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The Legacy of John Austin's Jurisprudence

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Preface

The role of John Austin (1790–1859) in the founding of analytical jurisprudence is unquestionable. Among his most remarkable contributions, mention should be made of his particular conception of jurisprudence ("general jurisprudence"), the command theory of law, the definition of positive law as the command of the sovereign, his peculiar idea of sovereignty, the sharp distinction between law and morality, the harsh criticism of the concept of natural law and rights, his particular conception of liberty, his strong commitment to codification or rule by law, and the various classifications of the law, most notably the distinction between the law of things and the law of persons, and primary and secondary rights and duties.

After a century and a half, time has come to assess his legacy. This book is intended to fill a void in the existing literature. Work on Austin is, in fact, surprisingly scant for one of the great names of both jurisprudence and utilitarian ethics. Even though Austin appears in most textbooks and in a great many articles, and his theory is still a crucial point of reference in the classroom, there are few books presenting Austin's legal and ethical thinking in relation to the different perspectives within legal theory.

This is the first-ever collected volume on Austin, assembling 15 papers presented at the 150th Anniversary Conference *John Austin and His Legacy*, organised by Michael Freeman at Austin's home institution, University College London, 16–17 December 2009. The chapters in this book correspond to papers given at the conference in the order they were originally presented. Only minor changes, such as titles, have been made so as to reflect the spirit of the meeting: "this 150th Anniversary Conference was the greatest assemblage of talent devoted to the jurisprudence of John Austin since John Stuart Mill attended his lectures" as James Murphy wrote to the editors. Scholars coming from different traditions of thought with diverse outlooks singled out, presented and discussed John Austin's legacy in jurisprudence. So this collection reflects the various currents within the broad set of post-positivistic, constitutionalist, and normativity-focused theories today dominating the scene in legal theory, as well as realist approaches to law. By harvesting the different sensibilities of those contributing to this collection, the aim is to offer a nuanced, vibrant and

richly diverse picture of John Austin, on the backdrop of the major trends in jurisprudence – a difficult task for any single scholar to accomplish.

Besides giving interesting insights to the historical origins of jurisprudence, the idea is to survey the wider issue of theoretical disagreement as it persists within contemporary legal theory, as well as to assess Austin's problematic relation to legal reasoning and provide some topical comparative analyses with other major movements in legal theory, such as positivism (including normative positivism) and legal realism. The volume applies multiple perspectives, reflecting Austin's different interests – stretching from moral theory to theory of law and state, from Roman law to constitutional law – and offers a comparative approach focusing on Austin's legacy in the light of the contemporary debate. This approach makes his jurisprudence accessible to both students and scholars as it sheds new light on some of the central issues of practical reasoning: the relation between law and morals, the nature of legal systems, the function of effectiveness, the value-free character of legal theory, the connection between normative and factual inquiries in the law, the role of power, the character of obedience and the notion of duty.

A focal point is naturally the theory of sovereignty and power: Pavlos Eleftheriadis (Mansfield College, Oxford) develops an innovative interpretation of two rival theories of sovereignty in Austin, namely sovereignty for a single person and for a "determinate body." Detailed assessments of the key concept of sovereignty permit testing of Austin's conclusion according to which sovereignty lies, ultimately, with the electors and discussion of the public and intelligible character of sovereignty. David Dyzenhaus (University of Toronto) engages in a dialogue with Eleftheriadis on the Austinian conception of sovereignty as the unfettered discretion of the supreme political authority to make judgements about the general welfare. A series of parallels with great names of the positivist tradition are drawn here, where the stakes are high indeed: the issue calls on constitutionalist perspectives on power and ultimately on the nature of legitimate authority.

The positivist methodology is another focal point. Andrew Halpin (National University of Singapore) and Brian Bix (University of Minnesota) make significant contributions to the understanding of the method of general jurisprudence in the light of the current debates. By confronting the ability of some contemporary accounts of the nature of law, such as Joseph Raz's exclusive legal positivism and Ronald Dworkin's interpretivism, the issue is raised of when deviations from conventional understandings of legal practice constitute grounds for dismissing a theoretical account and to what extent Austin's theory of law might offer an account that better fits the facts than conventionally assumed. This is also the occasion for stressing that Austin was adamant about the fundamental importance of linking theoretical inquiry to practical concerns, and in times of global changes to law, moving contemporary legal theory ahead from a condition inherited from Austin might require us to pay greater attention to what Austin did leave us.

"The ties" between law as it is and law as it ought to be, at the societal and normative levels, is further explored by Isabel Turégano Mansilla (Universidad Castilla-La Mancha) who deals with the separation thesis and the problem of the connection between the ethical and the legal dimensions of Austin's work; and by

Michael Rodney (London South Bank University) who discusses the key notion of habit in Austin so as to capture the often overlooked point that the diachronic existence of any social structure, including a legal system, requires regularised social practices which are constituted by the repeated activities of those that go to make up such structures.

Moreover, Michael Lobban (Queen Mary, University of London) explores the lasting influence of German Pandectism on Austin's positivism and its complications for the command theory of law: none of the rights Austin discussed – neither the primary right protected nor the secondary right to have one's wrongs redressed by a court – derive from a command. This entails questions such as whether judges are best said to be creating or recognising rights and if there can be such a thing as customary law. Taking an even longer perspective into account, Andrew Lewis (UCL) accounts for the Austinian view on Roman law, regarded as the essence of developed legal thinking. Contrarily to the idea that reference to Roman law in Austin locates him in a bygone age – following the spirit in which the study of Austin's work is too often approached nowadays – Lewis shows how subtle Austin's understanding of Roman law actually is; firmly grounded on the distinction between the pristine purity of classical Roman law on one hand and on the other the Roman heritage in the civil law tradition prevailing in much European law.

Wilfrid Rumble (Vassar College) takes on the puzzling question of why, after 1832, Austin published nothing that focused on jurisprudence. Was it really, as some suggest, because he developed an entirely different legal theory? If this is so, it would dramatically modify our understanding of his jurisprudence: the alleged changes would require us to revise not only our understanding of Austin's legal philosophy, but our evaluation of it. The riddle of whether Austin remained an Austinian is addressed with the great accuracy that only the very knowledgeable scholar masters.

Yet, it is also important to remember that Austin was concerned with much more than jurisprudence: stability of social interaction does not depend exclusively on external regularities of behaviour but on a common attachment to normative authority. So the emphasis on ethics is topical because his meta-ethical insights as well as his rule-utilitarianism are likely to find renewed attention after the recent re-edition of Bentham's *On Laws in General* that has spurred interest in Austin's "master" and the early positivist movement in the English-speaking world, notably because of the latter's prominent place in the field today. One of the overarching claims of the present collection is that Austin's positivism is, as Schauer puts it, "entitled to at least co-equal claims on the positivist tradition as the work of H. L. A. Hart."

This is why the collection focuses on close-up comparative analyses of the most important trends in legal theory: Frederick Schauer (Virginia University) gives an historical and philosophical account of Austin's legacy within mainstream positivism; Lars Vinx (Bilkent University) examines his legacy in relation to normativism, especially in the version of Kelsen; Patricia Mindus (Uppsala) and Jes Bjarup (Stockholm) offer differing views of Austin's reception in Scandinavian Legal Realism, where his theories cemented a new path different from the positivists' main road, whereas James Bernard Murphy (Dartmouth College) offers a well-argued

account of Austin's debt towards the natural law tradition, in particular in relation to the notion of divine law. To complete the picture, a comparative study of the great contemporaries that influenced Austin is included: Philip Schofield (UCL) examines the relation between Austin and Mill, and Bentham.

