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AUSTIN'S METHODOLOGY? HIS BEQUEST TO JURISPRUDENCE

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I. 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 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 thirty or forty 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

* School of Law, Swansea University. I am grateful to Michael Freeman and the participants at the John Austin 150th Anniversary Conference, *John Austin and his Legacy*, UCL, December 2009, for much stimulating discussion and helpful comments on an earlier draft of this essay presented as a paper at that conference. I am particularly grateful to Stanley Paulson for further helpful discussion thereafter.

[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 article to a consideration of legal theory in the English-speaking world. Despite acknowledging the influence of Continental legal theorists (see note 12 below), 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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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 mediaeval 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 is 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 establishing its foundations, could an adjustment

[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 pp. 77, 97 (V)(j); 86–87.

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to that process produce (across all aspects) a more engaged theory of law?

These issues are explored within the following five sections of this article. In the next section (II) 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 III 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 section IV, 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 V 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 section, VI, 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.

II. The Controversy

When John Austin's introductory lectures were delivered 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

[5] John Austin, *The Province of Jurisprudence Determined* (London 1832) – H.L.A. Hart (ed.) (London 1954) – Wilfrid Rumble (ed.) (Cambridge 1995). Citations below are from the Hart edition, with page references to the Rumble edition provided in square brackets.

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efforts, for all their significance in promoting jurisprudence as a distinct subject, have not succeeded in resolving the controversy over its subject matter. 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 Romanist influences,

[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 1950). The title of the first chapter, which previously appeared in two parts in (1944) 7 M.L.R. 97 & 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 W.L. Morison, *John Austin* (London 1982); Wilfrid Rumble, *The Thought of John Austin: Jurisprudence, Colonial Reform, and the British Constitution* (London 1985); Robert Moles, *Definition and Rule in Legal Theory: A Reassessment of H.L.A. Hart and the Positivist Tradition* (Oxford 1987); Wilfrid Rumble, *Doing Austin Justice: The Reception of John Austin's Philosophy of Law in Nineteenth-Century England* (London 2004); Neil Duxbury, *Frederick Pollock and the English Juristic Tradition* (Oxford 2004), pp. 97–106.

[9] Hutchinson, note 7 above, at 1–7, 21–24, 29. See also, Stone, note 6 above, 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 2009), pp. 293, 335. The need to differentiate both influences and outputs, becomes particularly acute when Leiter and Dworkin are brought into an Austinian tradition (as Hutchinson, note 7 above, suggests).

[11] Stone, note 6 above, at 3, refers to "The Austinian Revelation".

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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

[12] John Austin, *Lectures on Jurisprudence or the Philosophy of Positive Law*, 5th ed. revised and edited by Robert Campbell (London 1885), p. 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, note 6 above, at pp. 42–43.

[14] Hutchinson, note 7 above, at p. 11.

[15] Stone, note 6 above, at p. 32 & 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 pp. 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 Bix, "John Austin and Constructing Theories of Law", forthcoming (2011) 24 Canadian Journal of Law and Jurisprudence.

[17] Stone, note 6 above, at pp. 4–5, 42.

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conceptual analysis in order to provide an account of the essential nature of law.[18] Yet as Hutchinson himself concedes, a conscious interest in 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.

III. 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 alter radically 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.

[18] Hutchinson, note 7 above, at pp. 3, 15, 23; 11, 18, 60; 22–23, 30–31, 40–41.
[19] *Ibid.* at p. 33. For general discussion, see Andrew Halpin, "Methodology" in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory*, 2nd ed. (Hoboken, NJ 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, note 19 above.
[21] Hutchinson, note 7 above, at pp. 5, 43–44.

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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 viewpoints, no matter how spurious and unhelpful that particular theoretical viewpoint is then considered to be. Such a failed theoretical viewpoint has still engaged within a common field of inquiry alongside other competing viewpoints, in which its merits or otherwise can be tested, and so may contribute fruitfully to the general theoretical enterprise. In contrast to that, what Austin or Hutchinson is claiming is that a theoretical viewpoint falling outside the appropriate understanding of the field of inquiry, just because it is allied to the alternative, inappropriate, understanding of the field of inquiry, will entrench that false understanding in its competition with any other viewpoints it is prepared to compete with. The outcome of that competition can then only yield illusory results.

Perhaps an analogy may prove helpful. Suppose our concern is with the science of the wind. More particularly, we wish to understand how to obtain a fair wind to carry our ships to their preferred destination. One understanding of the appropriate field of inquiry treats the subject matter as essentially involving discernment of the mood of a deity in control of the wind and what is required to appease that deity. So, for Agamemnon, illumination eventually arrives when the seer Calchas reveals that the anger of the goddess Artemis will only be appeased by the sacrifice of Agamemon's daughter, Iphigenia, in order to release the wind that will carry the Greek ships to Troy. An alternative understanding of the appropriate field of inquiry treats the subject matter as essentially involving discernment of the relationships between different atmospheric phenomena so as to predict their outcome as manifested in a particular form of weather. So, for NASA, illumination is sought from experienced meteorologists as to when a fair wind can be expected to assist the passage of Endeavour on its voyage to the international space station.[22] Granted that Calchas was the best seer available to Agamemon, and that NASA employs the best meteorologists to be found, neither party can produce anything but illusion from the viewpoint of the other's understanding of the field of inquiry (though both purport to be dealing with predicting the wind).

Having taken the trouble to emphasise the magnitude of the claims made by Austin and Hutchinson, we should now express some caution over the readiness to overstate such claims. It can sometimes be too

[22] In July 2009 NASA delayed the launch of the space shuttle Endeavour for three evenings in a row due to bad weather.

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easy to cut off theoretical debate by proclaiming from one side that the opposition is so steeped in unacceptable axioms regarding the nature of the subject matter that no fruitful engagement with them is possible. Ronald Dworkin has advanced this type of argument in recent years.[23] The practice borrows some credibility from an approach to scientific understanding epitomised in Thomas Kuhn's "paradigm shift".[24] Yet even here it is possible to break out of the apparently self-contained and mutually insulated paradigms, to find some common ground over which engagement between them becomes possible. Kuhn himself acknowledged the additional ground of human experience over which rivalry between paradigms might be contested.[25]

So it is not inconceivable that even Agamemnon and NASA might find their opposing views on the nature of the wind brought into resolvable conflict through the acknowledgement of some common experience which has to be admitted on both sides favours the one viewpoint rather than the other. After all, they can both agree on identifying the same occurrence as the wind – it is in understanding its nature that they move so far apart.

This brings us to the crux of the matter. If a number of theoretical viewpoints have *identified* in common a particular subject matter, how precisely does one theoretical viewpoint, with its distinctive understanding on the nature of that subject matter, engage with other theoretical viewpoints which *understand* the nature of that subject matter in quite different ways?

Finding a case of axiomatic disengagement, where it is concluded that there is no possibility of meaningful discourse between the opposing viewpoints, should be a last resort. While there is still common acceptance of the identity of the subject matter, there remains the prospect of finding an argument drawing on some facet of the experience of that subject matter which will weaken the understanding of one viewpoint in favour of the other.[26] Nevertheless, where the axiomatic base of a particular viewpoint extends beyond an understanding of the subject matter in question so as to embrace a comprehensive world view (such as one based on belief in the Greek Pantheon, or on scientism), then it may have to be conceded for all practical purposes that no engagement is possible. If so, we should at least record the basis of the disengagement, so as to clarify where the real opposition between the theoretical viewpoints lies.

