From: John Austin, *Lectures on Jurisprudence*, 5th ed., Robert Campbell, ed. (London: John Murray, 1885)

LECTURE I.

86

The purpose of the following attempt to determine the province of jurisprudence, stated or suggested.

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 endeavour to analyse its numerous and complicated parts.

Law: what, in most comprehensive literal sense.

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.

Law of God.

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*.

Human laws. Two classes.

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.

1st class. Laws set by political superiors.

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

87

2nd class. Laws set by men not political superiors.

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.

Objects improperly but by close analogy termed laws.

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 two last placed in one class under the name positive morality.

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*.

88

Objects metaphori-

Besides the various sorts of rules which are included in the literal acceptation of the term law, and those which are

cally termed laws. 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*).

Laws or rules properly so called, are a species of commands. 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.

Accordingly, I shall endeavour, in the first instance, to analyze the meaning of '*command:*' an analysis which, I fear, will task the patience of my hearers, but which they will bear with cheerfulness, or, at least, with resignation, if they consider the difficulty of performing it. The elements of a science are precisely the parts of it which are explained least easily. Terms that are the largest, and, therefore, the simplest of a series, are without equivalent expressions into which we can resolve them *concisely*. And when we endeavour to *define* 89
them, or to translate them into terms which we suppose are better understood, we are forced upon awkward and tedious circumlocutions.

The meaning of the term command. 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.

The meaning of the term duty. 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.

The terms command and duty are correlative. 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 meaning of the term sanction. 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 90
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.

To the existence of a command, a duty, and a sanction, a violent motive to compliance is not requisite. I observe that Dr. Paley, in his analysis of the term *obligation*, lays much stress upon the *violence* of the motive to compliance. In so far as I can gather a meaning from his loose and inconsistent statement, his meaning appears to be this: that unless the motive to compliance be *violent* or *intense*, the expression or intimation of a wish is not a *command*, nor does the party to whom it is directed lie under a

duty to regard it.

If he means, by a *violent* motive, a motive operating with certainty, his proposition is manifestly false. The greater the evil to be incurred in case the wish be disregarded, and the greater the chance of incurring it on that same event, the greater, no doubt, is the *chance* that the wish will *not* be disregarded. But no conceivable motive will *certainly* determine to compliance, or no conceivable motive will render obedience inevitable. If Paley's proposition be true, in the sense which I have now ascribed to it, commands and duties are simply impossible. Or, reducing his proposition to absurdity by a consequence as manifestly false, commands and duties are possible, but are never disobeyed or broken.

If he means by a *violent* motive, an evil which inspires fear, his meaning is simply this: that the party bound by a command is bound by the prospect of an evil. For that which is not feared is not apprehended as an evil; or (changing the shape of the expression) is not an evil in prospect.

The truth is, that the magnitude of the eventual evil, and the magnitude of the chance of incurring it, are foreign to the matter in question. The greater the eventual evil, and the greater the chance of incurring it, the greater is the efficacy of the command, and the greater is the strength of the obligation: Or (substituting expressions exactly equivalent), the greater is the *chance* that the command will be obeyed, and that the duty will not be broken. But where there is the smallest chance of incurring the smallest evil, the expression of a wish amounts to a command, and, therefore, imposes a duty. The sanction, if you will, is feeble or insufficient; but still there *is* a sanction, and, therefore, a duty and a command.

Rewards are not sanctions.

By some celebrated writers (by Locke, Bentham, and, I think, Paley), the term *sanction,* or *enforcement of obedience*, is applied to conditional good as well as to conditional 91
evil: to reward as well as to punishment. But, with all my habitual veneration for the names of Locke and Bentham, I think that this extension of the term is pregnant with confusion and perplexity.

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

If *you* expressed a desire that *I* should render a service, and if you proffered a reward as the motive or inducement to render it, *you* would scarcely be said to *command* the service, nor should *I*, in ordinary language, be *obliged* to render it. In ordinary language, *you* would *promise* me a reward, on condition of my rendering the service, whilst I might be *incited* or *persuaded* to render it by the hope of obtaining the reward.