This range of interests shows why a collection on Austin is timely. As Dyzenhaus stresses, attention to Austin helps us to grasp significant continuities between his theory and that of many contemporary legal scholars. The historical perspective on philosophy of law enables us to appreciate the wealth of implications of the basic divide in legal theory, i.e. between those, on one hand, who focus on the distinction between the rule of law from the rule of men by stigmatising the arbitrary character that law may assume when it no longer is answerable to the ideal of legality and those, on the other hand, who perceive the rule of law in continuity with the reliance on the neutrality of legal science and its rule by law tradition where the nature of modern law raises questions of efficacious transposition into practice of choices made by policymakers and lawmakers.

Finally, the usefulness of gathering work on Austin, making arguments readily available and easier to overview, was made possible by the contribution and work of many. Some papers are reprinted here on authorisation of the prestigious journals that first published them: Chap. 2 by Andrew Halpin, entitled *Austin's Methodology? His Bequest to Jurisprudence*, first appeared on the *Cambridge Law Journal* in 2011 (vol. 70); we would like to thank Linda Nicol and the Cambridge University Press staff for allowing us to republish the paper. We would also like to thank Richard Bronaugh, at Law School, University of Western Ontario, Canada, for his permission to republish the papers that appeared in *Canadian Journal of Law and Jurisprudence*, volume XXIV, No. 2 in July 2011, that correspond to Chap. 8, entitled *Austin and the Electors* by Pavlos Eleftheriadis; Chap. 11, entitled *Austin, Hobbes, and Dicey* by David Dyzenhaus; and Chap. 14, entitled *Positivism before Hart* by Frederick Schauer. *The Canadian Journal of Law and Jurisprudence* also hosted different parts and earlier versions of Chaps. 1 and 4, respectively Brian Bix on *John Austin and Constructing Theories of Law* and Lars Vinx on *Austin, Kelsen, and the Model of Sovereignty: Notes on the History of Modern Legal Positivism*. This is also the occasion for thanking those who updated and revised their texts. We also thank Neil Olivier at Springer for his perseverance in getting this volume published.

Michael Freeman
Patricia Mindus

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Chapter 1
John Austin and Constructing Theories of Law*

Brian H. Bix

1.1 Introduction

One of the standard criticisms of John Austin's work is that his portrayal of law, as essentially the command of a sovereign to its subjects,[1] does not fit well with the way law is practiced in many or most contemporary legal systems or the way that it is perceived by lawyers, judges, and citizens who are participants in those systems. The argument continues: that since the theory "fails to fit the facts," Austin's theory must be rejected in favour of later theories that have better fit.

This seems like a standard move in theory construction. Where the objective is to describe or explain some practice, any conflict between the theory and the practice being described counts strongly against the proposed theory, and we should search for an alternative theory that fits the practice better.

The importance to jurisprudential theory-construction of fidelity to participants' understanding has been reinforced by the move in English-language legal theory towards a hermeneutic approach to legal theory (as in the "internal point of view" introduced by Herbert L. A. Hart,[2] and accepted by theorists as far apart

* An earlier version of this paper was presented at the University College London Conference, "John Austin 150th Anniversary" and a different version of portions of the paper was published in (2011) 24 *The Canadian Journal of Law and Jurisprudence* 431–440. I am grateful for the comments of Andrew Halpin, the other participants at the University College London Conference, and Brian Tamanaha.

[1] John Austin, *The Province of Jurisprudence Determined* ed. by Wilfrid E. Rumble (Cambridge: Cambridge University Press, 1995) (first published, 1832); John Austin, *Lectures on Jurisprudence, or The Philosophy of Positive Law* ed. by Robert Campbell (4th edition, rev., London: John Murray, 1873) [Bristol: Thoemmes Press reprint, 2002], two vols.

[2] Herbert L. A. Hart, *The Concept of Law* (rev. ed., Oxford: Clarendon Press, 1994) at 56–57, 84–91.

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methodologically as John Finnis and Joseph Raz[3]). In very rough terms, this approach argued (or, at times, merely assumed) that theories of law would be better to the extent that they accounted for the perspective of those citizens who viewed the law as giving them reasons for action. This approach to legal theory, in turn, reflects the general "hermeneutic" or "*Verstehen*" approach to the social sciences: a view that knowledge of social institutions is distinctly different from knowledge in the physical sciences, and that a primary focus of theorizing is and should be awareness of the motivations and purposes of participants, emphasizing participants' understanding, not merely their behaviour.

For many influential modern approaches to the nature of law, including Joseph Raz's exclusive legal positivism and Ronald Dworkin's interpretivism, while they criticize the lack of fit of theories like Austin's, those theories themselves unapologetically offer characterizations of legal practice that deviate in significant ways from the way most people practice or perceive law. Thus, at least at first glance, it appears that many contemporary legal theorists wish to have it both ways: they use the deviations from conventional understandings as grounds for dismissing some theories by other scholars, but forgive or overlook comparable deviations in their own theories.

This chapter will begin to explore what general principles can be learned, or developed, regarding when or to what extent deviation from the way law is practiced and perceived is appropriate in a theory of the nature of law. Additionally, the chapter will also consider whether, in light of the proper approach to fit and mistake in theory-construction, Austin's theory of law might be a more viable alternative than is conventionally assumed.

1.2 Deviations and Mistakes

Joseph Raz writes:

> John Austin thought that, necessarily, the legal institutions of every legal system are not subject to – that is, do not recognize – the jurisdiction of legal institutions outside their system over them. (…) Kelsen believed that necessarily constitutional continuity is both necessary and sufficient for the identity of a legal system. We know that both claims are false. The countries of the European Union recognize, and for a time the independent countries of the British Union recognize, the jurisdiction of outside legal institutions over them, thus refuting Austin's theory. And the law of most countries provides counterexamples to Kelsen's claim. I mention these examples not to illustrate that legal philosophers can make mistakes, but to point to the susceptibility of philosophy to the winds of time. So far as I know, Austin's and Kelsen's failures were not made good. That is, no successful alternative explanations were offered.[4]

[3] John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980) at 3–18; Joseph Raz, *Practical Reason and Norms* (Princeton: Princeton University Press, 1990) at 170–177.

[4] Joseph Raz, "Two Views of the Nature of the Theory of Law: A Partial Comparison" (1998) 4 *Legal Theory* 249 at 258 (footnotes omitted).

In a sense, this sort of criticism of Austin, and of Kelsen, is, within the jurisprudential literature,[5] perfectly common-place. Both theorists are presented as having interesting theories, but ultimately ones that are deeply flawed. In recent years, if scholars and students are familiar with Austin's work at all, it tends to be through H. L. A. Hart's use of Austin's work as a stepping stone to his own approach: the way Hart used purported weaknesses in Austin's command theory to justify Hart's own quite different form of legal positivism.[6]

Hart offered a series of criticisms of Austin's theory that are often now taken as proven accusations, with little attention given to potential defences of the theory. Hart's criticisms included: (1) that, contrary to Austin's theory, law contains much greater variety than is presented by a theory that equates law (only) with commands; (2) that Austin's theory cannot distinguish a legitimate legal system from the rule of gangsters or terrorists; (3) that theories that equate law with the command of a sovereign cannot account for the legal status of custom, and may also have trouble accounting for judicial legislation; and (4) that many communities do not have anything that would count as a "sovereign" in the sense used by Austin, a person or institution that has no limits or constraints. In fact, Austin noted many of these objections in his own works, and offered responses,[7] but these responses (some inevitably more substantial than others) have been largely forgotten in the rush to place Austin in his role as "the sincere but limited theorist whose faults were corrected by later and wiser writers."

