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ENGLISH CONCEPTIONS OF THE ROLE OF THEORY IN LEGAL ANALYSIS

1. Forms of Legal Inquiry

In the common law world "theory" is typically thought of as something set apart from the central concerns of legal scholars or practitioners. "Legal theory" is a distinct subject, an intellectual compartment relatively isolated from other legal studies. Theory itself is contrasted with "practice" [1] and often looked upon with some suspicion by those who see themselves as concerned with the realities of professional legal practice, or with problems of practical reform or doctrinal exegesis.

The problem of the place of theory in analysis is in no way a problem unique to legal studies, and its existence has not prevented a flourishing recent development of theoretical writing about law. Nevertheless the relative intellectual isolation of legal theory within legal studies and the lack of clarity as to its scope and function have hardly been beneficial. This article seeks, first, to outline major factors which have shaped attitudes to legal theory in the English context, and conditions which have created its uneasy relationship with other forms of legal study. Secondly, it seeks to examine meanings which the term legal theory has been given in England, and the extent to which the apparent isolation of theory can be, and is being, overcome in some contemporary forms of legal inquiry.

Theoretical analysis of law has meant a variety of things, changing its aims and orientation as the study and profession of law has developed historically and as the character of law itself has changed over time. The nature of legal theory can be explained only by explaining its history and the intellectual and professional pressures which have shaped it. Today "legal theory" is a term with no single agreed meaning. Like other terms of legal discourse it is frequently employed rhetorically. The "theoretical" is sometimes merely that which is "not practical," abstract, contrary to professional experience, generalised, or metaphysical. Even among those who consider themselves

[1] See *e.g.* Austin's remarks on this dichotomy: J. Austin, *Lectures on Jurisprudence* (5th ed., 1885), p. 1096. (All subsequent references to the *Lectures* are to this edition.)

specialists in legal theory there are important differences of view about the purposes of theory, its scope and the appropriate emphases of theoretical work.

These matters, it should be stressed, are not merely of concern for theoreticians. They indicate persistent ambiguities in thinking about law as a discipline or field of study. There is no generally accepted name for the systematic study of law, other than the name of the object of study itself [2]; nor is there a professional designation for the legal scholar and researcher which distinguishes him from the practitioner of law. The term jurist is treated in English normally as a title of honour rather than a professional designation. As with participant-oriented disciplines generally, the systematic scholarly study of law is not given a name which differentiates its concerns or methods from those of professional legal practice. And the systematic scholar-researcher is not professionally differentiated from the legal practitioner.[3]

Many would consider this a natural and desirable situation and it applies equally in other fields where the focus of knowledge is directly applicable expertise. But one of its effects is to suggest a narrowing of appropriate scholarly concerns in the field of law to those in harmony with, and directly useful in, professional legal practice.[4] Another effect, equally important, is that, in so far as attempts have often been made to conduct inquiries into law not simply as a focus of professional expertise but as a moral, historical or social phenomenon the intrinsic importance of which justifies concern with it as an object of knowledge quite apart from professional needs, the epistemology lying behind such studies has often remained unclear.[5]

Instead of a relatively steady line of theoretical and methodological refinement traceable through the history of legal studies and focused on a consistent disciplinary objective of furthering understanding of the nature of law, there are numerous extremely diverse works of

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[2] The term jurisprudence, which could be so used, has a different connotation in English usage, referring typically either to a special field or form of inquiry within academic legal studies or, sometimes to legal doctrine itself and the arts of its application. The wide divergence between these uses of the term is itself symptomatic of the disciplinary ambivalence referred to in the text.

[3] Unease with this situation has been hinted at in different ways by various writers. For example, a need to separate "juristic analysis" from "lawyers' (including judges') concern with law" is noted in J. Stone, *Legal System and Lawyers' Reasonings* (rev. ed., 1968), p. 121. See also H. Yntema, "Rational Basis of Legal Science" (1931) 31 Col.L. Rev. 925 on confusion of different professional concerns, and especially pp. 932 *et seq.* where a distinction between "the empirical science of law" and "law in discourse" is developed. Austin notes the "wide difference" between the "practical tact which suffices for the mere application of rules to practice, or for the discovery of rules applicable to the given case, and the adequate and clear perception of the legal system as a whole, and of the relations of its parts, which is necessary to the legislator," *Lectures*, p. 1095. For an interesting sketch of tensions and ambiguities arising from the professional setting of legal studies, see D. Riesman, "Law and Sociology: Recruitment, Training and Colleagueship" in W. M. Evan (ed.), *Law and Sociology: Exploratory Essays* (1962), pp. 12–55.

[4] *Cf.* Riesman, *op. cit.* pp. 26–28.

[5] Some aspects of this problem are discussed in Stone, *Social Dimensions of Law and Justice* (1966), pp. 28 *et seq.*

historical, philosophical, comparative, or social scientific legal scholarship scattered through the history of legal studies. Produced, often in isolation, contemporaneously with professional manuals of legal practice and commentaries on current doctrine, some of them survive as classics while much other legal writing passes with the temporal practices which it records. But these classics do not obviously define the scope or outlook of a scholarly discipline, as do, for example, the classic theoretical works of economics, sociology, or other social sciences. Nor do they represent definite stages in a cumulative scientific endeavour (or markers of scientific revolution)[6] as in the natural sciences. Nor are they considered indispensable as embodying in a unique manner the cultural spirit which is considered an essential defining characteristic of the subject of study (as with classics of literature and language studies). They often appear strangely peripheral in a progress of knowledge controlled by the pace of official production of doctrine and the exigencies of professional practice.

In law, however, as in other fields, no rigid line can be drawn between the disinterested search for knowledge and its practical application. In legal studies the significant line is not between "pure" and "applied" knowledge but between doctrinal exposition organised solely to meet the concerns of legal professional practice in particular fields, and systematic knowledge of the nature of law as a mechanism of government and as a social phenomenon.[7] Even this line, however, is an extremely difficult one to draw. Technical legal knowledge, relied on by the practitioner, is clearly essential to any wider understanding of the nature of law. The distinction to be drawn is not so much between types of subject-matter of study as between objectives and methods of analysis.

In the nineteenth and early twentieth century the term "legal science" was frequently used to refer to systematic inquiries about law of whatever nature. Recently the term has been re-adopted to refer to typical forms of legal inquiry of academic and practising lawyers.[8] In this article the term is used in a looser sense (comparable with the usage of "science" in "political science") to suggest the range of systematic inquiries which legal scholars and professional lawyers make concerning law and the workings of legal institutions. Some such inquiries are inspired only by a need for understanding and explanation of the nature of law—scientific in a perhaps stricter sense. Others are policy-oriented, concerned with justification, rationalisation or reform, or the provision of technically useful information for immediate practical purposes. If legal science is understood in this broad sense, legal theory and legal science are complementary concepts. Their ambiguities derive from the same sources. The professional and intellectual tensions reflected in the variety of methods and subject matter they refer to have the same historical and sociological causes.

