

REVIEW AND DISCUSSION QUESTIONS

1. Describe the nature or essence of law, according to Aquinas, indicating its connection with the common good.
2. How does he define "law"?
3. Describe briefly each of the types of law he distinguishes.
4. "Lawmaking is purposive and rational." Explain, indicating what Aquinas thinks its purpose is and why law cannot be arbitrary.

The Province of Jurisprudence Determined

John Austin

Along with Jeremy Bentham, John Austin was among the most influential of the early utilitarian philosophers. In this selection taken from his important work on law, Austin explains his positivist conception of law as a species of command and argues that the question of a law's status as law is distinct from the question of whether it is just or compatible with divine law.

LECTURE 1

The matter of jurisprudence is positive law: law, simply and strictly so called: or law set by political superiors to political inferiors.

...
A law, in the most general and comprehensive acceptation in which the term, in its literal meaning, is employed, may be said to be a rule laid down for the guidance of an intelligent being by an intelligent being having power over him. Under this definition are concluded, and without impropriety, several species. It is necessary to define accurately the line of demarcation which separates these species from one another, as much mistiness and intricacy has been infused into the science of jurisprudence by their being confounded or not clearly distinguished. In the comprehensive sense above indicated, or in the largest meaning which it has, without extension by metaphor or analogy, the term *law* embraces the following objects:—Laws set by God to his human creatures, and laws set by men to men.

The whole or a portion of the laws set by God to men is frequently styled the law of nature, or natural law: being, in truth, the

only natural law of which it is possible to speak without a metaphor, or without a blending of objects which ought to be distinguished broadly. But, rejecting the appellation Law of Nature as ambiguous and misleading, I name those laws or rules, as considered collectively or in a mass, the *Divine law*, or the *law of God*.

Laws set by men to men are of two leading or principal classes: classes which are often blended, although they differ extremely; and which, for that reason, should be severed precisely, and opposed distinctly and conspicuously.

Of the laws or rules set by men to men, some are established by *political* superiors, sovereign and subject: by persons exercising supreme and subordinate *government*, in independent nations, or independent political societies. The aggregate of the rules thus established, or some aggregate forming a portion of that aggregate, is the appropriate matter of jurisprudence, general or particular. To the aggregate of the rules thus established, or to some aggregate forming a portion of that aggregate, the term *law*, as used simply and strictly, is exclusively applied. . . . As contradistinguished to the rules which I

style *positively morality*, and so on which I shall touch immediately, the aggregate of the rules, established by political superiors, may also be marked commodiously with the name of *positive law*. . . .

Though *some* of the laws or rules, which are set by men to men, are established by political superiors, *others* are *not* established by political superiors, or are *not* established by political superiors, in that capacity or character.

Closely analogous to human laws of this second class, are a set of objects frequently but *improperly* termed *laws*, being rules set and enforced by *mere opinion*, that is, by the opinions or sentiments held or felt by an indeterminate body of men in regard to human conduct. Instances of such a use of the term *law* are the expressions—"The law of honour"; "The law set by fashion"; and rules of this species constitute much of what is usually termed "International law."

The aggregate of human laws properly so called belonging to the second of the classes above mentioned, with the aggregate of objects *improperly* but by *close analogy* termed laws, I place together in a common class, and denote them by the term *positive morality*. The name *morality* severs them from *positive law*, while the epithet *positive* disjoins them from the *law of God*. And to the end of obviating confusion, it is necessary or expedient that they *should* be disjoined from the latter by that distinguishing epithet. For the name *morality* (or *morals*), when standing unqualified or alone, denotes indifferently either of the following objects: namely, positive morality *as it is*, or without regard to its merits; and positive morality *as it would be*, if it conformed to the law of God, and were, therefore, deserving of *approbation*.

. . . I shall now state the essentials of a *law* or *rule* (taken with the largest signification which can be given to the term *properly*).

Every *law* or *rule* (taken with the largest signification which can be given to the term *properly*) is a *command*. Or, rather, laws or rules, properly so called, are a *species* of commands.

. . . A command is distinguished from other significations of desire, not by the style in which the desire is signified, but by the power and the purpose of the party commanding to inflict an evil or pain in case the desire be disregarded. If you cannot or will not harm me in case I comply not with your wish, the expression of your wish is not a command, although you utter your wish in imperative phrase. . . .

A command, then, is a signification of desire. But a command is distinguished from other significations of desire by this peculiarity: that the party to whom it is directed is liable to evil from the other, in case he comply not with the desire.

