A DICTIONARY OF LEGAL THEORY

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BRIAN H. BIX

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PREFACE

ONE inspiration for this work was the mundane experience of intellectual exchange among academic colleagues. Workshops where colleagues present their work to one another can too often have a 'Tower of Babel' feel, because academics working under one tradition do not comprehend the standard terminology of those who come from a different tradition. Those who work in the law and economics tradition rarely understand the terminology of those working within the tradition of analytical jurisprudence, and both sets of scholars may be largely ignorant of the ideas and phrases used by advocates of feminist legal theory or critical race theory. At a minimum, one hopes that this text might work as a translation manual, a Berlitz guide of words and phrases to help scholars understand and exchange ideas with those of other legal-academic cultures. If this book could offer something in the way of mutual understanding (which, one hopes, might be the first step towards mutual appreciation), it will have been more than worth the effort. The text also has more ambitious goals: to present some of the basic ideas from various jurisprudential traditions in a way that is accessible to students and scholars alike.

A few warnings: first, in a work such as this one, there are inevitable difficulties about what to include and what not to include; in determining coverage, I have followed a few principles:

1. There are no entries on authors living (at the time of writing), though living persons are discussed in the context of other entries (evaluations of contemporaries is always difficult, even without taking into account the problem of changing views; also, one is less likely to get angry messages from the deceased regarding their inclusion or exclusion).

2. The topic of legal theory is understood differently by different writers; I have tried to allow a broad scope, but there is always a danger of the project becoming completely unbounded, as legal theory edges into political theory, economics, moral philosophy, metaphysics, social theory, constitutional law, etc. I have allowed for a certain number of forays into these neighbouring categories, but inevitably some readers would have preferred a greater annexation of those other topics, while others might have preferred a more constrained list of topics.

3. When discussing theorists (*e.g.* Immanuel Kant) or topics (*e.g.* affirmative action) whose primary domain and importance is outside legal theory, narrowly understood, the discussion within this text will refer primarily to the relevance of that person or topic to legal theory.

Second, this work does not purport, on the main, to be original. Its main purpose is to present the conventional usage within a field in a way understandable to people outside that field. However, complete objectivity is probably undesirable, even if it were obtainable (which it probably is not). The text inevitably reflects my judgement, and frequently in a way that makes it clear that an editorial judgement is being offered. Another product of this text's purporting to represent the way terms and ideas are generally understood is that while all the entries are my own work, it is possible, perhaps even probable (if not inevitable), that the particular phrases or ways of characterizing ideas may echo those of other texts. Where a particular way of phrasing things is, to my knowledge, distinctive to a certain author, I have endeavoured to state as much in the text.

Third, references to legal practices will inevitably mostly be to those in the United States and England. However, many of the discussions reach a much broader scope, touching on the practices of other common law countries, and, occasionally, civil law countries as well. Similarly, much of the discussion of scholarship is grounded, inevitably, on work that was written in English or has been translated to English.

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B.H.B.

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A

acceptance (of a rule) The idea of 'acceptance' of a rule plays a key role in H. L. A. Hart's (1907–92) theory of law (elaborated most fully in *The Concept of Law* (1961)). According to Hart, a social rule can be distinguished from a mere habit by the actor's 'accepting' the rule as a standard for behaviour—a basis for justifying the actor's own behaviour, and for criticizing deviations.

Within Hart's practice theory of rules, the existence of a rule was equated with that rule's being accepted by some as a standard for behaviour. This view of rules has been criticized on various grounds (e.g. because there are commonly accepted practices that are the basis of criticism but are not considered rules, and there are rules that are not, or not connected with, common practices).

The idea of 'acceptance' is key within Hart's system at another point. His criteria (in *The Concept of Law*) for the existence of a legal system were obedience to the law by the bulk of the population, combined with the 'effective acceptance . . . as common public standards of . . . behaviour' by the system's officials of the secondary rules (the rule of recognition, the rules of change, and the rules of adjudication). Acceptance of a legal rule, within Hart's system, was something more than mere outward compliance with the rule, but something less than belief that the rule creates a binding moral obligation.

Neil MacCormick (1941–   ) has argued that acceptance of a rule could be understood as involving either of two attitudes towards the rule: (1) a willing acceptance, involving a wish that others act in accordance with the standard; and (2) a more reluctant acceptance, conforming to the rule and wishing that it be applied generally, or at least consistently, but more because of the rule's current acceptance or enforcement by others, than because of any direct endorsement of the standard.

Some commentators have criticized Hart for not focusing more on the *reasons* for acceptance of a rule, arguing that important issues regarding the normative nature of law (or the proper way to construct a theory of the nature of law) turn on a more careful distinction between kinds of reasons for acceptance.

