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

LECTURE V.

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Laws proper or properly so called, and laws improper or improperly so called.

THE term *law*, or the term *laws*, is applied to the following objects:—to laws proper or properly so called, and to laws improper or improperly so called: to objects which have all the essentials of an imperative law or rule, and to objects which are wanting in some of those essentials, but to which the term is unduly extended either by reason of *analogy* or in the way of *metaphor*.

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Distribution of laws proper, and of such improper laws as are closely analogous to the proper, under three capital classes.—1. The law of God, or the laws of God. 2. Positive law, or positive laws. 3. Positive morality, rules of positive morality, or positive moral rules.

Accordingly, I distribute laws proper, with such improper laws as are closely analogous to the proper, under three capital classes.

The first comprises the laws (properly so called) which are set by God to his human creatures.

The second comprises the laws (properly so called) which are set by men as political superiors, or by men, as private persons, in pursuance of legal rights.

The third comprises laws of the two following species: 1. The laws (properly so called) which are set by men to men, but not by men as political superiors, nor by men, as private persons, in pursuance of legal rights: 2. The laws which are closely analogous to laws proper, but are merely opinions or sentiments held or felt by men in regard to human conduct.—I put laws of these species into a common class, and I mark them with the common name to which I shall advert immediately, for the following reason. No law of either species is a direct or circuitous command of a monarch or sovereign number in the character of political superior. In other words, no law of either species is a direct or circuitous command of a monarch or sovereign number to a person or persons in a state of subjection to its author. Consequently, laws of both species may be aptly opposed to laws of the second capital class. For every law of that second capital class is a direct or circuitous command of a monarch or sovereign number in the character of political superior: that is to say, a direct or circuitous command of a monarch or sovereign number to a person or persons in a state of subjection to its author.

Laws comprised by these three capital classes I mark with the following names.

I name laws of the first class *the law* or *laws of God*, or *the Divine law* or *laws*.

For various reasons which I shall produce immediately. I name laws of the second class *positive law*, or *positive laws*.

For the same reasons, I name laws of the third class *positive morality*, *rules of positive morality*, or *positive moral rules*. 171

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Explanation of the following expressions: viz. *science of jurisprudence* and *science of positive morality; science of ethics or deontology*, *science of legislation*, and *science of morals*.

From the expression *positive law* and the expression *positive morality*, I pass to certain expressions with which they are closely connected.

The *science of jurisprudence* (or, simply and briefly, *jurisprudence*) is concerned with positive laws, or with laws strictly so called, as considered without regard to their goodness or badness.

Positive morality, as considered without regard to its goodness or badness, *might* be the subject of a science closely analogous to jurisprudence. I say '*might* be:' since it is only in one of its branches (namely, the law of nations or 173 international law), that positive morality, as considered without regard to its goodness or badness, has been treated by writers in a scientific or systematic manner.—For the science of positive morality, as considered without regard to its goodness or badness, current or established language will hardly afford us a name. The name *morals*, or *science of morals*, would denote it ambiguously: the name *morals*, or *science of morals*, being commonly applied (as I shall show immediately) to a department of ethics or deontology. But, since the science of jurisprudence is not unfrequently styled 'the science of *positive* law,' the science in question might be styled analogically 'the science of *positive* morality.' The department of the science in question which relates to international law, has actually been styled by Von Martens, a recent writer of celebrity, '*positives* oder *practisches* Völkerrecht:' that is to say, '*positive* international law,' or '*practical* international law.' Had he named that department of the science '*positive* international *morality*,' the name would have hit its import with perfect precision.

The science of ethics (or, in the language of Mr. Bentham, *the science of deontology*) may be defined in the following manner.—It affects to determine the test of positive law and morality, or it affects to determine the principles whereon they must be fashioned in order that they may merit approbation. In other words, it affects to expound them as they should be; or it affects to expound them as they ought to be; or it affects to expound them as they would be if they were good or worthy of praise; or it affects to expound them as they

doctrine sleeps, and men habitually admit the validity of laws which they dislike. To prove by pertinent reasons that a law is pernicious is highly useful, because such process may lead to the abrogation of the pernicious law. To incite the public to resistance by determinate views of *utility* may be useful, for resistance, grounded on clear and definite prospects of good, is sometimes beneficial. But to proclaim generally that all laws which are pernicious or contrary to the will of God are void and not to be tolerated, is to preach anarchy, hostile and perilous as much to wise and benign rule as to stupid and galling tyranny.

Another example from Blackstone.

In another passage of his 'Commentaries,' Blackstone enters into an argument to prove that a master cannot have a right to the labour of his slave. Had he contented himself with expressing his *disapprobation,* a very well-grounded one certainly, of the institution of slavery, no objection could have been made to his so expressing himself. But to dispute the existence or the possibility of the right is to talk absurdly. For in every age, and in almost every nation, the right has been given by positive law, whilst that pernicious disposition of positive law has been backed by the positive morality of the free or master classes.

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would be if they conformed to an assumed measure.

The science of ethics (or, simply and briefly, ethics) consists of two departments: one relating specially to positive law, the other relating specially to positive morality. The department which relates specially to positive law, is commonly styled *the science of legislation*, or, simply and briefly, *legislation*. The department which relates specially to positive morality, is commonly styled *the science of morals*, or, simply and briefly, *morals*.

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The positive moral rules which are laws improperly so called, are *laws set or imposed by general opinion*.

The positive moral rules which are laws improperly so called, are *laws set* or *imposed by general opinion:* that is to say, by the general opinion of any class or any society of 183
persons. For example, Some are set or imposed by the general opinion of persons who are members of a profession or calling: others, by that of persons who inhabit a town or province: others, by that of a nation or independent political society: others, by that of a larger society formed of various nations.

