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AUSTIN TO-DAY: OR 'THE PROVINCE OF JURISPRUDENCE' RE-EXAMINED

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YESTERDAY[1] at University College the centenary was celebrated of the death of Jeremy Bentham, one of the most influential thinkers of his own or any other epoch. One of the subjects about which he used to think was law: so much so that, had he figured among the galaxy of luminaries to whose contemplation this course of lectures has been given, no one could well have been surprised. His omission, however, will have been to some extent made good by the inclusion of a lecture on John Austin, who, in the particular field with which we here are concerned, had the principal part in overhauling, elaborating, and handing on to posterity a theory propounded, almost as *obiter dictum*, in the course of Bentham's massive examination of even wider themes.

It seems, moreover, in accordance with the fitness of things that, after ranging far and wide among thought-systems of foreign *provenance*, our attention should return in this concluding lecture to dwell upon the work of one who was himself a teacher in what was prospectively this University of London. Austin was Professor of Jurisprudence at the then newly founded University College—but not for very long. His teaching extended over only four years; and there is a certain pathetic timeliness in our pausing to re-examine it just now, for it was in this present month one hundred years ago that Austin regretfully gave up the attempt to justify his subject in the eyes of his audience.

In the autumn of 1832, after resigning his chair, he published *The Province of Jurisprudence Determined*, comprising some of the earlier lectures of his course. Though he lived another twenty-seven years, it was really not until after his death that, through the posthumous publication

[1] June 6, 1932.

of his unrevised lecture-notes and, through the eloquent praises of Sir Henry Maine, he came for a while to count among the very foremost of English writers upon law. Then, gradually, criticism of Austin in its turn became the fashion. Bryce, Sidgwick, Maitland, and their plagiarists built up the case against him, so that it is probably about as true to-day as when Bryce said it that 'most recent authorities are now agreed that his contributions to juristic science are really so scanty and so much entangled with error that his book ought no longer to find a place among those prescribed for students'.[1] For examples of the vein in which it now seems customary to mention Austin you should consult Professor Hearnshaw's recently published lecture, or the passage in which Professor C. K. Allen sums up 'this earnest, this all too earnest seeker after truth'.[2]

When appointed the first Professor of Jurisprudence in London, Austin was neither a Reader, a Lecturer, nor an Assistant Lecturer. Nor was he even a graduate. He had never been an undergraduate. His commission in the army had been obtained 'at a very early age', by purchase: not, that is, through Sandhurst or Woolwich. By any ordinary academic standards we may consider him to have been almost wholly self-taught.

The solid literature on his subject was practically all of it in German, a language which he did not happen to know. He was incidentally an invalid and not very well fitted by temperament to become a public lecturer.

On the other hand, to offset these minor handicaps, he was possessed with a profound sense of the importance of his mission, and the magnitude of the opening it offered. He evidently believed, with Hobbes, that 'the skill of making and maintaining Commonwealths consisteth . . . not (as tennis play) on practice only',[3] and, with Bentham, that 'the science of law considered in respect of its form is . . . to the art of legislation, what the science of anatomy is to the art of medicine'. . . . 'Nor is the body politic less in danger from

[1] *Studies in History and Jurisprudence*, ii, p. 182.
[2] *Legal Duties*, p. 144.
[3] *Leviathan*, chapter xx.

a want of acquaintance with the one science than the body natural from ignorance in the other.' So he set to work with the ardour that will triumph over every obstacle.

Being given two years' grace, off he went to Germany; and, from the condition of his books, now in the Inner Temple Library, one can appreciate how, in his German studies, he supposed himself to be laying the foundations of a life's work. Whether he fully understood all that he read is another matter. It is possible perhaps that, had he been less deeply imbued with certain of the ideas of Hobbes and Bentham, he might have made yet more than he did of the jurists of Germany and Rome. Let me, however, say in passing that I find merely jocular the suggestion, sometimes put forward by grown-up folk, that Austin had learned his jurisprudence in the army. This is but one among many little sallies that some friend of University College may by and by collect into a special 'Austin' museum.

In *The Province of Jurisprudence* there is, I think, relatively little to represent what Austin learned in Germany. His studies there were rather directed towards his main task as Professor of Jurisprudence: and remember that in *The Province* Austin gives us nothing beyond an introductory delimitation of the field within which his substantive teaching was to lie. It has lately been said that Austin nowhere explained what he meant by jurisprudence. This, however, he had sought to make clear in his first lecture of all[1] (a lecture not originally published with the others). In particular he had stated that jurisprudence had to do with what he called 'positive law': the succeeding lectures, which ultimately became the book, being an indication of what he would mean by that. Based fairly closely on Bentham, this account of the nature of 'positive' law, so far from being the final fruit of Austin's labours as a jurist, was hardly more than the jumping-off point from which he started. It was not for this that he had gone abroad and learned a foreign language.