Being liable to evil from you if I comply not with a wish which you signify, I am *bound* or *obliged* by your command, or I lie under a *duty* to obey it. If, in spite of that evil in prospect, I comply not with the wish which you signify, I am said to disobey your command, or to violate the duty which it imposes.

Command and duty are, therefore, correlative terms: the meaning denoted by each being implied or supposed by the other. Or (changing the expression) wherever a duty lies, a command has been signified; and whenever a command is signified, a duty is imposed.

. . . The greater the eventual evil, and the greater the chance of incurring it, the greater is the efficacy of the command, and the greater is the strength of the obligation.

. . . Rewards are, indisputably, *motives* to comply with the wishes of others. But to talk of commands and duties as *sanctioned* or *enforced* by rewards, or to talk of rewards as *obliging* or *constraining* to obedience, is surely a wide departure from the established meaning of the terms. . . .

It appears, then, from what has been premised, that the ideas or notions comprehended by the term *command* are the following. 1. A wish or desire conceived by a rational being, that another rational being shall do or forbear. 2. An evil to proceed from the former, and to be incurred by the

latter, in case the latter comply not with the wish. 3. An expression or intimation of the wish by words or other signs.

It also appears from what has been premised, that *command*, *duty*, and *sanction* are inseparably connected terms: that each embraces the same ideas as the others, though each denotes those ideas in a peculiar order or series. . . .

Now where it obliges *generally* to acts or forbearances of a *class*, a command is a law or rule. But where it obliges to a *specific* act or forbearance, or to acts or forbearances which it determines *specifically* or *individually*, a command is occasional or particular. . . .

If you command your servant to go on a given errand, or *not* to leave your house on a given evening, or to rise at such an hour on such a morning, or to rise at that hour during the next week or month, the command is occasional or particular. For the act or acts enjoined or forbidden are specially determined or assigned.

But if you command him *simply* to rise at that hour, or to rise at that hour *always*, or to rise at that hour *till further orders*, it may be said, with propriety, that you lay down a *rule* for the guidance of your servant's conduct. For no specific act is assigned by the command, but the command obliges him generally to acts of a determined class.

If a regiment be ordered to attack or defend a post, or to quell a riot, or to march from their present quarters, the command is occasional or particular. But an order to exercise daily till further orders shall be given would be called a *general* order, and *might* be called a *rule*.

If Parliament prohibited simply the exportation of corn, either for a given period or indefinitely, it would establish a law or rule: a *kind* or *sort* of act being determined by the command, and acts of that kind or sort being *generally* forbidden. But an order issued by Parliament to meet an impending scarcity, and stopping the exportation of corn *then shipped and in port*, would not be a law or rule, though issued by the sovereign legislature. . . .

Now the lawgiver determines a class or description of acts; prohibits acts of the class generally and indefinitely; and commands, with the like generality, that punishment shall follow transgression. The command of the lawgiver is, therefore, a law or rule. But the command of the judge is occasional or particular. For he orders a specific punishment, as the consequence of a specific offence. . . .

It appears, from what has been premised, that a law, properly so called, may be defined in the following manner.

A law is a command which obliges a person or persons.

But, as contradistinguished or opposed to an occasional or particular command, a law is a command which obliges a person or persons, and obliges *generally* to acts or forbearances of a *class*.

In language more popular but less distinct and precise, a law is a command which obliges a person or persons to a *course* of conduct.

Laws and other commands are said to proceed from *superiors*, and to bind or oblige *inferiors*. I will, therefore, analyze the meaning of those correlative expressions; and will try to strip them of a certain mystery, by which that simple meaning appears to be obscured.

Superiority is often synonymous with *precedence* or *excellence*. . . .

But, taken with the meaning wherein I here understand it, the term *superiority* signifies *might*: the power of affecting others with evil or pain, and of forcing them, through fear of that evil, to fashion their conduct to one's wishes.

For example, God is emphatically the *superior* of Man. For His power of affecting us with pain, and of forcing us to comply with His will, is unbounded and resistless.

To a limited extent, the sovereign One or Number is the superior of the subject or citizen: the master, of the slave or servant: the father, of the child.

In short, whoever can *oblige* another to comply with his wishes, is the *superior* of that

other, so far as the ability reaches: The party who is obnoxious to the impending evil, being, to that same extent, the *inferior*.

The might or superiority of God, is simple or absolute. . . .

A member of a sovereign assembly is the superior of the judge: the judge being bound by the law which proceeds from that sovereign body. But, in his character of citizen or subject, he is the inferior of the judge: the judge being the minister of the law, and armed with the power of enforcing it.