A few species of the laws which are set by general opinion have gotten appropriate names.—For example, There are laws or rules imposed upon gentlemen by opinions current amongst gentlemen. And these are usually styled *the rules of honour,* or *the laws* or *law of honour*.—There are laws or rules imposed upon people of fashion by opinions current in the fashionable world. And these are usually styled *the law set by fashion*.—There are laws which regard the conduct of independent political societies in their various relations to one another: Or, rather, there are laws which regard the conduct of sovereigns or supreme governments in their various relations to one another. And laws or rules of this species, which are imposed upon nations or sovereigns by opinions current amongst nations, are usually styled *the law* of *nations* or *international law.*

A law set or imposed by general opinion, is merely the *opinion* or *sentiment* of an *indeterminate* body of persons in regard to a kind of conduct.

Now a law set or imposed by general opinion is a law improperly so called. It is styled a *law* or *rule* by an analogical extension of the term. When we speak of a law set by general opinion, we denote, by that expression, the following fact.—Some *indeterminate* body or *uncertain* aggregate of persons regards a kind of conduct with a sentiment of aversion or liking: Or (changing the expression) that indeterminate body opines unfavourably or favourably of a given kind of conduct. In *consequence* of that sentiment, or in *consequence* of that opinion, it is likely that they or some of them will be displeased with a party who shall pursue or not pursue conduct of that kind. And, in *consequence* of that displeasure, it is likely that *some* party (*what* party being undetermined) will visit the

party provoking it with some evil or another.

The body by whose opinion the law is said to be set, does not *command,* expressly or tacitly, that conduct of the given kind shall be forborne or pursued. For, since it is not a body precisely determined or certain, it cannot, *as a body,* express or, intimate a wish. *As a body,* it cannot *signify* a wish by oral or written words, or by positive or negative deportment. The so called *law* or *rule* which its opinion is said to impose, is merely the *sentiment* which it feels, or is merely the *opinion* which it holds, in regard to a kind of conduct.

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In consequence of the frequent coincidence of positive law and 199
morality, and of positive law and the law of God, the true nature and fountain of positive law is often absurdly mistaken by writers upon jurisprudence. Where positive law has been fashioned on positive morality, or where positive law has been fashioned on the law of God, they forget that the copy is the creature of the sovereign, and impute it to the author of the model.

For example: Customary laws are positive laws fashioned by judicial legislation upon preexisting customs. Now, till they become the grounds of judicial decisions upon cases, and are clothed with legal sanctions by the sovereign one or number, the customs are merely rules set by opinions of the governed, and sanctioned or enforced morally: Though, when they become the reasons of judicial decisions upon cases, and are clothed with legal sanctions by the sovereign one or number, the customs are rules of positive law as well as of positive morality. But, because the customs were observed by the governed before they were clothed with sanctions by the sovereign one or number, it is fancied that customary laws exist *as positive laws* by the institution of the private persons with whom the customs originated....

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Note—on the prevailing tendency to confound what is with what ought to be law or morality, that is, 1st, to confound positive law with the science of legislation, and positive morality with deontology; and 2ndly, to confound positive law with positive morality, and both with legislation and deontology.—(See page 200, and note there.)

1st. Tendency to confound positive law with the science of legislation and positive morality with deontology.

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

Example from Blackstone.

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

Now, he *may* mean that all human laws ought to conform to the Divine laws. If this be his 215
meaning, I assent to it without hesitation. The evils which we are exposed to suffer from the hands of God as a consequence of disobeying His commands are the greatest evils to which we are obnoxious; the obligations which they impose are consequently paramount to those imposed by any other laws, and if human commands conflict with the Divine law, we ought to disobey the command which is enforced by the less powerful sanction; this is implied in the term *ought:* the proposition is identical, and therefore perfectly indisputable—it is our interest to choose the smaller and more uncertain evil, in preference to the greater and surer. If this be Blackstone's meaning, I assent to his proposition, and have only to object to it, that it tells us just nothing.

Perhaps, again, he means that human lawgivers are themselves obliged by the Divine laws to fashion the laws which they impose by that ultimate standard, because if they do not, God will punish them. To this also I entirely assent: for if the index to the law of God be the principle of utility, that law embraces the whole of our voluntary actions in so far as motives applied from without are required to give them a direction conformable to the general happiness.

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

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

But this abuse of language is not merely puerile, it is mischievous. When it is said that a law ought to be disobeyed, what is meant is that we are urged to disobey it by motives more cogent and compulsory than those by which it is itself sanctioned. If the laws of God are certain, the motives which they hold out to disobey any human command which is at variance with them are paramount to all others. But the laws of God are not always certain. All divines, at least all reasonable divines, admit that no scheme of duties perfectly complete and unambiguous was ever imparted to us by revelation. As an index to the Divine will, utility is obviously insufficient. What appears pernicious to one person may appear beneficial to another. And as for the moral sense, innate practical principles, conscience they are merely convenient cloaks for ignorance or sinister interest: they mean either that I hate the law to 216
which I object and cannot tell why, or that I hate the law, and that the cause of my hatred is one which I find it incommodious to avow. If I say openly, I hate the law, *ergo*, it is not binding and ought to be disobeyed, no one will listen to me; but by calling my hate my conscience or my moral sense, I urge the same argument in another and a more plausible form: I seem to assign a reason for my dislike, when in truth I have only given it a sounding and specious name. In times of civil discord the mischief of this detestable abuse of language is apparent. In quiet times the dictates of utility are fortunately so obvious that the anarchical