SOME MYTH ABOUT POSITIVISM

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"His estimate of men was low," wrote Sarah Austin of her late husband, John, "and his solicitude for their approbation was consequently small."[1] No doubt this attitude contributed to Austin's peace of mind, "unaccustomed as he was to any public recognition of his merits."[2] One gathers, however, that Sarah did not share her husband's indifference and must have been considerably gratified by the celebrity that Austin's memory achieved in the eighteen-sixties. Had she survived until 1871, she might have been even more delighted by Sir William Markby's words to the effect that the subject of the nature of law had been "exhausted" by Austin and that his conclusions had since received the general acceptance of English jurists.[3] And by the eighteen-nineties, commentators on the American continent apparently viewed all Englishmen as Austinians.[4] This idea drew forth an irascible reaction from Sir Frederick Pollock, who regarded Austin's "particular form of *Naturrecht*" as "already dead and buried for all students who have any sense of history."[5]

The reaction following Austin's brief heyday of popularity has been so complete that, since Pollock wrote, many writers and thinkers have appeared who apparently wish that some form of suttee had existed in the England of 1859 whereby Austin's theories might have been buried along with their author. Hostility to Austin has become so marked, in the United States in particular, that a student might be forgiven if he interpreted Holmes's association of positivism with the bad man's viewpoint as a personal reference to Austin. To some extent, this hostility can be regarded as an outcome of objections to analytical jurisprudence from the historical and sociological perspective. But to a greater degree it appears attributable to the fact that Austin has become a symbol for the theory that judicial decisions are mechanical applications of rules previously laid down by higher authority. One hears Austin constantly mentioned in this context, though his work does not appear on any of the recommended reading lists of the deans of American law schools.[6] In Australia, the belief that Austin's analytical system involves a series of mechanical derivations has determined the role which Julius Stone assigns to the Austinian system in the

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1. 1 AUSTIN, JURISPRUDENCE 20 (5th ed. 1885) [hereinafter cited as AUSTIN].
2. *Id.* at 15.
3. MARKBY, ELEMENTS OF LAW 4 (1871).
4. Pollock, *Note*, 10 L.Q. REV. 99 (1894) (citing SMITH, CRITICAL HISTORY OF MODERN ENGLISH JURISPRUDENCE (1893)).
5. *Id.* at 100.
6. See MARKE, DEANS' LIST OF RECOMMENDED READING (1958). Selected excerpts from Austin's work, however, appear in various books of materials.

jurisprudential scheme of things.[7] In Canada, the allegation that Austin denied that judges make law has appeared in print [8] contemporaneously with Professor Hart's opposite conclusion in the *Harvard Law Review*.[9] The charge is of respectable antiquity in England itself, having been made as early as 1920 by Sir Paul Vinogradoff.[10]

This unwarranted situation may justify the appearance of an article whose limited purpose is to set the record straight so that discussion about Austin may proceed on a more fruitful plane. Jurisprudence, after all, builds upon achievements of the past, and careful examination of history is essential to its development. The straw man created by the current misunderstanding of Austin's position has provided some with a whipping-boy to be denigrated, and others with a figure whose position may be defended in theory, but must ultimately be condemned as empirically inaccurate. Either exercise is a waste of energy which might better be spent in discerning the real issues raised by the Utilitarians; for an appreciation of these issues must precede their settlement.

THE ANATOMY OF THE STRAW MAN

Austin and Judicial Legislation

Best exemplifying the common view of Austinian theory—though many examples could be offered—is Edward McWhinney's formulation. After suggesting that analytical positivism may be an Austinian derivation from the German *"Begriffsjurisprudenz,"*[11] McWhinney proceeds:

7. See STONE, THE PROVINCE AND FUNCTION OF LAW ch. 2 (1950) [hereinafter cited as STONE].

8. McWhinney, *English Legal Philosophy and Canadian Legal Philosophy*, 4 MCGILL L.J. 213 (1958).

9. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 608-10 (1958).

10. 1 VINOGRADOFF, OUTLINES OF HISTORICAL JURISPRUDENCE 116 (1920).

The allegations are continuing. Filmer S. C. Northrop writes that "the positive legal rules and theoretical principles referred to by the judge are not, as the Austinian legal positivist affirms, the criteria of his judgment." Northrop, *The Mediational Approval Theory of Law in American Legal Realism*, 44 VA. L. REV. 347, 353 (1958). Edgar Bodenheimer concedes that Austin's belief that judges do make law has been demonstrated and restates the criticism of Austin in terms of Austin's alleged ideal that judges should not make law. Bodenheimer, *Analytical Positivism, Legal Realism, and the Future of Legal Method*, 44 VA. L. REV. 365, 369 (1958). Yet Bodenheimer ultimately concludes that Pound's position about Austin is still valid, though he quotes Pound as saying that the analysts assume the existence of "a complete body of law with no gaps and no antinomies, given authority by the state at one stroke and so to be treated as if every item was of the same date as every other." *Id.* at 365. Surely it should have been conceded that Pound's view needs substantial revision at least.

11. McWhinney, *supra* note 8, at 213. In fact, the main doctrines of analytical positivism were laid down by Jeremy Bentham, who in turn was heavily indebted to Hobbes and others of the British empiricists. Bentham was regarded as the founder of analytical positivism by Continental followers before Austin had begun to write, thanks, no doubt, to the activities of Bentham's French expositor, Dumont. See REDDIE, INQUIRIES IN THE SCIENCE OF LAW 50 (2d ed. 1847). Reddie cites as his source of information M. Rossi,

> Analytical positivism rests, first, on the command or imperative theory of law—that that is law which is laid down by duly constituted political authority—in the case of England, by the sovereign Parliament—and that only that is law. From the command theory of law is derived a normative proposition that judges have no business making law, for that is the business of the legislature and it would be usurping the legislator's functions for the judges to do so: from this *normative* proposition is derived a further, descriptive proposition that judges, in the process of decision-making, have not, as a question of fact, been concerned with questions of what the law ought to be but only with what the law is—that the judicial function has in the past been merely to "find" or "declare" the law and never to make it.[12]

If anyone is to be convicted of advancing this theory, Austin certainly seems, at first sight, the most likely suspect among the analysts. It can hardly be attributed to his successor, Holland, who merely argues that law consists of rules *enforced* by the sovereign, nor to Salmond, the early twentieth-century English positivist, or Gray, his American contemporary, who find the characteristic mark of law in judicial enforcement. Austin, after all, does say that laws are commands *set* by the sovereign. But, as Professor Hart has noted, Austin also alludes, in a number of passages, to the existence of judicial legislation and even accuses some judges of legislative timidity in language foreshadowing later pronouncements by Pollock and Lord Denning.[13]