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[6] See T. S. Kuhn, *The Structure of Scientific Revolutions* (2nd ed., 1970).
[7] *Cf.* Yntema, *op. cit.*
[8] J. W. Harris, *Law and Legal Science* (1979).

2. The Context of Development of English Legal Theory

" Common lawyers, together with the country in which the Common Law was born and developed, have a certain reputation for matter-of-factness and practicality. They are, we are often told, the enemies of general speculation, of the bold proclamation of universal principles and, above all, of metaphysics." [9] Distrust of theory is certainly justified and encouraged by the history and character of the law; by the avowed empiricism of common law methods; by the absence of rational codification and by the piecemeal character of legislation. Max Weber stressed the irrationality, in a certain sense, of English common law in comparison with continental legal thought.[10] But, at various phases in its development, rationalisation in Weber's dual sense of systematisation and generalisation [11] was imposed on it by legal reformers, by textbook and treatise writers [12] and by judicial consolidation and innovation. Rationalisation in this dual form involved development of rigorous concepts possessing broad utility for the organising of rules within an overall rational system of legal doctrine and consistent forms of legal reasoning.

Apart from the effects of the pragmatic ethos of the judiciary and of the apprenticeship tradition in legal professional training on attitudes to professional knowledge, distrust of theory has tended to be associated with distrust of continental legal methods, as those methods have been seen from the vantage point of the common law. Political influences traceable back to English reactions to the French Revolution stressed the alien character of broad concepts of human rights and the superiority of English legal empiricism, a superiority most authoritatively asserted by Dicey in, for example, his comparison of English habeas corpus legislation and continental bills of rights.[13]

History showed the apparent success in English law of a pragmatic approach to conceptual development. As common lawyers began to speculate seriously on their law under the pressure of political and professional need to defend and extend prestige and jurisdiction, an exaggerated dichotomy was gradually established in thought. The law could be expressed in principles or maxims sanctioned by long tradition [14] and, at certain politically crucial times, the authority of the common law could be bolstered by appeals to natural or fundamental law.[15] But flexibility, practicality, realism and tradition embodied in

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[9] A. E-S. Tay, " The Sense of Justice in the Common Law," in E. Kamenka and A. E-S. Tay (eds.), *Justice* (1979), p. 79. See also A. W. B. Simpson, " The Common Law and Legal Theory," in Simpson (ed.), *Oxford Essays in Jurisprudence* (2nd series) (1973).

[10] M. Weber, *On Law in Economy and Society* (ed. M. Rheinstein) (1954), *e.g.* pp. 79–80, 316–317.

[11] *Ibid.* pp. 61–62.

[12] Simpson, " The Rise and Fall of the Legal Treatise " (1981) 48 U.Chic.L.Rev. 632.

[13] A. V. Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (1885), Lecture VI, pp. 217–250; (10th ed., 1959, Chap. 5). See also especially W. Twining (1975) 61 *Archiv für Rechts-und Sozialphilosophie* 325, on Bentham's *Anarchical Fallacies* and its context. But the distrust of civilian methods in general has deep historical roots.

[14] See Simpson, *op. cit., supra*, note 12, pp. 642 *et seq.*

[15] See generally J. W. Gough, *Fundamental Law in English History* (1955), especially Chap. 3.

long continuity of gradual historical development tended to be seen as in opposition to rigorous conceptual or theoretical thinking in terms of abstract systems. Partly through the historical traditions of English legal thought, an opposition is still often thought to exist between these idealised characteristics of legal analysis. They are seen as mutually antagonistic. They have tended to symbolise common law mentality in opposition to civilian mentality.[16]

These differences have been largely at the level of general *attitudes* to law and legal inquiry rather than within law itself. Despite important differences in doctrinal style, the elements of rule, principle, concept and value have necessarily been blended in complex ways in all modern legal systems.[17] But one consequence of the common law outlook was reflected in the analysis of legal concepts. Whereas on the Continent such analysis became inseparable from ordinary legal education or legal literature,[18] in the Anglo-American world its place was much more rigidly demarcated as " general jurisprudence "—seen not as an aspect of legal thought but as a separate legal subject. The need for a degree of systematisation and generalisation in the common law promoted speculative conceptual analysis. But, in conformity with common law thinking, conceptual analysis was typically based in a strict empiricism, and when the most general concepts of law and legal system were analysed, again using the same empirical, anti-metaphysical methods, a form of legal theory, or general theory of law, was precariously established.

Attitudes towards science in the nineteenth century undoubtedly had much to do with the acceptance of legal theory in England during this time. According to the proclamations of scientific advance in the humanities and the social fields as well as in the study of natural phenomena, all phenomena which could be the subject matter of a science must be capable of being subjected to rational investigation and ordered and classified by rational means. Synthetic study in law should lead to construction of generalising principles, concepts and categories. Analytic study should elucidate typical patterns of legal thought to identify their elements—the specifically *legal* techniques of legal thought and legal science.[19]

Further, anything resembling a science of society was in its infancy when the self-conscious science of law was being established (Comte's epoch-making works which would exert great influence on the establishment of such a science were mostly still to be published when Austin's

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[16] Austin's admiration for Roman Law, as expounded by the German pandectists, was founded on its apparent conceptual coherence which made it " greatly and palpably superior, considered as a system or whole, to the law of England." *Lectures*, p. 58.

[17] See *e.g.* F. H. Lawson, *The Rational Strength of English Law* (1951); Lawson, *A Common Lawyer Looks at the Civil Law* (1953), p. 205: " the leading differences between [the Civil Law] and the Common Law world are not differences of method or in the ways of handling source materials." See also R. David and J. E. C. Brierley, *Major Legal Systems in the World Today* (2nd ed., 1978), pp. 366–367.

[18] See *e.g.* Stone, *Legal System*, pp. 217 *et seq.*; K. Zweigert and H. Kötz, *Introduction to Comparative Law* (1977), Vol. 1, pp. 141–142.

[19] *Cf.* Kocourek, *Introduction to the Science of Law* (1930), pp. 21, 23.

Province of Jurisprudence Determined appeared in 1832). In general, speculations about law as a social phenomenon were metaphysical, confused with ethics and natural law, and to be avoided in favour of scientifically acceptable data relevant to the field of study: the data provided by legal doctrine established in and regulating actual legal and judicial practice, and by the actual constitutional structures of government of England and those other countries with which it might usefully be compared. Treating law " scientifically " would not therefore require treating it as a social phenomenon with social origins and effects. The " causes " of legal phenomena were to be found within legal doctrine itself by rationalising the systems of legal authority which made it possible for doctrine to be created.