See **gunman situation writ large; Hart, H. L. A.; internal point of view; legal positivism; rule of recognition; rules, practice theory of**

adjudication, theories of Theories that purport to describe, interpret, or prescribe how judges decide cases. Some theories are aimed at or based upon a particular legal system, while others purport to make (analytical, conceptual, or prescriptive) claims valid for *all* legal systems.

Theories of adjudication, like all forms of theories regarding social action and social institutions, must consider the criteria for successful theorizing in these areas: are they merely trying to explain outward behaviour (e.g. who wins or loses cases), or should they also be trying to explain the perspective of the participants (a hermeneutic or *Verstehen* approach)? This question is important for theories of adjudication because many such theories argue that judges' actions are explained by political, social, or economic forces of which the judges do not appear to be fully aware.

A large portion of American legal theory centres on theories of adjudication: e.g. the American legal realists' attack on judicial formalism, Ronald Dworkin's interpretive theory of law (which some critics have characterized as more a theory of adjudication than a theory of the nature of law) and all the various theories offered to justify or reform constitutional review of legislation.

See **American legal realism; constitutional theory; formalism; hermeneutics; interpretive theory of law; *Verstehen* approach**

affirmative action A policy of favouring historically oppressed groups (e.g. women, members of ethnic and racial minority groups, or members of religious minority groups) in admission to schools, hiring and promotion in the private or public sector, the award of government contracts, etc. (the practice is also known as 'reverse discrimination' and 'positive discrimination'). Affirmative action is frequently considered in jurisprudential discussions, either in the context of justice theories (what is the correct response to historical injustice?) or in the context of critical theory (among both feminist legal theorists and critical race theorists there are varying and quite subtle reactions to the place and value of the practice).

Some have argued that in the United States affirmative action practised by government may seem either especially justified, as the government had been instrumental in prior discrimination, or especially problematic, because of constitutional restrictions on government actions based on racial grounds.

See **critical race theory; desert; equality**

agency costs A term from economic analysis, referring to complications to any discussion of profit maximization in even moderately intricate commercial ventures. As many ventures and transactions involve one person (the agent) acting on behalf of another person (the principal), and as the (short-term) interests of the parties involved could be said to diverge, practical questions frequently arise, e.g. on how principals can be sure that their agents are acting effectively on the principals' behalf, rather than on the agents' own behalf. Other complications arise not so much from a (potential) divergence of interests as from a (potential) asymmetry of information. The 'costs' of agency include those incurred by principals to monitor their agents, and those incurred by agents to give assurances to their principals that the agents are in fact faithfully and reliably serving the principals' interests. Attempts to evaluate, and reduce agency costs, can be seen in the analyses of a wide variety of areas (e.g. employment agreements, executive compensation policies, and franchise agreements). The set of issues is often considered under the label, 'principal–agent problem'.

See **principal–agent problem**

American legal realism The label for a category of legal commentators, primarily from the 1930s and 1940s, but with some significant contributions earlier and later. These commentators were 'realists' in the sense that they wanted citizens, lawyers, and judges to understand what was *really* going on behind the jargon and mystification of the law. The major figures of the movement included Jerome Frank (1889–1957), Karl Llewellyn (1893–1962), Robert L. Hale (1884–1969), Morris R. Cohen (1880–1947), Max Radin (1880–1950), W. Underhill Moore (1879–1949), and Felix S. Cohen (1907–53).

Oliver Wendell Holmes, Jr., (1841–1935) is sometimes included among the realists, though he lived and wrote at an earlier time, because Holmes's work was very influential among the realists, and most of the themes with which the realists are associated are first found in Holmes's work. Similarly, Roscoe Pound (1870–1964) is sometimes counted among the realists, even though Pound wrote work critical of American legal realism, for Pound's early work on 'sociological jurisprudence' influenced and presaged much of the realists' views.

There is a series of overlapping themes that connect the realists. Many raised challenges to the way that judges at the time actually decided cases: that these judges portrayed their work as the deduction from simple premises or basic legal concepts, when in fact the decisions

were grounded in policy preferences or the judge's biases. Other realists argued at a more basic and abstract level that legal rules could never determine the outcome of particular cases (or at least not for the more difficult cases), that rules were at best short-hand statements of how judges have decided issues of this sort in the past, or shorthand predictions of how they are likely to decide such issues in the future.

Such beliefs in 'rule scepticism' or 'legal indeterminacy' in turn fed a preference for deciding cases on social science grounds, instead of on the judge's unstated biases. Many legal realists shared a faith that there was a sufficiently objective science of human behaviour, which would eventually lead to objective knowledge of how legal rules could be fashioned better to achieve the common good.

Another aspect of the realist or sceptical view of (many) legal realists was to tie rights to remedies: that is, to emphasize that one's view of a legal protection should be strongly connected to the legal remedies one could obtain for its violation. (This view was to lead some American Contract Law scholars to change the way they taught Contract Law, and the way they wrote textbooks in the area—starting the course with remedies, rather than consideration or offer/acceptance.)