One sometimes hears the suggestion that the passages quoted by Hart must be regarded as untypical in the light of Austin's general theory. If they are untypical, however, they certainly are not isolated. Lecture XXXVII of Austin's *Jurisprudence* is entirely devoted to a comparison of statutory and judge-made law. The whole of Lecture XXXVIII seeks to demonstrate that some common objections to judicial legislation are groundless. And all of Lecture XXXIX is reserved for a discussion of the real problems attending judicial legislation and the ultimate superiority of a code system. Throughout these chapters, Austin's consistent assumption is that judicial law-making is an existing, influential force, and that the sole issue is whether its function should be largely supplanted by codification. This question he answers affirmatively; but he explicitly recognizes that judicial legislation would survive the enactment of a code, and suggests that the law so evolved might properly be wrought into statutory form from time to time.[14] Many other references to the judges' role in legislating appear outside the chapters mentioned, particularly in those sections of *Jurisprudence* dealing with the sources of law. Austin states that judges frequently base their decisions on customs of ancient or recent

De l'Etude du Droit, ANNALES DE LEGISL. ET DE JURISP. (1820). With respect to Austin himself, Mill writes from personal experience that "he never ceased to be an utilitarian, and with all his love of the Germans, and enjoyment of their literature, never became in the smallest degree reconciled to the innate-principle metaphysics." MILL, AUTOBIOGRAPHY 151 (1924 ed.).

12. McWhinney, *supra* note 8.
13. Hart, *supra* note 9, at 609.
14. 2 AUSTIN 675.

origin,[15] on their notions of public policy, or on simple expediency;[16] that they adopt as law the opinions and practices of conveyancers [17] and the advocatory writings of lawyers motivated by considerations of utility;[18] that they interpret statutes according to their personal notions of what the legislature should have meant;[19] that they apply the theories of their predecessors to new cases;[20] and that they sometimes "legislate" to further their own class interests, those of their appointors,[21] or those of the legal fraternity.[22] Finally, he refers to "the childish fiction employed by our judges, that judiciary or common law is not made by them, but is a miraculous something made by nobody . . . ."[23] After all this, he could hardly have anticipated that he himself would one day be regarded as the leading theoretical apologist for that same childish fiction.

One may argue, of course, that Austin cannot consistently affirm that judges legislate and simultaneously claim that law is a body of commands set by the sovereign. This may be true. The argument nevertheless fails to support an inference that Austin really believed that judges do not create law; for Austin thought that he had successfully reconciled both aspects of his theory by exploiting the notion of the legislature's acquiescence in acts of judicial law-making. Thus, he explains that rules which judges formulate derive their legal force from authority granted 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."[24] Bentham had expounded the conception elaborately in his posthumously published work, *The Limits of Jurisprudence Defined*,[25] and it even entered into his definition of law as "an assemblage of signs declarative of a volition conceived or adopted by the *sovereign* . . . ."[26] Adoption may occur, he explained, prior to the time at which the mandate adopted is expressed (preadoption) or subsequently (susception),[27] the latter mode being exemplified by the sovereign's adoption of his predecessors' mandates, and both modes being applicable to the mandates of judges and other subordinate power-holders.[28] Regarding the sovereign's mere failure to forbid an act as a tacit adoption of the act, Bentham drew some startling conclusions:

15. *Id.* at 539, 543.
16. *Id.* at 539.
17. *Id.* at 546.
18. *Ibid.*
19. *Id.* at 635.
20. *Id*, at 641.
21. *Id.* at 643-44.
22. *Id.* at 645.
23. *Id.* at 634.
24. 1 AUSTIN 102.
25. BENTHAM, THE LIMITS OF JURISPRUDENCE DEFINED (Everett ed. 1945).
26. *Id.* at 88.
27. *Id.* at 104.
28. *Ibid.*

> Take any mandate whatsoever, either it is of the number of those which he allows or it is not: there is no medium: if it is, it is his; by adoption at least, if not by original conception: if not, it is illegal, and the issuing it an offence. Trivial or important makes no difference: if the former are not his, then neither are the latter. The mandates of the master, the father, the husband, the guardian, are all of them the mandates of the sovereign: if not, then neither are those of the general nor of the judge. Not a cook is bid to dress a dinner, a nurse to feed a child, an usher to whip a schoolboy, an executioner to hang a thief, an officer to drive the enemy from a post, but it is by his orders.[29]

This theory of adoption allowed Austin, like Bentham, to reconcile his definition of law with the admitted reality of judicial and other kinds of subordinate legislation. For both, judicial legislation was the product of legislator and judge conjunctively, "the legislator sketching out a sort of imperfect mandate which he leaves it to the subordinate power-holder to fill up."[30] The weakness of their position here—despite Bentham's protestations to the contrary— lies in the fictional nature of the adoption notion. But neither Austin's nor Bentham's accounts of judicial legislation ought automatically to be held aberrational, as if this notion were not part of their command theory.

McWhinney at least avoids the confusion sometimes generated by commentators who fail to distinguish between the Utilitarians' attitudes regarding whether judges ought to make law and their estimation of whether judges do in fact legislate. He offers two distinct, if inaccurate, propositions: first, that analysts believe judges should not create law; and second, that analysts are convinced judges do not. Sir Paul Vinogradoff, in his account of Austin, sometimes appears to attribute one, sometimes the other, and sometimes both, of these views to Austin. "Austin's statements," says Vinogradoff, "in their extreme barrenness, were the appropriate vehicle for a theory of law in the sense of a formal machinery. As the bailiff serving a writ or the policeman effecting an arrest is formally justified by his warrant and would meet all protests and complaints by a reference to that warrant, so the judge from Austin's point of view is merely the agent of the Sovereign who has appointed him and who guarantees the execution of his decisions. It is not of his office to consider independently the justice of any claims except those expressly reserved by law or logically derived from existing legal rules."[31]

Bentham's reaction to these remarks—had he survived to subject Vinogradoff to the same sort of dissection that he performed on Blackstone's work in the *Fragment on Government* and the *Comment on the Commentaries*—is not difficult to imagine. Bentham complains that Blackstone, having begun a sentence in the character of an historical observer, suddenly becomes a censor and so asserts not facts but sentiments of approbation. "The distinction," says Bentham, "perhaps, is what never so much as occurred to him; and indeed the

29. *Id.* at 105.
30. *Id.* at 109.
31. 1 VINOGRADOFF, OUTLINES OF HISTORICAL JURISPRUDENCE 116 (1920).

shifting insensibly, and without warning, from one of these characters to the other, is a failing that seems inveterate in our Author . . . ."[32] The annoyance of the Benthamite Austin at Vinogradoff's ambiguous account of Austin's own work would have been even greater. Whichever way Vinogradoff's interpretation is understood, it is multiply inaccurate. If he meant to express Austin's view of the actual relations between judge and sovereign, then his treatment is falsified by Austin's recognition that judges freely make law in a multitude of situations other than those mentioned by Vinogradoff. If he meant to represent Austin's opinion of the proper relation between sovereign and judge, he is falsifying Austin's place in the history of jurisprudence, for Austin, preferring to deal with laws as they were, left censorial jurisprudence largely to Bentham. Even apart from this consideration, however, his portrayal would be incorrect, since Austin, as already suggested, certainly does not say that a judge should not legislate. Quite the contrary, such judicial activity may be wholly proper, especially in societies like the one in which Austin himself wrote. What he did affirm is that a judge should follow the terms of a clear statute; and since he proposed codification, he naturally looked forward to a decreasing necessity for judicial legislation.

