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ENGLISH JURISPRUDENCE BETWEEN AUSTIN AND HART

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INTRODUCTION

ANYONE who looks to textbooks on jurisprudence to understand the development of this subject in England might fairly conclude that nothing of great significance happened from the middle of the nineteenth century to the middle of the twentieth. Between 1832, when John Austin resigned as the professor of jurisprudence at University College London (“UCL”), and 1952, when H.L.A. Hart was appointed to the jurisprudence chair at Oxford, the only English development of note seems to have been the work of Sir Henry Maine—though even this receives but scant treatment in the most detailed of English jurisprudence textbooks.¹ One Canadian lawyer writing in the early 1960s bemoaned “the dismal litany of ‘act’, ‘right’, ‘duty’, ‘ownership’, ‘possession’, which has been the subject-matter of English analytical jurisprudence.”² To this brand of jurisprudence no convincing rival had emerged, he added, and so “English jurisprudence still suffers from an over-emphasis on law in the books, and a corresponding disinterest in law as a social and economic institution.”³ Only since around 1953 had “writers working in England” begun “challenging old assumptions and giving new life to English jurisprudence.”⁴

This commentator had a point. Between 1832 and 1952, only one notable jurisprudential perspective emerged in England—the historical perspective developed by Maine⁵—and even that had run its course by the early twentieth century. The interesting and enduring jurisprudential developments were occurring elsewhere—in Aus-

¹ See M.D.A. Freeman, *Lloyd’s Introduction to Jurisprudence* 908–09 (7th ed. 2001); see also J.W. Harris, *Legal Philosophies* 237–40 (2d ed. 1997). Writers of English jurisprudence textbooks often ignore Maine. See, e.g., *Introduction to Jurisprudence and Legal Theory: Commentary and Materials* (James Penner et al. eds., 2002).

² C.R.B. Dunlop, *Developments in English Jurisprudence—1953–1963*, 3 *Alberta L. Rev.* 63, 63 (1963).

³ *Id.* at 76.

⁴ *Id.* at 63.

⁵ Although Maine developed the approach, Savigny pioneered it. See Friedrich Carl von Savigny, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (Olms 1967) (1840).

tria, birthplace of Hans Kelsen's *Pure Theory of Law*,⁶ and in the United States, home of the principal realist tradition in jurisprudence.⁷ If anything comparable had come about in England during this period, the world would have heard about it. The blunt truth is that nothing did. "By the middle part of [the twentieth] century," Neil MacCormick observes, "[j]urisprudence in the universities had become a routine reading and re-reading of a canon of texts and text-books."⁸ If ever a subject had become moribund, it was English jurisprudence.⁹

It would be wrong to assume that nothing happened in English jurisprudence between Austin's era and Hart's. It is just that nothing much happened that would be remembered. Jurisprudence books and articles were being written, but not until the appearance of Hart's seminal writings on legal positivism did anything appear in England that would cause legal philosophers to reassess their assumptions and outlooks.¹⁰ A study devoted to this period—to what anyone with a passion for drama might term "the lost years of English jurisprudence"—seems from the outset unpromising. What might usefully be said, after all, about texts which today are all but forgotten? There are at least two answers to this question. The first,

⁶ Hans Kelsen, *Pure Theory of Law* (Max Knight trans., Peter Smith 2d ed. 1989) (1960).

⁷ I say "principal" because there is, of course, another realist tradition, pioneered by Alex Hägerström, which emerged in Scandinavia and which was taken very seriously in European jurisprudential circles for much of the twentieth century (though it receives little attention today). For an introduction to Scandinavian legal realism, see generally Geoffrey MacCormack, *Scandinavian Realism*, 15 *Jurid. Rev.* (n.s.) 33 (1970).

⁸ Neil MacCormick, *H.L.A. Hart* 19 (1981).

⁹ My primary interest here is in the history of jurisprudence in England rather than with English jurisprudence as something that might be representative of national character; and so for this reason, in this study, "English jurisprudence" means jurisprudence produced in England rather than jurisprudence produced by the English. This means that a jurisprudent like John Salmond, who was born in England but who was taken to New Zealand as a child, features little in this study, whereas a writer such as Carleton Kemp Allen, an Australian who made his career in England, features relatively prominently. It is worth noting also that this study is indeed concerned with English as opposed to British jurisprudence.

¹⁰ See, in particular, H.L.A. Hart, *The Concept of Law* (1961) [hereinafter Hart, *Concept of Law*]; H.L.A. Hart, *Definition and Theory in Jurisprudence* (1953), reprinted in *Essays in Jurisprudence and Philosophy* 21 (1983) [hereinafter Hart, *Definition and Theory*]; H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 *Harv. L. Rev.* 593 (1958) [hereinafter Hart, *Positivism*].

and to my mind the weaker, of these answers is essentially a general observation. In order to understand an intellectual tradition it is obviously important to pay attention to its defining works—those seminal essays by Hart are a case in point. There is also something to be said, however, for looking not only to the major texts of a tradition but also to the jottings, prototypes, and crossings-out that were left behind. As regards English jurisprudence, the likelihood that any of these *scripta minora* will turn out to be a neglected classic is remote. They should, nevertheless, provide us with an appreciation of the thought-processes behind English jurisprudence—of what was discarded along with what was retained of the inquiries that proved to be wrong turns or that failed to fire imaginations. For a thorough understanding of an intellectual tradition we do well to look not only to the best and most representative of that tradition but also to the ideas of those who, while working within the tradition, struggled to no obvious avail.

The difficulty with this first answer, and the reason it is likely to arouse suspicion, is that it seems to place hope above expectation. Let us be honest: the texts that fill up the lost years of English jurisprudence most likely never made it into the jurisprudential canon because they were simply not very good. To return to those texts may well serve the cause of historical completeness, but the outcome of such an initiative is likely to be more breadth and depth for the sake of it rather than a significantly richer understanding of English jurisprudence.

The second, and I would argue the more compelling, reason for returning to the landscape of English jurisprudence between Austin and Hart has less to do with jurisprudence itself and more to do with the development of law as an academic discipline. If one compares the development of juristic thought in England throughout this period with the development of the same in the United States, one discovers some significant differences. Perhaps the most crucial difference is that whereas Americans had accorded law a clear identity within their university system by the end of the nineteenth century, it was not until well into the second half of the twentieth century that law began to acquire much academic credibility within the English system. Before then, there had been little in the way of legal education, which was and still is primarily undergraduate education, in the English universities. Exploration of this fact helps us not only

to understand the status of jurisprudence in England but also to explain the different attitudes to theorizing about law that evolved in England on the one hand and in the United States on the other. Resistance to jurisprudence has not been uncommon in either country. But in the United States there has long existed an academic-legal culture that enables jurisprudential thought and inquiry—though not necessarily jurisprudence courses within the curriculum—to emerge easily.

Americans who travel the neglected path that is English jurisprudence from the 1830s to the 1950s will soon find themselves in a world very different from their own; in fact, anyone with an interest in jurisprudence who should take this route is likely to end up somewhere intriguing. This study follows this route, and considers the most notable developments—insofar as anything was a notable development—in English jurisprudence during the 120 years that separate Austin's resignation from UCL and Hart's appointment as a professor at Oxford. The period is tackled thematically rather than chronologically, although perhaps inevitably the focus on themes sometimes requires that we pay attention to their development or endurance over time. No effort is made to consider every work of English jurisprudence that was written during this period; even if we compiled a list of these works, there would be little point taking account of all of them since there is often very little that distinguishes one from another. Our focus will instead be on those texts which in one way or another exemplify the period. Studies published after 1952 are occasionally drawn upon because they offer historical perspective, though generally we will remain within the stipulated time frame.

Part I will deal with the main jurisprudential concepts, perspectives, and debates of the period. We will see that, notwithstanding the occasional effort to revitalize jurisprudence in England, the subject remained very much in the shadow of Austin well into the twentieth century. In Part II, we will consider why this should have been the case. The English black-letter lawyer's traditional hostility toward jurisprudence, along with a more general English tendency to be wary of abstraction and intellectualization, cannot have helped; nevertheless, it will be argued that the principal explanation for the stagnation of jurisprudence is to be found in the universities themselves. The subject did not advance significantly because most of the

emerging English law faculties of the first half of the twentieth century were not suited to the encouragement of jurisprudential ambition: most legal instruction was at undergraduate level; the students were often apprentice lawyers attending university on work release; resources, especially library holdings, tended to be modest; and few legal academics were either full-time or committed to the production of scholarship. The English law faculties, in short, have traditionally been uninspiring environments for those wishing to develop, rather than just summarize and teach, philosophies of law.

I. THE STATE OF ENGLISH JURISPRUDENCE, 1832–1952

A. *The Analysis of Legal Concepts*

“Analytical positivists from Austin onwards,” Wolfgang Friedmann has observed, “greatly influenced legal theory,” not only by endeavoring to answer the question of what makes for legal validity but also by concentrating “on the elaboration of legal concepts and categories, *i.e.*, on the tools of legal science.”¹¹ Austin himself contributed to the elaboration of these concepts and categories. In his *Lectures on Jurisprudence*, he devoted considerable energy to what he termed “Analysis of Pervading Notions.”¹² One of his basic tasks was, as he put it, “to unfold the notions which are signified by the term ‘Right’”¹³—the principal notions bound up with the concept of a legal right being, in his view, those of duty, sanction, person, thing, act, forbearance, injury, intention, motive, and liberty.¹⁴ Jeremy Bentham, before him, undertook a similar analytical exercise.¹⁵ Between the 1830s and the 1950s, furthermore, others would do the same. But those from this period who are remembered as the successors to Bentham and Austin had little or no connection with England. In Germany, the inspiration of the analytical tradition was probably first evident in the work of the nineteenth-century Protestant jurist, Ernst Bierling, who, like Austin, attempted to set out the basic con-

¹¹ W. Friedmann, *Legal Theory* 268 (5th ed. 1967).

¹² 1 John Austin, *Lectures on Jurisprudence* 343–507 (Robert Campbell ed., London, John Murray, 5th ed. 1885).

¹³ *Id.* at 346.

¹⁴ *Id.* at 344–45.

¹⁵ See Jeremy Bentham, *Of Laws in General* (H.L.A. Hart ed., Athlone Press 1970) (1782).

cepts which are bound up with the notion of right.¹⁶ In the United States, Wesley Newcomb Hohfeld, arguing that Austin had “use[d] the term ‘right’ indiscriminately and confusedly,” famously devised a scheme of jural opposites and correlatives which may well represent the greatest advance ever in the analysis of legal concepts.¹⁷ John Salmond—born and educated partly in England, but a New Zealander for most of his life¹⁸—produced at the turn of the twentieth century a treatise which would become something of a classic in the common-law world and which, very much in the Austinian spirit, carefully distinguished legal rights in a strict and in a wider sense.¹⁹ Within the civil law tradition a similar effort to build upon Austin’s analysis of legal concepts was undertaken by the influential Hungarian jurist, Felix Somló.²⁰

It would be wrong to assume that English jurists writing in the wake of Austin undertook no similar initiatives. The Canadian commentator’s lament in the opening paragraph of this essay about a “dismal litany” is, in essence, a reference to the fact that between the mid-nineteenth century and the mid-twentieth, a substantial amount of effort was devoted in England to the analysis of legal concepts. Most of the main carriers of this torch will, nevertheless, even in England, be remembered at best only dimly. Sir William Markby’s *Elements of Law*—“once much read,” according to one modern legal historian, but belonging to “a genre now extinct”²¹—exemplifies nineteenth century analytical jurisprudence after Austin. One of the redeeming features of Markby’s book is that it reads straightforwardly: it was written in 1870 as a series of lectures to be delivered to law students in India, and Markby was mindful of his

¹⁶ Ernst Rudolph Bierling, *Zur Kritik der juristischen Grundbegriffe* 53–80 (Gotha, Perthes 1877); see also G.W. Keeton, *The Elementary Principles of Jurisprudence* 136 (2d ed. 1949); Roscoe Pound, *Fifty Years of Jurisprudence* (pt. 1), 50 *Harv. L. Rev.* 557, 571–72 (1937).

¹⁷ Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* 78 (David Campbell & Philip Thomas eds., Ashgate 2001) (1923). See generally Albert Kocourek, *The Century of Analytic Jurisprudence Since John Austin*, in 2 *Law: A Century of Progress 1835–1935* (1937).

¹⁸ See generally Alex Frame, *Salmond: Southern Jurist* (1995).

¹⁹ John W. Salmond, *Jurisprudence or The Theory of the Law* 217–67 (3d ed. 1910). The book went into twelve editions (the last appearing in 1966).

²⁰ Felix Somló, *Juristische Grundlehre* 32–37, 200–04, 284–91, 353–59 (1917).

²¹ T.G.W. [Thomas Glyn Watkin], Markby, Sir William, in *Biographical Dictionary of the Common Law* 352, 353 (A.W.B. Simpson ed., 1984).

prospective audience's likely inability to cope with even mild out-breaks of technicality or abstruseness.²² Because Markby was so determined to eschew obscurity, his perspective becomes more or less immediately obvious. "When I speak of law," he wrote in the first chapter of his book, "I mean that law which is set by a sovereign authority to a political society; by a political society I mean a nation, which is in the habit of obedience to that sovereign authority."²³ This, as any jurisprudence student knows, is pure Austin, except that Austin made the point with a little more subtlety and a lot more fuss.²⁴

Markby, however, does not dwell on Austin's sovereignty theory for long; he quickly moves from the meaning of the term "law" to the "relations which arise out of it,"²⁵ the principal of these being the relationship between right and duty. Again following Austin, he argues that "[e]very right corresponds to a duty or obligation," but that "it is not necessary that every duty or obligation should have its corresponding right."²⁶ Out of this discussion of right and duty emerges another set of inquiries: into the notion of liability for breach of duty;²⁷ into "those duties and obligations which correspond to the right of ownership";²⁸ and into possession as distinct from ownership.²⁹ Much the same path of inquiry—from sovereignty to rights and duties to satellite concepts—was followed by other English jurists between the 1830s and the 1950s. Thomas Erskine Holland—who, like Markby, is sometimes credited for rendering Austin's ideas readable³⁰—follows this path in his *Elements of Jurisprudence*, first published in 1880. Observing that "[t]he most obvious

²² See William Markby, *Elements of Law, Considered With Reference to Principles of General Jurisprudence*, at xii (Oxford, Clarendon Press 2d ed. 1874).

²³ *Id.* at 6.

²⁴ See 1 Austin, *supra* note 12, at 220–21.

²⁵ Markby, *supra* note 22, at 49.

²⁶ *Id.* at 50; cf. 1 Austin, *supra* note 12, at 400–01 ("[T]he term 'right' and the term 'relative duty' are correlating expressions. They signify the same notions, considered from different aspects A relative duty is incumbent upon one party, and corresponds with a right residing in another party Where a duty is absolute, there is no right with which it correlates.").

²⁷ Markby, *supra* note 22, at 77–150.

²⁸ *Id.* at 72; see also *id.* at 151–65.

²⁹ See *id.* at 166–94.

³⁰ See, e.g., Frederick Pollock, *Oxford Lectures and Other Discourses* 98 (London, Macmillan 1890).

characteristic of Law is that it is coercive,”³¹ Holland offers a proviso: “Law is something more than police,” for its “immediate objects . . . are the creation and protection of legal rights.”³² The explanation of law in terms of command, “though essentially true, is inadequate, to the extent of being misleading”; better to explore “what advantages [the State] will protect as being legal rights, what disadvantages it will enforce as being legal duties, and what methods it will pursue in so doing.”³³

Holland’s departure from Austin does not really amount to anything more than a change of emphasis: he prioritizes Austin’s analysis of rights and duties—an analysis which he adapts³⁴—over the theory of sovereignty. Although *Elements of Jurisprudence* was a popular student text in its time, running through thirteen editions during Holland’s life, it has a distinctly antiquated air about it today. Consider, for example, his understanding of what is a right. “When a man is said to have a right,” he contended, “what is meant is that public opinion would see him do the act, or make use of the thing, or be treated in that particular way, with approbation, or at least with acquiescence.”³⁵ It is difficult to imagine any serious legal philosopher claiming today that rights are rights simply because they are supported by public opinion³⁶—though, as compared with the arguments of some of his contemporaries, Holland’s seems positively sophisticated.³⁷ What Holland failed to realize, George Keeton ob-

³¹ Thomas Erskine Holland, *The Elements of Jurisprudence* 79 (13th ed. 1924).

³² *Id.* at 81.

³³ *Id.* at 88–89.

³⁴ See *id.* at 91–149.

³⁵ *Id.* at 82.

³⁶ For a renowned demonstration of the wrongness of the claim, see Ronald Dworkin, *Taking Rights Seriously* 90–94, 184–205 (1978).

³⁷ See, e.g., John M. Lightwood, *The Nature of Positive Law* (London, Macmillan 1883). According to Lightwood, “instead of sending forth to the world the Austinian conception of Law as the foundation of our Science, and leaving it to be corrected in practice as best it may, it might be advisable to put it in a position in which the inherent value of Law will be more apparent.” *Id.* at 81. Lightwood himself eschewed the Austinian conception because he considered it to cast “so little light upon the real nature of legal Rights.” *Id.* at vii. In the place of the Austinian framework Lightwood put a strange amalgamation of speculative evolutionism—centred on the proposition that rights precede law, see *id.* at 141, 221—and intuitive utilitarianism. The proper business of jurisprudence, he argued, is “to seek to regulate the relations between man and man, in such a manner that they may best be brought into harmony with the common sense of Right.” *Id.* at 52. The “fundamental principle in Jurisprudence”

served in his *Elementary Principles of Jurisprudence*, is that “a legal right may be enforced in the face of public opinion.”³⁸

Keeton’s book, like Markby’s, began life as a series of lectures for overseas students. Its basic lesson, a lesson often encountered in English jurisprudential writings between the mid-nineteenth and mid-twentieth centuries, is easily summarized: Jurisprudence should point the way to a broader perspective on law. Just what constitutes such a perspective the literature of this period never makes clear, though many late-nineteenth and early-twentieth-century English jurists were convinced that the obvious way *not* to encourage breadth of outlook was to be an Austinian. Frederick Pollock, for example, had little time for what he termed “John Austin’s acute but extremely narrow and ill-informed dialectic.”³⁹ Although he believed Maine’s historical jurisprudence provided the best hope for jurisprudential progress, Pollock found both historical and analytical jurisprudence useful,⁴⁰ and argued that “the several methods of jurisprudence . . . need not and should not be[] positively hostile to one another”⁴¹ since “none of them can really subsist alone.”⁴² Keeton similarly maintained that “the labours of Austin and Maine are complementary, and lead to the same goal,” and he professed his task to be one of “showing how wide the field of Jurisprudence really is.”⁴³ In the first chapter of his book he sets out no fewer than ten “methods of approach”⁴⁴ before concluding that three of them, “the Historical, the Analytical, and the Comparative” methods, are the “most important” and “will be employed” in the remainder of the work.⁴⁵ Yet it becomes apparent as the book proceeds that al-

which enables us to discover “this sense of right,” *id.* at 57, is “the principle of Utility,” *id.* at 61—a principle which, if interpreted correctly, reveals “that sense of Right which is felt, if not by all, yet at least by the vast majority, of the individuals of a community,” *id.* at 41.

³⁸ George W. Keeton, *The Elementary Principles of Jurisprudence* 96 (1st ed. 1930).

³⁹ F.P. [Frederick Pollock], *Book Review*, 38 *Law Q. Rev.* 242, 242 (1922).

⁴⁰ Frederick Pollock, *Essays in Jurisprudence and Ethics*, at viii (London, Macmillan 1882) (Both “the historical and the analytical manner of considering legal phenomena . . . are in truth useful and necessary, and either of them alone is imperfect”).

⁴¹ Frederick Pollock, *The Methods of Jurisprudence*, 8 *Law Mag. & Rev.* (4th ser.) 25, 44 (1882).

⁴² *Id.* at 40.

⁴³ Keeton, *supra* note 16, at v–vi.

⁴⁴ *Id.* at 2.

⁴⁵ *Id.* at 13.

though Keeton found the Austinian method to be “defective” in certain respects—not least because “it overestimates the ‘command’ element present in law, and ignores its historical development”⁴⁶—it was the only method that seriously occupied him.⁴⁷ It did not really seem to matter, for Keeton, how many methods jurisprudence could incorporate. Austinian jurisprudence was all that counted.

In the first edition of *The Elementary Principles of Jurisprudence*, Keeton made one interesting departure from Austin. The proposition, put forward by Austin and followed by Markby, that there may exist absolute duties to which no rights correlate struck Keeton as incorrect. Rights and duties, he argued, must always be correlative.⁴⁸ By no means was he the first to advance this argument; John Salmond had already done so in his *Jurisprudence*, published in England in 1902.⁴⁹ But Keeton is notable because he drew his inspiration not primarily from Salmond—whose work was well known in England at this time—but from Hohfeld. Although Hohfeld’s theory of jural relations was not unknown in England in 1930, when Keeton’s book first appeared,⁵⁰ it had received little attention. For Keeton, there was much that jurists could learn by looking to Hohfeld.⁵¹ Indeed, he came to recognize—and was not alone among mid-twentieth century English jurists in recognizing—that major jurisprudential developments were taking place in the United States.

