JOHN AUSTIN, JUDICIAL LEGISLATION AND LEGAL POSITIVISM

The custom of using simple labels for complex traditions of legal philosophy is no doubt too well-established to change. The tenacity of the practice should not, however, obscure the imprecision which frequently results. Nothing illustrates the point better than 'legal positivism'. H L A Hart has distinguished five meanings of the term 'bandied about in contemporary jurisprudence'.[1] They include the idea that the legal order is a 'closed logical system'.[2] The implications for judicial reasoning are clear and familiar. Judges supposedly reach decisions by an impersonal process of logical deduction from established rules. Social aims, moral standards, or political considerations have little if any impact. The business of courts is only to apply rather than to make the law. In one of its meanings, that is to say, 'positivism' denotes a well-known kind of legal formalism or mechanical jurisprudence. Those who use the word in this sense frequently cite the ideas of John Austin as the *pièce de resistance*.[3] After all, no one would deny that the 19th century jurist is a legal positivist of the very first rank.[4]

In the last decade or two this interpretation of Austin has been sharply challenged, most notably by W L Morison.[5] Hart has praised the Australian's article on the subject as correcting serious misunder-

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1 Hart, *Positivism and the Separation of Law and Morals* (1958) 71 Har L Rev 593, 60 n 25.

2 Ibid. Also see Hart, *Legal Positivism* (1967) 4 Encylopedia of Philosophy 418.

3 For examples see Hart, supra note 1 at 608 n 32. The authors of a well-received textbook of jurisprudence now in its fourth edition write: 'Whence is the judge to draw his material? Some of the imperative school seem to proceed on the tacit assumption that all legal problems can be answered by analysis of the rules that exist and by deductions from them.' G Paton, A TEXTBOOK OF JURISPRUDENCE (Paton & Derham eds 1972). According to the same writers, the analytic system 'based on Austin's teachings' considered it possible to 'solve all legal problems by deduction from the actual rules of English law, eked out perhaps by careful borrowing from the Roman jurists'. Id at 10.

4 According to one scholar, 'it was Austin who was mainly associated with positivist jurisprudence. So much was this the case that one meaning of "positivism" makes it synonymous with the theory of Austin.' R Dias, JURISPRUDENCE (2d ed 1964) 355-356.

5 Morison, *Some Myths about Positivism* (1958) 68 Yale LJ 212.

standings of earlier writers.[6] The Oxford philosopher has also added an oar or two of his own. In his words: 'Only an entire misconception of what analytical jurisprudence is and why he [Austin] thought it important has led to the view that he, or any other analyst, believed that the law was a closed logical system in which judges deduced their decisions from premises.'[7] The great nineteenth-century figure not only recognized the existence of judicial legislation. Beyond that, he criticized the pretences by which it is obscured and 'berated . . . judges for legislating feebly and timidly'.[8] The responsibility for the conception of the judge as an automaton 'if it is to be laid at the door of any theorist, is with thinkers like Blackstone and . . . Montesquieu'.[9]

Although this more recent interpretation is more accurate than the older view of Austin, it is still incomplete. The purpose of this article is to fill this gap by explaining the full range of his ideas about 'judiciary law'. The goal is to explain the Englishman's analysis of the nature, scope, value, and disadvantages of judicial legislation. Fulfilment of this objective is desirable for a number of reasons. One such consideration is the need to understand precisely how mistaken any interpretation of Austinian positivism is, which attributes to it a blindness to the fact or utility of judge-made law. Yet, satisfaction of this need will also demonstrate that this mistake is understandable. For Austin was acutely conscious of what he felt to be the grave defects of judicial legislation. Indeed, his perception of these evils in large part explains his enthusiasm for codification. In a word, the jurist's attitude toward the law which judges make is complex. Although this complexity is not without its strengths, it accentuates the need carefully to sort out his actual thoughts on the matter.

Moreover, his analysis of judicial legislation is of substantial hisorical importance. Unlike his great predecessor Jeremy Bentham, Austin was by no means an unalterable opponent of judge-made law. In fact, his attitude was sufficiently *au courant* to provide a basis for the analogy which Hart has drawn between his ideas and Jerome Frank's.[10] The 19th century figure was, in any case, far ahead of his time. No other Anglo-American jurist with whose writings I am familiar had produced *by 1832* as penetrating an analysis of 'judiciary law'.

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6 H Hart, THE CONCEPT OF LAW (1961) 237.

7 Hart, supra 608 n 1.

8 Id 609.

9 Id 610.

10 Id 609. For two works representative of the evolution of Frank's thoughts, see LAW AND THE MODERN MIND (1963) [original date of publication 1930] and COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE (1949).

Finally, his account of this kind of law is valuable in its own right. Nor is its value limited to conceptual clarification. Although analysis of the meaning of legal concepts was the centre of Austin's lectures, it did not mark the circumference. Significant portions of his work go beyond the confines of analytical jurisprudence strictly interpreted. Nothing illustrates the point better than his analysis of judicial legislation. On a normative and empirical as well as conceptual level, much of it is appealing even today. His explanation of the role which established legal rules do and should play a judicial decision-making is an illustration. It constitutes a plausible middle-of-the-road position between mechanical jurisprudence and an extreme form of rule-scepticism.

Positive Law and Judicial Legislation

Explanation of Austin's analysis must begin with a brief account of his concept of positive law. For it conditioned *some,* though by no means *all,* of his views about the law which judges make. Furthermore, this concept is one reason for the relative neglect of his analysis of judicial legislation. It is not, to be sure, the only factor. Most of his ideas on the subject are put forth in a portion of his lectures which are not widely read.[11] His pronounced belief in codification may also have contributed. This conviction reflects a preference for statutory over judge-made law given certain ideal conditions. Students of Austin may have inferred from this belief an unbending opposition on his part to judicial legislation. Even so, his concept of law also influenced the tendency to overlook his analysis of 'judiciary law'. For the concept seems to imply that judges could not *make* law. In fact, the jurist was aware of his apparent implication and the difficulties which it created. His resolution of the problem may or may not be satisfactory, but the reason is not his blindness to the facts of legal life.

In the Austinian scheme of things laws properly so-called are species of commands, which may be either general or occasional. Specific

11 Austin's most widely read work is THE PROVINCE OF JURISPRUDENCE DETERMINED (Hart ed 1954). This book consists of the first ten of the jurist's lectures at the University of London. For purposes of publication the lectures were compressed into six chapters. They contain very little about judicial legislation, though what is said is very important. See id at 30-33, 190-191. The lectures as a whole were posthumously published and edited by Austin's wife. See J Austin, LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW (5th ed 1885). One entire section of this work is entitled 'law in relation to its sources'. This part refers in various places to judicial legislation, which is systematically analyzed in a number of chapters. See id vol 2, 620-647.

judicial *decisions* are the example *par excellence* of the latter and are not law. This label only applies to rules, which oblige a *class* of persons to a *course* of action. Such commands are 'the key to the sciences of jurisprudence and morals'.[12] The distinctive feature of these imperatives is 'the power and purpose of the party commanding to inflict an evil or pain in case . . . [his] desire be disregarded'.[13] This evil or pain is a *sanction,* the ability and intent to impose which is the essence of commands. To have an obligation or to be under a duty means to be subject or liable to a sanction for non-compliance with an intimated desire. This kind of wish may be signified either expressly and directly or tacitly and circuitously. The former is communicated by written or spoken *words,* while the latter is inferred from *conduct.*

Austin adopted the classification of laws initially developed by his great and venerated predecessor, John Locke. The 17th century philosopher used the phrase 'laws properly so-called'. He also divided these laws into three types—divine, civil, and moral.[14] In the same fashion Austin conceived of law properly so-called as the commands of God, certain rules or positive morality, and positive law. Only the last is the subject-matter of the science of general jurisprudence which he so painstakingly attempted to develop. Positive law is a reflection of the will of a political superior and exists by the '*position* or institution of its . . . author'.[15] This law is the direct or circuitous command of a sovereign, the ultimate source of all positive law. This common and determinate human superior is identifiable by a positive and negative mark. The sovereign is *habitually* obeyed by the bulk of an independent political society; and does *not* habitually obey any other determinate human being or beings.