A few among the realists (e.g. Robert Hale) offered analyses that could be taken as critical of the basic foundations of the economic and political system. For most of the realists, however, the criticism of legal, political, and economic life related more to change (though sometimes *substantial* change) *within* the established system. Thus, it was not surprising that many of the realists took up government posts serving President Franklin D. Roosevelt's 'New Deal' economic programmes.

The legacy of American legal realism has also been a point of contention. There are those who assert that the realists have fully prevailed, with their insights and critical views being incorporated into mainstream legal thinking (in some circles, it is a cliché to say, 'we are all realists now'). Some of the more critical modern commentators, such as various adherents of critical legal studies, argued that they were the true inheritors of the realist legacy, taking the critical insights of the realists seriously, while discounting other parts of the realist approach, such as the faith in a neutral and objective social science. A second view of the realists is to see them as the forebears of law and economics—in that they undermined the idea that law was sufficient unto itself, and argued for a 'policy science' to study the implications of alternative legal rules, a role that law and economics has taken up. (In undermining the idea of the autonomy and sufficiency of law, the realists were also in a sense the forerunners of all modern 'law and . . . ' interdisciplinary approaches to

law.) Yet a third view of the realists was to see them as a kind of intellectual dead end, useful only for their opposition to formalism, but otherwise putting forward no theoretical position or positive programme that has withstood critical scrutiny.

Additionally, the legal process school, which was briefly quite influential in the United States in the late 1950s and early 1960s, was a direct response to legal realism. Responding to the realist argument that legal rules alone cannot resolve many difficult legal disputes, and that judges were not necessarily experts on the kind of moral and policy arguments implicit in many disputes, the legal process movement pointed out that the legal profession could claim some expertise in questions of procedure—in deciding which person or institution decided disputes and according to what process (e.g. adjudication versus arbitration, and legislation versus agency rule-making). Also, legal process scholars argued that while there might not be unique right answers to all legal questions, judges who properly understood their role would be significantly constrained (e.g. by following what one legal process scholar called 'neutral principles').

See **adjudication, theories of; autonomy of law; Cardozo, Benjamin N.; conceptualism; critical legal studies; Dewey, John; formalism; Frank, Jerome N.; functionalism; Hale, Robert L.; Holmes, Oliver Wendell, Jr.; Hutcheson, Joseph C., Jr.; indeterminacy; legal process; legal reasoning; Llewellyn, Karl N.; neutral principles; pragmatism; public–private distinction; rule scepticism; Scandinavian legal realism; sociological jurisprudence**

analogical reasoning An integral part of legal reasoning, especially, though by no means exclusively, in common law reasoning. The basic structure of analogical reasoning is that if two items or situations are alike in some ways, they are (or should be treated) alike in other ways. In fact, the derivation is at best probabilistic (given some similarities, other similarities are likely, not certain). That analogical reasoning is clearly inferior to deductive reasoning, and arguably inferior also to inductive reasoning, has caused some to be sceptical about legal (or judicial) reasoning generally. However, as some commentators (e.g. Lloyd Weinreb (1936–)) have pointed out, analogical reasoning plays a central role in day-to-day practical reasoning, and there is no reason to believe that it is any less effective or legitimate in legal (or judicial) reasoning.

Within analogical reasoning generally, and particularly within the analogical reasoning used in judicial decision-making, a key question is which similarities and differences are relevant to the issue at hand, and which are irrelevant. For most purposes, one would not distinguish a

prior case because it occurred on a Wednesday rather than a Thursday, or because the defendant had brown hair instead of red hair; but other differences (e.g. the plaintiff's actions helped to increase the risk of accident in one case but not the other; the defendant was a government agency in one case but not the other) *might* be morally and legally significant. How one can distinguish relevant from irrelevant differences, and whether such judgements have an 'objective' basis, remain highly contested.

See **common law; legal reasoning**

analytical jurisprudence An approach to the philosophy of law which emphasizes the analysis of concepts (e.g. 'law', 'right', 'property'). This approach is connected to the more general 'analytical philosophy'. Analytical jurisprudence can be contrasted both with those forms of legal theory more focused on reforming or criticizing the law (e.g. feminist legal theory, American legal realism, and critical race theory), and with approaches that, while less normative, are strongly informed by particular areas of the social sciences or humanities (e.g. historical jurisprudence, sociological jurisprudence, and law and economics).

In particular, analytical (legal) philosophy is a search for the meanings of terms and concepts. Analytical philosophers tend to believe that conceptual analysis is a tenable approach to understanding parts of our world. Analytical claims are contrasted with claims that are primarily normative (what should be done) and claims that are primarily empirical (how things happen to be, as a contingent matter—they could have been otherwise). As W. V. O. Quine (1908–2000) argued ('Two Dogmas of Empiricism', *Philosophical Review*, 1951), it is highly contentious whether analytical claims and empirical claims can be sharply divided (and the dividing line between descriptive claims and evaluative claims is also sometimes challenged).