It appears, then, that the term *superiority* (like the terms *duty* and *sanction*) is implied by the term *command*. For superiority is the power of enforcing compliance with a wish: and the expression or intimation of a wish, with the power and the purpose of enforcing, are the constituent elements of a command.

"That *laws* emanate from *superiors*" is, therefore, an identical proposition. For the meaning which it affects to impart is contained in its subject. . . .

According to an opinion which I must notice *incidentally* here, though the subject to which it relates will be treated *directly* hereafter, *customary laws* must be excepted from the proposition "that laws are a series of commands."

By many of the admirers of customary laws . . . they are thought to oblige legally (independently of the sovereign or state), *because* the citizens or subjects have observed or kept them. . . .

At its origin, a custom is a rule of conduct which the governed observe spontaneously, or not in pursuance of a law set by a political superior. The custom is transmitted into positive law, when it is adopted as such by the courts of justice, and when the judicial decisions fashioned upon it are enforced by the power of the state. But before it is adopted by the courts, and clothed with the legal sanction, it is merely a rule of positive morality: a rule generally observed by the citizens or subjects; but deriving the only force, which it can be said to possess, from

the general disapprobation falling on those who transgress it.

Now when judges transmute a custom into a legal rule (or make a legal rule not suggested by a custom), the legal rule which they establish is established by the sovereign legislature. A subordinate or subject judge is merely a minister. The portion of the sovereign power which lies at his disposition is merely delegated. The rules which he makes derive their legal force from authority given by the state: an authority which the state may confer expressly, but which it commonly imparts in the way of acquiescence. For, since the state may reverse the rules which he makes, and yet permits him to enforce them by the power of the political community, its sovereign will "that his rules shall obtain as law" is clearly evinced by its conduct, though not by its express declaration. . . .

LECTURE 5

. . . Now it follows from these premises, that the laws of God, and positive laws are laws proper, or laws properly so called.

The laws of God are laws proper, inasmuch as they are *commands* express or tacit, and therefore emanate from a *certain* source.

Positive laws, or laws strictly so called, are established directly or immediately by authors of three kinds:—by monarchs, or sovereign bodies, as supreme political superiors: by men in a state of subjection, as subordinate political superiors: by subjects, as private persons, in pursuance of legal rights. But every positive law, or every law strictly so called, is a direct or circuitous command of a monarch or sovereign number in the character of political superior: that is to say, a direct or circuitous command of a monarch or sovereign number to a person or persons in a state of subjection to its author. And being a *command* (and therefore flowing from a *determinate* source), every positive law is a law proper, or a law properly so called.

Besides the human laws which I style positive law, there are human laws which I style positive morality, rules of positive morality, or positive moral rules.

The generic character of laws of the class may be stated briefly in the following negative manner.—No law belonging to the class is a direct or circuitous command of a monarch or sovereign number in the character of political superior. In other words, no law belonging to the class is a direct or circuitous command of a monarch or sovereign number to a person or persons in a state of subjection to its author. . . .

The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation and disapprobation. This truth, when formally announced as an abstract proposition, is so simple and glaring that it seems idle to insist upon it. But simple and glaring as it is, when enunciated in abstract expressions the enumeration of the instances in which it has been forgotten would fill a volume.

Sir William Blackstone, for example, says in his "Commentaries," that the laws of God are superior in obligation to all other laws; that no human laws should be suffered to contradict them; that human laws are of no validity if contrary to them; and that all valid laws derive their force from that Divine original.

Now, he *may* mean that all human laws ought to conform to the Divine laws. If this be his meaning, I assent to it without hesitation. The evils which we are exposed to suffer from the hands of God as a consequence of disobeying His commands are the greatest evils to which we are obnoxious; the obligations which they impose are consequently paramount to those imposed by any other laws, and if human commands conflict with the Divine law, we ought to disobey the com-

mand which is enforced by the less powerful sanction; this is implied in the term *ought*: the proposition is identical, and therefore perfectly indisputable—it is our interest to choose the smaller and more uncertain evil, in preference to the greater and surer. If this be Blackstone's meaning, I assent to his proposition, and have only to object to it, that it tells us just nothing.

Perhaps, again, he means that human lawgivers are themselves obliged by the Divine laws to fashion the laws which they impose by that ultimate standard, because if they do not, God will punish them. To this also I entirely assent. . . .

But the meaning of this passage of Blackstone, if it has a meaning, seems rather to be this: that no human law which conflicts with the Divine law is obligatory or binding; in other words, that no human law which conflicts with the Divine law *is a law*, for a law without an obligation is a contradiction in terms. I suppose this to be his meaning, because when we say of any transaction that it is invalid or void, we mean that it is not binding: as, for example, if it be a contract, we mean that the political law will not lend its sanction to enforce the contract.