Austin recognized that these signs of sovereignty are fallible tests for specific or particular cases. This fallibility did not lessen his commitment to the 'capital' idea of sovereignty, which he took very seriously indeed. The powers of the sovereign are indivisible and illimitable. To say that they can or should be limited by positive law is a 'flat contradiction in terms'.[16] The very nature of sovereignty

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12 J Austin, THE PROVINCE OF JURISPRUDENCE DETERMINED (Hart ed 1954) 13.
13 Id 14.
14 For Locke's ideas, see AN ESSAY CONCERNING HUMAN UNDERSTANDING (Fraser ed 1894) 474-475. Austin praised Locke's 'great and venerable name' and regarded his predecessor as the 'greatest and best of philosophers'. J Austin, supra note 12 at 263, 75.
15 J Austin, supra note 12 at 124.
16 Id 254.

implies that the 'power of a monarch . . . or the power of a sovereign number . . . is incapable of legal limitation'.[17]

These ideas appear to imply the imposibility of *judicial* legislation. Positive law consists exclusively of the commands of the *sovereign,* whose will judges are only to enforce. Since Austin firmly believed that judges do in fact legislate, this implication obviously created a problem for him. From a purely logical point of view it could be resolved in at least four ways. One is by denying the existence of judicial legislation, a solution which the Englishman did not adopt. A second alternative is to argue that judges are the *de facto* sovereign. For it could be argued that they have the final say on *whether, how,* and *which* rules are enforced. Such an argument is the basis of certain famous American definitions of law, most notably that of John Chipman Gray.[18] Although this line of thought can be viewed as an outgrowth of Austin's emphasis on the power to enforce, he never considered this possibility. For it involves substantial stretching of his notion of sovereignty and his view of the subordinate place of judges in the legal hierarchy. A third alterative is explicitly to alter the original definition of positive law so as to make it compatible with judge-made law. This course of action requires a change in a basic axiom of Austin's legal philosophy and was not adopted. The final possibility is to interpret his definition of positive law in such a way as to render it compatible with judicial legislation. This is the argument which the jurist chose to present and which is not without its own problems. Yet, to some extent they arise from a commendable desire not to sweep 'judiciary law' under a definitional rug.

According to the 19th century figure, the rules which judges *make* are the tacit commands of the sovereign. Judges are political ministers or inferiors of this supreme force. As such, their authority to make law is merely delegated. This delegation of power may be either express or tacit. If the authorization is express, its existence is clear. If the delegation is tacit, its existence is to be inferred from the behaviour of the sovereign. The conduct which justifies the inference is the supreme commander's toleration of or acquiescence in the judge-made law. 'For, since the state may reverse the rules which he [the judge] makes, and yet permits him to enforce them by the power of the political community, its sovereign will "that his rules shall obtain

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17 Id.

18 See J Gray, THE NATURE AND SOURCES OF LAW (2d ed, 1963).

as law" is clearly evinced by its conduct, though not by its express declaration.'[19]

Most students of Austin have not been favourably impressed by this argument. The reaction of Sir Henry Maine and John Chipman Gray is typical. To say that judicial legislation is the tacit command of the sovereign is, in their words, a 'mere artifice of speech', a 'straining of language', a 'forced expression'.[20] Their criticisms are difficult to contest. The rules which judges make may be contrary to the will of the sovereign or his elected representatives. Such rules may also be for problems about which the sovereign has or had no discernible will. Numerous cases of statutory interpretation richly illustrate the point.[21]

Austin's attempt to squeeze judicial legislation into the pigeon-hole of commands of the sovereign may also be subject to other criticisms. A long line of jurists argue that the concept of sovereignty which it involves is unsatisfactory.[22] The notion that law properly so-called consists only of commands is also questionable. If some rules of the criminal law and torts are closely analagous to commands, others are quite different. No one has more persuasively developed this point than H L A Hart. Rules which grant private or public *powers* are illustrative:[23]

> Legal rules defining the ways in which valid contracts or wills or marriages are made do not require persons to act in certain ways whether they wish to or not. Such laws do not impose duties or obligations. Instead, they provide individuals with *facilities* for realizing their wishes, by conferring legal powers upon them to create, by certain specified procedures and subject to certain conditions, structures of rights and duties within the coercive framework of the law.

While these criticisms are cogent, this fact is not a good reason for the relative neglect of Austin's analysis of judicial legislation. For much (though not all) of it is independent of his concept of law, the object of the criticisms. It is not inconsistent to reject the concept and,

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19 J Austin, supra note 12, 31-32.

20 H Maine, LECTURES ON THE EARLY HISTORY OF INSTITUTIONS 364-365 (7th ed, 1960), and J Gray, supra note 18, 85-86.

21 The 'White Slave Traffic Act', or the Mann Act, 36 Stat. 825 (1910), is an excellent example. For a fascinating analysis of its origins and interpretation by the courts, see E Levi, AN INTRODUCTION TO LEGAL REASONING (1948) 27-63.

22 See H Maine, supra note 20; J Bryce, STUDIES IN HISTORY AND JURISPRUDENCE (1901) 536-540; and H Hart, supra note 6, 49-76.

23 H Hart, supra note 6, 27.

at the same time, to accept much of the analysis. If it is unsatisfactory, it cannot be judged so only or largely on the basis of criticisms of his concept of law. Indeed, his very idea of judicial *legislation* presupposes that case law consists of rules. As he put it, 'Judiciary law consists of *rules,* or it is merely a heap of particular decisions inapplicable to the solution of future cases. On the last supposition, it is not law at all'.[24] Yet, the legal philosopher could never quite bring himself to conclude that these rules are not commands. Such a conclusion would have left him with two alternatives, neither of which was acceptable to him. He would have had to admit either that positive law does not consist wholly of commands, or that judges do not make law.[25]

Judicial Legislation and the Application of Law

Elucidation of Austin's concept of how judges make law requires an explanation of how they apply it. For the application of law is in his eyes the hallmark of *judicial* decision-making. Although the jurist never formally defined 'judge,' he implicitly conceived of such an official as essentially a law-applier. He recognized, to be sure, that judges can reach decisions without applying old or new rules. Nonetheless, he apparently regarded such action as exceptional and in any case wholly indefensible. The dominant method by which courts reach decisions is through the application of law. The essence of this process is the classification of the facts, their subsumption under rules. Most cases do and all cases should involve the application of law in this sense.

The law which judges apply may be one of two types. One kind consists of established rules, the sources of which are statutes or precedents. The other type consists of *newly-created* rules. Judges legislate to the extent that the law which they apply consists of these rules. Thus virtually all cases may be classified into two basic categories. In one kind judges only apply rather than create rules, while in others they make the rules which they then apply. Although the first sort of case does not involve judicial legislation, Austin recognized that it may entail serious difficulties. In fact, his analysis of the prob-

24 J. Austin, LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW (5th ed 1885) 664.

25 Austin in one place flirted with this last alternative. He writes: 'The *ratio decidendi* of a decision may, perhaps, indeed be that properly called not a law, but a *norma* or model, which the law obliges you to observe, the law itself being properly the intimation of the legislator's will.' Id at 642. He rejects this possible interpretation, however, because 'this would be equally a reason for excluding from the name *law,* all the expository part of the statute law'. Id.

lems which judges confront in such cases is highly perceptive. The factors which he isolated could be cited as evidence of large-scale creativity within the judicial process. They support, in short, the case for what Mr Justice Holmes called the judge's 'sovereign prerogative of choice'.[26]

Three of these problems merit special attention. One is statutory interpretation, which may be either genuine or spurious. Since the latter is a species of judicial legislation, it will be explained subsequently. The object of the former is the *discovery* of the legislative *intent,* the primary index to which is the literal, grammatical, customary, or obvious meaning of words.[27] In most cases the goal of this semantic quest is not difficult to achieve. As a rule the customary meaning of words, is 'obvious or easily assignable'.[28] Yet, in some cases, the problem is more formidable.

Austin in effect subdivided these difficult cases into two categories. Sometimes the customary meaning of the statutory language is indiscoverable or indicative of an indeterminate intent. Under these circumstances the judge must seek additional *indicia* of the legislative intent. They include the *ratio legis*; the history of the statute or other relevant statutes.[29] At other times the literal meaning of the words is discoverable, but conflicts with other indicators of the legislative intent. In these cases the judge should generally abide by the former. Otherwise the benefits of statutory law would be lost. 'For the purpose is, to give an index more compendious, compact (or lying together), and therefore less fallible, than is that to a judiciary rule. But if the interpreter might, *ad libitum,* desert the literal meaning, no such index could be given.'[30] On rare occasions, however, the result of strict construction is manifestly contrary to the intent of the legislator and ought not be followed. In short, the literal meanings of words is not an infallible guideline for statutory interpretation.[31]

A second difficulty which confronts judges is the determination of the *ratio decidendi* of a case. This problem has evoked considerable attention as well as controversy in recent years, and for understandable

26 O Holmes, COLLECTED LEGAL PAPERS (1952) 239. '[W]henever a doubtful case arises, with certain analogies on one side and other analogies on the other . . . the simple tool of logic does not suffice, and even if it is disguised and unconscious, the judges are called on to exercise the sovereign prerogative of choice.'

