

Re-examining Austin's Command Theory

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Is law like the threat of a burglar in any significant sense? When one contemplates this question, legal philosopher John Austin's command theory merits some attention. He took over and modified the project Jeremy Bentham had put forward. According to Austin (1832/1995), law is a command or order backed by a threat in a refined sense.

For good reason, this command theory has long been ignored, if not neglected. Quite apart from the fact that it is a theory from the nineteenth century, the command theory seems to have lost much of its philosophical attraction due to criticisms raised by none other than H. L. A. Hart. Today, not many seem to take the command theory seriously¹. The following fact suggests a stringent fact about the command theory: only a couple of affirmative works on John Austin and his command theory were published in the latter half of the twentieth century (Morrison 1982; Rumble 1985).

However, it would be fair to ask if Hart's criticism was sound, or even if he was free from the paradigm set by the command theory anyway. In *The Concept of Law* [hereinafter *CL*], Hart pointed out several defects in the command theory. Not only does the command theory inevitably fail to appreciate the use of rules from the internal point

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¹ For standardized treatments, see Coleman and Shapiro (2002) and Bix (2004). The former includes as much as two chapters on legal positivism, but they begin discussion from social nature of law, not command theory or coercive nature. The latter acknowledges that there are “alternative” legal positivism including Austin's. Yet it still treats Hart's positivism as a standard legal positivism in Anglophone jurisprudence (Bix 2004, 35).

of view, but the constitutional restriction on supreme sovereignty would also be grossly absent. In the face of such thorough criticism armed with linguistic philosophy, hardly anyone – until recently – questioned whether the command theory had really been defeated. Despite the recent renaissance and reinterpretation of Bentham (Schofield 2010) – another and even strong supporter of command theory – the seemingly harsh criticism of the command theory has been left unexamined.

Furthermore, Austin’s command theory merits attention even by those who would argue against legal positivism. In fact, it was the stark critic of positivism, Ronald Dworkin, who pointed out the significance of coercion in law (Dworkin 1986, 90-101). He saw the fact that law is in some way connected to coercion a matter of justification².

This paper critically examines the ‘conventional wisdom’ (Schauer 2010, 2) of twentieth-century legal philosophy. The aim of this paper is simply to demonstrate that Austin’s command theory and sovereignty have a homological relationship to Hart’s union of primary and secondary rules. This fact not only undermines the “descriptive” positivism of Hart, but also creates further internal contradiction. In section 1, I briefly summarize Austin’s command theory as a combination of command theory and the sovereign model, before comparing it to Hart’s law as a union of primary and secondary rules in section 2. Then, in section 3, I show that the similarities between them could undermine Hart’s “*descriptive*” project due to the relative success of command theory in specific discussions, which may also encourage us to reconsider the persuasiveness of Hartian legal positivism.

1. Austin’s Command Theory Reconstructed

First, I would like to distinguish what comprises Austin’s command theory from what results from it³.

(C₀) Laws are commands.

² It could be said that anti-positivist like Dworkin would see the significance of law in coercive nature while positivists like Raz and Shapiro see it merely auxiliary allowing the possibility of non-coercive order to be law (Hughes 2013, 185; Raz 1990, 161-2).

³ Propositions with capital letter(s) inside brackets are meant to represent summary or reconstructions of particular thesis. They are not to be confused with quotations from books or papers.

(SvC) Laws are commands of the sovereign.

The first of the two, (C₀), forms part of Austin's command theory of law. Note that (C₀) does not exhaust the command theory of Austin. (SvC), on the other hand, is consequentially related to Austin's theory, but does lack some delicacy. With this distinction in mind, this section examines Austin's definition of law in detail. It is reasonable to discuss *The Province of Jurisprudence Determined* (Austin 1832/1995, hereinafter PJD) first when aiming to build a reasonable reconstruction of Austin's philosophy of law since it was published during his lifetime. It was also used by Hart as the major source in constructing his counterarguments.

The main thesis of PJD contains three tasks, including but not restricted to (SvC). The first is the clarification task. Lectures I and V of PJD were devoted to the definition of law so that the proper object of inquiry should be determined. The core of the command theory of law, the (C) without subscript number which will be introduced later, is to be found here. Second, Austin separated what law is from what it ought to be. Lectures II through IV deal with the issue of ideal law. Unlike the separation thesis that later positivists would embrace, Austin devoted a good portion of his lecture to the question of *how* one can assimilate the ideal law of God, the principle of utility or what might be called *divine* law. The third task is the elucidation of the sovereign, which mandates positive laws in a jurisdiction (Lecture VI). Although these ideas are intertwined, and each serves some purpose in almost every lecture, it is fair to point out these three tasks are carried out in this order. Of these three tasks, the first and the third are of relative importance here, so we should look at them closely in turn.

Law as Command

The clarification begins with a simple definition. (C₀) does capture the core claim of Austin, i.e., law as command (PJD 21).