I would have some excuse if, even in praise of Austin,

[1] *A.J.* ii, p. 1071.

I failed to-day to say anything particularly novel. The merits of his teaching, of which I had intended to speak, were eloquently advertised in 1863 by John Stuart Mill, who himself had frequented and diligently recorded the lectures. Then again, at a certain stage my idea had been to demonstrate the comparative ill-success of Maine's attempted summary of Austin's position (for it is one thing to sense the virtuosity of an argument, and a different thing to reproduce it faithfully). But I found that this point had been made at the beginning of an article by John Dewey in 1894;[1] and, though dissenting from much of what follows in that article, I do agree with those opening sentences. Although, therefore, his admiration for Austin is, I consider, one of his best titles to our esteem, I ask you not to depend upon Maine's version of Austin's view. 'No such conception of sovereignty as consisting in absolute force', says Dewey, 'is to be found anywhere in Austin.'[2]

You will do well to treat with equal caution the following sentences by Sir William Markby.

> 'The aggregate of powers which is possessed by the rulers of a political society is called sovereignty. The single ruler, where there is one, is called the sovereign; the body of rulers, where there are several, is called the sovereign body, or the government, or the supreme government. The rest of the members of a political society, in contradistinction to the rulers of it, are called subjects. . . . This is the conception of law as stated by Austin in his lectures on the "Province of Jurisprudence"; I have only repeated his conclusions.'[3]

[1] *Political Science Quarterly*, ix, p. 31.

[2] It was Maitland who, writing privately to Sir Frederick Pollock, said of Maine: 'I always talk of him with reluctance, for on the few occasions on which I sought to verify his statements of fact I came to the conclusion that he trusted much to a memory that played him tricks and rarely looked back at a book that he had once read . . .' *Letters of Maitland to Pollock*: letter dated 21.1.1901. Maine's words were: 'There is, in every independent political community—that is, in every political community not in the habit of obedience to a superior above itself—some single person or some combination of persons which has the power of compelling the other members of the community to do exactly as it pleases': *Early History of Institutions*, p. 349.

[3] *Elements of Law*, 6th ed., pp. 3–4.

One would walk far, were Austin alive to-day, to hear him reply to his critics: but one would also go some distance to hear him acknowledge the flowers of his friends.

The Province, then, is a statement of what Austin understood by positive law.

You will doubtless have noticed that the thinkers lectured about in this course on 'Modern Theories of Law', like those who have done the lecturing, have not all of them been primarily lawyers: and you will possibly have seen some advantages in this. Why are lawyers often so ill at ease in the definitions they give us of law? Why, for instance, do they so commonly offer second-hand answers? You may of course tell me it is the instinct of every lawyer to give second-hand answers, to rely, that is, on authority. But in this matter I suggest there is the further circumstance that the question is one for the solving of which a lawyer's experience is not in itself a peculiarly suitable training.

'What is philosophy?' is doubtless a philosophical question: for amongst other things philosophy concerns itself with the true meaning of terms. Legal questions also are often concerned with the meaning of terms. Yet 'What is Law?' is not a legal question. For this question is concerned with the true meaning of the term law: whereas law, if often having to do with the meaning of terms, is concerned not with their true meaning but with their legal meaning.

In a film recently shown, men from opposing armies met and exchanged notes half-way between the trenches. The defining of law is one of those topics on which the lawyers and political scientists might at least in peace-time usefully meet and exchange notes. As it is, there are—in the books of political science—things relating to law which few mere lawyers can understand, let alone endorse. And conversely I appreciate well that any one who, being merely a kind of lawyer, crawls out a little into No-man's Land, must expect what he comes in for from the big guns across the way.

Whether we call him a lawyer or not Austin's political theory was either definitely second-hand or at most merely

a variant on certain ideas familiar in Benthamite circles. That law must be sharply distinguished from morals; that law was an aggregation of laws; that a law was a command, its badge as such being a sanction; that the maintenance of a system of law presupposed what McIver calls the Will *for* the State, and Bentham had called a general habit of obedience: his originality lay, not in entertaining these ideas, but in the laborious thoroughness with which he restated them.

If, however, he retained with little alteration Bentham's notion of law, he was not equally receptive of the great man's conception of jurisprudence,[1] or even of the somewhat different definition given by the elder Mill, Governor though the latter might be of the College where Austin was to teach. The new professor seems to have permitted himself an independent judgement as to the scope and purpose of his own particular subject. If in this respect he was a borrower from anybody, I fancy it was from Professor Falck of Kiel (even more than from Professor Hugo, to whom Austin expressly refers).

The purpose of jurisprudence, he allows himself thus more or less arbitrarily to assume, is instruction—in particular, to beginners in the law. Accordingly he will examine—as being 'pre-eminently pregnant with instruction'—[2] certain aspects of the ampler and maturer systems of law which obtain in societies of a certain type. He will study 'the general principles, notions, and distinctions' common to such systems. He makes no thorough-going attempt to define law in its most general sense. Noting, however, that the systems with which he proposes to deal have a certain common characteristic, in virtue of which he calls them systems of 'positive' law, he does seek to explain what he means by this particular term.