27 J Austin, supra note 24, 624.

28 Id 990.

29 Id 624.

30 Id 625.

31 Id 990.

reasons. On the one hand, the need to determine the ratio seems crucial in a system of case-law. Most jurists would agree with Austin that the law which cases establish is not the particular decision itself, but the *ratio decidendi.* Only the latter can function as a general rule aplicable to other cases. On the other hand, the ambiguity of this term is notorious. In the words of Arthur L Goodhart, with 'the possible exception of . . . malice, it is the most misleading expression in English law'.[32]

Two major problems are the definition and the determination of the *ratio.* Austin defined the term as the 'general reasons or principles of a judicial decision'.[33] This definition is, however, subject to two quite different interpretations. It could mean the psychologically decisive reasons for or causes of the decision. Some of the evidence tends to support this interpretation.[34] The *ratio* may also be defined in a logical sense, to denote the rule implied or imported by the decision. On balance Austin seems to have adopted this second conception. Thus he writes that the *ratio* is imported necessarily by the judge's decision 'of the very case before him'.[35] The crucial factor is also not what the judge *says,* or why, but what his decision implies. The latter must be decisive because the stated reasons for decisions may be too narrow or too broad. The arguments of the judge may be couched in terms which apply only to the instant case. These reasons cannot 'serve as a guide of conduct, or . . . applied to the solution of subsequent cases'.[36] At the other extreme, the rationale of the decision may go far beyond the precise issues raised by the case. Such *dicta,* or *obiter dictum,* are commonly 'extra-judicial, and . . . have no authority'.[37] In addition to all of this, judicial opinions are often written hastily and crudely expressed.[38] For these various reasons the *ratio* is a ground for decision 'whether it be expressed or not in the case'.[39]

The problem then is how to determine *which* rule a decision implies. Austin described the procedure to be followed in this fashion: 'Looking at the *general reasons* alleged by the Court for its decision, and *abstracting those reasons from the modifications which were suggested*

32 Goodhart, *Determining the Ratio Decidendi of a Case* (1930) 40 Yale LJ 161, 162.
33 J Austin, supra note 24, 627.
34 Id 625.
35 Id.
36 Id 622-23.
37 Id 622.
38 Id 626.
39 Id 631 n 58. Also see id 625 n 57.

by the pecularities of the case, we arrive at a *ground* or *principle* of decision, which will apply universally to cases of a class, and which, like a statute law, may serve as a rule of conduct.'[40] This formula implies that a rule which is the true *ratio decidendi* of a case must meet two requirements. At the least it must be broad enough to govern fact-situations of other cases. Otherwise the case could not serve as a precedent, since no two cases are precisely alike. Yet, the *ratio* must not be so broad that it is applicable to several *classes* of cases. If it were, then the judge would be legislating for some issues not before him and which he had no authority to resolve.

Austin's formula for detemining the *ratio decidendi* thus assumes that every case establishes a single rule. The accuracy of this assumption is open to very serious question. In fact, the particular holding in a specific case can be logically subsumed under numerous rules. Determination of which of these rules is 'the' *ratio* of the case depends on the classification of the facts. They can be fitted, however, into a vast number of categories. If some might generally be agreed to be too narrow and others too broad, numerous in-between alternatives are possible. No canons of logic provide an unambiguous test of the correctness of these classifications, which are frequently the subject of spirited disagreement among judges and lawyers. They must choose between different possibilities, none of which may be more or less logical than the others. In the words of Herman Oliphant, a student[41]

> [I]s told to seek the 'doctrine' or 'principle' of a case, but which of its welter of stairs shall he ascend and how high up shall he go? Is there some one step on some one stair which is *the* decision of the case within the meaning of the mandate *stare decisis?* . . . Each precedent considered by a student rests at the centre of a vast and empty stadium. The angle and distance from which that case is to be viewed involves the choice of a seat. Which shall be chosen? Neither judge nor student can escape the fact that he can and must choose.

To say this is in no way to deny that some choices are better than others. The only point is that the rules of logic do not provide the standards, or the only criteria, for such a judgment. In Felix Cohen's apt phraseology, 'logic provides the springboard, but it does not guarantee the success of any particular dive'.[42]

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40 Id 622.

41 Oliphant, *A Return to Stare Decisis* (1928) 14 A B A J 71, 73.

42 F Cohen, ETHICAL SYSTEMS AND LEGAL IDEALS: AN ESSAY ON THE FOUNDATIONS OF LEGAL CRITICISM (1959) 35.

Judges may also face a third difficulty in the application of law. They must sometimes choose between conflicting rules, each of which could be the basis of the decision. The facts of the instant case could be subsumed under any of these rules, from which different decisions are deducible. Several factors are responsible for this type of hard case, including the indefiniteness of the applicable rule or rules. The essence of the class of cases which they were intended to govern 'is not marked with perfect exactness'.[43] Each rule covers fact-situations analogous to, but not identical with, the instant case. The result is the competition of opposite analogies, which may indeed be severe. The larger the number of analogies, the greater is the difficulty of the judge in subsuming the case before him under the appropriate rule.[44] A second source of the problem may be the inconsistency of several definite rules. The same fact situation has been classified differently on the basis of competing rules. The difficulty which this conflict creates is less common, however, than the problem for which indefiniteness is the cause.

The very existence of these three dilemmas seems to vest considerable discretion or range of choice in judges. For this precise reason it could be argued that these hard cases necessitate judicial legislation. Cases which require a choice between competing rules or interpretations, each of which could plausibly be applied or developed, in effect create law. Although Austin teetered on the brink of this position, he never took the final plunge. He recognized, to be sure, that the application of some indefinite rules may involve or require judicial legislation. As examples he cites rules which involve degrees, such as libel, lunacy, prodigality and reasonable time or notice. Such standards are[45]

> [H]otbeds of competing analogies. The indefiniteness is incorrigible. A discretion is left to the judge. Questions arising on them . . . are hardly questions of interpretation or induction, for though the rule were explored and known as far as possible, doubt would remain.

Nonetheless, the jurist refused to say that hard cases necessarily make even bad law and for an understandable reason. It is his particular definition of judicial legislation, which he confined to the creation of *new* rules. Since difficult cases may result in the application of *established* rules, they do not necessarily require judicial *legislation.*

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43 J Austin, supra note 24, 998.
44 Id 999.
45 Id 628.

For in 'every judicial decision by which law is made, the *ratio decidendi* is a *new* ground or principle, or a ground or principle not previously law'.

This statement nicely captures one of the ingredients in Austin's concept of the nature of *judicial* legislation. To say that judges make law means in part that they create *new* rules. Yet, the jurist did not leave the matter at this. He also emphasized a number of important differences between statutory and judicially created rules. An understanding of these distinctions is crucial for grasping his evaluation of the latter. For his appraisal of judge-made law was strongly conditioned by his concept of its unique attributes.

One major difference between the two kinds of legislation is the varying goals of their respective authors. The direct or proper purpose of the judicial legislator is *not* the creation of a rule. Rather, it is the 'decision of the specific case to which the rule is applied. He legislates as *properly judging* and not as *properly legislating*'.[47] To put the matter differently, a judge is an official whose primary objective is the resolution of specific disputes. The attainment of this end may or may not require legislation, the construction of which is secondary. The very function of the direct legislator is, however, to *make* rules. Statutory law 'is made solely, and . . . professedly, *as* a law or rule. It is not the instrument or means of deciding a specific case, but is intended solely to serve as a rule of conduct'.[48]

A second difference between statutory and judge-made law is its form. The latter 'is embedded in concrete cases, from which it must be extracted. Judicial legislation exists nowhere in general or abstract form',[49] while statutory law 'wears the form or shape of a rule'.[50] This fact is responsible for a third difference between the two kinds of law, the weight to be attached to the language of the legislator. The judge's actual words 'are rather faint traces from which the principle [of the case] may be conjectured, than a guide to be followed inflexibly in case their obvious meaning be perfectly certain'.[51] If the language of a judge is scarcely a clue to the rule which his decision implies, the same is most definitely not true of statutory language.[52] For the law of the direct legislator is not 'the *ratio legis,* but the *lex*

47 Id 621.
48 Id 621-22.
49 Id 622.
50 Id.
51 Id 630.
52 Id 625.

ipsa. The rule . . . must be collected from the *terms* wherein the statute is expressed'.[53]

Austin fully understood, in any event, that the law which judges apply is sometimes created rather than discovered. Indeed, he drove the point home in language which would gladden the heart of the most convinced rule-sceptic among the legal realists.[54] The jurist censured '[T]he childish fiction employed by our judges, that judiciary or common law is not made by them, but a miraculous something, made by nobody, existing . . . from eternity, and merely *declared* from time to time by the judges'.[55] Furthemore, Austin believed that the amount of law which judges make is large. '*Much* of the judiciary law, administered by the Common Law Courts . . . [has] been made in recent times . . . and derived by its authors, the Judges, from their own conceptions of public policy or expediency.'[56] Still further, he recognized that a modicum of judicial legislation is inevitable. For no legislator can anticipate all the situations which may possibly arise in practice.[57] A system of law which attempted to provide for every conceivable case would be endless.[58]

Furthermore, the jurist was well aware of the not uncommon reluctance of judges to legislate candidly. His exposure of what actually happens in this respect would once more be applauded by the legal realists. They would agree with Austin that judges often introduce

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53 Id 628.