3. Aspects of Professionalisation

The institutionalisation of legal education in the universities was a factor of great importance in encouraging rational organisation of the law and highlighting the inadequacies of common law empiricism in face of the need to teach law as a system, a discipline, and a coherent field of knowledge. Through various scholars including Dicey,[20] who felt these inadequacies keenly when he sought to rebuild the prestige of the Vinerian Chair, the influence of Austinian legal theory helped to shape systematic exposition of law in the second half of the nineteenth century. In this way, Austin's ambition, that jurisprudence should provide a " map of the law "—a framework upon which the detail of legal technicality could be arranged [21] was partly fulfilled.

As Samuel Shuman has properly stressed, analytical jurisprudence is essentially a method of legal analysis, rather than theory.[22] But method and theory are inseparable. To be justified as scientific, analytical method required the support of theory which demonstrated that law could be understood without appeals to metaphysics or disputable social philosophies, as an independent field of scientific knowledge, a rational human creation, intelligible solely in terms of the logical coherence of its forms and the stable patterns of legal authority.

Bentham's radical reformism had relied on the union [23] of a science of law and a science of legislation: the former to describe the irreducible formal structure of law as a regulative mechanism, the latter to determine the appropriate content of law in the light of utilitarian aims and

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[20] R. Cosgrove, *Albert Venn Dicey: Victorian Jurist* (1981), Chap. 3 and *passim*, stresses Austin's influence on Dicey in this respect. *Cf.* D. Sugarman (1983) 46 M.L.R. 102, 105–106.

[21] Austin, *Lectures*, p. 1082. See also E. C. Clark, " Jurisprudence: Its Uses And Its Place In Legal Education " (1885) 1 L.Q.R. 201, 204. *Cf.* Kocourek, *Introduction*, p. 26.

[22] Shuman, *Legal Positivism* (1963), pp. 12 *et seq.* Austin considered " theory " to be " a systematical statement of rules or propositions." *Lectures*, p. 1096. Such a formulation confuses " theory " and " method " since it makes no reference to any specific explanatory aims of theory. Many later writers, down to the present time, adopt a similarly vague definition.

[23] J. Bentham, *Of Laws in General* (ed. H. L. A. Hart) (1970), Chap. 19; *Introduction to the Principles of Morals and Legislation* (eds. J. Burns and H. L. A. Hart) (1970), pp. 1–10.

rational assessment of the effects and limitations of law as an instrument of government. But the science of legislation, or censorial jurisprudence, in Bentham's formulation, was quickly seen as politically debatable,[24] metaphysical or at least of more concern to the policy maker than to the lawyer seeking a secure rational grounding for his craft. Consequently, this programme—a neglected forerunner of the sociology of law in some of its aspects [25]—tended to be gradually squeezed out of the purview of a theoretically guided legal science. Though Austin maintained his mentor's commitment to analytical jurisprudence as preparatory to utilitarian reform, his relative conservatism [26] no doubt influenced his own emphasis on the science of law, and the discarding of the critical science of legislation by influential later writers. Thus legal theory came to appear apolitical.

Nevertheless, in its application as analytical jurisprudence, it was not *neutral* in its view of the law. With the separation of the science of law from the science of legislation, the act of rationalising law often tended to be, in effect, the demonstration of law's strength and excellence, judged in terms of internal doctrinal coherence.[27] Legal theory, after Austin's time, well served the legal profession and the State (as well as developing legal education) in raising the status of law as doctrine [28] and as the rational framework of government,[29] and in proclaiming as *scientific technique*, the professional lawyer's ways of reasoning with the law. Further, in defining law as a coherent, independent focus of knowledge and practice, legal theory guaranteed through its rationalisations the legal expert's and legal practitioner's claim to possession of an autonomous field of professional knowledge.[30]

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[24] *Cf.* William Hazlitt's comment, in his *Spirit of the Age* (1825): " He turns wooden utensils in a lathe for exercise, and fancies he can turn men in the same manner." Quoted in Lloyd, *Introduction to Jurisprudence* (4th ed., 1979), p. 172.

[25] For this perspective on Bentham see U. Baxi, " Introduction," to Bentham's *Theory of Legislation* (1975 ed.).

[26] *Cf.* Austin's revealing remarks about law reform in *Lectures*, p. 1089, and his careful distancing of himself from Bentham's radical reformism in *A Plea for the Constitution* (1859), p. vi. This is coupled with an acute sensitivity to the need to maintain " the natural arrangements of society " (*ibid.* p. 19), which could be threatened by reforms. *Cf.* W. L. Morison, *John Austin* (1982), pp. 122 *et seq.*

[27] Thus, Weber saw the rationalising tendencies of modern positivist legal theory as powerfully promoting the conditions under which law could provide, in its form, the basis of its own political legitimacy, quite independently of any particular values or aims it might be thought to serve. I have discussed this in "Legality and Political Legitimacy in the Sociology of Max Weber," in D. Sugarman (ed.), *Legality, Ideology and the State* (1983).

[28] Austin had criticised " the matchless confusion and obscurity," " the unrivalled intricacy," the " chaos and darkness " of the English law of his time. *Lectures*, p. 58. As late as 1931, J. W. Jones could write of the role of legal theory in countering the " conviction that our law is little more than a disorderly mass of incoherent injunctions ": see " Modern Discussions of the Aims and Methods of Legal Science " (1931) 47 L.Q.R. 62.

[29] For an attempt to identify an implicit value element in analytical jurisprudence, see A. G. Chloros, " Some Aspects of the Social and Ethical Element in Analytical Jurisprudence " (1955) 67 Jurid.Rev. 79–102. The rise of Austinian jurisprudence allowed the " creation of a distinct science of jurisprudence which made it possible for nineteenth century liberalism to proclaim freedom through the rule of law, and also in the concept of sovereignty." (*ibid.* pp. 101–102).

[30] Cotterrell, " Professional Autonomy and the Construction of Professional Knowledge," in P. Abrams and P. Lewthwaite (eds.) *Development and Diversity: British Sociology 1950–1980* (1981).

