THE PURE THEORY OF LAW AND ANALYTICAL JURISPRUDENCE

I. Theory of Law and Philosophy of Justice

THE pure theory of law [1] is a theory of positive law; a general theory of law, not a presentation or interpretation of a special legal order. From a comparison of all the phenomena which go under the name of law, it seeks to discover the nature of law itself, to determine its structure and its typical forms, independent of the changing content which it exhibits at different times and among different peoples. In this manner it derives the fundamental principles by means of which any legal order can be comprehended. As a theory, its sole purpose is to know its subject. It answers the question of what the law is, not what it ought to be. The latter question is one of politics, while the pure theory of law is science.

It is called " pure " because it seeks to preclude from the cognition of positive law all elements foreign thereto. The limits of this subject and its cognition must be clearly fixed in two directions: the specific science of law, the discipline usually called jurisprudence, must be distinguished from the philosophy of justice, on the one hand, and from sociology, or cognition of social reality, on the other.

To free the concept of law from the idea of justice is difficult,

[1] See Kelsen, Allgemeine Staatslehre (23 Enzyklopädie der Rechts- und Staatswissenschaft 1925); Kelsen, Reine Rechtslehre (1934); Kelsen, *Théorie Générale du Droit International* (1932) 42 Recueil des Cours 121. For publications in English concerning the pure theory of law, see Cohen, Recent Theories of Sovereignty (1937) 57–79; Gauterpacht, Kelsen's Pure Science of Law (1933); Mattern, Concepts of State, Sovereignty and International Law (1928) 121–39; Husik, *The Legal Philosophy of Hans Kelsen* (1938) 3 J. Soc. Phil. 297; Janzen, *Kelsen's Theory of Law* (1937) 31 Am. Pol. Sci. Rev. 205; Kunz, *The Vienna School of International Law* (1934) 11 N. Y. U. L. Q. Rev. 370; Stern, *Kelsen's Theory of International Law* (1936) 30 Am. Pol. Sci. Rev. 736; Voegelin, *Kelsen's Pure Theory of Law* (1927) 42 Pol. Sci. Q. Rev. 268; Wilk, *Law and the State as Pure Ideas: Critical Notes on the Basic Concepts of Kelsen's Legal Philosophy* (1941) 51 Ethics 158; Wilson, *The Basis of Kelsen's Theory of Law* (1934) 1 Politica 54.

because they are constantly confused both in political thought and in general speech, and because this confusion corresponds to the tendency to let positive law appear as just. In view of this tendency, the effort to deal with law and justice as two different problems falls under the suspicion of dismissing the requirement that positive law should be just. But the pure theory of law simply declares itself incompetent to answer either the question whether a given law is just or not, or the more fundamental question of what constitutes justice. The pure theory of law — a science — cannot answer these questions because they cannot be answered scientifically at all.

To say that a social order is just means that it regulates the behavior of men in a way satisfactory to all, that is to say, so that all men find their happiness in it. The longing for justice is the eternal longing of men for happiness, the happiness that man cannot find alone and hence seeks in society. Justice is social happiness.

It is obvious that there can be no " just " order as long as the concept of happiness is defined in its original, narrow sense of individual happiness, whatever the individual considers it to be. For it is then inevitable that the happiness of one will at some time be inconsistent with that of another. Nor is a " just " order possible even under the supposition that it tries to bring about not the individual happiness of each, but the greatest possible happiness of the greatest possible number of persons. The happiness that a social order can assure can be happiness only in the collective sense, that is, the satisfaction of certain needs, recognized by the social authority as needs worthy of being satisfied, such as the need to be fed, clothed, and housed. But which human needs are worthy, and what is their proper precedence? The decision of these questions is a judgment of value, determined by emotional factors and therefore subjective in character, valid only for the judging subject and therefore relative only, as is every true judgment of value. The answer of a believing Christian, who holds the good of his soul in the hereafter more important than earthly goods, will differ from that of a materialist who believes in no afterlife; and there will be just as much difference between the decision of one who considers personal freedom the highest good, and of one for whom the equality of all men is rated higher than freedom.

The questions of whether spiritual or material possessions,

whether freedom or equality represent the higher values, cannot be answered rationally. Yet the subjective, and hence relative judgments of value which answer them are usually presented as assertions of objective and absolute value. It is a peculiarity of the human being that he has a deep need to justify his behavior, the expression of his emotions, his wishes and desires, through the function of his intellect. This seems to be possible, at least in principle, to the extent that the wishes and desires relate to means by which some end or other is to be achieved; for the relationship of means to end is a relationship of cause and effect, and this can be determined on the basis of experience, *i.e.*, rationally. To be sure, even this is frequently impossible in view of the present state of social science, for in many cases we have no adequate experience to enable us to determine how certain social aims may best be attained. Hence this question as to the appropriate means is also more frequently determined by subjective judgments of value than by an objective insight into the connection between means and end, between cause and effect; and hence, at least for the moment, the problem of justice, even as thus restricted to a question of the appropriate means to a generally recognized end, cannot always be rationally answered. The issue between liberalism and socialism, for instance, is in great part not really an issue over the ultimate aim of society, but rather one as to the correct way of achieving a goal as to which men are by and large in agreement, and this issue cannot yet be scientifically determined. And reason stultifies itself to the extent that it seeks to justify emotion by reference to ultimate ends, for the determination of ultimate ends is a true judgment of value, and as such wholly emotional. If the assertion of such ultimate ends appears in the form of postulates or norms of justice they always rest upon purely subjective and hence relative judgments of value. It goes without saying that there are a great many subjective judgments of value, very different from one another and mutually irreconcilable. I do not mean that every individual has his own system of values. In fact, most individuals agree in their judgments of value, for a positive system of values is not an arbitrary creation of the isolated individual, but always the result of the mutual influence which individuals exercise upon each other within a given social group, be it family, tribe, class, caste, or profession. Every system of values, espe-

cially a system of morals and its central idea of justice, is a social phenomenon, and hence differs according to the nature of the society within which it arises. The fact that there are certain values generally accepted in a certain society can have no effect upon their subjective and relative character, any more than the once common belief that the sun turns around the earth is, or was, proof of the truth of the idea. The criterion of justice, like the criterion of truth, is not dependent on the frequency of given judgments of value or judgments about reality.