(C₀) Laws are commands.

Nevertheless, (C₀) is less than clear in its details. The word "command" is too unclear for (C₀) to explicate the concept of law analytically. As Austin put it, commands are:

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. (PJD 24)

On the basis of this explanation, (C₀) can be revised as follows:

(C₁) Laws are commands, which are a wish or desire conceived by a rational being, that another rational being shall do or forbear; an evil to proceed from the former, and to be incurred by the latter, in case the latter does not comply with the wish; an expression or intimation of the wish by words or other signs.

This already lengthy definition still has some fatal defects. It requires three key aspects to assimilate Austin's command theory: sanction, generality, and the existence of superiors. First, (C₁) characterized command as a kind of wish or desire. However, it does not follow that any wish should be equated with command. If it is uncertain whether the wish would come true or not, the commander would enforce obedience by *sanction* (PJD 22). Note that the correlation between the degree of sanction and deterrence did not matter to Austin at all. He clearly denies the quantitative relationship, like a proportional one, between command and sanction (PJD 23-4). Once a desire is expressed, however small the penalty may be, it may safely be called a command by definition. For instance, a wealthy person to whom a petty motoring offence means nothing could still be subject to command.

The supposition that commands are accompanied by sanction stems from the triad of command, sanction, and duty. "Each of the three terms *signifies* the same notion; but each *denotes* a different part of that notion, and *connotes* the residue" (PJD 25). Austin regarded these three as being inseparably intertwined, thus he preferred one to the others depending on emphasis. The careful reader may have noticed that (C₁) implicitly imported this triad. Command corresponds to wish (1), sanction to expected evil itself (2), and duty or obligation to the liability of the expected evil (3).

The second amendment Austin provided (C₀) was the *generality* of law. Although (C₁) did incorporate an embryonic account of legal duty, it could not explain why a valid legal command creates duty while a burglar's threat does not. An expression of wish could have such a wide range, from "Your wallet, now!" to "Do not murder." Command as law is, therefore, to be equipped with generality in two senses: the types of action forced or forbidden and the range of application (PJD 28-9). One is

the generality in type of action to be regulated by a command. Law often forces or forbids certain types of action in general. The other is the generality of application range. Law is supposedly binding on its constituent members in general, if it is successfully applied

Now that a law is a general command, the stipulation excludes commands that are neither about a general type of action nor people in general. In Austin's definition, law as command binds certain generalized types of action by people in general; thus, commands which merely bind specifically and individually are no longer called laws (PJD 25-6). Austin gave a different name to such non-general commands, *occasional or particular* command. For example, it is called particular command when it forces only a single person to wake up at a particular hour on a particular date. This contrasts with a general order to wake up at the same hour, constantly or unless informed otherwise. However, the best example of drawing a clear line between a general command and a particular command is judicial command (PJD 27). The judiciary often issues occasional or particular commands for enforcement of statutes or rules concerning individual cases. Such commands of court contribute to the efficiency of law but should be distinguished from law.

Now, taking generality into the definition, (C₁) becomes (C₂).

(C₂) Laws are commands, which are a wish or desire conceived by a rational being, that another rational being *within a general class* shall do or forbear *general types of action*; an evil to proceed from the former, and to be incurred by the latter in case the latter does not comply with the wish; an expression or intimation of the wish by words or other signs.

Is generality enough to demarcate law as command from other kinds of command? Some commands meet (C₂) but are still not laws. Think of the senior members of a company who made it mandatory for their fellow workers to submit health reports annually so they can rest assured of the physical competence of their employees. If a worker should fail to submit a health report, he or she might be subject to less favourable treatment in the office. Though it is mostly voluntary and distinct from law as command, such an internal relationship within an organization could easily meet (C₂).

What (C₂) lacks has to do with the way laws come into existence. Austin sought to skirt around this issue by introducing the idea of *superiority*. Laws are created

by *superiors* and obligate *inferiors* (PJD 29-30). The meaning of superiority here comes down to power or *might*. Though Austin conceded that superiority could refer to *precedence* or *excellence* in class, wealth, or virtue in daily usage, he mainly framed it to mean might, that is, physical power to inflict harm on others or to force them (PJD 30). The superiors could cause fear among their inferiors, which would eventually lead them to do as the superiors wish. Following Austin, the example of God being superior to human beings would suffice to clarify this point.

Note that Austin did not fail to appreciate reciprocity of superiority among human beings. God may enjoy omniscient superiority over everything else in existence. However, we know intuitively that one human's superiority over another could easily be reversed depending on the criteria. Even beyond individual comparison, this is true. In particular, the power of multitude could tip the balance of asymmetrical political power between monarch and subject. The reciprocity is present even under the parliamentary system since members of sovereign assembly, such as members of parliament, stand over judges by virtue of legislative authority, while at the same time remaining under the judicial authority of court as civil members.

(C₂) should now assume superiority and become (C₃).

