

THE PROVINCE OF JURISPRUDENCE DETERMINED

John Austin



Introduction, Polycarp Ikuenobe

ALTHOUGH THOMAS HOBBS AND JEREMY BENTHAM espoused ideas that may be characterized as legal positivism, the English philosopher and legal theorist John Austin was the first major exponent of legal positivism. His effort to articulate legal positivism as a theory about the nature of law, legal system, and legal obligation can be found in a series of lectures later published under the title *The Province of Jurisprudence Determined*; this was the first attempt to do analytical jurisprudence. The school of analytic philosophy, of which analytic jurisprudence is a part, argues that philosophical problems can be resolved by the analysis of concepts. Austin tried to articulate a legal theory to resolve philosophical problems about the nature of legal system, law, and legal obligation by doing linguistic analysis of legal concepts such as sanction and command. The thrust of his theory is that a legal system exists just in case there is an absolute sovereign whose commands or pronouncements are considered to have the force of law. So, according to this view, “X is a law” just in case X is the command of an absolute sovereign. This view is usually referred to as the command theory of law. An essential tenet of his theory, which is considered a central thesis of legal positivism, is the idea that we must distinguish between “law as it is” and “law as it ought to be.” This idea is usually characterized as the separation thesis and it is expressed in the idea that law and morality are not necessarily connected.

Austin starts his theory by carefully distinguishing between *positive law* and *natural law*. Positive law is the law that someone who is a political superior, usually the sovereign power in an independent state, makes for another person, who is a political inferior, usually the subjects, to obey and use to regulate conduct. On the other hand, natural law is the law made by God for humans, which by analogy is related to physical laws of nature. Austin argues that positive law, and not natural law, is the proper province of jurisprudence. Positive law is simply the command from a political superior, and a command has to do with the expressed desire of a person who is superior to another person who is an inferior, specifying that the inferior should act or refrain from acting in a particular way, and such desire is backed up by

the threat of force, coercion, or punishment. The threat of punishment is what distinguishes a command by a superior or sovereign with some authority from other forms of expressed desires. Because of this threat, the person to whom the command is given has an obligation to obey. A law—that is, what the law is, as opposed to what it ought to be, according to Austin—is a special kind of general command that obliges people (in general) to behave in a particularly specified way. Laws in this sense create obligations: there are no laws, as some may argue, that create only rights. Laws that create rights are, in fact, laws that create a duty, which may correlate to a right.

One of the features of a law as a command is that it applies in a general sense as opposed to applying to specific situations. A law is based on superiority and sovereignty, which implies might and the power to inflict pain on a person of an inferior status, thereby forcing the person through fear and threat of punishment to conform his actions to the wishes of the superior. The power of the sovereign is not absolute; the sovereign has power only in relation to his subjects and inferiors. For Austin, the concept of command is analytically essential for a proper understanding of the nature and concept of law. Also embedded in the concept of a command are the concepts of sovereignty or superiority, sanction, and obligation. A sovereign, according to Austin, is a person or group of people who is habitually obeyed by other people in an independent society. The notion of independence is also essential to a proper understanding of the notion of sovereignty as determinate. An independent society is one in which people have a general habit of obeying an individual or group of individuals as a common superior, who does not have a habit of obeying someone else. We must understand the commands of the sovereign in terms of imposing obligation and the habit of obedience. In this sense, Austin sees the concepts of command, sanction, and obligation as correlatives, in that the meaning of one concept implies the meaning of the other.

Austin acknowledges that there are exceptions to his general thesis that law is a species or a special kind of command. In other words, there are laws that may not be commands but may be the legitimate concern of jurisprudence. For instance, he argues that the declarations of legislatures can hardly be called commands but are nonetheless laws. He also says that some laws may be commands in a different sense, in that they are not imperatives. An example of this, he says, is a law that repeals other laws: it releases people from the obligation to obey other laws, hence they are not imperatives in the sense of not imposing obligation. He also argues that imperfect laws of imperfect obligation are not commands as such, in that they declare that cer-

tain actions are crimes yet do not have sanctions or threat of punishment attached to them. Austin agrees with others who point out that there are customary laws that do not derive from the sovereign but are nonetheless laws because they are obeyed; the sovereign may abolish them at will, and they are enforced by the courts. The fact that they have not been abolished by the sovereign seems to suggest that they are indications of the sovereign's desire, hence they are imperatives of the sovereign directly or circuitously.