Thus there are a great many very different ideas of justice, too many for one to be able to speak simply of " justice." Yet one is inclined to set forth one's own idea of justice as the only correct one. The need for rational justification of our emotional acts is so great that we seek to satisfy it even at the risk of self-deception. And the rational justification of a postulate based on a subjective judgment of value, on a wish, as, for example, that all men should be free, or that all men should be treated equally, is self-deception, or — what amounts to much the same thing — an ideology. Typical ideologies of this sort are the assertions that some sort of ultimate end, and hence some sort of definite regulation of human behavior proceeds from " nature," that is, from the nature of things or the nature of men, from human reason or the will of God. In such an assumption lies the essence of the doctrine of so-called natural law. This doctrine maintains that there is an ordering of human relations different from positive law, superior to it, absolutely valid and just because it emanates from nature, human reason, or the will of God. But none of the numerous natural law theories has so far succeeded in defining the content of this just order in a way even approaching the exactness and objectivity with which natural science can determine the content of the physical laws of nature, or jurisprudence the content of any given positive legal order. That which has so far been put forth as natural law, or, what amounts to the same thing, as justice, are for the most part empty formulas like *suum cuique*, or unmeaning tautologies like the categorical imperative which permit any positive legal order to appear just. When the norms set up have a definite content, they appear as more or less generalized principles of a definite positive law that, without sufficient reason, are presented as natural or just law. It does happen, even if less fre-

quently, that the principles presented as "natural" or "just" run counter to a definite positive law. In either case their validity rests on judgments of value which have no objectivity; a critical analysis always shows that they are only the expression of certain group or class interests. Accordingly, the doctrine of natural law is now conservative, now reformatory or revolutionary in character. It either justifies positive law by proclaiming its agreement with the natural, reasonable, or divine order, an agreement asserted but not proved, or it puts in question the validity of positive law by claiming that it is in contradiction of one of the presupposed absolutes. The revolutionary doctrine of natural law, like the conservative, is concerned not with the cognition of positive law, of legal reality, but with its defense or attack.

In this respect the dualism between positive law and natural law, so characteristic of the natural-law doctrine, resembles the metaphysical dualism of reality and the platonic idea. This dualism has an optimistic or a pessimistic character according to whether it is assumed that there is agreement or contradiction between the empirical world of reality and the transcendental world of ideas. The purpose of this metaphysic is not — as is that of science — rationally to explain reality, but rather emotionally to accept or refuse it. And one is completely free to assume either relationship between reality and ideas, since objective cognition of ideas is not possible in view of the transcendentalism involved in their very definition. If man had complete insight into the world of ideas, then he, and hence his own empirical world, would be entirely good, and there would be no empirically real world at all in distinction to a transcendental ideal world. In the face of the existence of a just ordering of society, intelligible in nature, reason, or divine will, the activity of human law-makers would be a foolish effort at artificial illumination in bright sunshine. Were it possible to answer the question of justice as we answer problems of the technique of natural science or medicine, one would as little think of regulating relations among men by an authoritative measure of coercion as one thinks today of forcibly prescribing by positive laws how a steam engine should be built or a specific illness healed.

Justice is an irrational ideal. The usual assertion that there is indeed such a thing as justice, but that it cannot be clearly defined,

is in itself a contradiction. However indispensable it may be for volition and action of men, it is not subject to cognition. Regarded from the point of view of rational cognition, there are only interests, and hence conflicts of interests. They can be solved by an order that either satisfies one interest at the expense of the other, or seeks to establish a compromise between the two. That only one of these two orders is " just " cannot be established by rational cognition. Such cognition can grasp only a positive order evidenced by objectively determinable acts. This order is the positive law. Only this can be an object of science; only this is the object of the pure theory of law, which is a science, and not metaphysics. This science seeks the real and possible law, not the just, and in this sense it is radically realistic and empirical. It declines to justify or condemn.

One statement it can make, however, on the basis of experience: only a legal order which does not satisfy the interests of one at the expense of another, but which brings about such a compromise between opposing interests as to minimize the possible frictions has expectation of relatively enduring existence. Only such an order will be in a position to secure social peace on a relatively permanent basis to its citizens. And although the ideal of justice in its original sense as developed here is something different from the ideal of peace, there exists a definite tendency to identify the two ideals, or at least to substitute the ideal of peace for that of justice.

This change of meaning of the concept of justice goes hand in hand with the tendency to withdraw the problem of justice from the insecure realm of subjective judgments of value, and establish it on the firm ground of a given social order. " Justice " in this sense means legality. It is " just " for a general rule to be applied in all cases where according to its content the rule should be applied. It is " unjust " for it to be applied in one case and not in a similar case. And this seems " unjust " without regard to the value of the general rule itself, the application of which is under consideration. Justice, in this sense, is a quality which relates not to the content of a positive order, but to its application. " Justice " means the maintenance of a positive order by applying it conscientiously. It is " justice under the law." This is the only sense in which the concept of justice can enter into a science of law.

II. Normative and Sociological Jurisprudence

Positive law, which is the object of the pure theory of law, is an order by which human conduct is regulated in a specific way. The regulation is accomplished by provisions which set forth how men ought to behave. Such provisions are called norms, and either arise through custom, as do the norms of the common law, or are enacted by conscious acts of certain organs aiming to create law, as a legislature acting in its law-making capacity.