(C₃) Laws are commands, which are a wish or desire conceived by a rational being *superior in might*, that another rational being inferior in might within a general class shall do or forbear general types of action; that an evil to proceed from the former, and to be incurred by the latter in case the latter does not comply with the wish; an expression or intimation of the wish by words or other signs.

This, then, is the command theory of law, reconstructed relatively more loyally to Austin's original. I should like to simply call it (C) without a subscription number. As suggested at the very beginning of this section, the famous term "sovereign" is absent from (C). Before going on to the sovereign model, I should clarify two points.

First, the final version of (C₀), (C), is over-inclusive. Imagine a super-human being who expresses a wish of a general type backed by sanction, as was suggested in the example of God being superior to humans. The wish may well be characterized as a law according to Austin's theory. This would give rise to the sovereign model, which will be introduced later.

The other is the under-inclusive nature of (C). Austin's *The Province of*

Jurisprudence Determined appears less attractive after he conceded that some laws either are not or do not seem like commands (PJD 33-37). As is often the case with theories, the definition of “law as command” cannot cover all laws, so he had to incorporate some instances with the help of nominal account. In one respect, he admitted that there are so-called laws that are not commands: declaratory laws explaining the significance of existing laws; laws to nullify existing laws; and imperfect laws. The other kind Austin identified was laws that do not seem like commands: laws creating rights and customary laws. With respect to these two, however, he did make excuses somewhat forcibly. The laws creating rights could happily rest within command theory because rights supposedly have corresponding duties, hence backed by commands. As for the latter, customary laws, he strained to say they are imperative with the help of *tacit* commands. As Austin regarded it as a matter of legal reasoning, customary laws are indeed commands of the state “*circuitously*” (PJD 36, emphasis in added). In other words, customary laws are law because the courts turn them into legal rules.

The Sovereign

So far (C₀) has accumulated three additional provisions to become a rather sophisticated version, (C). However, the famous term associated with Austin is missing in (C), and that very idea would complete the task Austin ascribed himself (PJD 165). It was the habit of obedience and the unrestricted independent sovereignty that separates positive law from divine laws.

The introduction of sovereignty was of theoretical importance since the over-inclusive nature of (C) could easily admit law of God, or divine laws. It is rather inconvenient for Austin, who aimed to extract positive laws from others (PJD 11). As noted above, (C) could include laws from a super-human being who is more powerful in every respect than human beings. (C) needs another theory to separate positive law from divine law.

The distinctive feature of positive law lies, according to Austin, in the observation that it is set by the sovereign of an *independent political society*. Although (C) did touch the supremacy of the commander, it demands further clarification. In an independent political society, there is an independent sovereign (PJD 165-6). It is independent in two senses. First, the sovereign enjoys the habit of obedience. The supremacy of the sovereign flows partly from the fact that a large proportion of members

obey the “*determinate* and *common*” individual or group of people. Furthermore, the sovereign of an independent political society should not be in the habit of obedience to anyone. The sovereign with supremacy in these two senses indicates the existence of an independent political society and a legal system. A natural corollary of such characteristics is that the sovereign is incapable of legal limitation. As Austin sarcastically put it, “[s]upreme power limited by positive law is a flat contradiction in terms” (PJD 212).

Here too, subtle issues might tip the balance. An independent monarch who does not habitually obey anyone might be under the undeniable influence of a certain group. Favourable or not, a habitual deference to religious leaders among politicians may come as no surprise. Austin indeed responded to this. In a footnote that almost overtook the main text, he argued that habitual deference to a certain group is compatible with the independence of the sovereign and warns that one should not confuse a mere influence with habitual deference (PJD 185-6, n. 14).

Now (C) is to be supplemented by the sovereign model of an independent political society, or (Sv).

(Sv) In an independent political society, there is a determinate and common individual or group of people (a sovereign). The sovereign is independent and unlimited, and a sufficient number of people habitually obey it.

Austin did allow some variation to the independent political society. For example, as to the mode of exercise, the sovereign might use its power not by itself, but through its subordinates (PJD 191). As to the membership of the sovereign body, he admitted the existence of various possibilities between one and all. It might be worthwhile to note (or warn) that Austin excluded female members for their “natural incompetency” (PJD 184, n.13).

So far, this section has sought to reconstruct Austin’s claim. Two key components have been found, namely, the command theory of law (C) and sovereign model of independent political society (Sv). As noted, (C) alone cannot identify the sovereign for it lacks the identification of the source of law. Only with the help of (Sv) can a “rational being superior in might” find its own way as the source of legal system, as an independent and unrestricted sovereign in an independent political society. What

comes next is the almost canonical criticism of Austin and critical examination of its product.

