

## DEFENCES OF AUSTINIAN COMMANDS

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### INTRODUCTION

The purpose of this article is to examine the extent to which defences of the concept of “command” in the classical, Austinian, theory of law can be made out.<sup>1</sup> As such, it does not purport to be an examination of Austin’s definition of law as a whole (sometimes called “the command theory”), dependent as that would be on a satisfactory account of other notions, particularly sovereignty. Furthermore, neither does it include a detailed examination of the role of sanctions in his theory, even though Austin controversially included sanctions within his definition of “command” rather than as a separate consequence of a breach of a command. That has been explored often before,<sup>2</sup> and can be seen as one of the major discrete concepts in the theory that is best treated separately.

If a layperson (or perhaps even a lawyer) were asked what a law in its most pure, or obvious, form were like, a response would probably result that identified the following features. Laws on the whole give instructions about what to do and to refrain from doing. These instructions come from the highest political sources - the government through parliamentary processes - and are to be found in statutes. They are directed, in the main, towards the populace at large. In the event of non-compliance with these instructions, the courts are involved in imposing penalties on the malfasant. However, such a picture of law would probably be one that most people would recognise does not cover the whole canvas of law. For example, there is a widespread understanding that the courts do have some form of law-making as well as adjudicative functions. Most citizens are also probably aware that government ministers individually may possess a law-making power of a limited nature, although fewer of them would naturally refer to this as delegated legislation or understand the difference between a statute and a statutory instrument. Despite these caveats, it is a fair assumption that this description is an accurate account if it refers to common understanding of a typical law, or to law in its paradigmatic form.

A particularly interesting feature of this picture is that it does not contain the word “command” or even “imperative”, both at the core of classical positivist conceptions of law. But neither does it contain the words “rule” or “principle”, both of which were at the centre of twentieth-century legal theory. The first aspect of the description above was that law paradigmatically consists of instructions. It is note-worthy that this concept is not one that has had any jurisprudential coinage. This is so, even though it perhaps seems to side-step some criticisms made of the Austinian approach. For example, despite the imperative connotation of the word, not all

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<sup>1</sup> Austin, *The Province of Jurisprudence Determined*. References will be to *Lectures on Jurisprudence* or *The Philosophy of Positive Law* (ed Murray, 5th ed, 1885) and will be cited as *Austin*.

<sup>2</sup> See particularly Tapper, “Austin on Sanctions” [1965] *CLJ* 271

instructions are in fact mandatory. No definitional distortion is committed by the use of the term in a non-mandatory sense. The instructions one receives with a model or a mechanical or electrical device, for example, are not mandatory. They are not imperatives with which one must comply, but are conditional and informative. They are conditional in that one has a choice whether to comply with them or not, either by engaging or not engaging in the activity to which they relate, or by engaging in that activity in a different way to that to which the instructions refer. They are termed instructions to reflect that, if one wishes to be successful in the enterprise to which they refer, the manner laid down must be followed in order to be successful. In this way they play much more of an informative function than a mandatory role. What this illustrates is that a recognisable description of law need not, for its accuracy, be dependent upon the use of particular terms. What is important is the concept behind the word, and understanding of the ideas involved. In considering the Austinian command what is essential, therefore, is the understanding of the conceptual aspects in point rather than terminological and lexicographical rectitude of usage.

### Laws as Commands

Austin saw law as a command (incorporating a sanction for the event of non-compliance) of a sovereign. It would seem at first glance that this closely reflects our commonly-held understanding of law suggested above. However, it is important to establish from the beginning exactly what it was that Austin saw in terms of a command. To do this, it is necessary to consider his analysis of various usages of the term "law". He began his lectures by seeming to identify laws with commands. He says: "Laws proper, or properly so called, are commands; laws which are not commands, are laws improper or improperly so called."<sup>3</sup>

There are four kinds of laws, both proper and improper. There are, first, divine laws, set by God to humans. Then there are positive laws, which Austin terms laws simply and strictly so called. Thirdly, there is positive morality, and lastly laws which are laws only in a metaphorical or figurative sense. The first two types are the laws properly so called, and the last laws improper. Some of the third type, positive morality, are laws proper, and some laws improper. Not all the laws properly so called are the proper subject matter of jurisprudence, but only positive laws. Our concern, then, is with these. Laws properly so called are a species of command. Not all commands are laws, but all laws properly so called are commands.<sup>4</sup>

The notion of a command, for Austin, is thus the key to the sciences of jurisprudence and morals. He defines a command as an expression or intimation of a wish that another should do or forbear from some act which, in the event of non-compliance will be visited with an evil.<sup>5</sup> There are significations of desire other than commands, the differentiating factor being that, in the case of a command, the person commanding has the power to inflict an evil or a pain in the event of its being disregarded. For Austin, the

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<sup>3</sup> *Austin*, p 79.

<sup>4</sup> *Ibid*, p 88.

<sup>5</sup> *Ibid*, pp 88-89.

sanction is an integral part of the notion of a command, and not just a necessary adjunct to it. Being liable to the sanction gives rise to the duty to obey. Command and duty are thus for Austin correlative terms in the sense that where the one exists the other exists also. There are two types of commands. The first are laws, and the second are “occasional or particular commands”. The difference between the two is that, with regard to laws, there is a general obligation to do or forbear, whereas with regard to occasional or particular commands there is no such generality. A command to one’s servant to do an errand can thus be a command. However, as Austin recognises,<sup>6</sup> the two categories overlap.