Now, to say that human laws which conflict with the Divine law are not binding, that is to say, are not laws, is to talk stark nonsense. The most pernicious laws, and therefore those which are most opposed to the will of God, have been and are continually enforced as laws by judicial tribunals. Suppose an act innocuous, or positively beneficial, be prohibited by the sovereign under the penalty of death; if I commit this act, I shall be tried and condemned, and if I object to the sentence, that it is contrary to the law of God, who has commanded that human lawgivers shall not prohibit acts which have no evil consequences, the Court of Justice will demonstrate the inconclusiveness of my reasoning by hanging me up, in pursuance of the law of which I have impugned the validity. An exception, demurrer, or plea, founded on the law of God was never heard

in a Court of Justice, from the creation of the world down to the present moment.

But this abuse of language is not merely puerile, it is mischievous. When it is said that a law ought to be disobeyed, what is meant is that we are urged to disobey it by motives more cogent and compulsory than those by which it is itself sanctioned. If the laws of God are certain, the motives which they hold out to disobey any human command which is at variance with them are paramount to all others. But the laws of God are not always certain. . . . In quiet times the dictates of utility are fortunately so obvious that the anarchical doctrine sleeps, and men habitually admit the validity of laws which they dislike. To prove by pertinent reasons that a law is pernicious is highly useful, because such process may lead to the abrogation of the pernicious law. To incite the public to resistance by determinate views of *utility* may be useful, for resistance, grounded on clear and definite prospects of good, is sometimes beneficial. But to proclaim generally that all laws which are pernicious or contrary to the will of God are void and not to be tolerated, is to preach anarchy, hostile and perilous as much to wise and benign rule as to stupid and galling tyranny. . . .

LECTURE 6

. . . Every positive law, or every law simply and strictly so called, is set by a sovereign person, or a sovereign body of persons, to a member or members of the independent political society wherein that person or body is sovereign or supreme. Or (changing the expression) it is set by a monarch, or sovereign number, to a person or persons in a state of subjection to its author. Even though it sprung directly from another fountain or source, it is a positive law, or a law strictly so called, by the institution of that present sovereign in the character of political superior. . . .

The superiority which is styled sovereignty, and the independent political society which sovereignty implies, is distinguished from other superiority, and from other society, by the following marks or characters. —1. The bulk of the given society are in a *habit* of obedience or submission to a *determinate* and *common* superior: let that common superior be a certain individual person, or a certain body or aggregate of individual persons. 2. That certain individual, or that certain body of individuals, is *not* in a habit of obedience to a determinate human superior. Laws (improperly so called) which opinion sets or imposes, may permanently affect the conduct of that certain individual or body. To express or tacit commands of other determinate parties, that certain individual or body may yield occasional submission. But there is no determinate person, determinate aggregate of persons, to whose commands, express or tacit, that certain individual or body renders habitual obedience. . . . By “an independent political society,” or “an independent and sovereign nation,” we mean a political society consisting of a sovereign and subjects, as opposed to a political society which is merely subordinate: that is to say, which is merely a limb or member of another political society, and which therefore consists entirely of persons in a state of subjection.

In order that a given society may form a society political and independent, the two distinguishing marks which I have mentioned above must unite. The *generality* of the given society must be in the *habit* of obedience to a *determinate* and *common* superior: whilst that determinate person, or determinate body of persons must *not* be habitually obedient to a determinate person or body. It is the union of that positive, with this negative mark, which renders that certain superior sovereign or supreme, and which renders that given society (including that certain superior) a society political and independent.

REVIEW AND DISCUSSION QUESTIONS

1. Laws are rules, according to Austin, but rules are really just a form of command. How does Austin define a command?

2. Many of us give orders or commands, but these commands are not laws because we are not the "sovereign." How does Austin understand the sovereign?

3. How does Austin understand the notion of an obligation?

4. Which is superior, legal obligations or religious obligations? Explain.

5. Austin argued that in a democratic government the people are sovereign. Do you agree? Explain.

6. If Austin is correct that people are sovereign in a democracy, does it then make sense to think of law as orders?

7. How can Austin account for common or judge-made law?

8. Suppose a judge, noticing there is no relevant statute, applies a customary rule that people have followed for generations and holds a ship liable for not coming to the aid of another at sea. Who is the sovereign in that case? Was the customary rule law *before* the judge applied it, according to Austin?

9. Given his theory of obligation, do positive laws that contradict divine law establish obligations? If not, can they really be laws at all?