In retrospect, however, it can be seen that this kind of justification of law as doctrine and as professional knowledge was, at particular times, not sufficient and legal theory's demonstration of doctrinal integrity and consistency was supplemented by other contributions. The decline of natural law, under the onslaught of scientific rationalism, meant the decline of theory providing a moral or political justification of the content of particular legal orders.[31] Positivist legal theory glorified the rule of law, the *Rechtsstaat*, but it allowed any content of legal doctrine. It justified the law at the same time as it freed it from any mooring in moral absolutes or long tradition and allowed it to be steered into the currents of political change and development. The popularity for a time in England of historical jurisprudence, and particularly the work of Sir Henry Maine, can be seen as in part a nineteenth-century counter-current to advancing scientific rationalism in law and the reform with which it came to be associated.[32] On the Continent it had been a weapon against rational codification, and was characterised by both conservative and irrational tendencies. In England the popularity of Maine's work in the second half of the nineteenth century may be connected with fears about the pace of change,[33] the felt need for demonstration of legal continuities in history in a time of apparently accelerating legal and social change, and cultural needs which, on the Continent, related to nationalism and, in England, to conceptions of empire.[34] Maine's search for the roots of contemporary legal ideas of the common law in the broad sweep of history of earlier civilisations paralleled or inspired evolutionary studies in comparative religion, ethics and social institutions. Most of them suggested in one way or another a reassuring gradualism of social development over many centuries and presented modern institutions as the culmination of this historical process.

Historical jurisprudence provided a partial and temporary replacement for the lost absolutes of natural law theory, but its appeal gradually declined [35] as links with the past clearly failed to prevent substantial and, as it appeared to some, increasingly ambitious legal change, and the most appropriate legal theory could be seen to be analytical jurisprudence which demonstrated the rationality of legal form and legal concepts, as the scientific professional knowledge of the lawyer, while admitting the changing content of legal doctrine.

Despite its transience, historical jurisprudence left a legacy of theoretical insights which have only relatively recently been rediscovered: a recognition of the importance of legal phenomena as social phenomena which could be the subject-matter of a *social* science;

[31] *Cf.* H. Kelsen, *General Theory of Law and State* (1945), p. 10.

[32] Naturally, Maine claimed the prestige of "science" for his historical studies, invoking geology as a scientific model. *Ancient Law* (1861), p. 2.

[33] P. Stein, *Legal Evolution* (1980), pp. 99, 112–113, 122. For Maine's own views on such matters see his *Popular Government* (1885) and W. A. Robson, "Sir Henry Maine Today," in W. I. Jennings (ed.), *Modern Theories of Law* (1933), p. 176.

[34] For the influence of continental historical jurists on English thought see Stein, *op. cit.* pp. 72 *et seq.*

[35] *Cf. ibid.* pp. 125–126.

recognition of the need to understand the relationship between legal change and social change; emphasis on law as both doctrine and institutions; and recognition of irrational [36] as well as rational elements in law as theoretically significant.

4. Triumph and Decline of Analytical Jurisprudence

The intellectual and professional conditions discussed above constitute the immediate context in which positivist general jurisprudence based on Austin's work came to be accepted as the theoretical basis of legal science in England. A variety of assumptions were implicit in this acceptance. It was assumed that the theory was no mere philosophical pursuit but practically useful, indeed necessary, to guide and structure legal studies of whatever kind.[37] No distinction was made between the concerns of the practitioner and the scholar. Analytical jurisprudence would provide the element of systematisation and structural coherence in law which the empirical case-by-case method of the common law was in continual danger of missing.[38] And it was assumed to be scientific, in a sense rarely analysed rigorously but implying adherence to Mill's conception of induction and to the view that law could form the object of a unique science to be developed through rational classification and analysis of doctrine.

The triumph of analytical jurisprudence led to its atrophying, not because of its logical or empirical problems but because the assumptions which had underpinned its success ceased to hold. By the late 1920s, if not before, there were clear signs of crisis. After Austin, other scholars —particularly Markby, Holland, Salmond and the Americans Terry, Hohfeld and Kocourek—continued on the lines he had set, producing work of steadily increasing sophistication. But a commentator in an English journal could write in 1926 that the " present state of analytical jurisprudence in this country is unsatisfactory from a critical viewpoint but also in the sense that no one seems to be satisfied with it. These who teach it and those who learn it appear to have no pleasure or confidence in doing so; and if it would be going too far to say that it is of no practical use to the legal profession, it is certainly less useful to a lawyer than physiology is to a doctor or physics to an engineer." [39] He advocated a thoroughgoing reconstruction of legal theory in the light of contemporary psychological researches.

Others in the common law world, who were strongly sympathetic to analytical jurisprudence felt similar serious doubts about its value. A 1934 article held that " Kocourek's plan for analytical jurisprudence is . . . free from all the weaknesses criticized in preceding systems and, as far as can now be seen, his contribution to the graph of progress is the

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[36] In the Weberian sense of being sanctioned only by traditional or affectual considerations.

[37] See *e.g.* Clark, *op. cit.*, *supra*, note 21.

[38] See *e.g.* Austin, *Lectures*, p. 1095.

[39] H. C. Dowdall, " The Present State of Analytical Jurisprudence " (1926) 42 L.Q.R. 451.

most accurate and complete." [40] Yet, " while we steep ourselves in such a discussion of analytical jurisprudence, and appreciate its very great usefulness, we must stop to wonder whether we are not overestimating its value." [41] The work may be as fundamental to law as analysis is to chemistry, but law contains " the forever-changing human element, which may at any time modify or abolish the existing or create new basic foundations on which the whole structure of our jurisprudence is built." [42] Does analytical jurisprudence merely rationalise the ephemeral in ignorance of the real processes and conditions determining the ever-changing contours of legal doctrine? After all, " law as a whole will of necessity burst any system of categories that is imposed on it." [43] As if to stem the doubts, the author notes that the use of Hohfeld's methods is said to make correct solutions to legal problems easier to arrive at and more certain, and, in any event, the " deeper the analysis, the greater becomes one's perception of fundamental unity and harmony in the law." Nevertheless " it is very difficult to say that these consistent networks of elements and concepts had any existence either in the previous legal systems as they were being developed or in the minds of those who were causing their development." [44]

What lies behind the attitudes suggested in these statements? First, modern legal positivism, which had once been the banner of Bentham's and Austin's crusade against metaphysics, had permeated professional attitudes so that elaborate theoretical justifications of its implications no longer seemed necessary. Secondly, the conception of science which had underpinned the prestige of analytical jurisprudence seemed increasingly naive. Debate has raged as to what exactly Austin's system was intended to express. It has been suggested that his theory attempts to construct an abstract logically coherent model of an ideal legal system against which the empirical reality of actual legal systems could be compared.[45] But the opposing view, that the theory purports to describe the empirical reality of law, the actual conceptual structure common to modern legal systems,[46] is probably to be preferred.[47] Kocourek has acutely observed that the idea of law presented in Austin's work and in analytical jurisprudence for most of the century after the publication of *The Province of Jurisprudence Determined* was

[40] J. Dainow, " The Science of Law: Hohfeld and Kocourek " (1934) 12 Can.B.Rev. 265, 269.

[41] *Ibid.* p. 279.

[42] *Ibid.*

[43] J. Dickinson (1929) 42 Harv.L.Rev. 448, 453 (reviewing Kocourek's *Jural Relations*).