54 According to the late Karl N Llewellyn, one of the 'characteristic marks' of the realist movement is 'a distrust of the theory that traditional prescriptive rule-formulations are *the* heavily operative factor in producing court-decisions'. JURISPRUDENCE: REALISM IN THEORY AND PRACTICE (1962) 56. This distrust is the essence of rule-scepticism, which is a matter of degree. Very few legal realists were rule-sceptics all of the time. Some were also much more sceptical of the impact of established rules than other. Jerome Frank's first book reflects an extreme form of rule-scepticism. See LAW AND THE MODERN MIND (1963), which contrasts with his emphasis in COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE (1949). For a good discussion of the evolution of Frank's thought, see Rosenburg, JEROME FRANK: JURIST AND PHILOSOPHER (1970) 48-83. Llewellyn's emphasis on rule-scepticism also evolved considerably, if his views did not actually change. The text of THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY (1960) should be compared with the 'foreword', 8-10. Also see THE COMMON LAW TRADITION: DECIDING APPEALS (1960). For a discussion of the ideas of the legal realists, see A Rumble, AMERICAN LEGAL REALISM: SKEPTICISM, REFORM AND THE JUDICIAL PROCESS (1968) 48-106. For a different interpretation, see W Twining, KARL LLEWELLYN AND THE REALIST MOVEMENT (1973).

55 Id 634.

56 Id 549 (emphasis added).

57 Id 664.

58 Id 665.

new rules 'under colour of interpreting statute law, or of getting by induction at prior judge-made law'.[59] He emphasized that 'the new rule is not introduced professedly, but the existing law is professedly ascertained by interpretation or construction . . . and the new rule, thus disguised under the garb of an old one, is applied as law to new cases'.[60] The legal philosopher explained this covert mode of judicial legislation on several grounds. The respect of the innovating judges for the law which they virtually changed cannot be ignored.[61] This attitude partially explains the use of fictions, which preserve the appearance of continuity. There is also the desire to appease the admirers of the annulled law, for which purpose fictions are also useful. From this point of view they are analogous to 'those conventional, and not incommodious lies, through which much of the intercourse of polished society is habitually carried on'.[62]

The example of covert judicial law-making which the jurist explains at most length is the process of spurious interpretation *ex rationae legis*. The real basis of this kind is construction is *not* the literal meaning of statutory language. On the contrary, the judge decides according to his own notion of what the legislator ought to have established.[63] As such he either restricts or extends the unambiguous meaning if statutory language. The judge substitutes *his* version of the expressions which the legislator would or should have used for those which were in fact used. By such a process much judiciary law grows up.[64]

One example which Austin gives is the Statute of Frauds, which was enacted in 1677. According to Sir William Holdsworth, it is 'the most important of the few statutes of the seventeenth century which are concerned solely with the technical doctrines of English private law'.[65] The stated purpose of the statute was to prevent many fraudulent practices which are commonly endeavoured to be upheld by perjury and subornation of perjury. For Holdsworth, 'most of its clauses are concerned with carrying out this object, by making written or other adequate evidence necessary for certain transactions'.[66] The

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59 Id 635, 637. For a summary of the views of the realists, see K Llewellyn, JURISPRUDENCE: REALISM IN THEORY AND PRACTICE (1962) 56, 58.
60 Id 531.
61 Id 609.
62 Id 610.
63 Id 635.
64 Id 635.
65 G W Holdsworth, A HISTORY OF ENGLISH LAW (1924) 379.
66 Id 384.

statute has been the subject, in any event, of an immense amount of litigation. Austin believed that the cases interpreting its provisions have generated judge-made law introduced on the occasion of 'pretended applications of the statute'.[67] Such interpretation does not, however, deserve the name. In reality, it is 'a process of legislative amendment, or . . . correction'.[68]

Austin's Favourable Evaluation of Judicial Legislation

This evidence supports the judgment of W L Morison that '[A]fter all this, he [Austin] could hardly have anticipated that he himself would one day be regarded as the leading theoretical apologist for the childish fiction [that judges do not make law]'.[69] To appreciate his awareness of the existence of judicial legislation is, however, only part of the problem. Determination of how he evaluated it is another and much more complicated matter. On some occasions he warmly praised the law which judges make. For better or worse, such praise constitutes another similarity between Australian and realistic jurisprudence. At other times he took a much more negative position. For this reason, the analogy between Austin and the American legal realists is very inexact. In addition to that, the consistency of his evaluation of judge-made law is not beyond question. An accurate resolution of the problem requires a more detailed explanation of his views.

A substantial number of considerations attest to Austin's approbation of judicial legislation. To begin with, he explicitly distinguished his position from the wholly critical views of Jeremy Bentham. The jurist's admiration for his great predecessor was no doubt profound. Indeed, Austin wrote to Bentham in 1819 that 'the importance of your doctrines has long inflamed me with an earnest desire to see them widely diffused'.[70] The young lawyer even went so far as to describe himself as a disciple of the great reformer.[71] The discipleship did not include, however, wholesale acceptance of Bentham's completely negative attitude toward the law which judges make. The jurisprudence of the western world has seldom if ever known a more severe critic of this law. The Hermit of Queen Square Place condemned it with a legion of epithets of which the following are but samples. Judge-made law is

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67 J Austin, supra note 24, 635.
68 Id 629.
69 Morison, supra note 5, 215.
70 Letter from John Austin to Jeremy Bentham of July 20, 1819 on file in the Library of University College, University of London.
71 Id.

a 'mock', 'sham', 'bastard', and 'dog' law[72] which is 'disgraceful to men',[73] a 'shapeless heap of odds and ends',[74] a 'spurious and impostrous substitute',[75] a 'tissue of imposture', and a 'wretched substitute to real and genuine law'.[76]

Although Austin expressed his love for Bentham's 'pithy' and 'homely' term of 'judge-made law', the younger man rejected it. The disrespectful connotations of the term particularly bothered him. In his own words: 'For . . . it does, in some sort, smack or savour of disrespect. And, as I cannot concur with Mr Bentham in his sweeping dislike of law made by judges, I cannot consent to mark or brand it with the name importing irreverence.'[77] In fact, if judges made law avowedly and directly, then they 'might do the business [of legislation] *better* than any of the sovereign Legislatures which have yet existed in the world'.[78] For outside of their judicial function judges are 'the very best legislators possible, if they are enlightened as well as experienced lawyers'.[79]

Furthermore, Austin explained the existence of judicial legislation in almost every community on the basis of its 'obvious utility'.[80] He also praised the law which judges make as absolutely necessary and highly beneficial.[81] Beyond this, he *criticized* judges for their reluctance to legislate. He lashed out at their 'too great . . . respect for established rules' (a point which constitutes another analogy between his work and that of the legal realists).[82] As an example he cited the origin of the distinction between law and equity. It arose[83]

> [B]ecause the Judges of the Common Law Courts would not do what they ought to have done, namely to model their rules of law and of procedure to the growing exigencies of society, instead of stupidly and sulkily adhering to the old and barbarous usages. Equity, when it arose, has remained equally barbarous from the same cause.

72 H J Bentham, THE WORKS OF JEREMY BENTHAM (Bowring ed 1962) 235-36.
73 Id vol 3, 206.
74 Id vol 4, 459.
75 Id 460.
76 Id vol 9, 8-9.
77 J Austin, supra note 24, 532.
78 Id 533.
79 Id 651.
80 Id 612.
81 J Austin, supra note 12, 191.
82 J Austin, supra note 24, 646. For discussion of the views of the legal realists on this question, see McDougal, *Fuller v the American Legal Realists: An Intervention* (1971) 50 Yale LJ 834, and A Rumble, supra note 54, 195-96.
83 J Austin, supra note 24, 647.

Moreover, Austin appealed in realistic fashion for more candid judicial legislation. Indeed, he ascribed all the mischief and confusion of judge-made law to the covert mode in which it has been introduced.[84] The jurist also assailed the narrowness of the rules which judges make. He strongly objected to the 'timid, narrow, and piecemeal manner in which they have legislated, and . . . under cover of vague and indeterminate phrases'.[85]

Austin appears to have regarded judicial legislation as necessary or desirable under three circumstances. In the first place, judges may have to apply rules the indefiniteness of which is so gross as to demand legislation. Rules which involve degrees are the example *per excellence.* The judge who must apply them has no choice but to make law. In the second place, judicial legislation is desirable as a means to eliminate inconsistent rules. Although statutes also may reduce this defect in the *corpus juris,* the role of judge-made law is very important.[86] In the third place, it may be desirable as a means to adjust the law to socio-economic or other changes. No person who has considered the subject 'can suppose that society could possibly have gone on if judges had not legislated'.[87] Their legislation has historically been inperative, given the 'negligence or the incapacity of the avowed legislator'.[88] For[89]

> In almost every community such has been the incapacity, or such the negligence, of the sovereign legislature, that unless the work of legislation had been performed mainly by subordinate judges, it would not have been performed at all, or would have been performed most ineffectually: with regard to a multitude of most important subjects, the society would have lived without law; and with regard to a multitude of others, the law would have remained the pristine barbarity.