Legal norms may be general or individual in character. They may regulate beforehand, in an abstract way, an undetermined number of cases, as does the norm that if anyone steals he is to be punished by a court; or they may relate to a single case, as does a judicial decision which decrees that *A* is to suffer imprisonment for six months because he stole a horse from *B*. Jurisprudence sees the law as a system of general and individual norms. Facts are considered in this jurisprudence only to the extent that they form the content of legal norms. For example: jurisprudence takes cognizance of the procedure by which legal norms are created, for this procedure is prescribed by the norms of the constitution; of the delict, because it is defined by a norm as a condition of the sanction; of the sanction, which is ordered by a legal norm as a consequence of a delict. Only norms, provisions as to how individuals should behave, are objects of jurisprudence, never the actual behavior of individuals.

If we say that a norm "exists" we mean that a norm is valid. Norms are valid for those whose conduct they regulate. To say that a norm is valid for an individual means that the individual ought to conduct himself as the norm prescribes; it does not mean that the individual necessarily behaves so that his conduct actually corresponds to the norm. The latter relationship is expressed by saying that the norm is efficacious. Validity and efficacy are two completely distinct qualities; and yet there is a certain connection between the two. Jurisprudence regards a legal norm as valid only if it belongs to a legal order that is by and large efficacious; that is, if the individuals whose conduct is regulated by the legal order in the main actually do conduct themselves as they should according to the legal order. If a legal order loses its efficacy for any reason, then jurisprudence regards its norms as no

longer valid. Still, the distinction between validity and efficacy is a necessary one, for it is possible that in a legal order which is on the whole efficacious, and hence regarded as valid, a single legal norm may be valid but not efficacious in a concrete instance, because as a matter of fact, it was not obeyed or applied although it ought to have been. Jurisprudence regards law as a system of valid norms. It cannot dispense with the concept of validity as a different concept from that of efficacy if it wishes to present the specific sense of " ought " in which the norms of the law apply to the individuals whose conduct they regulate. It is this " ought " which is expressed in the concept of validity as distinguished from efficacy.

If jurisprudence is to present law as a system of valid norms, the propositions by which it describes its object must be " ought " propositions, statements in which an " ought," not an " is," is expressed. But the propositions of jurisprudence are not themselves norms. They establish neither duties nor rights. Norms by which individuals are obligated and empowered issue only from the law-creating authority. The jurist, as the theoretical exponent of the law, presents these norms in propositions that have a purely descriptive sense, statements which only describe the " ought " of the legal norm. It is of the greatest importance clearly to distinguish between legal norms which comprise the object of jurisprudence and the statements of jurisprudence describing that object.

The rule of law, using the term in a descriptive sense, is, like the law of nature, a hypothetical judgment that attaches a specific consequence to a specific condition. But between the law of nature and the rule of law there exists only an analogy. The difference lies in the sense in which condition and consequence are connected. The law of nature affirms that when an occurrence (the cause) takes place, another occurrence (the effect) follows. The rule of law, using the term in a descriptive sense, says that if one individual behaves in a certain manner, another individual should behave in a given way. The difference between natural science and jurisprudence lies not in the logical structure of the propositions describing the object, but rather in the object itself, and hence in the meaning of the description. Natural science describes its object — nature — in *is*-propositions; jurisprudence describes its object — law — in *ought*-propositions. In view of the specific

sense of the propositions in which jurisprudence describes its object, it can be called a normative theory of the law. This is what is meant by a specifically " juristic " view of the law.

This sort of jurisprudence must be clearly distinguished from another which can be called sociological.[2] The latter attempts to describe the phenomena of law not in propositions that state how men should behave under certain circumstances, but in propositions that tell how they actually do behave; just as physics describes how certain natural objects behave. Thus the object of sociological jurisprudence is not legal norms in their specific meaning of " ought-statements," but the legal (or illegal) behavior of men. It is supposed possible by observation of actual social happenings to achieve a system of rules by means of which this behavior, characterized as " law," can be described. These rules are supposed to be of the same sort as the laws of nature, and hence, like them, to afford the means for predicting future happenings within the legal community, future conduct to be characterized as law.

The pure theory of law by no means denies the validity of such sociological jurisprudence, but it declines to see in it, as many of its exponents do, the only science of law. Sociological jurisprudence stands side by side with normative jurisprudence, and neither can replace the other because each deals with completely different problems. It is on just this account that the pure theory of law insists upon clearly distinguishing them from each other, in order to avoid that syncretism of method which is the cause of numerous errors. What must be avoided under all circumstances is the confounding — as frequent as it is misleading — of cognition directed toward a legal " ought," with cognition directed toward an actual " is."

Normative jurisprudence deals with the validity of the law; sociological jurisprudence, with its efficacy; but just as validity and efficacy are two different aspects of the law that must be kept clearly apart, yet which stand in a definite relation to each other, so there exists between normative and sociological jurisprudence, despite the difference in the direction of their cognitions, a consid-

[2] I consider the most characteristic American representatives of sociological jurisprudence to be those men who are more commonly known as the American legal realists.

erable connection. The sociology of law cannot draw a line between its subject — law — and the other social phenomena; it cannot define its special object as distinct from the object of general sociology — society — without in so doing presupposing the concept of law as defined by normative jurisprudence. The question of what human behavior, as law, can form the object of sociology, of how the actual behavior of men to be characterized as law is distinguishable from other conduct, can probably be answered only as follows: " law " in the sociological sense is actual behavior that is stipulated in a legal norm — in the sense of normative jurisprudence — as condition or consequence. The sociologist regards this behavior not — as does the jurist — as the content of a norm, but as a phenomenon existing in natural reality, that is, in a causal nexus. The sociologist seeks its causes and effects. The legal norm as the expression of an " ought " is not for him, as for the jurist, the object of his cognition; for the sociologist it is a principle of selection. The function of the legal norm for the sociology of law is to designate its own particular object, and lift it out of the whole of social events. To this extent, sociological jurisprudence presupposes normative jurisprudence. It is a complement of normative jurisprudence.