[44] Dainow, *op. cit.* p. 280.

[45] Stone, *Legal System*, pp. 65 *et seq.* 82–83, 87–88. See also C. A. W. Manning " Austin Today," *Modern Theories of Law*, pp. 180 *et seq.*

[46] W. L. Morison, " Some Myth About Positivism " (1958) 68 Yale L.J. 212 Hart, *The Concept of Law* (1961), pp. 237, 241.

[47] As applied to Austin's work the distinction has an air of unreality about it. It would probably have been meaningless in the intellectual context of his times. It has appeared to become significant because of the problems of the role of analytical jurisprudence, discussed later in this article, which have become apparent since Austin's time. For a clear discussion of problems of evaluating such characterisations of the function of theory, see the comparison of " instrumentalist " and " realist " views of theory in E. Nagel, *The Structure of Science* (1961), Chap. 6.

" materialistic and anthropomorphic," that is, legal concepts were understood as actually expressing human qualities or social facts. Thus, sovereignty was a human power residing in a human being or group, law was the expression of human will in the form of a human command and legal relations were " material (social) bonds uniting material human beings." No clear distinction between concept and material reality was recognised; the nature and essence of law " for scientific purposes could be expressed in terms dealing with human beings, human groups and political society." [48]

With the development of social science and the recognition by natural scientists that statements about the empirical world could not be made in the form of true principles but only contingent hypotheses, the major scientific assumptions of classic analytical jurisprudence collapsed because its attempt *was* essentially to derive " true " principles from the empirical materials of doctrine. Some argued that the collapse undermined not just legal theory but the whole methodology of legal analysis.[49] But the argument could be avoided by ceasing to talk seriously about law as a science, or to examine rigorously the kind of knowledge created through legal analysis, or to consider any longer the rational basis on which law could claim to be a learned discipline of systematic knowledge and inquiry. Given that the reputation of law as professional expertise and educational subject had advanced immeasurably beyond that of Austin's day (and in no small measure because of his work and that of his followers) it had become possible to teach and practise law and rationalise legal doctrine, while putting to one side epistemological problems surrounding the enterprise.

This response was excusable though not justifiable because the assumption of the necessity of theory as the support of legal study and legal practice, an assumption far from universally shared in its heyday, collapsed as changes in the law itself seemed to demonstrate the increasing irrelevance of analytical jurisprudence to the concerns of doctrinal analysis in professional practice.

Thus, analysis of general concepts has seemed less and less appropriate with increasingly rapid legislative change. The form and content of new law seemed to defy traditional forms of conceptual analysis.[50] Increasingly, detailed regulation by statute, delegated legislation, codes

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[48] Kocourek, " The Century of Analytical Jurisprudence Since John Austin " in *Law: A Century of Progress* (1937), Vol. 2, p. 211.

[49] *Cf.* W. W. Cook, " Scientific Method and the Law " (1927) 13 Am. Bar Ass.J. 303. See also Yntema, *op. cit.*

[50] *Cf.* the orthodox " enlightened " view of Sir W. Greene, " Jurisprudence and the Practising Lawyer " [1936] J.S.P.T.L. 10, 18: " Law cannot exist without principle, and the principles of law cannot exist without that ultimate synthesis which unites them in one coherent system "; and the views expressed in discussion of Greene's paper. One participant remarked that there was " disagreement concerning the meaning of Jurisprudence. Some, like himself, thought it should consist of the logical analysis of the principal conceptions used in law, but he was amazed to find how few were the propositions of English law which could be dignified by the name of ' general principles.'" (*ibid.* p. 19. Discussion at the Annual Meeting of the S.P.T.L., July 18, 1936). See also *e.g.* D. Harris, " The Concept of Possession in English Law " in A. G. Guest (ed.), *Oxford Essays in Jurisprudence* (1961).

of practice or administrative directives has identified and specifically controlled particular situations, narrowly defined cases and particular categories of legal actors. Today the professional lawyer must continue to try to impose rationality on the law since his work depends on it but now it is widely accepted that it will be a " piecemeal " rationality, the creation of " relative " order in parts of the law without the possibility of a total picture, or overall doctrinal framework elucidated by theory. And the concern of positivist legal theory with formal legal definitions of authority and the specification of jurisdictions as of central significance is rendered somewhat unreal by the growth of administrative discretion in many fields, creating powers often far more significant than those specifically defined by law, so that without a knowledge of their scope and the manner in which they are exercised, legal expertise may be for many practical purposes valueless.

5. Hart and the Return to Empiricism

The collapse of the assumptions on which acceptance of the utility of Austinian analytical jurisprudence had been based, put in issue again the role of theory in legal analysis. For a theorist, the ignoring of epistemological questions is not an option if he seeks any degree of rigour in his work. Such questions determine the place of theory in a discipline or field of inquiry, and its appropriate concerns and objectives. But, in general, contemporary legal theory is not characterised by rigorous attempts to clarify these matters, nor by general implicit agreement on answers to the questions posed.

Professor H. L. A. Hart's 1953 address, *Definition and Theory in Jurisprudence*,[51] showed an acute awareness of the charge of unreality of conceptual inquiries in jurisprudence. It is significant that when this charge was becoming impossible to ignore, analytical inquiries were becoming more assertively conceptualistic through the influence particularly of Hohfeld, Kocourek and Kelsen. Such inquiries were self-consciously shedding " authropomorphic " or " materialistic " overtones, and developing what looked increasingly like a kind of legal calculus on the lines of models in mathematics.[52] They were willing to use, for example in Kelsen's work, admitted " hypotheses " or " postulates " not present in actual legal discourse (for example, the concept of basic norm) and to restructure legal forms (for example, the form of legal norm in Kelsen's legal theory) in a manner different from that typically recognised in legal practice. Hart's address, in effect, advocates a return to legal empiricism. Legal words should be elucidated by " considering the conditions under which statements in which they have their characteristic use are true," [53] that is, accepted as correct within actual legal discourse.

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[51] (1954) 70 L.Q.R. 37.

[52] *Cf.* Kocourek, " Century," p. 215, noting the emergence of what he calls the " conceptual " view of legal reality. Law came to be regarded " as conceptual in the whole of its existence and manifestations." (*ibid.*)

[53] Hart, " Definition and Theory in Jurisprudence " (1954) 70 L.Q.R. 37, 60.

The situation is not, however, that of Austin's day. Now we are aware that a theory is not " a compendious but elliptic formulation of relations of dependence between observable events and properties," [54] that is, a form of *description* of phenomena. Professor Bodenheimer [55] asks whether Hart's reformulated conceptual inquiries are redundant, amounting in effect to no more than an economical statement of the essentials of legal doctrine itself, so that the theorist has worked himself out of a job and what remains is orthodox doctrinal analysis, which is the concern of every lawyer. Surely, if the theorist is to give up his abstractions of systems from legal doctrine as unrealistic, he must justify his role by a different kind of theorisation of doctrine and legal experience: one which explains the production and development of doctrine and the nature of legal institutions in relation to history and society.