As you read Austin, consider and reflect on the following questions: What is the difference between positive and natural law? What type of law is the legitimate province of jurisprudence? What is the nature of the distinction between "law as it is" and "law as it ought to be"? In what way does the concept of command imply the concepts of sovereignty, obligation, and sanction? How do these concepts help us to understand the nature of law? What are the exceptions to the idea that laws are a species of commands?

LECTURE I

The matter of jurisprudence is positive law: law, simply and strictly so called: or law set by political superiors to political inferiors. But positive law (or law, simply and strictly so called) is often confounded with objects to which it is related by *resemblance*, and with objects to which it is related in the way of *analogy*: with objects which are *also* signified, *properly and improperly*, by the large and vague expression *law*. To obviate the difficulties springing from that confusion, I begin my projected Course with determining the province of jurisprudence, or with distinguishing the matter of jurisprudence from those various related objects: trying to define the subject of which I intend to treat, before I endeavor to analyse its numerous and complicated parts.

[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 included, 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*, is used simply and strictly, is exclusively applied. But, as contradistinguished to *natural* law, or to the law of *nature* (meaning, by those expressions, the law of God), the aggregate of the rules, established by political superiors, is frequently styled *positive* law, or law existing *by position*. As contradistinguished to the rules which I style *positive morality*, and 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*. For the sake, then, of getting a name brief and distinctive at once, and agreeably to frequent usage, I style that aggregate of rules, or any portion of that aggregate, *positive law*: though rules, which are not established by political superiors, are also *positive*, or exist *by position*, if they be rules or laws, in the proper signification of the term.

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*.

[Besides the various sorts of rules which are included in the literal acceptance of the term law, and those which are by a close and striking analogy, though improperly, termed laws, there are numerous applications of the term law, which] rest upon a slender analogy and are merely metaphorical or figurative. Such is the case when we talk of *laws* observed by the lower animals; of *laws* regulating the growth or decay of vegetables; of *laws* determining the movements of inanimate bodies or masses. For where *intelligence* is not, or where it is too bounded to take the name of *reason*, and, therefore, is too bounded to conceive the purpose of a law, there is not the *will* which law can work on, or which duty can incite or restrain. Yet through these misapplications of a *name*, flagrant as the metaphor is, has the field of jurisprudence and morals been deluged with muddy speculation.

[Having] suggested the *purpose* of my attempt to determine the province of jurisprudence: to distinguish positive law, the appropriate matter of jurisprudence, from the various objects to which it is related by resemblance, and to which it is related, nearly or remotely, by a strong or slender analogy: 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.

Now, since the term *command* comprises the term *law*, the first is the simpler as well as the larger of the two. But, simple as it is, it admits of

explanation. And, since it is the *key* to the sciences of jurisprudence and morals, its meaning should be analysed with precision. . . .

If you express or intimate a wish that I shall do or forbear from some act, and if you will visit me with an evil in case I comply not with your wish, the *expression* or *intimation* of your wish is a *command*. 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. If you are able and willing to harm me in case I comply not with your wish, the expression of your wish amounts to a command, although you are prompted by a spirit of courtesy to utter it in the shape of a request. "*Preces erant, sed quibus contradici non posset.*" Such is the language of Tacitus, when speaking of a petition by the soldiery to a son and lieutenant of Vespasian.

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.

Concisely expressed, the meaning of the correlative expressions is this. He who will inflict an evil in case his desire be disregarded, utters a command by expressing or intimating his desire: He who is liable to the evil in case he disregard the desire, is bound or obliged by the command.

The evil which will probably be incurred in case a command be disobeyed or (to use an equivalent expression) in case a duty be broken, is frequently called a *sanction*, or an *enforcement of obedience*. Or (varying the phrase) the command or the duty is said to be *sanctioned* or *enforced* by the chance of incurring the evil.

Considered as thus abstracted from the command and the duty which it enforces, the evil to be incurred by disobedience is frequently styled a *punishment*. But, as punishments, strictly so called, are only a class of sanctions, the term is too narrow to express the meaning adequately. . . .

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. . . .

Commands are of two species. Some are *laws* or *rules*. The others have not acquired an appropriate name, nor does language afford an expression which will mark them briefly and precisely. I must, therefore, note them as well as I can by the ambiguous and inexpressive name of "*occasional* or *particular* commands."