### Commands as Rules

It is important that Austin says that the general type of command may be termed a law or a rule.<sup>7</sup> He does this on more than one occasion.<sup>8</sup> But on the whole he uses the term “command”. It is therefore crucial to understand whether he uses the term “command” here as a synonym for “rule”, or in some other way. The answer would seem to be that his usage is not intended to connote a synonym for, it will be remembered, some rules (namely moral rules) are not laws strictly so called. That leaves the possibility that all laws are rules. It might be thought that Austin considered that not all laws are rules as some laws are occasional or particular commands. However, he does the opposite by insisting on the requirement of generality for laws.<sup>9</sup>

This requirement of generality is an important aspect of Austin’s theory, for the following reason. One of the more famous criticisms of the notion of command is that it cannot adequately account for the difference between being obliged and being under an obligation. When one is under an obligation (or obligated) there is a duty. Sometimes – this is not universally accepted<sup>10</sup> – obligation and duty are treated as synonyms. The notion of being obliged, however, does not connote duty, but coercion. An order to do something, backed up with a threat cannot, contrary to what Austin suggested, be adequate to describe the basis of obligations. To be coerced is not to be thereby under an obligation. Hart (from whom this criticism derives) illustrated this distinction with an example. If a gunman were to hold up a bank, the cashier could be said to be obliged to hand over the money, but could not be said to be under an obligation so to do.<sup>11</sup> Although

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<sup>6</sup> *Ibid*, p 93.

<sup>7</sup> *Ibid*, p 92.

<sup>8</sup> See *e.g. ibid*, p 109.

<sup>9</sup> *Ibid*, p 92.

<sup>10</sup> This is because, for example, obligations can be voluntarily incurred, whereas it might be thought duties arise from position, status or role. Although Hart seemed to adhere to this view (see “Legal and Moral Obligation” in *Essays in Moral Philosophy* (ed Melden, 1958), p 82; “Are There Any Natural Rights?” (1955) 64 *Philosophical Review* 175) there is no indication that he retained this view in *The Concept of Law*. Further distinctions between duty and obligation may lie in that one ‘does’ or ‘performs’ duties, but ‘discharges’, ‘meets’ or ‘fulfils’ obligations – see Brandt, “The Concepts of Obligation and Duty”, [1964] *Mind* 374. Although it is sometimes useful to draw this distinction for analytic purposes, it is not always necessary to do so – see *e.g.* Kramer, *In Defense of Legal Positivism* (1999), pp 80-81.

<sup>11</sup> Hart, *The Concept of Law* (2<sup>nd</sup> ed, 1994), p 19.

Hart described the command theory as the gunman situation writ large without qualification, it is noteworthy that the notion of generality was significant for him in understanding the nature of law. There must be generality in two ways, he said. First, there is the generality of a particular type of conduct, and secondly, that this applies to a general class of persons.<sup>12</sup> But Austin's requirement of generality is clear, and it is one that is plainly not characterised in the gunman model, which thus cannot reflect Austin's view of commands as laws. Austin's occasional and particular commands are closer to the gunman model than his general commands. As Austin said that occasional and particular commands were not laws, Hart's criticism, whilst highlighting an important distinction, thus fails as an attack on Austin's notion of a command.

### The Psychological Aspect of Commands

Austin's insistence on the requirement of generality means that it is easier to see the command theory as a theory of laws as rules in that the requirement of generality would seem to be central to the concept of rule. However, the difficulty would seem to remain that Austin's command model does not seem to account for the Hartian internal point of view (or "critical reflective attitude") essential to the notion of rules.<sup>13</sup> In other words, deviation from the behaviour required by the rule will attract some form of criticism. It is therefore essential, in order to recognise the rule, to go further than be able to recognise externally congruent action. Austin does not do this.

Such is the argument, propounded most strongly, of course, again by Hart himself. But how accurate is it? In a much-cited passage from the first lecture, Austin gives some hint that he was not altogether oblivious to this point. He wrote:

"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."<sup>14</sup>

In other circumstances, where intelligence is lacking, Austin says that it is right only to speak of laws by metaphor. Kronman has argued that this insistence on the requirement of reason and intelligence for a rule to exist is not unlike the critical reflective attitude, or internal aspect, which Hart employs to distinguish rule-governed behaviour from habit.<sup>15</sup> This is an argument that may seem difficult to accept. There is a wide gulf between the requirement of intelligence or reason, through which desired action must be brought about and the internal point of view. The essence of the latter is more than that the minimum requirements for the command to be understood are met, but that the rule is accepted in the sense that deviation from the required behaviour under the rule would be the object of censure and criticism. Reason and intelligence are merely the requirements for

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<sup>12</sup> *Ibid*, p 21.

<sup>13</sup> *Ibid*, pp 56-57.

<sup>14</sup> *Ibid*, p 86.

<sup>15</sup> A.T. Kronman, "Hart, Austin and the Concept of a Legal System: The Primacy of Sanctions" (1974-5) 84 *Yale Law Journal* 584 at 602.

understanding, and commands that are not laws properly so called, or rules, require the same. In other words, reason and intelligence are the *sine qua non* of communication through language and cannot alone connote a notion like a critical reflective attitude.