2. Another “Fresh Start”

The command theory has long been underestimated for good reason. Three chapters of Hart’s *The Concept of Law* [CL], chapters II through IV, have long determined the treatment of Austin in introductory remarks about him, but this has perhaps been for an unfair reason. The constant criticism may in fact have obscured what Hart owed to Austin. In this section, I examine Hart’s conceptual claim and show its critical similarity to Austin’s (C) and (Sv). Considering the *descriptive* nature of Hart’s positivism, this similarity could undermine its overall plausibility. Furthermore, the similarity represents a failure, for it fails to appreciate the necessary overlap between internal and external points of view.

To better appreciate Hart’s descriptive project, one should study his conceptual claim about law carefully. As it is the internal point of view that plays a major role in his theory, we should start from there. The internal point of view is that of someone who accepts and uses rules as a guide to conduct, whereas the external point of view is that of others who merely see them as regularities of conduct (CL 88-9). Given this distinction, the shortest possible explanation of what he was doing is a morally neutral project to describe the use of core concepts in legal practice. He himself provides a longer explanation as follows:

The reason why an analysis in these terms of primary and secondary rules has this explanatory power is not far to seek. Most of the obscurities and distortions surrounding legal and political concepts arise from the fact that these essentially involve reference to what we have called the internal point of view: the view of those who do not merely record and predict behaviour conforming to rules, but *use* the rules as standards for the appraisal of their own and other’s behaviour. (CL 98, emphasis in original)

Hart’s own selling point of his theory is that it would better to explain the use of core concepts such as duty, right, validity, source, legislature, judiciary, and sanction, which would inevitably attend legal practices. In other words, its virtue lies in the clarificatory power over legal and political concepts.

In *CL*, the internal point of view plays a major role in explaining the two conceptual devices, primary and secondary rules. The former can be explained as follows (CL 86-7):

(R) Given the internal point of view, rules impose obligations when there are:

(S1) seriousness – that the general demand for conformity is insistent and the pressure on (the threat of) deviation is great;

(S2) indispensability – that they are believed to be necessary to the maintenance of social life or some highly prized feature of it; and

(S3) the possibility of conflict with individual interest – that they may conflict with what the person who owes the duty may wish to do.

Note that (S1), (S2), and (S3) only form a necessary condition. When there is an obligation, all of these are met, but perhaps not otherwise, for it was contrary to Hart's intention to reduce legal theory to a matter of probability (CL 82-4). (R) is not a *pure* explanation from the external point of view because Hart had to incorporate the internal point of view as he polished it out.

Hart continued further because (R) could not sufficiently describe the actual use concerning binding rules that would create obligations. If a legal system were to comprise only rules of obligation, it would suffer from some defects: *uncertainty*, *static* character of rules, and *inefficiency* (CL 92-4). Legal rules not only impose obligations, but also provide standards and procedures for introducing and abolishing themselves. Therefore, the simple description of (R) should be supplemented and split into two.

(R1) Given the internal point of view, the primary rules impose obligations when there are (S1) seriousness, (S2) indispensability, and (S3) the possibility of conflict with individual interest.

(R2) The primary rules are identified by the secondary rules.

Hart recognized three subordinate categories of secondary rules corresponding to the three defects he found in the simple legal system of (R):

(R2-R) Rules of recognition specify the features of valid primary rules.

(R2-C) Rules of change empower a person or people to introduce or eliminate rules.

(R2-A) Rules of adjudication define the procedure to be followed in case of

controversy over the primary rules.

Of the three subcategories of the secondary rules, the rule of recognition, merits attention here. First, it is to be regarded as *supreme* within the given system of rules (CL 105-6). It is supreme in that a rule in conflict with the rule of recognition fails to gain the status of valid rule. The other characteristic of the rule of recognition lies in its being *ultimate* (CL 107-8). The rule of recognition is ultimate by virtue of the fact that there is no ground for its validity. In the case of primary rules, it is the rule of recognition that provides validity for a rule, for example, that one should drive on the left-hand side of road. However, it was Hart's contention that one cannot inquire into the validity of the rule of recognition itself in the same fashion as one would do with primary rules. It is not merely supposed; rather, it is constructively shown by the practices that identify the primary rules (CL 101-2, 108, 111). Thus, (R2-R) now calls for a revision to include supremacy and ultimacy.

(R2-R) The supreme and ultimate rule of recognition specifies the features of valid primary rules.

- (i) Supremacy: It has superiority over all the other rules when it is in conflict with them.
- (ii) Ultimacy: The validity of the rule of recognition is unquestionable and its existence is to be proven by the practice of rules.

We are now close to a rough sketch of Hart's description of law. One thing that (R1) and (R2) have not addressed is the fact that contemporary legal systems are so complex that not many people would know about such rules. It is often the case that only a limited number of people called "officials", such as judges, enjoy the empowerment of rules to create primary rules. This comes down to the following clarification by Hart:

There are therefore two minimum conditions necessary and sufficient for the existence of a legal system. On the one hand, those rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials. The first condition is the only one

which private citizens *need* satisfy... (CL 116, emphasis in original)

(R2-R) and the other secondary rules should, therefore, incorporate the minimum condition as a limited range of internal point of view concerning secondary rules. The final version of the rule of recognition should be, in a somewhat less intricate manner, as follows:

(R2-R) *Given the officials' internal point of view*, the supreme and ultimate rule of recognition specifies the features of valid primary rules.