That he appreciated as much is clear from the second edition of *Elementary Principles*, which was published in 1949. “In the eighteen years which have elapsed since the appearance of the first edition,” Keeton wrote, “there have been so many important contributions to the study of Jurisprudence that it has been necessary to rewrite the whole of the text.”⁵² One notable difference between

⁴⁶ Id. at 36.

⁴⁷ After discussing Austin in detail, Keeton turns his attention to Maine, to whom he devotes two-and-a-half pages of basic exposition. Id. at 41–44. The point of these pages within the framework of the book is not clear. Not only does Keeton not employ Maineian insights, but he offers no significant criticism of them either.

⁴⁸ Id. at 98–99.

⁴⁹ See Salmond, *supra* note 19, at 223.

⁵⁰ See H.J. Randall, Hohfeld on Jurisprudence, 41 *Law Q. Rev.* 86, 86 (1909).

⁵¹ See Keeton, *supra* note 38, at 101–05.

⁵² See Keeton, *supra* note 16, at v.

the first edition and the second is that, in the latter, Keeton is mindful of the rise in the United States of sociological jurisprudence and realism.⁵³ Yet these two jurisprudential tendencies did not appear to change his view of the legal world. As between the two editions of *Elementary Principles*, the chapter which underwent the most striking transformation was the one on precedents. In the first edition, this had been but five rather lazy pages devoted to a familiar argument: "Precedents develop the law rather than reform it. . . . Case-law cannot abrogate existing law; it can only modify it in some particular."⁵⁴ The second edition treats the theme to a longer discussion and as a thornier issue. But the difficulties that he had come to note regarding the notion of precedent were not the difficulties that had been identified in America by the likes of Roscoe Pound and Herman Oliphant.⁵⁵ Indeed, Keeton's conclusion on the subject of precedents would have struck any realist as simplistic at best, wrongheaded at worst: "Inasmuch as with the lapse of time an increasing number of rights are founded upon judicial decisions, it is plain that precedents . . . obtain binding increased force with the passage of time."⁵⁶ Keeton may have recognized that major jurisprudential developments were taking place in the United

⁵³ See *id.* at 20–22.

⁵⁴ Keeton, *supra* note 38, at 67.

⁵⁵ See, e.g., Herman Oliphant, *A Return to Stare Decisis*, 14 A.B.A. J. 71 (1928); Roscoe Pound, *Mechanical Jurisprudence*, 8 Colum. L. Rev. 605, 614–15 (1908). For Keeton, as for other English jurists of his generation, one of the major difficulties with precedents concerned the absence of any guarantee that they would be easily accessible. In English law, the fact that a precedent has not been reported does not prevent it from being binding, and so there was a time when a barrister could be put at a disadvantage in the courtroom because opposing counsel cited as authority what was effectively a secret weapon—the unpublished decision that one's adversary happened to remember and then locate in the form of, say, a stenographer's transcript. "Any report compiled by a member of the Bar may be cited [as authority] whatever the standing of the compiler," Keeton noted, "even though the report may be little more than a trap for the unwary." Keeton, *supra* note 16, at 104. The difficulty was exacerbated owing to the fact that, certainly up until the middle of the twentieth century, the Council of Law Reporting was fastidious in its determination to include in the Law Reports more or less only those decisions which established some new point of principle. See Frederick Pollock, *Essays in the Law* 241–57 (1922). As C.K. Allen noted, "the very process of selection" of cases for inclusion in the Law Reports, "however skilfully controlled, means that decisions are omitted which turn out to be of greater importance than seemed probable when they were given." Carleton Kemp Allen, *Case Law: An Unwarrantable Intervention*, 51 Law. Q. Rev. 333, 341 (1935).

⁵⁶ Keeton, *supra* note 16, at 111.

States, but recognition was about the sum of it. As we will see later, many of Keeton's English jurisprudential contemporaries were similarly minded. While they were generally prepared to acknowledge American legal realism as a notable development, few accepted any of its conclusions.

It is probably fair to say of not only Keeton but also Markby and Holland that they were generally willing, indeed eager, to learn about other jurisprudential faiths—if jurisprudence was to be a subject dedicated to revealing “the broader view,” it was probably difficult for them to be otherwise—but they each, ultimately, felt truly comfortable only in their own churches. No doubt there are other perspectives out there that will generate interesting insights, these writers seemed to be saying, but nothing emerges from our explorations to demand a radical reconsideration of premises and conclusions. Austin's legacy, perhaps more than that of anyone else, seemed to bolster this attitude. “The analysis of our primary ideas in law . . . was finally reduced to method by John Austin exactly ninety years ago,” Frederic Harrison observed in 1919, and his achievement “still remains to Englishmen the foundation of rational jurisprudence.”⁵⁷ Harrison had originally come to this conclusion in the 1870s,⁵⁸ but the passing of nearly half a century gave him no reason to alter his assessment. Thanks to Austin, he continued, “[t]here is no longer . . . any danger of confusing moral and legal obligation. . . . The work is done.”⁵⁹

Yet, in one sense, much of the work that was produced after Austin, even by those who considered him inspirational, was deeply un-Austinian. One of Frederick Pollock's many complaints about Austin's *Lectures on Jurisprudence* was that some of the lectures were what he called “ethics out of place”⁶⁰—studies not in jurisprudence but in moral philosophy. “If he feels moved to write on ethics as well as on jurisprudence,” Pollock observed haughtily, “he may do it separately.”⁶¹ But then many of those in England who produced jurisprudential studies after Austin, Pollock in-

⁵⁷ Frederic Harrison, *On Jurisprudence and the Conflict of Laws* 9 (1919).

⁵⁸ Frederic Harrison, *The English School of Jurisprudence* (pt. 1), 24 *Fortnightly Rev.* (n.s.) 475, 475 (1878).

⁵⁹ Harrison, *supra* note 57, at 21.

⁶⁰ Pollock, *supra* note 30, at 17.

⁶¹ *Id.*

cluded, struggled to keep focused on their subject matter. Not that they wandered from jurisprudence because of the temptations of ethics; rather, jurisprudence did not hold their attention for very long because they had very little—certainly very little new—to say on the subject, and so they turned their hands instead to writing about substantive law. Anyone who today reads the treatises of Markby, Keeton, and (to a lesser extent) Holland, or, for that matter, Pollock's *A First Book of Jurisprudence*,⁶² A.L. Goodhart's *Essays in Jurisprudence and the Common Law*,⁶³ or C.K. Allen's *Law in the Making*⁶⁴—all key jurisprudence texts during the period being considered—will be struck by the fact that these are not, principally, studies in jurisprudence as common lawyers tend to understand that term today (that is, meaning the philosophy of law), but essays about stare decisis, the relationship between law and equity, statutory interpretation, the English court system, the growth of negligence liability, the divisions between the various branches of the law, and other basic legal themes. When, in the late 1920s, A.L. Goodhart spoke at the University of Toronto on "Recent Tendencies in English Jurisprudence," his lecture contained nothing about legal philosophy; his sole concern was English developments in public international law, constitutional law, and the major private law subjects.⁶⁵ Dismissing Austinian analytical jurisprudence as "an absurd and narrow-minded piece of egoism,"⁶⁶ Edward Jenks produced in 1933 a book devoted to what he called "the new jurisprudence." What was this new jurisprudence? More of the old jurisprudence, it seemed. In terms of content, Jenks's book is hardly distinguishable from those of other post-Austinian English jurists: there is an outline of various methods of jurisprudence,⁶⁷ the obligatory effort to take the baton from Austin,⁶⁸ and a discussion of legal duties and rights,⁶⁹ along with meditations on the concept

⁶² Frederick Pollock, *A First Book of Jurisprudence for Students of the Common Law* (London, MacMillan 1896).

⁶³ Arthur L. Goodhart, *Essays in Jurisprudence and the Common Law* (1931).

⁶⁴ Carleton Kemp Allen, *Law in the Making* (3d ed. 1939).

⁶⁵ See A.L. Goodhart, *Recent Tendencies in English Jurisprudence*, 7 *Canadian B. Rev.* 275 (1929).

⁶⁶ Edward Jenks, *The New Jurisprudence* 4 (1933).

⁶⁷ *Id.* at 26–67.

⁶⁸ *Id.* at 73–87.

⁶⁹ *Id.* at 159–88.

of the legal person, the value of precedent, negligence doctrine, and the general machinery of the law.⁷⁰ All that seems novel about Jenks's book is his inability consistently to deal with these topics in the workmanlike manner that was typical of his English jurisprudential contemporaries.⁷¹ In short, the most striking feature of many of the English jurisprudence texts produced between 1832 and 1952 is how little jurisprudence there is to be found in them: more often than not, the main objective of their authors seems to have been to set out, and examine the state of, the core areas of English law.

B. The Dominance of Austin

It seems fair to say, then, that English jurisprudence after Austin lacked imagination and direction. One reason for this was that the shadow cast by Austin's work had a paralyzing effect on many of his successors. This is not to suggest that Austin was beyond criticism. We have seen already that, in some quarters, his jurisprudence was associated with narrowness of perspective. Some commentators even went so far as to dismiss his work entirely. Harold Laski, during his six-year sojourn in the United States, suggested to Oliver Wendell Holmes that if one reads the jurisprudential writings of Austin "and all his followers" one comes away with nothing.⁷² Holmes considered Laski's judgment harsh.⁷³ Certainly, coming from Laski, the judgment seems odd. Laski was a great admirer of Albert Venn Dicey—"quite the most considerable figure in English jurisprudence since Maitland," he wrote on Dicey's

⁷⁰ *Id.* at 189–240.

⁷¹ Having dismissed Austinian analytical jurisprudence as absurd, for example, Jenks added that "[t]he value to the jurist of the analytical method is . . . so obvious, that it is hardly necessary to labour it." *Id.* at 30. Having apparently changed his mind about Austin, he then proceeded to do the same again: "Austin's work, as it appeared in print, is so confused and fragmentary, that it is somewhat difficult to pin him down to a precise thesis." *Id.* at 74.

⁷² Letter from Harold J. Laski to Justice Oliver Wendell Holmes (Jan. 29, 1919), in 1 *Holmes-Laski Letters* 181, 181 (Mark DeWolfe Howe ed., 1953).

⁷³ Letter from Justice Oliver Wendell Holmes to Harold J. Laski (Feb. 1, 1919), in 1 *Holmes-Laski Letters* 181, 182 (Mark DeWolfe Howe ed., 1953) ("I don't think you do justice to Austin though he writes as he were a conveyancer at his job.").

death⁷⁴—yet Dicey's conceptualization of law was very much influenced by Austin.⁷⁵ Indeed, from the mid-nineteenth century onwards, there were few English jurists who were not, in one way or another, influenced by Austin.

Why should this have been so? There are at least two answers to this question. The first is that Austin's influence is largely attributable to the efforts of his widow.⁷⁶ Austin's ideas famously met with widespread indifference during his lifetime.⁷⁷ After his death in 1859, Sarah Austin resolved that she would "vindicate . . . him from the charge of indolence or indifference to truth."⁷⁸ Her efforts met with some success. In 1861, she arranged for the republication of Austin's *The Province of Jurisprudence Determined*; this volume, which comprises the first six lectures of his *Lectures on Jurisprudence*, received little attention apart from a handful of nice reviews in minor journals when it was first published in 1832.⁷⁹ The entire *Lectures on Jurisprudence* were themselves reconstructed and compiled by Sarah Austin from her late husband's notes, and she secured their publication in 1863. From the early 1860s onwards, English jurists began to reassess John Austin's legacy. "The book is evidently *taking root*,"⁸⁰ Sarah Austin observed of *The Province of Jurisprudence Determined* in 1865, and "my husband's influence grows."⁸¹ "It is become [sic] an examination book at both

⁷⁴ Events of the Week, 31 *The Nation* and the Athenaeum 75, 77 (Apr. 15, 1922); see Richard A. Cosgrove, *The Rule of Law: Albert Venn Dicey, Victorian Jurist* 293, 313 (1980) (attributing this note to Harold J. Laski).

⁷⁵ See A.V. Dicey, *Introduction to the Study of the Law of the Constitution* 68–74 (8th ed. 1915); A.V. Dicey, *The Study of Jurisprudence*, 5 *Law Mag. & Rev.* 382, 386–88 (1880) [hereinafter Dicey, *The Study of Jurisprudence*]; see also Cosgrove, *supra* note 74, at 23–28.

⁷⁶ See Richard A. Cosgrove, *Scholars of the Law: English Jurisprudence from Blackstone to Hart* 93–94 (1996).

⁷⁷ See Wilfrid E. Rumble, *Austin in the Classroom: Why Were his Courses on Jurisprudence Unpopular?*, 17 *J. Legal Hist.* 17, 17 (1996).

⁷⁸ Letter from Mrs. Austin to M. Guizot (Dec. 31, 1860), in 2 *Three Generations of Englishwomen: Memoirs and Correspondence of Mrs. John Taylor, Mrs. Sarah Austin, and Lady Duff Gordon* 100, 102 (Janet Ross ed., London, Murray 1888) [hereinafter *Three Generations of Englishwomen*].

⁷⁹ See, e.g., Book Note, 18 *Westminster Rev.* 237 (1833); Book Note, 3 *Legal Observer* 416 (1832).

⁸⁰ Letter from Mrs. Austin to M.B. St. Hilaire (Jan. 22, 1865), in 2 *Three Generations of Englishwomen*, *supra* note 78, at 151, 151.

⁸¹ Letter from Mrs. Austin to M. Guizot (Dec. 20, 1865), in *Three Generations of Englishwomen*, *supra* note 78, at 158, 159.

Oxford and Cambridge, and I am assured by barristers that there is a perfect enthusiasm about it among *young* lawyers—men among whom it was unknown till since [sic] I published the second edition.”⁸² Largely owing to his wife’s work, Austin, it has been suggested, seemed as if plucked from obscurity and subjected to “hero-worship.”⁸³

If Austin was worshipped as a hero, however, that did not preserve his jurisprudence from criticism. In fact, the second explanation for the pervasive influence of Austin is that, notwithstanding his laborious prose style, he set out a jurisprudential position that was as arresting and unequivocal as it was flawed and contestable. “Laws properly so called are a species of *commands*”;⁸⁴ “customary laws, considered as positive law, are not commands”;⁸⁵ “every law properly so called is a *positive law*”;⁸⁶ “[t]he matter of jurisprudence is positive law”;⁸⁷ “[e]very positive law . . . is set . . . by a sovereign person or body, to a member or members of the . . . society wherein that person or body is sovereign.”⁸⁸ Those who followed in Austin’s trail found in his work plenty of propositions such as these—clearly expressed arguments which seemed formulated as if to invite disputation or refinement. Why does law bind citizens? To what extent, if at all, does the binding force of law depend upon the moral quality of law? Austin had answers to these questions. But his answers, even to those who found them congenial, usually seemed correct only up to a point. Even when Austin was clearly wrong, H.L.A. Hart once quipped, “he was always wrong clearly.”⁸⁹ Austin had produced the “type of theory which has perennial attractions whatever its defects may be”⁹⁰—a theory which was attractive precisely because it seemed clear to many a successor just how it could be put right.

⁸² Letter from Mrs. Austin to M. Guizot (Mar. 2, 1863), in *Three Generations of Englishwomen*, supra note 78, at 137, 138.

⁸³ Joseph E. Keller, *Austin’s Position in Modern Jurisprudence*, 13 J.B. Ass’n D.C. 43, 43 (1946).

⁸⁴ 1 Austin, supra note 12, at 178.

⁸⁵ *Id.* at 101.

⁸⁶ *Id.* at 171.

⁸⁷ *Id.* at 86.

⁸⁸ *Id.* at 263.

⁸⁹ Hart, *Positivism*, supra note 10, at 593.

⁹⁰ Hart, *Concept of Law*, supra note 10, at 18.

And so those who, from the 1860s onwards, began to reassess Austin displayed not so much hero-worship as what we might call critical reverence. Some were distinctly more critical than reverent. Their favored line of argument was that Austin tended to be insensitive to history.⁹¹ Sir Henry Maine had effectively pioneered this line of critique as early as 1861 in his *Ancient Law*. “[T]he farther we penetrate into the primitive history of thought,” he wrote, “the farther we find ourselves from a conception of law which at all resembles” those developed by either Bentham or Austin.⁹² This critique he elaborated in his final two *Lectures on the Early History of Institutions*, delivered at Oxford in the early 1870s. Within the lectures there is plenty of the customary reverence: “[Austin’s *Province*] has long been one of the higher class-books in this University; and . . . it must always, or for a long time to come, be the mainstay of the studies prosecuted in this Department.”⁹³ But Maine’s analysis quickly becomes critical:

[T]he Austinian view of Sovereignty . . . is arrived at by throwing aside all the characteristics and attributes of Government and Society except one, and by connecting all forms of political superiority together through their common possession of force. . . . [I]t is its history, the entire mass of its historical antecedents, which in each community determines how the Sovereign shall exercise or forbear from exercising his irresistible coercive power. All that constitutes this . . . is rejected by the Analytical Jurists.⁹⁴

Maine’s critique of Austin impressed others and remained popular well into the twentieth century.⁹⁵ But most of those who adopted an attitude of critical reverence tended, as compared with Maine, to treat Austin leniently. The publication of the second edition of *The Province of Jurisprudence Determined* in 1861 coin-

⁹¹ See Peter Stein, *Legal Evolution: The Story of an Idea* 72 (1980).

⁹² Henry Sumner Maine, *Ancient Law: Its Connection with the Early History of Society, and Its Relation to Modern Ideas* 7–8 (London, Murray 1861).

⁹³ Henry Sumner Maine, *Lectures on the Early History of Institutions* 345 (London, Murray 1875).

⁹⁴ *Id.* at 359–60.

⁹⁵ See, e.g., Harrison, *supra* note 58, at 487–88; see also Carleton Kemp Allen, *Legal Duties and Other Essays in Jurisprudence* 141–42 (Scientia Verlag Aalen 1977) (1931).

cided with the publication of Maine's *Ancient Law*. In reviewing the two books together, James Fitzjames Stephen clearly found Austin's work to be the more stimulating:

Maine . . . confines himself most cautiously and studiously to the investigation of facts; he puts forward no philosophical theories at all . . . The light by which his book should be read is supplied by Bentham and Mr. Austin, who have analysed with a precision, which leaves hardly anything to be desired, the fundamental notions which lie at the bottom of jurisprudence.⁹⁶

Indeed, Stephen continued, "Austin's propositions on jurisprudence have as much precision, and will in all probability be seen hereafter to have as much importance, as the propositions of Adam Smith and Ricardo on rent, profits, and value."⁹⁷ "No writer whom we know had more of the qualities needed for initiating and disciplining other minds in the difficult art of precise thought," John Stuart Mill wrote upon the publication of Austin's *Lectures on Jurisprudence* two years later (echoing sentiments he had originally expressed when reviewing the first edition of *The Province of Jurisprudence Determined* thirty years earlier).⁹⁸ He wrote that "the remains which [Austin] has left, fragmentary though much of them be, are a mine of material for the future."⁹⁹ Echoing Mill, T.E. Cliffe Leslie judged the *Lectures* to be a "mighty work," the "momentousness" of which will be "difficult to overestimate."¹⁰⁰

Usually, when a book attracts positive reviews (or any reviews, for that matter), most of them will appear in the years immediately following the book's publication. But with Austin's work—which was, in effect, being granted a second lease on life—the tributes kept coming well into the later decades of the nineteenth century. Austin's *Province*, T.E. Holland claimed,

⁹⁶ [James Fitzjames Stephen], *English Jurisprudence*, 114 *Edinburgh Rev.* 456, 484 (1861).

⁹⁷ *Id.* at 466–67.

⁹⁸ [John Stuart Mill], *Austin on Jurisprudence*, 118 *Edinburgh Rev.* 222, 222 (1863) [hereinafter *Mill, Austin on Jurisprudence*]; see [John Stuart Mill], *Austin's Lectures on Jurisprudence*, 2 *Tait's Edinburgh Mag.* 343, 344 (1832).

⁹⁹ *Mill, Austin on Jurisprudence*, *supra* note 98, at 243.

¹⁰⁰ [T.E. Cliffe Leslie], *Modern Phases of Jurisprudence in England*, 26 *Westminster Rev.* (n.s.) 261, 276 (1864).

is indeed a book which no one can read without improvement. It presents the spectacle of a powerful and conscientious mind struggling with an intractable and rarely handled material, while those distinctions upon which Austin . . . bestows most labour are put in so clear a light that they can hardly again be lost sight of.¹⁰¹

For E.C. Clark, Austin's jurisprudence had, by the early 1880s, become "the staple of jurisprudence in all our systems of legal education."¹⁰² He had no doubt that Austin's *Lectures* provided the best outline of the subject.¹⁰³ Numerous English authors produced books—now long-forgotten—which, while rarely uncritical of Austin's jurisprudence, were essentially devoted to defending and advancing his achievements.¹⁰⁴ One finds, even a century after *The Province of Jurisprudence Determined* was first published, English jurists discussing Austin as if his ideas represented the latest thinking on law.¹⁰⁵ Perhaps we should not be surprised. English jurisprudence over that century had experienced little in the way of change.

Austin provided his successors in England with something to criticize and from which to obtain a sense of direction. But his jurisprudence also seemed to stifle innovation. One of the books from the period under examination which best illustrates the staleness that beset English jurisprudence during this period is William Buckland's *Some Reflections on Jurisprudence*.¹⁰⁶ Buckland was in his eighties when he wrote the book, which may explain why it has such a candid, devil-may-care tone to it.¹⁰⁷ He began by considering a number of then-current continental philosophies of law.¹⁰⁸ None

¹⁰¹ Holland, *supra* note 31, at vii.