Austin: Dreamer or Observer?

Vinogradoff classifies Bentham and Austin as rationalists,[33] and Julius Stone classifies Austin in the same way.[34] The application of this slippery word to the analysts may well have contributed to the current misinterpretations of their theories. Vinogradoff appears to employ the term in a variety of senses. At the outset, he contrasts rationalism with authoritarianism, explaining that the eighteenth century was rationalist because it believed that the facts of law could be subjected to the same methods of observation and deductive reasoning that are used in synthesizing the facts of the physical sciences.[35] But he immediately goes on to contrast "rationalism proper," which draws deductions from a priori principles, with the physical science method, which is concerned with co-ordinating the facts of experience under general laws.[36] He then explains that men utilizing the latter method qualify as rationalist in the sense

32. BENTHAM, A FRAGMENT ON GOVERNMENT 150 (Montague ed. 1891). Compare Bentham's comments, *id.* at 237:

> He sets out with the word *duty* in his mouth; and, in the character of a *Censor*, with all due gravity begins talking to us of what *ought* to be. 'Tis in the midst of this lecture that our *Proteus* slips aside; puts on the *historian*; gives an insensible turn to his discourse; and, without any warning of the change, finishes with telling us what is. Between these two points, indeed, the *is* and the *ought to be*, so opposite as they frequently are in the eyes of other men, that spirit of obsequious *quietism* that seems constitutional in our Author, will scarce ever let him recognize a difference.

33. 1 VINOGRADOFF, OUTLINES OF HISTORICAL JURISPRUDENCE 116-17 (1920).

34. STONE 49.

35. 1 VINOGRADOFF, OUTLINES OF HISTORICAL JURISPRUDENCE 104 (1920).

36. *Id.* at 105.

that they trust in intellectual interpretation of the facts. At this point, Vinogradoff is presumably in a position to describe as a rationalist, in one sense or another, anyone who believes that true general statements can be asserted about anything, whether such statements purport to be derived from experience or, in the case of "rationalists proper," from a priori postulates. Bentham, he says, belongs not with the rationalists proper but with that class of empiricists who may be called rationalists because they attempt an intellectual interpretation of observed facts.[37] He apparently holds the same view of Austin, whom he groups with Bentham.

Stone, on the other hand, characterizes Austin as what Vinogradoff would call a "rationalist proper." For Stone, analytical jurisprudence in general is "a rational as distinct from an empirical study."[38] Hence, Stone does not regard Austin's initial postulate, the definition of law, as having been intended to represent observation or experience in any way. The definition, in his opinion, seeks only to provide a basis for logical arrangement of a legal system. Thus:

> Austin's theory is not a description of an actual state nor of actual law. . . . [It is] a formal theory from which has been abstracted all reference either to actual political and social conditions or to desirable political and social conditions. . . . These definitions and the deductions from them belong to one dream of arranging a body of law in a logically interdependent system. . . .
>
> [A] system such as Austin's is purporting to expose the premisses from which each particular rule may follow as a conclusion, and to ascertain how far all such premisses may be ultimately found to stand together consistently with one supreme set of premisses, like the definition of "law" and "sovereign" or of the "necessary legal conceptions."[39]

Stone does not contend that this interpretation of Austinian jurisprudence is consistent with all Austin wrote.[40] But he explains away incompatible statements as lapses to which Austin was subject when he momentarily forgot that he was outlining not actuality but a logical dream world. He accordingly dismisses Austin's attempt to exemplify "sovereigns" by reference to contemporary European and American communities as an "incidental weakness" arising from Austin's departure from his proper sphere of discourse, contrary to his "main purpose and contribution."[41] His own view of Austin's work, Stone argues, is supported by passages in which Austin expresses his hope that students will perceive how the more minute rules of law depend upon general principles appearing throughout the legal structure,[42] and his belief in certain "necessary" principles without which a system of law could not be imagined.[43]

37. *Id.* at 105-06.

38. STONE 49.

39. *Id.* at 60, 61, 138.

40. See Stone's section entitled "Austin's Own Contribution to This Confusion," *id.* at 61-62.

41. *Id.* at 62.

42. *Id.* at 57-58 (citing to 2 AUSTIN, JURISPRUDENCE 1116 (3d ed. 1869)).

43. Compare the discussion in text accompanying notes 76-98 *infra.*

It seems natural to infer, as Hart has, that, under the Stone view, Austin should have denied the existence of judicial legislation.[44] If all the laws contemplated by the Austinian system are inevitable deductions from a priori definitions, a judge can only declare, never create, them. It should be reemphasized, however, that Stone discounts Austin's allusions to judicial legislation only because he believes that Austin's analytical system self-consciously disregards the rules which actually control society in order to deal with a logically derived, "pure" law. In fact, he distinguishes Austin's philosophy from that of the German school of *Begriffsjurisprudenz* precisely on the ground that the Germans, believing their logical system to represent actuality, felt the need to deny the existence of judicial legislation.[45] And, considering Austin to have avoided this identification, Stone feels that his system is unobjectionable and useful where *Begriffsjurisprudenz* is not.[46] Thus, although Stone may fail to mention Austin's recognition of judicial legislation when he discusses Austin's analytical system, he does specifically refer to the Austinian treatment of judicial law-making when he deals with the actual legal control of society.[47] His argument, therefore, would presumably be that Austin, speaking as an observer of facts, recognized judicial legislation and hence would have had to concede that a divergence exists between the rules governing society and the "laws" of his own closed system. Accordingly, the proper objection to Stone's position is not that he denies Austin's recognition of judicial legislation but that he is forced to regard Austin's extensive treatment of this subject as outside the Austinian scheme of analytical jurisprudence—though Austin himself, and Bentham, as already demonstrated, took considerable pains to fit judicial legislation into the analytical scheme by utilizing the notion of acquiescence.