This is not the place to give any final reckoning to the individual criticisms of Austin's work, but to consider the general sort of criticism raised. In particular, what I find intriguing about Raz's quoted criticism of Austin and Kelsen, is that the author of the criticism himself offers claims about law that other theorists and observers might similarly characterize as subject to "counter-examples," or as simply "mistaken" or "false."

Raz has famously argued for what others have labelled "exclusive legal positivism," a view that holds that moral evaluation can never play a role in determining what the law is (though it can play a role in determining what the law *should be*). When critics argue that there are clear contrary examples – moral standards in constitutional provisions or the use of moral reasoning in determining the content of common law legal norms – Raz denies that these are in fact refutations, or even counter-examples, to his theory. In the face of purported counter-examples, Raz notes that the judges'

[5] Here, as elsewhere in this paper, the reference is to the English-language jurisprudence literature. I am well aware that the traditions and discussions in other jurisprudential literatures are quite different (starting from the fact that, in many other countries, Austin, along with Hart and Raz, may be relatively unknown, while more emphasis is given to Kelsen's work).

[6] Herbert L. A. Hart, "Positivism and the Separation of Law and Morals" (1958) 71 *Harv. L. Rev.* 593 at 594–606; Hart, *The Concept of* Law, *supra* note 2 at 18–78; see also Scott J. Shapiro, *Legality* (Cambridge, MA: Harvard University Press, 2011) at 51–78.

[7] For example, Austin offers some detailed responses to possible objections to his claim that all societies have an unlimited sovereign, in Austin, *Province*, *supra* note 1 at Lecture VI, 190–242.

characterizations of what they are doing in opinions are often the result merely of conventions of presentation, or slightly mis-leading labels used so as not to provoke those naively attached to certain preconceptions (*e.g.*, that judges do not legislate).[8]

However, one would think that comparable arguments could be offered on behalf of Austin (and Kelsen, for that matter): arguing that whatever lack of fit there appears to be between their theories and current practices and perceptions would be removed or minimized by careful re-characterizations. Yet, for some reason, that move is rarely made by those commentators who are (too) quick to dismiss these theories.

1.3 Hart and Errors

And it is not just the rejected legal theorists of prior eras who must face accusations of lack of fit between theory and practice. Such claims reach even more established theorists.

The usual narrative of analytical jurisprudence, at least as given in most English and American university courses and in countless books and articles, is that John Austin has the merit of being the first, or one of the first, legal positivists, but that his theory was deeply flawed, flaws pointed out most clearly by H. L. A. Hart, whose own work set the standard for modern theories of law. However, though Hart's work is treated, in this narrative, as significantly superior to Austin's, and as the groundwork of all of merit in what has come since, there are occasional references to possible mistakes.

Some of the alleged errors are not relevant for our purposes, *e.g.,* because they relate to propositions that are tangential to Hart's theory of law; they can be abandoned without affecting the basic structure and basic claims of the theory (*e.g.*, regarding the tenability of Hart's practice theory of rules[9]). However, other claimed errors in Hart's work cannot be so easily shrugged off: *e.g.*, as to whether legal systems should be equated with the union of primary and secondary rules, whether every legal system has one (and only one) rule of recognition, and whether law is mostly a matter of rules.[10]

As regards the union of primary and secondary rules, Simon Roberts argued that this criterion for the designation "legal system" (or "*non-primitive* legal system") improperly excluded many communities with more informal dispute-resolution and

[8] See, *e.g.,* Joseph Raz, *Ethics in the Public Domain* (Oxford: Oxford University Press, 1994) at 210–21; Joseph Raz, *Between Authority and Interpretation* (Oxford: Oxford University Press, 2009) at 190–202.

[9] Of which both Dworkin and Raz have given effective rebuttals. See Raz, *Practical Reason and Norms*, *supra* note 3 at 50–58; Ronald Dworkin, *Taking Rights Seriously* (rev. ed., Cambridge, MA: Harvard University Press, 1978) at 48–58.

[10] See, *e.g.*, Joseph Raz, *The Authority of Law* (Oxford: Clarendon Press, 1979) at 95–96; Dworkin, *Taking Rights Seriously*, *supra* note 9 at 14–130.

norm-creation systems.[11] To which, one might answer, on Hart's behalf, that the mere fact that under some definition of law, or set of criteria for law, not all communities would be said to have law (or to have law in its fullest sense) is not, by itself, a reason to reject that definition or set of criteria.[12]

More central, perhaps, are two other criticisms. Under Hart's approach, all legal systems (at least all *sophisticated* legal systems) have a rule of recognition, which sets the criteria by which one determines which norms are part of that legal system. The rule of recognition is the highest (or, to change the metaphor, the most basic) norm in the chain of justification and authorization within the legal system. And, more implied than either asserted or argued for, each legal system has only one such rule of recognition. Raz has argued that there is no reason to assume that this will in fact be the case; that legal systems could well have two (or more) rules of recognition.[13] And Dworkin has argued forcefully that legal systems have principles as well as rules, legal standards that cannot be correlated with the sort of content-neutral "pedigree" criteria associated with a Hartian rule of recognition.[14] These claims of error cannot be brushed aside as easily as Roberts', and the arguments for and against have created a substantial literature, to which this article cannot do justice.[15]

1.4 Trade-Offs

One point I hoped to make by this too-quick tour of major legal theorists and their critics is that accusations that theories deviate from practices and perceptions are widespread, and by no means the end of the discussion. Perhaps, it would be better if a theory matched perfectly participants' perceptions of a practice, but it is acceptable if it does not, as long as there is some benefit one gets in return. More to the point, perhaps, a perfect match between theories on one side, and practices and perceptions on the other, is not to be expected.

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[11] See Simon Roberts, *Order and Dispute* (Harmondsworth, England: Penguin, 1979) at 23–25.

[12] See Brian H. Bix, *Jurisprudence: Theory and Context* (5th ed., London: Sweet & Maxwell, 2009) at 23–24.

[13] Joseph Raz, *The Concept of a Legal System* (2nd ed., Oxford: Clarendon Press, 1980) at 197–200.

[14] Dworkin, *Taking Rights Seriously*, *supra* note 9 at 14–45.

[15] One might note in passing a couple of possible lines of response: first, that for Hart, as for Kelsen before him, the notion of a single rule of recognition (for Kelsen, the single *Grundnorm* or "Basic Norm" – *e.g.*, Hans Kelsen, *Introduction to the Problems of Legal Theory* trans. by Bonnie Litschewski Paulson and Stanley L. Paulson (Oxford: Oxford University Press, 1992) at 55–65 – is more of an assumption, by legal officials and citizens as much as by theorists, based on the systematic nature of legal systems rather than a description or observation; and, second, that Dworkin's legal principles are more moral reasons for changing the law than they are aspects of the law as it currently is. See Joseph Raz, "Legal Principles and the Limits of Law" in *Ronald Dworkin and Contemporary Jurisprudence* ed. by Marshall Cohen (Totowa, NJ: Rowman & Allanheld, 1984) at 73–87.