The “psychological” aspect (if it may be so called) of commands, namely that a command is given of necessity by an intelligent being to another intelligent being, was considered by Kelsen.<sup>16</sup> He made the point that a command exists only when a particular individual sets and expresses an act of will. If either element (setting or expressing) is missing, then no act of commanding takes place. Say for example that the act of will is no longer present because the commanding individual has died then, even if the expression of the act of will is present in written form, the act of will is no longer present. Therefore, there can be no command if, as with some laws, the binding force of the “command” subsists after the will has gone. For example, a will is still valid even after the death of the testator – indeed, after all, it is intended to have legal effect only after death. Similarly in the case of a contract where one of the parties later changes his mind about what he wants to agree to. A contract remains valid even if the will of one of the parties no longer exists. Again, the binding force of a contract is of real significance only after one of the parties has changed his mind. For Kelsen, therefore, the command being so dependent upon its psychological aspects with regard to the form of words used meant that it could explain little about law. The problem is as acute when one considers statute law. Although it is a common matter to refer to the “intention” of Parliament in passing a Bill into law, every lawyer is aware that this is sometimes at best a fiction, and often meaningless. The difficulties associated with ascertaining the intention of a body of hundreds of persons are plain after even a moment’s reflection. There are also corollary duties relating to the psychological requirements inherent in the nature of a command that are demanded in the addressee. It is problematic to envisage the correct usage of the word “command” when the addressee is not aware of the meaning of the words used, whether they apply to him, or even of their existence.<sup>17</sup>

The assumption underlying both Austin’s and Kelsen’s treatment of this issue is that a will, a desire, or a wish of some sort is necessary for there to be a command. Kelsen denied that the use of “command” was appropriate with regard to much law because the will does not operate with regard to law as it does with command, as we have just seen.

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<sup>16</sup> Kelsen, *General Theory of Law and State* (1945), pp 32-33.

<sup>17</sup> Kelsen has another argument against commands explaining statute law (*ibid*, p 33). He argues that a statute owing its existence to a parliamentary decision first exists after the decision has been willed by the members of the parliament, and their minds have gone on to other things. Commands are not like this, he implies. The argument does not seem convincing, not because the analysis of the process is wrong, but because commands surely can be like that. In effect, Kelsen’s argument amounts to a denial that anything not given personally cannot be a command. But surely this is not so. The army officer dictating a memo containing instructions which, after typing, is placed on the notice board after his mind has turned to other things, can be said to be commanding just as much as if what he had said had been personally communicated.

But how far is it necessary for this type of notion to be present in order for a command to exist? Olivecrona doubted that it was. He argued that, whilst a wish is a common motive for issuing a command, it is by no means the only possible one.<sup>18</sup> It may be that a command is given (for example, in a hierarchical organisation) because there is an obligation or pressure so to do. This may be true, but it is doubtful that Olivecrona's example illustrates this well. He cites the case of the company commander in the First World War who had to order his men to "go over the top" to face machine guns, though he held the action to be senseless from a military point of view, and thus could be said to neither wish nor desire what he was commanding. However, there must be a distinction kept in mind between different orders of desire that may conflict. Indeed, the dilemma in many moral issues arises because of such conflicts. I may wish to eat ice cream, and I may wish to lose weight. I desire them both, but clearly the satisfaction of the one desire necessitates the defeat of the other. But it would be true to say, whatever course of action I take, that a desire is being fulfilled. Likewise with the officer, who commands as he does because of other motives.

The psychological aspect of commands throws up another telling criticism for commands as an explanation of the nature of law. This is that laws, unlike commands, can be self-referential – that is to say, laws may apply to the law-giver, but to use the word "command" in a similar manner would be to misuse the term. As Hart states,<sup>19</sup> it is of course possible that laws can be made to be exclusively other-regarding. An absolute monarch may be exempt from any of the laws that he makes. But with law this is a matter of interpretation and not a necessary fact about the nature of law. This is not the case with commands. It is not that they are paradigmatically other-regarding, but essentially so.

### Commands and Authority

As mentioned above, the command model has often been described, to use Hart's phrase, as the gunman situation writ large, which cannot adequately account for the distinction between being under an obligation to act in a particular way, and being obliged, or being coerced, to do so. If this charge is true, the reason for the inadequacy of the command model might be thought to lie in the fact that in the gunman situation, authority is lacking but law's obligatory nature derives from the authority the person or body has who issues it. A command can never account for this authority. This may be true, but it does not seem to undermine the command model. That a command cannot account for authority does not also mean that it does not presuppose it. It is difficult to envisage a situation in which it could properly be said that a command is issued where there is not also the connotation that the person doing the commanding does not have the authority so to do. This is where Hart's notion of the gunman theory breaks down. For, even if it were true in 1961 that the term "oblige" would be correctly used to describe the gunman's actions, there is something archaic in this usage now in such circumstances. The term is used in more restrictive senses than that,

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<sup>18</sup> Olivecrona, *Law as Fact* (2<sup>nd</sup> ed, 1971), pp 122-123.

<sup>19</sup> Hart, *op cit*, pp 26, 41- 43.

connoting a non-physical form of coercion. Most particularly, it would seem to be used most where, although there is no moral *obligation* to do an act (or not to do it), there is pressure of one sort or another in that regard. Similarly with the notion of command in the gunman situation. It is perhaps doubtful even in 1961 that the word command would have been properly used in the gunman situation, and indeed Hart does not do so. Although coercive acts backed by threats would seem to parallel in particular Austin's model, the fact that the word "command" is used indicates, even if it does not account for it, that it is only orders from a person with authority to issue such orders that are to be implied. It is far from clear, of course, that this observation rescues Austin's model, because his failure to account for the authority connoted by "command" is an important weakness in his theory, even given that the defence of command just proffered were one that he would accept. But, nevertheless, it would seem to offer a possibility of rescuing the idea of command as a possible key to the explanation of law. In a nutshell, the use of the word "command" necessarily implies, without more ado, the authority to issue it.