The difficulties inherent in Stone's rationalist interpretation are by no means confined to those which Stone himself mentions nor to those presented by passages of Austin's work recognizing judicial legislation. Stone might dismiss the latter as he did the former—as temporary lapses during which Austin lost sight of his main purpose, or as conscious adventures outside his main universe of discourse. The major inadequacy of Stone's interpretation is that it runs directly counter to what the Utilitarians regarded as the fundamental tenets of their jurisprudential school. Leslie Stephen, himself personally associated with members of the Benthamite school and the author of a three-volume treatise about them,[48] thus evaluates their contribution to knowledge: "The strong points of Benthamism may, I think, be summed up in two words. It meant reverence for facts. Knowledge was to be sought not by logical jugglery but by scrupulous observation and systematic appeals to experience."[49] Yet Pro-

44. Hart, *Positivism and the Separation of Law and Morals*, 71 Harv. L. Rev. 593, 608 n.32 (1958).
45. Stone 155, 161.
46. *Id.* at 161.
47. *Id.* at 196.
48. Stephen, The English Utilitarians (1900).
49. Stephen, Life of Sir James Fitzjames Stephen 123 (2d ed. 1895).

fessor Stone sees Austin as deliberately excluding all empirical references and preferring to engage in the syllogistic extrapolation of merely postulated premises. Noteworthy in this respect is the fact that Austin, no doubt rather impudently, claims membership in the historical school of jurisprudence for his mentor Bentham; and his reasons are precisely those that he advances in rejecting the method of rationalism which Stone was later to attribute to him. "Bentham," says Austin, "belongs strictly to the *historical* school of jurisprudence. The proper sense of that term as used by the Germans is, that the jurists thus designated think that a body of law cannot be spun out from a few general principles assumed *a priori*, but must be founded on experience of the subjects and objects with which the law is conversant." And he adds: "The meaning of their being called the historical school is simply this, that they agree with Bentham in thinking that law should be founded on an experimental view of the subjects and objects of law, and should be determined by general utility, not drawn out from a few arbitrary assumptions *a priori* called the law of nature."[50] Further proof of the Utilitarian attitude toward the separation of theory and practice is found in John Stuart Mill's account of his father's reaction when, at the age of thirteen, the younger Mill innocently remarked that something might be true in theory but not in practice. James Mill's indignant outburst left his son "fully persuaded that in being unable to give a correct definition of Theory, and in speaking of it as something which might be at variance with practice, I had shown unparalleled ignorance."[51] Although Mill thought his father's anger somewhat unreasonable, he never forgot the lesson. He might equally well have learned it from Austin, who became his tutor some years later[52] and whose first lectures on jurisprudence he attended and noted.[53] One can imagine that the following passage in Austin's lectures must have awakened painful recollections in his student:

> ' 'Tis true in *theory*; but, then, 'tis false in *practice*.' Such is a common talk. This says Noodle; propounding it with a look of the most ludicrous profundity.
>
> But, with due and discreet deference to this worshipful and weighty personage, *that* which is true in *theory* is *also* true in *practice*.
>
> Seeing that a true theory is a *compendium* of particular truths, it is necessarily true as applied to particular cases. The terms of the theory are general and abstract, or the particular truths which the theory implies would not be abbreviated or condensed. But, unless it be true of particulars, and, therefore, true in practice, it has no *truth* at all. *Truth* is always particular, though *language* is commonly general. Unless the terms of a theory can be resolved into particular truths, the theory is mere jargon: a coil of those senseless abstractions which often ensnare the *instructed*; and in which the wits of the ignorant are certainly caught and entangled, when they stir from the track of authority, and venture to think for themselves.[54]

50. 2 AUSTIN 679.
51. MILL, AUTOBIOGRAPHY 27 (1924 ed.).
52. *Id.* at 53.
53. 1 AUSTIN v.
54. *Id.* at 115-16.

Ironically, the man who applied these derogatory epithets to the view that theory and experience may disagree has become identified with that view.[55] Austin has been saddled not only with the "childish fiction" that judges do not legislate but with Noodle's "coil of senseless abstractions" as well.

It may nevertheless be argued that Austin's fundamental opposition to rationalism is irreconcilable with his belief in the feasibility of a science of expository jurisprudence. Austin's remarks on this matter are those to which Professor Stone appeals in support of his own interpretation of the philosopher's work. If such an inconsistency exists, however, the conclusion should be that Austin's theory does not cohere, not that the true substance of his jurisprudence can be precipitated by rejecting its empirical foundations. For on these foundations much of his theory is built. In particular, his concepts of law as a command of the sovereign, and of rights, duties, powers and obligations as mere statements of the relations involved in this basic idea, represent an attempt to describe legal rules in strictly factual terms in order to make them identifiable in the social process. Stone has to argue that, for Austin, sovereignty is a logical postulate and not a political fact.[56] But Stone offers no evidence from Austin's work to support this conclusion, and relies rather on inferences from Frederic Harrison's remarks that Austinian theory presupposes "that the lawyer is considering sovereignty only on the side of force," that "the force that [the sovereign] . . . exerts [is] unlimited," and that there exists "except in moments of anarchy . . . a perfectly defined centre of sovereign power . . . where the spheres of positive law and of moral obligation are habitually treated as separate." "It must be apparent," comments Stone, "that any body of knowledge based upon such patently artificial presuppositions is not a body of knowledge about any particular society."[57] Although this notion may indeed seem "apparent" now, one can properly attribute it to Austin only if Austin can be shown to have been aware of his making these assumptions, and of their falsity. All of the first-hand evidence shows, however, that Bentham and Austin each believed that the sovereigns which he described actually existed, and that the attempts which each made to find them were not mere fits of absent-mindedness. "There is commonly in a State," writes Bentham, "some person or body of persons whose office it is to assign to and distribute among the members of the Government their several departments, their functions, and their prerogatives, while retaining a general authority over them severally and collectively. The person or body of persons exercising this supreme power is termed 'the Sovereign.' "[58] Bentham in fact argues that a people which ceases to recognize a sovereign is doomed:

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55. Austin's associates are quick to remark that one should not be misled about Austin's mild and sensitive nature by his strong language. See Mill, *Austin on Jurisprudence*, 118 EDINBURGH REV. 439, 481 (1863), reprinted in 4 MILL, DISSERTATIONS AND DISCUSSIONS 210, 277 (1867).

56. STONE 60.

57. *Id.* at 61.

58. 2 BENTHAM, THEORY OF LEGISLATION 6-7 (1914).

> I will only observe that the division [of power] must not involve the creation of separate and independent powers, for that would lead to a state of anarchy. It is always necessary to recognize some authority superior to all others, which does not receive law, but gives it, and retains supreme control even over the very rules it has itself laid down to regulate its own mode of action.[59]

To multiply examples of Bentham's references in a factual context to the sovereign would be tedious in the extreme. The same is true with respect to Austin. Stone claims that Austin's whole approach differs from Hobbes's in that Hobbes, unlike Austin, was attempting to give an account of actual society.[60] Yet Austin himself rejects one feature of Hobbes's definition of sovereignty on the explicit ground that, if accepted, it would not apply to any existing society.[61] And though he generally agrees with that philosopher's main tenets, Austin persistently complains that Hobbes inculcates too absolutely the religious obligation of obedience to established government and that he explains the origin of sovereignty by a fiction, when better investigation would have disclosed that sovereignty subsists because the governed recognize its obvious expediency.[62] Still, if Stone is right about Austin's views, Austin's attempts to establish his own views of sovereignty, as against Hobbes's, by means of an appeal to facts, constitute yet another aberration.