To the extent that sociology of law attempts to describe and as far as possible to predict the activity of the law-creating and law-applying organs, especially of the courts — a task that its American representatives place foremost — its results cannot be very different from those of normative jurisprudence. To be sure, the meaning of the propositions of sociological jurisprudence is, as we have seen, completely different from that of the propositions of normative jurisprudence. The latter determines how the courts should decide in accordance with the legal norms in force; the former how they do and presumably will decide. But since normative jurisprudence regards legal norms as valid only if they belong to a legal order that is generally efficacious, that is, actually obeyed and applied, no great difference can exist between the actual and the lawful conduct of law-applying organs. As long as the legal order is on the whole efficacious there is the greatest probability that the courts will actually decide as — in the view of normative jurisprudence — they should decide. The activities of the law-creating organs, however, especially of the legislative organs, that

are not bound by legal norms in force or are bound only to a very slight extent, cannot be predicted with any degree of probability. The predictability of legal functioning by sociological jurisprudence is directly proportional to the extent to which that functioning has been described by normative jurisprudence.

Whether the prediction of future occurrences is an essential task of natural science, and hence by analogy one of sociology, is doubtful. The sociology of law at any rate has other more promising problems. It not only has to describe and if possible to predict the actual conduct of the individuals who create, apply, and obey the law; it must also explain it causally. In order to fulfill this task, it must investigate the ideologies by which men are influenced in their law-creating and law-applying activities. Among these ideologies the idea of justice plays a decisive role. The ideologico-critical analysis of this idea is one of the most important and promising tasks of a sociology of law.

III. The Concept of the Norm

Since the pure theory of law limits itself to cognition of positive law, and excludes from this cognition the philosophy of justice as well as the sociology of law, its orientation is much the same as that of so-called analytical jurisprudence, which found its classical Anglo-American presentation in the work of John Austin. Each seeks to attain its results exclusively by analysis of positive law. While the pure theory of law arose independently of Austin's famous *Lectures on General Jurisprudence*,[3] it corresponds in important points with Austin's doctrine. It is submitted that where they differ the pure theory of law has carried out the method of analytical jurisprudence more consistently than Austin and his followers have succeeded in doing.

This is true especially as to the central concept of jurisprudence, the norm. Austin does not employ this concept, and pays no attention to the distinction between " is " and " ought " that is the basis of the concept of the norm. He defines law as " rule," and " rule " as " command." He says, " Every *law* or *rule* . . . is a

[3] The first edition was published in 1832, under the name of *The Province of Jurisprudence Determined*; a considerable amount of new material was added in subsequent editions. All references in this article are to the fifth edition, published in 1885. It will be hereinafter cited as Austin.

command. Or, rather, laws or rules, properly so called, are a *species* of commands." [4]

A command is the expression of the will of an individual directed to the conduct of another individual. If it is my will that someone behave in a certain manner, and if I express my will as regards this other individual in a certain way, my expression is a command. Thus a command consists of two elements: a wish directed toward someone else's behavior, and its expression in one way or another. There is a command only so long as both the will and its expression are present. If someone issues a command to me, and before its execution I have adequate reason to assume that it is no longer his will, then neither is it any longer a command, even though the expression of his will should remain. But a so-called " binding " command is said to persist even if the will, the psychic phenomenon, has lapsed. More accurately, however, that which persists is not really the command, but rather my obligation. A command, on the other hand, is essentially a willing and its expression.

Hence legal rules, which according to Austin constitute the law, are not actually commands. They exist, that is to say, they are valid and obligate individuals, even if the will by which they were created has long ceased to be. It may even be said to be doubtful whether some instances in which legal obligations exist as to certain behavior ever represented the real will of anyone. An example will illustrate this.

If one calls a statute constitutionally enacted by a legislature a command, or, what amounts to the same thing, the " will " of the legislators, this expression has almost nothing to do with the true concept of " command." The statute is valid, that is, binding, even after all the members of the legislature that enacted it have died; then, therefore, the content of the statute is no longer the " will " of anyone, at least not of anyone competent to will it. Thus binding law cannot be the psychological will of the lawmakers even though a real act of will is necessary to make the law. And an analysis of the constitutional process by which a statute comes into being shows that even the act creating a binding law need by no means represent any will to the behavior required by the statute. The statute is enacted when a majority of the legis-

[4] AUSTIN 88.

lators have voted for a bill submitted to them. The content of the statute is not the " will " of the legislators who vote against the bill; their will is expressly contrary. Yet their expressions of will are just as essential to the existence of the statute as are the expressions of will of the members who voted for it. The statute is an enactment of the whole legislature, including the minority, but this obviously does not mean that its content is the will — in the psychological sense — of all the members of the legislature. Even if one takes into consideration only the majority that voted for the bill, the assertion that the statute was the will of the majority is patent fiction. Voting for a bill by no means implies actually " willing " the content of the statute. Psychologically one can " will " only something of which one has an idea; one cannot " will " something of which one knows nothing. And it is indubitable that in very many if not all cases, a large proportion of the members of a legislature who vote for a bill either do not know its content or know it very superficially. That a legislator raises his hand or says " Aye " when the vote is being taken does not mean that he has made the content of the bill the content of his own will, in the way in which a man who " commands " another to act in a certain way " wills " this conduct.

Clearly, therefore, if a particular law is called a command, or, what amounts to the same thing, the " will " of the law-maker, or if law in general is called the " command " or " will " of the " state," this can be taken as only a figurative expression. As is usually the case, an analogy lies at its root. When definite human behavior is " enacted," " provided," " prescribed," in a rule of law, the enactment is quite similar to a true command. But there is an important difference. The statement that a command exists means that a psychic phenomenon — a will — is directed toward certain human behavior. Human behavior is enacted, provided, or prescribed by a rule of law without any psychic act of will. Law might be termed a " depsychologized " command. This appears in the statement that man " ought " to conduct himself according to the law. Herein lies the importance of the concept of " ought," here is revealed the necessity for the concept of the norm. A norm is a rule stating that an individual ought to behave in a certain way, but not asserting that such behavior is the actual will of anyone.