Humpty Dumpty, you will remember, reserved his liberty to give words whatever meanings he chose. Austin,

[1] Austin underlines in Bentham, but certainly does not adopt, an allusion 'to that branch of jurisprudence which contains the art or science of legislation'.

[2] *A.J.* ii, p. 1073.

when explaining his own ideas, assumed a similar freedom: but, as the teacher of young law-students his concern was usually to render explicit the particular meaning that words bore in the standardized and ordinary usage of lawyers. As Professor Ginsberg told us, 'You can define law in such a way as not to bring in the notion of "State" at all.' Austin would, I think, have asked himself, 'But will that represent what the lawyers are thinking about?' This as to his attitude in dealing with terms.

An important clue to another of Austin's main preoccupations is to be found, I think, in the good words he has for a certain Dr. Brown, a psychologist, who, in his discussion of the springs of human behaviour, seems to have concluded that every act of a man was simply the automatic resultant of the balancing-up of a number of competing desires. In dealing with facts—and human activity is a fact—it is evidently Austin's opinion that the investigation should proceed in a spirit of relentless realism regardless of the promptings of traditional terminology. In those days it seems, as in these, to have been widely, though not universally, believed that man was endowed with a will. 'That this same "will" is just nothing at all', says Austin, 'has been proved (in my opinion) beyond controversy by the late Dr. Brown: who has also expelled from the region of entities, those fancied beings called "powers" of which this imaginary "will" is one . . . . For further proof I must refer you to Brown's *Analysis of Cause and Effect*.'[1]

It would hardly be possible to discuss Austin succintly without paraphrasing his position. This is admittedly a difficult task, calling not only for a sense of the exact intention of the writer's language, but also for a certain sympathy with the feelings that led him to say what he did. What follows here is an attempt to convey, mostly in *non*-Austinian language, what seems to me the substance of Austin's view.

With what did he begin? With his notion of man? Of

[1] *A.J.* i, p. 412.

society? Of political society? Of sovereignty? Of law? Of positive law? Though expert opinion appears divided even here, the new professor of jurisprudence seems, on his own showing, to have begun, relevantly enough, with his notion of jurisprudence.

Jurisprudence had to do with systems of positive law. Such systems obtained in what he would term 'political societies'. Such societies were composed of individuals—and it was ultimately on the psychology of individuals that the systems in question rested.

At the time Austin lectured the English governmental régime was an example neither of absolute monarchy nor of anything like universal suffrage. The first Reform Bill was as yet only under discussion. His personal interest in the comparative study of forms of government was, for the purpose of his introductory lectures to law-students, limited by the recognition that, for that purpose, structural diversities of governmental mechanism were not immediately material. His view was not, I think, that absolute monarchy was the normal, or the ideal, or even a desirable basis of government, but that it was the simplest to express in a diagram and that, in relation to the individual confronted in a particular situation with a particular legal prohibition or injunction, it could make little if any essential difference whether the system was one of absolute monarchy, of universal suffrage, or of something midway between. The possibility of government as such did indeed depend upon the maintenance of a ratio, but the ratio in question was not one between those who did and those who did not participate in the function of governing, but between those who did and those who did not acquiesce in the system as such.

As for law in general, it is, as I have said, worth noticing that Austin discussed it not as a phenomenon occurring in various forms, but as a term endowed, properly or improperly, with various meanings. The item 'positive law', however, would by him be used to denote a certain important feature incidental to the life-process of a functioning

'political society'. Positive law presupposed government, however rudimentary. Government rested upon an attitude prevalent among members of the society. Given the appropriate attitude and given the consequently feasible law, it implied for the individual the possibility of coming in the concrete vicissitudes of his daily life against what we may term particular legal requirements. The system of government, no matter what its form, would furnish on the one hand the content of the law's requirements—a content which might be repugnant to him: on the other hand, it would also furnish a possibility or probability of disagreeable consequence in the event of his non-compliance with those, the law's requirements.

On the one hand, then, you had the average individual, and hence society in general, preserving a certain prerequisite attitude. On the other hand, the exceptional individual for whom, with his lack of any general predisposition to obey, the law's requirements would in certain cases represent nothing more than a crude choice between two alternative evils.[1] For while, without a widespread habit of obedience, the governmental system could not function, the characteristic mark of positive law as such was that the exceptional individual, if he disregarded the law, ran thereby a certain specific kind of risk. Political societies no doubt took various forms: but, the dependence of government on the attitude of the average individual, and the predicament of the exceptional individual faced with his choice of evils, were constant factors no matter what the form.