[23] Technically, Dworkin has primarily employed the argument to scatter his enemies by the device of placing them in an impossible position with each other. For discussion, see Halpin, note 4 above, at pp. 79–81.
[24] T.S. Kuhn, *The Structure of Scientific Revolutions*, 2nd ed. (Chicago 1970).
[25] *Ibid.* at pp. 72, 77.
[26] For an illustration of this employing Dworkin's engagement with Hart, see Halpin, note 4 above, at p. 81.

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Avoiding axiomatic disengagement, how is it possible for one theoretical viewpoint to make a claim of the magnitude we have attributed to Austin and Hutchinson? The claim is extensive, we may recall, because it purports to establish not the detail of a particular viewpoint on the understanding of the subject matter, but the general approach to be adopted to understanding the nature of that subject matter – tantamount to establishing a distinct field of inquiry (a "province") for the subject. Frankly, it would be easier to regard this as a case of axiomatic disengagement such that the claim's force would lie in adopting an axiom strong enough to be irreconcilable with all rival theoretical viewpoints and so dispossess them of explanatory power at the very threshold of engaging in argument. However, the evidence is that Austin and Hutchinson are keen to engage with their opponents, and we should seek an alternative explanation if we can find one.

An alternative might be found in the form of their providing an insight on the subject matter that relates to one or more of the key tenets held by opposing viewpoints but is powerful enough to knock out all of those viewpoints for failing to follow through the clear implication of that insight, which leads ineluctably into the favoured field of inquiry as opposed to that previously followed by the opponents. Cast in this form, Austin's engagement with his opponents can be rendered in a simplified manner along the following lines. We commence with the insight delivered on the back of the accepted tenet: You accept that law can be made by the legislature, but on occasion it can be observed that the law so made proves to be far less than justice requires. The clear implication: In order to understand law, we need to be able to understand the law that is unjust. The ineluctable conclusion: We shall not succeed in understanding law by treating the field of inquiry as involving the study of the pursuit of justice, but rather as the study of what processes are capable of producing law.[27]

The magnitude of Austin's claim that any theoretical viewpoint capable of bringing illumination must operate within his field of inquiry now lies not in the strength of an irreconcilable axiom which disengages all opposing viewpoints before debate can commence. Rather, it lies in the ambition of his insight which engages his opponents on common ground before dismissing them fundamentally and comprehensively for failing to attach to that insight the clear implication that he has grasped. The size of the ambition is measured by a dual confidence, that the insight will first be accepted as an insight, and secondly that it leads to the particular implication which broadens out into a recognition of the appropriate field of inquiry for the subject.

[27] Compare Austin, note 5 above, at pp. 184–185 [157–158].

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Axiomatic disengagement and ambitious insight can be recognised as two distinct routes to reaching the kind of claim made by Austin and Hutchinson over the province of jurisprudence. Before considering in detail what motivated Austin[28] to establish an exclusive field of inquiry for jurisprudence, and the arguments he puts forward to vindicate his claim, there is an ancillary matter that needs to be briefly mentioned.

Another strategy can be adopted to set apart a particular theoretical viewpoint within its own field of inquiry so as to disengage opposing viewpoints. This is to employ the device of splitting the subject matter. The preferred viewpoint is then permitted to reign within a field of inquiry that is limited to one side of the divided subject matter, immune from debate with theoretical viewpoints operating across the divide within the excluded side. The strategy is illustrated by Herbert Hart's suggestion in his Postscript that he and Dworkin had been engaged in separate inquiries (relating, respectively, to a general understanding of law applicable to all municipal legal systems, and an understanding of law within a particular municipal legal system) and hence had not been engaged in the same debate.[29] Putting to one side the plausibility of Hart's suggestion,[30] his motive seems conciliatory rather than hostile, in that both inquiries in such a division can coexist with complementary roles.

Nevertheless, hostilities may break out here. An attempt to impose a split field of inquiry can be resisted by theorists working the other side of the divide who do not accept that their work is as limited as has been suggested, or even feel marginalised by the division. They may consider that their theories do have something pertinent to contribute to the issues on the other side, as is surely the case with Dworkin in relation to Hart, and would appear to be likely for any theorist working on a particular legal system in relation to issues thrown up by a general theory of law – unless we are prepared to countenance a general theory that need not relate to particular instances.[31] The feeling of marginalisation may arise from a sense that the division does not merely represent a practicable division of labour, but introduces a hierarchical ordering of significance: making the work on the other excluded side to be of primary importance. This sentiment has appeared among those

[28] For a detailed consideration of Hutchinson's position, see Halpin, note 7 above.

[29] H.L.A. Hart, "Postscript", *The Concept of Law*, 2nd ed., Penelope Bulloch and Joseph Raz (eds.) (Oxford 1994), pp. 240–241.

[30] For discussion, see Halpin, note 4 above, at pp. 87, 103 (XI)(a).

[31] Insisting on some commerce between general theory and particular instances becomes problematical for a strict reading of the "philosophical" methodology dealing with law's essential nature or necessary characteristics, attributed to analytical jurisprudence in general by Hutchinson (see text at note 18 above), but certainly found in the work of Joseph Raz. For discussion, see Brian Bix, "Raz on Necessity" (2003) 22 Law and Philosophy 537, and "Raz, Authority, and Conceptual Analysis" (2006) 50 American Journal of Jurisprudence 311; Halpin, note 19 above, at pp. 612–614.

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who criticise Hart for setting the limits of his field of inquiry to official state law, and deriving a general concept of law exclusive to that limited field of inquiry, thus denigrating other legal phenomena with a lesser status.[32]

Although arranging the boundaries of a field of inquiry, either by actively splitting a recognised field, or by omitting to move beyond the restrictions settled by a recognised field, concerns more the identification of the subject matter than an understanding of the nature of that subject matter, it would be a mistake to deny the connection between the two. Setting the boundaries for what is identified as the subject matter for theoretical investigation will obviously impinge upon how we can view the nature of that subject matter. Put simply, the more expansive the identification of subject matter, the more demanding and competitive it will become to propose a common nature to that subject matter favoured by a particular theoretical viewpoint. Conversely, the narrower the area of field of inquiry that is split off, the easier it is to maintain a particular theoretical viewpoint favouring an understanding of the nature of that subject matter and to isolate it from competing viewpoints.

IV. Austin's Ambitious Insight and Methodology

The rendering of Austin's engagement with his opponents in the previous section as a matter of "ambitious insight" can now be examined more closely. It will be recalled that the ambition of the insight was broken down into, first, a confidence that the insight would be accepted, and secondly, a confidence that its acceptance would lead to a recognition of the appropriate field of inquiry, namely, Austin's determination of the province of jurisprudence.

Austin expresses his confidence in no uncertain terms:[33]

> The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation and disapprobation. This truth, when formally announced as an abstract proposition, is so simple and glaring that it seems idle to insist upon it.