Nor did Austin exempt the legislative labours of learned and judicious lawyers from this criticism. The statutes which even such legislators

84 Id 613.

85 J Austin, supra note 12, 191.

86 J Austin, supra note 24, 1000.

87 J Austin, supra note 12, 191. This point constitutes another and very strong analogy between the point of view of Austin and the legal realists. According to Llewellyn, one of the 'characteristic marks' of the realist movement is 'the conception of society in flux, and in flux typically faster than the law, so that the probability is always given that any portion of law needs re-examination to determine how far it fits the society it purports to serve'. JURISPRUDENCE: REALISM IN THEORY AND PRACTICE (1962) 55. The legal realists manifested 'very general agreement on the need for courts to face squarely the policy questions in their cases, and use the full freedom precedent affords in working towards conclusions that seem indicated'. Id 72.

88 J Austin, supra note 12, 191.

89 J Austin, supra note 24, 612.

have produced have often been obscurely expressed and inaptly constructed. The Statute of Frauds is the example which the lawyer once again cites.

Although he strongly praised judicial legislation in mixed legal systems, he also believed it to be improper under several conditons. Judicial deviation from unambiguous statutory language constitutes one such circumstance. If the case before the judge involves statutory construction, he should legislate only if he has no other choice. This situation would arise if an unprovided case occurs. Since Austin was deeply convinced of the negligence or incapacity of direct legislators, such cases were not in his eyes infrequent. In the absence of these contingencies judges should merely apply law. Otherwise, the certainty to which the 19th century thinker attached such supreme importance would be threatened.

The best evidence of his attitude on the question is his dissatisfaction with spurious interpretation, of which he strongly disapproved. As a rule the judge *must* abide by the literal meaning of statutory language or the certain sense of its terms. To be sure, apprehension of the unpredictability which loose construction would generate is not the only reason for Austin's commitment to this norm. Another reason is his view of the superior position of the direct legislator in the legal chain of command. This is one important reason why the judge should not set aside the 'solemn and unchanged will of the legislator,' however much he may think it is desirable that it should be altered.[90] A second and no less fundamental consideration is the vast uncertainty which spurious interpretation would cause. This indirect legislation lays all statute law, good and bad, at the mercy of the courts.[91] Such arbitrariness markedly reduces, if it does not utterly destroy, the certain guidance which statutory rules can and should provide. For 'if the literal meaning of the words were not the primary index (or were not scrupulously regarded by the interpreter), all the advantages (real or imagined) of statute legislation would be lost'.[92]

This prescription assumes that in most cases of statutory construction the intent of the lawmaker is in fact discoverable. The accuracy of this assumption is arguable. At least it was the opinion of John Chipman Gray, which was shared by some legal realists, that[93]

90 Id 631.

91 Id 621.

92 Id 625.

93 J Gray, THE NATURE AND SOURCES OF LAW (1963) 172-173. For the views of some legal realists on statutory construction, see Radin, *The Theory of Judicial Decision: Or How Judges Think* (1925) 11 A B A J 360; Radin,

> [W]hen a Legislature has had a real intention, one way or another, on a point, it is not once in a hundred times that any doubt arises as to what its intention was . . . The fact is that the difficulties of so-called interpretation arise when the Legislature has had no meaning at all; when the question which is raised on the statute never occurred to it; when what the judges have to do is, not to determine what the Legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present.

Regardless, Austin also condemned judicial legislation with respect to certain kinds of precedents. Once more, his criticism reflects the high priority which he attached to legal certainty. The introduction of a new rule is unjustified if it would interfere with interests and expectations which have grown out of established rules.[94] For judges lack power to indemnify the injured parties.[95] Under other circumstances judges of capacity, experience, and weight should seize every opportunity for making law.[96]

Other than this, Austin did not spell out in any detail the standards to be used by judges in deciding *whether* to legislate. His few explicit remarks on the subject indicate that he would apply a utilitarian guideline. The test is whether a new rule would be beneficial for the future.[97] From a purely logical point of view this is also the principle which he could reasonably be expected to recommend. The jurist was, after all, deeply convinced of the truth and importance of the theory of utility.[98] He devoted three of the six chapters in the only book which he published in his lifetime to an exposition of this idea.[99] Indeed, the relationship between this part of the work and Austin's philosophy of law has never received the attention which it deserves.[100] Regardless, his commitment to utilitarianism is indicative of the test which he would probably recommend for judicial legislation.

Statutory Interpretation (1930) 43 Harv L Rev 863; Radin, *Realism in Statutory Interpretation and Elsewhere* (1935) 23 Calif L Rev 156; Radin, *A Short Way with Statutes* (1942) 56 Harv L Rev 388; Bingham, *What is the Law?* (1912) 11 Mich L Rev 24; and J Frank, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE (1949) 292-309.

94 J Austin, supra note 24, 646.

95 Id 647.

96 Id.

97 Id.

98 J Austin, supra note 12, 7.

99 Id 33-118.

100 One study which attempts to redress this situation is the present author's article, *Divine Law, Utilitarian Ethics, and Positivist Jurisprudence: A Study of the Legal Philosophy of John Austin.* As yet unpublished.

The 19th century thinker was a rule- rather than an act-utilitrian. He was highly critical of a decision-making procedure in which the *particular* consequences of a *specific* act are the measure of its worth. Rather, decisions to act should be deducible from rules which are themselves justifiable on utilitarian grounds. These rules are chosen by calculating and comparing the tendencies of alternative *courses* of action. The tendency of an action is the sum total of the consequences of the class of actions of which it is a part. The rules which ought to guide conduct are those the effects of which are preferable to any other rules. The measure of these effects is their tendency to promote general happiness or good.

The standard which Austin would recommend for judicial legislation can be inferred from these considerations. The test is whether the judicial decision can be deduced from a new rule, the effects of which are preferable to the effects of precedents. The principle which the Englishman would in all probability favour is virtually identical, in other words, with what Richard Wasserstrom has called the two-level procedure of justification. It means that judges should decide cases on the basis of the norm that a decision is justifiable 'if and only if it is deductible from the legal rule whose introduction and employment can be shown to be more desirable than any other possible rule'.[101]

Austin's Criticisms of Judicial Legislation

This endorsement of judicial legislation constitutes only one side of the Austinian coin. The other is a pronounced dissatisfaction with the law which judges make, an attitude which sharply distinguishes Austin from the legal realists. This negative evaluation is also more systematically developed than his approbation of 'judiciary law'. If the jurist was displeased with Bentam's critique of such law, he did not reject it entirely. Moreover, Austin to some extent accepted his predecessor's remedy for the disadvantages of judicial legislation. For both men the ideal legal system would take the form of a complete code of laws.

The most fundamental of the evils which Bentham attributed to judge-made law is the uncertainty which it generates. 'WHERESOEVER COMMON LAW IS HARBOURED, SECURITY IS IS EXCLUDED.'[102] 'The grand utility of the law is certainty: un-

101 R Wasserstrom, THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL JUSTIFICATION (1961) 138.

102 THE WORKS OF JEREMY BENTHAM IV (Bowring ed 1962) 504.

written law does not—it cannot—possess this quality.'[103] The law which judges make is always after the fact and applicable only to a particular case. The individual can never know before the decision *which* rule the judge will apply in his particular case. 'IN MOST OF THE INSTANCES, IN WHICH UNDER COMMON LAW A CASE HAS BEEN SERIOUSLY ARGUED, THE JUDGE MIGHT, WITHOUT REPROACH TO HIS PROBITY OR HIS JUDGMENT, HAVE PRONOUNCED A DECISION OPPOSITE TO THAT ACTUALLY PRONOUNCED BY HIM.'[104] Even if the equities of the case prevail, particular utility in this sense is achievable only 'by a course of successive acts of arbitarary power . . . spreading APPREHENSIONS OF INSECURITY . . . which are inherent in the very essence of EX POST FACTO law'.[105] In both the civil and penal branches of law judicial power is 'everywhere ARBITRARY with the semblance of a set of rules to serve as a SCREEN to it'.[106]

The whole world knows Bentham's remedy for this insecurity and arbitrary power. The supreme dedication of his life, Mary Mack has written, 'was a complete code of law'.[107] He was, in the words of Elie Halevy, 'possessed by one fixed idea: to secure the drawing up and the promulgation of his entire code, everywhere, somewhere, no matter where'.[108] Even a bad code, the great reformer believed, is preferable to the 'chaos to which it comes to be substituted'.[109] Nor is the construction of a good code difficult. Wise legislators need only to free themselves from 'the shackles of authority . . . to soar above the mists of prejudice'.[110] They will then find that they 'know as well how to make laws for one country as another: all they need to be possessed fully of are the facts'.[111] This information includes knowledge of the local situation, the climate, the bodily constitution, the manners, the legal customs, and the religion of the country involved. Other than this, 'all places are alike'.[112]

One great advantage of a code is its completeness, by means of which the pestilential evil of judicial legislation can be exorcised.