Theories are models: efforts to "boil down" complicated reality, and the variety of experience over time and across societies, to claims regarding what is "essential" amid the details and the differences. One could even argue that the problem is with theories of law that work *too* hard to account for nuance (*e.g.*, accounting for all the different kinds of legal rules, etc.,) that they lose the basic insight about law's nature. They are like maps that are large and detailed, almost as big as the area they purport to describe, creating realistic portraits of the area, but doing so at such a large size that they are no longer functional, and can no longer serve their intended function of helping us to find quickly the best route from one place to another.[16]

Theories and models involve, by their nature, trade-offs. The power or insight of the theory is to be weighed against the simplification, distortion, or mis-characterization involved in reducing the complexity of life to a simple picture. In economic modelling, it is sometimes argued that any distortions of human behaviour presented in the model are compensated for by the value of the model in predicting human behaviour. There is debate regarding whether in fact economic models *are* successful in predicting behaviour,[17] but that is, for our purposes, beside the point. What is relevant is that prediction of events is a (relatively) objective matter, a marker most of us can agree upon as a valuable counter-weight to the cost of any distortion within the model.

However, within jurisprudence there are additional problems. How can one discuss the meta-theoretical trade-offs in theories of law if there is no consensus regarding either intermediate or ultimate values? One must first know what one is aiming for and what would count as success before one can even think about costs and benefits in relation to theory construction. What is it that we are doing, or trying to do, when we theorize about (the nature of) law?

This is a basic question for legal philosophers – as Nigel Simmonds put it in discussing the challenge facing Herbert L. A. Hart and those who came after him: "once essentialism (…) was avoided as an option, it became hard to see how an investigation of law's nature could be anything other than an empirical matter."[18] Is there something *philosophical* to be said about law, that goes beyond mere historical and sociological investigations? But certainly Kelsen and Hart, and Finnis, Dworkin, and Raz – and likely Austin as well – thought of themselves as doing something different than empirical investigation.

What is the benefit we seek from a successful theory of law? Raz speaks of the ultimate objective of legal theory as explaining part of our community's self-understanding.[19] For Ronald Dworkin, it is an interpretive process that reworks

[16] For a discussion of "reductionism" in the theories of John Austin, Hans Kelsen, and James W. Harris, see Brian H. Bix, "Reductionism and Explanation in Legal Theory" in *Properties of Law: Essays in Honour of Jim Harris* ed. by Timothy Endicott, Joshua Getzler and Ed Peel (Oxford: Oxford University Press, 2006) at 43–51.

[17] See, *e.g.*, *Judgment Under Uncertainty: Heuristics and Biases* ed. by Daniel Kahneman and Paul Slovic Amos Tversky (Cambridge: Cambridge University Press, 1982).

[18] Nigel E. Simmonds, "Law as a Moral Idea" (2005) 55 *U. Toronto L.J.* 61 at 69–70.

[19] Raz, *Between Authority and Interpretation*, *supra* note 8 at 17–46.

existing practices in their best moral or political light.[20] For Liam Murphy, it is selecting or constructing the theory whose belief by society would have the best consequences.[21] For Sean Coyle, it is part of an exploration of the role of law in realizing the good.[22] For John Finnis, similarly, the objective of legal theory is, or should be, about asking the "why" question: "Why have law?" How does law fit within the moral requirement to seek the common good?[23] If we do not know what the objective of theorizing is, or if we cannot agree on what it should be, it will be difficult even to begin the discussion of when a theory's lack of fit is justified by its achievements.

Ronald Dworkin's concept of constructive interpretation gives an example of how trade-offs might be understood in theorizing. According to Dworkin, an interpretation (here of a social practice, though for Dworkin the claim is generalized to all interpretation) must meet some minimal level of fit with the practice being interpreted; otherwise it would not even qualify as an interpretation. Beyond that, one would either choose the best interpretation that also had the minimal level of fit (according to an early version of the theory[24]) or choose the theory that had the best combination of fit and value (according to later versions[25]).

A different question arises when it is not a straight trade-off, but rather a weighted choice. When Hart urges us to take into account the internal point of view, his argument is that this perspective is more central and (therefore) more important than the perspective of those who do *not* perceive the law as giving them reasons for action.[26] It is because this is a richer, better, fuller, or more central explanation that the theory should be built around it, rather than on a different basis, even if that other basis might have a better overall fit with perceptions and practices.[27]

It is in the nature of trade-offs, that the greater the insight one believes that the theorist (Austin or Raz or Kelsen or Dworkin) has offered, the greater the deviation from participant perception ("lack of fit" or "mistakes") that one will condone in the details of the theory. Even granting this much, the problem is that the existence and quality of an "insight" often seems to vary from one reader (observer) to another, and also over time. Thus, while in one era a theory's mistakes might seem trivial relative to the insight offered, in another era that same lack of fit might seem fatal. Thus, to many, and perhaps to most, Austin's theory looks untenable now, and, for these same observers, it may not be easy to understand how Austin's theory could

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[20] Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986).

[21] Liam Murphy, "The Political Question of the Concept of Law" in *Hart's Postscript* ed. by Jules Coleman (Oxford: Oxford University Press, 2001) at 371.

[22] Sean Coyle, *From Positivism to Idealism* (London: Ashgate, 2007) at 10.

[23] John Finnis, "Law and What I Truly Should Decide" (2005) 48 *Amer. J. Juris.* 107.

[24] Dworkin, *Taking Rights Seriously*, *supra* note 9.

[25] *E.g.*, Dworkin, *Law's Empire*, *supra* note 20.

[26] See Hart, *The Concept of Law*, *supra* note 2 at 82–91; see also Finnis, *Natural Law and Natural Rights*, *supra* note 3 at 3–18.

[27] *Cf.* Finnis, *Natural Law and Natural Rights*, *supra* note 3 at 4–11 (criticizing Kelsen's theory for seeking "the lowest common denominator" of all legal systems: *ibid.* at 10).

ever have been as dominant as it was. While for many of these same contemporary commentators, any lack of fit exhibited by, say, Joseph Raz's exclusive legal positivism is worth carrying for the insights that theory offers about the connections between law, rules, reasons for action, and authority. How much deviation from practice one believes a theory can carry will inevitably be a matter of *judgement*.

1.5 Not (Quite) Trade-Offs

Perhaps we move too fast to be speaking of trade-offs for theories of law. Some theorists argue that there is no need to speak of trade-offs, because the theories in question in fact do not suffer from any lack of fit. Rather, the practices and perceptions that purport to differ from the theories are in fact untenable. For example, under a Razian analysis, judges may think that because they are applying moral-sounding constitutional provisions, they are declaring a pre-existing legal status, rather than making new law, when they invalidate a statute. However, Raz would say that this cannot be, for it is contrary to matters essential to the nature of law.[28] Similarly, under a Dworkinian analysis, a judge may think that she is declaring the legislators' intentions for some statute, intentions that are purely matters of fact, but Dworkin would insist that this simply misunderstands what legislative intentions are or could be.[29]

A final example, further afield, comes from the Scandinavian legal realists (*e.g.*, Alf Ross, Karl Olivecrona, and Vilhelm Lundstedt), who criticized the normative language (*e.g.*, "right" and "duty") used in law.[30] The Scandinavian realists believed that concepts like "legal right" and "legal duty" were phrases without a reference, and could be explained only in terms of subjective psychological feelings of power or bindingness, or the residue of ancient beliefs about magical powers. These theorists did not doubt that citizens and legal officials referred to "legal right" and "legal duty" as though they were objects that somehow existed in the world, but in that, the Scandinavian realists argued, the citizens and officials were simply deceiving themselves.