A comparison of the " ought " of the norm with a command is

apt only to a very slight extent. The law enacted by the legislator is a " command " only if it is assumed that a " command " has binding force. A command which has binding force is, indeed, a norm. But without the concept of the norm, the law can be described only with the help of a fiction, and Austin's assertion that legal rules are " commands " is a superfluous and dangerous fiction of the " will " of the legislator or the state.

IV. The Element of Coercion

In accordance with the assertions of analytical jurisprudence, the pure theory of law regards the element of coercion as an essential characteristic of the law. Austin [5] and his followers characterize law as " enforcible " or as a rule " enforced " by a given authority. By this they mean that the legal order " commands " the individual to act in a certain fashion, and " forces " men in a specific way to obey the commands of the legal order. The specific means by which the law " enforces " the obedience of individuals consists in inflicting an evil called a sanction in case of disobedience. The " coercion " which according to this view is characteristic of the law is a psychic one; obedience to the commands of the law is achieved through fear of the sanction.

From the standpoint of a strictly analytical method, this formulation is not correct. It has reference to the behavior of the citizen and the organs applying the law, but it may well be doubted whether the lawful behavior of individuals is brought about by fear of the threatened sanction. So far as we know anything about the motives for the behavior of individuals, we may surmise that moral or religious motives, for instance, are important, and even perhaps more effective than fear of the sanction of the law. And psychic coercion is not a specific element of the law. Moral and religious norms as well are coercive in this psychological sense. For the rest, this question as to the motives for lawful behavior is beside the purpose of cognition directed only to the content of the legal order.

We are here in the presence of a problem of sociological, not analytical or normative jurisprudence. The latter can only affirm that the law sets up coercive measures as sanctions that are to be

[5] See Austin 89 *et seq.*

directed under definite conditions against definite individuals. From this standpoint, it is not the psychic coercion that proceeds from the idea men have of the law, but the outward sanctions which it provides that are of the law's essence.

Among the conditions to which the law attaches the sanction as a consequence, the delict is decisively important. The delict — with a limitation to be mentioned later — is conduct of the individual against whom this sanction is directed which is the opposite of the conduct that the law prescribes. Hence the sanction is provided for the very case where the law fails in a concrete instance to achieve its purpose, for the case in which obedience to the law does not receive the enforcement that Austin maintains is essential to law. Hence the law is not, as Austin formulates it, a rule " enforced " by a specified authority, but rather a norm which provides a specific measure of coercion as sanction. The nature of the law will not be grasped if one characterizes it as does Austin, as a command to conduct oneself lawfully. The law is a decree of a measure of coercion, a sanction, for that conduct called " illegal," a delict; and this conduct has the character of " delict " because and only because it is a condition of the sanction.

The legal norm refers to the conduct of two entities: the citizen, against whose delict the coercive measure of the sanction is directed; and the organ that is to apply the coercive measure to the delict. The function of the legal norm consists in attaching the sanction as a consequence to certain conditions among which the delict plays a leading part. Looked at from a sociological point of view, the essential characteristic of law, by which it is distinguished from all other social mechanisms, is the fact that it seeks to bring about socially desired conduct by acting against contrary socially undesired conduct — the delict — with a sanction which the individual involved will deem an evil. Analytical jurisprudence takes into consideration only the content of the legal order, and hence only the connection between delict and sanction.

Although Austin recognizes the essential significance of the sanction for the concept of law, he fails to define the legal norm in a manner corresponding to this understanding. The pure theory of law is only drawing an obvious conclusion when it formulates the legal norm (using the term in a descriptive sense) as a hypothetical judgment, in which the delict appears as an essential

condition, the sanction as the consequence. The sense in which condition and consequence are connected in the legal norm is that of "ought." If one steals, he ought to be punished; if one does not make good tortious damage, civil execution ought to issue against him. This concept of the legal norm is the fundamental concept of normative jurisprudence. All other concepts, especially those of legal duty and right, are derived from it.

V. The Legal Duty

The pure theory of law stresses the primary character of the concept of duty in relation to that of right, just as Austin does. "Duty is the basis of Right." [6] To say that an individual is legally obligated to observe certain conduct means that a legal norm provides a sanction for contrary behavior, a delict. Normally the sanction is directed against the individual who has committed the delict. It can happen, however, — and in primitive legal orders this is the rule — that the sanction is directed not alone against the delinquent but against other individuals as well, against those who stand in a specific relation to the delinquent. They are individuals who belong to the same legal group as the delinquent — to the same family, tribe, or state. If the sanction is directed only against the delinquent himself, then it is a case of individual responsibility. If the sanction is directed against the co-members of the group, it is a case of collective responsibility. Such is the blood revenge or vendetta of the primitive law. Such is the operation even today of international law, the sanctions of which (reprisal and war) are directed against the state as an entity — in effect, therefore, against the citizens of the state whose organ has violated the law. The fact that the sanction can be directed against individuals other than the delinquent makes it necessary to distinguish between the idea of duty and that of liability or responsibility. The liability rests upon the individual against whom the sanction is directed. The duty rests upon the potential delinquent who may by his behavior commit the delict. Normally, in modern law the subjects of the duty and of the liability are one and the same. But as an exception collective responsibility is still possible — is, indeed, the rule of international law today.

[6] Austin 395.

In the theory of Austin, this clear separation between the concept of duty and responsibility is not made. Austin proceeds from the supposition that the sanction is always directed against the individual who commits the delict, and takes no account of the cases in which the sanction is not directed against the delinquent but against someone who stands in a specific relation to him. Hence he fails to see the difference that exists between " to be obliged to maintain a certain behavior," and " to be responsible for a certain behavior." He defines legal duty: "' To be obliged to do or forbear,' or ' to lie under a *duty* or *obligation* to do or forbear,' is to be liable or obnoxious to a sanction, in the event of disobeying a command." [7] But how is it when it is not the delinquent individual, but another who is exposed to the sanction? Then, according to Austin, the legal norm would not have set up any duty at all. But according to Austin it is the nature of a legal norm to set up a legal duty. It is the " command," which, according to Austin, obliges the individual.