With absolute monarchy the content of positive law was determined by the monarch, and the average individual's acquiescence in relation to the law was simply an aspect of his general habit of obedience *vis-à-vis* the monarch. The entire system, however, rested at bottom on this attitude of the mass. The authority of the monarch was merely the correlate, the reflex, the counterpart of their habitually obedient attitude.

[1] *A.J.* i, p. 454.

The evil consequence held out as liable to be visited upon the offending individual Austin called a 'sanction'. In that the desire of avoiding the sanction was among the factors contributing to determine the individual's actual behaviour, the law was said to be 'binding' upon him, to 'oblige' him, 'obligation' being thus definable as a contingent evil. The fact that positive law depended for its distinctive character upon there being associated with it a sanction might be expressed by calling positive law 'imperative' and putting it into the general category of 'command'.

The command of the monarch, then, binds even the exceptional individual. But we are never to forget that this is so only because behind the command, the positive law, is the monarch's authority, the correlate, the reflex, the counterpart of a prerequisite habitual obedience. Nor is it our business in a generalized analysis to account for this acquiescence. It is enough to say that without it the system would not be possible.

Now what if the political society take some other form? How can it be said that this will make no substantial difference to our analysis of the relation between positive law and individual psychology? Remove the absolute monarch. What then? The reason why government is still possible is because, in place of the absolute monarch, and filling the same role, we find in other systems what may be thought of as a substitute mechanism, less easy to suggest in a diagram, but, like an absolute monarch, furnishing the law's content and enjoying the needful authority.

And this, I imagine Austin saying, is what we find Where you have no absolute monarch, you have a 'constitution' which distributes among a smaller or larger portion of the community the possibility of joining in a process the resultant of which is treated precisely as if it were the fiat of an absolute monarch. So that we may say that, where you have not an absolute monarch, you have a determinate number which, by acting in its collective capacity,

fills the same role as elsewhere an absolute monarch might fill—and this because it enjoys the same authority.

It matters not that we call such authority. But let us call it 'sovereignty'. We may now say that positive law is an aggregation of commands of the sovereign one or number.

Theoretically, constitutions may be thought of as either susceptible or not susceptible of amendment. Austin's thesis is that, given a constitution admitting of amendment, the number who participate, or who could at pleasure participate, in the amending process collectively hold that authority which corresponds to all such habitual obedience as would continue to be rendered under the amended constitution.

The assumption you see is that obedience to any given régime may properly be construed as obedience to that authority at whose pleasure such régime persists. In a particular case it is possible that we may mistakenly descry the authority in question; but then it is not the generalized theory which will be at fault, but our application of it in misconstruing a given set of facts. Maybe a given society is not a political society within our definition at all. Maybe the authority though determinate is determined by technical formulae which deceive us.

The real question is, 'With what sort of validity can you be said to obey me when you are merely obeying those whom I have commanded you to obey?' A system in which human wills are constantly active, but under which only those get their way who observe forms prescribed by an authority seldom active, is one in which it is only in a certain sense true that that authority is all the time getting his way.

No one, I hope, will feel insulted if for the sake of emphasis, I make use now of some familiar analogies.

You will not, I trust, fall into the error of supposing that in Austin's mind the sovereign number and the subjects were mutually exclusive groups. Though this School can

for some purposes be conveniently thought of as made up of teachers and students, it is to be hoped that no one here is a teacher who is not a student also, and I imagine there are few titular students who do not now and then take a hand in the teaching. That, after all, is what students are for. Even if the sovereign number embrace the whole community the distinction between the sovereign and the subjects remains intact and helpful. Can we not, in the case of a company, differentiate between the directors and the shareholders, although the directors themselves hold shares? Do we not, with similar reservations, talk of producers and consumers, or, at a wedding, of friends-of-the-bride and friends-of-the-bridegroom?

Then, as to the celebrated objections about the régime of Runjeet Singh and about the Laws of the Medes and Persians, one can only point out that what Austin gives us is *his* conception of a 'political society'. In examining our notion of, say, a modern city, we do not proceed: 'Venice exists to-day: therefore Venice is a modern city: there are no taxis in Venice: therefore there are no taxis in a modern city.' We say rather: 'Although Venice exists to-day it does not represent *our* notion of a modern city.' It is no doubt psychologically possible for a community to commit suicide before the altar of its deceased ancestors, in obedience to a law which they said should be changeless. You will remember Casabianca 'staying put' upon the burning deck. So too, a nation's foreign policy . . . . However, that is another story. But one may conjecture that Austin would have brushed aside such an example as illustrating merely an abnormal, pathological condition of political mentality. In a normal community, he might have said, the law is made for society, and not vice versa: and it is amenable to change, the only important question being, Who is to have the last word in the matter of whether and how?