Again: If a law hold out a *reward* as an inducement to do some act, an eventual *right* is conferred, and not an *obligation* imposed, upon those who shall act accordingly: The *imperative* part of the law being addressed or directed to the party whom it requires to *render* the reward.

In short, I am determined or inclined to comply with the wish of another, by the fear of disadvantage or evil. I am also determined or inclined to comply with the wish of another, by the hope of advantage or good. But it is only by the chance of incurring *evil,* that I am *bound* or *obliged* to compliance. It is only by conditional *evil*, that duties are *sanctioned* or *enforced*. It is the power and the purpose of inflicting eventual *evil*, and not the power and the purpose of imparting eventual *good*, which gives to the expression of a wish the name of a *command*.

If we put *reward* into the import of the term *sanction,* we must engage in a toilsome struggle with the current of ordinary speech; and shall often slide unconsciously, notwithstanding our efforts to the contrary, into the narrower and customary meaning.

The meaning of the term command, briefly restated.

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.

The inseparable connexion of the three terms, command, duty, and sanction.

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 92
each denotes those ideas in a peculiar order or series.

'A wish conceived by one, and expressed or intimated to another, with an evil to be inflicted and incurred in case the wish be disregarded,' are signified directly and indirectly by each of the three expressions. Each is the name of the same complex notion.

The manner of that connexion.

But when I am talking *directly* of the expression or intimation of the wish, I employ the term *command:* The expression or intimation of the wish being presented *prominently* to my hearer; whilst the evil to be incurred, with the chance of incurring it, are kept (if I may so express myself) in the background of my picture.

When I am talking *directly* of the chance of incurring the evil, or (changing the expression) of the liability or obnoxiousness to the evil, I employ the term *duty,* or the term *obligation:* The liability or obnoxiousness to the evil being put foremost, and the rest of the complex notion being signified implicitly.

When I am talking *immediately* of the evil itself, I employ the term *sanction,* or a term of the like import: The evil to be incurred being signified directly; whilst the obnoxiousness to that evil, with the expression or intimation of the wish, are indicated indirectly or obliquely.

To those who are familiar with the language of logicians (language unrivalled for brevity, distinctness, and precision), I can express my meaning accurately in a breath.—Each of the three terms *signifies* the same notion; but each *denotes* a different part of that notion, and *connotes* the residue.

Laws or rules distinguished from commands which are occasional or particular.

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 93
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 94
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 deliberation 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.

A different line of separation has been drawn by Blackstone and others. According to Blackstone and others, a law and a particular command are distinguished in the following manner.—A law obliges 95
generally the members of the given community, or a law obliges *generally* persons of a given class. A particular command obliges a *single* person, or persons whom it determines *individually*.

That laws and particular commands are not to be distinguished thus, will appear on a moment's reflection.

For, *first*, commands which oblige generally the members of the given community, or commands which oblige generally persons of given classes, are not always laws or rules.

Thus, in the case already supposed; that in which the sovereign commands that all corn actually shipped for exportation be stopped and detained; the command is obligatory upon the whole community, but as it obliges them only to a set of acts individually assigned, it is not a law. Again, suppose the sovereign to issue an order, enforced by penalties, for a general mourning, on occasion of a public calamity. Now, though it is addressed to the community at large, the order is scarcely a rule, in the usual acceptation of the term. For, though it obliges generally the members of the entire community, it obliges to acts which it assigns specifically, instead of obliging generally to acts or forbearances of a class. If the sovereign commanded that *black* should be the dress of his subjects, his command would amount to a law. But if he commanded them to wear it on a specified occasion, his command would be merely particular.

And, *secondly,* a command which obliges exclusively persons individually determined, may amount, notwithstanding, to a law or rule.

For example, A father may set a *rule* to his child or children: a guardian, to his ward: a master, to his slave or servant. And certain of God's *laws* were as binding on the first man, as they are binding at this hour on the millions who have sprung from his loins.