The insight is "so simple and glaring", but as Austin's following pages illustrate, there are numerous cases where it "has been forgotten". However, Austin remains confident that from the illumination gained from his recalling of the insight, such lapses can readily be written off as

[32] See works cited in Halpin, note 4 above, at p. 100 (VII)(k).
[33] Austin, note 5 above, at p. 184 [157].

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"stark nonsense", "to talk absurdly", "abuse of language", "confusion of ideas" and "contemptible imbecility".[34]

Allow then that Austin's confidence in his insight is justified. Once jolted from any forgetfulness we are prone to by his forceful presentation of the facts, we all accept it is possible to have a law that exists but which lacks merit, or fails some standard we would apply to it. The existence of the law is one thing, its failing another. Austin's confidence then naturally flows over into the second stage: acceptance of the clear implication and the ineluctable conclusion. We have to accept that our study of law will have to take in law with and law without merit, law that passes and law that fails a standard of approval; and, in turn, that our study of what law is will differ from our study of whether laws meet some standard or are regarded as having merit. Within that conclusion, already expressed in the passage quoted above, we have all the argument necessary to win us over to Austin's exclusive province of jurisprudence, the study of positive law.

The opening words of Lecture 1 of *The Province* proclaim, "The matter of jurisprudence is positive law".[35] At this point, the title of Austin's book might simply have been, *Jurisprudence: The Study of Positive Law*. The need to determine a province of jurisprudence follows a few lines further down, once Austin has pointed out a problem: the subject of his chosen study can be, and is, easily confused with other subjects. The task of *determining* the province of jurisprudence is the same as the task of *distinguishing* the subject of jurisprudence from those other subjects: "I begin my projected Course with determining the province of jurisprudence, or with distinguishing the matter of jurisprudence from those various related objects".[36]

Since Austin can show that the subject of law that exists differs from the subject of law that we approve of or has merit (the obvious insight), the province of jurisprudence is determined to include the one and to exclude the other. The other subject of study is entitled by Austin, "the science of legislation: which affects to determine the test or standard … by which positive law ought to be made, or to which positive law ought to be adjusted."[37] There is no startling methodological technique in establishing the exclusivity of Austin's Province, no distinctive methodology of analytical jurisprudence that arises at this point. Accept the insight, and all else follows, aided only by the familiar method of *per genus et differentiam*, a method Austin adopted without

[34] *Ibid.* at pp. 184–188 [157–161].
[35] *Ibid.* at p. 9 [18]. Words echoed at the commencement of "The Uses of the Study of Jurisprudence", *ibid.* at p. 365 [not contained in the Rumble edition]: "The appropriate subject of Jurisprudence, in any of its different departments, is positive law".
[36] *Ibid.* at p. 9 [18]. The alternative representations of Austin's task as determining or distinguishing are repeated subsequently: *ibid.* at pp. 131, 192–193 [116, 164–165].
[37] *Ibid.* at p. 366 – from "The Uses of the Study of Jurisprudence". See also, note 15 above.

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innovation, and tirelessly. In this respect, Austin's approach can be distinguished from the analytical approaches of Bentham and later theorists.

Hart contrasts Bentham's innovations in the exposition of fictitious legal entities with a straightforward application of *per genus et differentiam*, referring to Bentham's techniques of phraseoplerosis, paraphrasis and archetypation.[38] The problem as Bentham saw it, reported by Hart, was the absence of a meaningful superior genus to which fictitious entities belonged. Yet at the very point Bentham is denying the genus, he provides some clue as to its possible construction: "being of the number of … fictitious [legal] entities"; and at a prior point in his lengthy note, he has acknowledged that they "are all of them … the results of some manifestation or other of the legislator's will".[39] Moreover, the three innovative techniques mentioned above do not in themselves preclude the application of *per genus et differentiam*: one simply has a greater store of material by which to recognise membership of a genus or species.

An alternative explanation for Bentham giving up on the process, was that it was simpler and far less work to stop at exposition by reference to the distinctive use of these fictitious legal entitites (which is what the first two innovative techniques amount to) or their distinctive connotations (covered by the third), rather than then proceeding to go through all the possible distinctions generated by a rigorous process of *per genus et differentiam*. This explanation is supported by Bentham himself claiming in the same note to have actually undertaken the "uninviting" labour with "voluminous" results as regards only a part of these fictitious legal entities, the rights and powers of property. Further support for the tendency of Bentham to avoid such painfully extensive labour is perhaps provided by John Stuart Mill's contrast between Austin's untying of intellectual knots with Bentham's cutting of them, the latter finding more use for the battering ram than the builder's trowel.[40]

Hart also suggests that Austin followed Bentham in departing from *per genus et differentiam*,[41] relying on Austin's reference to terms that "will not admit of definition in the formal or regular manner".[42]

[38] H.L.A. Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Oxford 1982), pp. 129–131.

[39] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, J.H. Burns and H.L.A. Hart (eds.) (Oxford 1996), ch. XVI para. XXV n. 1

[40] In Mill's review of Austin's *Lectures on Jurisprudence* in the Edinburgh Review of October 1863, collected under the title, "Austin on Jurisprudence" in Mill's *Dissertations and Discussions* III (1867) and republished in John M. Robson (ed.), *The Collected Works of John Stuart Mill* XXI (Toronto 1984). I am grateful to Philip Schofield for suggesting the significance of Mill's comment.

[41] Hart, note 38 above, at p. 130.

[42] Austin, note 5 above, at pp. 370–371 – from "The Uses of the Study of Jurisprudence".

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However, Austin makes it clear that these merely form a case of complexity, soluble by "long, intricate and coherent" work. His illustration of this work is sufficient to demonstrate his continuing adherence to *per genus et differentiam*: distinguishing the "various classes" of "Laws or Rules", detaching law from morals, and allowing the student to attend to "the distinctions and divisions which relate to law exclusively."[43]

It is also clear that Austin displays no peculiar affinity to philosophy such as to lead to a special "philosophical" methodology for analytical jurisprudence, contrary to what Hutchinson has suggested.[44] In contrast to Hart, whose primary academic discipline was philosophy, and whose targeted peers to judge his initial academic efforts were Oxford philosophers,[45] Austin's frustration was not to have had his academic output assessed as "a schoolman of the twelfth century – or a [nineteenth century] German [law] professor."[46]

Although it is notoriously difficult to tie Hart down to a specific methodology (philosophical or otherwise),[47] it is undeniable that contemporary exponents of analytical jurisprudence under the influence of Hart have openly embraced a philosophical approach, the most overtly philosophical in methodology being Joseph Raz.[48] However, where Austin makes reference to "essential" or "essentials", the "essence" or "nature", "essential difference", and "essential or necessary property",[49] his purpose is to identify those characteristics of various objects or notions (such as law, positive law, independent political society, sovereignty) by which they can be distinguished from others, in order to get on with his standard method of *per genus et differentiam*. There is no quest by Austin for an elevated philosophical grasp of "essential nature" or "necessary characteristic". He simply seeks to extrapolate from empirical observation[50] the character or marks[51] of one thing which set it apart from another.