Though there are oversimplifications in Bodenheimer's critique, Hart's answers are not satisfactory. He will not accept that analytical jurisprudence should be replaced, as Bodenheimer suggests, or that conceptual and formal inquiries should be seen as merely an aspect of wider analyses of law as a social phenomenon. Hart considers that analytical jurisprudence can still give the lawyer a " deeper understanding " of doctrine.[56] Such analysis is not, as Austin thought, a necessary introduction to essential legal studies but a culmination of them. But what kind of deeper understanding is this? Why is it needed and why is it not obtainable in ordinary doctrinal studies? Why is there virtue in imposing on doctrine a " system " which it does not necessarily actually express or recognise and which is presumably subject to continual change or reinterpretation? Probably the better justification is Kocourek's: that new legal ideas may be constructed by synthesis and that these can be used to improve the law.[57] On this view the mission of analytical jurisprudence would not be fulfilled " until its findings are translated into legal codes and legal techniques."[58] But now we accept that the life of the law has not been logic but experience; or rather, both, in complex combinations. And the greater the conceptual purity of reformulation of doctrine, the less likely that modern legal pragmatism will even recognise its injunctions. As long as theory's sole concern is with rational abstraction, organisation and interpretation of legal doctrine according to the precepts of analytical

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[54] Nagel, *op. cit.* p. 118.

[55] E. Bodenheimer, " Modern Analytical Jurisprudence and the Limits of its Usefulness " (1956) 104 U.Pa.L.Rev. 1080.

[56] Hart, " Analytical Jurisprudence in Mid-Twentieth Century : A Reply to Professor Bodenheimer " (1957) 105 U.Pa.L.Rev. 953, 964 *et seq.*

[57] Kocourek, *Introduction*, p. 23.

[58] Kocourek, " Century," p. 216. In effect, this is a restatement of Bentham's hopes for his expository jurisprudence. Hohfeld considered analytical jurisprudence " an indispensable prerequisite " to substantial law reform and to " reduction in the bulk of the law, making it more easily interpreted by officials, and more intelligible to the public." W. N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1923), p. 350. In this formulation, however, the objective might be thought appropriate to many forms of legal analysis and inquiry and does not suggest a specific justification of analytical jurisprudence.

jurisprudence, it seems that it must remain stranded between the Scylla of a conceptualism and abstraction substantially irrelevant to systematic understanding of the realities of legal practice and legal experience and the Charybdis of empirical doctrinal inquiry which merely duplicates ordinary legal analysis without introducing significant theoretical and methodological refinements.[59]

Why is Hart so concerned to reject the widening of conceptual inquiries to encompass the historical development and sociological significance of legal forms, legal doctrine and legal concepts? Such a widening would allow the reconstruction of the traditional forms of inquiry of analytical jurisprudence as a necessary, but not sufficient, component of rigorous theoretical study of law as a social phenomenon. Undoubtedly a reconstruction of this kind would deny any claim for analytical jurisprudence that it has an epistemology which allows it to stand independently as an autonomous field of inquiry or branch of knowledge. Its validity would be only as an element in wider theoretical study. Hart rejects the " absurd " and " quite fantastic " view that " law in its proper functioning needs no recourse to other disciplines." [60] But this is in no way seen to compromise the integrity of analytical jurisprudence, and a rigorous justification of that integrity is not forthcoming. Ultimately his justification for concentrating on conceptual inquiries in the old conditions of intellectual isolation [61] is a pedagogic one [62]: it is *educationally* letter to do so because conceptual inquiries are more educationally valuable for students than inquiries into the social bases and consequences of law.[63]

As to why this should be so the answer is considered to lie in the primitive state of conceptual analysis in social science. The " average book written in the sociological vein, whether on legal topics or otherwise, is full of unanalysed concepts and ambiguities of just that sort which a training in analysis might enable a student to confront successfully." [64] There is undoubtedly some truth in this [65] but two points need to be made. First, it is the best work, and not the average, which marks the worth of any form of inquiry. Generalised statements about lack of conceptual rigour in the social sciences will not lightly be invoked by those familiar with the work of, for example, Max Weber.

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[59] *Cf.* A. H. Campbell, " A Note on the Word ' Jurisprudence ' " (1942) 58 L.Q.R. 334. It is the " danger of descent into mere legal exposition " which seems to underlie Stone's insistence on the non-empirical character of analytical jurisprudence. See *Legal System*, p. 51.

[60] Hart, " Analytical Jurisprudence " (*supra*, note 56) pp. 955–956.

[61] But Hart points out that as well as " exclusively legal concepts, the student's analytical inquiries should certainly cover concepts such as those of Justice, Natural Law, Punishment and Responsibility " since these are " closely interrelated with law and have traditionally been included in the study of jurisprudence." *Ibid.* p. 973.

[62] *Cf.* Austin, *Lectures*, pp. 1087–1088, comparing analytical jurisprudence with mathematics as a mental training. But for Austin this is not a justification of the scientific integrity of analytical jurisprudence, but merely one of several valuable by-products of analytical method.

[63] Hart, " Analytical Jurisprudence," pp. 973 *et seq.* See also Hart, " Philosophy of Law and Jurisprudence in Britain (1945–1952)" (1953) 2 Am.Jo.Comp.Law 355, 263–364.

[64] " Analytical Jurisprudence," p. 974.

[65] *Cf.* Shuman, *Legal Positivism*, pp. 170–171.

Nor will the careful student be easily persuaded of its obvious inferiority as an intellectual achievement when compared with work that analytical jurisprudence has produced. Secondly, the business of philosophy is conceptual clarification. It would be strange if those committed to this discipline could not hold it out as a paragon of conceptual rigour and, perhaps, as superior in this respect to most other disciplines. But it would be as unfair to use this quality to belittle, in general terms, the intellectual contributions of other disciplines as it would for a sociologist concerned with law to complain that philosophers contribute little or nothing to analysis of social factors influencing types of legal development and differences in legal ideas or forms of legal reasoning in different types of social order.

That Hart's implicit epistemology is in important respects similar to Austin's, despite the serious problems of the latter, is confirmed by positions made explicit in the *Concept of Law*. In Hart's view, in so far as analytical jurisprudence " is concerned with the clarification of the general framework of legal thought " it can be also a form of " descriptive sociology." [66] As in Austin's work, there is a close relation between concept and empirical social reality. In a sense they are the same. Hart genuinely seems to see conceptual inquiries, *per se* and without guidance and structuring by any social theory or formulation as sociological hypotheses, as being capable of answering sociological questions.[67] This position has, not unnaturally, attracted criticism.[68] Hart is undoubtedly correct to argue that some sociological questions can be dissolved away by clarification of confused concepts.[69] But this cannot justify a tendency either to ignore important empirical questions relevant to legal theory or to see them through distorting philosophical spectacles which obscure their real importance.