Analytical philosophy is commonly contrasted with 'continental philosophy' (though many now think the distinction overstated or unhelpful). In this contrast, analytical philosophy refers to philosophical approaches that emphasize logic, broadly understood, and explorations of the surface or hidden logic of terms and concepts, and is associated primarily with English-language theorists (e.g. Bertrand Russell (1872–1970) and G. E. Moore (1873–1958)). Continental philosophy is usually associated with the broad French and German systematic theories (e.g. G. W. F. Hegel (1770–1831) and Maurice Merleau-Ponty (1908–61)).

See **conceptual analysis**

analytical legal philosophy *See* **analytical jurisprudence**

animal rights The relatively abstract question of whether animals (or certain kinds of animals) are capable of having rights is often conflated with the moral question of how human beings ought to act towards animals, while in fact the two questions are relatively independent. As regards the conceptual question, those who believe that only entities with the power of autonomous choice can be said to have rights might deny that animals have rights, but could still maintain (e.g. under a utilitarian moral theory) that human beings should not inflict pain on such creatures without very good reasons. One could similarly argue, under a different conceptual and moral theory, that while animals *are* the type of entity that can have rights, they *in fact* do *not* have any rights, or that any rights they have are overridden in relevant circumstances by stronger rights held by human beings.

See **interest theory (of rights); rights; utilitarianism; will theory (of rights)**

anthropology of law The application of anthropology to law, whose importance is based in part on what such studies have purportedly shown about the nature and variety of legal (and near-legal) forms of organization, and in part on the reflections on the nature of law that anthropologists have brought to their work, prior to and independent of their subsequent findings in the field. Some of the better-known work, such as E. Adamson Hoebel's *The Law of Primitive Man* (1954), Bronislaw Malinowski, *Crime and Custom in Savage Society* (1926), and Max Gluckman, *Judicial Process Among the Barotse of Northern Rhodesia* (1967), showed the variety of ways in which different communities guided behaviour and settled disputes. (There was also a notable meeting of legal anthropology and American legal realism when Karl Llewellyn and E. Adamson Hoebel co-wrote *Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (1941).) Legal anthropology has tended to focus on law as the source of social order. Anthropological studies of law have influenced sociological inquiries: defining 'law' in general ways to allow for more fruitful comparison and analysis. Additionally, anthropological studies have been useful both as support and refutation for various views within the 'historical jurisprudence' school regarding the connection between social development, legal institutions, and legal norms.

See **historical jurisprudence; law and society; sociological jurisprudence**

Aquinas, Thomas Arguably the most important philosopher and theologian of medieval times, Saint Thomas Aquinas (1224–74) wrote the first detailed and systematic discussion of natural law theory in his most important work, *Summa Theologiae* (unfinished at his death in 1274). Aquinas's work was important for trying to show Church doctrines to be consistent with the teachings of Aristotle, to show Faith as consistent with and supported by Reason (while retaining the idea that some aspects of the true faith will be knowable only through revelation).

Aquinas's writings on law (largely confined to *Summa Theologiae*, I–II, questions 90–7), while not considered central to his theological project, are none the less original and have had lasting significance in theoretical thinking about law, as much of the natural law tradition in jurisprudence can be seen as elaborations on this work.

Aquinas defines law as 'an ordinance of reason for the common good of a community, promulgated by the person or body responsible for looking after that community' (qu. 90, art. 4, corpus). According to Aquinas, human positive law in line with natural law was 'binding in conscience'—a not-quite-equivalent modern translation would be to say that such laws created a prima facie moral obligation. (Natural law in turn is grounded on 'eternal law'—divine providence.)

For Aquinas, the connection between natural law and human positive law (the positive law the lawmaker *should* enact) is sometimes a matter of direct derivation, and sometimes a matter of *determinatio*—a selection among equally legitimate alternatives within a general framework (qu. 95, art. 2).

Unjust laws (laws contrary to the Common Good, exceeding the lawgiver's authority, or imposing disproportionate burdens) do not 'bind in conscience' and may be disobeyed if this can be done 'without scandal or greater harm [*turbationem*—also sometimes translated as "disorder" or "demoralization"]' (qu. 96, art. 4, corpus). This is usually understood as meaning that the decision whether to obey an unjust law, like many moral decisions, may come down to the relative good and harm that might be caused by that action (for example, the public disobedience of an unjust law in an otherwise generally just legal system may work to undermine the legal system, thus causing more harm than good).

Aquinas writes elsewhere that 'every human positive law has the nature of law to the extent that it is derived from the Natural Law. If, however, in some point it conflicts with the law of nature it will no longer be law but rather a perversion of law' (qu. 95, art. 2, corpus).

This is probably as close as Aquinas comes to stating the phrase often associated with him and with natural law theory generally, that 'an unjust law is no law at all' (*lex iniusta non est lex*).