Austin's use of character and mark clearly demonstrates a directly empirical and philosophically unsophisticated approach. His liberality in employing these terms synonymously, and as synonyms for his

[43] *Ibid.* at p. 371. See also, Morison, note 8 above, at 60, where Austin's remark on terms not admitting of definition is attributed to "probably just retailing recollected Bentham." Morison points out that Austin "then … proceeds to his work on the opposite basis."

[44] Text at note 18 above.

[45] See Nicola Lacey, *A Life of H.L.A. Hart: The Nightmare and the Noble Dream* (Oxford 2004).

[46] As reported by his widow, Sarah, in her Preface to Austin, note 12 above, at 12. Sarah Austin refers specifically to Hugo and Savigny as German professors whose position Austin envied.

[47] See Halpin, note 19 above, at p. 615.

[48] See note 31 above, and note 56 below.

[49] Austin, note 5 above, at pp. 3, 213–16, 372; 3, 214; 8–9, 193; 211 [12, 181–3, –; 12, 182; 16–17, 165; 179–80].

[50] *Ibid.* at p. 366 [–], "principles abstracted from positive systems are the subject of general jurisprudence"; 373 [–], "a description of such subjects and ends of Law as are common to all systems".

[51] *Ibid.* at pp. 131–2, 192, 213, 356 [116–17, 164, 181, 289–90] for examples of "character"; and at pp. 131–2, 192, 195, 356 [116–17, 164–65, 167, 289–90] for examples of "mark".

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variety of other terms already mentioned for conveying essential or necessary properties, distances his vocabulary and approach yet further from the later philosophically elevated pursuit of essential nature or necessary characteristics.[52]

W.L. Morison sought to argue for a "naïve empiricism" on the part of Austin as making his approach quite distinct from Hart's approach to analytical jurisprudence.[53] Although Morison's amplification of naïve empiricism has not been well received,[54] his underlying insight that the methodological and philosophical approach of Austin differs fundamentally from that of Hart, and in a way that takes a less sophisticated and more direct approach to empirical observation, is undoubtedly sound. One particular manifestation of the empirical grounding of Austin's theoretical approach is seen when he laments the imperfections of his analysis at the point where empirical evidence throws up contrary examples.[55] Austin never thinks to use Raz's demurrer: that his conceptual analysis is not contingent but "philosophically necessary", and so not refutable by empirical evidence.[56]

Nevertheless, commentators on Austin have persistently posed a problem in working out whether Austin's work should be regarded as *either* descriptive-empirical *or* conceptual.[57] This dilemma was raised, even prior to Hart, by Stone,[58] drawing on a couple of sentences from "The Uses of the Study of Jurisprudence" in which Austin refers to the "necessary" subjects of general jurisprudence.[59] Stone considers this establishes Austin's ambition for a "universalist analytical jurisprudence" as distinct from the descriptivist "'comparative' jurisprudence" Stone detects elsewhere. Although Austin does also refer here to a criterion of "logical coherence" for these necessary elements, there is nothing to suggest Austin is departing at this point from what can be empirically discovered and described. A stronger suggestion to the contrary arises from the fact that both the necessary elements, and what Austin later distinguishes as being the elements that are "not necessary",[60] are "to be found" or "in fact occur".[61]

[52] *Ibid*., e.g., at 213 [181], "a character or essential property"; and, "the two distinguishing marks" of sovereignty, at 195 [167], become "two essentials" at 214 [181].
[53] Morison, note 8 above, at 178ff.
[54] For critical reviews of Morison, see David Lyons, "Founders and Foundations of Legal Positivism" (1984) 82 Michigan Law Review 722; Jerome Bickenbach, "Empiricism and Law" (1985) 35 University of Toronto Law Journal 94.
[55] Notably in his discussion of "anomalous cases" which render his definition of positive law "defective or inadequate" – Austin, note 5 above, at p. 354 [288].
[56] The starkest presentation of the demurrer is to be found in Joseph Raz, *Between Authority and Interpretation* (Oxford 2009), p. 25; see also, *ibid*. at pp. 91–92.
[57] Discussed by Brian Bix, note 16 above, at p. 13, and in his entry on Austin in *The Stanford Encyclopaedia of Philosophy*, available at http://plato.stanford.edu/entries/austin-john/.
[58] Stone, note 6 above, at pp. 67–69.
[59] Austin, note 5 above, at pp. 365–367 [–].
[60] *Ibid.* at pp. 368–369.
[61] *Ibid.* at pp. 366, 369. See also the passages cited in note 50 above.

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Wilfrid Rumble seeks to perpetuate the descriptive-empirical/formal-conceptual tension by suggesting Austin's work is ambiguous, but then has to implicate John Stuart Mill for failing to appreciate the ambiguity.[62] Michael Lobban rightly finds the suggestion unconvincing and calls for a fuller explanation.[63] The explanation offered here is that to see conceptual analysis as opposed to empirical work through a philosophically specialist perspective on "necessary characteristic" or "essential nature" is to move beyond Austin's (and Mill's) frame of reference where no such tension existed; any detected ambiguity is anachronistically imposed by the observer.[64]

Moreover, it is not as though the move to a more sophisticated, contemporary grasp of philosophical necessity in itself solves the problems of relating theoretical work to the empirical, as can be seen from examining Raz's work.[65] The complexity of his arguments cannot be fully treated here, but two points can be briefly made on the apparent opposition between philosophical necessity and empirical contingency. In the passages previously cited,[66] Raz does allow for the contingency of political and social institutions and practices, in contrast to the philosophically necessary (legal) characteristics of law. He fails to explore the possibility of necessary political and social connections for law, or the possibility of contingent features of legal institutions. Yet in both cases of the political and the legal aspects of legal institutions it is possible for universal abstract characteristics to meet contingent particular instantiations – suggesting that what is deemed to be a "necessary" characteristic will depend upon a judgement as to what level of abstraction is regarded as theoretically significant. Secondly, the very contingencies, which Raz has contrived to ignore, of those legal institutions which he places at the heart of his concept of law,[67] raise questions that Raz has suppressed in asserting that his (what he refers to as "our") concept of law applies to Jewish religious law or contemporary Iranian law.[68]

Whatever might be made of the philosophical influences that entered analytical jurisprudence through Hart, it is not possible to transpose their impact back through time on Austin. As Frederick Schauer has pointedly observed, Austin lived before "the largely

[62] Rumble (2004), note 8 above, at p. 96.
[63] Michael Lobban, Review of Rumble's *Doing Austin Justice* (2006) 45 Journal of British Studies 221 at p. 222.
[64] Despite acknowledging the trap of temporal dislocation, Bickenbach, note 54 above, at p. 106, comes close to falling into it.
[65] Raz, note 56 above. The chapters of Raz's book have been published previously, and as such have met with the engagement of Bix (see note 31 above). For a critical review of the book, covering the issues discussed here, see Allan Hutchinson, "Razzle-Dazzle" (2010) 1 Jurisprudence 39 at pp. 45–49.
[66] See note 56 above.
[67] Raz, note 56 above, at pp. 27–31, 40.
[68] *Ibid.* at pp. 40–41.