A different alternative to a "trade-off" analysis would be that theorizing should be understood in terms similar to Willard V. O. Quine's "web of beliefs." Under this analysis, we have inter-connected views, that hang or fall together, and facts that do not initially seem to fit into our beliefs may require adjustments in aspects of the interconnected propositions, but that almost any such fact can be accommodated, albeit at times with some uncomfortable stretching in those beliefs.[31]

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[28] See, *e.g.*, Raz, *Ethics*, *supra* note 8 at 204–10.

[29] See Dworkin, *Law's Empire*, *supra* note 20 at 313–54.

[30] See, *e.g.*, Brian H. Bix, "Ross and Olivecrona on Rights" (2009) 34 *Australian J. Legal Phil.* 103.

[31] *E.g.*, Willard V.O. Quine, Joseph S. Ullian, *The Web of Belief* (New York: Random House, 1970). Quine was referring to the effect of sensory experiences on the periphery of our web of beliefs, but the notion also works, in broad analogy, with the topics discussed in the text.

Theorists who do not entirely deny that there are mistakes or deviations in comparing their theories to actual practices and perceptions may instead discount the importance of the deviations. These discounting arguments come in certain common forms. First, there is the argument that the way certain judges, lawyers or citizens speak about the law does not reflect their actual views about the law, but instead reflects only certain conventions of presentation. This argument is often used in response to the observation that judges frequently speak about "finding" or "discovering" existing law (rather than creating new law) even when the outcome seems far different than prior decisions and other settled law.[32] Second is the argument that judges and lawyers may characterize their actions in a certain way to respond to the political pressures and misunderstandings by naïve citizens (*e.g.*, who do not want to think of their unelected judges as making new law, or making "political" judgements in interpreting and applying the law); according to this argument, these judges and lawyers do not believe the characterizations they report. Third (though this is seen far less often than the other two) is the claim that the judges, lawyers, and some citizens as well, are simply deceiving themselves. When the great English common law judges and commentators of the medieval and renaissance periods claimed that judges merely discover existing law, is it possible that at some level even these sophisticated and worldly observers actually believed that? Perhaps some of them did, and perhaps they did because it helped them to avoid facing unpleasant political and legal issues.

1.6 Is Law Distinctive?

In discussing legal theories, past and present, in this work, I have spoken in abstract terms regarding the process of building theoretical models, and the trade-offs within a theory. One issue left unconsidered is whether law, and theorizing about law, might be different in important ways from other theorizing about social practices, distinctive in ways that affects our thinking about models and trade-offs.

One difference that might be worth noting that is law has a role (at least an arguable role) in our practical reasoning – reasoning about what we ought to do and how we ought to live – that most other social practices do not have or claim to have. This aspect of law has been particularly emphasized by natural law theorists, but is accepted, to different degrees and in various ways, by many other theorists as well. As John Finnis has argued, law has a "double life": it is simultaneously a social/historical fact and a normative system.[33] Law as a social-historical fact is constituted

[32] *Cf.* Scott Altman, "Judicial Candor" (1990) 89 *Mich. L. Rev*. 296; Paul Butler, "When Judges Lie (and When They Should)" (2007) 91 *Minn. L. Rev.* 1785.

[33] *E.g.* John Finnis, "The Fairy Tale's Moral" (1999) 115 *Law Quarterly Review* 170, 170; John Finnis, "On the Incoherence of Legal Positivism" (2000) 75 *Notre Dame Law Review* 1597, 1602–6.

by the actions of officials within a particular legal system from its beginning to the present. There are propositions about law which are primarily summaries of what decisions legislatures and judges, and perhaps also administrative agencies and executive/enforcement officials, have made over time. Such claims are made by social scientists and other academics, as well as by legal practitioners and judges.

Often, when claims are made about the law, there is some ambiguity regarding whether the claims are descriptive/historical, regarding what actions were actually taken by officials in the past, or whether there is some element of modifying, re-characterizing, or reforming the rules to make the current (or future) cases better. And when theories are offered of areas of law, the detailed case outcomes are built into generalizations in ways that reflect a conscious bias towards making the overall picture more just or at least more coherent. This is sometimes described as "rational reconstruction."[34]

The way that law has an aspect of social practice and an aspect of practical reasoning certainly complicates any effort to theorize about the nature of law. And it may make a difference on what counts as a cost or a trade-off in theorizing about law. However, it is not clear that law's distinctive nature changes the general meta-theoretical question about how one balances insight and distortion: the comparison of costs and benefits appears to remain comparable with what occurs with theories in other areas.

1.7 A Different View of Austin

I want here to take a brief break from general discussions of theorizing and lack of fit to return to Austin, and consider what arguments might be raised on his behalf.

The argument for Austin might go as follows (and no claim is being made that this argument can be found in Austin's own works, or even that he would have approved of it had it been brought to his attention). Austin's theory simplifies, and therefore distorts, but the simplification is a necessary cost for an important objective: uncovering a basic insight about law.

Regarding the problem of theoretical objectives, discussed earlier, one might note first that there are significant doubts regarding what Austin saw himself as offering in this theory. At one or two points in his lectures on jurisprudence – but (to my knowledge) not much more often, in the course of over 1,000 pages of text – Austin describes his work as offering a "science" of law.[35] This may parallel the continental European theorists he had read, and later continental theorists like Kelsen, who saw their conceptual analyses as part of a "science" of law. At the same

[34] Rational reconstruction is comparable to what Ronald Dworkin has called "constructive interpretation." Dworkin, *Law's Empire*, *supra* note 20 at 49–53.

[35] See Austin, *Lectures*, *supra* note 1 at vol. 2, 1107–08.

time, modern commentators find that Austin's discussions could be as easily interpreted as description (this is what is true of all known legal systems) as conceptual (this is what is necessarily true of any legal system).[36] A conceptual objective would make it easier to speak of "insights" that justify any lack of fit.

There are different (but related) ways of characterizing the insight(s) about law that can be drawn from Austin's command theory. First, that law is essentially about power.[37] Second, that law is best understood (and best practiced) as a top-down institution, with norms imposed by the government on its citizens, rather than as a bottom-up institution (as both the classical commentators on the English common law and the continental historical jurisprudence theorists would have it). Third, that every legal system has some entity whose power is effectively unconstrained.[38]

From the perspective of some of these perspectives, it is a benefit, not a drawback, that Austin's theory does not incorporate the perspective of citizens who view the law as creating reasons for action. From this Austinian approach, it is the Hartian legal positivist approach that is mistaken, in its apparent willingness to join certain strains of natural law theory in focusing too much on how law can or should create (moral) reasons for action.[39]

Of course, one response to a revised Austinian theory would be in much the same tune as prior criticisms: that this is a theory built on a poor fit with actual practices and perceptions (what might less delicately called "mistakes"), and thus cannot claim to have uncovered insights, only distortions. Under the Dworkinian analytical structure mentioned above, the argument is that the theory's fit with the practice is too poor to even qualify as an "interpretation." (Perhaps under a coherentist view, like Quine's web of beliefs or Thomas Kuhn's discussion of "paradigms,"[40] it is the claim that certain facts are so hard to incorporate into the existing analytical or conceptual structure that the whole structure must be rejected and replaced).