See ***determinatio***; ***lex iniusta non est lex***; **natural law theory**

Aristotle The Greek philosopher (384–322 BC) who, along with his teacher, Plato, is one of the foundational writers of Western philosophy. While his influence is pervasive (if often indirect) in *all* theory, the connection with legal theory is most evident in the following areas: (1) justice—where his analysis of corrective and distributive justice remains central, as well as his distinction between acting strictly according to the rules ('legal justice') and what 'true justice' might require by way of 'equity'; (2) natural law theory—where many of his ideas, translated through Augustine and then Aquinas, particularly about form and teleology, helped to shape the tradition; and (3) the use of rhetoric within law (in making persuasive legal arguments).

See **corrective justice; distributive justice; equity; justice; natural law theory**

Arrow's theorem Also known as 'Arrow's paradox' or the 'impossibility theory', it is a foundational principle of social choice theory, showing that there are often no rational means of aggregating individual preferences into an expression of social choice. More technically, it can be shown that given choice among three or more options, five apparently reasonable and intuitive conditions cannot all be met simultaneously in many situations: (1) minimum rationality (transitivity)—if society prefers outcome A to outcome B, and outcome B to outcome C, then society prefers A over C; (2) Pareto optimality—if at least one person prefers A over B, and everyone else either agrees or is indifferent, then society prefers A over B; (3) non-dictatorship—society's preferences are not simply to be equated with that of any one person; (4) independence of irrelevant alternatives—if option C is not being considered, then whether A is preferred to B should not depend on how either compares to C; and (5) unrestricted domain—there are no restrictions on how the available options can be ranked by individual voters.

While the proof is relatively complicated, examples are common. Consider three voters: Voter 1 prefers A to B, and B to C; Voter 2 prefers B to C, and C to A; and Voter 3 prefers C to A, and A to B. Among these three voters, a majority would prefer A over B, but there is *also* a majority for B over C, *and* C over A. Collectively, transitivity

breaks down (that is, though the group collectively prefers A over B *and* B over C, it does *not* prefer A over C), and disparate results can occur depending on the order in which choices are put to the voters.

This theorem can be seen as a generalization or improvement on Condorcet's voting paradox, which had been published two hundred years earlier, though it was not much noticed at that time.

Arrow's theorem has reshaped aspects of political theory and economics, owing to its implications both for predicting what officials will do and for welfare economics—discussing what *should* be done, in terms of maximizing welfare, given people's preferences. The theorem raises questions as to whether one can usefully speak in terms of a social or collective version of, or aggregation of, individual utility curves or preference functions.

See **Condorcet's voting paradox; public choice theory; social choice theory**

Austin, J. L. John Langshaw Austin (1911–60), was an English philosopher of language, whose important works included *Sense and Sensibilia* (1962) and *How to Do Things with Words* (1962). J. L. Austin's work on 'ordinary language philosophy', advocating that distinctions of analytical importance can be found within the resources of ordinary linguistic usage, was influential in H. L. A. Hart's (1907–92) theory of law. Hart's theory of law in *A Concept of Law* (1961) was constructed around ordinary-language distinctions between acting out of habit and acting according to a rule, and between 'being obliged' and 'having an obligation'.

Austin was also known in philosophy of language for his distinction between 'constative' and 'performative' utterances, a 'speech act' theory which recognizes that sometimes language is *part of the performance*, and not merely a report of it. Attempts to build theories of law around this insight can be found in some of the Scandinavian legal realists, and in H. L. A. Hart's earliest writings, though Hart largely dropped this line of analysis by the time of his better-known works.

See **Hart, H. L. A.; Scandinavian legal realism**

Austin, John John Austin (1790–1859) was an English legal and political theorist from whose work modern legal positivism developed, though modern legal positivism has rejected many of his views. Austin was called to the Bar in 1818, but he took on few cases, and quit the practice of law in 1825. Austin shortly thereafter obtained an appointment to the first Chair of Jurisprudence at the recently established

University College London. He prepared for his lectures by study in Bonn, and evidence of the influence of continental legal and political ideas can be found scattered throughout Austin's writings. Lectures from the course he gave were eventually published as *The Province of Jurisprudence Determined* (1832) (a more complete set of Austin's lecture notes were published, posthumously, as a large two-volume set).

While Austin's work was influential in the decades after his death, its impact seemed to subside substantially by the beginning of the twentieth century. A significant portion of Austin's current reputation derives from H. L. A. Hart's (1907–92) use of Austin's theory as a foil for the explanation of Hart's own, more nuanced approach to legal theory.

Analytical Jurisprudence and Legal Positivism

Early in his career, Austin came under the influence of Jeremy Bentham (1748–1832), and Bentham's utilitarianism is evident in the work for which Austin is best known today. However, Austin's particular reading of utilitarianism (at one point equating divine will with utilitarian principles) has had little long-term influence, though it seems to have been the part of his work that received the most attention in his own day.