Olivecrona disagrees. He admits that the idea is plausible in that some people do react negatively when given a command by somebody who does not have the authority to do so, but he comes up with what he describes as "weighty" reasons against it.<sup>20</sup> His first argument is that the authority to command (the "right" to command) could be of significance only if it were a mystical force compelling obedience. But that would be absurd, he says. All that is of importance is the idea in the mind of the addressee that there is authority. In that case, it is irrelevant whether such authority really does "exist", if that is a term that can be used in this context at all. However, it is not necessary to enter these mystical realms to explain the authority to command. All that may be meant by this is that a further law in the system recognises the commands the commander makes as ones which it will enforce. Ultimately this involves tracing back to a law which cannot derive its authority from a further rule, but that need only be a rule of recognition on the Hartean model.

Olivecrona's second argument is that, whilst it is true that the authority to command is often an important factor in causing the commanded person to obey, there are other reasons why people do obey commands, such as fear, habit, personal respect, pure suggestion, or a combination of such factors. Again, this may be true, but that does not damage the command thesis. All that is argued here is that the notion of command denotes that there are reasons for obeying a command (the authority to command) other than the coercion that may also be involved. That such coercion is sometimes the reason for obeying commands cannot affect the force of this argument.

One of Hart's objections to the command theory is that it involves a circularity in an explanation of law.<sup>21</sup> The word "command", he says, carries with it a very strong implication that there is a relatively stable hierarchical organisation of men, in which the commander occupies a position of pre-

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<sup>20</sup> Olivecrona, *op cit*, p 123f.

<sup>21</sup> It has to be said that the specific term "circularity" is not used by Hart, but that is his clear implication.

eminence.<sup>22</sup> But because authority is a notion that is closely linked to that of law, and command with authority, therefore a circularity would seem to be involved. But that, of course, makes the point. The command thesis is just this - that there is an inevitable linkage between laws and commands, to the point that laws are explained by them. The charge of circularity cannot be sustained because, however close the relationship between commands and law, there are clearly commands that do not derive their authority from law.

It seems, therefore, that the differences between Hart and Austin here are not ones of substance. Hart argues that the command theory is the gunman situation writ large. Orders backed by threats can exist in situations where there is no authority. Therefore, to use the term "command" in that situation is to misdescribe, because the notion of command necessarily connotes authority, and furthermore, law. The Austinian apologist would argue along the following lines, however. It is true that the command theory involves the idea of orders backed by threats. However, the notion of commanding is employed. Commanding denotes authority, and the gunman situation does not involve that. Therefore, a description of the command theory in terms of the gunman situation is false.

### Laws Which Are Not Commands

The notion of command as understood by Austin described so far would tend to suggest that he viewed all law in terms of commands. However, there are some types of laws which are not commands, it might be thought. In what sense can a statute which repeals an earlier statute be a command? In what sense can a statute which provides a facility for citizens rather than laying down an obligatory course of conduct for them to follow be considered to be a command? In what sense can international law, based primarily on the practice of states, be considered to be a collection of commands? How can laws which have gained legal status through custom be commands? How can decisions of the courts, addressed to the parties involved, be considered to be binding on others, and therefore commands addressed to them? All these raise particular difficulties for Austin's notion of a command as it has so far been described, and he dealt with them in a variety of ways, and with varying degrees of thoroughness, conviction and success.

First of all, it must be acknowledged that Austin, having laid out clearly the differences between varied types of commands, and differing types of laws, in order to determine what are laws properly so called and what are not, and having done that, to define which of the laws properly so called can be called the proper subject matter of jurisprudence in that they are positive laws, in effect recognises that the picture he has painted is not only inadequate but inaccurate. He does this by, first of all, acknowledging that, although laws which are within the province of jurisprudence are commands (as well as other laws properly so called), and on the whole laws which are improperly

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<sup>22</sup> Hart, *op cit*, pp19-20. Olivecrona argues that Hart is inconsistent here as he recognises that, for example, Christ commanded his disciples, which was not a relationship which involved a hierarchical organisation (Olivecrona, *op cit*, pp 123-124). This is misguided, just because Hart does make it clear that "a body of disciples" is one of the ideas he had in mind.

so called are therefore outside the province of jurisprudence, there are in fact categories of laws which break this rather neat process of subdivision. There are laws of positive morality (being species of laws improperly so called) that are nevertheless within the province of jurisprudence, even though they are not commands. In this case, at best the command model can be only a description of a paradigm positive law and not a thorough account of the nature of all positive law. Austin wrote:

“... the proposition ‘that laws are commands’ must be taken with limitations. Or rather, we must distinguish the various meanings of the term *laws*; and must restrict the proposition to that class of objects which is embraced by the largest signification that can be given to the term properly.”<sup>23</sup>

The laws improperly so called that are within the province of jurisprudence are laws which explain laws, laws to repeal laws, and imperfect laws. By the first category, Austin means declaratory laws, being those which, as he put it, work no change in the actual duties of the governed. An alternative way he describes such laws (whilst pleading that they can scarcely be called laws) is that they are acts of “authentic interpretation”. Repealing legislation does not consist of commands, Austin concedes, but revocations of commands. As he puts it: “They authorise 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.”<sup>24</sup> He also refers to these as permissive laws, or permissions. The third category, imperfect laws, or laws of imperfect obligation, are laws which lack a sanction. This means, for Austin, that the law is not binding. So, the simplest example would be a law which declared certain acts as crimes, but which did not specify a penalty in the event of an offence being committed.