103 Id vol III, 206.
104 Id vol IV 488.
105 Id 460.
106 Ibid.
107 A BENTHAM READER (Mack ed 1969) xx.
108 E Halevy, THE GROWTH OF PHILOSOPHIC RADICALISM (1955) 149.
109 J Bentham supra note 107 at 456.
110 THE WORKS OF JEREMY BENTHAM I (Bowring ed 1962) 180-81.
111 Id.
112 Id.

According to Bentham, '[I]t will be necessary to forbid the introduction of all unwritten law. It will not be sufficient to cut off the head of the hydra; the wound must be cauterized, that new heads may not be produced'.[113] He was not convinced, to be sure, that even the best of codes could completely provide for all possible cases. 'Of this object the complete attainment may, perhaps, be too much for human weakness.'[114] Nonetheless, he emphasized that the *species* of every possible case may be foreseen. He also insisted that under no circumstances should the judge make law, even if established rules need revision. Such authority is for the legislature and needs to be exercised once in a hundred years.[115]

A number of recurring themes in Austin's writings indicate his acceptance of much of this indictment of judicial legislation. The most notable example is his enumeration of its varied disadvantages, which are in effect reducible to six. They are also liabilities most of which he felt to be inherent in or of the essence of judiciary law. The first, second, third, and sixth of the evils to be explained merit this description, and the fourth probably does.[116] Only the fifth disadvantage is not of this type. Consequently, Austin believed that most of the problems of judicial law making were insoluble *as long as this form of legislation exists.*

The six disadvantages are:

(1) The relative inaccessibility and unknowability of judicially created rules vis-a-vis an aptly and unambiguously worded statute. Indeed, judge-made law is nearly unknown to the bulk of the community.[117] The only exceptions are a few extremely simple rules of the criminal law and contracts. Other rules fashioned by judges are virtually unknown to the 'simple-minded laity'. They might as well be 'subject to the mere *arbitrium* of the tribunals, as to a system of law made by judicial decisions'.[118] Most lawyers are not in a much better position. Judge-made rules are 'known imperfectly to the mass of lawyers, and even to the most experienced of the legal profession'.[119]

A number of factors account for this defect of judiciary law, one of which is the enoromous bulk of the documents in which it is to be

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113 Id vol III, 210.
114 Id vol IV, 455.
115 Id vol III, 210.
116 J Austin, supra note 24, 658.
117 Id 652.
118 Id 653.
119 Id 652.

found.[120] A second cause is the difficulty of determining the *ratio decidendi* of a case. Unlike certain contemporary jurists, Austin believed that this problem was soluble in principle. The *ratio* may be discovered by logical analysis of the facts of the case and the rationale of the decision. Still, he was acutely conscious that the process of discovery is in practice 'not uncommonly . . . delicate and difficult'.[121] The difficulty is proportionate to 'the number and the intricacy of the cases from which the rule . . . must be abstracted and induced'.[122]

(2) The discovery of the *ratio* by no means ends the problems which confront the judge in a case law system. Besides this, he must decide precisely how much *weight* should be given to the rule. According to Austin, no certain test exists by means of which its importance in this sense can be known.[123]

> Is it the *number* of decisions in which a rule has been followed, that makes it law binding on future judges? or is it the *elegantia* of the rule . . . or its consistency and harmony with the bulk of the legal system? Or is the *reputation* of the judge or judges by whom the case or case introducing the rules were decided?

Whether a precedent will be followed by future judges in analogous cases cannot for this reason be known with absolute certainty.[124]

(3) In addition to these disadvantages, the rules which judges make are *ex post facto*. The understandable revulsion for such law is, according to John Chipman Gray, the major reason for the unwillingness to recognize the existence of judicial legislation.[125] Although Austin obviously did not share this reluctance, he was deeply troubled by the retroactive quality of judge-made law. It has in general all of the mischievous conseqeunces of *ex post factor* law.[126] This objection would not apply, of course, if the effect of the new rules which

120 Id.
121 Id 650.
122 Id.
123 Id 655.
124 Id 665.
125 J Gray, supra note 93, 100. Although Gray felt this unwillingness to be 'natural', he also regarded it as unreasonable. For, 'Practically in its application to actual affairs, for most of the laity, the Law, except for a few crude notions of the equity involved in some of its general principles, is all *ex post facto*. When a man marries, or enters into a partnership, or buys a piece of land, or engages in any other transaction, he has the vaguest possible idea of the Law governing the situation, and with our complicated system of Jurisprudence, it is impossible it should be otherwise. . . . Now the Law of which a man has no knowledge is the same to him as if it did not exist.' Id.
126 J Austin, supra note 24, 652.

judges introduce were prospective rather than retrospective. Unfortunately, Austin did not consider this possibility.[127]

(4) The circumstances under which judges legislate, most notably the hurry of judicial business, are far from ideal. As a result, they must make law without the mature deliberation and requisite forethought which wise legislation requires.[128] Rules which are made in cases on appeal, after solemn argument and deliberation, are no doubt an exception. Law of this sort may indeed be made 'with as much care and foresight, perhaps, as any statute law'.[129] Since most judicial legislation occurs on the appellate court level, this admission seems seriously to qualify Austin's criticism. Nevertheless, he insisted that the situation of judges does not 'render them the best of legislators, nor does it fit them pre-eminently for actual legislation'.[130]

(5) Judge-made rules are not only made in haste, but lack comprehensiveness.[131] The major reason for this allegedly unfortunate situation is the reluctance of judges to legislate candidly and systematically. A very important sign of this unwillingness is the tendency of courts to interpret precedents restrictively. Thus the 'exigencies of society are provided for bit by bit, in the slowest and most ineffectual manner'.[132]

Assuming that the rules which judges make tend to be narrower than statutory rules, whether this is a disadvantage is a nice question. An argument certainly could be made for the kind of incremental change which the development of case law so frequently illustrates. At any rate, Austin was definitely wrong to assume that judges only interpret precedents restrictively. No one has demonstrated the point more effectively than Karl N Llewellyn. He in essence argues that how judges interpret precedents depends on what they wish to achieve. They may desire either to be freed from the apparent implications of established rules or to exploit them to the hilt. The most common method of achieving the freedom is to distinguish the facts of the instant case from those of prior cases. The most extreme form which this can take is to confine the scope of a precedent to the precise facts of that particular case. This strict method is thus 'in practice the dogma which is applied to *unwelcome* precedents. It is the recog-

127 For discussion of this possibility, see Levy, *Realist Jurisprudence and Prospective Overruling* (1960) 109 U Pa L Rev 1.
128 J Austin, supra note 24, 651.
129 Id.
130 Id.
131 Id 657.
132 Id 658.

nized, legitimate, honourable technique for whittling precedents away, for making the lawyer, in his argument, and the court, in its decision, free of them. It is a surgeon's knife'.[133] This restrictive kind of interpretation is not in practice, however, the only type used by lawyers or judges. The loose view of precedent, which Austin ignores, is no less 'recognized, legitimate, honourable'.[134] The essence of this method is to use as authority for a desired point *any* ground articulated by a prior court for its decision. The words of the judge may be cited 'wholly without reference to the facts of the case which called the language forth'.[135] The purpose, obviously, is to capitalize 'welcome precedents'.[136]

(6) A final disadvantage which Austin perceived in judicial legislation is its bad effect on the symmetry of the *corpus juris*. In mixed legal systems it tends to lack the consistency, compactness, brevity, and system which a body of law should have. Statutory rules become 'merely a partial and irregular supplement to that judiciary law which is the mass and bulk of the system'.[137] Since this law tends to lack coherence,[138]

> Wherever . . . much of the law consists of judiciary law, the entire legal system, or the entire *corpus juris,* is necessarily a monstrous chaos partly consisting of *judiciary* law, introduced bit by bit, and imbedded in a measureless heap of particular judicial decisions, and partly of legislative law stuck by patches on the judiciary law, and imbedded in a measureless heap of occasional and supplemental statutes.