Thus, Hart's much discussed concept of the " internal aspect " of rules [70] remains strangely vague despite being claimed to be " a decisive advance for analytical jurisprudence." [71] The concept refers to the possibility of acceptance of a rule as a general standard for behaviour of members of a group, and of the basing of criticism of behaviour and demands for conformity on the contents of the rule. It implicitly recognises important sociological issues[72] of legal legitimacy, such as those analysed in depth by Weber,[73] as underlying Hart's conception

[66] Hart, *Concept of Law*, p. vii.

[67] *Cf.* Harris, *Law and Legal Science*, pp. 52 *et seq.*

[68] See especially, J. P. Gibbs, " Definitions of Law and Empirical Questions " (1968) 2 Law and Society Rev. 429.

[69] " Analytical Jurisprudence," pp. 974–975.

[70] See J. D. Hodson, " Hart on the Internal Aspect of Rules " (1976) 62 *Archiv fur Rechts-und Sozialphilosophie* 381; D. N. MacCormick, *Legal Reasoning and Legal Theory* (1978), pp. 275–292.

[71] MacCormick, *H. L. A. Hart* (1981), p. 32.

[72] *Cf.* J. Raz, *The Concept of a Legal System* (2nd ed., 1980), p. 210.

[73] I have discussed these matters in the paper referred to *supra*, note 27. While the claim that Hart has introduced the " hermeneutic " method to English legal theory may be correct (P. M. S. Hacker, " Hart's Philosophy of Law " in Hacker and Raz (eds.), *Law, Morality and Society* (1977)), the statement is a little misleading in view of the lack of any real attempt to locate Hart's insights within the context of the substantial literature on hermeneutic methods in social science. Nevertheless one can agree with Professor Mac-

of law and of the " existence " of a legal system. But it is formulated in such a way as to suggest that these sociological issues can be avoided or solved by assertion rather than inquiry.[74] And, as has been noted by a sympathetic commentator on Hart's work, the closely related distinction which he draws between types of legal rule, is similarly based on " testable but untested sociological assertion about the way in which people perceive and think about the law."[75] Other problems arise with very important anthropological assumptions in the *Concept of Law* which have been identified and challenged.[76]

The problems which arise in this respect are remarkably similar in kind to those which plagued Austin because of his similar tendency to see concepts as " embodying " social reality: for example, the problem of the actual location of sovereignty in England or the United States,[77] or Maine's use of the case of Runjeet Singh as an " empirical test " of Austin's theory.[78] The return to legal empiricism, dictated by the need to make analytical jurisprudence " realistic," involves, when incorporated in an attempt to set out the essential conceptual structure of a legal system in general theory, a dangerous intrusion into sociological territory: dangerous because the theory is not, according to the postulates of analytical jurisprudence, allowed to admit its interdependence with social theory and with researches in the social sciences generally.

6. Legal Theory, Philosophy and Social Theory

Since the publication of *The Concept of Law*, theoretical writing on law in England has shown two related tendencies which appear to reflect attempts to avoid the dilemmas of analytical jurisprudence, which Hart's work so clearly demonstrates, without attempting a reconstruction of the links between legal theory and social science. One of these tendencies is an increasingly apparent retreat back into conceptualism.[79]

Cormick (*loc. cit.*, *supra*, note 71 and " Law, Morality and Positivism " (1981) 1 L.S. 131, 138 *et seq*) that Hart's innovation is highly significant in so far as it has altered the outlook of analytical jurisprudence.

[74] *Cf.* D. C. Galloway, " The Axiology of Analytical Jurisprudence," in T. W. Bechtler (ed.), *Law in a Social Context—Essays for Lon Fuller* (1978), p. 84. The terminological vagueness of Hart's discussion of the concept, which has been noted by several writers (see *e.g.* Hodson, *op. cit.* p. 398; MacCormick, *H. L. A. Hart*, p. 34) hints at the underlying sociological complexities but hardly contributes to an understanding of them.

[75] MacCormick, " Law as Institutional Fact " (1974) 90 L.Q.R. 102, 116.

[76] See S. A. Roberts, *Order and Dispute* (1979), pp. 24–25; L. J. Cohen, Book Review (1962) 71 Mind 395, 409–410; Galloway, *op. cit.* pp. 85 *et seq. Cf.* G. D. MacCormack, " ' Law ' and ' Legal System ' " (1979) 42 M.L.R. 295. To say, as Hacker does (*op. cit.* p. 12), that Hart's discussion is " not a piece of armchair anthropology, but is conceptual analysis " begs the question of whether conceptual analysis of a transition from the " pre-legal " to the " legal " is of value if it fails to take account of the empirical diversity and patterns of development of actual normative orders.

[77] Austin, *Lectures*, pp. 219 *et seq.*, especially pp. 245–247, 261.

[78] Maine, *Lectures on the Early History of Institutions* (7th ed., 1914), pp. 379 *et seq.* and, generally, Lectures XII and XIII.

[79] Even if the range of concepts treated as appropriate for analysis is significantly wider than that favoured by earlier writers. *Cf.* R. S. Summers, " The New Analytical Jurists " (1966) 41 N.Y.U.L.Rev. 861. By conceptualism I mean, specifically, conceptual analysis undertaken seemingly as an end, rather than a means; without clear specification of the practical purposes of such analysis as a contribution to understanding empirical phenomena or as a guide to action.

This is associated with the assertion or assumption that legal theory is a branch of the discipline of philosophy and that, as legal philosophy, it adopts the outlook, methods and concerns of that discipline. Legal theory is no longer seen as needing to derive its justification specifically from its relation with legal science. It appears to seek a " deeper understanding " not primarily of the complex empirical world of legal regulation and legal practice, but of more fundamental frameworks of thought considered to be reflected in law. The apparent irrelevance of many of these philosophical inquiries to practical issues of significance for lawyers and law reformers,[80] as well as to current debates about the nature of social changes affecting or affected by the law, is not generally seen as a matter of serious concern. The increasing professionalism and analytical rigour of legal philosophy seems to be considered, by those engaged in it, as ample compensation for what may appear to others as its drift towards sterility.[81]

The other tendency reflected in recent writing, and, like the first, indirectly influenced by Hart's dual disciplinary competence and interests in law and philosophy, is the renewal of legal theory's interests in political philosophy, and more generally in analysis of purposes and ideals of law. Concern with the stability or changeability of apparent legal ideals, the rational justification of legal policy (for example in criminal law), the substantive content of rights and the basis of judicial decision-making, are all understandable given the rapid pace of change in law and fears of the directionless character of its increasing technicality. In a sense, however, much of the work in this area seems to lay itself open to the charges which have undermined the apparent relevance to realistic legal analysis of analytical jurisprudence. The tendency is to assume that modern highly technical law contains, ought to contain, or can usefully be thought of as containing some rationally elaborated value system.[82] But it may be doubted whether it is any more reasonable to assume this than it is to assume, in the theory which grounds analytical jurisprudence, that such law is founded on, or can be realistically explained in terms of, abstract, logically coherent, formal conceptual systems.