Austin's importance to legal theory lies elsewhere—his theorizing about law was novel at three different levels of generality. First, he was arguably the first writer to approach the theory of law analytically (as contrasted with approaches to law more grounded in history or sociology, or arguments about law that were secondary to more general moral and political theories). Second, within analytical jurisprudence, Austin was the first systematic exponent of 'legal positivism'—an approach to the study of law centred on the view that law 'as it is' must be separated from any argument about law 'as it ought to be'. Most of the important theoretical work on law prior to Austin had treated jurisprudence as though it were merely a branch of moral or political theory, asking how the state should govern (and what gave governments legitimacy), and under what circumstances citizens have an obligation to obey the law. Austin specifically, and legal positivism generally, offered a quite different approach to law: as an object of 'scientific' study, dominated neither by prescription nor by moral evaluation. Third, Austin's version of legal positivism, a 'command theory of law', was distinctive, though there were broad similarities with the views developed by Jeremy Bentham, whose theory could also be characterized as a 'command theory'. (Austin's work was more influential in this area than Bentham's, largely because Bentham's jurisprudential writings did not appear in a

form even roughly systematic until long after Austin's work had already been published.)

Austin's Views

Austin's basic approach was to ascertain what can be said generally about all laws. Austin's analysis is often viewed as either a paradigm or a caricature of analytical philosophy, in that his discussions are dryly full of distinctions, but thin in argument. The texts lack much of the meta-theoretical, justificatory work; where Austin does articulate his methodology and objective, they are fairly traditional: he 'endeavoured to resolve a law (taken with the largest signification which can be given to that term properly) into the necessary and essential elements of which it is composed' (*The Province of Jurisprudence Determined*).

As to what is the core nature of law, Austin's answer is that laws ('properly so called') are commands of a sovereign. He clarifies the concept of positive law (i.e. man-made law) by analysing the constituent concepts of his definition, and by distinguishing law from other concepts that are similar: (1) 'Commands' involve an expressed wish that something be done, and 'an evil' to be imposed if that wish is not complied with. (2) Rules are general commands (applying generally to a class), as contrasted with specific or individual commands ('drink wine today' or 'John Smith must drink wine'). (3) Positive law consists of those commands laid down by a sovereign (or its agents), to be contrasted with those of other lawgivers, such as God's general commands, and the general commands of an employer. (4) The 'sovereign' is defined as a person (or collection of persons) who receives habitual obedience from the bulk of the population, but who does not habitually obey any other (earthly) person or institution (Austin's 'sovereign' is related to, but arguably more precise than the sovereign found in prior theorists, e.g. Thomas Hobbes (1588–1679)); Austin thought that all independent political societies, by their nature, have a sovereign. (5) Positive law should also be contrasted with 'laws by a close analogy' (which includes positive morality, laws of honour, international law, customary law, and constitutional law) and 'laws by remote analogy' (e.g. the laws of physics).

In the criteria set out above, Austin succeeded in delimiting law and legal rules from religion, morality, convention, and custom. However, also excluded from 'the province of jurisprudence' were customary law (except to the extent that the sovereign had, directly or indirectly, adopted such customs as law), public international law, and parts of

constitutional law. (These exclusions alone would make Austin's theory problematic for most modern readers.) Within Austin's approach, whether something is or is not 'law' depends on which people have done what: the question turns on an empirical investigation, and it is a matter mostly of power, not of morality. Austin is not arguing that law should not be moral, nor is he implying that it rarely is; neither is Austin taking a nihilistic or sceptical position. He is merely pointing out that there is much that is law that is not moral, and what makes something law does nothing to guarantee its moral value.

In contrast to his mentor Bentham, Austin had no objection to judicial lawmaking, which Austin called 'highly beneficial and even absolutely necessary'. Nor did Austin find any difficulty incorporating judicial lawmaking into his command theory: he characterized that form of lawmaking, along with the occasional legal/judicial recognition of customs by judges, as the 'tacit commands' of the sovereign, the sovereign's affirming those 'orders' by its acquiescence.

Criticisms

As many readers come to Austin's theory mostly through its criticism by other writers (prominently, that of H. L. A. Hart), the weaknesses of the theory may be better known than the theory itself: (1) In many societies, it is hard to identify a 'sovereign' in Austin's sense of the word (a difficulty Austin himself experienced, when he was forced to describe the British 'sovereign' awkwardly as the combination of the King, the House of Lords, and all the electors of the House of Commons). Additionally, a focus on a 'sovereign' may make it difficult to explain the continuity of legal systems: a new ruler will not come in with the kind of 'habit of obedience' that Austin sets as a criterion for a system's rulemaker. However, one could argue that the sovereign is best understood as a constructive metaphor: that law should be viewed as if it reflected the view of a single will (a similar view, that law should be interpreted as if it derived from a single will, can be found in Ronald Dworkin's (1931–) work). (2) A 'command' model seems to fit some aspects of law poorly (e.g. rules which grant powers to officials and to private citizens—e.g. the rules for making wills, trusts, and contracts), while excluding other matters (e.g. international law) which most people are not inclined to exclude from the category 'law'. (3) More generally, it seems more distorting than enlightening to reduce all law to one type. For example, rules that empower people to make wills and contracts perhaps can be recharacterized as part of a long chain of reasoning for eventually imposing a