These disadvantages are not the only indicators of Austin's dissatisfaction with judicial legislation. Beyond this, he strongly favoured codification as *the* ideally best remedy for the ills of judiciary law. He was, no doubt, far more conscious than Bentham of the vast difficulties of constructing a good code.[139] Nonetheless, Austin was convinced that it was both possible and desirable. Two of his many thoughts on the matter are of particular relevance for understanding his evaluation of judicial legislation. To describe one, he conceived of a code in a manner which implies the absence of any such law-making. A code in the modern sense is 'a *complete* body of statute

133 K Llewellyn, THE BRAMRLE BUSH: ON OUR LAW AND ITS STUDY (1960) 67.
134 Id 68.
135 Id.
136 Id.
137 J Austin, supra note 24, 660.
138 Id 660.
139 Id 660, 662.

law'.[140] As such, it is 'intended to supersede *all other* law whatsoever'.[141] Codified rules will be '*the only positive law* obtaining in the community'.[142] If this design is not wholly achievable, judicial legislation may be confined to a 'moderate bulk'[143] and 'narrow limits'.[144] In the best of all possible worlds, in short, it would be either non-existent or negligible.

Furthermore, the major stated justification adduced by Austin for a code is the disadvantages of judicial legislation. It has 'great defects'[145] and 'monstrous evils'.[146] a mere enumeration of which is 'amply sufficient to demonstrate . . . that codification is expedient'.[147] Any direct proof of its expediency other than this is superfluous.[148] For 'no judicious or candid man will doubt . . . that a well-made statute is *incomparably superior* to a rule of judiciary law'.[149] To be sure, no code can so condense and simplify the law that the bulk of the community may know much of it. Still, the law 'may be so condensed and simplified that *lawyers* may know it. And that, at a moderate expense, the rest of the community may learn from lawyers beforehand the legal effect of transactions in which they are about to engage'.[150]

At any rate, the most fundamental reason for Austin's dissatisfaction with judicial legislation is apparent. For it can be objected to on a number of grounds. The rules which judges make may create inequality before the law, by applying different standards to the same material facts. These rules also embody policies the enactment of which, it could be argued, belong in a democratic society to the elected representatives of the people. None of these criticisms is to be found in the jurist's lectures. Although he once shared the radical democratic politics of the Benthamites, by 1832 his faith had waned. The great defect of judge-made law is not its undemocratic character, but its inherent uncertainty. Positive law is a guide for conduct or means for directing behaviour. The part of this law which judges make is difficult to find, to know, to predict, and therefore to follow. It is, in a word, a very uncertain guide. If judges do decide to change the rules of their

140 Id 672 (emphasis added).
141 Id 636.
142 Id 649 (emphasis added).
143 Id 675.
144 Id 1028.
145 Id 666.
146 Id 660.
147 Id 662.
148 Id 663.
149 Id 661.
150 Id 653.

predecessors, the law which is made is by definition *ex post facto*. To this extent, the uncertainty of judicial legislation is also a source of injustice.

This evaluation of the rules which judges make obviously presupposes that legal certainty is an extremely important value. For Austin, it was the most significant technical value of a legal system. Laws may be appraised from two radically different perspectives, the technical and the ethical. Although the Englishman does not use this precise language, it corresponds to terms which he does employ. From the ethical point of view, laws are good or bad depending on whether they promote the general happiness or good. From the technical point of view, laws are good or bad if they are well-arranged and expressed.[151] According to Austin, the achievement of the desired sort of arrangement and expression 'is incomparably more difficult than what may be styled the ethical [goal of legislation] . . . it is far easier to conceive justly what would be useful law, than so to construct that same law that it may accomplish the design of the lawgiver'.[152] The satisfaction of this need requires, in any case, that the rules which are made offer clear guidance. Legal certainty in this sense was also for Austin a universally shared value. Thus he believed that the question of codification 'may be regulated with safety, because everybody must admit that the law ought to be known, whatever he may think of the provisions which it ought to consist'.[153]

The jurist's critique of what today would be called the equitable application of law indicates the depths of his commitment to legal certainty. The decision-maker who utilizes this approach does not substitute a good for a bad rule. Rather, he 'allows the law to remain, and simply dispenses with it in specific cases'.[154] The 19th century thinker vehemently assailed either jurors or judges who refuse in this way to apply law. He ridiculed jurors who talk of justice or equity:[155]

> The veriest dolt who is placed in a jury box, the merest old woman who happens to be raised to the bench, will talk finely of equity of justice—the justice of the case, the equity of the case, the imperious demands of justice, the plain dictates of equity. He forgets that he is there to enforce *the law of the land,* else he does not administer that justice, or that equity with which alone he is immediately concerned.

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151 Id 663.
152 Id 660.
153 J Austin, supra note 12, 374-75.
154 J Austin, supra note 24, 581.
155 J Austin, supra note 12, 190.

Nor is it sufficient to respond to this by arguing that jurors judge only the facts of the case. It is 'only necessary to look at the terms of the finding, to see that this maxim is false. Generally, and nortoriously, the jury is judge of law as well as of fact'.[156]

In addition to this, Austin excoriated judges who render decisions on the basis of their *le bon sens* or *l'equite* rather than the dictates of the law. Equitable decisions attempt to avoid the injustice which can result from strict compliance with the letter of even good laws. Precisely for this reason they have been endorsed by Aristotle, St. Thomas Aquinas, Roscoe Pound, Jerome Frank, and many others. To be sure, they are not agreed on how frequently judges should apply law equitably rather than strictly. Nevertheless, each of them approved of equitable application *to some degree*.[157] In contrast, John Austin was convinced that its effects are 'clearly mischievous'.[158] The reason for his disapproval with his perception that the applica-

156 J Austin, supra note 24, 588.

157 See THE BASIC WORKS OF ARISTOTLE (Mckeon ed 1941) 1020, 1372; THE POLITICAL IDEAS OF SIR THOMAS AQUINAS (Bigonigiared 1953), 75 and 77 and *Infra*.

Pound's point of view changed somewhat in the course of his long life. In the earlier stages of his career he seemed to give a general endorsement of 'equitable application of law'. At least he described the position of 'sociological jurists', with whom he obviously sympathized, in these terms: 'Another point is the importance of reasonable and just solutions of individual causes, too often sacrificed in the immediate past to the attempt to bring about an impossible degree of certainty. . . . In general the sociological jurists stand for what has been called equitable application of law' that is, they conceive of the legal rule as a general guide to the judge, leading him toward the just result, but insist that within wide limits he should be free to deal with the individual case, so as to meet the demands of justice between the parties and accord with the general reason of ordinary men.' Pound, *The Scope and Purpose of Sociological Jurisprudence* (1912) 25 Harv L Rev 515. Subsequently, he characterized 'much' that had been written by advocates of this method as 'extravagant'. AN INTRODUCTION TO THE PHILOSOPHY OF LAW (rev ed 1954) 63. He still believed, however, that equitable application of law is desirable for 'cases involving the moral quality of individual conduct or of the conduct of enterprises, as distinguished from matters of property and commercial law. Id at 68. According to Frank, at least at one stage in his career, 'We want judges who . . . viewing and *employing all rules as fictions,* will appreciate that, as rules are fictions "intended for the sake of justice", it is not to be endured that they shall work injustice in any particular case, and must be moulded in furtherance of those equitable objects to promote which they were designed'. LAW AND THE MODERN MIND (1963) 180. Frank's commitment to this equitable method of reaching decisions was by no means shared by all realists. For a very different view of how decisions ought to be reached, see K Llewellyn, THE COMMON LAW TRADITION: DECIDING APPEALS (1960).

158 J Austin, supra note 24, 582.

tion of almost any rule is 'productive of some consequence which a good-natured judge would wish to avert'.[159] For this very reason the judicial refusal to apply a good rule the particular application of which is inequitable would be disastrous. The effect would be the destruction of *any* law to which expectations could be accommodated, and by which conduct could be guided.[160] The process of equitable application renders all law 'utterly uncertain'.[161] Decisions reached in this manner introduce an unpredictability which 'would defeat all the ends of law, more than an army of robbers'.[162] In a word, equitable application gravely threatens the 'security, and the feeling of security, which ought to be the principal end of political government and law'.[163]

Evaluation of this criticism requires a more detailed explication of the argument by which Austin justified it. His rationale is subject to several possible interpretations. Under one of them, cases in which equitable application is proper are indistinguishable from those in which it is improper. The justification of this mode of reaching decisions is the avoidance of an evil which characterizes the application of any rule. In fact, this process always has some particular painful effect which a benovolent judge would wish to avoid. If equitable application is justifiable in *any* case, it is for this reason justifiable in *every* case. On the other interpretation, this method of reaching decisions is bad because it is uncontrollable. To sanction its use in a few cases will open the floodgates, a course of action which will inundate the judicial landscape. Then little if any law would exist prior to decisions on the basis of which reliable expections could be formed. The law of a great nation, to use John Chipman Gray's phrase, would indeed be utterly uncertain.