¹⁰² E.C. Clark, *Practical Jurisprudence, A Comment on Austin 5* (Cambridge Univ. Press 1883).

¹⁰³ E.C. Clark, *Jurisprudence; Its Use and Its Place in Legal Education*, 1 *Law Q. Rev.* 201, 204 (1885).

¹⁰⁴ See, e.g., W. Jethro Brown, *The Austinian Theory of Law* (1906); R.A. Eastwood, *A Brief Introduction to Austin's Theory of Positive Law and Sovereignty* (1916); R.A. Eastwood & G.W. Keeton, *The Austinian Theories of Law and Sovereignty* (1929).

¹⁰⁵ See, e.g., Maurice Sheldon Amos, *Some Reflections on the Philosophy of Law*, 3 *Cambridge L.J.* 31, 38 (1927).

¹⁰⁶ W.W. Buckland, *Some Reflections on Jurisprudence* (1945).

¹⁰⁷ Hart described it as "Buckland's chilly little book." H.L.A. Hart, *Philosophy of Law and Jurisprudence in Britain (1945-1952)*, 2 *Am. J. Comp. L.* 355, 362 (1953).

¹⁰⁸ Buckland, *supra* note 106, at 6-30.

of these philosophies was to his liking, and some of the criticisms that he offered are acute.¹⁰⁹ Indeed, the first chapter of the book is acerbic and exhilarating stuff. For all the criticisms, however, it is not clear where Buckland was trying to take his readers. Only near the end of that chapter are we given a clue as to his purpose. Having dismissed the works of various continental legal theorists, Buckland noted:

[I]n the foregoing pages it has been sought to shew that the bases on which they rest their conclusions are unsatisfactory. . . . These writers seem to be in error in supposing that [the reasons for obedience to law] must be of a special, often mystical, kind. . . . [T]hese imaginings do not help and a more pedestrian way may be better.¹¹⁰

The more pedestrian way preferred by Buckland was, not surprisingly, Austin's way. Indeed, his endorsement of Austin is the epitome of critical reverence: "[W]ith the limitation that it is not universally true," he claimed, "there is not much to quarrel with in Austin's doctrine,"¹¹¹ and so "it is well to do him justice."¹¹² Doing Austin justice, Buckland believed, was a task at which even Austin's popularizers had failed.¹¹³ But when Buckland attempted to perform this task the outcome was disappointing. The Austinian

¹⁰⁹ Consider, for example, his prescience when dealing with Hans Kelsen's *Pure Theory of Law*. In accounting for the validity of a legal order, Kelsen, according to Buckland, asserts "that we must assume . . . an ideal or hypothetical super-Constitution"—that is, the so-called Basic Norm or *Grundnorm*. Id. at 21. "As it stands," Buckland continues, Kelsen's *Pure Theory* "is very much in the air. . . . Having supposed a supernorm we may indeed suppose another still superior norm, and so on *ad infinitum* The super-Constitution is a non-jural postulate. The lawyer is quite entitled to say that he does not look beyond this. . . . But neither he nor the philosopher is entitled to say that it explains the binding force of law. . . . The thing is imaginary." Id. at 21–22. In due course, Kelsen would adopt a remarkably similar view. See Hans Kelsen, *The Constitutional Function*, 25 *Jurid. Rev.* 214, 222 (1980) ("[T]he acceptance of a basic norm . . . not only contradicts reality, in which no such norm exists as the meaning of an actual act of will, but also contains contradiction within itself, for it presents the authorization of a supreme moral or legal authority, and hence authority issues from an authority lying beyond that authority, even though the further authority is merely fancied.").

¹¹⁰ Buckland, *supra* note 106, at 28.

¹¹¹ Id. at 48.

¹¹² Id. at 2.

¹¹³ See *id.* at 71 (discussing how most of Austin's popularizers were in fact "deal[ing] with Particular Jurisprudence" even when they purported to be engaging in General Jurisprudence).

analysis explains why law binds citizens, but “we cannot help asking for something more, for some central notion which shall account not only for the binding force of law, but also for its content. It may be doubted whether the quest can be successful.”¹¹⁴ It may be doubted, in other words, that there is much point looking beyond Austin. Buckland was not alone among his generation in demonstrating incredible erudition along with a willingness to consider a multitude of perspectives. Ultimately, however, he found little of value in those perspectives: better, he believed, to stick with the tried and tested. So it is that his book offers plenty in the way of criticism but little that is constructive. It is an exemplary piece of post-Austinian English jurisprudence.

C. *The Poverty of Historicism*

Between 1832 and 1952, Austinian jurisprudence was not entirely without competition in England. Specifically, there were the historical-jurisprudential studies initiated in England by Sir Henry Maine. We know that Maine was a critic of Austin. But did his work offer an alternative jurisprudential vision? The essential premise of historical jurisprudence is that a proper explanation of a legal system requires not, primarily, the articulation and analysis of general legal concepts or fundamental principles—this, in essence, being the way of the Austinian—but an examination of the history of the society living under that system. History, in other words, is the key to understanding law. “The matter of legal science is not an ideal result of ethical or political analysis,” Pollock and Maitland argued in the 1890s, “it is the actual result of facts of human nature and history.”¹¹⁵ Maine elaborated on this argument in his *Ancient Law*. Austin, he claimed, sought to understand law by way of a “separation of ingredients”—to “resolve every law into a *command* of the lawgiver, an *obligation* imposed thereby on the citizen, and a *sanction* threatened in the event of disobedience.”¹¹⁶ The deeper we delve into early legal history, however, the more removed we are “from a conception of law which at all resembles a compound of

¹¹⁴ *Id.* at 57.

¹¹⁵ 1 Frederick Pollock & Frederic William Maitland, *The History of English Law Before the Time of Edward I*, at xciii (Cambridge Univ. Press, 2d ed. 1968) (1898).

¹¹⁶ Maine, *supra* note 92, at 7.

the[se] elements.”¹¹⁷ Because Austin’s explanation of law in terms of command is historically uninformed, it leaves open “[t]he whole question . . . as to the motives of societies in imposing these commands on themselves, as to the connexion of these commands with each other, and the nature of their dependence on those which preceded them, and which they have superseded.”¹¹⁸

Maine’s assessment of Austin is somewhat harsh: Austinian jurisprudence is not entirely inattentive to history, and it can hardly be said that Austin ignored the ways in which commands interconnected.¹¹⁹ Even if one concedes that the assessment is harsh, nevertheless, there is still good reason to expect that English jurisprudence, with its soft spot for the purveyor of the broader perspective, would have taken Maine to heart. This certainly seems to have been Maine’s expectation. “There is such wide-spread dissatisfaction with existing theories of jurisprudence, and so general a conviction that they do not really solve the questions they pretend to dispose of,” he wrote in *Ancient Law*, “as to justify the suspicion that some line of inquiry, necessary to a perfect result, has been incompletely followed or altogether omitted by their authors.”¹²⁰ Maine himself was not promising anything akin to a “perfect result”—whatever that might mean in this context—but he was certainly pointing the way toward a more expansive, historical-comparative approach to law.¹²¹

Yet English jurisprudence never really warmed to Maine’s project. This is not to say that one cannot find tributes to his brilliance and achievements—there are, in fact, plenty of eulogies around.¹²² The point, rather, is that if one looks at the history of English jurisprudence since the first appearance of *Ancient Law* in 1861, it quickly becomes clear that his perspective, considered as a jurisprudential perspective, has more often been neglected than pursued. In a characteristically comprehensive survey of late-nineteenth and early-twentieth-century jurisprudence, Roscoe

¹¹⁷ *Id.* at 8.

¹¹⁸ *Id.* at 117–18.

¹¹⁹ See Michael Lobban, *The Common Law and English Jurisprudence 1760–1850*, at 223–56 (1991).

¹²⁰ Maine, *supra* note 92, at 118.

¹²¹ See *id.* at 119–20.

¹²² See generally *The Victorian Achievement of Sir Henry Maine: A Centennial Reappraisal* (Alan Diamond ed., 1991).

Pound had plenty to say about the achievements of those in England and elsewhere who had traveled the same path as Austin.¹²³ The subject of historical jurisprudence, by contrast, merited little discussion: "As to historical jurisprudence, . . . in the present century it has lost ground."¹²⁴ Not that Pound wanted it this way: "Looking to the future, to me the greatest need is a revived historical jurisprudence which will remake historical method."¹²⁵ But he was under no illusions about Maine's fate. Likewise is William Robson of the London School of Economics, writing around the same time as Pound: "Maine was, indeed, not only original, he was unique," Robson noted, "[b]ut who, one may ask, has followed him? . . . [W]e lawyers have remained cloistered in our narrow walls, treading complacently the old paths. In so far as the call has been heard at all it has been answered by the anthropologists and the historians."¹²⁶ This last assessment might even have been a little too generous. The historical method generally, it has been argued in recent times,

left remarkably little direct legacy; the bandwagon ran into the sand and even the ruts have been almost covered by oblivion. Anthropology, perhaps, has testified best to its sense of continuity; Maine and Tylor are still occasionally invoked, and ritual slayings of Sir James Frazer were still in order up to a few years ago. In other disciplines, figures such as Max Müller, Pollock, Vinogradoff, Cliffe Leslie, or Freeman have not within living memory been keepers of an academic golden bough worth even the least ambitious aspirant's acquisition.¹²⁷

In short, the historical method was itself confined to history. The neglect of historical jurisprudence, which was but an instance of this method, was part of a more general trend. But why should Maine, in particular, have suffered this fate?

¹²³ See Pound, *supra* note 16, at 564–82.

¹²⁴ *Id.* at 582.

¹²⁵ Roscoe Pound, *Fifty Years of Jurisprudence*, 1937 *J. Soc'y Pub. Tchrs. L.* 17, 30.

¹²⁶ William A. Robson, *Sir Henry Maine To-day*, in *Modern Theories of Law* 160, 178–79 (Wildy 1963) (1933); see also Julius Stone, *The Province of Jurisprudence Re-determined* (pt. 1), 7 *Mod. L. Rev.* 97, 101–02 (1944).

¹²⁷ Stefan Collini et al., *That Noble Science of Politics: A Study in Nineteenth-Century Intellectual History* 209 (1983).

At least one commentator has suggested a straightforward answer to this question: "Sir Henry Maine's contribution to the spread of interest in jurisprudence is less than that of Austin only because, perhaps, Austin came first . . ." ¹²⁸ But one does not have to be disadvantaged by the fact that one is the later author. The ideas of those who are not the first may well eclipse those of a pioneer precisely because the pioneer made crucial mistakes from which others learned: Austin also preceded Hart, but this could hardly be said to have been to Hart's disadvantage. Sequence alone cannot explain why English jurisprudence never really embraced historical jurisprudence.

So, what does? There appear to be at least three explanations. The first is that by the early twentieth century, Maine's approach to legal history—a crucial element of his historical jurisprudence—was being regarded with deep suspicion. "You spoke of Maine," Frederic Maitland wrote to Pollock in 1901. "Well, I always talk of him with reluctance, for on the few occasions on which I sought to verify his statements of fact I came to the conclusion that he trusted much to a memory that played him tricks and rarely looked back at a book that he had once read . . ." ¹²⁹ Pollock himself had, in 1883, succeeded Maine as Oxford's Corpus Christi Professor of Jurisprudence and by the beginning of the twentieth century was still lauding Maine's achievements as an historian. ¹³⁰ But even Pollock would come to adopt Maitland's attitude of suspicion. ¹³¹ The same attitude was adopted by the English barrister, Arthur Diamond, in his *Primitive Law*, first published in 1935. Maine's *Ancient Law*, Diamond claimed,

is a work ill-adapted by its methods of construction to serve as a starting-point for any enquiry. Only exceptionally does the author supply references to support his opinions. Especially the earlier chapters of *Ancient Law* abound in broad and vivid generalisations as to the course of the development of law amongst

¹²⁸ R.H. Graveson, *The Teaching of Jurisprudence in England and Wales*, 4 J. Legal Educ. 127, 128 (1951).

¹²⁹ Letter from F.W. Maitland to Frederick Pollock (Jan 21, 1901), in *The Letters of Frederic William Maitland* 222, 222 (C.H.S. Fifoot ed., 1965).

¹³⁰ See, e.g., Pollock, *supra* note 55, at 27.

¹³¹ Frederick Pollock, *Introduction to the Progress of Continental Law in the Nineteenth Century*, at xlix (1918).

all peoples. Knowing, as we do, what sources of knowledge were available in the author's time, it is yet often difficult to imagine what were the considerations which led him to his conclusions; and often it is certain that there was no real evidence to support them. It is, perhaps, partly for these reasons that in the seventy years and more that have elapsed since the publication of *Ancient Law*, while Maine has enjoyed the veneration of every legal theorist, no lawyer in this country has continued in his tracks, with the exception, perhaps, of Sir Paul Vinogradoff, in the first volume of his *Outlines of Historical Jurisprudence*.¹³²

In fact, even Vinogradoff was wary about Maine's legacy. For Vinogradoff, Maine was inspirational—one of his “most influential teachers.”¹³³ Maine was unfairly subjected, moreover, to “cheap criticism” by those who “talk in a rather supercilious manner of the lack of erudition and accuracy, of the allusiveness and vagueness of [his] writings.”¹³⁴ Vinogradoff fully appreciated, nevertheless, why Maitland, “the most brilliant legal historian of modern England,” should have “rebelled against Maine's assumptions and lack of careful investigation of sources.”¹³⁵ “[N]owadays”—after Maine, that is—“we must be more careful in the analysis of single cases,” Vinogradoff warned, “more critical in our historical investigations, less prompt to generalize and less sanguine of getting quickly to ultimate results in the shape of laws of development.”¹³⁶ Maine, to be blunt, was not considered a meticulous historian.

The second reason Maine's project fared poorly in the history of English jurisprudence is that it is difficult to identify historical jurisprudence, as one might identify analytical jurisprudence, as a distinctive approach to the study of law. An English jurisprudence teacher remarked in the early 1950s that incorporating Maine into the jurisprudence syllabus can derail a series of lectures: “before you know where you are you are . . . chasing fascinating anthropo-

¹³² A.S. Diamond, *Primitive Law* 2 (2d ed. 1950).

¹³³ Paul Vinogradoff, *The Teaching of Sir Henry Maine*, 20 *Law Q. Rev.* 119, 119 (1904).

¹³⁴ *Id.* at 120.

¹³⁵ 1 Paul Vinogradoff, *Outlines of Historical Jurisprudence* 147 (1920).

¹³⁶ Vinogradoff, *supra* note 133, at 132.

logical will-o'-the-wisps that take you far off your course."¹³⁷ The essence of this objection is that historical jurisprudence, perhaps more than any other type of jurisprudence, lacks identifiable boundaries. Other writers have noted a more specific problem with the breadth of historical jurisprudence: that it is difficult to distinguish it from the discipline of legal history. Roscoe Pound correctly observed in 1937 that Vinogradoff, although he tended to work under the banner of historical jurisprudence, produced studies in legal history: "To-day we have excellent legal history," Pound concluded, "but no historical jurisprudence."¹³⁸ Writing around the same time, Michael Oakeshott reached a similar conclusion. "There is," he claimed, "no difficulty in distinguishing historical from analytical jurisprudence To distinguish historical jurisprudence from legal history is, however, a matter of greater difficulty, and, in the end, it is, I think, a matter of degree."¹³⁹ As another commentator elaborated, "the term 'historical jurisprudence'" seems applicable "to any work of legal history on a large scale, at least so long as it explicitly or tacitly draws from its historical material inferences about the nature and origin of law, as in the case of Vinogradoff's great work."¹⁴⁰ Sometimes it seems that jurists have been not so much doubtful of the merits of historical jurisprudence as unconvinced that historical jurisprudence is a genuine jurisprudential project.

This brings us to the final explanation for the undistinguished history of historical jurisprudence in England: historical jurisprudence, unlike analytical jurisprudence, did not fulfill the epistemic requirements of late-Victorian university culture. English social thinkers of the second half of the nineteenth century began to produce analyses that were, as compared with those of their predecessors, generally more technical and methodologically robust. "It became very important," Reba Soffer remarks, "to agree upon the criteria for recognizing truth."¹⁴¹ In economics, there was an ever

¹³⁷ Denis Browne, *Reflections on the Teaching of Jurisprudence*, 2 *J. Soc'y Pub. Tchrs. L.* (n.s.) 79, 81 (1953).

¹³⁸ Pound, *supra* note 125, at 26.

¹³⁹ Michael Oakeshott, *The Concept of a Philosophical Jurisprudence* (pt. 1), 3 *Politica* 203, 209 (1938).

¹⁴⁰ A.H. Campbell, *A Note on the Word "Jurisprudence,"* 58 *Law Q. Rev.* 334, 338 (1942).

¹⁴¹ Reba N. Soffer, *Discipline and Power* 31 (1994).

more intense emphasis on measurement.¹⁴² “[U]niversity historians . . . [b]y the end of the nineteenth century . . . were expected to recognize the objective evidence that was there for every student who sought it out.”¹⁴³ Likewise with philosophy: In the 1870s, Harvie claims,

the desire to produce a simple, serviceable ethics slackened, to be replaced by more rigorous intellectual debates about fundamental questions of philosophy. . . . Philosophy was maturing as a profession at the universities—henceforth, even when philosophers remained concerned with politics, fundamental postulates about the nature of mind and the analysis of concepts and relationships played a much greater part in forming their ideas The nature of authority at the universities was changing Politics as a lived experience declined in importance, intellectual values were enhanced. The university was increasingly a separate, internally satisfying world.¹⁴⁴

In English jurisprudence, this hardening of knowledge took the form of a general juristic preference for Austin’s analytical project.¹⁴⁵ Even those fundamentally critical of Austin’s work recognized that it was well suited to the late-nineteenth century university environment. Maine’s audiences dwindled when he taught historical jurisprudence at Oxford.¹⁴⁶ “[T]he only lectures which draw a large number of undergraduates to my class are lectures on elementary Austinism,” he complained in 1875.¹⁴⁷ The reality, Dicey proclaimed four years later, was that “the study of jurisprudence . . . generally and inevitably meant the study of Austin.”¹⁴⁸ As with teaching, so too with research: historical jurisprudence might have been more broad-ranging and nuanced than Austinian

¹⁴² See Collini et al., *supra* note 127, at 316–20.

¹⁴³ Soffer, *supra* note 141, at 38.

¹⁴⁴ Christopher Harvie, *The Lights of Liberalism: University Liberals and the Challenge of Democracy 1860–86*, at 202–03 (1976).

¹⁴⁵ See generally Neil Duxbury, *Why English Jurisprudence is Analytical*, 57 *Current Legal Probs.* (forthcoming March 2005) (on file with the Virginia Law Review Association).

¹⁴⁶ See Collini, *supra* note 127, at 357.

¹⁴⁷ F.H. Lawson, *The Oxford Law School 1850–1965*, at 49 (1968) (quoting Letter from Henry Sumner Maine to James Bryce (Nov. 25, 1875)).

¹⁴⁸ Dicey, *The Study of Jurisprudence*, *supra* note 75, at 386.

jurisprudence, but the questions and goals of historical jurisprudence were less obvious. In Austin, English jurisprudence found a sense of purpose. Only those who wanted to be removed from where the action was, it seemed in the late-nineteenth century, would have devoted their energies to historical jurisprudence. "In many ways the historical spirit is in strong contrast to the true spirit of jurisprudence," Frederic Harrison observed in 1879.¹⁴⁹ The historical method may be "a potent and fruitful instrument of jurisprudence," he continued, but we must recognize that it is "merely an instrument of jurisprudence, and never take it for jurisprudence itself."¹⁵⁰ For "the historical method, if left unqualified, is perpetually tending to carry us off the field of law into the field of social history or political antiquities"—onto a terrain, in other words, "most alien to the scientific aspect of law."¹⁵¹ Historical jurisprudence is a tolerable distraction so long as it is not taken to be real jurisprudence. This rather puts one in mind of the committed carnivore's insistence that vegetarian meals are fine so long as they are not assumed to be anything more than side-orders. A superficial reader of English jurisprudential history might come away with the impression that, during the nineteenth century, historical jurisprudence and Austinian jurisprudence competed for the mantle of legal science. But the truth is that it was a one-sided contest.

D. Blips on the Radar

So far, nothing has been offered here to disabuse the reader of the impression that English jurisprudence in the years separating Austin and Hart really was a one-horse town. It was intimated in the introduction to this study that the situation was not quite so simple. Although critical reverence for Austin may have dominated English jurisprudence, other lines of inquiry did emerge. These lines of inquiry did not have the look of rival approaches, as was the case with historical jurisprudence, but were generally efforts by an individual or a small number of individuals to identify and cast light on what were perceived to be "jurisprudential" prob-

¹⁴⁹ Frederic Harrison, *The English School of Jurisprudence* (pt. 3), 25 *Fortnightly Rev.* (n.s.) 114, 120 (1879).

¹⁵⁰ *Id.* at 124.

¹⁵¹ *Id.* at 122.

lems. Some of these problems were approached from what was essentially an analytical-jurisprudential perspective. This is true, for example, of the many English discussions of possession as a matter of legal right as distinguishable from possession as a matter of actual fact,¹⁵² and of the person as a legal fiction as distinguishable from the person as a living entity.¹⁵³ These discussions were often inspired by, or in the spirit of, Austin; indeed, they tend to illustrate further an English preoccupation with the analysis of legal concepts. But not all of these minor lines of jurisprudential inquiry can be straightforwardly identified as part of Austin's legacy. Although, from Austin's era to Hart's, the mould of English jurisprudence was never broken, there was the occasional effort to do without it.