There should be no change as to the supplementary (i) and (ii).

Now that we are in possession of (R1) and (R2), one should be careful to do justice to Hart. He would have wanted to emphasize the nature of these skeleton propositions. One should not misconstrue these descriptions as being external observations in any way. As noted when the simple (R) was introduced, it is not a pure explanation from the external point of view. It does not guarantee there would be a necessary and sufficient relationship or prediction when all of the (R1) and (R2) are met. The matter comes down to the existence of the internal point of view.

To sum up the points of Hart's conceptual claim, it could clarify concepts such as duty, right, and the like better than Austin's could by virtue of the internal point of view. It comprises (R1), which creates an obligation coupled with a description of a rule-generating situation. A simple system of (R1) would inevitably suffer from the systematic inefficiencies of uncertainty, static character of rules, and inefficiency. Thus, a legal system would naturally be equipped with secondary rules, providing remedies for the defects, namely, rules of recognition (R2-R), rules of change (R2-C), and rules of adjudication (R2-A). Of these three, the rule of recognition merits careful attention in that it provides supreme and ultimate criteria for the validity of the system.

3. Homology to Austin's Positivism

It should come as no surprise to careful readers if Austin and Hart had critical similarities in their respective positivism, but one would still be inclined to emphasize the differences rather than similarities between the two.

Whereas [Hart] took the Benthamite-cum-Austinian stance on the absence of a conceptual link between law and morality, and while indeed his critical moral

philosophy drew heavily on the utilitarian liberalism of Bentham and John Stuart Mill, [he] departed sharply from their view of what law is. (MacCormick 2008, 37)

In this section, I discuss their homological relationship – i.e., their sharing the same root – though it is more accurate to say that one came from the other. By closely comparing the main theses, it could be said that Hart’s conception of primary rule corresponds functionally to Austin’s command theory of law (C), and the conception of secondary rule – especially the rule of recognition – to the sovereign model (Sv).

As observed in the previous section, Austin’s so-called command theory involves two core claims about the nature of law.

(C) Laws are commands, which are a wish or desire conceived by a rational being superior in might, that another rational being inferior in might within a general class shall do or forbear general types of action; that an evil to proceed from the former, and to be incurred by the latter in case the latter does not comply with the wish; an expression or intimation of the wish by words or other signs.

(Sv) In an independent political society, there is a determinate and common individual or group of people (a sovereign). The sovereign is independent and unlimited, and a sufficient number of people habitually obey it.

Hart attacked both command theory and the sovereign model, examining each of the two in chapters III and IV of *CL*. He took issue with (C) for three main reasons. The first was that (C) is grossly under-inclusive because laws which not only impose duties but also empower people to create legal duties and rights, such as wills (CL 27-42). Secondly, it fails to appreciate the range of application since laws even bind legislators, the commanders themselves (CL42-4). Thirdly, it fails to do justice to customary laws, for laws are sometimes created by customs without intentional legislation by the legislator.

The attack on Austin also covered the sovereign model (Sv). Hart seems to have thought that “rule” is a better description of law than “command”. He argued that a habitual obedience amounts to a mere factual overlap of action, while rules seen from the internal point of view would better explain the social pressure on deviations (CL 55-6). Furthermore, he claimed that (Sv) inevitably fails when it is most necessary since it cannot explain the transition of sovereign nor constitutional restrictions over the governing body unless Austin admits that the sovereign would succeed the position with

the help of rules (CL 61-6).

After such through criticism, Hart introduces the above refined combination of (R1) and (R2). Due to space constraints, I will treat the rule of recognition here as the prime example of secondary rules.

(R1) Given the internal point of view, the primary rules impose obligations when there are (S1) seriousness, (S2) indispensability, and (S3) the possibility of conflict with individual interest.

(R2-R) Given the officials' internal point of view, the supreme and ultimate rule of recognition specifies the features of the valid primary rules.

One should be warned of critical similarities here. At the outset of chapter V in *CL*, Hart declared he would make “A Fresh Start” – the same phrase another Austin, the linguistic philosopher, used twice in his *How to Do Things with Words* (Austin 1975, 91&121). Yet the idea of a legal system as a union of primary and secondary rules corresponds to the combination of (C) and (Sv). Take (R1) and (C), and one notices they both are sought to identify legal obligations. The (R2-R) and (Sv) call for careful wording but could still be said to form a source of validity.

Even Hart's own words would provide some evidence. Secondary rules, especially the rule of recognition (R2-R), occupy the place where the sovereign model (Sv) used to sit in Austin's *PJD*.

Once we abandon the view that the foundations of a legal system consist in a habit of obedience to a legally unlimited sovereign and *substitute for this the conception of an ultimate rule of recognition* which provides a system of rules with which its criteria of validity, a range of fascinating and important questions confronts us. (CL 110, emphasis added).