Remaining for consideration are those sections of Austin's work which Stone cites as positive evidence for his interpretation. These sections appear almost exclusively in Austin's essay on the "Uses of the Study of Jurisprudence." Here, Austin writes that the principles common to maturer systems of law are the subject of an extensive science whose exclusive or at least appropriate object is their exposition.[63] Here, too, he contends that of the principles, notions, and distinctions which are the subjects of general jurisprudence, some may be esteemed necessary, since no system of law (or system of law in a refined community) can be coherently imagined without conceiving them as constituent parts of it.[64] Others are not necessary but occur very generally.[65]

Stone's inference from these remarks—that Austin aims to find a universal system of "law" by logical analysis from a priori notions—is not surprising. If Austin means to suggest that the very conception of "law" involves conceiving a host of principles which follow necessarily, he certainly does seem a "rationalist proper." And even though he does not say—and in fact disaffirms[66]—that all the details of every legal system are conceptions necessarily involved in the notion of law, this disaffirmance could simply be regarded as

59. *Id.* at 306.
60. STONE 60-61.
61. 1 AUSTIN 234-35.
62. *Id.* at 279 n.(u).
63. 2 AUSTIN 1072.
64. *Id.* at 1073.
65. *Id.* at 1074.
66. *Id.* at 1072.

contrary to the main direction of the thought that general jurisprudence is a science; for one naturally imagines a science to be something comprehensive in nature.

The best indications are that Austin had not thought his "system" through. His material on a science of jurisprudence, after all, is contained in a brief essay which he did not choose to publish in his lifetime; and the task of establishing an empirical definition of jurisprudence cannot be considered less difficult than that of providing an empirical definition of law, a matter to which Austin devoted practically exclusive attention in the major work he did publish. In defining jurisprudence, moreover, Bentham had introduced a misleading classification. Austin's mentor had divided jurisprudence into the expository and censorial branches and had further subdivided the expository branch into the particular and the general, assigning the term "local" to the exposition of a particular system of law.[67] Austin, therefore, must at least have toyed with the idea that a science of jurisprudence which attempted a comprehensive elucidation of the actualities, as distinct from the proprieties, of law, must qualify as a general exposition of universally obtaining legal principles. Bentham himself did not draw this conclusion, arguing that a general expository jurisprudence could at best provide terminological clarifications;[68] but Austin's enthusiasm for the science of jurisprudence seems to have led him to use less guarded language than his teacher.

As Myres S. McDougal has indicated, an empirical theory about law consisting of an exposition of legal principles as commonly understood is an impossibility.[69] To arrive, as Austin intended, at an empirical account of what actually happens in the legal field, one must, following Austin's procedure, identify legal rules in some empirical way and then go on to examine the part these rules play in decision-making. At this point, conceivably, some general propositions about rules may emerge; but they will be propositions *about* rules, not mere expressions *of* the rules. In this connection, Austin's own theory that a legal rule expresses only the content of a command is thoroughly inconsistent with the notion that legal rules themselves describe some sort of truth.[70]

Nevertheless, because of Austin's tendency to identify a general theory of law with the exposition of legal principles, Stone is able, by implication at least, to credit Austin with viewing the definition of law as a part of ex-

67. BENTHAM, PRINCIPLES OF MORALS AND LEGISLATION 324-25 (1907).

68. *Id.* at 325.

69. See, *e.g.*, McDougal, *Law as a Process of Decision: A Policy-Oriented Approach to Legal Study*, 1 NATURAL L.F. 53, 59-64 (1956).

70. Austin's allusions to an expository jurisprudence, whether general or particular, may in part be regarded as the unfortunate survival of Benthamite thinking. Probably, too, his remarks on this subject stemmed from the very natural-law modes of thinking which it was his main purpose to reject, according to which legal rules represent truths pointed out by reason, and from the common speech of that time, which tended to identify jurisprudence and "law."

pository jurisprudence. Austin presents the definition of law, Stone feels, as the fundamental premise of the legal system,[71] as if it were some sort of basic norm from which inferior norms are to be logically deduced. Support for this interpretation is difficult to find in Austin's few and ambiguous allusions to the relation between his definition of law and an expository jurisprudence. In one place, Austin treats the definition of law as though it is separate from general expository jurisprudence. An exposition of the necessary principles, notions, and distinctions is impossible, he says, *until* the meaning of certain terms which must necessarily be employed—such as Law, Right, Obligation, Injury, Sanction; Person, Thing, Act, Forbearance—has been determined.[72] Presumably, he would have regarded these definitions as equally prerequisite for Bentham's censorial jurisprudence, for he could hardly have imagined that, in talking of what law ought to be, one is speaking of law in a *sense* different from that in which he employed the term in his own inquiries. Hence, the definition would have no specific relation to expository jurisprudence.[73] On the other hand, Austin proposes as the first group of "necessary principles, notions, and distinctions" themselves, "the notions of Duty, Right, Liberty, Injury, Punishment, Redress; with their various relations to one another, and to Law, Sovereignty, and Independent Political Society."[74] The reappearance of these conceptions in this context raises doubts, especially since the terms are presented here shortly after a statement that general jurisprudence is an exposition of principles of law. Austin could conceivably mean that the statement "law is a command of the sovereign" is a principle of law. Yet, contrariwise, on the very same page, Austin attributes Bentham's narrow view of general jurisprudence to Benham's notion that such jurisprudence concerns what "*obtains*" (emphasis Austin's) universally as law.[75] Austin thus strongly suggests that his own view is different.

A Better View of Austin's Analytical System

Austin's Classificatory Activity

One is tempted, therefore, to dismiss Stone's rationalistic interpretation of Austin as an overstressing of one or two ambiguous propositions in a chapter itself containing much in conflict with the interpretation suggested—especially since the remainder of Austin's work abounds in evidence of his empirical approach. This still does not foreclose argument that a considerable part of Austin's work comprises exposition, not of necessary *principles* of law (for one fails to recall a single one of these), but of what are supposed to be

71. See note 39 *supra*.

72. 2 Austin 1075.

73. Yet, oddly enough, Bentham himself regarded the definition of law as part of general expository jurisprudence. See Bentham, Principles of Morals and Legislation 324-25 (1907).

74. 2 Austin 1073.

75. *Id.* at 1073 n.56.

necessary *classifications.* Perhaps, then, the rationalistic notions of his chapter on the uses of jurisprudence are not to be deemed unimportant to him.

John Stuart Mill, from his attendance at Austin's lectures and his notion of Austin's logical bases, seeks in his review of Austin's posthumously published *Uses of the Study of Jurisprudence* to interpret Austin's "necessary principles, notions and distinctions."[76] Of the *principles* Mill has little to say, observing merely that substantive provisions of different systems naturally contain similarities, designed as they are for the same world and the same human nature.[77] This may sound rationalistic, but Mill would certainly have regarded the proposition as a generalization from experience. But, says Mill, "there is also a certain common groundwork of general conceptions or notions, each in itself very wide, and some of them very complex, which can be traced through every body of law, and are the same in all. These conceptions are not pre-existent; they are a result of abstraction, and emerge as soon as the attempt is made to look at any body of laws as a whole, or to compare one part of it with another, or to regard persons, and the facts of life, from a legal point of view."[78] In Mill's mind, therefore, the necessary conceptions do not exist a priori but are distilled by generalization from a study of laws and other facts. And in studying rules of law, Mill took Austin to be studying empirical data—"the legal institutions which exist, or have existed, among mankind, considered as actual facts."[79]

The necessary *distinctions* are presented as deriving by "abstraction" from the facts; but it has already been shown that Austin did not think abstract propositions necessarily ceased to be true of the particulars from which they are abstracted—if they did, they became, in his words, *"senseless* abstractions."[80] And Mill agrees in his review that classification must be based on really existent common features in the facts.[81] To be sure, Mill concurs with Stone that Austin is applying logic to law.[82] For Mill, however, classification is a part of logic,[83] and it is on Austin's classificatory activities that he concentrates. The general science of jurisprudence merely presents schemes of arrangement. It endeavors not to *prescribe* what should be the content and relationships of the subjects with which laws are concerned, but merely to *describe* the common features of those subjects and the common structure of rules and systems.