1. "Fresh Starts"

It would be wrong to assume that nobody in England became exasperated with jurisprudence during this period. Austin's "simple idea of orders, habits, and obedience, cannot be adequate for the analysis of law," Hart declared in 1961,¹⁵⁴ "there is plainly a need for a fresh start."¹⁵⁵ He was not the first to assert the need for a fresh start. The political philosopher, Michael Oakeshott, made the same assertion in his intriguing article, "The Concept of a Philosophical Jurisprudence," published in 1938. Oakeshott's essay is intriguing because he approached jurisprudence with few of the presuppositions and habits of thought common to lawyers tackling the subject. "The greatest hindrances which stand in the way of a fresh and profitable start with the philosophical enquiry into the nature of law," Oakeshott maintained,

are the prevailing ignorance about what has already been accomplished in this enquiry, and the prejudice, that springs from this ignorance, that little or nothing has been accomplished. . . .

¹⁵² See, e.g., Goodhart, *supra* note 63, at 75-90; 1 Frederick Pollock, *An Essay on Possession in the Common Law* 26-27 (Oxford, Clarendon Press 1888); Albert S. Thayer, *Possession and Ownership* (pts. 1-2), 23 *Law Q. Rev.* 175, 186, 324 (1907).

¹⁵³ See, e.g., W. Jethro Brown, *The Personality of the Corporation and the State*, 21 *Law Q. Rev.* 365, 372-74 (1905); W.M. Geldart, *Legal Personality*, 27 *Law Q. Rev.* 90 (1911); Martin Wolff, *On the Nature of Legal Persons*, 54 *Law Q. Rev.* 494 (1938).

¹⁵⁴ Hart, *Concept of Law*, *supra* note 10, at 75.

¹⁵⁵ *Id.* at 80.

If . . . a fresh start is to be made, it must be made with as profound a knowledge as we can acquire of what I shall call the tradition of Western European philosophical jurisprudence.¹⁵⁶

Jurisprudents, in other words, tend to be philosophically ill-informed. Indeed, although Oakeshott never expressly states as much, his view appeared to be that jurisprudential writing is generally anti-philosophical in spirit. Certainly he believed that neither analytical nor historical nor any other suggested school of jurisprudence is genuinely philosophical. Analytical jurisprudence, for example, although it provides “a precise and self-contained kind of theory or explanation of the nature of law,”¹⁵⁷ is not introspective: “[W]hat we are not given . . . is a positive and coherent view of the character and presuppositions of analytical jurisprudence.”¹⁵⁸ “[T]he world of jurisprudence,” according to Oakeshott, “is itself nothing better than a chaos of unrelated kinds of explanation of the nature of law.”¹⁵⁹ “What is lacking” from this world “is a coherent philosophy of explanation”¹⁶⁰ Jurisprudence does not have to be this way; but anybody seeking “to think out afresh a conception of philosophical jurisprudence . . . will find little help in the present position of enquiry.”¹⁶¹ The hope for jurisprudence, it seems, lies outside jurisprudence.

How, then, might jurisprudence be reconceived as genuine philosophy? “The notion that the business of a philosophy of any sort is actually to determine ends is,” according to Oakeshott, “false.”¹⁶² “Philosophical thought and knowledge is simply thought and knowledge without reservation or presupposition.”¹⁶³ Jurisprudential “schools” incorporate that which philosophical knowledge eschews. A genuine philosophy of law would “not begin with already defined and accepted abstract ideas such as the ideas of Right, Duty, Obligation,” but rather “with the ideas about law which any-

¹⁵⁶ Michael Oakeshott, *The Concept of a Philosophical Jurisprudence* (pt. 2), 3 *Politica* 345, 357 (1938).

¹⁵⁷ Oakeshott, *supra* note 139, at 207.

¹⁵⁸ *Id.* at 206.

¹⁵⁹ *Id.* at 221.

¹⁶⁰ *Id.* at 214.

¹⁶¹ *Id.* at 221–22.

¹⁶² *Id.* at 218.

¹⁶³ Oakeshott, *supra* note 156, at 345.

one who has not considered the question [viz., what is law?] may be supposed to have."¹⁶⁴ This "process of getting rid of . . . presuppositions and reservations" in order to come to "know more fully and more clearly" what is in some sense already known is, Oakeshott maintained, one that will be obvious "to anyone who has studied the history of philosophical thought."¹⁶⁵ By taking seriously this process of banishing assumptions, we might arrive at an authentic "philosophical jurisprudence" that "will cease to be merely one among a number of unrelated explanations of law."¹⁶⁶

Oakeshott's recommendation that we do away with our predispositions and schools in order to stand a chance of arriving at a genuinely philosophical jurisprudence has roots in his first book, *Experience and Its Modes*, published in 1933. In that book, Oakeshott paid no attention to jurisprudence; but he does emphasize that philosophy is concerned with "experience without reservation or presupposition."¹⁶⁷ Whereas the thesis of *Experience and Its Modes* is that philosophy is distinguishable from various types of experience, the thesis of his article of 1938 is that jurisprudence as philosophy is distinguishable from jurisprudence built upon assumptions. The two theses are obviously similar; but they are not identical,¹⁶⁸ and indeed with the 1938 article, which emphasizes the process of "getting rid" of presuppositions, there is a specific difficulty. The proposition that jurists must get rid of their predispositions and reservations if they are to make a fresh start, as if this act of discarding were as straightforward as emptying a computer's recycle bin, seems peculiarly casual. The reality seems to be that predispositions and reservations cannot just be disposed of on command—indeed, the proposition that one must think without being influenced by the knowledge one already has seems to be classic case of willing what cannot be willed.¹⁶⁹ Perhaps, in one or another instance, I will think thus—just as I might genuinely be

¹⁶⁴ Id. at 346.

¹⁶⁵ Id. at 346–47.

¹⁶⁶ Id. at 352.

¹⁶⁷ Michael Oakeshott, *Experience and Its Modes* 82 (1933).

¹⁶⁸ See Luke O'Sullivan, *Oakeshott on History* 110–13 (2003).

¹⁶⁹ See Jon Elster, *Sour Grapes: Studies in the Subversion of Rationality* 43–66 (1983).

amused by the joke you said I must laugh at—but it will not be the injunction that will have determined how I think.

The principal reason for presenting Oakeshott's essay on philosophical jurisprudence here is not to take issue with it but to show how it would be wrong to believe that nobody in England was trying to devise a fresh approach to jurisprudence during the years separating Austin and Hart. Not that the essay made a mark on English jurisprudential thought; one struggles to find English legal philosophers who even mention it.¹⁷⁰ Between the appearance of Oakeshott's essay and Hart's appointment to the jurisprudence chair at Oxford there came another plea for a fresh start—one which, while still something of a footnote in the history of English jurisprudence, is remembered somewhat better. The year 1945 saw the publication of two studies by Glanville Williams in which he outlined his exasperation with jurisprudence. Austin seemed initially to have caused this exasperation. One of Austin's goals, Williams pointed out, was "to arrive at the 'proper' meaning of the word 'law'."¹⁷¹ Two types of "law," according to Austin, are improperly so called. First, there is what he terms "objects" which are "[c]losely analogous to human laws"—examples being laws of fashion, etiquette, and honor.¹⁷² Controversially, Austin added that "much of what is usually termed 'International law'" also belongs under this heading.¹⁷³ Second, there is what he calls "laws metaphorical or figurative"—scientific laws and the laws governing games belong to this type.¹⁷⁴ These two types of law are not law properly so called because they are not positive laws—laws, that is, which are set by a determinate human superior. For Austin, "every law properly so called is a *positive law*"¹⁷⁵ and "[t]he *science of jurisprudence* (or, simply and briefly, *jurisprudence*) is concerned with positive laws."¹⁷⁶ Austin was hooked on italicization, but this was an instance where even the most hopeless addict might have

¹⁷⁰ For a rare exception, see Buckland, *supra* note 106, at 2.

¹⁷¹ Glanville L. Williams, *International Law and the Controversy Concerning the Word "Law,"* 22 *Brit. Y.B. Int'l L.* 146, 146 (1945) [hereinafter Williams, *International Law*].

¹⁷² 1 Austin, *supra* note 12, at 87.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 169.

¹⁷⁵ *Id.* at 171.

¹⁷⁶ *Id.* at 172.

abstained: it is, after all, hard to envisage a more emphatic jurisprudential argument.

For Williams, Austin's error was to turn jurisprudence into logomachy. Austin was clear in his own mind about what the word "law" properly denotes; but he was also insistent, Williams believed, that what he took the word to mean is "what the word should mean for other people."¹⁷⁷ By purporting to present the intrinsically "proper" meaning of the word law, Austin "was assuming a power that no man possessed."¹⁷⁸ But this, Williams argued, was only the beginning of the problem. A significant number of jurists following in Austin's wake failed to appreciate that "many questions and disputes that seem to be concerned with the empirical world are concerned only with definitions."¹⁷⁹ Like Austin, furthermore, they assumed that law has an inner essence—that it is an "entity mysteriously existing on its own account, independently of the external world and of the world of the mind"¹⁸⁰—which is amenable to being located and properly defined. While many jurists did not consider Austin's definition of law to be the proper one, they did not necessarily reject the goal that he had pursued: "[S]ome tried to answer the fool according to his folly by contending that other bodies of rules than those recognized by Austin were law 'properly' so called."¹⁸¹ Logomachy thus endured.

Williams did not identify this problem as one which specifically concerns English jurisprudence, but it is clear from his analysis that many of those whom he identified as major culprits were English jurists.¹⁸² These jurists wanted to show that Austin was wrong and that they had better understandings of what can properly be called law when, in fact, all they had were different definitions of law. "This initiated in England the sterile discussion of definitions of

¹⁷⁷ Williams, *International Law*, supra note 171, at 148.

¹⁷⁸ *Id.*

¹⁷⁹ Glanville L. Williams, *Language and the Law* (pt. 4), 61 *Law Q. Rev.* 384, 389 (1945) [hereinafter Williams, *Language and the Law* (pt. 4)].

¹⁸⁰ Glanville L. Williams, *Language and the Law* (pt. 1), 61 *Law Q. Rev.* 71, 85 (1945) [hereinafter Williams, *Language and the Law* (pt. 1)]. For the remaining parts of this article, see Glanville L. Williams, *Language and the Law* (pts. 2, 3, & 5), 61 *Law Q. Rev.* 179 (1945), 61 *L. Q. Rev.* 293 (1945), 62 *Law Q. Rev.* 387 (1946) [hereinafter Williams, *Language and the Law* (pts. 2, 3, & 5)].

¹⁸¹ Williams, *International Law*, supra note 171, at 148.

¹⁸² See *id.* at 149–51.

the word 'law' that has done so much to discredit jurisprudence."¹⁸³ Williams rejected the idea that a word could have an intrinsically proper meaning,¹⁸⁴ and believed that jurists who argue about what deserves to be called "law" are "simply . . . arguing about each other's peculiarities of expression."¹⁸⁵ While they created the impression that jurisprudence was "ridden with disputes," those disputes turned out "on examination to be disputes not as to matters of fact or value-judgment but purely as to the use of words."¹⁸⁶

"Law" was not the only word subjected to such disputes. Similar jurisprudential discussions could be found, Williams observed, relating to "right," "duty," "ownership," "possession," and other basic legal concepts.¹⁸⁷ Williams could have taken his analysis still further and pointed out that, in England, the word "jurisprudence" had been subjected to the same treatment: one of the most puzzling discussions to be found in many of the English jurisprudence texts of the period being studied concerns the question of what is "really" jurisprudence. This was something different from the chaos of competing explanations—the many different brands of adjectival jurisprudence¹⁸⁸—which met with Oakeshott's disapproval. Rather, it was a discussion about whether "medical jurisprudence," say, or "equity jurisprudence" truly merited being called jurisprudence (the answer usually being that they did not).¹⁸⁹ The fact that this discussion took place regularly in early- to mid-twentieth century English jurisprudence reinforces Williams's basic contention that many jurists overvalued definition.

¹⁸³ *Id.* at 150.

¹⁸⁴ *Id.* at 148.

¹⁸⁵ *Id.* at 152.

¹⁸⁶ Williams, *Language and the Law* (pt. 1), *supra* note 180, at 72.

¹⁸⁷ See Williams, *Language and the Law* (pt. 2), *supra* note 180, at 179; *Language and the Law* (pt. 4), *supra* note 179, at 390–91; *Language and the Law* (pt. 5), *supra* note 180, at 398–99.

¹⁸⁸ See Campbell, *supra* note 140, at 338–39 ("Polonius might have found reason to approve of modern 'jurisprudence' as the best subject in the world, 'either for tragedy, comedy, history, pastoral, pastoral-comical, historical-pastoral, tragical-historical, tragical-comical-historical-pastoral, scene indivisible, or poem unlimited'. But it makes things a little difficult for the student.") (quoting William Shakespeare, *Hamlet* act 2, sc. 2).

¹⁸⁹ See, e.g., Holland, *supra* note 31, at 4–5; Keeton, *supra* note 38, at 2; Keeton, *supra* note 16, at 5; Julius Stone, *The Province of Jurisprudence Redetermined* (Concluded), 7 *Mod. L. Rev.* 177, 179 (1944).

Williams's argument did not suffer the same fate as Oakeshott's case for a genuinely philosophical jurisprudence. The main difficulty with the argument is that it seeks to demonstrate too much: everybody may well be free, like Humpty Dumpty, to use any word as they please, so that definitions have the status of linguistic recommendations; but it may still be the case that some recommendations are better than others.¹⁹⁰ Williams's response was that although a word may have its "usual meaning," which might be taken to be the best recommendation regarding its use, there is no requirement that the word be accorded this meaning.¹⁹¹ Hart, in his inaugural lecture, considered this response to be unhelpful. Although Hart rejected the essentialist approach to defining law that had been taken by Austin and others, he considered it "no answer," when faced with someone asking "What is law?," "merely to tender examples of what are correctly called . . . laws . . . and to tell the questioner if he is still puzzled that he is free to abandon the public convention and use words as he pleases."¹⁹² "Sometimes, as with the word 'law' itself," explained Hart,

the range of cases to which it is applied has a diversity which baffled the initial attempt to extract any principle behind the application, yet we have the conviction that even here there is some principle and not an arbitrary convention underlying the surface differences; so that . . . it is not felt absurd to ask why, within municipal law, the immense variety of different types of rules are called law, nor why municipal law and international law, in spite of striking differences, are so called.¹⁹³

Hart, as is well known, set about explaining the concept of law not by way of definition but by endeavoring to elucidate the function that legal words perform when used in the operation of a legal

¹⁹⁰ Perhaps especially when a great deal turns on the recommendations. For a polite critique of Williams's argument which takes account of this point, see John Wisdom, *Philosophy and Psycho-Analysis* 157-58 (1953) ("Whether a lion with stripes is a tiger or a lion is, if you like, merely a matter of the application of a name. Whether Mr. So-and-So . . . did or did not exercise reasonable care is not merely a matter of the application of a name or, if we choose to say it is, then we must remember that with this name a game is lost and won and a game with very heavy stakes.").

¹⁹¹ Williams, *International Law*, *supra* note 171, at 148.

¹⁹² Hart, *Definition and Theory*, *supra* note 10, at 21-22.

¹⁹³ *Id.* at 22.

system. His perspective differed from that of Williams, but he took Williams's basic claim—that debates about the proper meaning of law are essentially sterile—to be correct. "Much time and ingenuity has been wasted in jurisprudence," Hart wrote in *The Concept of Law*, "in the vain attempt to discover, for the purposes of definition, the common qualities which are . . . held to be the *only* respectable reason for using the same word of many different things."¹⁹⁴

While Oakeshott and Williams believed that jurisprudence had to be subjected to significant reappraisal if the discipline was to make intellectual advances, others in England took more modest approaches to the question of jurisprudential revival. Three approaches stand out, although only two of them need occupy much of our time. The first approach, which emerged mainly during the first half of the twentieth century, was simple: look abroad for fresh ideas. The first edition of what has always been England's most detailed jurisprudence textbook, *Lloyd's Introduction to Jurisprudence*, was published just a few years outside the period under review but is notable for our purposes because of its cosmopolitanism. Dennis Lloyd, who had attended Ludwig Wittgenstein's Cambridge seminars in 1935 and 1936,¹⁹⁵ seemed little interested in Austinian jurisprudence. "One result of the positivist school of law" inspired primarily by Austin, he claimed, "was that legal science became . . . rigidly demarcated from other studies."¹⁹⁶ Although Lloyd did not neglect Austin's work, he argued that anyone seeking a rigorous conceptual approach to jurisprudence would do better to look to Hans Kelsen's *Pure Theory of Law*.¹⁹⁷ Indeed, Kelsen's effort to explain the validity of a legal order as a hierarchy of valid legal norms founded upon a hypothetical Basic Norm is the only positivist theory to which Lloyd, in the first edition of his book, devoted a whole chapter. Lloyd was not alone in turning to Kelsen.¹⁹⁸ Fur-

¹⁹⁴ Hart, *Concept of Law*, supra note 10, at 234; see also Robert S. Summers, *The New Analytical Jurists*, 41 N.Y.U. L. Rev. 861, 862-63 (1966).

¹⁹⁵ See Dennis Lloyd, *Introduction To Jurisprudence*, at xiv (1959).

¹⁹⁶ *Id.* at xvi.

¹⁹⁷ *Id.* at 7.

¹⁹⁸ See, e.g., J. Walter Jones, *Historical Introduction to the Theory of Law* 222-34 (1940) [hereinafter Jones, *Historical Introduction*]; J. Walter Jones, *The "Pure" Theory of International Law*, 16 *Brit. Y.B. Int'l L.* 5 (1935); H. Lauterpacht, *Kelsen's*

thermore, others in England shared Lloyd's interest in the Scandinavian Realist argument that rights are essentially chimerical,¹⁹⁹ and in Marxist jurisprudential questions concerning the role of law—if, indeed, there is any role for law—in a genuinely communist society.²⁰⁰ In short, during the early- to mid-twentieth century there was plenty of English curiosity about what was happening in jurisprudence elsewhere.²⁰¹ But curiosity really was the sum of it: nobody in England was much persuaded by the Scandinavian and Marxist perspectives, and even Kelsen, though much admired for his analytical rigor, was regarded as the architect of a theory which seemed to translate poorly from civilian to common-law systems.²⁰²

2. *New Themes*

The second way in which English jurisprudence writers sought to revive their subject was by finding some new themes. Although, by the middle of the twentieth century, there was noticeable interest in England in Kelsen's *Pure Theory of Law* and in Scandinavian Legal Realism, this interest was basically attributable to the fact that Kelsen and the Scandinavians had tackled themes familiar to English jurists—What makes law bind? What are rights and duties?—in ways which were unfamiliar. Challenging though these foreign perspectives were, they essentially offered new answers to old questions. English jurists seemed relatively uninterested in identifying new jurisprudential questions.

Pure Science of Law, in *Modern Theories of Law*, supra note 126, at 105, 105–37; Charles H. Wilson, *The Basis of Kelsen's Theory of Law*, 1 *Politica* 54 (1934).

¹⁹⁹ See Lloyd, supra note 195, at 237–78. Interest in the Scandinavian Realist critique of rights began to develop seriously in England only after the translation and publication of one of the major Realist texts in the early 1950s, Axel Hägerström's *Inquiries Into the Nature of Law and Morals*. (C.D. Broad trans., Karl Olivecrona ed., 1953).

²⁰⁰ See W. Friedmann, *Legal Theory* 227–34 (1944); Jones, *Historical Introduction*, supra note 198, at 270–300; Lloyd, supra note 195, at 279–95; see also Vinogradoff, supra note 135, at 79–99. I return to this matter in the next Section.

²⁰¹ See, e.g., Allen, supra note 95, at 156–96; W. Jethro Brown, *The Jurisprudence of M. Duguit*, 32 *Law Q. Rev.* 168 (1916); J. Walter Jones, *Modern Discussions of the Aims and Methods of Legal Science*, 47 *Law Q. Rev.* 62 (1931); Harold J. Laski, *M. Duguit's Conception of the State*, in *Modern Theories of Law*, supra note 126, at 52; B.A. Wortley, François Génay, in *Modern Theories of Law* supra note 126, at 139.

²⁰² See Buckland, supra note 106, at 19–20; Friedmann, supra note 200, at 105; Jones, *Historical Introduction*, supra note 198, at 234.