The term *laws* or *rules* being not unfrequently applied to occasional or particular commands, it is hardly possible to describe a line of separation which shall consist in every respect with established forms of speech. But the distinction between laws and particular commands may, I think, be stated in the following manner.

By every command, the party to whom it is directed is obliged to do or to forbear.

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. In other words, a class or description of acts is determined by a law or rule, and acts of that class or description are enjoined or forbidden generally. But where a command is occasional or particular, the act or acts, which the command enjoins or forbids, are assigned or determined by their specific or individual natures as well as by the class or description to which they belong.

The statement which I have given in abstract expressions I will now endeavour to illustrate by apt examples.

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 acts 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. The order regarding exclusively a specified quantity of corn, the negative acts or forbearances, enjoined by the command, would be determined specifically or individually by the determinate nature of their subject.

As issued by a sovereign legislature, and as wearing the form of a law, the order which I have now imagined would probably be *called* a law. And hence the difficulty of drawing a distinct boundary between laws and occasional commands.

Again: An act which is not an offence, according to the existing law, moves the sovereign to displeasure: and, though the authors of the act are legally innocent or unoffending, the sovereign commands that they shall be punished. As enjoining a specific punishment in that specific case, and as not enjoining generally acts or forbearances of a class, the order uttered by the sovereign is not a law or rule.

Whether such an order would be *called* a law, seems to depend upon circumstances which are purely immaterial: immaterial, that is, with reference to the present purpose, though material with reference to others. If made by a sovereign assembly deliberately, and with the forms of legislation, it would probably be called a law. If uttered by an absolute monarch, without deliber-

ation or ceremony, it would scarcely be confounded with acts of legislation, and would be styled an arbitrary command. Yet, on either of these suppositions, its nature would be the same. It would not be a law or rule, but an occasional or particular command of the sovereign One or Number.

To conclude with an example which best illustrates the distinction, and which shows the importance of the distinction most conspicuously, *judicial commands* are commonly occasional or particular, although the commands which they are calculated to enforce are commonly laws or rules.

For instance, the lawgiver commands that thieves shall be hanged. A specific theft and a specified thief being given, the judge commands that the thief shall be hanged, agreeably to the command of the lawgiver.

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.

According to the line of separation which I have now attempted to describe, a law and a particular command are distinguished thus.—Acts or forbearances of a *class* are enjoined *generally* by the former. Acts *determined specifically*, are enjoined or forbidden by the latter. . . .

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*. We talk of superiors in rank; of superiors in wealth; of superiors in virtue: comparing certain persons with certain other persons; and meaning that the former precede or excel the latter in rank, in wealth, or in virtue.

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 the same extent, the *inferior*.

The might or superiority of God, is simple or absolute. But in all or most cases of human superiority, the relation of superior and inferior, and the relation of inferior and superior, are reciprocal. Or (changing the expression) the party who is the superior as viewed from one aspect, is the inferior as viewed from another.

For example, to an indefinite, though limited extent, the monarch is the superior of the governed: his power being commonly sufficient to enforce compliance with his will. But the governed, collectively or in mass, are also the superior of the monarch: who is checked in the abuse of his might by his fear of exciting their anger; and of rousing to active resistance the might which slumbers in the multitude.

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 *sanc-tion*) 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 it, are the constituent elements of a command. . . .

Like most of the leading terms in the science of jurisprudence and morals, the term *laws* is extremely ambiguous. Taken with the largest signifi-cation which can be given to the term properly, *laws* are a species of *com-mands*. But the term is improperly applied to various objects which have nothing of the imperative character: to objects which are *not* commands; and which, therefore, are *not* laws, properly so called. . . .

1. Acts on the part of legislatures to explain positive law, can scarcely be called laws, in the proper signification of the term. Working no change in the actual duties of the governed, but simply declaring what those duties are, they properly are acts of interpretation by legislative authority. Or, to borrow an expression from the writers on the Roman Law, they are acts of authentic interpretation.

But, this notwithstanding, they are frequently styled laws; *declaratory* laws, or declaratory statutes. They must, therefore, be noted as forming an exception to the proposition “that laws are a species of commands.”