Why, then, do Mill and Austin think that some notions and distinctions are "necessary," and in what sense are they speaking? The answer seems to

76. See Mill, *Austin on Jurisprudence*, 118 EDINBURGH REV. 439 (1863), reprinted in 4 MILL, DISSERTATIONS AND DISCUSSIONS 210 (1867).

77. *Id.* at 443, reprint at 216.

78. *Ibid.*

79. *Id.* at 442, reprint at 214.

80. See note 54 *supra* and accompanying text. (Emphasis added.)

81. Mill, *Austin on Jurisprudence*, 118 EDINBURGH REV. 439, 444 (1863), reprinted in 4 MILL, DISSERTATIONS AND DISCUSSIONS 210, 219 (1867).

82. *Id.* at 441, reprint at 213.

83. 1 MILL, SYSTEM OF LOGIC 11 (5th ed. 1862).

lie in Benthamite conceptions of scientific classification. Bentham believed that the materials of any science, including jurisprudence, were susceptible of a natural classification,[84] and for this reason "the same arrangement that would serve for the jurisprudence of any one country, would serve with little variation for that of any other."[85] Mill admiringly adopts Bentham's notion that general scientific principles of classification apply to jurisprudence;[86] hence, Mill's exposition of the nature of classification in his *System of Logic* provides many insights into his understanding of the nature of Austin's classificatory activities. Moreover, since Mill's exposition represents a rather extensive adaptation of the scholastic logic, for which Austin's affection is well known,[87] Mill's understanding is probably very much akin to Austin's own.

In Mill's scheme, any definition is in one sense verbal. What it does is to attach a name to an attribute or combination of attributes.[88] So, Mill would undoubtedly argue, what Austin's definition of law does is to adopt the name "law" for commands of a sovereign in an independent political society. Mill adds, however, that a definition is also commonly intended to assert that the attributes to which the name is attached really do exist in combination;[89] and he certainly understands Austin to be saying that independent societies exist in which sovereigns issue commands. The definition *proper*, Mill explains, is a mere identical proposition, giving information only about the use of language, and from which no conclusions affecting matters of fact can ever be drawn.[90] Obviously, then, Mill would not have thought that Austin was attempting to derive conclusions about the nature of law from his definition of law as such. But, Mill continues, the *postulate accompanying the definition* does affirm a fact, and this may lead to consequences of every degree of importance.[91] This accompanying affirmation of "truth" is not, however, a postulate in Stone's sense—an assumption not intended to represent actuality. Insofar as it asserts the existence of the attributes in combination, the postulate can only result from empirical investigation. Nor, according to Mill's theory, do the consequences stemming from the postulate derive independently of factual investigation. The consequences determined by demonstration from the postulate are consequences which have been established by investigations including those which established the postulate itself.[92] But certain other consequences are discoverable which are established not by demonstration but by causation. Through factual investigations of the objects which possess the

84. BENTHAM, A FRAGMENT ON GOVERNMENT 117-18 (1891).
85. *Id.* at 119.
86. MILL, SYSTEM OF LOGIC 478-79 (1889).
87. "I ought to have been a schoolman of the twelfth century . . . ." 1 AUSTIN 12.
88. 1 MILL, SYSTEM OF LOGIC 121-30 (5th ed. 1862).
89. *Id.* at 124.
90. *Id.* at 163.
91. *Ibid.*
92. This seems clear from the examples he gives, *ibid.*, understood in the light of Mill's general theory of logic.

combination of attributes specified in the definition, one can discover (by various methods which Mill outlines) that these attributes cause other attributes to be present along with themselves; in other words, a necessary connection exists between the attributes specified in the definition and those discovered by an investigation of the objects possessing them.[93] Here is the Utilitarian explanation of Austin's necessary notions and distinctions common to all systems of law. They are either attributes of legal systems the existence of which is demonstrated by the investigations that led to or surrounded the discovery of sovereign commands, or they are the attributes of those systems which are caused by the presence of the attributes specified in the definition of law.

Mill casts his views into the terms of the scholastic logic familiar to Austin.[94] The classical theory of definition is by genus and difference, the genus representing a general class and the difference constituting the attribute which distinguishes a given species from the genus. Mill argues, however, that in true species there are an indefinite number of attributes distinguishing the species from the genus. The attributes denominated as the *difference* are distinguishable from the others only by virtue of the terms employed in the definition. Thus, if the attribute is part of the connotation of the name denoting the subject of the definition—that is, if the attribute is specified in the predicate of the definition—it is included in the *difference*; otherwise, it is not. The distinguishing attributes of the species which are not included in the definition, but which are established by demonstration or causation to be necessary accompaniments of those which are specified, Mill takes to be the *propria* recognized by the scholastic logicians. So, in this scheme, Austin's necessary notions and distinctions would appear as *propria* in relation to law. Mill goes on to complete the classical scheme of classification by noting that, in addition to *propria*, there are *accidents* of a species. These neither are involved in the definition of the name denoting the species nor have the necessary connection with the attributes connoted by that name to qualify as *propria*. They may be inseparable accidents, which means that, although experience has so far shown them to be present wherever the combination of attributes constituting the species is found, no reason can be assigned for the phenomenon, and further investigation might prove the connection less than universal. Into this class, no doubt, would fall those features which Austin found in all the systems he studied but which he did not claim were necessary. Separable accidents are those attributes which are known to appear only spasmodically in members of the species. Into this category, presumably, would fall those institutions of particular legal systems which are outside the subject matter of general jurisprudence.

Austin explains that jurisprudence is the science of what is "essential" to law,[95] and Mill clearly takes him to be using this term in contradistinction to

93. *Id.* at 148.
94. See *id.* at 146-49.
95. 2 AUSTIN 1077.