It is important to note here just what it is that Austin is conceding. With regard to declaratory laws, he maintains that they are not law, saying they can scarcely be called law. However, with regard to the other two categories, repealing laws and laws of imperfect obligation, he concedes that they are exceptions to the proposition that laws are a species of commands. With regard to the concession in respect of declaratory laws, it hardly amounts to a concession at all. He maintains here that laws are commands necessarily, although jurisprudence is wide enough here to include within its province some matters which are not laws. As a statement about jurisprudence, this must be uncontroversial, unless it were to be argued, which Austin never does, that jurisprudence should be confined to the study of law alone. However, with regard to the remaining two categories of law, a statement about the province of jurisprudence is not being made, but an acknowledgement that, indeed, some laws are not commands. This must characterise Austin’s analysis at best as an account of paradigmatic forms of law. But it need not have been the case. As Dias has pointed out, and Buckland earlier before him<sup>25</sup>, no concession need have been made at all. Declaratory laws could be brought within the notion of command as being repetitions of earlier commands, and repealing statutes could be viewed as

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<sup>23</sup> *Austin*, p 98.

<sup>24</sup> *Ibid.*

<sup>25</sup> Buckland, *Some Reflections in Jurisprudence* (1949), p 4.

fresh commands cancelling earlier ones.<sup>26</sup> And Austin himself dealt with the idea that not all commands have sanctions attached, and therefore laws without sanctions need not be seen as fatal to the command analysis.

With regard to other laws that did not appear to be commands, Austin holds to his ground with the result that he is susceptible to the charge that he is prepared to stretch the notion of command too far. This is particularly true of his use of the idea of tacit commands. A command is an express command if it is signified by written or spoken words, but if it is signified by conduct, or by signs of desire other than in words, the command is said to be tacit.<sup>27</sup> This device is used by Austin particularly to explain how customary law could be law. For Austin, custom is not law unless and until it is turned into a legal rule by decisions of the courts, which in turn are then to be seen as tacit commands of the sovereign legislature. The state signifies its desire that these should be legal rules by failing to use its power to abolish them. In this way, customary law is just as much commanded as other forms of law. It is interesting to note that Austin at this point takes up a markedly different position to that of Bentham who did not see customary law as law at all.<sup>28</sup> Bentham had various objections:

“A customary law is not expressed in words: now in what words should it present itself? It is one single indivisible act, capable of all manner of constructions. Under the customary law there can scarcely be said to be a right or wrong in any case. How should there? Right is the conformity to a rule, wrong the deviation from it: but here there is no rule established, no measure to discern by, no standard to appeal to: all is uncertainty, darkness and confusion.”<sup>29</sup>

Therefore Austin is not driven to view customary law as law, and thereby forced to account for it in some way by his notion of tacit command. That he chose to do so may be the basis of criticism as to his understanding of customary law rather than as a fundamental flaw in looking at commands as an adequate explanation of law. Certainly, the idea that custom should not

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<sup>26</sup> See Dias, *Jurisprudence* (5th ed, 1985), p 346.

<sup>27</sup> Austin, p 102.

<sup>28</sup> Bentham, *Of Laws In General* (1964), Ch XV.

<sup>29</sup> *Ibid*, p 184. Consider, too, this argument of Kelsen's that customary law cannot be seen in terms of command (Kelsen, *General Theory of Law and State*, *op cit*, pp 34-35: “Suppose that, in a certain community, the following rule is considered valid: A debtor has to pay his creditor 5 per cent interest if there is no other agreement on this point. Suppose too that this rule has been established through custom; that over a long period of time creditors have in fact demanded 5 per cent interest and debtors have in fact paid that amount. Suppose also that they have done this in the opinion that such interest ‘ought’ to be paid. . . Whatever may be our theory about the law-creating facts with respect to customary law, we shall never be able to contend that it is the ‘will’ or ‘command’ of those people whose actual conduct constitutes the custom. . . In each particular case, neither the creditor nor the debtor has any will whatsoever concerning the conduct of other people. . . When, in a particular case, a court of the community condemns the debtor to pay 5 per cent interest, the court bases its judgment on the presumption that in matters of loan one has to act as members of the community have always acted. This presumption does not reflect the actual ‘will’ of any legislator.”

be seen as law has been one readily accepted by a host of writers apart from Bentham.<sup>30</sup>

In any event, the notion of tacit command is a difficult one in explaining customary law. According to Hart,<sup>31</sup> it is not necessarily the case, as Austin said, that customary rules have no status in law until they are used in litigation. There is no reason why, as with statutes which are law before being applied by the courts, custom should not be viewed in the same way. The possibility, which undoubtedly exists, that a legal system could provide that custom were not to operate as law before being applied by the courts would be just that – a possibility – and not necessarily so. Again, this may merely seem to be a criticism of the way in which Austin viewed customary law, not on commands as explanatory of law. Leaving well alone can be an act of will and not a result of ignorance, and if this is how a custom exists, and is acknowledged to exist, it is difficult to see how this should not be seen as a form of command. There is nothing illogical in commanding that things remain as they are and securing that desire by failing to do a positive act.

There is a second difficulty for Austin, and that is that he defined laws as commands of a *sovereign*, and it is difficult to see how customary law, even if properly viewed in terms of tacit commands, can be viewed as being commanded by the sovereign.<sup>32</sup> The difficulty is that, in the absence of any act of commanding, it is rarely possible to ascribe the necessary mental element for a command we have already considered to the sovereign, however the sovereign is defined. For example, as Hart says, only rarely is the attention of the legislature turned to customary rules applied by the courts. Again, this may merely seem to be a criticism of the way in which Austin viewed customary law, not on commands as explanatory of law. Leaving alone can be an act of will and not a result of ignorance, and if a custom exists, and is acknowledged to exist, by such means, it is difficult to see how this could not be seen as a form of command. There is nothing illogical in commanding that things remain as they are and securing that desire by failing to do anything positive.