This becomes clear if one considers the puzzle that is Jeremy Bentham. One of the mysteries of English jurisprudence in the period separating Austin and Hart concerns the low profile of utilitarianism: why was it that Bentham, who was such a significant influence on Austin, should have been largely neglected by English jurists between the 1830s and the 1950s? Certainly many in England appreciated that Bentham had bequeathed a significant jurisprudential legacy.²⁰³ But most lawyers who wrote about Bentham seemed preoccupied with the man—particularly his precociousness and his intellectual indefatigability—rather than with his ideas.²⁰⁴

Many of those ideas may well have been too radical for English jurists. Bentham made a distinction between expository and censorial jurisprudence: “To the province of the *Expositor*,” he wrote in 1776, “it belongs to explain to us what, as he supposes, the Law *is*: to that of the *Censor*, to observe to us what he thinks it *ought to be*.”²⁰⁵ Although Bentham accorded a central place in his science to exposition, he generally cast himself in the role of censor.²⁰⁶ This was a role which many English jurists regarded warily. “Because the jurists felt the need to make themselves acceptable to the legal establishment, and because Bentham was regarded as the most furious critic of that establishment,” Schofield has written, “they distanced themselves from him. In short, Bentham’s radicalism was unacceptable to a body of men who by both inclination and situation tended to be politically conservative.”²⁰⁷

²⁰³ See, e.g., A.V. Dicey, *Lectures on the Relation Between Law & Public Opinion in England During the Nineteenth Century* 129–210, 303–10 (2d ed. 1920); 13 William Holdsworth, *A History of English Law* 41–155 (A.L. Goodhart & H.G. Hanbury eds., 1952); William Holdsworth, *Some Makers of English Law* 248–56 (1938); Ivor Jennings, *A Plea for Utilitarianism*, 2 *Mod. L. Rev.* 22 (1938); *Jeremy Bentham and the Law: A Symposium* (George W. Keeton & Georg Schwarzenberger eds., 1948); H.F. Jolowicz, *Jeremy Bentham and the Law*, 1 *Current Legal Probs.* 1 (1948).

²⁰⁴ See, e.g., Allen, *supra* note 95, at 119–38; H.A. Hollond, *Jeremy Bentham: February 15, 1748–June 6, 1832*, 10 *Cambridge L.J.* 3 (1948); H.J. Randall, *Jeremy Bentham*, 22 *Law Q. Rev.* 311 (1906).

²⁰⁵ *Jeremy Bentham, A Fragment on Government* (London 1776), *reprinted in* *Jeremy Bentham, A Comment on the Commentaries and A Fragment on Government* 393, 397 (J.H. Burns & H.L.A. Hart eds., 1977).

²⁰⁶ See William Twining, *1836 And All That: Laws in the University of London 1836–1986*, 40 *Current Legal Probs.* 261, 269 (1987).

²⁰⁷ Philip Schofield, *Jeremy Bentham and Nineteenth-Century English Jurisprudence*, 12 *J. Legal Hist.* 58, 70 (1991).

It seems just as likely that many jurists simply found Bentham unmanageable. He produced so many manuscripts—most of them unpublished during his lifetime—on such a diversity of issues that the task of editing his work continues to this day. Moreover, his prose, especially in later years, made for extremely unpleasant reading, and he tended to be repetitive, dogmatic, and obsessed with details. Although Austin offered a narrower jurisprudential vision, it was one with which English jurists could identify.²⁰⁸ For whatever reason, those jurists, instead of plundering Bentham's legacy, instead of seeing it as a source of inspiration, tended to treat it as part of the background to Austinian jurisprudence. "The exact measure of Bentham's work in constructing the Science of Law is difficult to evaluate," Sheldon Amos wrote in 1874,

as he combined in himself so many distinct faculties; generally attempting to reform the political substance at the same time that he laid bare the incongruities of the logical form of law. Nevertheless, in reforming, or endeavouring to reform, legal terminology and classification on principles of general logic, he was a necessary forerunner of Mr. Austin, to whom, as has been said, the conscious establishment of the legal science must properly be attributed.²⁰⁹

While "many of Bentham's legislative proposals have now been practically adopted," and while his writings have encouraged a "true cross-questioning spirit," Amos observed in 1870, his ethical conclusions have been "largely modified, if not superseded."²¹⁰ "The sagacious and almost revolutionary measures demanded by Bentham," he added two years later, had been "mostly carried out since his time."²¹¹ Perhaps seeking a prize for the ultimate backhanded compliment, James Bryce wrote in 1901 that "Bentham had not only a vigorous but a fertile and inventive mind, acute and ingenious, if sometimes warped or liable to become what is now

²⁰⁸ See Lobban, *supra* note 119, at 223–56.

²⁰⁹ Sheldon Amos, *The Science of Law* 8 (London, King 1874).

²¹⁰ Sheldon Amos, *A Lecture on the Best Modes of Studying the Science of Jurisprudence* 18–19 (London, Ridgway 1870).

²¹¹ Sheldon Amos, *A Systematic View of the Science of Jurisprudence* 15 (London, Longmans 1872).

called ‘cranky.’”²¹² His “legal writings,” Bryce added, “have now only a historical interest.”²¹³ Amos and Bryce were jurists of different persuasions—Amos essentially a follower of Austin, Bryce essentially a follower of Maine—yet both were united in regarding Bentham as a figure to be given a wide berth. English jurisprudence might well have proved to be a more thematically diverse subject in the years between Austin and Hart if more attention had been paid to the writings of Jeremy Bentham; but the fact is that Bentham was just too prodigious and imaginative, too maverick, for English tastes.

In so far as English jurists did find new themes during the period being considered, those themes were not actively sought out but rather suggested themselves. Wolfgang Friedmann, who worked as an academic lawyer in England in the late 1930s and early 1940s, noted in the third edition of his *Legal Theory* that many of the legal problems which beset mid-twentieth century Britain, with its nationalized industries and its welfare state, were similar to those that had arisen in the Soviet Union. Of course, Britain remained a liberal democracy, and the rights of the individual were not to be routinely subordinated to the will of the state. Nevertheless, British “public corporations” were “instruments of national policy” and so “part of the national economic plan, like Soviet trusts.”²¹⁴ Indeed, Friedmann continued, “[b]oth the Soviet and the British conception of the public corporation subordinate the interest in private freedom of trade and enterprise to . . . ‘the economic prosperity of society.’”²¹⁵ Although the British and Soviet systems may have been very different ideologically, both faced the problem of having to develop legal frameworks and methods appropriate for collectivist policies. From the early twentieth century onwards there steadily emerged in England a body of literature indicating juristic interest in the dilemmas posed by Soviet law,²¹⁶ and it might seem reasonable to assume that this interest

²¹² 2 James Bryce, *Studies in History and Jurisprudence* 615 (1901).

²¹³ *Id.* at 617.

²¹⁴ W. Friedmann, *Legal Theory* 266 (3d ed. 1953).

²¹⁵ *Id.* at 267 (quoting George Whitecross Paton, *A Text-Book of Jurisprudence* 117 (2d ed. 1951)).

²¹⁶ See, e.g., Rudolf Schlesinger, *Soviet Legal Theory: Its Social Background and Development* (1945); S. Dobrin, *Soviet Jurisprudence and Socialism*, 52 *Law Q. Rev.* 402 (1936); Edward Jenks, *Recent Theories of the State*, 43 *Law Q. Rev.* 186 (1927);

was largely inspired by the fact that the Soviet Union faced legal challenges which bore some similarity to those that were emerging in Britain.

For at least two reasons, however, one has to tread very carefully with this assumption. First of all, in terms of ideology and political organization the United States was more distanced from the Soviet Union than was Britain, yet American jurists were no less intrigued by the Soviet legal system than were their colleagues across the Atlantic.²¹⁷ One cannot simply cite recognition of problems in common, in other words, as an explanation of why English jurists became interested in Soviet jurisprudence. Second, and more significant, when one considers what English jurists had to say about Soviet jurisprudence, one sees that they were not so much trying to learn from the methods and experiences of another legal culture as describing just how different that culture was. Certainly there were lessons that could be learned by looking eastwards. The concept of ownership, for example, was handled by Marxist jurists in a fashion very different from that which had been adopted by those working within the Austinian tradition. In his *Institutions of Private Law and Their Social Functions*, first published in English in 1949, the Austrian Marxist, Karl Renner, attempted to show that understanding a legal concept such as ownership requires an appreciation of the role that the concept has played in economic history. The function of ownership in a medieval society, he argued, is very different from the meaning of ownership in a modern capitalist society.²¹⁸ But English jurists, certainly in the period separating Austin from Hart, seemed little interested in this type of argument. What interested them far more was the question of how communism could be reconciled with the rule of law, for

A. Nove, *Some Aspects of Soviet Constitutional Theory*, 12 *Mod. L. Rev.* 12 (1949); H.W. Robinson, *Law and Economics*, 2 *Mod. L. Rev.* 257 (1939); Rudolf Schlesinger, *A Glance at Soviet Law*, 65 *Law Q. Rev.* 504 (1949); Rudolf Schlesinger, *Recent Developments in Soviet Legal Theory*, 6 *Mod. L. Rev.* 21 (1942). This literature expands significantly if one looks beyond 1952.

²¹⁷ See, e.g., Harold J. Berman, *The Challenge of Soviet Law* (pts. 1 & 2), 62 *Harv. L. Rev.* 220 (1948), 62 *Harv. L. Rev.* 449 (1949); Lon L. Fuller, *Pashukanis and Vyshinsky: A Study in the Development of Marxian Legal Thinking*, 47 *Mich. L. Rev.* 1157 (1949); John N. Hazard, *Soviet Law: An Introduction*, 36 *Colum. L. Rev.* 1236 (1936).

²¹⁸ See Karl Renner, *The Institutions of Private Law and Their Social Functions* (Agnes Schwarzschild trans., 1949).

communism was taken to entail not the triumph of socialist law, but the triumph of socialism over law.

Friedrich Engels prophesied that the arrival of communism would entail the “withering away” of the state.²¹⁹ In the 1920s the Soviet jurist, Evgeny Pashukanis, argued that law, being part of the state apparatus, would face the same fate. Law exists, he claimed, “for the sole purpose of being utterly spent.”²²⁰ Unfortunately, Soviet politics overtook Pashukanis. An increasingly authoritarian state came to rely ever more heavily on law (this is especially evident from the Soviet Constitution of 1936²²¹) so that proclamations about the future redundancy of law under communism began to look not merely incorrect but also disrespectful to Stalin’s ambitions. On January 20, 1937, *Pravda* suggested that Pashukanis was an enemy of the people; he was arrested soon afterwards and was never seen again.²²² Although little of Pashukanis’s work was translated into English until the second half of the twentieth century, his position—hardly a difficult one to summarize—was quite often set out in the writings of Anglo-American jurists during the 1930s and 1940s.²²³ It was clearly a position that puzzled and intrigued some English writers. English bewilderment at the sheer “otherness” of Soviet jurisprudence as represented by Pashukanis is well illustrated by the reflections of J. Walter Jones, an Oxford law don writing at the end of the 1930s. Jones noted the commitment of communist theory to the withering away of the state,²²⁴ and observed also that “at the present day Russian writers see no inconsistency in describing the Soviet Union as a State.”²²⁵ But something was amiss. Although “Russian theorists” cannot but “help speaking of the Soviet Union as a State,” Jones asserted, they “are

²¹⁹ Frederick Engels, *Anti-Dühring: Herr Eugen Dühring’s Revolution in Science* 387 (2d English ed. 1959) (1878).

²²⁰ Evgeny B. Pashukanis, *Law and Marxism: A General Theory* 133 (Barbara Einhorn trans., Chris Arthur ed., 1978).

²²¹ See Lloyd, *supra* note 195, at 287–90.

²²² See Robert Sharlet, *Stalinism and Soviet Legal Culture, in Stalinism: Essays in Historical Interpretation* 155, 170 (Robert C. Tucker ed., Transaction Publishers 2d ed. 1999) (1977).

²²³ See, e.g., Schlesinger, *supra* note 216, at 23–26; Dobrin, *supra* note 216, at 413–24; Fuller, *supra* note 217, at 1159–62; Roscoe Pound, *Fifty Years of Jurisprudence* (pt. 3), 51 *Harv. L. Rev.* 777, 780–82 (1938).

²²⁴ See Jones, *Historical Introduction, supra* note 198, at 275.

²²⁵ *Id.* at 275–76.

never tired of insisting upon the gulf which separates this State from others.²²⁶ These theorists were clearly right to proclaim this gulf, he believed, for there was no doubt that it existed. English jurisprudence had always taken law to be a given; although preferences were sometimes expressed regarding types of law—Bentham's well-known preference for codification over judge-made law, for example—the goal of jurisprudence had never been to question whether law was actually necessary. Soviet jurisprudence, by contrast, not only contemplated but had advocated the formation of a social order without the rule of law. For Soviet jurists, Jones declared,

[i]f law is to be recognized at all, it is only in its character as a technical instrument for compulsive enforcement of measures deemed desirable in the interests of the communist programme. The law as a means must be subordinated to its end, and if the end is more easily attained by other means the law may be altogether dispensed with. In a communist society the law with its mechanism of courts and police will have vanished; in the meantime, it may be necessary to retain this apparatus, but it must be used, not according to any supposed principle of legality or "rule of law," but for ushering in a society in which the law itself will be unnecessary.²²⁷

Jones's assessment would win no prizes for subtlety. It seems to be derived more or less entirely from Pashukanis's assertion that, under communism, law would be replaced by "technical regulation"²²⁸—but it is significant for our purposes because it highlights the nature of the mid-twentieth century English interest in Soviet legal thought. English jurists seemed to have turned their attention to Soviet jurisprudence not because they expected it to be somehow instructive, but because it embodied a theory of law that was utterly alien to their sensibilities. The theory was not only alien but also difficult to refute: how, after all, could one conclusively disprove that we would no longer have a need for law once capitalism had run its course? Perhaps it is not surprising that a legal theory

²²⁶ *Id.* at 276.

²²⁷ *Id.* at 277.

²²⁸ See Pashukanis, *supra* note 220, at 79–81, 134, 187.

which is as exasperating as it is counterintuitive should have exercised the minds of many Anglo-American jurists.

Mid-twentieth century English jurists were, like many of their continental European and North American counterparts, interested in fascist as well as socialist conceptions of law.²²⁹ Although no strain of fascist jurisprudence involved the claim that law was fated to wither away, some English jurists certainly saw in both fascist and socialist legal philosophies a similar disregard for the idea of the rule of law. Fascist legal theories, Julius Stone contended in 1937, promote “the notion of a government of men and not of laws, subordination of the entire hierarchy of government to the person who in fact wields the power of the strong state, and the freedom of that person from responsibility to the people or its elected representatives.”²³⁰ Essential to these theories, so far as Stone could see, is the idea that the government which respects the rule of law lacks power: “The only difference, according to fascist thinkers, between a democratic legislature and the head of the fascist state, is in the weakness and incompetence of the former.”²³¹ Jones saw the matter no differently: for the fascist jurist, “too much regard for the law by the government is an admission of weakness. The State which acknowledges the ‘rule of law’ is a prisoner of the law. . . . Fascist and Bolshevist are agreed that law should be an instrument of action rather than a check upon it.”²³²

It is tempting to view such observations as another case of jurisprudential tourism—of English jurists looking to fascist legal the-

²²⁹ For evidence of this interest in the United States and continental Europe, see, for example, H. Arthur Steiner, *The Fascist Conception of Law*, 36 *Colum. L. Rev.* 1267 (1936); Marcel Prélot, *La théorie de l'État dans le Droit fasciste*, in *Mélanges R. Carré de Malberg* 433 (1933).

²³⁰ Julius Stone, *Theories of Law and Justice of Fascist Italy*, 1 *Mod. L. Rev.* 177, 181 (1937).

²³¹ *Id.* at 196.

²³² Jones, *Historical Introduction*, *supra* note 198, at 279–80; see also J. Walter Jones, *The Nazi Conception of Law* 12 (1940) (“[T]he Nazis deduce that respect for statute as such is just another of the superstitions of old-fashioned Liberalism. They agree with the Soviet lawyers that the reverence paid to statutes is little more than a *bourgeois* fiction. And they have still less use for the distinction drawn in countries like the U.S.A. between constitutional laws, which cannot be enacted or repealed by the ordinary legislature, and ordinary statutes, which can. After all, when the law *in toto* is reduced to a mere expression of the will of the Leader, all such distinctions become insignificant.”).

ory, as indeed they seemed to look to socialist legal theory, in order to do little more than find it all so alien. In fact, however, fascist legal theory seemed to create a sense of unease among English jurists to a degree that socialist legal theory did not. In an article about English jurisprudence it is something of a liberty to cite the words of a Scottish law professor—even if those words appeared in an English law journal—but Archie Campbell's reflections in his 1946 inaugural lecture at the University of Edinburgh well capture this sense of unease. Recounting a discussion with a Nazi law professor concerning the *Führerprinzip* or "principle of Leadership,"²³³ Campbell explained his objection to the principle thus:

I could understand that a small party of men inspired by a common enthusiasm or engaged on a common task, or a group of young people guided by someone older and more experienced, could recognize and follow the natural leadership of one man, obeying his directions not through any fear of punishment or with any feeling of constraint, but simply and naturally because they knew him and knew that he was wiser than they and his decisions were better than theirs. . . . But I could not understand how one Leader could lead and guide and control a nation of a hundred million people in every detail of their lives in ordinary times. . . . All decisions, except those on the very highest level, would have to be made by subordinates, and, unless there were fixed rules of law for these subordinates to follow, what guarantee was there against their arbitrary self-seeking and oppression?²³⁴

What concerned Campbell primarily was not the authority of the dictator within a fascist system, but the unaccountability of the dictator's "subordinates."²³⁵ Jones displayed much the same concern when he argued that fascist legal theory entails a "demand for freedom of executive action"—"it is the Executive which is given the dominating position in the State," while "the very idea that the

²³³ A.H. Campbell, *Fascism and Legality*, 62 *Law Q. Rev.* 141, 148 (1946).

²³⁴ *Id.* at 146.

²³⁵ Campbell believed that there was greater respect for legality in Mussolini's Italy than there was in Hitler's Germany. See *id.* at 142, 150–51. For a critique of his position, see Norman S. Marsh, *Some Aspects of the German Legal System Under National Socialism*, 62 *Law Q. Rev.* 366 (1946).

directing hand of the executive power is to be fettered by a legislative body . . . is dismissed as fantastic.”²³⁶ Although mid-twentieth century Britain was little perturbed by the possibility of the rise to power of a home-grown dictator, there was no shortage of concern about the growth of an increasingly powerful and essentially unchecked executive branch. This basic sense of worry is amply illustrated by Lord Hewart’s classic of the period, *The New Despotism*.²³⁷ “[N]othing is more dangerous in public affairs,” Hewart wrote, “than that nominal responsibility should belong to one person while real authority rests with another.”²³⁸ Increasingly, however, delegation of power seemed to be the British way. Not only had there been a proliferation of legislation which “vested in public officials, to the exclusion of the jurisdiction of the Courts of Law, the power of deciding questions of a judicial nature,” but much of this legislation, though it stipulated that one or another matter was to be decided by a government minister, in fact allowed the matter to be determined by some anonymous official, “of more or less standing in the [minister’s] department, who has no responsibility except to his official superiors.”²³⁹

Legislation enabling government officers to exercise power with little or no accountability—“the accumulation of despotic power in the hands of anonymous officials,”²⁴⁰ to borrow Hewart’s dramatic language—seemed to militate against the rule of law:

The complaint is . . . that rules and regulations are made . . . at such a stage, in such a form, and in such circumstances as to deprive, at one and the same time, both Parliament and the Law Courts of any real authority in relation to them. . . . The department becomes judge in its own cause.²⁴¹

Thus it was that mid-twentieth century English jurists found in fascist legal theory something akin to a morality tale about the dangers of executive power channeled through delegated legislation. C.K. Allen, Oxford’s Professor of Jurisprudence from 1929 to

²³⁶ Jones, Historical Introduction, supra note 198, at 280.

²³⁷ Lord Hewart, *The New Despotism* (1929).

²³⁸ Id. at 109.

²³⁹ Id. at 43.

²⁴⁰ Id. at 154.

²⁴¹ Id.

1931, wrote in 1943 of how one of the greatest dangers in the modern state “has been the constant tendency to place the executive above the law.”²⁴² So far as he was concerned, “the greatest misfortune which can happen to a democracy is that decent average opinion should disinterest itself in the representative process and allow power to pass into the hands of professionals who use the democratic machinery only for their own ends.”²⁴³ If Allen is remembered at all today it is for a once popular treatise on the sources of law,²⁴⁴ and indeed we will have reason to turn to his work on this topic in a moment. But it should be noted that this topic was hardly Allen’s abiding passion. From 1931 until his death in the mid-1960s, he was far more interested in assessing the relationship between democracy and bureaucracy.²⁴⁵ The stark truth is that he cast little light upon this relationship, and it is no surprise that his many tirades against bureaucratic hubris are for the most part forgotten today. It is noteworthy, nevertheless, that the theme which he considered to require sustained jurisprudential attention came not from Austin or any other familiar juristic source, but stemmed from the thorny relationship between law and politics.

3. The Province of Jurisprudence Expanded: Habit, Custom, and Precedent

The third way in which English jurists sought to revitalize their subject was by widening its scope. At the heart of this approach is the endeavor to determine the province of jurisprudence in some way different, indeed better, than had Austin. The approach is of that type which Glanville Williams found lamentable, but historically it is significant. For Austin, as is well known, “the sovereign, or supreme legislator, is the author of all law.”²⁴⁶ This fact does not preclude the possibility of what he called subordinate sources or legislators. But these subordinate sources derive their authority from the sovereign: “Individuals or bodies legislating in

²⁴² Carleton Kemp Allen, *Democracy and the Individual* 70 (1943).

²⁴³ *Id.* at 22.

²⁴⁴ See Allen, *supra* note 64.

²⁴⁵ See, e.g., Carleton Kemp Allen, *Bureaucracy Triumphant* (1931); Carleton Kemp Allen, *Law and Orders: An Inquiry Into the Nature and Scope of Delegated Legislation and Executive Powers in England* (1945).

