

FROM: LEGAL THEORY BLOG

# LEGAL THEORY LEXICON: LEGAL THEORY, JURISPRUDENCE, AND THE PHILOSOPHY OF LAW

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## INTRODUCTION

The *Legal Theory Lexicon* series usually explicates some concept in legal theory, jurisprudence, or philosophy of law. But what are those fields and how do they relate to each other? Is “jurisprudence” a synonym for “philosophy of law” or are these two overlapping but distinct fields? Is “legal theory” broader or narrower than jurisprudence? And why should we care about this terminology?

As always, this entry in the *Legal Theory Lexicon* series is aimed at law students, especially first-year law students with an interest in legal theory.

## WHO CARES ABOUT TERMINOLOGY

Why should we care about terminology? Who cares what goes under the label “jurisprudence” or “philosophy of law” or “legal theory”? Well, of course, there is a sense in which we

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shouldn't care at all. What matters in a deep way is the *substance* of theorizing about law. On the other hand, these labels are important for a different reason – because their use tells us something about the *sociology* of the academy. When people argue about what “jurisprudence” really is, the terminological dispute may reflect a conflict over “turf” and “authority.”

## DISCIPLINARY LINES AND THEORIZING ABOUT LAW

Very broadly speaking, the turf of high-level legal theory is disputed by at least four groups. First and (still) foremost are the academic lawyers, those whose graduate-level training is exclusively (or almost exclusively) in law as it is taught in the legal academy. Second, there are the economists – some of whom are primarily (or exclusively) trained in economics; while others legal economists were trained primarily by law professors. Third, there is the “law and society” movement – broadly defined as the study of law from a social science (but noneconomic) perspective. Law-and-society theorists may have been trained in political science or sociology or criminology, but many may have been trained in the legal academy as well. Fourth, there is the law-and-philosophy movement, with “analytic legal philosophy” or “analytic jurisprudence” as the focal point of a variety of philosophical approaches. Many “philosophers of law” have formal philosophical training, but some were trained in law or political theory in a political science department. There are other approaches to the study of law (e.g., “law and courts” scholarship in political science departments), but for the most part they do not claim to be doing “legal theory” or “jurisprudence.”

So, what about the turf wars? Those who use the phrase “philosophy of law” tend to be philosophers, while the term “jurisprudence” is more strongly associated with the legal tradition of theorizing about the law, but there is frequently a blurring of these two terms. From the 1960s on, a single figure had a dominant influence in defining the content of “philosophy of law” courses in philosophy departments and “jurisprudence” courses in the law schools – that figure was H.L.A. Hart. Of course, there were many, many

exceptions, but for quite a long time the standard course in both disciplines included as a central, organizing component, an examination of Hart's ideas, either *The Concept of Law*, Hart's great book, or the Hart-Fuller debate in the Harvard Law Review. When I was a student in the 70s and early 80s, I thought that "jurisprudence" and "philosophy of law" were synonymous – and that both were references to analytic philosophy of law in the tradition of Hart and included figures like Dworkin and Raz. One consequence of the "philosophicalization" of jurisprudence was the move to fold moral and political philosophy into jurisprudence. I have a very clear memory of browsing the law shelves of the textbook section of the UCLA bookstore in the mid to late 70s, and discovering John Rawls's *A Theory of Justice* and Robert Nozick's *Anarchy, State, and Utopia* as the texts for the jurisprudence course. I have always assumed that similar courses were offered elsewhere, although I could be wrong about that.

Philosophy is important as a matter of the sociology of the legal academy, but it is not the only important interdisciplinary influence: economics, political science, and sociology, each of these also has a major influence. Given that the "jurisprudence" course was "captured" by philosophers, how could these other approaches to legal theorizing express their theoretical framework in the law school curriculum. One mode of expression was the alternative theory course – "Law and Economics" and "Law and Society" were the two leading competitors of "Jurisprudence." Moreover, the tradition of distinctively legal thinking about high legal theory remains. American Legal Realism was largely the product of the law schools – although many other disciplines figured in the realist movement. Likewise, Critical Legal Studies was largely a phenomenon of the legal academy. Some jurisprudence or legal theory courses incorporate philosophy of law, law and economics, and law and society into a course that is taught from a distinctively legal point of view.