To some extent this is the argument that is still going on in legal theory, relating not only to Austin's work, but more generally regarding the role of coercion in the

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[36] Roger Cotterrell, *The Politics of Jurisprudence* (2nd ed., London: LexisNexis, 2003) at 81–83. Here, contrast William L. Morison's view of Austin, William L. Morison, *John Austin* (London: Edward Arnold, 1982) at 2 (Austin's focus was to portray law "empirically") with Julius Stone's view, Julius Stone, *Legal System and Lawyer's Reasoning* (London: Stevens, 1964) at 68–69 (Austin as a conceptual theorist).

[37] *Cf.* Grant Lamond, "Coercion and the Nature of Law" (2001) 7 *Legal Theory* 35; Grant Lamond, "The Coerciveness of Law" (2000) 20 *Oxford J. Legal Stud*. 39; Danny Priel, "Sanction and Obligation in Hart's Theory of Law" (2008) 21 *Ratio Juris* 404; Frederick Schauer, "Was Austin Right After All?: On the Role of Sanctions in a Theory of Law" (2010) 23 *Ratio Juris* 1; Nicos Stavropoulos, "The Relevance of Coercion: Some Preliminaries" (2009) 22 *Ratio Juris* 339.

[38] Portions of the above paragraph derive from Cotterrell, *Politics of Jurisprudence*, *supra* note 36 at 49–77.

[39] See Frederick Schauer, "Positivism Through Thick and Thin" in *Analyzing Law* ed. by Brian H. Bix (Oxford: Oxford University Press, 1998) at 65–78.

[40] Thomas S. Kuhn, *The Structure of Scientific Revolutions* (2nd ed., Chicago: University of Chicago Press, 1970).

nature of law.[41] Those who believe that coercion is central to law's nature think that theories of law that omit or discount coercion are missing something basic. Theorists on the other side of the issue make comparable criticisms, asserting that it is the coercion-centred theories that are missing something essential.[42]

1.8 Conclusion

Of course, there are no bright-line rules for determining when a theory of some practice is tenable and when it is not, and when an existing way of understanding a practice needs to give way in the face of purportedly recalcitrant facts. (And this is not merely because we are dealing here with social practices rather than the physical sciences; a similar lack of bright lines applies also to when one Kuhnian paradigm within science must give way to another[43]).

To some extent, the success or failure of a theory becomes a matter of perception and a matter of judgement among the consumers of theory. Legal theories – like all other ideas – arise in response to the intellectual questions and practical concerns of the time in which they arise.[44] They may yet adapt or be re-characterized in ways that make them seem responsive to the questions and concerns of another period, but inevitably there will come a time when a theory that once seemed powerful and important begins to seem instead quaint and without use to a new generation of thinkers. And such changes in perception likely occur also at the level of components of theory, and components of theory-construction. For one generation, the insights of Austin's (or Kelsen's or Raz's) theory might seem central, and the deviations trivial, while for a later generation, the insights might seem small or hard to accept, while the deviations seem fatal.

Theories of the nature of law are relatively "unmoored," lacking, on one hand, the constraint of prediction of events; and, on the other hand, any agreed purpose. It should thus not be surprising that there is significant disagreement among theorists. There is disagreement about how to characterize certain of the facts on the ground, but even where agreement can be found on that, disagreement remains, as reasonable people can choose differently when faced with theories that make different choices about what is important, what counts as "insight," and how much of participants' perceptions or "common sense views" one can or should throw overboard in the name of theory-building.

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[41] See publications listed *supra* note 37.

[42] And, a similar debate goes on around economic theories of law, where the question is whether the rational actor model is a great insight around which to build a predictive model, or is instead a politically biased and empirically disproven misreading of human nature.

[43] See Kuhn, *Structure of Scientific Revolutions*, *supra* note 40.

[44] A point made by Joseph Raz, among others. See, *e.g.*, Raz, *Between Authority and Interpretation* *supra* note 8 at 3.

The theorist has resources available when faced with apparent deviations between a theory and people's practices and perceptions. It can be argued that apparent deviations just reflect conventions of presentation, deceptions, or self-deceptions. Alternatively, it can be argued that any characterization of the relevant practices other than the one offered by the theory is unsupportable. Beyond that, a theorist's claim in the face of recalcitrant data will be some variation of the trade-off metaphor: that the cost involved in deviating from the practices and perceptions is worth accepting in light of the insights discovered and displayed by the theory.

Theory construction, especially where the theory is not anchored by falsifiable predictions, is often more a matter of persuasiveness, rather than a matter of truth. And if John Austin's theory seems less sustainable than it once did, that may say as much about us, and what concerns us, as it does about his theory.

Chapter 2
Austin's Methodology? His Bequest to Jurisprudence

Andrew Halpin

2.1 Introduction

Contemporary Anglophone legal theory[1] attracts some of the brightest minds in the legal academy. Their output is intellectually sophisticated, vibrant, occasionally flamboyant, and richly diverse. To engage with this material as a student can be rewarding in terms of broadening and deepening the academic study of law in ways that other subjects do not even aspire to. If some students fail to engage, this can still be regarded as a sign of the elevated status of legal theory, or jurisprudence, as a subject: only those with real aptitude and application can scale its heights. Yet there are other cases of disengagement which are less easy to dismiss.

One cause for concern is the disengagement of the professions with legal theory. Although this could be regarded as part of a blanket attitude on their behalf towards academic law,[2] an inability by legal theorists in this wider setting to communicate anything of use to practitioners would still raise fundamental questions about the purpose and value of jurisprudence. The concern becomes more marked when

[1] Recognition of a different relationship between academic law and legal practice within Continental Europe, and the implications of that for the development of legal theory, provide reasons for constraining the present essay to a consideration of legal theory in the English-speaking world. Despite acknowledging the influence of Continental legal theorists (see *infra* note 12), the emergence of a modern subject of Anglophone jurisprudence is treated here as a distinct event. Although historically something of an artificial construction (that also overlooks pre-Austinian Scots legal theory), it exerts a dominant influence on the shape and subject matter of Anglo-American jurisprudence today.

[2] Influential examples of such attitudes are provided by Harry Edwards, "The Growing Disjunction between Legal Education and the Legal Profession" (1992) 91 *Michigan Law Review* 34, and Robert Goff, "The Search for Principle" (1983) 69 *Proceedings of the British Academy* 169.

