

Austin and the Separation thesis; his criticism of Blackstone in Lecture 5

Austin's claim that "the existence of law is one thing; its merit or demerit is another" is simply another way of putting the separation thesis. By embracing the separation thesis, Austin rejects the core claim of the natural law theory that "an unjust law is not really a law at all." William Blackstone is a natural law theorist whose views Austin criticizes in Lecture 5.

The separation thesis says 2 things:

- 1) A legal obligation to do x need not entail a moral obligation to do it; it's possible to be legally obligated without being morally obligated, and
- 2) A moral obligation need not entail a legal obligation; it's possible to have a moral obligation to do something that is not legally required.

2) seems pretty unproblematic and defenders of the natural law theory would not dispute it. 1) is the crucial part of the thesis.

Against 1), it might be contended that *there is a moral duty to obey the law*. But there is a stronger and a weaker way of understanding this claim.

Weaker: If there is nothing wrong with a law that commands X, then the mere fact that the law commands it makes it a moral duty on our part to do it. For example, suppose that income taxes are not unjust, and the state commands that they be paid by April 15, not the end of April. Then one has a moral duty to pay one's taxes by April 15.

Stronger: One has a moral duty to obey the law, no matter what it commands. Hence, if the law commands that members of one race sit in a separate section of the bus from another, then one has a moral duty to do that. Breaking the law is *always* morally wrong.

Defenders of the separation thesis can accept the weaker claim; it's only the stronger one that they must reject. Consider for a moment how someone might try to defend the stronger claim. He probably would not say "there is a moral duty to obey immoral laws." He wouldn't put the matter that way. Instead he would object that whether or not any law is immoral is "all a matter of opinion." If people believe that's it's morally permissible to break "immoral laws," that's a threat to the *rule of law*, which is the only thing keeping us out of the frightening, anarchic state of nature.

-- This is precisely the view of Thomas Hobbes. Consider these two excerpts from his *Leviathan*:

The notions of right and wrong, justice and injustice have there [the state of nature, where there is no government] no place. Where there is no common power, there is no law: where no law, no injustice. (ch. 13)

Also:

He that is subject to no civil law sinneth in all he does against his conscience, because he has no other rule to follow but his own reason; yet it is not so with him that lives in a commonwealth; because the law is the public conscience, by which he hath already undertaken to be guided. Otherwise in such diversity, as there is of private consciences, which are but private opinions, the commonwealth must

needs be distracted, and no man dare to obey the sovereign power, farther than it shall seem good in his own eyes. (ch. 29)

-- I find the Hobbesian view inconsistent. The Hobbesian is a moral skeptic when it comes to judgments like “a law denying people freedom of religion is so unjust that they have no moral duty to obey it” but he is not a moral skeptic about his *own* moral judgment that anarchy is an evil so horrible that it should be avoided at all costs. What’s more, the Hobbesian probably exaggerates the dangers posed by the belief that we should disobey grossly unjust laws and he ignores the dangers posed by his own belief that we have a duty to obey the law no matter what it commands. The danger is that a people who accept it are more likely to submit to oppression, which increases the chances of government’s becoming tyrannical.

-- Austin says he doesn’t believe that we have a moral duty to obey human law no matter what it commands. He says on p. 52 that he “assents without hesitation” to the idea that we ought to obey God’s laws rather than human laws when they conflict.

Which of the following is the claim made by the natural law theorist?

i) There is not and should not be any legal obligation to act in a way contrary to one’s conscience (i.e. what *one believes* is contrary to natural or divine law).

ii) There *cannot* be a legal obligation to do what *really is* grossly immoral or unjust.

The answer is ii). And the negation of ii) (“it is possible to have a legal obligation to do what is grossly immoral”) is part 1) of the separation thesis. ii) should not be confused with i), which we should reject.

-- Why should we reject i)? In *Reynolds v. U.S.* (1878), the Supreme Court rejected a Mormon polygamist’s claim that a federal ban on polygamy violated his right to the “free exercise” of his religion. The majority asked rhetorically “Can a man excuse his practices [in violation of the law] because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.” (See p. 275 in our textbook). I’m not sure that the Court has a good objection to the view that a ban on polygamy violates Free Exercise, but I do think that it is a good objection to i). To give everyone the legal permission to ignore any law that’s contrary to his conscience, no matter how idiosyncratic his conscience may be, would make each person a “law unto himself” and threaten society with anarchy.

-- One case where our legal system does allow someone to be exempt from a legal duty because it conflicts with his conscience is the “conscientious objector” to war. In 1970 the Supreme Court ruled that conscientious objection needn’t be grounded on religion; someone who is a strict pacifist for purely moral reasons is exempt too. In 1971, in *Clay v. U.S.*, it ruled that the conscientious objection must be to all war, not just some. The exemption is only partial: the conscientious objector might still have to serve the country in some noncombat capacity.

Consider this passage in Austin:

Suppose an act innocuous, or positively beneficial, be prohibited by the sovereign under the penalty of death; if I commit this act, I shall be tried and condemned, and if I object to the sentence, that it is contrary to the law of God, who has commanded that human lawgivers shall not prohibit acts which have no evil consequences, the Court of Justice will demonstrate the inconclusiveness of my reasoning by hanging me up, in pursuance of the law of which I have impugned the validity. An exception, demurrer, or plea, founded on the law of God was never heard in a Court of Justice, from the creation of the world down to the present moment. (p. 53)

Does Austin refute ii) with this? The answer is “no” for a couple of reasons. Consider a case in which the Court does reject a defense of “the law was invalid because contrary to God’s law.” An example is the trial of Paul Hill, who in the 1990’s assassinated an abortion doctor in Florida; he pled that he acted in defense of innocent human life—the fetuses whom that doctor would have aborted—but was found guilty and sentenced to death. It’s open to the natural law theorist (if he agrees with Hill) to argue that the punishment meted out by the Court is not really legal; it is mere “violence.” Second, what Austin claims courts always do when presented by the defense in question—namely, reject it—simply is not true. Sometimes juries refuse to convict even though they believe that the defendant is legally, technically guilty, because they believe that conviction and punishment would be *wrong*. These are cases of “jury nullification.” I’ll bet that there were cases in the North before the Civil War where juries refused to convict someone charged with helping runaway slaves escape to Canada via the Underground Railway, even though there was overwhelming evidence that the defendant violated the Fugitive Slave Laws, because the jury felt that the Laws were grossly unjust.

In the paragraph that begins with “But this abuse of language is not merely puerile, it is mischievous,” Austin seems to present another objection to the natural law theory. The objection is that the theory leads to “anarchy” (Austin’s word). Here it looks to me that Austin is endorsing the Hobbesian position described above, the one inconsistent with the idea to which he says he “assents without hesitation.” So it appears that Austin is inconsistent.