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analytic, nonspeculative, nonempirical, and language-focused style of philosophy that characterized much of Anglo-American philosophy from Bertrand Russell through the time that Hart did his most important work."[69]

V. The Detection of Doubt

Towards the end of Lecture VI, the final lecture contained in *The Province of Jurisprudence Determined*, Austin announces that his determination of the Province is imperfect: "is not a perfectly complete and perfectly exact determination."[70] Part of his concern clearly expressed here is the inadequate definition of the elements of the subject matter that gave a distinctiveness to the Province. If he has not produced an adequate definition of positive law, then the Province cannot be adequately determined by reference to that as an exclusive subject of study.

For this part of his concern, Austin offers himself some relief. The inadequacy of the definition of positive law is seen in certain "anomalous cases" which do not quite fit the definition he has proposed, such as where laws bind those who are not members of the independent political society. Austin suggests that these anomalous cases can be worked out through further refinement (or "supplement") to his definition within the details of his further lectures on the science of jurisprudence.[71] Austin similarly disposes of a related problem he detects, how precisely to determine who is and who is not a member of a particular independent political society. Empirically, it is obvious to him that there is not a single uniform test that applies across all communities.[72] This problem is also reserved for the "detail of jurisprudence".[73]

It is the other part of his concern, which goes without relief, or indeed, any hint of further discussion from Austin in the *The Province*, that has greater importance for our present interests. This is the problem of "the ties" between positive law and the other subjects from which it has been distinguished by Austin:[74]

> To determine the province of jurisprudence is to distinguish positive law (the appropriate matter of jurisprudence) from the various

[69] Frederick Schauer, "(Re)Taking Hart" (2006) 119 Harvard Law Review 852 at 857.
[70] As heralded in the marginal note, and then expressed in the main text, Austin, note 5 above, at pp. 350–51, 354 [285, 288].
[71] *Ibid.* at pp. 354–55 [288–89]. (The further lectures being found, together with Lectures I-VI, in Austin, note 12 above.)
[72] *Ibid.* at pp. 356–58 [290–91].
[73] *Ibid.* at p. 357 [291]. Austin is perhaps sensing (though not fully addressing) here the problem of contingent variation in the instantiation of a general definitional element, raised in relation to Raz, text following note 66 above. In Austin's terms, how can we be sure that these differences are not significant in upsetting the common classification of the laws of different societies employing *per genus et differentiam*?
[74] *Ibid.* at p. 354 [288].

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> objects (noted in the foregoing lectures) to which it is allied or related in the way of resemblance or analogy. But so numerous are the ties by which it is connected with those objects, or so numerous are the points at which it touches those objects, that a perfect determination of the province of jurisprudence were a perfect exposition of the science in all its manifold parts.

Although this problem too is reserved to work that extends beyond the scope of the introductory lectures in *The Province*, Austin is less specific here as to where and how it might be carried out – unlike the definitional "supplement" to deal with the anomalous cases, that could be expected in his remaining lectures. One conjecture is that Austin had further work entirely in mind, beyond his course of lectures, where he might have brought about the "perfect exposition of the science in all its manifold parts". Robert Moles has suggested that Austin's planned but never executed book, *The Principles and Relations of Jurisprudence and Ethics*, is an indication not simply of how *The Province* might have been completed, but also of how it should be understood.[75] It is not possible to do justice to the richness of Moles's argument here, but fundamental problems arise, not least in Moles treating his own confidence, in extracting from certain texts or unpublished fragments of Austin a coherent scheme, as being capable of retrospectively annulling the doubts felt by Austin himself in *The Province*.

Certainly in the "Analysis of Lectures", with which Austin prefaces *The Province*, it is clearly stated that the problem of the ties concerns the relationship between positive law and divine law, and more specifically, between positive law as it is and positive law as it ought to be (the latter being part of divine law in Austin's worldview).[76] And it is here that Austin refers to their respective branches of study, the science of jurisprudence and the science of legislation, as "kindred", and "connected by numerous and indissoluble ties."[77] Indeed, in his Analysis Austin makes a defence of spending such a considerable portion of *The Province* in dealing with what, according to its principal thesis, should not fall within the province of jurisprudence at all: the nature of the way in which man ascertains divine law.[78] The only submission in his defence is that this subject matter is required in order to deal with "the *rationale* of jurisprudence" or "the *rationale* of positive law".[79]

[75] Moles, note 8 above, particularly at pp. 12–16.
[76] Austin, note 5 above, at pp. 6–7 [14].
[77] *Ibid.* These ties are not to be confused with the "ties of resemblance and analogy" mentioned earlier in the "Analysis of Lectures" (*ibid.* at p. 2 [11]), which Austin announces will be dealt with in "the six ensuing lectures".
[78] *Ibid.* at pp. 3–4 [12–13]. The subject extends across two whole lectures and a greater part of a third, out of six. For Austin's principal thesis, "The matter of jurisprudence is positive law", see note 35 above and accompanying text.
[79] *Ibid.* at pp. 4, 3 [13, 12]. Italics in original.

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Despite these prefatory remarks on the connection between positive law as it is and positive law as it ought to be, within the body of *The Province* Austin reinforces his obvious insight, that the existence of a law differs from an assessment of its merit,[80] with a strong invocation of the is/ought divide. This acts in general as a kind of running title on the lengthy note at the end of Lecture V (which amounts to a manifesto for Austin's campaign for jurisprudence), and in particular as a setting for the ambitious insight, quoted above, which appears in the paragraph immediately following these words:[81]

> *Note* – on the prevailing tendency to confound what is with what ought to be law or morality, that is, 1st, to confound positive law with the science of legislation …

The admonition continues, disposing of a number of other is/ought confusions and serving as a comprehensive endorsement of the is/ought divide. There appears to be no opportunity here for raising the problem of the ties as in some way qualifying the possibility of separately determining the province of jurisprudence.

What then are we to make of Austin's doubts on this particular matter? A simple answer to the quandary would be to suggest that Austin was stressing the value of complementing a science of jurisprudence with a science of legislation, in the same way that Bentham sought to promote both an expository jurisprudence and a censorial jurisprudence.[82] There is clear evidence elsewhere that Austin upheld this view. However, this response does not do justice to the unequivocal link Austin makes at the end of Lecture VI between the problem of the ties and the incomplete and imperfect determination of the Province. The ties between positive law as it is and positive law as it ought to be are not to be unravelled in order to establish the external relations of jurisprudence, but to fully determine the internal nature of jurisprudence itself.

It would be fruitless to speculate on where these doubts might have led Austin, and whether they would have been dispelled in his projected work, *The Principles and Relations of Jurisprudence and Ethics*. An air of unfulfilment lingers over the life and work of John Austin.[83] However, it would be equally wrong to ignore these doubts. A sensitivity to subtlety and a capacity for astute observation can be discerned in his work beyond that which is often credited to him.[84] If Austin had

[80] See text at note 33 above.
[81] Austin, note 5 above, at p. 184 [157].
[82] See note 15 above.
[83] In general, see Lotte and Joseph Hamburger, *Troubled Lives: John and Sarah Austin* (Toronto 1985). See also, Rumble (2004), note 8 above.
[84] See the positive review of Rumble (2004), note 8 above, on this theme by Matthew Kramer, (2008) 20 Utilitas 252.