Moreover, although it may look like one, this is not at bottom a legal question. Nowhere that I have noticed does Austin define sovereignty as the supreme legal competence

to legislate. His paraphrasers, I think, with hardly an exception ascribe to him such a definition. He does not trouble to define *legal* sovereignty—though he evidently understands as well as any one the constitutional position of Parliament in England. He does indicate pretty clearly what he means by sovereignty. It is the authority logically correlative to the prevalent attitude in a certain type of society. And this authority is logically *pre*-legal, as indeed almost everything, in his system, may be considered pre-legal, except the content of this or that separate command.

It is too commonly supposed that for Austin legislation was the typical law. All I understand him as saying is that only where legislation occurs have you a society whose legal system can be described as, for English law-students, 'pre-eminently pregnant with instruction'. In his theory, as I understand it, nobody *commands* except the sovereign: command is logically pre-legal: on the other hand *legislative power* exists under and by virtue of the law of a constitution—as does the power of the citizen to vote. For Austin, as it seems to me, legislation is no more essentially a command than contract is. Each is the exercise of a power, under the existing law, to modify the existing legal position. Kelsen, with his 'gradual concretization and crystallization of the legal order', is merely using other words for Austin's vision of all legal rules as deriving their specific force from the same ultimate fountain of authority.

What interests Austin, and at bottom matters most of all, is, not where the constitution declares that the highest constitutional authority shall under the constitution reside, but whence the constitution itself derives that logically pre-constitutional authority in virtue of which it at all substantially matters *what* the constitution has to say. Generalized, Austin's position is, not that the sovereign is a specified organ or complex of organs, but that it is that individual or collectivity at whose pleasure the constitution is changed or subsists intact. 'Unless we watch developments closely', writes Mr. Jennings, 'we shall find the Cabinet becoming a Grand Fascist Council and the

Prime Minister a Dictator.' 'Wisely spoken;' Austin would say, 'it is precisely the business of the sovereign number to watch developments closely. . . . Every sovereign gets the constitution it deserves.'

His logic then is—The people inherits, tolerates, and so maintains a constitution. The constitution (*a*) fixes the membership of the sovereign number or the identity of the sovereign, and (*b*) organizes governmental machinery under that sovereign. At any moment the people may overthrow the constitution, and *a fortiori* the sovereign, and *a fortissimo* the government. At any moment the sovereign, while maintaining the constitution, may overthrow the government. The government will do well, therefore, to give heed to the attitude (*a*) of the sovereign; (*b*) of the people. Where—with a broad suffrage—the sovereign and the people tend to be identical the government need think of only one body of opinion at a time. *Tant mieux*—or, if you like, *tant pis!*

You see, the point Austin is making is not so much that law depends on the ideas of the electorate as to what ought to be law, as that the system depends upon the ideas of the community as to who ought to form the electorate. The law designates, but cannot change, the electorate. The electorate, on the other hand, theoretically at any rate, can ultimately change the law. So, of these two, the electorate for the time being seems to be—what shall I say—'top-dog'. But the electorate is top-dog only so long as the community habitually obeys: so the community is top-dog. Even if the electorate be so extended as to include the whole community it may in one capacity become very tired of what it does in its other capacity—just as you may cook your own breakfast and none the less dislike it.

So much for the law's relation to the habitually obedient mass. Let us now talk of sanctions, and the law's relation to the potentially disobedient individual.

In order to be influential sanctions do not of course need to be constantly in visible operation. 'If', says Austin, 'the obedience to the law were absolutely perfect, it is manifest

that sanctions would be dormant . . . We undoubtedly can conceive a state of society so improved and refined that obedience to the law would be perfect.' Perhaps! However, of more importance is the question, Why, in point of fact *do* the people obey? Notice that Austin is far from assuming that the bulk of the community render their habitual obedience through fear of sanctions. 'The man who fulfils his duty', says Austin, 'because he fears the sanction, is an unjust man, although his conduct be just.'[1]

Austin's position is that the individual is under what is nowadays termed social control—which in the marginal case occurs as institutionalized coercion. In a school of economics we are bound to be familiar with marginal cases. Austin's account of the function of the sanction suggests to one's mind the picture of a sheep-dog. The business of the sheep-dog is to round up the marginal cases. If all the sheep wanted to be marginal cases there would not be much of a flock. The flock owes its continued existence as such not merely to the sheep-dog, but to the fact that the average sheep is content to trot along in the middle, and rarely if ever becomes a marginal case.

Furthermore, even as regards those who in complying with the law advert consciously to the sanction, Austin does not contend that the fear of a contingent evil is the sole, or even the principal, factor operative in determining their obedience.

> 'In case the party', he says, 'at the moment of the alleged wrong were conscious of the law and could foresee the consequences of his conduct, it is manifest that the sanction would inspire him with some desire of avoiding it. And an inquiry into the strength or steadiness of that desire, would seem to be idle; because it must necessarily be different in every different person, whether he be infant or adult, mad or sane, drunk or sober.'