The aim of this article is not to deny the worth either of inquiries into the nature of legal forms and concepts or of inquiries about values reflected in the law. It is to deny that such inquiries can have any real utility in constructing theory fully adequate to serve the needs of legal science, unless they are seen merely as incomplete parts of a wider theoretical enterprise. That enterprise is the reformulation of the

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[80] R. H. S. Tur, " Jurisprudence and Practice " (1976) 14 J.S.P.T.L.(N.S.) 38, 43–44. See also Stone, *Legal System*, pp. 7 *et seq*: " Most of the problems of jurisprudence, however, are in substance different from those of philosophy, having either no counterpart there, or involving additional or different elements with respect to which philosophical answers are rather collateral." (p. 8). *Cf.* Hacker, *op. cit.* p. 2, and W. L. Twining, " Academic Law and Legal Philosophy " (1979) 95 L.Q.R. 563–564.

[81] See generally Twining, *op. cit.* pp. 565 *et seq.*

[82] *Cf.* W. L. Morison, " Frames of Reference for Legal Ideals," in E. Kamenka, R. Brown and A. E.-S. Tay (eds.), *Law and Society* (1978).

relationship between legal theory and social theory[83]—theory which seeks to explain the structure of societies and the processes of change in social structure—so that legal theory is recognised as an aspect or component of social theory, concerned to structure inquiries about the nature of law as an empirical social phenomenon. Since law can be seen as, in essence, an affair of ideas intended to influence action, such a restructuring in no way displaces the central concern of legal theory with analysis of doctrine and with conceptual elements and moral or political values reflected in the law. But these elements cannot be considered only in so far as they are rational or systematic [84]; many of them, in modern legal systems, are contradictory, only vaguely or partially elaborated in doctrine, and can be explained in their rise, modification and decline only in relation to complex historical conditions. To ignore the complexities of pressures which shape the history of legal doctrine, the social, political and economic conditions which influence the directions and pace of change in different areas of the law, the factors which influence success or failure of law reform movements, and the contribution which law itself makes to social stability and change, is to confine legal theory to inquiries which, taken alone, can explain little of real significance about the character and development of modern law. The conditions of modern legal practice suggest that conceptual rationalisation is properly seen as the lawyer's necessary attempt to maintain the stability of legal doctrine in conditions of continual legislative change dictated by complex political, economic and social conditions. Lawyers' pragmatic doctrinal rationalisations, in contemporary conditions, need, and can receive, little technical aid from general theory. It would seem presumptuous for any theorist lacking rigorous knowledge of the technical doctrinal detail of particular areas of law to suggest otherwise.[85] What theory can do is to aid in showing the place of such rationalisations in a broader understanding of the law in modern conditions. It can and should help to alert the

[83] In a passage added to the second edition of his *Concept of a Legal System* (*supra*), Joseph Raz recognises what he calls the "dependence on theoretical sociology" of important questions of legal theory, arising from the fact that both the existence and identity of law are bound up with the existence and identity of the political system of which it is a part. "If the book is at fault it is in not emphasising this point enough." (pp. 210–211). The comment suggests a willingness to recognise explicitly tendencies which remain largely implicit in the work of his mentor Professor Hart. Misconceptions about the scope and nature of social theory may pose unnecessary obstacles to progress. For example, J. W. Harris remarks "If social theory has any distinctive contribution to make to jurisprudence, it is by showing that different kinds of society produce, or correspond with, different kinds of law." *Legal Philosophies* (1980), p. 245. But this is too limited a view. In so far as social theory guides explanation of tendencies to stability and change in societies of various kinds, it provides a necessary theoretical basis for analysis of these tendencies as they influence, or may be in some measure influenced by, law and legal institutions in particular societies.

[84] Despite its exaggeration for effect, Thurman Arnold's classic polemic, *The Symbols of Government* (1935), especially Chaps. 2 and 3, remains a forceful statement on this theme. See also J. Cohen, "The Value of Value Symbols in Law" (1952) 52 Col.L.Rev. 893.

[85] But the kinds of systematic analysis which have typified analytical jurisprudence are, if seen in the context suggested here, often of inestimable value in making explicit the assumptions and implications of pragmatic rationalisations of legal doctrine.

lawyer to fundamental change in the overall shape of law and legal institutions, not merely by describing, but by guiding *explanation* of, legal change in relation to social change.

Although there are many varieties of inquiry within what has been termed, in this article, legal science, legal theory with the objectives and outlook specified above seems potentially important for all of them. It holds out the prospect of contributing to explanation of the transformations of legal doctrine in a way that transcends mere rationalisation. It can provide frameworks for understanding how legal institutions—legal professional organisations, courts, legislatures, administrative and executive agencies—function in relation to other institutions in society. These are matters of no small significance in understanding the conditions of legal practice and legal reform. Theory of this kind undoubtedly demands far-reaching inquiry, but this scope is no more than the scope of law's social significance. It would, nevertheless, be as misleading to ignore the complexity, inconsistencies and contradictions of social theory,[86] as to deny the richness of insight of the classical theorists of modern society into aspects of law. All of these characteristics, positive and negative, are reflected in contemporary research concerned with the restructuring of theoretical inquiries about law in the light of social theory. Such research cannot be free of serious controversy, any more than social or legal issues of importance can be. Neither can it reveal " truth " about law in the way that nineteenth-century science sought truth. Science typically recognises now that knowledge is provisional, and that the role of theory is to structure the formulation of hypotheses and the means of testing them.[87] In social science, historical experience, with all its ambiguities, provides the most elusive yet most important test of all hypotheses. It cannot be imagined that the interpretation of history or the understanding of present conditions can be anything other than a task of never-ending incompleteness and formidable difficulty. But, as scholars and practitioners concerned with the consequences and potentialities of law and the advancement of its understanding, we have a duty not to absent ourselves from this task.

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[86] For a modern attempt to use a study of law specifically to contribute to reformulation of social theory see R. M. Unger, *Law in Modern Society* (1976).

[87] *Cf. e.g.* Nagel, *op. cit.* Chap. 10, especially pp. 322 *et seq.*

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