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CAMBRIDGE TEXTS IN THE HISTORY OF POLITICAL THOUGHT

法理学范围之限定

The Province of Jurisprudence Determined

Austin 奥斯汀

Edited by
WILFRID E.
RUMBLE

中国政法大学出版社

约翰·奥斯汀
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JOHN AUSTIN
The province of jurisprudence determined

剑桥政治思想史原著系列

丛书编辑

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在政治理论领域，“剑桥政治思想史原著系列”作为主要的学生教科丛书，如今已牢固确立了其地位。本丛书旨在使学生能够获得从古希腊到20世纪初期西方政治思想史方面所有最为重要的原著。它囊括了所有著名的经典原著，但与此同时，它又扩展了传统的评价尺度，以便能够纳入范围广泛、不那么出名的作品。而在此之前，这些作品中有许多从未有过现代英文版本可资利用。只要可能，所选原著都会以完整而不删节的形式出版，其中的译作则是专门为本丛书的目的而安排。每一本书都有一个评论性的导言，加上历史年表、生平梗概、进一步阅读指南，以及必要的词汇表和原文注解。本丛书的最终目的是，为西方政治思想的整个发展脉络提供一个清晰的轮廓。

本丛书已出版著作的书目，请查阅书末。

CAMBRIDGE TEXTS IN THE HISTORY OF POLITICAL THOUGHT

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Introduction

The Province of Jurisprudence Determined (1832) (cited hereafter as *PJD*) is a classic of nineteenth-century English jurisprudence. It has been read by generations of students and left an indelible impression upon some of them. The book itself contains most, though not all, of the core of John Austin's legal philosophy (the rest of it may be found in his posthumously published *Lectures on Jurisprudence* (*LJ*)). Although his work did not become widely known until the 1860s, some of his ideas eventually had a profound impact on the study of legal theory in England. Moreover, Austin exerted an influence in many other parts of the world, including the United States. Such leading American jurists as Justice Holmes (1841–1935) and J. C. Gray (1839–1915) knew their Austin and adopted some of his ideas. If he has often been ignored or rejected in the twentieth century, the situation changed dramatically in the 1980s (Morison, *John Austin*; Hamburger, *Troubled Lives*; Rumble, *Thought*; Moles, *Definition and Rule*). In any event the *PJD* is not a narrow, legalistic treatise intended only for students of jurisprudence. Instead, Austin designed it so that 'any reflecting reader, of any condition or station, may . . . understand it' (*PJD*: xx). He reasoned that 'the nature or essence of law, and . . . morality, are of general importance and interest' (*PJD*: xix–xx). The same is true of many of the other issues discussed in his book, the only one that he published in his lifetime.

I

Austin was born on 3 March 1790, the eldest of the five sons and two daughters of Jonathan and Anne Austin. Jonathan Austin was a Suffolk miller and corn merchant who became wealthy during the Napoleonic wars. Anne Austin was apparently a deeply religious person with a strong 'tinge of melancholy' (Ross, *Three Generations of English Women*: 88), a trait shared by her eldest son. Knowledge of his childhood is sparse, but he enlisted in the army shortly before his seventeenth birthday. He resigned his commission in 1812 after serving in both Sicily and Malta.

Legal education in its modern form, or anything close to it, did not exist when Austin began the study of law in 1814. Instead, the student was 'obliged to get his knowledge of law by means of undirected reading and discussion, and by attendance in chambers, in a law office, or in the courts' (Holdsworth, *History of English Law*: 77). Although not much is known about how Austin acquired his legal knowledge, he evidently developed as a student the intention 'to study and elucidate the principles of Law' (Ross, *Fourth Generation*: 73). His experience as an apprentice to an equity draftsman may also have affected his literary style. At least, he wrote to his fiancée in 1817 that he would 'hardly venture on sending a letter of much purpose, even to you, unless it be laboured with the accuracy and circumspection which are requisite in a deed of conveyance' (*LJ*: 4).