One further difficulty for Austin would seem to be that he puts more weight on the notion of tacit command than merely to explain the inclusion of customary law within law, which on the one hand is not universally accepted in any event, and on the other, is not of major importance considering the decline in significance of customary law in modern legal systems. In particular, Austin seeks to explain judicial decisions as sources of law in terms of tacit commands. He notices the view that judicial decisions can be seen as “purely the creature of the judges by who it is established immediately”.<sup>33</sup> It needs but a moment’s reflection, he says, to realise that this objection is groundless, and that all judge-made law is the creature of the sovereign state. However, apart from his analysis of customary law as commands, he does not expound on this further. In fact, of course, the argument is difficult to sustain. It is one thing to argue that judges derive

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<sup>30</sup> Cf Fuller, “Human Interaction and the Law” (1969) 14 *AJJ* 1, where the neglect of customary law is described as doing great damage to our thinking about law.

<sup>31</sup> Hart, *op cit*, pp 45–46.

<sup>32</sup> *Ibid*, pp 46–47.

<sup>33</sup> Austin, p 101.

their authority to issue commands from the sovereign, or that they are indeed a part of the sovereign. But Austin's argument is not this. It is that the decisions of the judiciary are in some way tacitly commanded by the sovereign. As Rumble points out,<sup>34</sup> the rules that judges make may be contrary to the wishes or desires of the sovereign. At best, it may be, and probably usually will be, that the rules made will be about matters over which the sovereign has no discernible will. Neither is this only the case with development of common law rules, but applies, as every lawyer knows, to statutory interpretation as well when meaning has to be given to terms and phrases in statutes which the sovereign legislature plainly has not considered.

Cotterrell has argued that this objection betrays a misunderstanding of Austin's concept of the sovereign in his theory. The difficulty arises in seeing Austin's sovereign as a legal sovereign, an ultimate legislating institution. Cotterrell writes:

"... the legal doctrine of parliamentary sovereignty in Britain - which recognises Parliament as the highest law-creating authority - does not, of course, entail that judges are delegates of Parliament. Austin's theory does not, however, suggest that they are. It claims merely that they must act as representatives of the constitutional order of which they are a part . . . . Logically, it would seem to follow that delegation of sovereign power, insofar as it is accomplished by law, must itself be accomplished by means of the sovereign's commands - whether as specific requirements for action or prohibitions imposing limits on action, whether addressed to holders of an office or to those people who are to be subject to the power of the office-holder, and whether express or tacit."<sup>35</sup>

This must surely be right, but it misses the point. The Austinian line is not that delegation to the judiciary must of necessity be by the sovereign, but that the commands made in consequence of that delegation are somehow to be taken as commands of the sovereign. It may be that an argument could be made out for that on lines of agency,<sup>36</sup> but Cotterrell's attempted riposte to Austin's critics does not defend the target at which they were aiming.

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<sup>34</sup> Rumble, *The Thought of John Austin* (1985), p 112.

<sup>35</sup> Cotterrell, *The Politics of Jurisprudence* (1989), pp 75-76.

<sup>36</sup> An interesting complication here would be the suggestion sometimes made of the idea of the sovereign in the work of Hobbes (from whom Austin derived much of his thinking in this area, including the idea of tacit command - see *Leviathan* (ed Macpherson, 1968), Ch XXVI) that the sovereign obtains his authority only by the surrender or loan of power by the people. See e.g. Hampton, *Hobbes and the Social Contract Tradition* (1986), pp 122-123; but see for a contrary view, Gauthier in *Perspectives on Thomas Hobbes* (ed Rogers and Ryan, 1988), pp 148-151.

### The Persistence of Law and Commands

A further problem with the idea of law as commands was also raised by Hart, namely the problem of the persistence of law which is not shared by commands. Hart wrote:

“It is true there is a sense in which the gunman has an ascendancy or superiority over the bank clerk; it lies in his temporary ability to make a threat, which might well be sufficient to make the bank clerk do the particular thing he is told to do. There is no other form of relationship or superiority and inferiority between the two men except this short-lived coercive one. But for the gunman’s purposes, this may be enough; for the simple face-to-face order ‘Hand over those notes or I’ll shoot’ dies with the occasion. The gunman does not issue to the bank clerk *standing orders* to be followed time after time by classes of persons. Yet laws pre-eminently have this ‘standing’ or persistent characteristic. Hence if we are to use the notion of orders backed by threats as explaining what laws are, we must endeavour to reproduce this enduring character which laws have.”<sup>37</sup>

This really is a very strange argument from Hart in that all it serves to show is the inadequacy of his characterisation of the Austinian position. Let us examine the various stages of this characterisation. First, laws are commands. Secondly, commands are orders backed by threats. Thirdly, an order backed by threats can be described by the gunman situation. Fourthly, an order backed by threats with regard to legislators and populace is the gunman situation writ large. But, says Hart, orders backed by threats are not persistent and enduring, whereas laws are. The fallacy of this argument is clear. All Hart has addressed here is the idea that laws are not orders backed by threats. But the Austinian apologist would not need to deny this, for reasons we have already seen – the notion of command connotes something different to naked orders backed by threats. Hart’s target is a straw man.<sup>38</sup> In any event, as Hart himself acknowledges, orders (commands) which are not law *can* be persistent, for example, in the notion of a standing order.<sup>39</sup> He argues that it is difficult to account for the persistence of law in the same way, but it can be seen by this that his position perceptibly changes. On the one hand he suggests that laws are persistent whereas commands are not, and then also argues that the way the persistence of commands can be explained is different to that which can explain the persistence of laws.

### The Promulgation of Laws and Commands

Hart was perhaps on firmer critical ground in pointing out that, whereas commands are usually addressed to people, it is wrong to think that laws are

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<sup>37</sup> Hart, *op cit*, pp 22-23.

