of quite the same sort as the eye of the man in the street. It is more like the eye of a man on the top of a very tall building which, as Lord Coke appreciated, it took him years to climb. Austin's idea was to facilitate the ascent. 'A crammer?' you may say. No: I think the crammer is rather the man who stands in the street selling pictures of the view from the top of the building. What Austin did was to install, for the first part of the way, what he thought was a lift: but its outward appearance was so unprepossessing that the young men continued to follow Lord Coke and Company up the

[1] *A.J.* i, p. 16.

well-worn stairs. 'Little came of it all', writes Maitland, almost as if with a sigh of relief.[1]

At bottom the question was, and is, What brand or brands of jurisprudence, if any, need to be taught to law-students, and, in particular, to beginners? It may be that the full meaning, say, of religion, cannot be understood without a knowledge of life, but this is not held to render unsuitable the starting of religious instruction in the nursery. Is the suggested analogy wholly unsound?

It would of course be possible, though I will not say magnanimous, for persons of consequence to reason as follows. In a country where the Bench is recruited from among the more successful, sometimes even the most successful, of the practising members of the Bar, and where a hard head and a strong character are appreciated in a judge, there may be no particular point in artificially smoothing the path to success in that profession. Throw the little ones into the river and let them learn to swim!

One would gladly have given even more space to matters subsidiary to the main topic of this lecture. There is so much which is penetrating and suggestive in Austin apart from his endorsement and elaboration of the Imperative Theory: yet presumably it is with this last that his name will continue to be principally linked.

It is a mistake, though a most natural one, to think that Austin's position is easy to comprehend. No subtle position is easy to comprehend: and if, besides being subtle, it is confused, the difficulty is correspondingly greater. While agreeing, however, with Professor Hearnshaw that Austin's mind was 'mole-like'[2] (a merit, in my view), I respectfully protest against his saying that it was 'muddled'. Considering his circumstances and the materials with which he worked, I do not on the whole consider Austin's position to have been surprisingly inadequate. What he seems to have so meritoriously borne in mind was that no account

[1] *Encyclopaedia Britannica*, 11th ed., article on English Law.

[2] *Social and Political Ideas of the Age of Reaction and Reconstruction*, p. 169.

of human institutions could properly be styled scientific which had not its bases in the most plausible findings in his day available in the field of human psychology. He accepted—but who can blame him?—what appeared to him the soundest expert analysis then to be had of the nature of law-respecting conduct in the marginal case.

At the same time Austin accepted—but many writers still do—the hoary assumption that law is a mere aggregation of rules.

Finally, being a lawyer, or preferably, in spite of being a lawyer, he assumed that law and legal entities had somehow a *de facto* existence. Had he only laid bare the distinction between law and fact as plainly as he did that between law and morals, we might have been spared a deal of wordy but inconclusive writing these hundred years.

Nevertheless his presentation of the Benthamite view was hardly such as to justify some of the loose terms in which you will still find it referred to. Listen. 'Austin was by nature, experience, and training an absolutist in government and law.'[1] Apart from the fact that his 'number' is by no means necessarily a small one, Austin is in any case very far from suggesting the essential irresponsibility of the sovereign: on the contrary he explains that 'superiority' and 'inferiority' are 'reciprocal', so that in one sense the sovereign is the 'inferior' of the community;[2] only you will see that, the relation being pre-legal, his sovereign is not in any *technical* sense responsible; any more than a member of Parliament is to his constituents.

Nor does he make any assumption as to the worthiness of his sovereign one, or number, to continue enjoying the people's obedience. He simply notes, or, if you like, postulates, that obedience as a fact. That the people do not rebel is of course no more a proof that government is good than the forbearance of its customers to make a run upon a bank is a safe sign that the bank is solvent. Austin, as I understand him, was fully aware of this: indeed he puts the rational case for exceptional resistance to established

[1] *Political Theories in Recent Times*, p. 146.