²⁴⁶ 2 Austin, *supra* note 12, at 510.

subordination to the sovereign, are more properly *reservoirs* fed from the source of all law, the supreme legislature²⁴⁷ Austin, as Allen observed, believed “that the full dignity of the term ‘source’ can be properly applied only to the sovereign.”²⁴⁸

English jurists, for all their customary regard for Austin,²⁴⁹ generally considered his argument that all sources of law derive from a single origin to be simplistic. But what had Austin missed? In answering this question, various representatives of English jurisprudence advanced rather hesitantly a line of argument that was to become the starting-point, though really nothing more than the starting-point, for Hart’s critique of the command theory in *The Concept of Law*. The first distinguishing feature of sovereign authority, according to Austin, is that “[t]he *bulk* of the given society are in a *habit* of obedience or submission to a *determinate* and *common* superior.”²⁵⁰ However, to try to explain the validity of law by reference to “a general habit of obedience,” Hart argued, is to appeal to “an essentially vague or imprecise notion. The question how many people must obey how many such general orders, and for how long, if there is to be law, no more admits of definite answers than the question how few hairs must a man have to be bald.”²⁵¹ Hart, as any legal philosopher knows, had plenty more to say about Austin’s inappropriate reliance on the notion of habit.²⁵² What interests us here is not Hart’s critique of Austin, or even the position of Austin himself, but discussions of habit in the English jurisprudential literature that separate the two men.

The discussions of habit to be found in this literature—and it has to be said that these discussions are often somewhat muddled—basically present the notion as what we might term a source of a source of law. Just as customs may become positive laws, so the argument went, habits may become customs. “A habitual course of action once formed,” Holland claimed in *The Elements of Jurisprudence*, “gathers strength and sanctity every year. It is a course

²⁴⁷ Id.

²⁴⁸ Allen, *supra* note 64, at 3.

²⁴⁹ Allen was no different in this respect. See *id.* at 8 (“For a systematic exposition of the methods of English jurisprudence, we still have to turn to Austin. Nobody has replaced him.”).

²⁵⁰ 1 Austin, *supra* note 12, at 220.

²⁵¹ Hart, *Concept of Law*, *supra* note 10, at 23–24.

²⁵² See *id.* at 50–55, 68–69, 112.

of action which every one is accustomed to see followed: it is generally believed to be salutary, and any deviation from it is felt to be abnormal, immoral."²⁵³ Markby similarly argued that "uniformity of action, when it has settled down into a rule, will be called a custom."²⁵⁴ Neither Holland nor Markby appeared to appreciate that habits, even habits shared by large social groups, do not necessarily evolve into customs over time. Only sarcastically would one claim that public rudeness is customary in major cities, even though living in such cities does tend to get one into the habit of dispensing with manners which are taken as standard back home. Before Hart, furthermore, no representative of English jurisprudence appeared to be capable of distinguishing a habit from a social rule. Both Vinogradoff and Allen appreciated that what they called a "social custom" was somehow "more obligatory" than a habit.²⁵⁵ But neither was able to explain, as Hart did, that whereas a habit is simply a regularized pattern of behaviour deviation from which "need not be a matter for any form of criticism,"²⁵⁶ a social rule, such as a basic rule of etiquette, "has an 'internal' aspect"; that is, "some at least must look upon the behaviour in question as a general standard to be followed."²⁵⁷

The key point here is not that Hart was a subtler legal philosopher than were his predecessors, though undoubtedly he was, but that some of the basic notions that he explicated in his effort to move beyond Austinian thinking had been troubling Austin's successors for some time. Others in England saw before Hart—even if none saw as clearly as he did—that certain concepts which could not, in Austin's scheme, be classified as "law properly so called" nevertheless belonged within the province of jurisprudence.

Custom was perhaps the most obvious of these concepts. Austin's position on custom was dogmatic and inflexible. A custom, he claimed, "is a rule of conduct which the governed observe spontaneously."²⁵⁸ By "rule of conduct" Austin did not mean that a cus-

²⁵³ Holland, *supra* note 31, at 57.

²⁵⁴ Markby, *supra* note 22, at 33.

²⁵⁵ Allen, *supra* note 64, at 62-63; Paul Vinogradoff, *Common-Sense in Law* 19-23 (1914).

²⁵⁶ Hart, *Concept of Law*, *supra* note 10, at 54.

²⁵⁷ *Id.* at 55.

²⁵⁸ 1 Austin, *supra* note 12, at 101.

tom is a legal rule; rather, a custom “is merely a rule of positive morality: a rule generally observed by the citizens or subjects; but deriving the only force, which it can be said to possess, from the general disapprobation falling on those who transgress it.”²⁵⁹ Customs can be “turned into legal rules” by judicial decision, these “legal rules which emerge from the customs” being “*tacit* commands of the sovereign legislature.”²⁶⁰ But “till they become the grounds of judicial decisions upon cases . . . the customs are merely rules set by opinions of the governed, and sanctioned or enforced morally.”²⁶¹

Representatives of English jurisprudence after Austin were generally unconvinced by his effort to distinguish law and custom. “Law everywhere begins with Custom,”²⁶² Bryce declared at the beginning of the twentieth century—a declaration which he neglected to elaborate possibly because he suspected that most English lawyers would share the sentiment. The common law is composed of customs, Blackstone had claimed in 1765, which “are not set down in writing, as acts of parliament are, but . . . receive their binding power, and the force of laws, by long and immemorial usage, and by their universal reception throughout the kingdom.”²⁶³ Austin considered Blackstone’s position to be an absurd conceit²⁶⁴— “[t]he admirers of customary law love to trick out their idol with mysterious and imposing attributes,” he lamented.²⁶⁵ In England, however, most of Austin’s jurisprudential successors would have seen more sense in Blackstone’s position than they did in his. Naturally, the relationship between custom and law can be overstressed. Pollock observed in his *First Book of Jurisprudence*, “a great deal of law, at any rate of modern law, has not any visible relation to pre-existing custom.”²⁶⁶ But he had no disagreement with Blackstone’s claim that the common law in particular is customary:

²⁵⁹ *Id.* at 102.

²⁶⁰ *Id.*

²⁶¹ *Id.* at 199.

²⁶² Bryce, *supra* note 212, at 640.

²⁶³ 1 William Blackstone, *Commentaries* *64.

²⁶⁴ See 1 Austin, *supra* note 12, at 36–37.

²⁶⁵ *Id.* at 102.

²⁶⁶ Pollock, *supra* note 62, at 12.

The very name Common Law seems to imply some kind of reference to general usage and acceptance as being the ultimate claim of the law upon the individual citizen's allegiance. In short, the Common Law is a customary law if, in the course of about six centuries, the undoubting belief and uniform language of everybody who had occasion to consider the matter were able to make it so. To this day "coutume" is the nearest equivalent that learned Frenchmen can find for its English name.²⁶⁷

Pollock was not the only Oxford jurisprudence professor to argue thus. C.K. Allen did the same,²⁶⁸ as did Allen's successor, A.L. Goodhart.²⁶⁹ But neither Pollock nor Allen nor Goodhart captured—only Allen, among them, tried to capture²⁷⁰—what was wrong with Austin's position; rather, each simply revealed his preference for a conception of custom more congenial to the common-law cast of mind. Had these authors wanted to analyze Austin's position, rather than just distance themselves from it, they might have recognized that it pointed to an interesting jurisprudential debate. For Austin, as we have seen, was insistent that custom only acquires the force of law once it has received judicial approval and application: custom becomes law, in other words, once it has been turned into judicial precedent. Maine, by contrast, argued that, strange though it may seem, in ancient legal systems judicial precedent would often precede custom²⁷¹—an argument accepted in the United States by John Chipman Gray.²⁷² Between these two

²⁶⁷ Id. at 240.

²⁶⁸ See Allen, *supra* note 64, at 66–68.

²⁶⁹ See A.L. Goodhart, *English Law and the Moral Law* 37 (1953). For Goodhart, the fact that custom—what he called "the moral law"—is "rarely in conflict" with the laws of England explains why those laws command the general obedience of citizens:

[T]he strength of English law . . . depends in large part on the fact that the people of this country recognise that they are under an obligation to obey the law, and that this sense of obligation is based, not on force or fear, but on reason, morality, religion, and the inherited traditions of the nation. It is for this reason that we can truly say that the common law is our common heritage.

Id. at 31, 151; cf. Percy H. Winfield, *Ethics in English Case Law*, 45 *Harv. L. Rev.* 112 (1931) (presenting a rather more subtle English treatment of the relationship between the common law and morality).

²⁷⁰ Allen, *supra* note 64, at 63–65.

²⁷¹ See Maine, *Ancient Law*, *supra* note 92, at 5.

²⁷² See John Chipman Gray, *The Nature and Sources of Law* 297 (Roland Gray ed., Macmillan 2d ed. 1921) (1909).

arguments can be located one which is likely to have more appeal to traditional common lawyers: namely, that a custom will be law not because it has been recognized by the courts but because, having been a popular course of action for so long as anyone can remember, it will be recognized by the courts if the occasion arises. "A custom does not wait to put on the nature of law until it has been actually enforced by the courts," Salmond argued in 1902, "any more than an act of Parliament or an agreement is destitute of legal efficacy until it has required and received judicial recognition."²⁷³ Our purpose here is neither to consider nor to make judgments about these different perspectives but merely to point out that, within English jurisprudence during the period under examination, these perspectives were never set against one another. Proponents of English jurisprudence may generally have found a particular conception of custom to be preferable to another, but none of them seemed much interested in explaining the relationship between custom and precedent.

This does not mean, however, that English jurists showed no interest in the subject of precedent itself. Quite the contrary: one of the most obvious differences between Austin and his successors is that most of them considered the subject to be jurisprudentially significant. Nearly all of the major English jurisprudence treatises between 1832 and 1952 contain discussions of precedent.²⁷⁴ A.L. Goodhart's *Essays in Jurisprudence and the Common Law* contains fifty pages on the subject, the third edition of Allen's *Law in the Making* over 150.²⁷⁵ The number of pages given over to precedents in the second edition of Keeton's *Elementary Principles of Jurisprudence*, though comparably modest, more than trebled from the first edition.²⁷⁶ Only a strict Austinian like T.E. Holland, or the occasional idiosyncratic, continental-minded expositor like James Bryce or J. Walter Jones, was prepared to hold out and accord the subject no attention.

²⁷³ Salmond, *supra* note 19, at 157.

²⁷⁴ See, e.g., Jenks, *supra* note 66, at 99–108; Markby, *supra* note 22, at 23–24; Pollock, *supra* note 62, at 299–328; 2 Paul Vinogradoff, *Outlines of Historical Jurisprudence* 78–80 (1922).

²⁷⁵ Allen, *supra* note 64, at 151–304; Goodhart, *supra* note 63, at 1–26, 50–74.

²⁷⁶ Keeton, *supra* note 16, at 96–112; Keeton, *supra* note 38, at 66–70.

It is difficult not to conclude that those English jurists who left the subject alone showed good judgment, for those who did tackle it seemed incapable of doing so with imagination. English discussions of precedent were generally expository exercises—efforts to explain how the doctrine evolved in English law, the history of English law reporting, the hierarchy of the courts, the principles of authority and overruling, the difference between the *ratio decidendi* of and *obiter dicta* in judgments, the status of foreign legal sources, and so on. These exercises were not so much efforts at jurisprudence as basic introductions to the English judicial process. The point of bringing precedent within the province of jurisprudence might well have been to broaden the subject's scope, but in England the initiative actually created the impression that the subject was bland and without much purpose.

4. *English Legal Realism?*

“Whatever the case for Angry Young Men in other areas of English life at mid-century,” one Canadian law professor observed in the late 1950s, “I am not absolutely persuaded of the existence of a burning need for any English Realist or Sociological movement in law.”²⁷⁷ English jurisprudential discussions of precedent rather suggested that the appropriate response to this observation was that chance would have been a fine thing. One need not be an American lawyer to know that, during the period under examination, there emerged in the United States an approach to the notion of precedent that certainly could not be characterized as merely expository. Not for nothing was this approach called realist. The “sophisticated notion . . . that ‘the law’ is to be found in the decisions of courts and in the rules, principles and standards which courts announce and employ” has no connection with the real world, Leon Green proclaimed in 1928.²⁷⁸ “A decision of a case,” he continued, “is no more law than the light from last night’s lamp is electricity.”²⁷⁹ Even Americans who were not quite so skeptical about the force of precedent nevertheless considered that a judge

²⁷⁷ Edward McWhinney, *English Legal Philosophy and Canadian Legal Philosophy*, 4 McGill L.J. 213, 216 (1958).

²⁷⁸ Leon Green, *The Duty Problem in Negligence Cases* (pt. 1), 28 Colum. L. Rev. 1014, 1015 (1928).

²⁷⁹ *Id.*

is likely to reach a decision primarily on the basis of what he or she would prefer as an outcome rather than on the basis of what a previous court has done in analogous circumstances. "Judges, we know, are people," Max Radin wrote in 1925:

They eat the same foods, seem moved by the same emotions, and laugh at the same jokes. Apparently they are a good deal like ourselves. If, therefore, in a controversy in which we are engaged, we could rid ourselves of the personal interest in it, we might shrewdly guess that a great many judges would like to see the same person win who appeals to us.²⁸⁰

"[M]ore frequently than otherwise," Radin concluded, judges will decide by "discovering the desirable result first and summing their category to justify it, afterwards."²⁸¹

In one way or another, American legal realists raised questions about the doctrine of precedent: some, like Green, were prepared to claim that precedents simply have no force; others, like Radin, argued that precedents tend to come second to judicial preferences; yet others contended that because precedents are sometimes ambiguous or in conflict, judges simply have to make choices.²⁸² Today, all of these arguments are so familiar as to be trite, and there is little to be gained here from returning to that vast subject known as American Legal Realism. The question which concerns us is that of whether there was an English counterpart. In the early- to mid-twentieth century, do we find representatives of English jurisprudence replicating or assimilating realist views?

It would be a mistake to expect English jurisprudence to take much from the lessons that were being learned in the United States. American legal realism, after all, was a jurisprudential response to the dominance of Langdellianism in the law schools, the initiatives of the American Law Institute, the perceived "laissez-faire" ideology of the late-nineteenth and early-twentieth-century United States Supreme Court, and some of the legal problems

²⁸⁰ Max Radin, *The Theory of Judicial Decision: Or How Judges Think*, 11 *A.B.A. J.* 357, 359 (1925).

²⁸¹ *Id.*

²⁸² See, e.g., Walter W. Cook, *The Utility of Jurisprudence in the Solution of Legal Problems*, in *Lectures on Legal Topics 1923-1924*, at 335 (1928).

posed by the New Deal.²⁸³ It would be odd to expect a type of jurisprudence which evolved in relation to a collection of distinctively American schemes and problems to translate straightforwardly into another legal culture. But did it translate at all? As regards mid-twentieth century England, the answer is that, to a very limited degree, it did.

Consider, first of all, the question of whether judges make law. The American realists clearly believed that judges can and do make law. In English jurisprudence of the same period, however, few writers are to be found arguing quite so unequivocally. The idea that judges simply declare and never make law had few subscribers by the mid-twentieth century: jurists by this point had generally taken to heart Austin's disparaging of the declaratory theory of law as a "childish fiction,"²⁸⁴ even if the courts sometimes reacted more stubbornly.²⁸⁵ Many English jurists struggled, nevertheless, with the proposition that judges are not necessarily bound by the precedents that they create. *Stare decisis* "is so deeply impressed in the mind of an English judge," the English jurist and Lord of Appeal, Robert Alderman Wright, observed before an American audience in 1936,

that he finds it hard to approach any problem except by first turning to the authorities, though in the end he may find that justice requires some modification of the rules apparently settled by the cases, and then he has to find if the authorities leave him the latitude which he desires. A good judge is one who is the master, not the slave, of the cases.²⁸⁶

This "good judge," though recognizing that the authorities allow "latitude" in interpretation, never goes so far as to abandon precedent for personal preference; for precedent always provides a framework within which the courts must operate. As Wright elaborated in 1938, again addressing an American audience, when English courts reach decisions on the basis of public policy they act not

²⁸³ See generally Neil Duxbury, *Patterns of American Jurisprudence* 65–159 (1995).

²⁸⁴ 2 Austin, *supra* note 12, at 634.

²⁸⁵ See, e.g., *Baylis v. Bishop of London*, 1 Ch. 127 (C.A. 1913); *Willis & Co. v. Baddeley*, 2 Q.B. 324 (C.A. 1892).

²⁸⁶ Lord Wright, *The Common Law in its Old Home* (1936), *reprinted in* *Legal Essays and Addresses* 327, 341 (1939).

outside but in accordance with the law: “[P]ublic policy is not a matter depending on the personal views of the individual judge, but a body of rules in some cases fixed, in other cases flexible, but governed by precedent and authority like other branches of the common law.”²⁸⁷ This is classic mid-twentieth century English theorizing about the judicial function: the doctrine of precedent is not so strict as to prevent judges from being creative with the authorities; nor, however, is it so slack as to facilitate judicial legislation.²⁸⁸ “[I]t is idle to ask in general terms whether our Courts do or do not make law,” Pollock wrote in 1929, very much summarizing the English attitude; “the only answer is that they develop and mould it as interpreters, but do not create it as legislators.”²⁸⁹

It seems peculiar that one of the staunchest defenders of the English approach to the judicial function should have been an American. Arthur Lehman Goodhart left the United States in his early twenties to read law at Trinity College, Cambridge. After completing his studies, he remained at Trinity as a law tutor for over a decade whereupon, in 1931, he was elected to the Professorship of Jurisprudence at Oxford, a post which he held for twenty years.²⁹⁰ In his inaugural lecture at Oxford, delivered in May 1932, Goodhart argued that although precedents can be manipulated to suit judicial preferences as American realists claimed, “I believe that, on the whole, [the doctrine of precedent] does make for impartiality, for, as a rule, an attempt by a judge to distinguish cases which are really indistinguishable will be easily apparent.”²⁹¹ Whether or not such efforts to distinguish the indistinguishable really will always be apparent—one certainly catches a whiff of wishful thinking from Goodhart’s words—it is not at all obvious that the transparency of the exercise would stop a judge from undertaking it if he or she felt there was a chance it would lead to the desired result.

²⁸⁷ Lord Wright, *Public Policy* (1938), *reprinted in* *Legal Essays and Addresses*, supra note 286, at 66, 95.

²⁸⁸ See generally Claud Mullins, *In Quest of Justice* 41–106 (1931); Lord Wright, *Precedents*, 8 *Cambridge L.J.* 118 (1943).

²⁸⁹ Frederick Pollock, *Judicial Caution and Valour*, 45 *Law Q. Rev.* 293, 293 (1929).

²⁹⁰ On Goodhart, see generally Neil Duxbury, *Jurists and Judges* 87–98 (2001).

²⁹¹ A.L. Goodhart, *Precedent in English and Continental Law*, 50 *Law Q. Rev.* 40, 56 (1934).

Goodhart is interesting for our purposes not because he presents a weak argument but because of his aversion to American legal realism. "It is doubtful whether the realist school would have attained quite the importance which it now holds in American legal thought if it could not have claimed to find support for its views in the writings of Mr. Justice Holmes," he observed in a lecture delivered at the London School of Economics in 1932.²⁹² "Perhaps, from the English standpoint," he continued (it is very easy, when reading Goodhart, to forget that he was an American), "the most striking feature of this school is the stress they place upon the uncertainty of law."²⁹³ While there was something invigorating about this school's approach—Goodhart purported to admire "the energy and enthusiasm of the realists"²⁹⁴—"there is a danger that the over-emphasis on the uncertainty of law may lead to juristic pessimism on the part of the students, and, what is even more dangerous, that it will induce an emotional rather than a rational approach to legal problems."²⁹⁵

Harold Laski chaired Goodhart's lecture at the London School of Economics and saw straight through it: "He thought, clearly, that the realists . . . were just wicked," Laski wrote to Holmes, "and that all the materials of legal decision could be found in the reported cases."²⁹⁶ Goodhart generally seemed unwilling to dismiss any legal perspective as completely without merit, and so it can sometimes be difficult to know where he stood on an issue. But his attitude toward realism, notwithstanding the veneer of tolerance, seems clear enough. "Of course," Goodhart wrote in 1929, "in doubtful cases it is clear that the judge must be and is free to choose that precedent which he believes will lead to a desirable result. He will be guided by his views on morals, economics, politics in the best sense, and philosophy."²⁹⁷ Not quite realism, one might say, but certainly not an anti-realist sentiment. With Goodhart,

²⁹² A.L. Goodhart, *Some American Interpretations of Law, in Modern Theories of Law*, supra note 126, at 1, 9. The Preface to the volume makes clear the date and location of the lecture. *Id.* at v.

²⁹³ *Id.* at 11.

²⁹⁴ *Id.* at 19.

²⁹⁵ *Id.* at 20.

²⁹⁶ Letter from Harold J. Laski to Justice Oliver Wendell Holmes (Jan. 20, 1932), in 2 *Holmes-Laski Letters*, supra note 72, at 1358, 1358.