<sup>38</sup> It is arguable that such a defence of the Austinian position could be found in Austin’s work but, even if it is a position that could be taken up only by his apologists as a variation of his position, that is something that must be allowed in the same way that Hart’s attack is on a target that differs from Austin’s position at certain points (see Hart, *op cit*, p 18).

<sup>39</sup> Hart, *op cit*, p 23.

addressed, as Austin does.<sup>40</sup> To do so suggests a face-to-face situation which does not exist. A command does involve addressing, however, as do all forms of ordering. Although it may be desirable, Hart says, to make sure laws are brought to the attention of those to whom they apply, it is not essential that this is done. When one uses the term “address” in the context of law, what is usually meant is that the persons who are “addressed” are those to whom the law applies.

This point does have some substance, and is more than a terminological nicety. However, there are a number of points which could be made out for Austin in his defence here. The first is that the notion of addressing is not central to Austin’s characterisation of a command. Although it must be admitted he does use the term, he does indicate at other points that he envisages something rather different. It will be remembered, for example, that when he introduces the idea of “command”, he defines it in terms of a “signification” of a desire.<sup>41</sup> A signification, whilst connoting an addressee, has less overtone of a recipient than does the term “address”. There is, however, a more substantive point, which defends the command idea. This is that there is an argument to be made out that a law does have to be addressed in order to be a law. Fuller famously made such a claim when he argued that law had to fulfil eight desiderata in order to be law. The term “desiderata” is, however, misleading, because a failure in any one of these will result, he says, in that law not being a law at all. He wrote this:

“A total failure in any one of these eight directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all, except perhaps in the Pickwickian sense in which a void contract can still be said to be one kind of contract.”<sup>42</sup>

However, Fuller naturally does acknowledge that, not only is it not possible to educate all those to whom a law applies, but to do so would involve a price that would be too high to pay or, as he puts it, that the requirement of promulgation is subject to the principle of marginal utility.<sup>43</sup>

In fact, Fuller does not make it clear whether, in referring to a total failure to promulgate, he means a failure with regard to all law, or whether a single law which is totally not promulgated is not a law. The signs seem to indicate that he means the more acceptable idea that he is referring to law in general, because he says that failure results in there being no legal system, which clearly could not be the case with respect to an individual law.<sup>44</sup> But he does not say why, if he does so believe, the principle would apply to single laws. If total failure to promulgate all law means the collapse of a legal system, why is it not the case that an unpromulgated law is not a law?

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<sup>40</sup> Hart, *op cit*, p 21-22.

<sup>41</sup> Austin, p 89.

<sup>42</sup> Fuller, *The Morality of Law* (revised ed, 1969), p 39.

<sup>43</sup> *Ibid*, p 49. In fact, Fuller seems to claim that Bentham was willing to go further than he was in this regard.

<sup>44</sup> However, there are indications too that he may be considering laws in the individual as well as the general sense; see *e.g. ibid*, pp 51, 54.

A further interesting attack can be made arising from the requirement that commands be addressed, on these lines. Commands are addressed to those to whom they apply in the sense that it is the addressee whose conduct is the subject of the order. As Hart says,<sup>45</sup> when we speak of laws being addressed we pick up on this particular aspect of addressing. However, laws do not operate in the same way as commands because their addressees (insofar as they have them) are not those whose conduct is the subject matter of the law. Laws are directed at officials, not at the population at large. The conduct which is the subject matter of the law of murder is clearly that of those who may or may not commit it, namely everyone. However, the law which is said to prohibit murder in fact merely amounts to a direction to an official (a judge) as to what he should do in the event of a murder being committed, namely pass a particular sentence. A difficulty associated with this idea derives from the fact that Austin linked it with a requirement for sanctions. But that is not necessary. A direction to an official need not only be to apply a sanction in the event of transgression of a law, but can authorise the provision of a facility. For example, the Wills Act 1837 stipulates that two witnesses shall be required in order for a will to be legally valid. From this it may be said that one ought to have a testator's signature witnessed by two witnesses. But there is nothing in the Act that says that this is what a citizen ought to do. It provides the citizen with a facility which he may wish to take up. The command is placed upon officials, particularly judges, who are ordered where there are two witnesses to treat the will as a valid legal will.

There is a paradox here, for in this criticism to which the Austinian apologist would seem to have no reply, there lies the basis of a powerful defence. For the fact that it is possible to separate the relationship between the law (legislature/sovereign) and the citizen on the one hand, and the law and the official on the other, means that one can maintain both the idea that the rule may be power-conferring, and yet also that it imposes a duty by way of a command. The command imposes a duty on the officials to recognise the effect of a citizen taking up a facility which the law offers to him. So power-conferring rules (to use Hartian terminology) can be seen as always also duty-imposing too.

However, there is a sting in the tail for this defence. This is that the duty arising from the command does not in our example arise from the application of a sanction stipulated by that command. The sanction on the judge who fails to obey the command must come from quite another command. The law prohibiting murder is one that Austin would see as placing a duty on the citizen not to murder, and not on the official. The duty on the citizen, if it were nevertheless to derive from the command to the judge to sentence in the event of a murder, would necessitate a move for Austin away from his theory of duties. For Austin said that duties derive from commands addressed to those who have the duty,<sup>46</sup> and in our example a duty has arisen from a command directed at someone else. To rescue the idea of command from the clutches of power-conferring rules for the Austinian thus necessitates also in a shift on the basis of duties, and that may be too high a price to pay.

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<sup>45</sup> Hart, *op cit*, p 22.

<sup>46</sup> See *e.g.* Austin, p 89.