Austin was called to the Bar in 1818. The following year he married Sarah Taylor, a remarkable person in her own right. She not only became her husband's main prop, comforter, and literary agent (of sorts), but developed a career of her own as a reviewer and translator (Hamburger, *Troubled Lives*). Since John Austin's income for most of their married life was small, Sarah's earnings were important for their support (their daughter Lucie was born in 1821). The Austins moved to London shortly after their marriage and became neighbours of Jeremy Bentham and James Mill. Bentham was the intellectual leader of the utilitarians and no one did more than Mill to spread the gospel. Austin's friendship with them thus placed him at the heart of a vital reform movement. His relationship to it helps to explain his large intellectual debt to Bentham. To be sure, Hobbes, Locke, and others also cast a

shadow over the *PJD*. Moreover, Austin was no slavish follower of Bentham and criticized many of his ideas. Then, too, political differences between the two men developed and multiplied in the course of time. Nevertheless, Bentham probably had a heavier impact upon Austin's ethical and legal philosophy than any other person.

The prospects for Austin as a barrister appeared to be bright, a judgement evidently shared by a number of his contemporaries. His name appeared on the Law List in 1819 and 1824 as an equity draftsman. Although little is known about his experiences at the Bar, he evidently held only one brief (Hamburger, *Troubled Lives*: 29). He became so discouraged that in 1825 he quit the practice of law. One year later he was appointed to the Chair in Jurisprudence and the Law of Nations at the newly founded University of London. Its purposes included creating opportunities for the study of subjects neglected at Oxford or Cambridge, one of which was law.

Austin devoted much of the next two or three years to the preparation of his lectures. The task was difficult and to facilitate it he and his wife took up residence in Bonn for part of 1827 and 1828. The atmosphere of this German university town was very congenial to them and they apparently thrived in it. Although the impact of the 'German connection' is subject to different interpretations, it was significant. Austin's disposition became less 'militant and polemic', while his 'views of life' underwent a 'very perceptible change' (Mill, *Autobiography*: 185). This period culminated in a retreat from much of his earlier political radicalism, the first major stage in the evolution of his political conservatism. Aside from this, he increased his knowledge of Roman law, the study of which was undergoing an 'explosion of interest' (Whitman, *Legacy of Roman Law*: 85). Finally, his exposure to German jurisprudence reinforced his drive for the systematization and classification of law.

Austin was scheduled to begin his course in November 1828. He was unable to complete the preparation of his lectures, however, and received permission to postpone them for a year. He justified the postponement on two grounds, one of which was a recurrence of his periodic bouts of ill-health. He was subject throughout his life to severe 'feverish attacks' (*LJ*: 4), the symp-

toms of which were very similar to migraine headaches. He also quite justifiably complained that he had no model for his innovative attempts to expound the 'principles of Jurisprudence' (Letter to Leonard Horner 1828). In any case he eventually surmounted these obstacles and began lecturing in November 1829. Enrolment in the class was large and impressive (Mill, 'Austin on Jurisprudence': 175). It included John Stuart Mill, who had been tutored by Austin in Roman law and took his course more than once. No more than six or seven students enrolled, however, in the subsequent three offerings of the course. Austin became very discouraged by this response and stopped teaching the class in 1833. When he taught a course on jurisprudence at the Inner Temple in 1834, it too suffered from low enrolment and was discontinued.

Various factors contributed to the unpopularity of Austin's courses. They include the small enrolment overall at the University of London, the primitive state of legal education, the highly abstract character of the courses, and his limitations as a teacher. His introductory lecture was off-putting, his subsequent lectures tended to be repetitive, and they were completely written out and read. Whatever the reasons for it, the significance of the 'failure' of his courses is difficult to exaggerate. At the outset, it convinced him that he had to resign his Chair, which he did in 1835. His resignation was the 'real and irremediable calamity of his life – the blow from which he never recovered' (*LJ*: 9). Moreover, he became convinced that he had no future in the classroom and never taught again. The unpopularity of his courses also contributed to the writer's block on legal philosophy that he developed after the publication of the *PJD* in 1832. Although he subsequently contemplated a much more ambitious tome on general jurisprudence and ethics, it never left the drawing board. He also refused to permit even the reprinting of the *PJD*, which he was urged to do. He was a perfectionist and had evidently detected numerous defects in it (what he perceived them to be is unknown). In any event he regarded them as sufficiently important to require a complete rewriting of the book (*LJ*: 15–16).

