

Summary of John Austin's Legal Positivism:

John Austin (1790-1859) was a nineteenth century British legal philosopher who formulated the first systematic alternative to both natural law theories of law and utilitarian approaches to law. (Bentham and Mill were utilitarians, advancing the view that there should be a separation between law and morality, and that law should be about maximizing utility, or personal pleasure or pain, and the effect or wisdom of a particular policy could be calculated by adding together all the pleasure and subtracting all the pain it brought everyone.)

Austin's analytic approach to law offered an account of the concept of law, that is, what law *is*. This was termed "Legal Positivism" because it set out to describe "what law is" in terms of what humans *posited it was*, thus the link between "positive law" and "Legal Positivism." Austin's theory of law is a form of analytic jurisprudence in so far as it is concerned with providing necessary and sufficient conditions for the existence of law that distinguishes law from non-law in every possible world.

Austin's particular theory of law is often called the "command theory of law" because the concept of command lies at its core: law is the command of the sovereign, backed by a threat of sanction in the event of non-compliance. Legality, on this account, is determined by the *source* of a norm, not the merits of its substance (ie it embodies a moral rule). Thus, the answer to the question "what is law?" is answered by resort to facts not value. On Austin's view, a rule R is legally valid (i.e., is a law) in a society S if and only if R is commanded by the sovereign in S and is backed up with the threat of a sanction. The relevant social fact that confers validity, on Austin's view, is promulgation by a sovereign willing to impose a sanction for noncompliance.

If what makes a rule a legal rule is not determined by its content but by its source, then why should we obey the law under Austin's account? Well, to avoid sanction - since the theory of law, under this account, provides a reliable prediction of what will befall a person, at the hands of those in charge, if you disobey the law. Not a particularly compelling ground upon which to build a theory of why we have a *duty* to obey law.

H.L.A. Hart, in A Concept of Law sought to provide a positivist account of law that at once improved upon that developed by Austin and destroyed Austin's central concept: the command theory of law. A Concept of Law was a step by step effort to provide an account of the nature of law that i) rejected the notion that law's moral force was grounded in morality, and having done so, ii) provided an analytic account of the *criteria of legality*: the criteria a norm must satisfy in order to count as a *legal* norm.

Further reading on Austin:

John Austin, The Province of Jurisprudence Determined (1832)

John Austin, Lectures on Jurisprudence and the Philosophy of Positive Law (St. Clair Shores, MI: Scholarly Press, 1977)

A Companion to Philosophy of Law and Legal Theory (Patterson ed. 1999) pp. 244-46