[2] *A.J.* i, p. 97.

rule, if not as cogently as some of our present-day writers, then at least with a very fair exercise of intelligent anticipation.[1]

What seems to me, however, to estop us, as it were, from speaking slightingly of Austin to-day is, not any supposed perfection in the results of his efforts, but our own comparative failure to put anything more satisfactory in their place. Many of us still talk as if the type of analysis to which he submitted the notion of status was substantially sound. We still quite commonly speak of ownership as if it were a bundle of rights, of sovereignty as if it were an aggregation of powers. Life, of course, has similarly been described as merely a series of opportunities—just one thing after another.

The offence which, in our enlightened age, has perhaps been most resented in Austin is his assertion that 'international law . . . is not positive law at all but only positive morality'.[2] In this connexion it is not usually mentioned that, while consistently excluding it from the category of *positive* law as defined by him, Austin nevertheless does seem in the end to have classed international law with 'law properly so called',[3] and does from the beginning put it on a level with 'constitutional law'; which, except in so far as it consists of commands of the sovereign, is not, with him, an example of 'positive law' either.[4]

We need not assume that were he living now Austin's views would even in the international field be found a bar to progress. After all, the core of his position was that without authority it was not possible for law to stand. And it is precisely the decay in the authority of law that is bound to be so discouraging to any who still look to the ultimate building up of a more rationally integrated world order. While Austin might have fewer illusions than some of us as to the limits of law's possibilities as a controlling

[1] *A.J.* i, p. 118. [2] *A.J.* ii, p. 754.
[3] See *The Province*, 2nd ed., footnotes on pp. xlv, 17, and 112.
[4] *A.J.* ii, p. 740.

influence in international relations, he would see little, I think, in the contemporary world to weaken his belief that a wide-spread predisposition to submit to the rules of the game was for any community a priceless inheritance.[1] It was because he preferred that this habit should rest rather on intelligence and insight than on ignorance and inertia that he so ardently stood (a century ago) for universal education, more particularly in the social sciences; and deemed himself so happy in being called upon to play, in that needed process of education, a small but honourable part.

'It cannot be too deeply regretted,' wrote Mill, 'that, through the combined effects of frequently-recurring attacks of depressing illness and feelings of discouragement. . . . Mr. Austin did not complete his Lectures in the form of a systematic treatise.' '. . . he would have attracted to the study of the subject every young student of law who had a soul above that of a mere trader in legal learning; and many non-professional students of social and political philosophy (a class now numerous and eager for an instruction which unhappily for the most part does not yet exist) would have been delighted to acquire that insight into the rationale of all legal systems without which the scientific study of politics can scarcely be pursued with profit . . . since juristical ideas meet, and, if ill understood, confuse, the student at every turning and winding in that intricate subject.'[2]

There is no necessity for his admirers to seek to read into Austin's words an appreciation of every distinction which may now seem plain to us. He found his subject in an encircling gloom; but discovered in Hobbes, and partly also in Locke, a technique, a kindly light, for working towards the day. Some of his most illuminating phrases are secreted, as it were, in the interstices of his general argument: so that it is an advantage, when re-reading him, not to trouble about his conclusions but simply to watch his cautious, nicely-tempered mind at work. Maine, indeed,

[1] Cf. Sir Arthur Salter: 'Half the art of government, let us never forget, consists in the luck of having amenable subjects.' *Recovery*, p. 56.
[2] *Dissertations and Discussions*, vol. iii, p. 269.

in advising a study of Austin's 'conclusions',[1] seems to me to have slightly missed the mark. If Austin has lessons for us we shall find them I think not in his conclusions—which are inevitably as fallible as certain of his premises—but in his method and the spirit in which he practised it.

There would seem to be room to-day for workers of Austin's stamp in a number of fields: in municipal jurisprudence, international jurisprudence, political philosophy, and in the social sciences generally. His own scientific interests were by no means confined to jurisprudence. Regarding a department of inquiry which he called 'ethics', but which we should perhaps call 'social engineering' he had some particularly significant things to say. Of himself he is quoted as complaining that he had been born out of due time. In view of the fact that, when he was young, neither Sir Ernest Cassel nor Mr. John D. Rockefeller, Senior, had as yet been even thought of, I suppose we can only concur.

[1] *Early History of Institutions*, p. 343.