A number of Austin's other experiences also contributed to his sense of estrangement from his vocation. They include his somewhat slanted perception of the reaction to the *PJD*, which did

not receive the attention that he felt it merited. While the two leading journals of the day took no notice of the book, it received seven reviews that would have delighted most authors (Rumble, 'Nineteenth-Century Perceptions of John Austin'). Moreover, his appointment in 1833 to the Criminal Law Commission did not turn out well and he resigned in frustration in 1836.

It is no wonder then that Austin claimed to be born 'out of time and place', or that he should have been a 'schoolman of the twelfth century – or a German Professor' (*LJ*: 12). In any case he accomplished relatively little in the final twenty-four years of his life. They were all too frequently marred by illness, depression, social isolation, fits and starts of work, and huge wastes of time. To say this is not to imply that he accomplished nothing during these years. In 1836 he was appointed a Royal Commissioner to Malta. The other Commissioner was George Cornewall Lewis, a former student and great admirer of Austin. Their reports covered a wide variety of subjects, they were of unusually high quality, and many of their recommendations were accepted. The British government, however, did not give any public acknowledgement of Austin's services, which further embittered him (Hamburger, *Troubled Lives*: 118). He also published two long articles while he and his wife lived in Germany and France from 1841 to 1848. Moreover, he wrote *A Plea for the Constitution* in 1859, eleven years after his return to England. The pamphlet expressed his dissatisfaction with various proposals for the reform of Parliament, all of which were 'mischievous' (Austin, *Plea for the Constitution*: iii). It also contained a defence of the British aristocracy and constitution that would have shocked either Bentham or James Mill.

Austin died on 17 December 1859. His wife subsequently characterized his life as one of 'unbroken disappointment and failure' (Ross, *Three Generations of English Women*: 373). Although this description is not fully accurate, it contains a large element of truth. He had very few clients, he was unable to attract many students, and he wrote relatively little. Indeed, Sarah Austin was 'far more widely known than her husband during her lifetime' (Hamburger, *Troubled Lives*: ix). The situation began to change, however, shortly after his death. The person most responsible for the change was his wife. She dedicated the final eight years of

her life to the arduous task of editing her husband's lectures and papers on jurisprudence. She published a second edition of the *PJD* in 1861. In 1863 she edited two additional volumes of his work, which are invaluable for students of his legal philosophy. They discuss numerous matters only alluded to briefly in the *PJD*, or not mentioned at all, such as 'judiciary' law, codification, and the classification of the *corpus juris*. Mrs Austin also synthesized into a single essay the two introductory lectures in her husband's courses at the University of London and the Inner Temple (*LJ*: 1071). Although she exercised an unusually large amount of editorial discretion in constructing the essay, no student of John Austin's philosophy of law can ignore it.

The reviews of Sarah Austin's editions were widespread and, in general, very favourable. Their publication thus marks the start of a process that would transform Austin from a minor figure into a dominant force in nineteenth-century British jurisprudence. As such, he would exert a vastly stronger influence from the grave than he had ever exercised during his life.

II

The *PJD* is a compressed version of the first ten lectures in Austin's course. He designated them 'lectures' rather than 'chapters' because their 'style ... assumes that they are read to an audience'. He claimed that changing their mode of expression would have required 'much and profitless labour' (*PJD*: vi). This is debatable, but the book does reflect more the style of a lecture than an essay. It also cuts a much wider swathe than the subsequent lectures in Austin's course. Unlike them, for example, the book contains a substantial amount of ethical and political theory. Many of the judgements expressed in the *PJD* are also anything but 'morally, politically, and evaluatively neutral' (Hart, 'Legal Positivism': 419). This consideration is indeed one reason why it is a mistake to interpret the work as simply an essay in 'analytical jurisprudence'. Moreover, Austin never used this term. It was very much the invention of subsequent nineteenth-century British jurists, especially Sir Henry Sumner Maine (Maine, *Lectures*: 357, 359).