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doubts, there were probably good reasons for them, even if those reasons remained obscure to Austin himself. So let us return to Austin's obvious insight, buttressed by the is/ought divide, and consider whether anything will give.

Austin insists on recognising the two distinct categories: (1) what the law is; and, (2) what the law ought to be. To assail this distinction is to invite the ridicule that Austin readily employed against those who failed to heed it, ranging from the accusation of nonsense to the diagnosis of imbecility. This we shall avoid. Nevertheless, it is possible, without denying the distinctness of the two categories, to add a third.

The third category arises as soon as it is accepted that the present state of (1) is inadequate to provide a clear answer in every case requiring legal judgment. What the law is comprises legal materials that do have a bearing upon the case in question, but they leave it open to further argument as to whether the case should be disposed of in favour of the one party or the other, and what precise consequences should follow. Such argument, what is commonly referred to as legal reasoning, does not, however, amount to category (2). For that category covers the *open field* of reasoning from whatever grounds are thought appropriate, whatever standards meet with the approval of the reasoner, whatever is considered to be the outworking of "the index to the tacit command of the Deity" (i.e., utilitarianism) in Austin's view,[85] in order to suggest a way of dealing with the case. It is perfectly plausible for a number of people to engage in (2); for each to come up with a different conclusion,[86] all of them respected as valid instances of (2); *and* for each of them to accept that his or her own conclusion differs from what the law might be in disposing of the case at hand. Not so with legal reasoning.

Legal reasoning involves, first of all, *some constraint* on the modes and the possible outcomes of the reasoning used to dispose of the case at hand.[87] Secondly, the person engaged in legal reasoning advances an argument as to what the law ought to be regarded as being in order to dispose of the case at hand. This cannot be expressed as being

[85] Austin, note 5 above, at p. 6 [14]. Austin, *ibid*. at p. 186 [159], concedes that due to the insufficiency of utilitarianism as an index to the divine will, different people may come to different conclusions in applying it.

[86] Not simply dealing with the binary issue, favour party *A* or favour party *B*, but also determining ways in which the unfavoured party should be made to answer to the favoured party; suggesting that a different party should be held responsible; suggesting radical reforms whereby legal liability should be avoided altogether in favour of compulsory insurance; etc.

[87] A point made pithily by Frederick Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* (Cambridge, MA 2009), p. 11: "In a society governed by the wise and the good, legal reasoning is likely simply to get in the way." The precise nature of the constraint is highly contestable, and is probably better viewed as a tension between doctrinal certainty and social critique, which eases in different locations at different times – see "The Use of Legal Materials", ch. 1 of my *Definition in the Criminal Law* (Oxford 2004).

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incompatible with what the law is,[88] nor can it be tolerant of opposing views. The purpose is to exclusively reach what the law is, but through argument rather than incontrovertible deduction.

We have here then a third category differing both from what the law is and from what the law ought to be, a hybrid ought-is: (3) what the law ought to be regarded as being. This third category challenges the sufficiency of Austin's obvious insight which restricts us to the distinction between (1) and (2). And if that restriction lies at the heart of Austin's exclusive determination of the province of jurisprudence, then this too is challenged.

Category (3) may act as a bridge between (2) and (1), in that some of what would fall under (2), as a view of what the law ought to be, can make its way across through what the law ought to be regarded as being, into what the law is regarded as being, which amounts to (1), what the law is. That is to say, legal reasoning may operate as a bridge between morality and positive law.[89]

How does this affect the Province? It provides one way of settling Austin's anxiety, considered above, of how to deal with the problem of the ties. Legal reasoning provides the venue in which it is possible to maintain a dynamic relationship between positive law as it is and positive law as it ought to be; some sort of relationship between what Austin referred to as the science of jurisprudence and the science of legislation. However, this is only possible if legal reasoning is allowed into the province of jurisprudence. In order to achieve this the exclusivity of Austin's Province would need to be breached: acknowledging that the law by which the subjects in a political community are governed is not limited to that which has been "set by political superiors",[90] but extends to the outcome of reasoning with those settled materials. This is something Austin himself did not contemplate in *The Province*, restricting himself there to fleeting endorsements of judicial legislation, and some acknowledgement of the need to deal with vague terms, without detracting from his understanding of law as the command (or rule) established by a political superior.[91]

[88] For the case at hand. It is possible to argue that law previously established for dealing with previous cases should be overturned, but again there are constraints on the legal reasoning that may be effectively employed to this end.

[89] Taking positive law in the sense used by Austin, note 5 above, at pp. 9, 202 [18, 172]: "law, simply and strictly so called: or law set by political superiors to political inferiors"; "every positive law, or every law simply and strictly so called, is set directly or circuitously by a monarch or sovereign number to a person or persons in a state of subjection to its author." For Austin, that covers both legislation and judge-made law.

[90] See note 89 above.

[91] Austin, note 5 above, at p. 32 [36], endorsing judge-made laws as tacit commands of the sovereign; at pp. 190–91 [162–63], endorsing Lord Mansfield in "assuming the office of a legislator" (while objecting to his enforcement of morality); at p. 207 [176], recognising vague terms in positive law without affecting its status. Both topics are held over for his later lectures. See note 93 below.

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Nevertheless, at the end of *The Province*, Austin expressed his own doubts over the exclusive province of jurisprudence that he had constructed. Here, I have expressed more specific doubts over the sufficiency of Austin's obvious insight which undergirds his construction. By challenging the restriction imposed by the is/ought divide, I have opened up the possibility of including legal reasoning within the Province. This would provide a bridge between law and morality, or allow some exploration of "the ties" between positive law as it is and positive law as it ought to be. Whether or not this is regarded as a satisfactory explanation for Austin's doubts, we do know that the exclusion of legal reasoning from a general theory of law has been cause for doubt elsewhere. Hart, in his own final reflections on his major work, admitted to an oversight in that he had "said far too little … about the topic of adjudication and legal reasoning".[92] He might reasonably have blamed this omission on the influence of Austin.

VI. Reassessing Austin's Legacy

If, as was suggested in section IV, we should reject a particular methodology for analytical jurisprudence attributable to Austin, how then are we to understand his legacy? Is his influence on the exclusion of legal reasoning from a general theory of law, mentioned at the close of the previous section, really so significant? At first sight, it would hardly seem so. It is not as though Austin had nothing to say on topics related to legal reasoning. In his remaining lectures, Austin tackles judge-made law ("judiciary law" as he preferred to label it), legal interpretation, and the use of analogy with a keen eye for the details of the processes involved.[93] However, the significance of excluding legal reasoning from the Province cannot be appreciated without bearing in mind that its absence supports a grander ambition, to take exclusive control of the subject matter of jurisprudence in a fiercely fought contest.

The problem portrayed above with legal reasoning is that it occupies a hybrid ought-is form and operates as a bridge between law as it is and law as it ought to be, even between law and morality. This is an unwelcome presence at the point the battle is being waged to preserve the identity of what law is against the threat of alien forces that would

[92] Hart, note 29 above, at p. 259. In the remaining pages of the Postscript, as edited, Hart accepts the significance of legal principles (as well as rules), but in effect only so far as they are introduced through a rule of recognition (*ibid.* at p. 267); and reverts (*ibid.* at pp. 272–276) to his former position on judicial discretion – relying on a restrictive analysis exhausted by settled law or judicial legislation ("judicial law-making"), which is pure Austin. This hardly amounts to saying *more* on the topic of legal reasoning, but it is impossible to speculate how much more Hart might have said, and what its significance might have been.