²⁹⁷ Goodhart, supra note 63, at 269.

however, there always seems to be a “but” on the horizon: “But,” he continued, “in the vast number of cases there really is no choice. There is a guiding precedent which it is the judge’s duty to follow, and his task is only to state what the existing law is and to decide in accordance with that law.”²⁹⁸ In his inaugural lecture, the same style is adopted with more stridency: “precedent . . . gives us certainty in the law,” he asserted; “when a precedent has once been created, then the law becomes rigid.”²⁹⁹ We should not ignore the realist argument “that some precedent cases are so ambiguous that it is difficult to determine what principles they establish, and that even where the principles are apparently clear the Courts may escape from their effect by subtle distinctions.”³⁰⁰ But: “With all respect to these arguments, it might equally well be said that the commands of a general are not binding on the officers of his army because we know that occasionally such orders are ambiguously worded.”³⁰¹

It seems strange that Goodhart, only moments after his having suggested that judges are likely to follow precedent where to do otherwise may create the impression of attempting to distinguish the indistinguishable, should acknowledge that judges will sometimes try to escape precedents by making subtle distinctions.³⁰² Anyone with a mind critically to scrutinize his jurisprudential skills is likely (following his own lead and adopting military imagery) to have a field-day.³⁰³ Goodhart is nonetheless interesting for our purposes because, rather than try to introduce an American perspective into English jurisprudence, he seemed keen to impress upon the English that they were right to keep faith with what he took to be a strict doctrine of *stare decisis*. Certainly he might have pointed to English contemporaries who adopted positions very similar to his own regarding legal certainty and the pitfalls of American legal realism.³⁰⁴ But the English faith was really that which we encountered in the work of R.A. Wright and Pollock: the belief not that

²⁹⁸ *Id.*

²⁹⁹ Goodhart, *supra* note 291, at 58–59.

³⁰⁰ *Id.* at 59.

³⁰¹ *Id.*

³⁰² For a textbook realist critique of Goodhart’s faith in *stare decisis*, see Thurman W. Arnold, Book Note, 41 *Yale L.J.* 318 (1931) (reviewing Goodhart, *supra* note 63).

³⁰³ See Duxbury, *supra* note 290, at 88.

³⁰⁴ See, e.g., H.W.R. Wade, *The Concept of Legal Certainty: A Preliminary Skirmish*, 4 *Mod. L. Rev.* 183 (1941).

the doctrine of precedent is strict, but that it is neither too strict nor too slack. Responding to Goodhart's proposition that precedents provide certainty in law, Sir William Holdsworth contended that English judges in fact "apply to old precedents a process of selection and rejection which brings the law into conformity with modern conditions."³⁰⁵ Judicial sifting of precedents, he continued,

keeps the law in touch with life . . . I think, in fact, that it is true to say that it hits the golden mean between too much flexibility and too much rigidity, for it gives to the legal system the rigidity which it must have if it is to possess a definite body of principles, and the flexibility which it must have if it is to adapt itself to the needs of a changing society.³⁰⁶

Goodhart's paean to the sturdiness of English precedents may not have impressed Holdsworth, but Holdsworth's image of English law hitting the golden mean between rigidity and flexibility was hardly less romanticized. In 1937 Ivor Jennings, a Reader in Constitutional Law at the London School of Economics, argued that the inability of the English appeal courts to hold to an even vaguely consistent line when interpreting public health legislation basically made nonsense of Holdsworth's claim. "If those responsible for public health law waited for the courts to hit the golden mean," he wrote mockingly, "society would certainly change, and we should all be rigid."³⁰⁷ For Jennings, scrutiny of what the English courts had done rather suggested that the American realists had the measure of the judicial process: with respect to the interpretations of public health legislation, he noted, we find that "a later court can generalise in a different way" from an earlier one, so that "new kinds of facts become relevant, and a case which is precisely the same on the former 'relevant facts' becomes completely different because different 'relevant facts' are selected."³⁰⁸ Apropos of the apparent admission by one English judge that he had engaged in this very strategy "because he did not like the early [public health law] decisions," Jennings observed that this is "the kind of statement which is rarely found outside the American legal peri-

³⁰⁵ W.S. Holdsworth, *Case Law*, 50 *Law Q. Rev.* 180, 192 (1934).

³⁰⁶ *Id.* at 193.

³⁰⁷ W. Ivor Jennings, *Judicial Process at Its Worst*, 1 *Mod. L. Rev.* 111, 129 (1937).

³⁰⁸ *Id.* at 130.

odicals. If judges begin to ‘distinguish’ because they do not like decisions, where stands *stare decisis*?³⁰⁹ Although Jennings was clearly exasperated by the English courts’ handling of public health matters, the truth is that he had no doubt where *stare decisis* stood. In 1936, writing for an American law review, he disparaged “the old fallacy that there is a correct interpretation of every rule, and that the task of the judge is to give that interpretation.”³¹⁰ “[A]ll interpretation on ‘doubtful’ points,” he insisted, “is in fact legislation.”³¹¹ Jennings appreciated more than did most mid-twentieth century English jurists that American legal realism had at least one significant lesson to teach.³¹²

What of other jurists working in England during the middle part of the twentieth century? Were any of them absorbing the lessons of legal realism? Goodhart clearly was not, nor was his Oxford colleague, C.K. Allen. For Allen, those who sought to connect law with the social sciences often appeared to be engaging in what he termed “Megalomaniac Jurisprudence.”³¹³ Like Buckland, he seemed to want jurisprudence to be more pedestrian in its ambitions.³¹⁴ While he considered Pound’s sociological jurisprudence to be inappropriately normative—“[t]he sociological point of view . . . is apt to thrust on society what, in accordance with theoretical principles, society *ought* to want and desire”³¹⁵—legal realism filled him with feelings approximating disgust: “[I]t has added nothing to the moderate sociological school, except an extreme dogmatism in repelling dogmatism, and a remarkable wealth of invented jargon.

³⁰⁹ Id.

³¹⁰ W. Ivor Jennings, *Courts and Administrative Law—The Experience of English Housing Legislation*, 49 Harv. L. Rev. 426, 453 (1936).

³¹¹ Id. at 454.

³¹² It is important to emphasize that he was not alone in recognizing the lessons of legal realism. One finds much the same realist argument regarding the capacity of judges to enact preferences in Harold J. Laski, *Judicial Review of Social Policy in England: A Study of Roberts v. Hopwood*, 39 Harv. L. Rev. 832 (1926). Laski, like Jennings, wrote his article while at the London School of Economics, and they served together on the Editorial Board of the School’s political science journal, *Politica*.

³¹³ Allen, *supra* note 64, at 35.

³¹⁴ See *supra* note 110 and accompanying text; see also Allen, *supra* note 64, at 35 (“The boundaries between the different branches of knowledge are indeed difficult to define, but experience has shown again and again that knowledge of everything usually ends in wisdom in nothing.”).

³¹⁵ Allen, *supra* note 64, at 41.

It was perhaps appropriate that the age of jazz should produce a Jazz Jurisprudence.³¹⁶ Not everyone at Oxford, however, was so resistant to legal realism. J. Walter Jones—one wonders how this man interacted, if indeed he did interact, with Goodhart and Allen³¹⁷—clearly had some sympathy for a broadly realist understanding of the judicial function, although Jones's views were more inspired by French and German jurists than they were by American jurists.³¹⁸ Jones was also tolerant of the social sciences. “[J]urisprudence,” he wrote, is a “precise and effective instrument for putting the social sciences into effect.”³¹⁹ One of the difficulties with his work, however, is that it never becomes clear how he believed jurisprudence might put the social sciences into effect. His expositions of psychological and economic theories of law, for example, were at best politely descriptive,³²⁰ and on occasions he could seem exasperated with the methods of other disciplines. Political theorists, he asserted, rather than try to answer a legal problem, “have shown a decided tendency to hand the problem back to the lawyers.”³²¹ North American commentators were concluding by the 1960s that English jurisprudence and American jurisprudence were each motivated by different concerns, and that the English had but the flimsiest understanding of realist legal thought.³²² It is difficult to argue that this conclusion was wrong.

³¹⁶ *Id.* at 45. From 1931 until 1952, Allen was Warden of Rhodes House, Oxford, where, judging from his wife's memoirs, the music of choice would more often than not have been Bach. See Dorothy Allen, *Sunlight and Shadow* 131, 146, 163 (1960).

³¹⁷ Goodhart and Allen were by all accounts sociable figures, but Jones was a different proposition. According to one Oxford professor who remembers Jones from Queen's College, Oxford, in the late 1940s, he was “a reclusive loner” who “played no part in promoting legal philosophy in Oxford.” Email from A.M. Honoré to author (May 19, 2004) (on file with the Virginia Law Review Association). Jones (1892–1973) was Fellow, Tutor and Praelector in Law at Queen's College from 1927–48 and Provost of the College from 1948–62. On his retirement from the Provostship, one of his colleagues at Queen's noted his “excessive modesty” and “dislike (even fear) of the limelight.” Provost Jones, 4 *Queen's College Rec.* 3, 4 (1962). Apparently, Jones taught a range of legal subjects, but was unwilling to teach jurisprudence. See *id.* at 5.

³¹⁸ See Jones, *supra* note 201, at 64–75.

³¹⁹ *Id.* at 68.

³²⁰ See Jones, *Historical Introduction*, *supra* note 198, at 187–202, 235–69.

³²¹ *Id.* at 208.

³²² See, e.g., Denis V. Cowen, *An Agenda for Jurisprudence*, 49 *Cornell L.Q.* 609, 617 (1964); Dunlop, *supra* note 2, at 73–75.

Yet if one stays in England but moves outside Oxford, the realist spirit can be found flickering here and there. Within the main London law faculties, particularly at the London School of Economics, there was considerable interest in the study of legal issues from social scientific (particularly economic) perspectives.³²³ The first full article to be published in *The Modern Law Review*, a journal closely connected to the London School of Economics, was a specially commissioned essay by an American legal realist reflecting upon the reformist potential of realism.³²⁴ R.M. Jackson's article in the same volume on the history of jury trials was clearly inspired by the empirical strand of the realist project.³²⁵ The influence of realism upon Ivor Jennings we have considered already. William Robson, one of Jennings' colleagues in the Law Department of the London School of Economics, was likewise inspired by the American realist tradition.³²⁶ Not only did Robson accept the familiar realist argument that lawyers may learn much of value from the social sciences,³²⁷ he also accepted the standard realist claim that it is distinctly unrealistic to assume that judges make decisions without taking account of their own preferences:

Everyone who has to use his discretion in connection with social affairs must in the last resort exercise it in accordance with preconceived ideas of what is desirable, be he administrator or judge or legislator. In this sense judges are, and must be, biased. A background of social prejudice is as necessary for judges as it is

³²³ See, e.g., William A. Robson, Legal Conceptions of Capital and Income, in *London Essays in Economics in Honour of Edwin Cannan* 249 (T.E. Dalton & Hugh Gregory eds., 1927); D. Hughes Parry, *Economic Theories in English Case Law*, 47 *Law Q. Rev.* 183 (1931); Robinson, *supra* note 216. There was some interest in law and economics at Oxford as well. See C.A. Cooke, *Adam Smith and Jurisprudence*, 61 *Law Q. Rev.* 326 (1935).

³²⁴ See Felix S. Cohen, *The Problems of a Functional Jurisprudence*, 1 *Mod. L. Rev.* 5 (1937). On the commissioning of the article, see Cyril Glasser, *Radicals and Refugees: The Foundations of the Modern Law Review and English Legal Scholarship*, 50 *Mod. L. Rev.* 688, 701 (1987).

³²⁵ See R.M. Jackson, *The Incidence of Jury Trial During the Past Century*, 1 *Mod. L. Rev.* 132 (1937).

³²⁶ See William A. Robson, *Justice and Administrative Law: A Study of the British Constitution*, at xvii (1928).

³²⁷ See *id.* at xiv.

for the rest of us, and cannot be dispensed with in the discharge of their daily work.³²⁸

Possibly the most significant indication of receptiveness toward American realism within the London law faculties came with the appearance, in 1944, of the first edition of Wolfgang Friedmann's *Legal Theory*. Friedmann was one of the earliest members of the Editorial Committee of *The Modern Law Review* and a lecturer in law at University College London in the years immediately before and after the Second World War. A German by birth (he became a British citizen in 1939), Friedmann had both the training and the linguistic skills to master continental European as well as Anglo-American jurisprudence, and in *Legal Theory* he provided a sympathetic, compendious assessment of his subject-matter. Since the writing of *Legal Theory* coincided with World War II, he noted in the Preface, it had been "difficult to follow some of the most recent publications from overseas, especially recent American literature."³²⁹ Circumstances did not prevent him, however, from producing a thoughtful and positive assessment of American legal realism.³³⁰ "The realist movement," he noted, "has supplemented legal ideology by making use of statistics, psychology, criminology, business practice, administrative practice, etc., in order to demonstrate the working of law in society."³³¹ It was a movement to be learned from rather than dismissed: "[B]y analysing judicial decisions and attacking what is alleged to be the fallacy of certainty of the law," realism seemed "to prepare the way for a different approach to law in the Anglo-American legal system."³³² Moreover—and it is interesting to find a German émigré making this claim—it was a movement produced by democracy. Rather than being a jurisprudence of despair,³³³ realism, according to Friedmann, could be seen "as an attempt to rationalise and modernise the law—both the administration of law and the material for legislative change—by utilising

³²⁸ *Id.* at 242.

³²⁹ Friedmann, *supra* note 200, at v.

³³⁰ *See id.* at 183–95.

³³¹ *Id.* at 413.

³³² *Id.* at 303.

³³³ *See* Philip Mechem, *The Jurisprudence of Despair*, 21 *Iowa L. Rev.* 669 (1936).

scientific methods and the results reached in those fields of social life with which the social law is inevitably linked.”³³⁴

The realist movement has arisen and can operate only where there is sufficient freedom in the play of social forces to make this scientific weighing possible in the administration of law; it therefore demands a society which admits objectivity, that is a fundamentally tolerant society. A totalitarian system has no room for realist jurisprudence.³³⁵

Friedmann’s level-headed assessment of realist jurisprudence contrasts sharply with the essentially dismissive approaches taken by Goodhart and Allen.³³⁶ Furthermore, among his contemporaries, Friedmann was not unique in believing that realism deserved to be taken seriously. In the same year that *Legal Theory* was published, there appeared in the *Modern Law Review* a two-part article by Julius Stone entitled “The Province of Jurisprudence Redetermined.”³³⁷ Stone was perhaps a more peculiar case than was Friedmann. Tutored at Oxford by a man who disliked jurisprudence, and disdainful of what Oxford taught under the name of jurisprudence,³³⁸ Stone nevertheless became one of England’s most prolific legal theorists. He never taught at Oxford—or at Cambridge or London, the other two points in the so-called “golden triangle” of English universities—but spent most of his short-lived English academic career on the law faculty of the University of Leeds.³³⁹ Be-

³³⁴ Friedmann, *supra* note 200, at 194.

³³⁵ *Id.* at 195.

³³⁶ Goodhart, perhaps not surprisingly, did not like Friedmann’s book. A.L. Goodhart, *Legal Theory*, 8 *Mod. L. Rev.* 229 (1945).

³³⁷ See Stone, *supra* note 126; Stone, *supra* note 189.

³³⁸ See Leonie Star, *Julius Stone: An Intellectual Life* 16–17 (1992).

³³⁹ See *id.* at 44–51. Leeds was Stone’s hometown, though this is probably not the reason he worked there: he unsuccessfully sought posts at various universities before securing a position at Leeds. See *id.* at 38–44. It is clear from Star’s biography that Stone was abrasive and tactless, and so it is perhaps not surprising, notwithstanding his Harvard background and strong research record, that he found it difficult to secure a law lectureship in a British university in the 1930s. His chances can hardly have been improved, however, by the apparent fact that one of his referees, a senior British legal academic of that period, considered “himself ‘honourably bound’, in any report he made about Stone, to mention that Stone was a Jew.” *Id.* at 43. According to Star, this referee “believed that no more than a quarter of the staff of any educational institution should be Jewish.” *Id.* This attitude was by no means unusual among academic lawyers in England during this period. One of the principal protagonists of this study,

fore joining the Leeds faculty, Stone had studied and taught as an assistant lecturer at Harvard, where he had come under the influence of Roscoe Pound.³⁴⁰ This influence is abundantly evident in *The Province of Jurisprudence Redetermined*—a study which is perhaps remarkable not because of its many citations of Pound but because of its many citations. At a time when English law reviews carried few footnotes and tended to be sparing in their use of paper, Stone produced an essay as comprehensive and as copiously noted as many a modern American law review article.

The essay, as its title suggests, is yet another mid-twentieth century effort to begin jurisprudence afresh. Stone sets out by noting what he calls “the English Lawyer’s belief that analytical jurisprudence is ‘The Jurisprudence.’”³⁴¹ The dominance of the analytical approach was hardly surprising; after all, “the mere labour involved in an intelligent study of Austin’s system tends in itself to exclude all other inquiries.”³⁴² But the time had come, Stone insisted, to move on.

Moving on—“redetermining the province of jurisprudence in the twentieth century”³⁴³—did not necessitate jettisoning the analytical project. Analytical jurisprudence has a place in the curriculum, Stone insisted, “but its limited nature should be recognised.”³⁴⁴ Alongside the analytical project a place must be found in the syllabus—note that Stone is basically concerned with jurisprudence as it is taught—for “*Sociological (or Functional) Jurisprudence*” and for a jurisprudence of justice.³⁴⁵ Only once jurisprudence has been rearranged in accordance with such a “threefold division”³⁴⁶—what Stone calls “the Analytical-Sociological-Theory of Justice division”³⁴⁷—might the subject “escape from the present impasse, in

A.L. Goodhart, himself a Jew, was apparently anxious that the promotion of too many Jews to positions of influence would generate anti-Semitism. See Nicola Lacey, *A Life of H.L.A. Hart: The Nightmare and the Noble Dream* 171 (2004).

³⁴⁰ See Star, *supra* note 338, at 28–38.

³⁴¹ Stone, *supra* note 126, at 98.

³⁴² *Id.* at 103.

³⁴³ Stone, *supra* note 189, at 177.

³⁴⁴ *Id.* at 182.

³⁴⁵ See *id.* at 183–87.

³⁴⁶ *Id.* at 191.

³⁴⁷ *Id.* at 192.

which all branches of jurisprudence are treated as but ancillary to analytical jurisprudence."³⁴⁸

It is difficult to see Stone's exhortation—for exhortation seems to be the sum of it—as anything other than trite. Make jurisprudence into something broader than it currently is, he seemed to be saying, and it will become something less narrow than it currently is. He did not redetermine the province of jurisprudence, but simply set out the themes that he would like to see included in a jurisprudence course. But this in itself—and this says so much about the sterility of English jurisprudence during the mid-twentieth century—was significant enough, for much of what Stone wanted to see on the English jurisprudence syllabus was not what one would normally find there. Both he and Friedmann, as Hart appreciated, were rubbing against the grain.³⁴⁹ While Stone's vision of jurisprudence was certainly not Hart's, Hart had no hesitation in commending Stone for his jurisprudential ambition: "In Dr. Stone," he wrote, "the English lawyer has at last his Pound."³⁵⁰

In fact, however, by the time that "The Province of Jurisprudence Redetermined" was published, it was the Australian lawyer who had at last his Pound. Stone had left England in 1939 to take a post at the University of Auckland, and two years later he had moved to Australia for a chair at the University of Sydney.³⁵¹ In 1947, Friedmann quit English academic life to become a law professor at the University of Melbourne.³⁵² Both men were exceptions to the traditional English jurisprudential type, and fleeting exceptions at that. Law in the English universities would have offered them little in the way of intellectual sustenance—little that would have made them want to stay. England during the period under review was a place where a lawyer with a decent knowledge of philosophy might use that knowledge for no purpose other than to

³⁴⁸ *Id.* at 187.

³⁴⁹ Hart, *supra* note 107, at 359.

³⁵⁰ *Id.* at 360.

³⁵¹ See generally Star, *supra* note 338, at 50–59; James Crawford, *Realism, Scepticism and the Future World Order: Some Thoughts on Julius Stone's Contribution to International Law*, 13 *Sydney L. Rev.* 475, 475–78 (1991).

³⁵² In 1950 Friedmann moved to the Faculty of Law of the University Toronto and in 1955 to the Columbia Law School where he remained until his untimely death (he was the victim of a mugging) in 1972.

show that law, as a discipline, is not particularly philosophical,³⁵³ a place where a subject such as legal anthropology, although well researched by anthropologists and even by some barristers, could be almost completely neglected by university lawyers;³⁵⁴ a place where a man who had spent twenty years as Oxford's Professor of Jurisprudence could comment that "the older I grow the less inclined I am to trust to any general theories of jurisprudence."³⁵⁵ Gustav Radbruch, a German jurisprudence professor who visited Oxford from 1935 to 1936, reported to his wife that "English jurisprudence . . . is not very interesting and fruitful."³⁵⁶ "The development of English legal philosophy," he explained in *The Law Quarterly Review*, "shows the insular character of England. It develops without any indication that Continental legal philosophy had more than a superficial influence, . . . indeed it may rather be said that its trend of development is opposite to that of the Continent."³⁵⁷ Whereas America had made what he called a "decisive advance towards a valuating philosophy of law,"³⁵⁸ England remained mired in its Austinian past,³⁵⁹ unwilling and perhaps unable to develop "a philosophy of legal values."³⁶⁰ In short, one has to scour the litera-

³⁵³ See Dennis Lloyd, Reason and Logic in the Common Law, 64 *Law Q. Rev.* 468 (1948).