Functionally, (Sv) plays the same vital role as the rule of recognition in that it specifies the valid laws which impose obligations. Although (C) speaks about the properties a valid command should meet, (C) alone cannot explain why the given rules should be distinguished as legal rules. (Sv) does the job by giving an external description of an independent political society, in which one could find the existence of a legal system thereby supposedly supplementing (C)'s incapability to distinguish laws

from bare commands. Together they provide a content-independent test of a valid norm.⁴

Given such similarity between Austin and Hart's positivism, the matter comes down to whether Hart was aware of it and whether his theory can survive the problem it would cause. There is an ambiguity about Hart's self-conception. He seems to have understood *CL* as being as much "descriptive" about the internal aspect of law as it is indebted to Austin's legacy. On the one hand, it was "an essay in descriptive sociology" (CL vi). It was the social context to be investigated rather than the meanings of words (ibid). At the outset of *CL*, Hart admitted that any educated person would agree upon general descriptions of law (CL 3). Given the internal point of view, people could always start from such a general expectation when they do armchair philosophizing, thus setting the bottom line of the social context to look at.

There is more to Hart's descriptivism. In his "Postscript" to the same book, he further clarified it as a work of descriptive study in a particular sense:

My account is *descriptive* in that it is morally neutral and has no justificatory aims: it does not seek to justify or commend on moral or other grounds the forms and structures which appear in my general account of law, though a clear understanding of these is, I think, an important preliminary to any useful moral criticism of law. (CL 240, emphasis in original)

Therefore, it appears safe to say that Hart's positivism was meant to focus on the internal point of view and describe it in an amoral manner (i.e., without specific moral commitment), at least in part.

On the other hand, however, Hart also regarded his book as being "an essay in analytical jurisprudence" (CL vi). He paid due respect to academic inquiries into the

⁴ Although Murphy pointed out that Austin explained positive law "by reference to its pedigree in an act of legislation" (Murphy 2013, 172), the word "pedigree" should be avoided. Dworkin had also used that word when he labelled Hart's positivism as factual, formal theory (Dworkin 1978, 14-45). One can find Hart's own reply in his "Postscript" to *CL*, where he argues that it was a misunderstanding on Dworkin's part to reduce his theory to plain-fact positivism because the rule of recognition could even include moral principles if it is constructed so (CL 250-4). For this reason, the word "pedigree" carries a narrow connotation. The word "validity" would be more appropriate here.

nature of law, despite the possibility of general agreement, when he allowed three kinds of questions: (1) the distinction between law and orders backed by threats; (2) the difference between legal and moral obligation; and (3) the nature of rules (CL 13). To these, he left an approving comment:

Yet the instinct which has often brought these three questions together under a single question or request for definition has not been misguided... (CL 16)

Therefore, the correspondence is far from being a mere coincidence.⁵

Stephen R. Perry has pointed out that even the first *descriptive* nature is already ambivalent (Perry 2001). He found two methodologies residing within Hart's positivism: the descriptive-explanatory method and the method of conceptual analysis. The former is an external study of law, while the latter is conceptualizing social practices from the participant's point of view. According to Perry's analysis, Hart intended to explain the internal point of view by the descriptive explanatory method, but only with some qualifications, thus encapsulating the final end of conceptual analysis with a facade of descriptive-explanatory method. The complexity of the method calls for some qualification in the face of two issues internal to Hart. One is that the superiority of Hart's theory is not trivial. "A radically external theory that transcended or ignored the participants' conceptualization of their own practice might well have greater explanatory power in the usual scientific sense" (322). The other is that the transition from a simple system of primary rules to a combination (R1) and (R2) accompanies an evaluative claim. It was the defects of uncertainty, static character of rules, and inefficiency that forced the simple (R) to split into two. To say the simple system of (R) would not guide people's action *well* is, Perry argues, equivalent to an evaluative judgment about the very social fact Hart was studying.

If the similarity between Austin and Hart has anything to add to this, it would be the question of how he could claim his theory is descriptive, true to the internal point of view, while committing himself to a typical set of questions borrowed historically. Even if Hart claimed that his theory better describes social practice, he would still have to explain why an external-descriptive theory should give way to his description of the

⁵ Hart was certainly not alone in criticizing Austin in that particular manner. He acknowledged in the footnote to Chapter VI that his view was very close to Salmond (CL 292; see also Postema 2012).

internal point of view. In terms of theoretical efficacy, a command theory could serve better in some respects. For example, when Laurence Lessig compared different modalities of regulation over individuals, it was the sanction that distinguished laws from social norms, market, and architecture (Lessig 1998). He further pointed out the fact that laws condition the other three, thus making them subject to law, and the danger indirect regulation might pose to the publicity of regulation. Although law is closely associated with power to change reasons for action (Raz 1985, 296-300; 2009, 3-27), state laws could be stipulated in a way that would bypass actors' normative reasoning – think of unchangeable character of physical design in public spaces – and yet might still meet the “constraint model” of exclusionary positivism (Shapiro 1998). Although very selective and defensive in his conventional definition of law, Lessig's articulation caught a salient feature of law in a way that would allow him to raise a critical issue surrounding law. This does not necessarily show that command theory would do a better job in every respect than the union of rules by Hart would do. Yet, it suffices to point out that it still possesses the possibility of standing on a par with Hart's revised positivism.

