

**PHIL 168: Philosophy of Law**  
**Winter 2008; David O. Brink**  
**Handout #1: Austin and the Command Theory**

In The Province of Jurisprudence Determined (1832) John Austin (1790-1859) exploits a very natural view of the law as a body of rules or commands issued by the state for the purpose of regulating conduct, violation of which is subject to punishment. Austin's **command theory** develops and makes more accessible some related views of Austin's mentor, friend, and fellow "philosophical radical" Jeremy Bentham (1748-1832). Bentham and Austin both defend the legal positivist claim that there is no necessary connection between law and morality, against the sort of natural law tradition exemplified by St. Thomas Aquinas (1225-74) and the English jurist William Blackstone (1723-80).

Austin embeds the command theory in an elaborate taxonomy of law and related phenomena (see chart on next page).

**THE COMMAND THEORY**

(1) law is the **command** of the **sovereign**, which is backed by threat of sanction for noncompliance; (2) x is a sovereign within a community iff (a) the bulk of the community is in the habit of obedience or submission to x, and (b) x is not in the habit of obedience to any person or group of persons in that community.

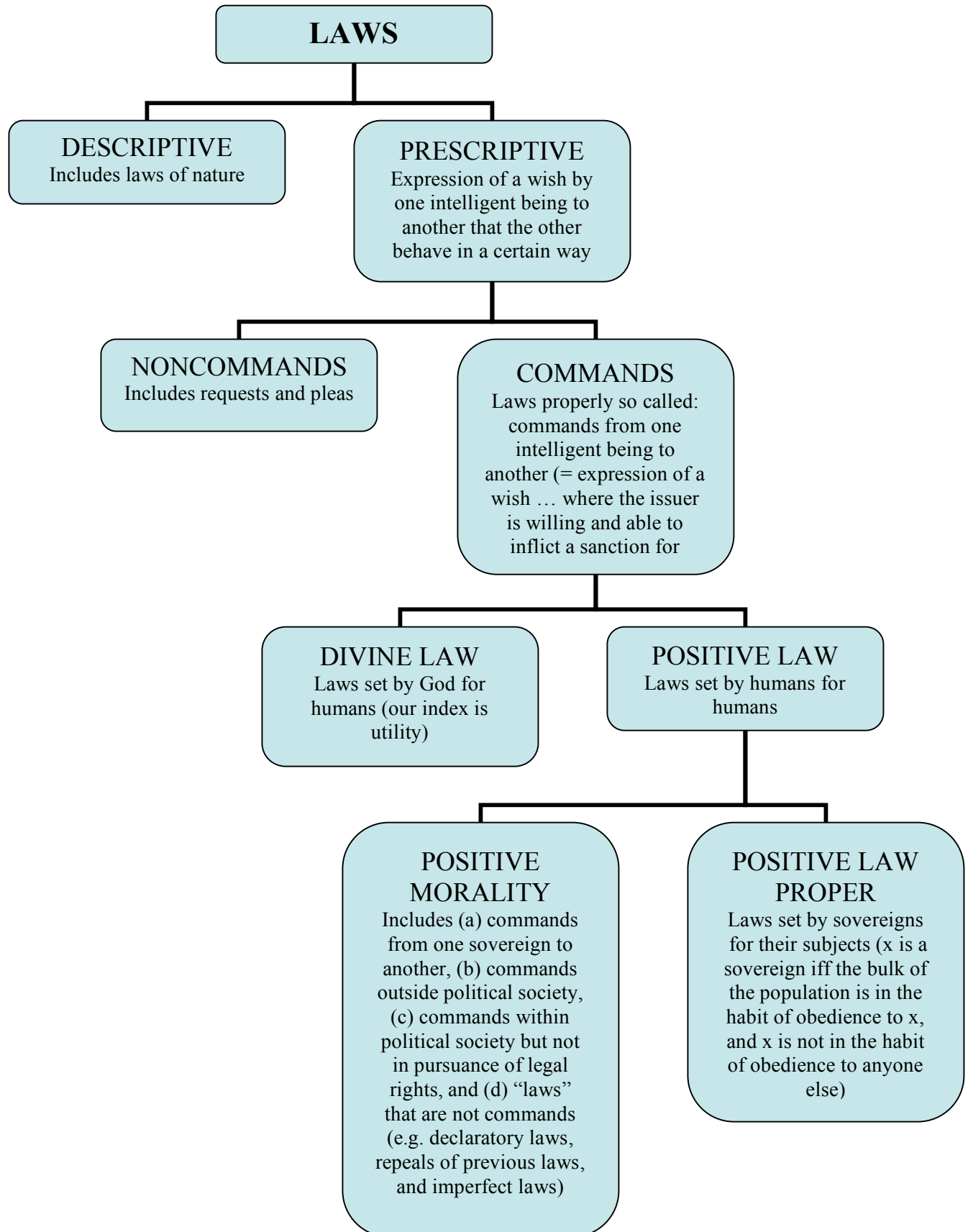
**THE COMMAND THEORY AND LEGAL POSITIVISM**