It is this concept of the command which prevents Austin from distinguishing between duty and liability. According to Austin, a legal rule is a command to legal behavior. The decreeing of the sanction does not appear in the norm which obligates the individuals. Only if one formulates the legal rule as does the pure theory of law, as a norm by which a sanction is decreed for the case of illegal conduct, can one distinguish the case in which the sanction is directed against the individual who acts contrary to the " command " of the law, from the case in which the sanction is directed against someone who is made responsible for the delict committed by another.

VI. The Legal Right

The word " right " has many meanings. It is used both in the sense of a right to conduct oneself in a certain way, and in the sense of a right that someone else should conduct himself in a certain way. To say that someone has a right to behave so, may only mean that he has no duty to behave otherwise; he is free. For instance, I have a right to breathe, think, walk in the park. This freedom is only the negation of a duty. But the phrase may also

[7] Austin 444.

have the positive meaning that someone else is obliged to behave correspondingly. For example, that I have a right to use an object in my possession implies a duty on every other person not to disturb me in its use; or that I have the right to express my opinion means that it is the duty of the state — more correctly, of the organs representing the state — not to hinder my expression. That the right of one presupposes the duty of another is especially clear when the right is to certain conduct by someone else. That I have a right to have a certain man pay me a sum of money necessarily implies that it is his duty to pay. Every true right that is not mere negative freedom from a duty consists of a duty of another, or many others. " Right " in this sense is a " relative " duty. Austin's statement is apposite: ". . . the term ' right ' and the term ' *relative* duty ' signify the same notion considered from different aspects." [8]

But Austin's theory contains no concept of right different from that of duty. Such a right exists when an individual is accorded by the legal order the opportunity to make the duty of another effective by bringing a suit and thus setting in motion the sanction provided for violation. Only in this case does the right of A to conduct on the part of B fail to coincide with the duty of B toward A. Only in this case is the legal situation incompletely described by stating that B is under an obligation to A to act in a certain way. Hence the pure theory of law restricts the concept of a right to this situation. Only here is there a separately existing right in the narrow sense of the word.

VII. The Static and Dynamic Theory of Law: the Hierarchy of Norms

Analytical jurisprudence, as presented by Austin, regards law as a system of rules complete and ready for application, without regard to the process of their creation. It is a static theory of the law. The pure theory of law recognizes that a study of the statics of law must be supplemented by a study of its dynamics, the process of its creation. This necessity exists because the law, unlike any other system of norms, regulates its own creation. An analysis of positive law shows that the process by which a legal norm is

[8] Austin 395.

created is regulated by another legal norm. Indeed, usually other norms determine not only the process of creation, but also, to a greater or lesser extent, the content of the norm to be created. Thus a constitution both regulates the procedure by which statutes are created, and contains provisions, mostly negative, concerning their content. For example, freedom of speech, press, and religion cannot be limited by statute, or only in a certain way. Similarly, while laws concerning civil and criminal procedure regulate the way in which the individual norms of judicial decisions are made, a civil or a penal code determines by its general norms the content of these individual norms. In the same way, in a system of customary law such as the common law, the content of judicial decisions is defined by preexisting general norms to a much greater degree than is the content of statutes by the constitution. The difference between legal norms that determine the mode of creation of other legal norms and those that determine their content is expressed in Anglo-American terminology by a distinction between " adjective " and " substantive " law.

The relation existing between a norm which governs the creation or the content of another norm and the norm which is created can be presented in a spatial figure. The first is the " superior " norm; the second the " inferior." If one views the legal order from this dynamic point of view, it does not appear, as it does from the static point of view, as a system of norms of equal rank, standing one beside the other, but rather as a hierarchy in which the norms of the constitution form the topmost stratum. In this functional sense, " constitution " means those norms that determine the creation, and occasionally to some extent the content of the general legal norms which in turn govern such individual norms as judicial decisions. It is a complex of norms which regulates primarily the organs and the procedure of legislation, and which includes also the norm by which custom is recognized as a creator of law. To be included within this complex, a norm need not be found in a written constitution — it may be a part of the unwritten constitution created by custom.

The relation between a norm of a higher level and one of a lower, for instance that between a constitution and a statute enacted in accordance with it, means also that in the higher norm is found the reason for the validity of the lower; a legal norm is valid be-

cause it has come into being in the way prescribed by another norm. This is the principle of validity peculiar to positive law. It is a thoroughly dynamic principle. The unity of the legal order is achieved by this connection. If one asks the reason for the validity of a judicial decision, the answer runs: the decision containing the individual norm, by which, for example, *A* is obligated to pay *B* $1000, is valid because the decision came into being by the application of general norms of statutory or customary law that empower the court to decide a concrete case in a certain manner. The general norms so applied are valid because they were created in accordance with the constitution. What is the reason for the validity of the constitution? The norm from which the constitution derives its validity is the basic norm of the legal order. This basic norm is responsible for the unity of the legal order. The question of which is the basic norm responsible for the unity of a national legal order can be answered only in connection with the relation in which national law stands to international. And this question presupposes a clear insight into the relation of law and state.

VIII. The Law and the State

It is one of the characteristics of Austin's doctrine that it has no legal concept of the state. The concept of an " independent political society " plays a certain role in his teachings, but it is not a legal concept, and Austin himself does not call this " independent political society " a state. By it he means a society consisting of a sovereign and subjects.[9] The sovereign may be an individual or a group, but never all the persons comprising the political society. Austin says occasionally " law is the creature of the sovereign or state," [10] but " state " here obviously means not a political society, but rather the bearer of the sovereignty within the society. For the rest, Austin seldom uses the word " state," and reveals a disinclination for the concept. When he says that all law is created by the " state," he means: " Every positive law . . . is set by a sovereign person, or a sovereign body of persons," [11] that is to say, by that portion of the political society in which the sovereignty resides.