Regardless of which of these interpretations is correct, Austin's argument is unsatisfactory. It is possible though not easy to distinguish between cases in which the equitable application of law is proper and improper. One way to draw the distinction is in terms of the magnitude of the evil which results from the application of a rule which is on balance good. The jurist's moral philosophy reflects just this kind of distinction. Although he was a rule-ultilitarian, he recognized that in some extraordinary cases non-compliance with

159 Id 581.
160 Id.
161 Id 582.
162 Id 620.
163 Id 577.

a good rule is justifiable. The specific consequences of such deviation may be so important 'that the evil of observing the rule might surpass the evil of breaking it. Looking at the reasons from which we had inferred the rule, it were absurd to think it inflexible'.[164] The same sort of reasoning furnishes a utilitarian justification for equitable application of law. This conclusion is also justifiable by an appeal to a higher law than positive law, an approach for which Austin had no sympathy. Furthermore, the history of common law adjudication indicates that equitable application of law is controllable. The actual extent of this mode of reaching decisions is difficult to gauge, but it no doubt exists. The result has not been, however, utter uncertainty The reason for this may well be judicial awareness of the dire effects of a too frequent equitable application of law. Whatever the explanation, the effects which Austin projected are not borne out by the record.

The Consistency of Austin's Evaluation of Judicial Legislation

Regardless, his evaluation of judicial legislation must be distinguished from his critique of equitable decisions. For they do not involve the application of *any* rule, old or new. The jurist's appraisal of judicial law-making raises, in any event, a host of questions. From the point of view of understanding Austin, which is the major purpose of this study, one issue stands out. It is the apparent inconsistency of his evaluation of judge-made law. On the one hand, he praised it as of obvious utility and highly beneficial. On the other hand, he excoriated its great defects and monstrous evils. On the surface, at least, these remarks seem to be contradictory. The Englishman is no more able than anyone else to run with the hares of legal realism and chase with the hounds of mechanical jurisprudence.

There is a way, however, in which his apparent contradition could be resolved. It is by the argument that the benefits of judicial legislation in mixed legal systems outweigh its admittedly high costs. Such a cost-benefit analysis corresponds perfectly to the utilitarian style of ethical reasoning which Austin obviously favoured. It is also a response considerable evidence for which can be found in his writings. Judicial legislation is costly because the rules which judges make are *inherently* much less knowable and predictable than statutory rules. To say this is not to imply, however, that the former is *in practice* wholy uncertain or less cognizable than the latter. Austin indeed insisted that 'there is more of stability and coherence in judiciary

164 J Austin, supra note 12, 53.

law, than might, at first blush, be imagined'.[165] Those critics who deny the existence of legal certainty in this sense assume that judges legislate arbitrarily. This assumption reflects a lamentable ignorance of the potent constraints of judicial legislation.[166]

Whether Austin included Bentham among these critics of judiciary law cannot be known. The jurist insisted, in any case, that judges rarely legislate arbitrarily.[167] The law which they make is in fact subject to five influential restraints. The arbitrium of judges is controlled by public opinion, sovereign legislatures, and courts of appeal. Further more, courts are restrained by the supervision and censure of the bar. Judicially created rules are in reality the joint product of judges and of the 'private lawyers who by their cunning in the law have gotten the ear of the judicial legislators'.[168] This control is so potent that it prevents deviations from existing law which are inconsistent with 'the interests of the community, or, at least . . . the interests of the craft'.[169] Austin optimistically believed that the two sets of interests 'do, in the main, chime'.[170] Finally, judges manifest a high regard 'for the interests and expectations which have grown up under established rules or under consequences and analogies deducible from them'.[171] In fact, judicial respect for precedents is 'too great'.[172]

Furthermore, Austin believed that judge-made rules are *in practice* less uncertain than statutory law. He not only admitted that the latter may be irregular, bulky,[173] and 'obscure';[174] or that judge-made law is 'less uncertain in effect than a statute law unaptly and dubiously worded':[175] or that 'unless a statute be well-made, it commonly is more uncertain than a rule of judiciary law'.[176] In addition to all of this, the Englishman explicitly asserted that the rules which judges create *are* technically superior to statutory law. Indeed, he even stated that 'the law of *every country* which was made by judges has been far better made than . . . statutes enacted by the legisla-

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165 J Austin, supra note 24, 647.
166 Id 644.
167 Id 645.
168 Id.
169 Id.
170 Id.
171 Id 646.
172 Id.
173 Id 659.
174 Id 654.
175 Id 650.
176 Id 661.

tive'.[177] This technical superiority is the major reason for the sovereigns' aquiescence in judicial legislation. This practice will continue until legislatures are much better constructed than they have been in the past.[178] The jurist was pessimistic that this possibility would ever be realized.

Conclusion

The major purpose of this study is to explain John Austin's analysis of judicial legislation. The evidence is overwhelming that he was not ignorant of either its existence or utility. Such ignorance is also not evident in the work of Hans Kelsen, who is probably the most influential European legal positivist of this century.[179] The same can be said of H L A Hart, whose importance for the philosophy of law needs no elaboration.[180] For these reasons the association of legal positivism with mechanical jurisprudence is, in all probability, unfounded. Proof of this point is, however, beyond the scope of this essay. It has only demonstrated that John Austin should not be tarred with the brush of legal formalism.

To be sure, some qualification of this conclusion is necessary. Austin cannot be wholly exempt from all responsibility for the misinterpretation of his version of positivism. His concept of positive law seems to imply that judges *could* not legislate. He was also an ardent proponent of codification, which he partially justified by enumerating the grave disadvantages of 'judiciary law'. The Englishman was convinced that a well-constructed code would obviate most, if not all, of the law which judges make. To that extent, the legal order which he felt to be ideally desirable would approximate a closed logical system. This train of thought provides the basis, such as it is, for the interpretation of the jurist advanced by his hostile critics.

Even so, his analysis of judicial legislation is a notable achievement. On at least three levels—conceptual, descriptive, and prescriptive—it constitutes a substantial contribution to an important problem. Austin's concept of the differences between statutory law and the rules which judges make may be profitably scrutinized even today. His explanation of the difficulties which frequently characterize the application of established rules is full of insight. His analysis implies that judges must exercise a choice which, if it is not legislative, is far from mechanical. His account of the existence of judicial legislation, and the covert

177 J Austin, supra note 12, 191.
178 J Austin, supra note 24, 612.
179 See H Kelsen, GENERAL THEORY OF LAW AND STATE (1961) 134-35, 149-50.
180 H Hart, THE CONCEPT OF LAW (1961) 120-150.

form which it often takes, was far ahead of his time. Over seventy years ago Roscoe Pound correctly pointed out that the jurist's view of spurious interpretation 'deserves more attention than it has received . . . in a time when we ought to have outgrown fictions, the pretended interpretation by virtue of which the law grows, deserves to be so branded that no one shall be deceived'.[181] Austin's explanation of the necessity for, and utility of, judge-made law is no less valuable. In many of these respects he clearly adumbrated positions which twentieth century sociological and realistic jurists were subsequently to take. At the same time, his appraisal of judicial legislation has a balance not always present in their work. For the introduction of new rules by judges *can* have serious disadvantages..

To say this is in no way to imply that Austin's analysis of judiciary law is the end-all or be-all. His reconciliation of judicial legislation with his concept of positive law is not notable for its success. The intent of the legislature may be much less discoverable than he believed it to be. The value of his formula for determining the *ratio decidendi* is subject to considerable doubt. His critique of equitable application of law is hyperbolical. The root of many of these problems may well be the extraordinary priority which the jurist attached to legal certainty. On more than one occasion it skewed his vision of what is or ought to be the case. Furthermore, the utilitarian basis which he favoured for the rules which judges should make is also debatable. No one who accepts the criticisms of utilitarianism put forth by John Rawls could regard it as satisfactory.[182] The same may be said of the critique of positivism developed by Ronald Dworkin.[183]

Despite this, Austin's ideas about judicial legislation stand in refreshing contrast to those of most 19th century Anglo-American jurists. In fact, the quality of his account was not superseded historically until the classic works of Mr Justice Holmes (if then).[184] Moreover, the great utilitarian's analysis of judge-made law is not without relevance for our own time. A contribution of this magnitude merits much greater attention than it has heretofore received.

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181 Pound, *Spurious Interpretation* (1907) 7 Col L Rev 379, 380-81.

182 J Rawls, A THEORY OF JUSTICE (1971).

183 Dworkin, *The Model of Rules* (1967) 35 U Chi L Rev 14, and Dworkin, *Hard Cases* (1975) 88 Harv L Rev 1057. For Dworkin's specific criticisms of Wasserstrom's utilitarian two-level procedure, of justification, see Dworkin, *Does Law Have a Function?* (1965) 74 Yale LJ 640.

184 See O Holmes, supra note 26, and O Holmes, THE COMMON LAW (Howe ed 1963).

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