"accidental." Thus, he explains Austin's purpose as being "to free from confusion and set in a clear light those necessary resemblances and differences, which, if not brought into distinct apprehension by all systems of law, are latent in all, and do not depend on the accidental history of any."[96] Again, he speaks of Austin's task as "the disentangling of the classifications and distinctions grounded on differences in things themselves, from those arising out of the mere accidents of their history . . . ."[97]

Some may still wish to call a view of this sort rationalistic in a sense, however determinedly Mill argues that a meaningful classificatory activity depends on generalization from experience.[98] In any event, it should be clear that, under the Bentham-Austin-Mill logic, the affirmation of some necessary classifications in all systems of law is not tantamount to an assertion that all details of law are necessary implications of the nature of a legal system. Austin's theory envisages many features of a system existing as accidental results of history, rather than as *propria.* And even the *propria* are presented as factual discoveries, not as logical deductions somehow following, without examination of relevant empirical contexts, from the definition itself.

"Necessary" Classifications and Judicial Legislation

Arguably, in positing any "necessary" classifications at all, a jurist is formulating a theory in which judicial legislation can have only a limited meaning. For it is well known that a judge frequently "legislates" by giving a new meaning to the *subject* of a legal rule, that is, to the category to which the rule attaches legal consequences. This appears to happen even with the most general categories. Thus, the result in a particular case will often depend, for instance, on whether a judge classes a fact complex as "contract" or "tort." If the meanings of contract and tort are fixed by the nature of law itself, the judge may be thought to have little freedom of movement. Perhaps it is because Professor Hart has encountered this type of argument that he says that Stone and Friedmann's attribution of a mechanical view of law to Austin seems to depend on their belief that no theory of the meaning of legal terms is possible if judges legislate.[99]

This argument, again, can only be sustained by carrying Austin into conclusions which might be derived from his vague remarks about a general expository jurisprudence but violate his whole empirical framework. If the statement, "law is a command of the sovereign," is a principle of "law" in Austin's analytical sense, it might follow that, because Austin thinks a notion of contract having specific content is implicit in the definition of law, a judge

96. Mill, *Austin on Jurisprudence*, 118 EDINBURGH REV. 439, 444 (1863), reprinted in 4 MILL, DISSERTATIONS AND DISCUSSIONS 210, 219 (1867).

97. *Id.* at 440, reprint at 212.

98. 1 MILL, SYSTEM OF LOGIC 345 (5th ed. 1862).

99. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 608 n.32 (1958).

who gave a different interpretation of the term contract would be speaking outside the "law." But Austin seems to be asserting only the matter-of-fact proposition that any system of law is susceptible of classification under certain categories.[100] Therefore, if the law of a particular country turned out not to correspond with one of his categories,[101] Austin would take this as proof not that the judges were wrong in law, but that he was wrong in fact—that a conception which he believed to be among the *propria* of legal systems was really only an accident. And, of course, many of the conceptions which Austin believed he had established as *propria* have incontestably proved to be accidents.

It may serve as emphasis to notice that, of the Utilitarians, at least Mill thought the principles of causation apply in the moral sciences as universally as in the physical sciences. Accordingly, he would surely have said that, were it not for the impossibility of acquiring all the relevant information, one could accurately predict judicial decisions. A judgment would be the necessary consequence of a combination of factors. Hence, the distinction between notions necessary in law and legal notions which are not necessary is only a distinction between those concepts which Mill regards as caused by the nature of law and those which are caused by other factors operative in particular cases. But to suggest that this notion of necessity involves the view that judges make no "law" in Austin's sense of the term is to ignore the Austinian distinction between positive laws and scientific laws of nature.[102] As the Utilitarian James Fitzjames Stephen says in his article on Austin: "[Science] has no more tendency to govern . . . the conduct to which it refers than the Nautical Almanack has to govern the tides."[103]

These, then, in summary fashion, are the points to be noted in any evaluation of Austin's thinking on judicial legislation:

(1) Austin in his own writings repeatedly asserted the existence of judicial legislation.

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100. In Utilitarian writing it is often unclear whether the thought is that any system of law will contain rules which in fact belong to certain classifications or whether the idea is that the system will itself employ terms which connote these classifications. If Austin is saying both, this would explain why terms like "law," "right," and "duty" appear in two places in his exposition—once as Austin's choice of terms to connote certain attributes and once as the terms or translation of the terms used by all systems of law to connote them. See notes 72-74 *supra* and accompanying text. Mill seems to stop short of this position, for he says that the necessary notions are those "which, if not brought into distinct apprehension by all systems of law, are latent in all . . . ." Mill, *Austin on Jurisprudence*, 118 EDINBURGH REV. 439, 444 (1863), reprinted in 4 MILL, DISSERTATIONS AND DISCUSSIONS 210, 219 (1867). This ambiguity, however, does not affect the point under discussion in text.

101. Or, if the proper interpretation of Austin is the second one suggested in note 100 *supra*, the judges ceased to use any term connoting the category in question.

102. See 1 AUSTIN 206-08.

103. *English Jurisprudence*, 114 EDINBURGH REV. 456, 465 (1861). This article is attributed to Sir J. F. Stephen by Leslie Stephen, in the latter's LIFE OF SIR JAMES FITZJAMES STEPHEN 484 (2d ed. 1895).

(2) Bentham and Austin reconciled the fact of judge-made law with their view that laws are sovereign commands by reasoning that those judicially established principles which the sovereign leaves intact he approves and inferentially asserts.

(3) Bentham, Austin, and Mill joined in holding law to be an empirical, not a rational, science. The Utilitarians in fact denied that there are any rational sciences at all.

(4) The definition "law is a command of the sovereign" is presented by the Utilitarians not as a logical postulate from which substantive propositions of law can be analytically deduced but rather as a connotation of the word "law" in terms of empirical facts.

(5) Austin's notion of general jurisprudence as an exposition of principles of law is inconsistent with the empirical foundations upon which the predominant part of his theory is based. Much that appears in the very chapter introducing this view is in conflict with it. Austin's belief in necessary principles, notions and distinctions, moreover, should not be taken to be an implication of his expository jurisprudence. More probably, this belief followed from his grounding in the *propria* of scholastic logic, for which J. S. Mill worked out an empirical interpretation.

(6) Thus undersood, Austin's affirmation of necessary principles, notions and distinctions involved neither the assertion that all legal principles and classifications follow from the nature of law nor even the view that any principles or classifications are authoritatively prescribed for the judge by the nature of law.