What can we say about our three terms – jurisprudence, philosophy of law, and legal theory?

## JURISPRUDENCE

My sense is that most Anglo-American legal academics view “jurisprudence” as mostly synonymous with “philosophy of law”. This is not a unanimous view. There is still a lingering sense of “jurisprudence” that encompasses high legal theory of a nonphilosophical sort – the elucidation of legal concepts and normative theory from within the discipline of law. Moreover, in other legal cultures, for example, in Europe and Latin America, my sense is that the move to identify jurisprudence with philosophy of law never really took root.

## PHILOSOPHY OF LAW

The meaning of the phrase “philosophy of law” is inevitably tied up in the relationship between the two academic disciplines – philosophy and law. In the United States and the rest of the Anglophone world, “philosophy of law” is a subdiscipline of philosophy, a special branch of what is nowadays frequently called “normative theory” and closely related to political philosophy. Of course, there are many different tendencies within academic philosophy generally and the philosophy of law in particular. Still, the dominant approach to philosophy of law in the Anglophone world is represented by “analytic jurisprudence,” which might be defined by the Hart-Dworkin-Raz tradition on the one hand and by the larger Austin-Wittgenstein-Quine-Davidson-Kripke tradition on the other. (In both cases, the list of names is arbitrary and illustrative – we could add Coleman or Finnis or drop Davidson or Wittgenstein and still refer to the same set of central tendencies.)

Coexisting with the analytic tradition in the philosophy of law are many other philosophical approaches. These include Hegelianism, neo-Thomism, Marxism, as well as the contemporary continental philosophical tradition, ranging from Habermas (with close affinities to the analytic tradition) to Foucault and Derrida (with much more tenuous links).

The philosophy of law covers a lot of ground. An important line of development focuses on the “what is law?” question, but much

contemporary legal philosophy is focused on normative questions in specific doctrinal fields. The application of moral and political philosophy to questions in tort and criminal law is an example of this branch of contemporary legal philosophy.

*My sense of the “lay of the land” is that debates over the “What is Law?” question have recently become more exciting (Scott Shapiro’s work is just one example) – but in my opinion the center of attention has shifted from the nature of law to normative legal theory. A variety of potentially exciting developments that are very recent include the emergence of experimental jurisprudence and explorations of the connections between metaethics and metajurisprudence.*

## LEGAL THEORY

Legal theory is a much broader and encompassing term, encompassing the philosophy of law and jurisprudence as well as theorizing from a variety of other perspectives, including law and economics and the law and society movement. In my opinion, “legal theory” is currently the best neutral term for referring to legal theorizing, broadly understood. It allows us to avoid the turf wars and sectarian disputes that make the word “jurisprudence” somewhat problematic.

## CONCLUSION

When you start theorizing about law, you are likely to adopt some term or phrase to describe your activity. “I’m doing jurisprudence,” or “I’m a philosopher of law.” I hope that this entry in the *Legal Theory Lexicon* will help you use these labels with some awareness of their history and the controversies that surround their use.

## RELATED LEXICON ENTRIES

[Legal Theory Lexicon 065: The Nature of Law](#)<sup>1</sup>

[Legal Theory Lexicon 016: Positive and Normative Legal Theory](#)<sup>2</sup>

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<sup>1</sup> [solum.typepad.com/legal\\_theory\\_lexicon/2008/05/legal-theory-le.html](http://solum.typepad.com/legal_theory_lexicon/2008/05/legal-theory-le.html).

<sup>2</sup> [solum.typepad.com/legal\\_theory\\_lexicon/2003/12/legal\\_theory\\_le.html](http://solum.typepad.com/legal_theory_lexicon/2003/12/legal_theory_le.html).

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