[93] Austin, note 12 above, Lectures XXVIII-XXXI, and the appended incomplete "Essays on Interpretation and Analogy". Further consideration of vague terms is also found here, e.g., at pp. 998–999.

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submerge it into some moral or other conception of what law ought to be. The threat is not simply a risk of contamination from the alien influences the other side of the bridge. The threat spreads in the admission that the material collected within the fortified conception of law as it is (law as commands – or rules, or norms) is not in itself adequate to deliver the operations law must perform (disposing of every case requiring legal judgment). The admission exposes that material to a broader sweep of its attributes beyond those constituting its narrow legal status or pedigree (as a command, rule or norm). This may adopt an aetiological approach which regards the material as formed by a previous view of what law ought to be, or may attribute to the material some present view of what law ought to be, in order to work out the full effect of that material within the process of legal reasoning.[94]

In this light, it should come as no surprise to learn that Austin's aversion to legal reasoning within his general theory of law is shared by other leading positivist exponents of analytical jurisprudence. Austin's own position on judge-made law differs from Bentham's. As David Dyzenhaus explains it, Austin shared with Bentham an antipathy towards the common law, but not towards judicial legislation, due to Austin's greater faith in an elite judiciary than a popular legislature to decide matters for the benefit of society.[95] However, he takes up a common position with Bentham in excluding legal reasoning from an understanding of law.[96] Hart's position has already been mentioned. The position of Raz is more extreme than Hart's. Far from being susceptible to doubt over not having said enough about legal reasoning, Raz has contributed much on the subject but in doing so has always rigidly demarcated his theory of legal reasoning from his theory of law.[97] As for Kelsen, Stanley Paulson has observed, "The editor of 'The Collected Works of Hans Kelsen' reported to me that his published writings – books, articles, and reviews – come to some 17,500 pages.

[94] Again, Austin is not unaware of these issues. Consider the fleeting reference to the "rationale" of positive law (note 79 above) in *The Province*, or the extensive discussion of the causes of judge-made law in his *Lectures*, note 12 above, at pp. 634–635, 644–647. Nevertheless, Austin rigidly avoids setting these topics within a discussion of legal reasoning – the judicial function is exhaustively determined by either applying a rule or creating a rule (e.g., *ibid*, at pp. 998–1000), and it is the rules (or commands) that form the subject matter of *The Province*. See further, Rumble (1985), note 8 above, at pp. 116–118.

[95] David Dyzenhaus, "The Genealogy of Legal Positivism" (2004) 24 O.J.L.S. 39; Austin, note 5 above, at p. 191 [163].

[96] Gerald Postema, *Bentham and the Common Law Tradition* (Oxford 1986), p. 463, concludes his assessment of Bentham's hostility to any judicial legislation with a criticism of Bentham's narrow "identification of law with the execution of *already achieved* agreement or consensus", and his failure to allow into a general theory of law the recognition of "the capacity of … legal practice to provide both a *matrix of* and *forum for* the continual forging and reforging of consensus".

[97] See Raz, note 56 above, particularly chs. 3, 8 & 14. For criticism, see Hutchinson, note 7 above, at pp. 77–78, on the lack of "analytical credibility for a concept of law that tells most judges and lawyers … that, whatever they are doing, they are not doing law when they go about the prosaic routines of their lawyering or judicial lives."

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In all that I've read thus far, I have yet to encounter a single page on legal reasoning."[98]

It may be easy to account for the motivation of these authors in excluding legal reasoning from a theory of law, which they seek to construct so as to avoid contamination or confusion with a view of what law ought to be according to some moral or other non-legal standpoint. This does not provide justification for the exclusion. The justification provided by Austin's obvious insight goes as far as upholding the distinction between what law is and what law ought to be.[99] It does not extend to the more complex phenomenon of the hybrid-form legal reasoning, which deals with arguing for how the law ought to be regarded as being in order to dispose of a particular case.

The unjustified exclusion of legal reasoning from a theory of law produces a flaw in the foundations of the theoretical enterprise. If as a matter of descriptive fact, the state of the law (as it is) comprises legal materials that are insufficient to dispose of cases requiring legal judgment, and yet a theory of law sets itself up to account for the nature of law as that social phenomenon which has a principal function of disposing of such cases, there is still something left over to be described. By restricting their analysis to those legal materials alone, positivist theories of law ironically sabotage their own positivistic ambitions. Ideally, perhaps, a system of municipal law would contain sufficient materials in an appropriate condition so as to provide by a process of incontrovertible deduction the resolution of all disputes and the regulation of all transactions between its citizens – and *then* an exclusive analysis of those materials would provide an adequate theory of positive law as it is. But, at best, this is a theory of an ideal system of law, or, positive law as it ought to be, not positive law as it is.

More than destabilising the foundations of legal positivism, the approach left to us by Austin is responsible for the disengagement between legal theorists I referred to in the introductory section. This, in two ways. First, and more obviously, the "something left over to be described" by the legal positivists produces a clear opportunity for competing theorists to sieze upon the unused part of the analysandum and make of it what they will. But whatever they might make of it, there is no possibility of engagement with the positivists for the simple reason that they have excluded that very part from what they are prepared to deal with in a theory of law.

If this first aspect of the disengagement is made out, we should expect to see some of the most intractable disputes within legal theory revolve around the nature and status of legal reasoning. This is not the

[98] Personal communication to author.
[99] This is the common justification relied upon by all the positivist authors mentioned.

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place to attempt a rigorous proof of the hypothesis, but as grounds for allowing its credibility consider the following. The Hart-Dworkin debate, which still has not run out of steam, has been presented in terms of disputes over rules versus principles, descriptive versus normative, the separation versus the connection of law and morality; in terms of issues of methodological differences and theoretical disagreement. Each of these dividing lines can be viewed as separating positions which respectively do not and do admit legal reasoning as part of the subject matter that a theory of law has to deal with. Once we recognise the significance of the attitude towards legal reasoning in sustaining division here, it is not difficult to detect it elsewhere: for example, in wider disagreements over the normative/descriptive divide, including the antagonism between hard and soft positivism.

The second aspect of the disengagement that can be regarded as part of Austin's legacy is less obvious but possibly has had a deeper impact. It has to do with the very attempt to establish a province of jurisprudence. All theory building is territorial in the sense introduced in section III when discussing the contestability of theoretical viewpoints. Theorists seek to capture an area of ignorance or confusion through dispelling the obscurity with their own theoretical illumination. The distinction with establishing "a province" or "an exclusive field of inquiry" lies in the theorist in that case seeking to exclude certain ways of understanding the subject matter of the inquiry. The promotion of an exclusive field of inquiry necessarily favours certain theoretical viewpoints over others, which would operate with a different understanding of the nature of the subject matter, requiring an alternative field of inquiry.