Whether this be sound psychology or not, Austin clearly is anxious not to exaggerate the actual influence of the

[1] *A.J.* i, p. 449.

sanction. When we say of a meeting that the more advanced people came in red ties we mean that they wore the badge of a certain political tendency: we single out for mention a small but significant detail in their dress; but we do not mean that they came in ties and nothing further. The sanction is the badge of the legal rule, but this does not mean that fear is the only motive making for compliance. Even the marginally-minded sheep will take a turn at mingling with the flock, and this not necessarily for fear of the sheep-dog.

And what if for one reason or another the sanction cannot be applied, the machinery of enforcement cannot be set in motion? See how carefully Austin avoids the thesis that law is law by virtue of its enforcement. Whether the particular rule could in every case be effectively enforced did not concern him. The law is a declared wish, the disregard of which is *in principle* liable to be visited with sanctions. Anyhow, it is the connotation of the term he is giving, not the course of events as observed in practice.

May I ask you to think of the wash-basin in a hotel bedroom? Why is one of the water-tops marked HOT? You know by experience that even from a hot-water tap it is not always possible to obtain hot water. You know that the hot-water tap is properly so called because if at a given moment you turn it on there is a *chance* that the water will be hot. So too, Austin makes it abundantly clear that law for him is law because there is a chance that the breach of it will be visited with an evil.[1]

Even for one who appears, like Austin, to conceive of 'the sovereign' as the ultimate recipient of the people's obedience, and to assume that sovereignty as so understood must reside somewhere, there would seem to be room to disagree with his reading of the facts, say, in parliamentary England. Dr. A. D. Lindsay for instance, I rather think, considers that obedience in a modern state is ultimately rendered neither to one nor to a number but to the constitution

[1] *A.J.* i, p. 90.

as such.[1] Deference to the Powers that Be thus comes in merely as a corollary to loyalty to the Constitution that Is. To this a would-be defender of Austin may perhaps protest that the constitution in its turn only enjoys support because conceived of, however vaguely, as in principle allowing the law to give expression to the wishes of the electorate. Is it easy to say which picture is the truer to life? Assuming that sovereignty must lie somewhere, are we to conclude that it is, so to say, a wise community that knows its own sovereign?

You will probably agree that, if Austin's 'placing' of sovereignty is to be judged purely as an attempted rationalization of the average citizen's submission to the law, Dr. Lindsay's opinion seems at least equally near to the truth. But I doubt if Austin would have admitted that his problem was merely to formulate accurately the tacit assumptions of 'the law-abiding citizen'. The question he was considering was, I think, both more simple and more subtle. More subtle, for reasons which will, I hope, appear as we proceed. More simple, because to psycho-analyse an abstraction seems to me a palpable impossibility, and for living individuals there are between the two extremes many possible intermediate positions. Some of those who habitually obey the law may do so with no more than the vaguest idea that somebody (one word), or some body (two words), is by the constitution entrusted with the last word, if not in so many words. In order for ideas to determine human conduct it is not necessary that they be clear—any more than that they be true.

In so far as a functioning legal system rests at bottom upon prevalent assumptions it is, no doubt, upon the assumptions of laymen, and not for instance the assumptions of lawyers—and this despite the fact that law in itself is a body of doctrine orthodox among a professional lawyer

[1] *Aristotelian Society's Proceedings*, 1923–4, p. 244. The people's obedience to 'certain persons' is 'derived from its obedience to the constitution', the 'main fact about all modern constitutional governments' being that 'the bulk of the society' accept the constitution.

class. But the communal psychology upon which government is founded cannot, I think, be exhaustively portrayed in terms of coherent assumptions at all. And such common ideas as do seem indispensable—for example the belief that law as such is binding—do not cover all the questions Austin would have liked to answer—as, for example, the question, Why is it binding, anyway?

In passing I think we might also notice that, on Dr. Lindsay's very attractive reading of the facts, the modern state is anyhow not a 'political society' within Austin's definition at all, so that, at least on the logically pre-constitutional plane, there is no necessity to seek in it for authority, or for obedience either: the field thus lying entirely open for some quite independent theory, in terms, say, of a general sense of the prospective blessings of co-operation. And, although while rejecting Austin we are free to use words as we will, it would be convenient if, on the pre-constitutional plane, we could in such case altogether avoid the term sovereignty, so deeply is it tinged for many of us with authoritarian associations.

Not all of Austin's other critics seem to me to have studied him with such care as Dr. Lindsay. You will remember Professor Goodhart's words: 'So far as I know, no American lawyer has ever accepted Austin's attempt to place sovereignty with that body which has power to amend the constitution.' In certain of those cases I fancy you would find that the objector had tested Austin's results in the light of some conception of sovereignty different from that which Austin is purporting to apply. There is indeed a quite common tendency to talk at large of 'sovereignty' and 'the theory of sovereignty' in loose association with the name of Austin; whereas the term is used in many senses and enters into the statement of many theories—while Austin was responsible only for a particular account of the relation between law and communal psychology, in the course of which he made use of the term 'sovereignty' in a single rather clearly defined sense.