Most, indeed, of the laws which are established by political superiors, or most of the laws which are simply and strictly so called, oblige generally the members of the political community, or oblige generally persons of a class. To frame a system of duties for every individual of the community, were simply impossible: and if it were possible, it were utterly useless. Most of the laws established by political superiors are, therefore, *general* in a twofold manner: as enjoining or forbidding generally acts of kinds or sorts; and as binding the whole community, or, at least, whole classes of its members.

But if we suppose that Parliament creates and grants an office, and 96
that Parliament binds the grantee to services of a given description, we suppose a law established by political superiors, and yet exclusively binding a specified or determinate person.

Laws established by political superiors, and exclusively binding specified or determinate persons, are styled, in the language of the Roman jurists, *privilegia*. Though that, indeed, is a name which will hardly denote them distinctly: for, like most of the leading terms in actual systems of law, it is not the name of a definite class of objects, but of a heap of heterogeneous objects.[a]

([a]) Where a *privilegium* merely imposes a duty, it exclusively obliges a determinate person or persons. But where a *privilegium* confers a right, and the right conferred *avails against the world at large*, the law is *privilegium* as viewed from a certain aspect, but is also a *general law* as viewed from another aspect. In respect of the right conferred, the law exclusively regards a determinate person, and, therefore, is *privilegium*. In respect of the duty imposed, and corresponding to the right conferred, the law regards generally the members of the entire community.

This I shall explain particularly at a subsequent point of my Course, when I consider the peculiar nature of so-called *privilegia*, or of so-called *private laws*.

The definition of a law or rule, properly so called.

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.

The meaning of the correlative terms superior and inferior.

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 97
power of affecting us with pain, and of forcing us to comply with his will, is unbounded and resistless.

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

In short, whoever can *oblige* another to comply with his wishes, is the *superior* of that other, so far as the ability reaches: The party who is obnoxious to the impending evil, being, to that same extent, the *inferior*.

The might or superiority of God, is simple or absolute. 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 *sanction*) is implied by the term *command*. For superiority is the power of enforcing compliance with a wish: and the expression or intimation of a wish, with the power and the purpose of enforcing it, are the constituent elements of a command.

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

If I mark the peculiar source of a given law, or if I mark the peculiar source of laws of a given class, it is possible that I am saying something which may instruct the hearer. But to affirm of laws universally 'that they flow from *superiors*,' or to affirm of laws universally 'that *inferiors* are bound to obey them,' is the merest tautology and trifling.

Laws (improperly so called) which are not commands.

Like most of the leading terms in the sciences of jurispru- 98
dence and morals, the term *laws* is extremely ambiguous. Taken with the largest signification which can be given to the term properly, *laws* are a species of *commands*. 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.

Accordingly, 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.

I have already indicated, and shall hereafter more fully describe, the objects improperly termed laws, which are *not* within the province of jurisprudence (being either rules enforced by opinion and closely analogous to laws properly so called, or being laws so called by a metaphorical application of the term merely). There are other objects improperly termed laws (not being commands) which yet may properly be included within the province of jurisprudence. These I shall endeavour to particularise:—

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 99
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.

But this is a matter which I shall examine with exactness, when I analyze the expressions 'legal right,' 'permission by the sovereign or state,' and 'civil or political liberty.'

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 that 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.

100

Laws (properly so called) which may seem not imperative.

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.

The meanings of the term *right*, are various and perplexed; taken with its proper meaning, it comprises ideas which are numerous and complicated; and the searching and extensive analysis, which the term, therefore, requires, would occupy more room than could be given to it in the present lecture. It is not, however, necessary, that the analysis should be performed here. I purpose, in my earlier lectures, to determine the province of jurisprudence; or to distinguish the laws established by political superiors, from the various laws, proper and improper, with which they are frequently confounded. And this I may accomplish exactly enough, without a nice inquiry into the import of the term *right*.

101

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 expected 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 hake 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 en-

forced 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 102
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 promulged 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 103
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.

Laws which are not commands, enumerated.

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).

But the space occupied in the science by these improper laws is comparatively narrow and insignificant. Accordingly, although I shall take them into account so often as I refer to them directly, I shall throw them out of account on other occasions. Or (changing the expression) I shall limit the term *law* to laws which are imperative, unless I extend it expressly to laws which are not.