sanction (Austin spoke in this context of the sanction of 'nullity') on those who fail to comply with the relevant provisions. However, such a recharacterization misses the basic purpose of those sorts of laws—they are arguably about granting power and autonomy, not punishing disobedience. (4) A theory that portrays law solely in terms of power fails to distinguish rules of terror from forms of governance sufficiently just that they are accepted as legitimate by their own citizens.

See **Bentham, Jeremy; Blackstone, William; command theory of law; gunman situation writ large; Hart, H. L. A.; Hobbes, Thomas; international law; legal positivism; reductionist theories of law; utilitarianism; will theory (of rights)**

authority The term has a variety of related meanings within legal and political theory. First, a person or institution in certain situations is said to 'have authority' over other people to compel compliance with commands or promulgated norms. Second, one 'is an authority' on a subject if one's expertise makes one a reliable source of information on that subject. Third, a person may derivatively have the authority to do something if the moral or legal system grants that person permission or the power to do it. The first and second sense of authority are often distinguished under the terms of 'practical' (power) versus 'theoretical' (expertise) authorities—reasons for action as against reasons for belief. The third sense of authority is usually dealt with under the rubric of rights (as in 'X has the right/authority to do A').

Theorists often distinguish de facto from de jure authority, where the former speaks to actual power or influence, and the latter to a legal or moral justification for such power or influence.

Robert Paul Wolff raised a famous paradox in his *In Defense of Anarchy* (1970) regarding how practical authority could ever be legitimate: authority involves deference to another, and how can it be morally right, or consistent with autonomy, to obey someone else, *regardless* of whether one believes that other person to be right or wrong? To do something just because one has been told (commanded) to do so could be seen as an abandonment of one's right and obligation to decide for oneself, considering all relevant reasons, what is to be done. A variety of responses have been offered to Wolff's challenge. One, based on Joseph Raz's (1939–) work (e.g. *The Morality of Freedom* (1986)), is that there are occasions when we know that we are more likely to do the right thing (we are 'likely better to comply with reasons which apply' to us) by following someone else's directive rather than deciding for ourselves. This may be because we know the other person to be an expert on the

subject, because we know that our judgement is temporarily less than optimal (e.g. because we are biased, fatigued, or intoxicated), or because the other person is a salient source of co-ordination on some matter on which co-ordination is necessary to achieve an important social good.

Various sorts of jurisprudential theories have turned on the purported role of authority within law. For example: (1) theorists argue about the role of authority in how courts should interpret statutes (e.g. as 'faithful agents' trying to determine the intention(s) of the legislature, for it is the legislature's authoritative choices, even when not entirely clear, that should, under this argument, be given priority); and (2) Joseph Raz's authority-based argument for 'exclusive legal positivism'. Raz's argument, in brief, is that law, by its nature, purports to be a legitimate practical authority for its citizens. However, to be an authority, Raz argues, legal rules must be able to guide without evaluation in terms of the underlying reasons for and against an action. Thus, Raz concludes, the validity and content of law must be ascertainable without resort to moral evaluation (the basic position of exclusive legal positivism).

See **interpretation; legal positivism; rights**

autonomy Self-government, or *the capacity* to govern oneself. The concept of autonomy is central to many moral and political theories, though the nature and possibility of autonomy remain highly contested. For example, for some Kantian theorists, autonomy is evidenced only by actions grounded on reason; actions motivated by desire are not considered autonomous. Some communitarian and feminist theorists criticize the possibility or desirability of autonomy, on the basis that our actions never completely derive from our own will, but are inevitably conditioned by our position in society.

Within legal theory, discussions of autonomy often arise within the context of debates about the legislative enforcement of morality, with those who believe that autonomy is a central value urging a strong presumption against state action that constrains the range of life choices available to citizens.

See **consent; morality, legal enforcement of**

autonomy of law The 'autonomy of law' refers to a number of related but distinct claims: (1) that legal reasoning is different from other forms of reasoning; (2) that legal decision-making is different from other forms of decision-making; (3) that legal reasoning and decision-making are sufficient to themselves, that they neither need help from other

approaches, nor would they be significantly improved by such help; and (4) that legal scholarship should be about distinctively legal topics (often referred to as 'legal doctrine') and is not or should not be about other topics.