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Law and Philosophy Library 103, DOI 10.1007/978-94-007-4830-9_2,

the disengagement takes place among other legal academics, of a more doctrinal or practical persuasion, who see no value added from legal theory to their own academic interests. Such an attitude is less prevalent now than it was 30 or 40 years ago, but it is far from extinguished. For one thing, theoretical intrusions into subjects such as Torts, Contract, and Criminal Law, tend to be limited to the particular concerns of the subject in question rather than engaging with the general questions of jurisprudence. More significantly, there remain leading figures in these other fields who are openly dismissive of legal theory, either modestly claiming that it is beyond their reach, or confidently asserting it is of no use – "Theorists can spend their time theorising the subject; my job is to get on with actually doing the subject."[3]

Although the disengagement of students, practitioners, and other legal academics might ground genuine concerns, it is not my purpose to address them here, except to suggest tangentially that any such concerns may be related to the root concern I shall investigate. These other concerns can properly be expressed in questions about the purpose and value of jurisprudence. However, we do not need to look so far for the insinuation that jurisprudence is of no earthly use at all, and that the work of legal theorists has acquired the self-indulgence of medieval scholasticism. This is a charge that has been made from within legal theory itself.[4] For all the intellectual energy that has been poured into the subject, legal theory today as a discipline is fragmentary and schismatic. Its debates are often ferocious, and more often inconclusive. The root concern to be addressed here is that legal theorists are disengaged from each other.

This may be regarded as a root concern in two senses. In the instrumental sense already given, it may lie at the root of the disengagement and disenchantment with legal theory found among other potential stakeholders in the subject. That sense, I have already indicated, will not be developed here beyond the scope of the suggestive. The primary sense to be investigated in detail is intimately bound up with the subject itself and deeply historical. The concern is that at its roots jurisprudence in the English-speaking world emerged as a subject already disengaged with itself, or, less cryptically, in a state that made the mutual disengagement between legal theorists inevitable.

In order to trace and explain this state of affairs, we shall need to excavate the historical origins of jurisprudence, and survey the wider issue of theoretical disagreement as it persists within contemporary jurisprudence. If the concern is substantiated, two tantalising lines of inquiry open up. What could have happened differently at the founding of jurisprudence as a subject? What might be different in the state of legal theory today? The radical opportunity then presents itself. If the current disengaged state of legal theory is traceable to a particular historical moment in

[3] Evidence for this class of the disengaged is best kept anecdotal and anonymised, but is readily available.

[4] Initially brought against legal positivism by Ronald Dworkin, it has also been turned against Dworkin himself. See Andrew Halpin, "The Methodology of Jurisprudence: Thirty Years Off the Point" (2006) 19 *Canadian Journal of Law and Jurisprudence* 67 at 77, 97 (V)(j); 86–87.

establishing its foundations, could an adjustment to that process produce (across all aspects) a more engaged theory of law?

These issues are explored within the following five sections of this essay. In the next Sect. 2.2, the controversy over establishing a "province of jurisprudence" is introduced. This controversy is linked to the attempt to establish an exclusive determination of the subject matter of jurisprudence against a backdrop of contestability. Section 2.3 then broadens the discussion of theoretical contestability and disagreement, and identifies three particular strategies by which a favoured theoretical viewpoint can take command of a subject as against opposing viewpoints: axiomatic disengagement, ambitious insight, and a split field of inquiry. Austin's approach is suggested here as taking the form of ambitious insight, a suggestion that is fully examined in Sect. 2.4, focusing on Austin's key distinction between what law is and what law ought to be. The details of Austin's approach, as examined in this section, are considered incompatible with his having established a common methodology for analytical jurisprudence. Section 2.5 uses Austin's own doubts about the success of his project as a platform for a critical challenge to his simple is/ought divide. The challenge arises from recognising a hybrid category of what the law ought to be regarded as being, associated with the activity of legal reasoning once the insufficiency of existing legal materials is acknowledged. The final Sect. 2.6, discusses a common aversion to legal reasoning when expounding a general theory of law shared by leading legal positivists. The combination of this characteristic with a tendency towards exclusivity in shaping the subject matter of jurisprudence is regarded as the greater part of Austin's bequest to jurisprudence, and as the basis for attributing responsibility to him for the current disengaged state of legal theory. However, the section concludes with the neglected part of Austin's legacy, found in his doubts, and his insistence that legal theory should be engaged with practice. It is this part of his legacy that is regarded as an overlooked inspiration for a fundamentally different direction for legal theory.

2.2 The Controversy

When John Austin's introductory lectures were published in 1832 under the title, *The Province of Jurisprudence Determined*,[5] that title was sufficient to signal the intention of Austin to capture as the subject matter of jurisprudence what had previously been obscure or contestable, or both. Subsequent allusions to the title have indicated that Austin's efforts, for all their significance in promoting jurisprudence as a distinct subject, have not succeeded in resolving the controversy over its subject matter.

[5] John Austin, *The Province of Jurisprudence Determined* (first published, 1832) ed. by Herbert L. A. Hart (London: Weidenfeld & Nicolson, 1954); ed. by Wilfrid E. Rumble (Cambridge: Cambridge University Press, 1995). Citations below are from the Hart edition, with page references to the Rumble edition provided in square brackets.

Halfway through the last century, Julius Stone in *The Province and Function of Law*,[6] argued against an exclusively analytical aspect to the Province, insisting that room should be made for questions of justice, and the social meaning of law. More recently, Allan Hutchinson's choice of title for his book in 2009, *The Province of Jurisprudence Democratized*, leaves no doubt that the subject matter remains contestable. Hutchinson adopts a more radical approach to Stone, seeking to dismiss analytical jurisprudence entirely in favour of a jurisprudence that is politically committed to local concerns and informed by a notion of strong democracy.[7]

The precise nature of this contest is not altogether clear. What is clear is that it is not simply a dispute with Austin's jurisprudence, with the particular details of his theory of law or with the positions adopted by Austin in addressing specific jurisprudential topics. Whatever evaluation, or re-evaluation, may be made of Austin on those points,[8] there remains something less personal and more far reaching in Austin's legacy to jurisprudence. One way of capturing this is to treat Austin as the progenitor of an analytical tradition in jurisprudence.[9] Those following in his line may no longer exhibit the detailed characteristics of their forebear, but they are undeniably indebted to him for their present position and standing. Although a more rigorous account would explore other distinct influences on the tradition, notably from Kelsen, and consider the details of significant variations within analytical approaches to jurisprudence,[10] the historical role of Austin in the founding of analytical jurisprudence is unquestionable.[11] As for the intellectual role, that is a broader issue, encompassing Austin's intellectual debt to Bentham, and the German and

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[6] Julius Stone, *The Province and Function of Law: Law as Logic Justice and Social Control, A Study in Jurisprudence*, second printing with corrections (Sydney: Maitland Publications, 1950). The title of the first chapter, which previously appeared in two parts in (1944) 7 *M.L.R.* 97 and 177, makes Stone's relation to Austin unmistakeable: "The Province of Jurisprudence Redetermined."

[7] Allan Hutchinson, *The Province of Jurisprudence Democratized* (Oxford 2009). I consider Hutchinson's position in detail in a conjoined study, sharing much of the scene-setting material with the present article, "The Province of Jurisprudence Contested" (2010) 23 *Canadian Journal of Law and Jurisprudence* 515.