Nevertheless, Austin's technique for establishing the Province by means of ambitious insight was regarded more highly than the use of axiomatic disengagement, in that there was at the point of constructing the Province an engagement with rival theorists on the common ground held by the insight. There was also more than a hint in section III that deploying ambitious insight was a more honest strategy than relying on a split field of inquiry which could surreptitiously demote competing viewpoints by artificially excluding or marginalising them. However, the virtue of open engagement with opposing viewpoints, which lifts ambitious insight over axiomatic disengagement or splitting a field of inquiry as a theoretical technique, is found only at the creation of the Province. Once the Province is established as an exclusive field of inquiry, engagement with opposing viewpoints which might challenge the distinctiveness of that field is precluded.

What this may mean, as we discovered in the case of Austin, is that the strength of the obvious insight can dazzle the theorist into a more far reaching confidence when establishing the exclusivity of a field of

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inquiry than the ambitious insight can actually bear. Despite initially engaging with viewpoints that Austin discerned could beneficially learn from his insight, by insisting on an exclusive field of inquiry – a province of jurisprudence *fully determined* – he foreclosed engagement outside of the Province with viewpoints providing insights Austin was as yet not ready to assess.

It is this proclivity to exclusivity that constitutes the second aspect of the disengagement between legal theorists, that can be traced to Austin. Mention has already been made in section II of the general exclusivity of analytical jurisprudence. This has reached positions in terms of philosophical elevation (encountered in section IV) and positions involving a narrowing of the general jurisprudential agenda away from matters of practical and political concern, which would have been quite alien to Austin and Bentham,[100] but are wholly understandable as an extension of the exclusivity in determining the subject matter of jurisprudence that Austin bequeathed to his successors.

So deep set is this problem within jurisprudence that attempts to alleviate it, such as Stone's effort to add sociological and normative branches to the analytical branch of jurisprudence, considered in section II, only serve to sustain the underlying exclusivity. The idea that there should somehow be a link between analytical and sociological jurisprudence is a matter for contemporary puzzlement rather than resolution,[101] and the analytical-normative relationship is almost invariably hostile.[102] Unsurprisingly so, if the separation into exclusive approaches was from the start wholly artificial.

The exclusivity and disengagement does not bite only at the level of general approaches to jurisprudence. Individual theorists appear burdened with taking exclusive control of the subject matter of jurisprudence by redetermining the province of jurisprudence, by analysing *the* concept of law, by providing the definitive statement of what law *is*, instead of offering theoretical insights that are open to engaging with further insights to contribute to a fuller understanding of law.

Often the frailty of the endeavour which rests a restrictive understanding of law on a single insight is obvious to everyone except the

[100] For arguments that the nature of the earlier positivists' work has been narrowly interpreted, so impoverishing legal positivism, see Oren Ben-Dor, *Constitutional Limits and the Public Sphere: A Critical Study of Bentham's Constitutionalism* (Oxford 2000); David Dyzenhaus, "Positivism's Stagnant Research Programme" (2000) 20 O.J.L.S. 703; William Twining, *Globalisation and legal theory* (London 2000), pp. 16–20, 94–98.

[101] The puzzle has been raised in particular over Hart's purported affiliations with both descriptive sociology and analytical philosophy – see Lacey, note 45 above, and also her "Analytical Jurisprudence Versus Descriptive Sociology Revisited" (2006) 84 Texas Law Review 945; William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge 2009), ch. 2.

[102] A notable exception is John Finnis's insistence that some sort of synthesis between the analytical and normative is required in any adequate theory of law in his *Natural Law and Natural Rights* (Oxford 1980). However, his remarks remain allusive and undeveloped.

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theorist and loyal supporters. The multiplication of this scenario, sadly, does not undermine the credibility of the endeavour. Instead, each faction persists in the atavistic quest for complete control of the subject matter of jurisprudence. They heap scorn on their rivals to the point of ignoring what value their rival's insights might possess. They shore up their own preferred model with abstruse refinements to protect it from attack, but by so doing distort the very insight they seek to preserve and render it incapable of the illumination it originally shed. Few legal theorists will fail to recognise the process described. A number have committed a similar analysis to print. The tendency, however, is to acknowledge it only so far as it affects one's rivals.

The resultant picture of mutual academic disengagement, from both aspects of Austin's legacy, spills over easily into disengagement from other potential stakeholders in legal theory. Fierce hostility over the basis on which legal reasoning can even be admitted as part of the subject matter of jurisprudence, coupled with abstruse and distorted theoretical insights turned in against each other rather than outwards towards issues of practical concern, does not present a friendly interface to stimulate the engagement of those whose priorities are less theoretical.

Yet if this is Austin's legacy, it certainly was not his will. The two aspects of disengagement in his bequest, that have been charted here, ignore the doubts that Austin also left to us. These doubts unquestionably spoke to a more integrated view of legal theory, embracing "the ties" between law as it is and law as it ought to be, within "a perfect exposition of the science [of jurisprudence] in all its manifold parts." Austin was also adamant about the fundamental importance of linking theoretical inquiry to practical concerns:[103]

> This is the main, though not the only use of *theory*: which ignorant and weak people are in a habit of *opposing* to practice, but which is essential to practice guided by experience and observation. … Unless the terms of a theory can be resolved into particular truths, the theory is mere jargon: a coil of those senseless abstractions which often ensnare the *instructed*; and in which the wits of the ignorant are certainly caught and entangled …

Moving contemporary legal theory from a condition I have argued is inherited from Austin, requires us to pay greater attention to what

[103] Austin, note 5 above, at pp. 49–50 [50–51]. To avoid the risk of the following words of Austin being transformed into another "ambitious insight", it should be stressed that such insight that they contain needs to engage with further insights, notably relating to the matters that are importantly raised in Bix, note 16 above. The critical issue to explore is how a lack of fit between theory and practice is used to shed light on practice as it is, on practice as it might be, or on other concerns related to but not affecting that practice as it is currently experienced or conceived (very loosely: descriptive theory, normative theory, and blue sky theory). Raising and answering the question would indicate some advance. Evaluating the answers might alleviate Austin's anxiety, or exacerbate it.

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Austin did leave us. Although it may be impossible to imagine how the founding of jurisprudence would have differed had Austin himself resolved his doubts and had the opportunity to respond to his wider vision for the science of jurisprudence, his further prompts still have the potential to assist in reshaping legal theory today, one hundred and fifty years after his death. There is, furthermore, at the present time an impetus from the changing practical condition of law. The questioning of established insight is unavoidable in the face of novel forms of legal phenomena in the global context; and the complexity found there will test even more severely efforts to narrow the field of inquiry in pursuit of a solitary insight. Likewise, the insufficiency of legal materials to dispose of all cases requiring legal intervention in the global context renders legal reasoning an indispensable part of the subject matter.[104] The historical moment for a fully engaged legal theory is upon us.

[104] See Andrew Halpin and Volker Roeben (eds.), *Theorising the Global Legal Order* (Oxford 2009), chs. 1 & 14; and, more widely, Twining, note 101 above; Jack Goldsmith and Daryl Levinson, "Law for States: International Law, Constitutional Law, Public Law" (2009) 122 Harvard Law Review 1791.

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