A claim about the autonomy of law could be understood in three different ways: descriptively, analytically, and prescriptively. Descriptively, the question is what level of autonomy is assumed or encouraged by current practices within a particular legal system. The form of judicial reasoning and the approach to legal education within a community may be more or less autonomous. The general trend in both England and the United States, and in both legal reasoning and legal education, has been *away from* legal autonomy, towards a more interdisciplinary approach. Analytically, the question is whether law, by its nature, either *necessarily is* or *necessarily is not* autonomous. For an analytical claim, one would investigate the ways in which legal reasoning is purportedly autonomous, and see whether such claims stand up to close scrutiny. Prescriptively, one can argue that current practices should (or should not) be changed to incorporate greater or lesser dependence on other disciplines, either in judicial decision-making or in legal education. (A desire for greater use of other disciplines can, but need not, be connected with an argument about the non-autonomy of legal reasoning and the (limited) value of traditional doctrinal legal scholarship. One could argue that legal doctrinal analysis *requires* no supplement, but would none the less be improved by ideas from other disciplines.)

Obviously, there are connections between the analytical claim regarding autonomy and the descriptive and prescriptive claims. If one believes that legal reasoning either *must be* or *cannot be* autonomous, then this obviously constrains what one can sensibly prescribe for the practice, and must also affect the description of the practice (e.g. it may be, as some of the American legal realists argued, that judges portray their decisions as autonomous when, according to the realists' analytical view, that cannot be the case, and thus the judges must be attempting to deceive others, or at least are unintentionally deceiving themselves).

While it could be argued that the legal profession seems to depend on a language and a way of thinking entirely foreign to common sense and common language, this is only the appearance of one extreme of the practice. At the other extreme, those who claim that legal reasoning is in no way distinctive do not necessarily claim that there is no need for legal experts, and no such thing as legal expertise. For even if there is no special way of reasoning legally, decisions about what the law requires

would need a knowledge of the sources of law, a set of rules and principles that (in most societies) are extensive and separate from the rules and principles of other normative systems (e.g. conventional morality or religion).

If there is an argument to be made for an approach to decision-making that is distinctively legal (both separate from non-legal forms of decision-making, and common from one legal system to the next), it would probably be one that emphasized certain aspects of (most) legal systems: institutional decision-making, a hierarchy of decision-makers, and an effort to systematize the rules. And because law is intended as a practical guide for action, there is a pressure in the interpretation and application of legal norms towards consistency, coherence, stability, predictability, and finality. Those pressures are sometimes at tension with the desire that the outcomes be fair and just (with 'justice' here referring to those aspects of justice that go beyond 'following the rules laid down'—going beyond meeting reasonable expectations and reasonable reliance). These tend to combine into rules of precedent, statutory interpretation, and constitutional interpretation. Though such rules tend to vary from one legal system to another, rough convergences can be found, and the form of reasoning can be contrasted with other social practices and social institutions that do not operate under similar constraints and pressures.

A similar conclusion might be reached from a different approach: what is distinctive about legal reasoning and decision-making is that it is primarily, though not exclusively, guidance by way of rules. The peculiar normative status of rules (and promises and agreements) is that when there is a reason to be governed by and through rules, one has a reason to do as the rule states independent of the content of the rule (though this is only a presumptive conclusion, which can be overcome when contrary reasons of a sufficient weight are present—thus, one can have reasons to disobey an unjust rule, just as one can have reasons to disregard a promise to do an evil act). In such situations as common-law judging, where the rule-applier also has the power to modify the rule, the tensions between following the rule earlier laid down, even when not optimal, and promulgating the optimal rule, together lead to a distinctive structure and style of analysis and argumentation (though other rule-governed institutions may have similar forms of argument and decision).

See **American legal realism; autopoiesis; formalism**

autopoiesis An approach to law developed by Niklas Luhmann (1927–98) and Gunther Teubner (1944–) and others, under which social systems, including law, are seen as (relatively) autonomous. Autopoiesis is the idea that many systems (both biological and social) have significant feedback or recursive mechanisms that allow the self-regulation of the system. 'Autopoietic law' starts from the notion that legal systems often are significantly self-regulating, self-reinforcing, and self-sustaining. Law is created, transformed, and justified according to its own rules; and autopoietic law discusses what follows from this fact. It is important to note that, at least in Luhmann's version of autopoiesis, 'law' and 'legal system' refers primarily to the 'discourse' of law, not to some set of institutions. In particular, Luhmann focuses on the creation of meaning—in the case of law, the way that things are defined as either 'lawful' or 'unlawful'. The claim is not that law is 'autonomous' in the sense of being unaffected by external forces (e.g. political movements and cultural changes); autopoietic law accepts that such forces affect law, but the effects are transformed into legal terms (distinguishing what is 'lawful' and 'unlawful') by the normal legal processes. Under this approach, there is a sense, not always fully delineated, in which law 'acts', 'thinks', or develops 'on its own'.

See **autonomy of law; Luhmann, Niklas**