[8] For discussion, see William L. Morison, *John Austin* (London: Edward Arnold, 1982); Wilfrid E. Rumble, *The Thought of John Austin: Jurisprudence, Colonial Reform, and the British Constitution* (London: The Athlone Press, 1985); Robert Moles, *Definition and Rule in Legal Theory: A Reassessment of H. L. A. Hart and the Positivist Tradition* (Oxford: Basil Blackwell, 1987); Wilfrid E. Rumble, *Doing Austin Justice: The Reception of John Austin's Philosophy of Law in Nineteenth-Century England* (London: Continuum, 2004); Neil Duxbury, *Frederick Pollock and the English Juristic Tradition* (Oxford: Oxford University Press, 2004) at 97–106.

[9] Hutchinson, *The Province of Jurisprudence Democratized*, *supra* note 7 at 1–7, 21–24, 29. See also, Stone, *The Province and Function of Law*, *supra* note 6 at 11, in equating the "hegemony of Austinianism" with "the monopoly held by analytical jurisprudence."

[10] On both the influence of Kelsen and different approaches to analytical jurisprudence, see, *e.g.*, Joseph Raz, *The Authority of Law* (2nd ed., Oxford: Oxford University Press, 2009) at 293, 335. The need to differentiate both influences and outputs, becomes particularly acute when Brian Leiter and Ronald Dworkin are brought into an Austinian tradition (as Hutchinson, *The Province of Jurisprudence Democratized*, *supra* note 7, suggests).

[11] Stone, *The Province and Function of Law*, *supra* note 6 at 3, refers to "The Austinian Revelation."

Romanist influences, among others, on Austin. Austin himself, at the start of his "Outline of the Course of Lectures" which was appended to the original publication of *The Province*, admits to borrowing terminology from Hugo and to a lack of originality in the "subject and scope" of his enterprise, which he considered had been recognised by Hobbes, Plato, Aristotle, Cicero and others.[12]

This still leaves open the questions of what exactly it is that Austin bequeathed to analytical jurisprudence, and how that affects the contestability of its subject matter. A simple observation to make is that it is the exclusivity of an analytical approach, traceable to Austin, that lies at the heart of the controversy. Both Stone and Hutchinson take issue with this but differ in their responses. Where Stone adopted a more expansive approach open to "gaining what insights we can from all the approaches to legal theory,"[13] Hutchinson replaces one exclusivity with another: the resources of jurisprudence are to be diverted wholly to "advancing the democratic project."[14] Stone's generosity in welcoming all insights made him less concerned to dwell on what transmitted an exclusivity to analytical jurisprudence. He overlooked the intriguing question of why exactly it was that theories of justice, which Stone was prepared to admit as a branch of his scheme of jurisprudence, were left outside Austin's province of jurisprudence, despite, as Stone acknowledged, Austin's recognition of their significance.[15] Stone contented himself in drawing attention to the lack of fit between a restrictive analytical approach and the actual practice of law,[16] and in suggesting, by way of explanation, that it was the product of its age[17] (an explanation that grows dimmer with the persistence of exclusive analytical jurisprudence through different ages). Hutchinson, in more combative mood, explains and rejects the exclusivity of an analytical approach to jurisprudence in terms of a flawed methodology.

The flawed methodology attributed by Hutchinson to Austin, and to the tradition of analytical jurisprudence that Hutchinson considers has followed Austin's false lead, is "philosophical," focusing on the universal and general rather than the local and particular, employing conceptual analysis in order to provide an account of the essential nature of law.[18] Yet as Hutchinson himself concedes, a conscious interest in

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[12] John Austin, *Lectures on Jurisprudence, or the Philosophy of Positive Law*, rev. and ed. by Robert Campbell (5th ed., London: John Murray, 1885) at 32. See further, Stanley Paulson, "The Theory of Public Law in Germany 1914–1945" (2005) 25 *O.J.L.S.* 525 at 525–526.

[13] Stone, *The Province and Function of Law*, *supra* note 6 at 42–43.

[14] Hutchinson, *The Province of Jurisprudence Democratized*, *supra* note 7 at 11.

[15] Stone, *The Province and Function of Law*, *supra* note 6 at 32 and n. 122, 10, accepts the alternative appellation of censorial jurisprudence for theories of justice; acknowledges this was recognised as "censorial jurisprudence" (in Bentham's terminology) or "the science of legislation" (in Austin's terminology); and, was regarded as important by both Bentham and Austin.

[16] *Ibid*. at 42, 71–73. For illuminating discussion on a general tendency towards lack of fit between theory and practice and its possible benefits, related to Austin, see Brian H. Bix, "John Austin and Constructing Theories of Law" (2011) 24 *Canadian Journal of Law and Jurisprudence* 431–440.

[17] Stone, *The Province and Function of Law*, *supra* note 6 at 4–5, 42.

[18] Hutchinson, *The Province of Jurisprudence Democratized*, *supra* note 7 at 3, 15, 23; 11, 18, 60; 22–23, 30–31, 40–41.

methodology has come relatively recently to analytical jurisprudence.[19] When it has emerged, methodology has not proven a unifying force for exponents of analytical jurisprudence but rather an arena for hostilities between them, particularly if Dworkin is admitted among their number,[20] as Hutchinson considers he should be.[21] Although we shall return to the issue of Austin's methodology in some detail below, these preliminary comments on methodology suggest that the factor linking together Austin's bequest to jurisprudence, the exclusivity of analytical jurisprudence, and the contestability of the subject matter of jurisprudence may be found elsewhere. An alternative place to commence the search is the competitive manner in which Austin sought to establish the province of jurisprudence. This competition is sharpest among Austin and Hutchinson with their exclusive claims over the Province. Stone, with his pacific inclinations, can for this stage of the investigation be stood down.

2.3 Theoretical Contestability and Theoretical Disagreement

Any theoretical endeavour is likely to encounter obscurity. Why call on theory if everything is already perfectly clear? And within a particular field of theoretical inquiry we can expect competing theoretical accounts of the subject matter to arise, which aim to offer in their respective ways some sort of illumination on that obscurity. So, in a trivial sense, obscurity of subject matter is easily linked to contestability of theoretical viewpoint.

But this trivial link between obscurity of subject matter and theoretical contestability is insufficient to convey the competition on which Austin embarked and which Hutchinson has more recently joined. Each in his own way has sought to radically alter our perception of the subject matter of jurisprudence so as to reveal a very different field of inquiry. Within the appropriate field of inquiry, the appropriate "province of jurisprudence," obscurities can be illuminated by competing theoretical viewpoints, *but outside of the appropriate field of inquiry no useful theoretical work can be undertaken*. Theoretical work attempted outside will be positively harmful in its effects, yielding illusion rather than illumination.

We need to pause in order to appreciate the magnitude of Austin's (and Hutchinson's) claim. The comprehensive illusion suffered by working in an inappropriate field of inquiry is not equivalent to the failing of a particular theoretical viewpoint, which in the ordinary course of the theoretical enterprise loses a contest with other competing

[19] *Ibid*. at 33. For general discussion, see Andrew Halpin, "Methodology" in ed. by Dennis Patterson, *A Companion to Philosophy of Law and Legal Theory* (2nd ed., Hoboken, NJ: Wiley-Blackwell, 2010).

[20] Dworkin has used methodology to mount a fierce attack against his positivist rivals, but even elsewhere within contemporary analytical jurisprudence, methodological differences tend to map theoretical disagreements. For discussion, see Halpin, "Methodology" *supra* note 19.

[21] Hutchinson, *The Province of Jurisprudence Democratized*, *supra* note 7 at 5, 43–44.