**Natural law** theory asserts that there is an essential connection between law and morality, whereas **legal positivism** denies this. On one interpretation of the essential connection, natural lawyers insist that genuine laws must have adequate moral content, whereas legal positivists deny this.

Austin insists that the command theory supports legal positivism. A sovereign can issue morally acceptable or wicked commands: "The existence of the law is one thing, its merit or demerit another".

**CONCERNS ABOUT THE COMMAND THEORY**

Whereas the command theory fits absolute monarchies and criminal and tort law pretty well, Hart thinks Austin cannot do justice to the complexity of modern laws and legal systems. Hart has several worries about the command theory; even if Austin's theory can avoid incoherence, Hart thinks he achieves consistency and uniformity at the price of distortion.



### COMMANDS AND OPTIONS (POWER CONFERRING RULES)

Whereas some laws regulate behavior, enjoining particular kinds of conduct, other kinds of law (parts of contract, probate, and family law) confer legal powers. Hart distinguishes between public and private power-conferring rules, and contrasts both with commands. Commands appear to express **categorical** demands.

- In circumstances C do x, regardless of your own interests or desires.

By contrast, power-conferring rules express **hypothetical** demands.

- In circumstances C do x iff that will help you achieve your aim A.

Whereas **commands foreclose options, power-conferring rules create options**. However, might commands be understood as hypothetical demands after all?

- In circumstances C do x iff you want to avoid the risk of punishment.

Or, we might represent them as having disjunctive form.

- In circumstances C do x or risk punishment.

As hypothetical demands, power-conferring rules could also be represented disjunctively.

- In circumstances C do x or forego your aim A.

Notice that with power-conferring rules the condition is a carrot, whereas with commands the condition is a stick. Is this a problem? If so, might nullity be treated as a sanction (stick)? With commands, the sanction for noncompliance is conceptually independent of the rule enjoining conduct. Is nullity a conceptually independent sanction? In any case, can categorical demands be rendered in hypothetical form? Hasn't the criminal broken the rule, even if he suffers punishment; indeed, isn't this **why** he suffers punishment (when he does)?

### SCOPE: LAWS THAT BIND THE SOVEREIGN

Is the sovereign above the law? In democracies and constitutional monarchies the sovereign falls within the scope of the law. Austin seems forced to claim that in such cases the law makers are either (a) commanding themselves or (b) each is "really" two people: sovereign and citizen. Hart treats (a) as absurd and argues that (b) requires sovereign-independent (public) power-conferring rules.

### ORIGIN: LAWS NOT THE RESULT OF ENACTMENT

Commands are discrete, dateable events. But some laws (e.g. customary law) are not the result of explicit enactment. Austin thinks that courts recognize custom as law and that judicial enactments are tacit or oblique commands of the sovereign insofar as the sovereign delegates authority to the judiciary. But Hart thinks courts recognize custom as law, rather than making it into law; its status, as law, Hart thinks, presupposes (public) power-conferring rules.

**CONTINUITY OF AUTHORITY**

How can we explain the orderly transition of sovereign authority (e.g. from Rex I to Rex II) on the command theory? Rex II's first commands cannot count as law, because there is as yet no habit of obedience to Rex II that has been established. Could Austin appeal to standing laws that Rex I creates to obey Rex II?

**CONTINUITY OF LAW**

Here the problem is not with the smooth transfer of authority, but with the persistence of law after the sovereign who commanded it is gone. Might Austin appeal to standing laws again? Can't he claim that x is a law if it was commanded by a sovereign and has not been subsequently contravened by a sovereign?

**SANCTIONLESS LAW**

Are sanctions part of the very concept of law, such that we couldn't imagine a legal system that did not regularly apply or threaten sanctions for noncompliance?