Nor is he one of those writers who, starting with a word,

'sovereignty', ask themselves, What shall I mean by it? Where shall I place it? He starts with an assumption of fact—the existence, or assumed existence, in the world, of some political societies, as defined by him, and asks, What is the essence of such an assumed situation of fact? At the root of much misunderstanding there is, I suspect, the idea that for Austin the typical law was a British statute, that to 'command' meant to 'enact', and perhaps also that just as we are apt to talk of Members of Parliament as so many 'legislators', so Austin thought of the sovereign number as so many 'commanders'. What in Austin's theory the anti-social individual fears to-day is the sanction attaching to-day, and only by virtue of that sanction does Austin consider any law to be in force to-day. We, however, are wont to regard say, the Statute of Frauds, as in force because of its having been enacted, i.e. commanded, once and for all, by Parliament, in 1677.

First, let us notice that Austin never conceives of action by the sovereign number in their several capacities. The number is always referred to as It, not as They. He nowhere suggests that the sovereignty is shared among the sovereign number.

Again, although positive law for him is an aggregate of laws, each law being a command, that is to say being supported by a sanction, he says nothing which is inconsistent with the picture of a sanctioned *system*, every component element of which is sanctioned by its mere inclusion in the system. The several provisions of yesterday's statute are law to-day, because part of a system of law which is sanctioned to-day and therefore commanded to-day. As an engine by putting current through an electric system keeps each several lamp in a city continually alight, so the sovereign in effect displays constantly a signal 'As the law stands to-day, so let it continue to stand'. As the lighting system lives by reason of the power-station in the background, so the system of law is kept in operation by the always imperative aspect of the sovereign in the background. The Statute of Frauds has its place in the system

because enacted by Parliament in 1677, but it is binding because commanded by the sovereign number here and now.

Returning to the topic of action taken by 'It', the sovereign number, you will not, I hope, protest that this is an extravagant and ill-explained idea. So far from explaining it now, I shall merely mention that in this matter Austin's language is perfectly consistent. The sovereign number only acts 'in its collective and sovereign capacity'. For, whether the idea be intelligible or not, it is plain that lawyers, like laymen, both civilized and savage, take kindly enough to the notion of action by a number in a corporate capacity. After all there is at bottom no difference between 'consulting the electorate' and 'putting a resolution to a committee'. No one who swallows the theory that a committee 'takes decisions' should strain at the doctrine that the King, Lords, and electors, acting in their corporate capacity (that is through the recognized forms) causes or could at any moment cause the law to change.

That Austin had thought on these things would appear from his disapproving reference to a dictum of Julian. 'First,' he says, 'it confounds an act of the people in its collective and sovereign capacity with the acts of its members considered severally, and as subjects of the sovereign whole.'[1]

Having once noticed that Austin's sovereign number is to be thought of, not as a plurality, but as a personified collectivity, we perceive that his sovereign is after all an abstraction, and his sovereignty and command just a brace of ideas. This 'number' is not on any theory that Austin could consistently sustain a 'real' being. It—as distinct from its component elements—is just as much a 'fancied being' as any of those so-called 'powers' which his much-admired Dr. Brown had so impressively 'expelled from the region of entities'. Both the 'sovereign' and the 'command' are part of a theoretical apparatus quietly, and I suppose unconsciously, introduced to serve as a link between the habitual obedience of the many and the exercise by various hands of various kinds of legal competence.

[1] *A.J.* ii, p. 540.

The actual facts of government may be complicated and difficult to ascertain: but once we start personifying collectivities we have already left the realm of fact for the world of ideas, and in this world of ideas the question when a given collectivity is to be deemed to have exercised its collective will can scarcely be a mere question of fact. Where reality is intricate, it is the privilege of theory to be simple. If, owing to man's nature, government be possible only when it is by most people readily acquiesced in and for exceptional people potentially coercive, and if the acquiescence is towards and the enforcement is at the hands of one and the same 'system of government', the simplest plan for the theorist may be to have a single personified entity to fill both parts—to receive the obedience and to issue the commands. There are limits, of course, even for the theorist, but they are the limits not of what is true, but of what is plausible, and intellectually convenient. For instance, the sovereign collectivity has to be 'determinate'. Why? you may ask. Dr. Lindsay says, 'This is clearly for a lawyer essential'.[1] Austin gives a more generalized answer, the substance of which is that any collectivity (whether one that legislates or one that in practice merely confers legislative competence) must, if it is to function in accordance with constitutionally significant forms, have a membership constitutionally determinable.[2] And this 'must', you will realize, is not a mere lawyerly, constitutional 'must' but a common-sense, practical, extra-constitutional 'must'.