In response, Hart might wish to appeal to his famous separation thesis to claim that what he meant by “descriptive” was the separation of law and morality, and that he conducted conceptual inquiry in the spirit of separation thesis. At first glance, this would sound convincing. However, it would be a false move for two reasons. First, Hart would be blurring the distinction between legal positivism as a claim about connection between law and morality and one as a claim about conceptual inquiry. Hart distinguished five possible meaning of ‘positivism’ (CL 302). Hart seemed to ascribe separation thesis –denial of necessary connection between law and morals— and the significance of value-free inquiry into legal concepts, rejecting other candidates. If Hart were to appeal to separation thesis to defend descriptive nature of his positivism, he would be conflating the distinction he makes without much explanation.

Furthermore, another of his own writing would discourage him to do so. Hart once identified the utilitarian tradition as the bundle of three independent theses: the separation of law and morality, analytical inquiry into legal concepts, and the command theory of law (Hart 1958: 600-2). His main contention was that among the three, the falsity of one cannot prove that of the others. Now that there is a doubt about the existence of such a tradition (Schofield 2010), it may not sound plausible. Even if one compromise on it, Hart would still need to explain why Austin's command theory

deserves less attention given that Austin also embraced the separation thesis (PJD 157).

Perry's charge was perhaps too strong. If so, Hart's burden of proof should be lessened. Hart should at least be excused in relation to the transition from a single society of primary rules to a more complexed society of (R1) and (R2). He might respond that the transition reflected general human nature. A widespread inclination of human beings might prove that the transition generally corresponds with the reality.

Nevertheless, the similarity between Austin and Hart would threaten the latter. We have seen that Austin's command theory procures the source of validity from (Sv) – namely, the sovereign model – which most people habitually obey. (Sv) generally supposes a linear relationship between the governing body and the governed, and it is the governed who *accept* the rule. Hart substituted secondary rules, especially (R2-R), for (Sv). A further striking feature of the rule of recognition is that the range of necessary acceptance is quite narrow compared to the counterpart in Austin's command theory. Hart had to this say:

[W]hat is crucial is that there should be a unified or shared official acceptance of the rule of recognition containing the system's criteria of validity. But it is here that the simple notion of general obedience, which was adequate to characterize the indispensable minimum in the case of ordinary citizens, is inadequate. (CL 115)

Contrary to the test of obedience collectively assigned to the independent political society, Hart narrowed the range of obedience necessary for the existence of a legal system.

Despite its appearance of precision, Hart's distinction between officials and private citizens would fail to their intra-personal inseparability. It is impossible for officials, such as judges, to have only an internal point of view. Hart separated the viewpoints of officials and private citizens, thus creating a conceptual distance between rules of recognition and matters of general obedience.

In an extreme case the internal point of view with its characteristic normative use of legal language (“This is a valid rule”) might be confined to the official world. In this more complex system, only officials might accept and use the system's criteria of legal validity. The society in which this was so might be deplorably sheeplike; the sheep might end in the slaughter-house. But there is little reason for thinking that it could not exist or for denying it the title of a legal system. (CL 117)

This description is unfortunate not because a tyranny could legitimately be called a legal system – though it is indeed in one way – but because it overlooks the fact that officials are private citizens subject to the law as much as they are legally empowered. Hart criticises the impossibility of the (Sv) model (CL 21-2), but his picture of pure acceptance of law is factually and conceptually improbable.

What is striking about the problem is that it has its roots in Austin's (Sv). As Raz has pointed out, Austin's (Sv) model was destined to suffer from its inability to explain the situation in which the sovereign deviates from the accepted constitution. The reason is because "Austin does not distinguish between a single person's acting as a sovereign and his acting as a private citizen" (Raz 1980, 38). In the case of Austin, it was the sovereign that had to bear "The King's Two Bodies" (Kantorowicz 1957)⁶. Just as Austin's sovereign suffers from its dual nature of being a private individual with official status, Hart's officials also pose a problem. It is hard to tell whether a certain official is acting upon his personal belief or out of solid fidelity to law (Schauer 2015, 48-52). Insofar as such a dual nature of acceptance exists, a legal system supervenes on the issue of obedience of private citizens.