Erosion of Austin's Ideas Through the Apologists

The character of Stone's misinterpretations would perhaps be less important if Stone were not prepared to defend the philosophy he attributes to Austin as a valid juristic theory. Stone seems ready to argue that if his account is not really what Austin meant, it is at least what he should have meant.[104] And though, as Stone acknowledges, no one has presented the same defense of Austin,[105] his view is not truly unique. Significantly, Stone derives the most substantial support for his interpretation not from Austin but from later writing about Austin.[106]

Neo-Austinian thinking has resorted to various forms of rationalism in an effort to defend Austin's empirical propositions from empirical attack and thus has saved some of Austin's conclusions at the expense of his empirical framework. The earliest manifestation of this tendency appears in James Fitzjames Stephen's 1861 review of Austin's work.[107] Stephen's lapse appears to have

104. STONE 61, 62.

105. See Stone's reference to Lindsay's views, *id.* at 62.

106. See note 57 *supra* and accompanying text.

107. *English Jurisprudence*, 114 EDINBURGH REV. 456 (1861), cited at note 103 *supra*.

stemmed not so much from the difficulty of maintaining Austin's theories of law as from the problem of justifying Ricardo's theory of political economy, with which, in terms of scientific status, he compared Austin's theory of law. Beginning in the Utilitarian, logical tradition, to which Austin belonged, Stephen writes that "science is nothing more than a classification, a shorthand description, of all the facts relating to the particular subject-matter with which it is conversant."[108] He proceeds to argue, however, that, since the facts of the moral sciences are transient and obscure, they cannot be stated with the precision of a scientific rule. Nevertheless, he says, "the truth of Ricardo's theory of rent is altogether unaffected by the circumstance that the facts nowhere correspond to it."[109] Finally, by grouping Austin's theory with Ricardo's,[110] he seems to imply that this same evaluation can be made of Austin's work. In recognizing the existence of "truth" in a theory which does not correspond with facts, Stephen's account diverges sharply from John Stuart Mill's treatment of the same matter. Mill's inference from the transience of facts in the moral sciences was that, unfortunately, principles derived from them might be only approximately true, that is, might only approximately correspond with the facts—not that such principles might have other than empirical truth.[111]

Sir Henry Maine gave specific impetus to Stephen's line of Austinian interpretation. Unlike other historical jurists, Maine was thoroughly sympathetic to the Austinian analysis;[112] but, like Stephen, he conceived that Austin was involved in a process of abstraction which caused deductions from Austinian principles to lack strict truth. The Austinian idea of sovereignty, he believed, had been developed through uniting all forms of government into a single group by imagining them as stripped of every attribute except coercive force. "[T]he deductions from an abstract principle," Maine says, "are never from the nature of the case completely exemplified in facts . . . ."[113]

Like Stephen, Maine compares Austin's work with that of writers on political economy, and this comparison may be used to indicate how Maine's interpretation does violence to Austin's own estimate of his work. When the classical economists are said to have abstracted the profit motive from the total context of transactions of distribution and exchange, the real point being made is that they assumed that people engaging in these transactions are always dominated by the profit motive, whereas profit is only sometimes the dominant factor in their actions. Naturally, their principles would not be completely exemplified by the facts. But all the evidence indicates that when Austin made general factual statements about independent political communities, he believed them to be universally true. He was not purporting to present a "pure"

108. *Id.* at 465.
109. *Id.* at 466.
110. *Id.* at 466-67.
111. MILL, SYSTEM OF LOGIC 554 (1889).
112. See MAINE, EARLY HISTORY OF INSTITUTIONS 343 (1888).
113. *Id.* at 362.

theory in which factors only sometimes operative are represented as always operative so that "truth" in theory diverges from truth in fact. If, because experience has shown his universal propositions to be too broad, attempts have been made to accord them "theoretical truth," they should be recognized as revising Austin, not interpreting him—as Maine assumed he was doing.

The process by which classical economic theories have been maintained as "pure" theories in the face of facts contradicting their general propositions has been happily termed "theoretic blight." It would be tedious to trace the progress of this malady as it overtook Austin's theory—from the statements of James Stephen and Maine through the writings of Frederic Harrison,[114] and through Manning's remarks that Austin's theory represents a possible *tertium quid* between truth and falsity.[115] Suffice it to say that, as an increasing number of Austin's general statements have been found untrue, his theory has been regarded as "abstracting" more and more from actual facts, until in the present terminal stage Professor Stone represents the theory as having "abstracted all reference either to actual political and social conditions or to desirable political and social conditions."[116]

Conclusion

Everyone writes the history of jurisprudence for himself. What one regards as the true Austinian tradition will depend on what one considers to be the important contribution that Austin made, a consideration which will in turn depend upon what one accepts of Austin's philosophy. Thus, Stone regards Austin's claims to the empirical method as contrary to "his main purpose and contribution," for Stone, as already shown, defends the view that analytical jurisprudence is a rational science. Yet it is difficult to see how this theory can be developed in detail. If there are no sovereigns in the Austinian sense, not even verbal inferences can be drawn from the statement that law is a command of the sovereign. A minor premise cannot even be supplied to support an inference that something should be called a law. Stone assumes that Austin began with a number of rules to be collated—law in the books, not actual facts. But how these propositions are to be presented as deductions from the postulation of a sovereign seems inexplicable in terms of a logical analysis divorced from facts. The attempt to quiet Austin's title in a logical ivory tower and thereby to endow him with a position more secure than, even if inferior to, that of a sociological jurist dealing in actualities, has thus established Austin's reputation as not merely a dreamer, but an incoherent dreamer.

To one who agrees that Austin's empirical approach represents his real contribution to legal philosophy, Hart's is the acceptable analysis: "Austin

114. Stone relies, in particular, on Harrison's commentary. See note 57 *supra* and accompanying text.

115. Manning, *Austin To-Day: or 'The Province of Jurisprudence' Re-Examined*, in Modern Theories of Law 180, 212 (1933).

116. Stone 61.

was determined to use in his analysis only clear, hard, empirical terms . . . but for this laudable enterprise he chose the wrong fundamental notions."[117] From this perspective, Professor Fuller is entirely correct in regarding the American realists, among others, as inheritors of the Austinian tradition;[118] for whatever their excesses in treating authoritative rules as having no influence on legal decision, the American realists have made a determined effort to describe legal processes in objective, factual terms. So, one reads Professor Hart[119] and Professor Goodhart[120] with a pang of regret when they refer to the American realists in the past tense; and one laments Professor Llewellyn's observation that the young fellow who wrote *The Bramble Bush* no longer exists.[121] Nonetheless, the natural-law doctrines against which the Utilitarians struggled are not left unopposed. In America the theories of Lasswell and McDougal draw heavily on Utilitarian theory and reinterpret it, primarily in the light of modern psychological investigations. The theories of the Scandinavian realists excite increasing attention. As for England, although McWhinney feels that some English law schools are bogged down in trivial problems of linguistic analysis,[122] his impatience will not be shared by those who recall that the philosophical inspiration of these studies is the attempt to exclude metaphysics by demonstrating its dependence on misunderstandings of the functions of language. The legal studies of the Utilitarians were associated with the British empirical tradition in philosophy, tracing back through James Mill, Hartley, Hume, Locke, Hobbes and Bacon to a more remote ancestry. That legal studies should continue to be influenced by further developments of the same stream of philosophical empiricism is a legitimate source of national pride.

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117. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED xi (Hart ed. 1954).

118. FULLER, THE LAW IN QUEST OF ITSELF 45-65 (1940).

119. Hart, *supra* note 99, at 606.

120. KANTOROWICZ, THE DEFINITION OF LAW xvi (1958).

121. LLEWELLYN, THE BRAMBLE BUSH 7 (2d ed. 1951).

122. McWhinney, *English Legal Philosophy and Canadian Legal Philosophy*, 4 McGILL L.J. 213, 218 (1958).