The sovereign collectivity is determinate in the sense that its membership may be ascertained by reference to constitutional law, which distributes the competence to participate in the process whose resultant will be deemed the expression of the sovereign's pleasure. A revision of constitutional law may to-morrow redistribute the right of participation, but if this be effected in due constitutional form, this redistribution will itself be taken to have

[1] *Aristotelian Society's Proceedings*, 1923–4, p. 238.
[2] *A.J.* i, p. 189.

happened at the pleasure of the sovereign collectivity, which will be deemed to survive intact the change in its membership just as if that change were occasioned by the death of an old voter or the qualifying of a new one. That abstraction the sovereign lives on with an undisturbed identity—in the world of ideas.

Some one may at this point propound a nice conundrum. How comes it that the so-called 'determinate sovereign number' is found, on inquiry, to be determined only by the criteria of that law which, by definition, is the output of the sovereign number itself? Can a logically pre-legal sovereignty be ascribed to a collectivity whose very membership is determined by law? Is there not a certain circularity here? This is the twin-brother of another question, which goes to the heart of the whole matter, namely, how, except *under* a constitution, can a sovereign, or any other, number act in its collective capacity? How in the first place did Austin's sovereign number proceed to establish those criteria, or delegate the power to establish those criteria, by which the membership and mode of functioning of the sovereign number itself were from then on to be determined? Granted that, the game having once begun, the resultants of certain constitutional processes *are*, by extra-constitutional doctrine, deemed to be commands of the sovereign, by what original process must the sovereign number be deemed to have in the first place determined what were thenceforth to be considered due constitutional processes?

We are here on the plane of pre-constitutional dogma, where it is very much a case of 'Every man to his fancy' It is the realm in which a Hobbes puts his savings on a Social Contract and a Kelsen, if I am not mistaken, on an Initial Hypothesis.

One answer Austin might offer would be that a purely analytical treatment need not profess to cover the problems of social prehistory. Even though we cannot tell which came first, contemporary observation of the egg and the chicken does nevertheless enable us to say positively

that, in current practice, each serves as a source of the other. Law having at a certain stage established orthodox criteria for determining the membership of the sovereign number and its modes of self-expression, social statics can only make grateful use of those criteria, not however merely because they happen to be legal, but because by the same token they happen to be orthodox.

The real explanation, as it seems to me, why Austin's placing of sovereignty 'under the English constitution' has been a puzzle to everybody since, so that hardly any one pauses to assume that he seriously meant it, is that, while, in finding the sovereign, both Austin and his critics rely on legal criteria, he and they do so for differing reasons. His critics rely on legal criteria because they start with a legal notion of sovereignty and are looking to see where the law puts legal sovereignty. Austin adopts legal criteria because present recognition of legal criteria seems to him to be implied in present submission to government. He is never looking for *legal* sovereignty. He starts with the *notion* of factual sovereignty—not as 'practical mastery' but as the logical correlate of an assumed factual obedience —and infers that such obedience allows sovereignty to reside wherever law places the ultimate control. He does, it is true, trace sovereignty rather like a real property lawyer tracing title: but he is not interested in the law's ideas on their own account; it is the logical implications of a law-abiding people's attitude that he is following out.

Without necessarily believing Austin to have vividly realized what it was he was attempting, I fancy some of you will now be with me in considering it to have been a more subtle task than the mere rationalizing of an habitual attitude; and, if it had not been obvious to you all along, I hope my use a little way back of the term 'social statics' may have helped to show you what I take to have been the nature of that task.

In case, however, some one may still be accusing me of

talking in riddles I propose to offer here a further word of explanation.

The metaphorical use of the term 'force' in the analysis of social situations is, I suppose, familiar enough. If then for a particular purpose we assume, as Austin does, a momentary condition of stable social equilibrium, it seems legitimate to style the study of that situation an exercise in social statics.[1]

The process of rationalizing a personal attitude, of attempting to make explicit what the point of view underlying it would be if consciously and candidly formulated, may perhaps be described as the process of construing that attitude intrinsically. To this process we may oppose that of construing the attitude in the light, not of its psychological basis, but of some outside criterion, adopted because germane to some particular purpose. This way of construing the attitude will be, not intrinsic, but extrinsic.

What Austin construes extrinsically is, not the particular situation existing, say, in the England of 1828, but the type of situation obtaining in 'political societies' as a class. The purpose in view is the intellectual fortification of young law-students. And the criterion relied on is the logic of a modern constitution.

Every objection to Austin's work as being an imperfect description thus seems to me beside the mark. To observe and describe is not the same thing as to observe and construe. Perhaps it is impossible to give a single description which covers the social statics of all societies at all times—or even all parts of a given society at a given time. On the other hand, for a given purpose, a given construction may be found to fit equally well (though for other purposes it fit equally ill) every society relevant to the given purpose.

Austin, in a word, was not describing a particular situation for the student of sociology or history. He was construing a type of situation for the student of law. Confronted with the antithesis between an attempt to describe

[1] The term I know occurs in Herbert Spencer, but I do not know whether it is in a similar sense.