To such an allegation, Hart would have a response. He might argue that the acceptance by the officials is acceptance *as* an official and should not be confused with acceptance as a citizen (CL 116). But this is tantamount to confusing explanation with explanandum. If acceptance by officials must be explained as acceptance *as* officials, it would be a non-starter in the same way as Dworkin's calling the rule of recognition "a non-rule of recognition" (Dworkin 1978, 42). It is hard to discern the acceptance by

⁶ Eleftheriadis (2013) brilliantly paved a way for mediating the two characters through the idea of publicity. He argued that Austin's theory can be better read in light of publicity, or law as public standard of guiding behaviour. He conceded the criticism that the private character of sovereignty made up by a single person seemed to suffer from a lack of constitutional restraint. However, he pointed out that sovereignty as a group of persons, or a corporate sovereign, should produce a similar conclusion to Hart's rule of recognition. He wrote, "We identify the law by means of a cognitive process of reasoning on the basis of some standard of decision-making" (162). It would be quite attractive if one could refine Austin enough to overcome Hart's criticism in such a way, but it takes a careful elucidation of what it is like for a sovereign to exist and a conceptual clarification of publicity at least. For an actual attempt to carry out the former, see Morrison (2016). What Eleftheriadis called "publicity" still needs a clarification.

officials *as* official. Even in extreme “sheeplike” cases, they must exercise obedience as citizens as well as officials. This is the problem that the homological relationship to Austin caused Hart.

Hartian positivists would now face a choice. One would be to reject the internal-external dichotomy, as Hart himself did (Hart 1983, 10-1). In that case, the “detached” nature of legal statements (Raz 1990, 170-1; 2009, 153-7) would loom up as an effective alternative and Hart would have to remain silent about the nature of acceptance.⁷ Another would be to take a radically external point of view for theoretical purity. Fortunately for the latter, we are now in possession of a couple of potential theories. In *The Force of Law*, Schauer has put forward a sanction-centred concept of law (Schauer 2015). Morrison (2016) is another thorough reconstruction of command theory.

One final remark: I have so far treated Austin as a descriptive positivist, but Austinians would perhaps be inclined to disagree with this. Rumble, for example, argued that Austin’s commitment to utilitarianism gave rise to necessity for legislative authority because it enables optimal action guidance based on utilitarianism (Rumble 1985, 62-71), and Austin did not *separate* but *distinguished* positive laws from divine laws and positive laws, permitting the possibility that positive laws overlap with, for example, divine laws (71-87)⁸. Be that as it may, the conclusion of this paper would be

⁷ Dickson points out that Hart should actually have done so (Dickson 2007). Hart’s rule of recognition was the ultimate and supreme rule of validity by supposition. Given these characteristics, he could and should have refrained from reducing it to acceptance by officials. In reality, Hart embraced what he called “the practice theory” in his *Postscript to CL* (254-9).

⁸ Though it is beyond the reach of this paper to assess if it was the case, but it worth mentioning that Kramer (2013) set out such possibility in line with Austin as utilitarian. He argues Austin’s extensive comments in *Lectures on Jurisprudence* suggests his conception of punishment included a theory of political morality influenced by his support for utilitarianism. In Kramer’s view, Austin thought the point of punishment lay in deterrence of morally undesirable action. Thus, “... the psychological reaction on which the imposition of punishment centrally and indispensably trades for the fulfillment of a morally worthy purpose is the fear induced by the prospect of harmful consequences” (Kramer 2013, 117). This conception does resonate with Austin’s explanation on proper purpose of government in *PJD* (241-7), where he was eloquent to spare a 4-page footnote.

of some help in two senses to those Austinians. First, Hart's project is now lessened to stand on a par with command theory. Given that Hart's descriptivist picture of Austin faces trouble, all they have to do is show that the external theory of law is somehow better than the mixed methodology of Hart. Furthermore, this paper has set a goal for command theorists. The dual nature of the sovereign was as troublesome for Austin as that of officials was to Hart. That is the problem for command theory to solve. Morrison recently suggested that Austin should not have described the sovereign as an individual or a group of individual people. The alternative was to impersonalise the concept. He suggested it been regarded as the "locked-in" political ruling pattern (Morrison 2016, 368-78). Whether that view is correct or not, such recent developments in command theory indirectly suggest that the contention of this paper could be fruitful.

Conclusion

The argument may have been longer than it should have been as the conclusion will not take very long.

I began this paper with an overview of Austin's command theory and confirmed that it comprises of two parts, (C) and (Sv). Hart's union of primary and secondary rules has critical similarities to it, which threatens Hart's positivism in two ways. First, there are doubts about the descriptive nature of positivism. Hart would not be able show that his description was better than Austin's external one without confusing separation thesis with the descriptive-explanatory method. The second problem is the impossibility of pure official acceptance. Hart understood the rule of recognition to be demonstrated by the officials' acceptance as *officials*. However, this is implausible because the acceptance by officials is at the same time also made in their capacity as private citizens. Such dual nature of acceptance stems from the similarity to Austin's sovereign model. Hartian positivists may not agree with the present paper but should be aware of the fact that they are standing on shaky ground.

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