[9] See Austin 220. [10] *E.g.*, Austin 101. [11] Austin 220.

As all law emanates from the sovereign, the sovereign himself is not subject to the law. One of the main principles of Austin's theory is that sovereign power " is incapable of *legal* limitation." [12] The essence of sovereignty consists, according to Austin, in the fact that the individual or group designated as sovereign will " not be habitually obedient to a determinate human superior." [13] This concept of the sovereign is sociological or political, but not juristic — yet it is an essential element of Austin's jurisprudence, which teaches that law is to be understood only as the command of the sovereign. This is difficult to reconcile with the theoretic method of analytical jurisprudence, which derives its concepts only from an analysis of positive law. In the norms of positive law no such thing as a " sovereign," a person or group " incapable of legal limitation," can be found. The central difficulty is that the jurisprudence of Austin, while it deals with the concept of a sovereign which is not the state but only an organ of the state, does not concern itself at all with the problem of the state itself.

On this point there is a great difference between Austin's analytical jurisprudence and the pure theory of law. The latter does not deny the traditional view that the state is a political society; but it shows that a number of individuals can form a social unit, a " society " or better, " community," only on the basis of an order, or, in other words, that the element constituting the political community is an order. The state is not its individuals; it is the specific union of individuals, and this union is the function of the order which regulates their mutual behavior. Only in this order does the social community exist at all. It is a political community, because and to the extent that the specific means by which this regulatory order seeks to attain its end is the decreeing of measures of coercion. The legal order is such a coercive order, as we have seen. One of the distinctive results of the pure theory of law is its recognition that the coercive order which constitutes the political community we call a state, is a legal order. What is usually called the legal order of the state, or the legal order set up by the state, is the state itself.

Law and state are usually held to be two distinct entities. But if it be recognized that the state is by its very nature an ordering of human behavior, that the essential characteristic of this order,

[12] AUSTIN 263. [13] AUSTIN 224.

coercion, is at the same time the essential element of the law, this traditional dualism can no longer be maintained. By subsuming the concept of the state under the concept of a coercive order which can only be the legal order, by giving up a concept of the state distinct in principle from the concept of law, the pure theory of law realizes a tendency inherent in the doctrine of Austin. Austin rightly felt that a *political* concept of the state had no place in a juristic theory. Hence he seeks to dispense with it. But he substitutes for it another political concept, that of the " sovereign," instead of establishing a *legal* concept of the state.

The state which " possesses " a legal order is imagined as a person. This " person " is only a personification of the unity of the legal order. The dualism of state and law arises from hypostatizing the personification, asserting this figurative expression to be a real being, and so opposing it to the law. If, however, juristic thinking is freed from this fiction, then all the problems concerning the relation of state and law are revealed as illusory. Thus the much-mooted question whether the state creates the law is answered by saying that men create the law, on the basis of its own definite norms. The individuals who create the law are organs of the legal order, or, what amounts to the same thing, organs of the state. They are organs because and to the extent that they fulfill their functions according to the provisions of the legal order which constitutes the legal community. For an individual to be an organ of the state means only that certain acts performed by him are attributed to the state, that is, are referred to the unity of the legal order. If it be asked why a certain act of an individual is imputed to the state, there is no other answer than that this conduct is determined by the legal order. The criterion of this imputation of a human act to the state is purely juristic in character. If a norm of the legal order is created in accordance with the stipulations of another norm of this legal order, then the individual who creates the law is an organ of the legal order, an organ of the state. In this sense it can be said that the state creates the law, but this means only that the law regulates its own creation.

If one resolves the dualism of law and the state, if one recognizes the state as a legal order, then the so-called elements of the state — territory and population — appear as the territorial and

personal spheres of validity of the national legal order. What Austin calls the " sovereign " appears as the order's highest organ, and sovereignty is then not a characteristic of the individual or group of individuals comprising this organ, but a characteristic of the state itself. For sovereignty to be a characteristic of the *national* legal order, however, can mean only that above this order no higher order is assumed.

IX. International and National Law

If there is a legal order superior to the national legal orders, it must be international law. Whether it is really law in the same sense as national law, and whether, as a legal order, it stands above the national legal orders, are the two decisive questions. Austin answers both negatively, admitting the validity of international law only as " positive international morality." [14] Therefore the theory of international law, like the theory of the state, is eliminated from the province of Austin's jurisprudence. The pure theory of law, on the other hand, shows that it is quite possible to consider international law as real law, since it contains all the essential elements of a legal order. It is a coercive order in the same sense as national law: it obligates states to definite mutual behavior, in that it provides sanctions against contrary conduct. The sanctions provided by international law are reprisals and war. The pure theory of law attempts to prove that according to international law not only reprisals but war, as well, is permissible only as a reaction against a wrong that has been suffered. The pure theory of law shows that the principle of *bellum justum* is a principle of positive international law. International law is real law, but it is primitive law. This is so especially because the reaction against the delict, the execution of the sanction, is left to the state itself, the very subject whose rights are infringed, instead of being delegated to a central organ as is the case in the national legal order. Thus the international legal order is radically decentralized, and for this very reason the international community constituted by international law is not a state, but only a union of states. A certain degree of centralization is essential to the state. Similarly the completely decentralized community of a

[14] See Austin 172 *et seq.*

primitive tribe is not a state, although there is no doubt that the order constituting it is a legal order.