It often, indeed, happens (as I shall show in the proper place), that laws declaratory in name are imperative in effect: Legislative, like judicial interpretation, being frequently deceptive; and establishing new law, under guise of expounding the old.

2. Laws to repeal laws, and to release from existing duties, must also be excepted from the proposition “that laws are a species of commands.” In so far as they release from duties imposed by existing laws, they are not commands, but revocations of commands. They authorize or permit the parties, to whom the repeal extends, to do or to forbear from acts which they were commanded to forbear from or to do. And, considered with regard to *this*, their immediate or direct purpose, they are often named *permissive laws*, or, more briefly and more properly, *permissions*.

Remotely and indirectly, indeed, permissive laws are often or always imperative. For the parties released from duties are restored to liberties or rights: and duties answering those rights are, therefore, created or revived. . . .

3. Imperfect laws, or laws of imperfect obligation, must also be excepted from the proposition “that laws are a species of commands.”

An imperfect law (with the sense wherein the term is used by the Roman jurists) is a law which wants a sanction, and which, therefore, is not binding. A law declaring that certain acts are crimes, but annexing no punishment to the commission of acts of the class, is the simplest and most obvious example.

Though the author of an imperfect law signifies a desire, he manifests no purpose of enforcing compliance with the desire. But where there is not a

purpose of enforcing compliance with the desire, the expression of a desire is not a command. Consequently, an imperfect law is not so properly a law, as counsel, or exhortation, addressed by a superior to inferiors.

Examples of imperfect laws are cited by the Roman jurists. But with us in England, laws professedly imperative are always (I believe) perfect or obligatory. Where the English legislature affects to command, the English tribunals not unreasonably presume the legislature exacts obedience. And, if no specific sanction be annexed to a given law, a sanction is supplied by the courts of justice, agreeably to a general maxim which obtains in cases of the kind.

The imperfect laws, of which I am now speaking, are laws which are imperfect, in the sense of the *Roman jurists*: that is to say, laws which speak the desires of political superiors, but which their authors (by oversight or design) have not provided with sanctions. Many of the writers on *morals*, and on the so called *law of nature*, have annexed a different meaning to the term *imperfect*. Speaking of imperfect obligations, they commonly mean duties which are *not legal*: duties imposed by commands of God, or duties imposed by positive morality, as contradistinguished to duties imposed by positive law. An imperfect obligation, in the sense of the Roman jurists, is exactly equivalent to no obligation at all. For the term *imperfect* denotes simply, that the law wants the sanction appropriate to laws of the kind. An imperfect obligation, in the other meaning of the expression, is a religious or a moral obligation. The term *imperfect* does not denote that the law imposing the duty wants the appropriate sanction. It denotes that the law imposing the duty is *not* a law established by a political superior: that it wants that *perfect*, or that surer or more cogent sanction, which is imparted by the sovereign or state.

I believe that I have now reviewed all the classes of objects, to which the term *laws* is improperly applied. The laws (improperly so called) which I have here lastly enumerated, are (I think) the only laws which are not commands, and which yet may be properly included within the province of jurisprudence. But though these, with the so called laws set by opinion and the objects metaphorically termed laws, are the only laws which *really* are not commands, there are certain laws (properly so called) which may *seem* not imperative. Accordingly, I will subjoin a few remarks upon laws of this dubious character.

1. There are laws, it may be said, which *merely* create *rights*: And, seeing that every command imposes a *duty*, laws of this nature are not imperative.

But, as I have intimated already, and shall show completely hereafter, there are no laws *merely* creating *rights*. There are laws, it is true, which *merely* create *duties*: duties not correlating with correlating rights, and which, therefore may be styled *absolute*. But every law, really conferring a right, imposes expressly or tacitly a *relative* duty, or a duty correlating with the right. If it specify the remedy to be given, in case the right shall be infringed, it imposes the relative duty expressly. If the remedy to be given be not specified, it refers tacitly to pre-existing law, and clothes the right which it purports to create with a remedy provided by that law. Every law, really conferring a right, is, therefore, imperative: as imperative, as if its only purpose were the creation of a duty, or as if the relative duty, which it inevitably imposes, were merely absolute. . . .

2. 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 species of commands."