The term that Austin used to characterize his approach was

'general' or 'universal' jurisprudence. Although no comprehensive explanation of it occurs in the *PJD*, a number of his other writings fill part of the gap (*LJ*: 1071–91; 'Jurisprudence'; *Outline of a Course of Lectures*). To begin with, he distinguished sharply between general and particular jurisprudence. Both focus on positive laws as they are rather than as they ought to be, but in very different ways. Particular jurisprudence is the exposition of the positive laws that actually exist, or have existed, in a particular nation or nations. General jurisprudence is the exposition of quite different kinds of principles, notions, and distinctions. Some may be found in advanced legal systems, but not elsewhere, while others are universal. These propositions are not only common to very different legal orders, but are also 'essential', 'inevitable', and 'necessary' (*LJ*: 32, 58, 1073–4). To this extent, general jurisprudence focuses upon 'law as it necessarily *is*, rather than with law as it *ought* to be; with law as it must be, *be it good or bad*, rather than with law as it must be, *if it be good*' (*LJ*: 32). To say this is not to suggest that what law ought to be is unimportant, which was most definitely not Austin's position. Rather, it was that this question belongs to the science of legislation rather than the science of jurisprudence (p. 113). He also emphasized the 'numerous' and 'indissoluble' ties between the two sciences, which is one of the reasons for his lengthy discussion of ethical theory (p. 14). In any event he claimed that Hobbes expressed well the distinction between particular and general jurisprudence. He described his intention in the *Leviathan* as 'to show, *not what is law here or there, but what is law* [Austin's emphasis]: As Plato, Aristotle, Cicero, and divers others have done, without taking upon them the profession of the study of the law' (*LJ*: 32). (The quotation from Hobbes is slightly inaccurate (see Hobbes, *Leviathan*: 183).)

Austin's course was about what is law rather than what is law here or there. The principal stated purpose of the portion of it included in the *PJD* was to distinguish positive from other laws. Fulfilment of this objective was essential because positive laws constitute the raw material, or subject-matter, of jurisprudence. Determining the nature of a positive law is, however, no easy task. There are several different kinds of laws that resemble or are analogous to each other, that share a common name, and that are often 'blended and confounded' (p. 11). Moreover, the

very term 'laws' is large, vague, and 'extremely ambiguous' (p. 31). Still further, explication of it and other leading expressions cannot be achieved by 'short and disjointed definitions'. Instead, what is required is a dissertation that is 'long, intricate, and coherent' (*LJ*: 1076).

The *PJD* constitutes precisely this kind of treatise. Many, though not by any means all, of the issues that Austin discusses in the book are about the meaning of words. It is unlikely that he would have devoted so much space to such questions if he had regarded them as purely semantic. Rather, he evidently accepted a premise that John Stuart Mill articulated very clearly. Mill not only profoundly admired Austin, but wrote highly laudatory reviews of both of his books (Mill, 'Austin's Lectures on Jurisprudence': 51; 'Austin on Jurisprudence': 165). Mill interpreted the *PJD* as from beginning to end the analysis and explanation of the term 'positive law'. He insisted, however, that the discussion of it is as 'far from being . . . merely verbal . . . as the inquiry into the meaning of justice' in Plato's *Republic*. The meaning of a name lies, after all, in 'the distinctive qualities of the thing named'. They can only be found by close study 'of the thing itself, and of every other thing from which it requires to be distinguished' (Mill, 'Austin on Jurisprudence': 176).