There are today two opposing views in regard to the relation between national and international law, the one dualistic and the other monistic. The former maintains that national law and international law are two completely distinct and mutually independent systems of norms, like positive law and morality, for instance. The pure theory of law shows that such a dualistic concept of the relation between national and international law is logically impossible, and that none of the followers of the dualistic theory is able to maintain his point of view consistently. If one assumes that two systems of norms are considered as valid simultaneously from the same point of view, one must also assume a normative relation between them; one must assume the existence of a norm or order that regulates their mutual relations. Otherwise insoluble contradictions between the norms of each system are unavoidable, and the logical principle that excludes contradictions holds for the cognition of norms as much as for the cognition of natural reality. When positive law and morality are asserted to be two distinct mutually independent systems of norms, this means only that the jurist, in determining what is legal, does not take into consideration morality, and the moralist, in determining what is moral, pays no heed to the prescriptions of positive law. Positive law and morality can be regarded as two distinct and mutually independent systems of norms, because and to the extent that they are not conceived to be simultaneously valid from the same point of view. But once it is conceded that national and international law are both positive law, it is obvious that both must be considered as valid simultaneously from the same juristic point of view. For this reason, they must belong to the same system of norms, they must in some way supplement each other.

The monistic theory meets this logical requirement. It regards national and international law as one system of norms, as a unity. Opinions differ, however, as to how this whole is constructed. Some assert international law to be a part of national law, those norms of national law that regulate the relation of the state to other states. The rules admitted to be international law can bind the individual state only when the latter recognizes them and thereby takes them over into its own legal order. This is the theory of

the primacy of national law, obviously proceeding from the idea that the state is sovereign, that is, that the national legal order is an order of the highest rank, above which no other order can be deemed valid. As this is true for each of the many national legal orders, there is, according to this theory, not one international law, but as many as there are national legal orders. In truth, there is no international law at all as such, but only national law. The relationship between the different national legal orders can be established only from the point of view of one given order, whose norms alone determine its relations to the other orders. From such a point of view, that is, from the standpoint of a definite national legal order, all other orders appear not as sovereign, but rather as delegated orders. They are systems of valid norms only to the extent that they are recognized as such by the state whose legal order constitutes the point of departure.

The pure theory of law shows that this monistic theory is indeed logically possible, but that it is not consonant with the idea that all states or national legal orders are of the same rank. The primacy of national law means the primacy of one national legal order not only in regard to international law, but in regard to all the other national legal orders as well. The idea quite generally held, that all states form a community in which they stand side by side on a footing of equality, is possible only on the assumption that above the states, or above the national legal orders, there is a legal order that makes them equal by defining their mutual spheres of validity. This order can be only international law. The pure theory of law shows by an analysis of positive international law that it actually does perform the function just mentioned, and hence can be regarded, if one foregoes the assumption of the sovereignty of the individual states, as a system of norms standing above the national legal orders, according them equal rank, and binding them together into a universal legal order. This is the theory of the primacy of international law, the theoretic basis for which was revealed for the first time by the pure theory of law.

There is nothing to prevent this interpretation of the legal material except the idea of the sovereignty of the state. One of the most important results of the pure theory of law is that sovereignty, in the specific sense which this idea has in a theory of law,

is not a real characteristic of a real thing. Sovereignty is a judgment of value and as such it is an assumption. The individualistic philosophy of the 18th and 19th centuries proceeded from the idea that the human individual was sovereign, *i.e.*, of the highest value. From this it was concluded that a social order can be binding on the individual only when it is recognized by the individual as binding. From this came the doctrine of the social contract, which still has its exponents; but today the inclination is rather to a universalistic philosophy of values according to which the community is superior to the individual.

In the sphere of international relations the view that the state is essentially sovereign is an individualistic philosophy, based on the individuality of the state. The dogma of sovereignty is not the result of scientific analysis of the phenomenon of the state, but the assumption of a philosophy of values. Consequently it cannot be contradicted scientifically. One can only show that an interpretation which proceeds from another assumption — namely, from that of the sovereignty of the international legal community — is just as possible, and that positive international law itself, so far as its validity is admitted, requires this interpretation.

The analysis of positive international law made by the pure theory of law shows that its norms are incomplete norms, which need supplementing by the norms of the national legal orders. The generally accepted proposition that international law obligates only states means not that international law does not obligate individuals, but rather that while, like every law, it obligates individuals, it does so indirectly, through the medium of national legal orders. To say that international law obligates a state to certain conduct means that international law obligates an individual as an organ of this state to such conduct, but that international law determines directly only the conduct, leaving the national legal order to determine the individual whose conduct forms the content of the international obligation. Thus international law presupposes the simultaneous validity of national legal orders within one and the same system of legal norms that embraces international law as well.

A generally recognized principle of international law, formulated in the usual manner, reads as follows: if a power is established anywhere, in any manner, which is able to ensure permanent

obedience to its coercive order among the individuals whose behavior this order regulates, then the community constituted by this coercive order is a state in the sense of international law. The sphere in which this coercive order is permanently effective is the territory of the state; the individuals who live in the territory are the people of the state in the sense of positive international law. This is the principle of effectiveness, so important throughout international law. ' By this legal principle, international law defines the territorial and personal spheres of validity of the national legal orders, spheres which each state is bound to respect. By it also is determined the validity of the national orders. These are valid, in the sense of international law, because and to the extent that they satisfy the requirement of effectiveness. If jurisprudence, as we have shown, considers a legal norm as valid only when it belongs to a legal order which is in the main effective, it is using a principle of positive law itself, a principle of international law.

Since the national legal orders find the reason for their validity in the international legal order, which at the same time defines their spheres of validity, the international legal order must be superior to each national order. Thus it forms, together with them, one uniform universal legal system.

As it is the task of natural science to describe its object — reality — in one system of natural laws, so it is the task of jurisprudence to comprehend all human law in one system of norms. This task Austin's jurisprudence did not see; the pure theory of law, imperfect and inaccurate though it may be in detail, has gone a measurable distance toward its accomplishment.

Hans Kelsen.

HARVARD LAW SCHOOL.