### Alternatives to 'Command'

Bentham was unhappy with the word “command” and considered various alternatives.<sup>47</sup> His objection was threefold. First, the source of law (for Bentham, the sovereign) was not implied by the use of the word. Secondly, it did not include a countermand, and thirdly, it was a term which connoted a concept rather than a material object unlike, for example, “order” which can apply both to the idea and to the piece of paper on which it is written. But neither is “order” adequate, because that too does not connote the sovereign. Other alternatives that might appeal initially to the modern mind include “decree”, but as Bentham said, this is wide enough to cover the resolution to issue a command as well as the command itself, and in any event could not cover the common or customary law well. Bentham considered many other possibilities – thirteen in all – and preferred, if preference had to be made, “mandate” to any other, although to that he also had objections.

Perhaps the most attractive alternative to command is “imperative”. Sometimes the two words are used interchangeably, and the command theory is often referred to as the imperative theory. But it is possible to draw a distinction between the two ideas, and to the extent that imperatives differ from commands, some of the defects in command, insofar as characterising law is concerned, are perhaps avoided.

An imperative may be described as a grammatical form which contains the word “shall”, or some such prescriptive equivalent (such as “must”), or which can be translated into such form. “Shut that door” is an imperative if its meaning is the same as “You shall shut that door”. However, imperatives which have to be translated into the “shall” form are not necessarily recognisable as imperatives by their grammatical form alone. For example, “Shut that door” may, as well as being an imperative, be said by someone to mean something entirely different. It may be said as a response to a question as to how best to keep out a draught (to give advice), to remind someone of a particular comedian’s catchphrase (to give information), in response to a question as to what one would like done (to request), or a host of other ideas. The “shall” form, however, does not have these alternative meanings. In the other form it is necessary to know the context in which what is said is said in order to determine whether or not it is an imperative.

An imperative can be contrasted with a command in that a command may be seen as a form of imperative about which it is essential to know certain circumstantial matters in order to determine whether it is a form of imperative that is a command. All commands are imperatives, but not all imperatives are commands. What seems to make some imperatives commands is that they are used in certain circumstances. For example, there is a commander and an addressee, one in a position of superiority (but not necessarily absolute) over the other. “Shut that door” said by a school student

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<sup>47</sup> *Of Laws In General*, p 10f; cf Cotterrell, *op cit*, p 59 who, whilst noting that Bentham prefers to talk of law as “an assemblage of signs declarative of a volition”, argues that he essentially treats law as a species of commands. He writes: “the thrust of his conception turns out to be much the same as Austin’s direct and straightforward characterisation.”

to a head teacher is imperative, but not a command. Said by a head teacher to a student, it becomes a command.

With shall-statements, we can say that they are clearly imperatives, but not necessarily that they are commands. We need to know the circumstances in which such a statement is made in order to determine whether or not it is a command. With all non-shall imperatives, we need to know the circumstances in which they are made, both to tell whether they are imperatives at all (or requests, provision of information etc.), and also to tell whether they are imperatives which can also be commands. Part of this 'circumstantial evidence' is the wish-desire element. We do not know whether a non-shall statement is an imperative unless we know the purpose for which the statement is made. It is not possible to identify the character of statements like "shut that door" without such information. This may be determined only if we know the wishes or desires of the person making the expression. It therefore follows that, if the wish-desire element is, as we have argued above, not something that should be part of a characterisation of law, that law may perhaps better be seen as a non-command imperative. Certainly, by taking out the elements from command that we have mentioned is to remove the source of much that in that model necessitates some difficulties for a characterisation of law. In particular, the requirement of an addressee is removed, which squares with our conception of a law as being a law even before it is promulgated. Difficulties of laws applying to whole communities over a time-scale are also removed if the psychological element and the addressee element are removed. In addition, the idea that there is something in the grammatical form of laws that generates authority, is also removed. And because an imperative is a grammatical form requiring no empirical facts of superiority and inferiority, psychology, and a personal relationship, the notion of self-referential law can be accounted for. There is nothing logically difficult in stating an imperative which in fact applies to oneself.

We can illustrate the general point from another angle. R.M. Hare has argued that, as imperatives can be contrasted with indicatives, attempts to reduce imperatives to indicatives should be resisted as false.<sup>48</sup> He says that there are two ways that this has been attempted, one of which is of particular interest to us here. This is the idea that imperatives are described as representing the mind of the speaker. "A is right" therefore means "I approve of A" or "shut the door" means I want you to shut the door. Similarly, we may say this is represented in Austin's work on law, for he argues that "X is the law" means "X is desired by the sovereign that it be done". But the first example in each case is clearly prescriptive and cannot be explained by a description. As Hare says: "instructions for cooking omelets (Take four eggs, &c.) are instructions about eggs, not introspective analyses about the psyche of Mrs. Beeton."<sup>49</sup>

We can apply this line of argument clearly to the Austinian view of commands which confuses the descriptive and prescriptive by arguing that the prescriptive nature of law (the command) derives from a description of

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<sup>48</sup> Hare, *The Language of Morals* (1952), p 5f.

<sup>49</sup> *Ibid*, p 6.

what is the desire of the sovereign.<sup>50</sup> It should be kept clear, however, what is entailed in this argument. To say that imperatives are not descriptions of this type does not entail that to identify a form of imperative – the command – the circumstantial evidence is not required. Take away this circumstantial, psychological, element, however, and one is left at best with a pure non-command imperative. Therefore it is possible to agree with the objections to Austin's model of law on this basis, and yet retain an imperative model – but of necessity a non-command imperative model.

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<sup>50</sup> In that Austin argues that the existence of a command of the sovereign gives rise to a duty (see *Austin*, p 89), and that the command exists because of a fact (the desire of a sovereign), Austin attempts to derive an ought from an is here.