By many of the admirers of customary laws (and, especially, of their German admirers), they are thought to oblige legally (independently of the sovereign or state), *because* the citizens or subjects have observed or kept them. Agreeably to this opinion, they are not the *creatures* of the sovereign or state, although the sovereign or state may abolish them at pleasure. Agreeably to this opinion, they are positive law (or law, strictly so called), inasmuch as they are enforced by the courts of justice: But, that notwithstanding, they exist *as positive law* by the spontaneous adoption of the governed, and not by position or establishment on the part of political superiors. Consequently, customary laws, considered as positive law, are not commands. And, consequently, customary laws, considered as positive law, are not laws or rules properly so called.

An opinion less mysterious, but somewhat allied to this, is not uncommonly held by the adverse party: by the party which is strongly opposed to customary law; and to all law made judicially, or in the way of judicial legislation. According to the latter opinion, all judge-made law, or all judge-made law established by *subject* judges, is purely the creature of the judges by whom it is established immediately. To impute it to the sovereign legislature, or to suppose that it speaks the will of the sovereign legislature, is one of the foolish or knavish *fictions* with which lawyers, in every age and nation, have perplexed and darkened the simplest and clearest truths.

I think it will appear, on a moment's reflection, that each of these opinions is groundless: that customary law is *imperative*, in the proper signification of the term; and that all judge-made law is the creature of the sovereign or state.

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 transmuted 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.

The admirers of customary law love to trick out their idol with mysterious and imposing attributes. But to those who can see the difference between positive law and morality, there is nothing of mystery about it. Considered as rules of positive morality, customary laws arise from the consent of the governed, and not from the position or establishment of political superiors. But, considered as moral rules turned into positive laws, customary laws are established by the state: established by the state directly, when the customs are promulgated in its statutes; established by the state circuitously, when the customs are adopted by its tribunals.

The opinion of the party which abhors judge-made laws, springs from their inadequate conception of the nature of commands.

Like other significations of desire, a command is express or tacit. If the desire be signified by *words* (written or spoken), the command is express. If

the desire be signified by conduct (or by any signs of desire which are *not* words), the command is tacit.

Now when customs are turned into legal rules by decisions of subject judges, the legal rules which emerge from the customs are *tacit* commands of the sovereign legislature. The state, which is able to abolish, permits its ministers to enforce them: and it, therefore, signifies its pleasure, by that its voluntary acquiescence, “that they shall serve as a law to the governed.”

My present purpose is merely this: to prove that the positive law styled *customary* (and all positive law made judicially) is established by the state directly or circuitously, and, therefore, is *imperative*. I am far from disputing, that law made judicially (or in the way of improper legislation) and law made by statute (or in the properly legislative manner) are distinguished by weighty differences. I shall inquire, in future lectures, what those differences are; and why subject judges, who are properly ministers of the law, have commonly shared with the sovereign in the business of making it.

I assume, then, that the only laws which are not imperative, [and which belong to the subject matter of jurisprudence,] are the following—

1. Declaratory laws, or laws explaining the import of existing positive law.
2. Laws abrogating or repealing existing positive law.
3. Imperfect laws, or laws of imperfect obligation (with the sense wherein the expression is used by the Roman jurists). . . .

LECTURE VI

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, or determinate aggregate of persons, to whose commands, express or tacit, that certain individual or body renders habitual obedience.

Or the notions of sovereignty and independent political society may be expressed concisely thus.—If a *determinate* human superior, *not* in a habit of obedience to a like superior, receive *habitual* obedience from the *bulk* of a given society, that determinate superior is sovereign in that society, and the society (including the superior) is a society political and independent.

To that determinate superior, the other members of the society are *subject*: or on that determinate superior, the other members of the society are *dependent*. The position of its other members towards that determinate superior, is a *state of subjection*, or a *state of dependence*. The mutual relation which subsists between that superior and them, may be styled *the relation of sovereign and subject*, or *the relation of sovereignty and subjection*.

Hence it follows, that it is only through an ellipsis, or an abridged form of expression, that the *society* is styled *independent*. The party truly independent (independent, that is to say, of a determinate human superior), is not the society, but the sovereign portion of the society: that certain member of the society, or that certain body of its members, to whose commands, expressed or intimated, the generality or bulk of its members render habitual obedience. Upon that certain person, or certain body of persons, the other members of the society are *dependent*: or to that certain person, or certain body of persons, the other members of the society are *subject*. 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 of supreme, and which renders that given society (including that certain superior) a society political and independent. . . .