The *PJD* is a 'close study' of two kinds of things for which the word 'law' is used as the name. One consists of the 'objects' for which the word is the proper name. The other consists of the 'objects' to which the word sometimes refers, but improperly. Whether the use of the term is proper or improper depends, then, on the nature of the objects to which the name refers. Do they have all, or only some, of the 'qualities composing the essence of the class' (p. 108)? The first lecture is an analysis of the nature or essence of a law, the 'necessary or essential elements of which it is composed' (p. 117). Austin argued that all genuine laws are sub-sets of commands, which are the '*key* to the sciences of jurisprudence and morals' (p. 21). A command is the signification or intimation of a desire by one person or persons, to another person or persons. What is signified is that the latter must do, or abstain from, an act or course of action. If it is intimated that a specific act must be performed or forborne, then the command is particular or occasional. If it is signified that a course of conduct

or class of actions must be performed or forborne, then the command is general. Only general commands are laws. What is distinctive about a command is not, however, that it is expressed in the imperative mood. Rather, it is the actual power and the purpose of the commander to impose an evil for disregard of his or her wishes. If there is no such power or purpose, there is no command. Commands thus imply superiority, but only in the sense of might, or 'the power of affecting others with evil or pain, and of forcing them, through fear of that evil, to fashion their conduct to one's wishes' (p. 30). This evil is a sanction the liability to which is the essence of legal obligation or duty.

The second, third, and fourth lectures discuss, among other things, Austin's ethical theories. The stated basis of them is divine law, which constitutes one of the three types of law 'properly so called'. It is also the ultimate measure or test of the ethical value of human laws. Their goodness or badness depends upon whether they correspond to, or conflict with, the law of God. These ideas contrast sharply with Bentham's ethical theories, in which divine law has no place. Its important role in Austin's system is very similar, however, to the views of the so-called 'theological utilitarians'. They included Archdeacon William Paley, a highly influential British theologian of the late eighteenth century. Although some of his ideas were criticized strongly by Austin, he fully accepted others.

Austin conceived of the divine law as the express or tacit commands of God. While some of his general orders may be discovered by revelation, others are not expressly revealed. How *these* commands may be discovered is the major issue that Austin addresses in his second lecture. The only indices to them that he discusses are the moral sense and the principle of general utility, which he supported. God's tacit commands may be inferred from calculations and comparisons of the tendencies of alternative classes or types of human actions, their 'probable effects . . . on the greatest happiness of all' (p. 41). These tendencies would then serve as the basis of rules from which decisions to act could be deduced. 'Our rules would be fashioned on utility; our conduct, on our rules' (p. 49). Still, Austin did not advocate an unqualified form of rule-utilitarianism. Rather, he took the position that exceptions to rules may occasionally be justified. In unusual situ-

ations the effects of departing from a rule might be better than the effects of adhering to it. In such cases we must discard the rule and decide how to act by applying the principle of general utility to the situation. He illustrated the point with a brief discussion of the rule of obedience to established governments. Although adherence to it is in general desirable, the social benefits of resistance to a bad government might outweigh the costs. Whether the one is likely to outweigh the other can only be determined by calculating specific consequences. (For a very different, conscience-based, theory of resistance roughly contemporaneous with Austin's, see Thoreau, *Reform Papers*: 63–90.)

Austin's opinion was that in the vast majority of cases our conduct should be based upon rules. This position raises the question of how we are to know the rules which we are bound to observe. This issue is the major focus of the third lecture. Although it could be argued that each person should attempt to learn the rules on his or her own, this was not Austin's view. He argued that the classes of human action are too numerous for any single person to comprehend their respective tendencies. Besides this, 'the many' are too preoccupied with earning a living to become experts in the science of ethics. Unfortunately, in the present state of society no trustworthy authority exists to which the bulk of mankind can defer. Rather, there are a variety of authorities, each of which has its own particular interests. As a result, there is not that '*concurrence or agreement of numerous and impartial inquirers*, to which the most cautious and erect understanding readily and wisely defers' (p. 62). Nevertheless, Austin was optimistic that these barriers would gradually be overcome. The key to further progress is popular education, 'one of the weightiest of the duties, which God has laid upon governments' (p. 68).

The fourth lecture contains Austin's most systematic critique of the theory of the moral sense. He took the position that it is the only alternative to the principle of utility, one or the other of which is 'certainly true' (p. 81). Although he acknowledged the imperfections of the principle of utility as an index to the divine will, he regarded it as vastly preferable to the moral sense. The latter involves numerous assumptions which are either problematic or false. The principle of utility is also subject to certain