³⁵⁴ A.S. Diamond's work on primitive law, see Diamond, *supra* note 132, was produced while he was at the Bar, as was Hugh Goitein's study of the primitive ordeal and its legal significance. See H. Goitein, *Primitive Ordeal and Modern Law* (1923).

³⁵⁵ Frederick Pollock, *The Talkative Profession* 11 (1932).

³⁵⁶ Carola Vulpius, Gustav Radbruch in Oxford: Zur Aufarbeitung eines Kapitels länderübergreifender Rechtsphilosophie 59 (1995) (quoting Letter from Gustav Radbruch to Lydia Radbruch (Aug. 11, 1935)) ("ist diese engl[ische] Jurisprudence . . . nicht sehr interessant und fruchtbar").

³⁵⁷ Gustav Radbruch, *Anglo-American Jurisprudence through Continental Eyes*, 52 *Law Q. Rev.* 530, 530 (1936). Radbruch was not the only émigré jurist at Oxford and Cambridge at this time. Between 1935 and 1940, Hermann Kantorowicz worked at both institutions. During that period (he died in 1940), he produced a penetrating critique of Friedrich Karl von Savigny's historical school and began work on a defence of essentialist jurisprudence. See Hermann Kantorowicz, *The Definition of Law* (A.H. Campbell ed., 1958); Hermann Kantorowicz, *Savigny and the Historical School of Law*, 53 *Law Q. Rev.* 326 (1937). On Kantorowicz in England, see David Ibbetson, *Hermann Kantorowicz (1877-1940) and Walter Ullmann (1910-1983)*, in *Jurists Uprooted: German-speaking Émigré Lawyers in Twentieth-century Britain* 269, 271-89 (Jack Beatson & Reinhard Zimmermann eds., 2004).

³⁵⁸ Radbruch, *supra* note 357, at 541.

³⁵⁹ See *id.* at 531-36.

³⁶⁰ *Id.* at 544.

ture of English jurisprudence to find anything so much as quirky, let alone innovative, in the years separating Austin and Hart. The unremarkable quality of the subject during this period is probably its most remarkable feature.

Now that we have reached this conclusion, we are faced with the most obvious question that arises from it: why should things have been this way?

II. THE STATUS OF ENGLISH JURISPRUDENCE, 1832–1952

It is tempting to answer this question by claiming that English jurisprudence reached its sorry state because black-letter lawyers had no time for the subject. There is certainly no shortage of evidence appearing to support this claim: one does not have to become too immersed in the period under examination to discover jurists fretting about the lawyer's dislike of jurisprudence. Some of this evidence will be considered shortly, and we ought to acknowledge straight away that the lack of regard that many English lawyers have shown for jurisprudence probably contributed to the failure of the subject to flourish. But before we consider this evidence it has to be said that one must be circumspect with it. The first point to make is that after Austin and before Hart, English jurisprudence was represented by some of England's most respected and influential jurists. Arthur Goodhart and Frederick Pollock are exemplary in this respect; although neither man was as keen on jurisprudence as one might have expected a professor of the subject to be, both were, for many years, jurisprudence professors. Both were also highly regarded and effective commentators on the English common law. Goodhart edited and regularly contributed to *The Law Quarterly Review*, one of the major and most influential English legal journals, for forty-five years.³⁶¹ Not only did Pollock do the same for forty years, but he served for fifty years as the Editor-in-Chief of the Law Reports of England and Wales and was the author of major treatises on the English law of contract, torts, and

³⁶¹ Professor A.L. Goodhart: Influence on Law in Britain, *Times* (London), Nov. 11, 1978, at 16F (obituary). Goodhart also served for four years (1921–1925) as one of the Editors of *The Cambridge Law Journal*, the founding of which he partly financed. See Duxbury, *supra* note 290, at 89.

partnership.³⁶² Whatever shortcomings one may find in the jurisprudential writings of each of these men, neither was the type of jurisprudence professor who cared little about the operation of the law or whose work was insignificant to the legal profession.

The second reason we ought to proceed cautiously in positing a link between disdain expressed for jurisprudence and the failure of the subject to grow is that, if one looks to the United States, no such link presents itself. In the United States during the period being considered, there is certainly no lack of indifference and hostility toward jurisprudence,³⁶³ or of jurists who took such feelings to heart.³⁶⁴ But if jurisprudence was at all besieged in the United States, this did not prevent the subject from flourishing—or rather, it did not stop certain types of legal theorizing from flourishing.³⁶⁵

Here we encounter a crucial distinction between the history of academic law in the United States and in England. In the United States, jurisprudence has never been a high-profile legal subject because, since the early twentieth century, American law schools have been preoccupied with numerous theoretical approaches to law. As compared with many of these approaches, “jurisprudence” as a discrete subject—legal philosophy—has often been considered by American law students and teachers to generate too few interesting conclusions about, indeed to be insufficiently relevant to, law.³⁶⁶ In England from the 1830s to the 1950s, jurisprudence was

³⁶² See Neil Duxbury, *Frederick Pollock and the English Juristic Tradition 184–323* (2004).

³⁶³ See, e.g., Samuel Mermin, *The Study of Jurisprudence—A Letter to a Hostile Student*, 49 *Mich. L. Rev.* 39 (1950); see also Albert Kocourek, *Jurisprudence as an Undergraduate Study*, 8 *Cal. L. Rev.* 232, 232 (1920).

³⁶⁴ See, e.g., Lon L. Fuller, *The Place and Uses of Jurisprudence in the Law School Curriculum*, 1 *J. Legal Educ.* 495 (1949); Reginald Parker, *Teaching Jurisprudence in a Smaller School*, 3 *J. Legal Educ.* 439 (1951).

³⁶⁵ Jurists were often concerned about the status of their subject because, as Julius Stone noted, it was being taught as a discrete course in only about a quarter of American law schools. Julius Stone, *The Province and Function of Law* 6 (1946); see also Cowen, *supra* note 322, at 609. But there was evidence that jurisprudential literature and analyses tended to find their way into many of the courses in the American law school curriculum. See Albert A. Ehrenzweig, *The Teaching of Jurisprudence in the United States*, 4 *J. Legal Educ.* 117 (1951).

³⁶⁶ For dissatisfaction over this state of affairs see, for example, Wesley Newcomb Hohfeld, *A Vital School of Jurisprudence and Law: Have American Universities Awakened to the Enlarged Opportunities and Responsibilities of the Present Day?*,

not a high-profile subject because, first of all, for a long time there were no law schools and, secondly, when law schools (or law faculties, as the English would tend to say) did start to emerge—and by the 1950s they had hardly emerged at all—there was little call or place for any kind of theorizing.³⁶⁷ In the United States, indifference and hostility toward jurisprudence has not traditionally been incompatible with an urge to theorize about law. In England, during the period with which we are concerned, indifference and hostility toward jurisprudence was indicative of a widespread belief that there was little point in theorizing about law. For the purpose of this study, the English attitude toward jurisprudence obviously needs to be examined and explained.

A. A Subject Under Siege?

When one looks back today at the jurisprudential literature produced in England in the period separating Austin and Hart, one is immediately struck by how the same problems and discussions kept cropping up. English jurisprudence of that period revolved around various recurrent questions about the nature of a person, of possession, of rights and duties, of precedent, of causality and the scope of liability, and so on. Those who considered these questions seemed generally to believe, perhaps correctly, that their answers said something about the operation of the law and not merely about the concerns of jurists with a taste for abstraction. To put the matter simply, English jurisprudence at this time was generally written as if aimed at striking a chord with the legal practitioner. Today, those engaged in jurisprudence, in England as elsewhere, seem happy to write primarily for one another rather than for a perceived “outside” audience. Whether this is a good or a bad thing is of no consequence here. What matters is that we acquire

1914 Proc. Fourteenth Ann. Meeting of the Ass'n of Am. L. Schs. 76, 81–82; Edwin W. Patterson, *A Required Course in Jurisprudence*, 9 *Am. L. Sch. Rev.* 582, 582 (1940).

³⁶⁷ At this point it was still the case that very few of those who entered the legal profession in England took a degree in law. In 1953, the Society of Public Teachers of Law (the United Kingdom equivalent of the Association of American Law Schools) had just 205 members. J.W. Bridge, *The Academic Lawyer: Mere Working Mason or Architect?*, 91 *Law Q. Rev.* 488, 493 (1975). Many of these members would have been part-time teachers who did not produce scholarship. See William Twining, *Blackstone's Tower: The English Law School* 27–31 (1994).

some understanding of what motivated those who represented English jurisprudence between the 1830s and the 1950s.

Hardly surprisingly, much of the jurisprudential literature of this period, as of any period, was concerned with persuading would-be readers of the superiority of this or that perspective over others. Many of these efforts at persuasion were not especially imaginative; most English jurisprudential writing of this era, as we have seen, was either broadly in favor of or opposed to the Austinian project. This should not detract, however, from the fact that such efforts were made. Few and far between the English writers may have been, but they were sufficient in number to have differences and disagreements which could be quite prominent in the legal literature.³⁶⁸ English jurists were motivated, however, by more than just a desire to promote their own perspectives. Even though in nineteenth-century England few people studied jurisprudence, let alone needed persuading of the value of the subject, those who taught and wrote about it would sometimes feel sufficiently moved to extol the importance of philosophical perspective to the practitioner.³⁶⁹ This basic attitude carried over into the twentieth century.³⁷⁰ Jurisprudence, C.K. Allen noted in 1931, has often “exposed itself to the reproach that the results achieved are sadly disproportionate to the effort expended.”³⁷¹ To worry much about this reproach, however, would be to risk losing a sense of perspective: “[A]ll solid studies are at the mercy of the pedant,” and to focus only on “arbitrary classifications and distinctions” and “interminable symposia” is to ignore “the real marrow of jurisprudence.”³⁷² The most discriminating exercises in jurisprudence aid the legal practitioner in “the comprehension of his art as a coherent whole”; for “he who has imbibed the scientific spirit of the law will see his

³⁶⁸ See generally Richard A. Cosgrove, *The Reception of Analytic Jurisprudence: The Victorian Debate on the Separation of Law and Morality, 1860–1900*, 74 *Durham U. J.* 47 (1981).

³⁶⁹ See, e.g., Clark, *supra* note 103. Austin did not stress the importance of jurisprudence for the practitioner, but simply noted that to have a taste for legal philosophy was not necessarily to be intolerant of, or to have no talent for, legal practice. See 2 Austin, *supra* note 12, at 1082.

³⁷⁰ See, e.g., Wolfgang Friedmann, *Legal Theory and the Practical Lawyer*, 5 *Mod. L. Rev.* 103 (1941).

³⁷¹ Allen, *supra* note 95, at 22.

³⁷² *Id.*

way to the heart of the matter, while the empiricist, however adroit, will be groping in a murk of minutiae."³⁷³

The importance of the "broader view"—and the importance of jurisprudence because it supplies this view—to the practicing lawyer is a popular refrain among English jurists during the period under examination.³⁷⁴ Among those who lauded jurisprudence thus, nevertheless, there was a widely shared sense that the practicing lawyer had little or no time for their subject. "Jurisprudence is a word which stinks in the nostrils of the practising barrister," Dicey famously declared in 1879.³⁷⁵ Buckland reinforced the point eleven years later: "To the student of law who views his subject from an academic standpoint," he wrote,

nothing that he meets with is more discouraging than the attitude adopted by practical lawyers towards the study of jurisprudence. He finds them never more than tolerant of the study, and even toleration he finds exceptional, the more usual attitude being one of disgust and scarcely veiled contempt.³⁷⁶

Was the English legal profession really as intolerant of jurisprudence as Dicey and Buckland made out? Generally, yes. When Frederick Pollock's *A First Book of Jurisprudence* was published, *The Law Times*, then one of England's main practitioner-oriented journals, tersely declared the book to be "too far removed from the working of the law."³⁷⁷ Considered from the offices of *The Law Times*, *The Law Quarterly Review*, the journal which Pollock edited, deserved no more favorable an assessment: "It is as dry as tinder," one contributor to *The Law Times* wrote in 1890. "If anything, this magazine is too academic to be of interest to the busy lawyer, and students of legal science are becoming fewer every

³⁷³ Id.

³⁷⁴ See, e.g., A.L. Goodhart, *The Vocational Teaching of Law*, 1 *J. Soc'y Pub. Tchrs. L.* (n.s.) 333 (1950); Harry Street, *Law and Administration: Implications for University Legal Education*, 1 *Pol. Stud.* 97, 102-05 (1953).

³⁷⁵ Dicey, *The Study of Jurisprudence*, *supra* note 75, at 382; see also Kocourek, *supra* note 363, at 232.

³⁷⁶ W.W. Buckland, *Difficulties of Abstract Jurisprudence*, 6 *Law Q. Rev.* 436, 436 (1890).

³⁷⁷ *Legal Education*, 101 *Law Times* 367, 367 (1896).

year."³⁷⁸ This judgment was reinforced in the same journal three years later: "Very scientific, no doubt, but atrociously dull."³⁷⁹

Ironically, during the twentieth century *The Law Quarterly Review* came to be cherished by many within the English legal profession. Its main competitor during that century, *The Modern Law Review*, was from the beginning less conventional, more of a journal for the inquisitive jurist. Yet even *The Modern Law Review* was prepared to carry in 1944 an essay basically substantiating Dicey's and Buckland's assertions. C.P. Harvey was a barrister who is perhaps best remembered, if he is remembered at all, for a short and sometimes irksome book about what he considered to be law's ridiculous complexity and pomposity.³⁸⁰ If the law is sometimes fatuous, then with jurisprudence, he argued in *The Modern Law Review*, this is always the case.³⁸¹ "I adjure the academic jurist to divert his attention from abstract jurisprudence," Harvey asserted, "and to concentrate upon a subject which really matters."³⁸² He had no particular subject in mind; anything would repay one's efforts better than would the study of jurisprudence. "[T]he ultimate and only proper test of law is . . . whether it works—whether on the pedestrian level of daily life it answers the needs and resolves the difficulties of the common man, to whom the stratosphere of jurisprudence is as uninteresting as it is remote."³⁸³ At this pedestrian level jurisprudence has nothing of value to say. "If you have once got a set of reasonably acceptable rules and a machinery for applying them which really works you do not need any jurisprudence."³⁸⁴ Although Harvey titled his essay "A Job for Jurisprudence," he seemed to envisage no commendable task for the discipline other than its self-destruction: "the one and only item you can do without is jurisprudence."³⁸⁵

Harvey's tirade drew a response from a rather bizarre source. The leaden state of mid-twentieth-century English jurisprudence is illustrated by the fact that although *The Modern Law Review* car-

³⁷⁸ Law Library, 89 Law Times 198, 198 (1890).

³⁷⁹ The Law and the Lawyers, 94 Law Times 499, 499 (1893).

³⁸⁰ See C.P. Harvey, *The Advocate's Devil* (1958).

³⁸¹ See C.P. Harvey, *A Job for Jurisprudence*, 7 Mod. L. Rev. 42 (1944).

³⁸² Id. at 53–54.

³⁸³ Id. at 49.

³⁸⁴ Id. at 42.

³⁸⁵ Id.

ried a critical reply to Harvey's essay, it came from the United States. Walter Kennedy was a law professor at Fordham University from 1923 until 1945. Realism, Kennedy insisted, is a "goose-step philosophy"³⁸⁶ which could lead only to the "absolute despair of a juristic order."³⁸⁷ "With realism unchecked and rampant there is absolutely no reason for the existence of a single law school," he wrote in 1934, "for the very simple reason that there would be no law (as we use the term) to teach."³⁸⁸ Kennedy seemed to believe that Harvey was England's closet legal realist. Harvey, he noted, "implores the 'academic jurist' to come down from his heaven of legal concepts and to deal with concrete problems in the law. He urges the conceptual scholars . . . to divert their talents and time to subjects that really matter."³⁸⁹ Do not take this "peremptory ejection of jurisprudence"³⁹⁰ at face value, Kennedy insisted: "Mr. Harvey, despite his complete dismissal of jurisprudence, has his own secret brand of legal philosophy which may tentatively be called pragmatic in its basic qualities."³⁹¹ Mention of pragmatism in Kennedy's writings is invariably an indication that he has spied the Mark of the Beast. Although "the pragmatic jurist, no less than the conceptual scholar, must still find the legal solution,"³⁹² Kennedy argued, Harvey, like "many of his brethren in the pragmatic and realist schools,"³⁹³ had little to advocate other than "the shaping of legal rules after the events that created the problems."³⁹⁴

The notion that Harvey was an English legal realist is laughable. Harvey was simply a blimpish barrister who could not see the point of law as a subject to be studied in an academic environment. This is obvious from his reply to Kennedy ("the Professor," as he insisted upon calling him³⁹⁵), which reinforced the anti-intellectualism

³⁸⁶ Walter B. Kennedy, *in* *My Philosophy of Law: Credos of Sixteen American Scholars* 145, 151–52 (1941).

³⁸⁷ Walter B. Kennedy, *A Review of Legal Realism*, 9 *Fordham L. Rev.* 362, 373 (1940).

³⁸⁸ Walter B. Kennedy, *The New Deal in the Law*, 68 *U.S. L. Rev.* 533, 538 (1934).

³⁸⁹ Walter B. Kennedy, *Another Job for Jurisprudence*, 8 *Mod. L. Rev.* 18, 18–19 (1945).

³⁹⁰ *Id.* at 19.

³⁹¹ *Id.*

³⁹² *Id.* at 21.

³⁹³ *Id.*

³⁹⁴ *Id.* at 23.

³⁹⁵ C.P. Harvey, *A Job for Jurisprudence*, 8 *Mod. L. Rev.* 236, 237 (1945).

of the initial article. "The philosophic and historical aspects of law have now been exhaustively examined," Harvey declared, "and there is no longer a need for further research in these fields."³⁹⁶ Even if such research were needed, he added insultingly, Kennedy would hardly be up to the task: "[I]t is clear that the Professor does not intend to exert himself in the furtherance of new ideas" and that "he will hardly fall down on this job from overwork"³⁹⁷—an unfortunate riposte given that, within a month of its being published, Kennedy died while serving as Acting Dean at Fordham.³⁹⁸

However unattractive a character Harvey may have been, he is notable for our purposes because England must have produced many a lawyer who shared his attitude toward jurisprudence. If anything, he might have been more adventurous than many of his colleagues, since he actually wrote for *The Modern Law Review* during a period when some within the legal establishment could take offense on reading it.³⁹⁹ Whatever be the correct estimation of Harvey, his comments offer a glimpse of what English jurisprudence has traditionally been up against. "[T]he practical man," wrote G.L. Haggan in his address to the Society of Public Teachers of Law ("SPTL") in 1933, "represents perhaps the most disturbing problems that members of this Society as a body have to face."⁴⁰⁰ One of the problems that this practical man represents, Haggan remarked, is the one Dicey and Buckland had identified: "Jurisprudence . . . [t]he practical man regards . . . with a contempt which he seldom troubles to conceal."⁴⁰¹ By the end of the period under examination, the problem had not disappeared. Lord Denning, addressing the SPTL in 1951, noted that in England jurisprudence

³⁹⁶ Id. at 240.

³⁹⁷ Id.

³⁹⁸ Harvey's response was dated May 9, 1945, and was published in the November issue of *The Modern Law Review* for that year. Kennedy died on December 30. Walter Kennedy, A Dean at Fordham, N.Y. Times, Dec. 31, 1945, at 14 (obituary); see also Walter B. Kennedy 1885-1945, 15 Fordham L. Rev. 1 (1946).

³⁹⁹ For offense taken by senior members of the legal establishment at the critical approach of *The Modern Law Review*, see L.C.B. Gower, Looking Back, 14 J. Soc'y Pub. Tchrs. L. (n.s.) 155 (1978); see also Glasser, *supra* note 324, at 703-06.

⁴⁰⁰ G.L. Haggan, The Training of the Practical Man, 1933 J. Soc'y Pub. Tchrs. L. 14, 14.

⁴⁰¹ Id. at 17.

was still a “subject which the practising lawyer distrusts.”⁴⁰² If jurisprudence between the 1830s and the 1950s was in a dismal state, it was hardly more dismal than the attitude adopted toward the subject by many English lawyers. Jurisprudence failed to flourish, and members of the legal profession not only saw little reason to care but occasionally intimated that nothing would be lost were the subject to die at the roots.

If English jurists had anything to fear, however, it was not the legal profession. Reactionary lawyers could harrumph all they liked—after all, was not one of the purposes of jurisprudence, as C.K. Allen had insisted, to elevate the lawyer with the talent to become a “master-craftsman” above the small-minded legal technician who sees nothing apart from facts and rules?⁴⁰³ Built into this conception of jurisprudence—jurisprudence as a subject dedicated to encouraging the search for that much-lauded broader view—is the idea that raising the hackles of workaday practitioners is part of the subject’s purpose (had an anti-intellectual like Harvey found no quarrel with jurisprudence, then it would perhaps have been time to conclude that the subject had died at the roots). This is not to suggest that there was nothing for English jurists to be concerned about. The point, rather, is that it was not primarily the English legal profession that was inhibiting the development of jurisprudence. If anything explained the subject’s stymied state, it was the predicament of English legal education.

B. A Subject in Search of a Home

The reason that “English legal philosophy has not been valued more highly,” A.L. Goodhart wrote in 1948,

is that when we look at its history we find that it has many of the faults . . . of the Common Law. Like the Common Law it is difficult to find: English jurists have not always collected their thoughts in a single volume, but have left us to seek them in various places. Nor have they tended to form definite schools,

⁴⁰² Lord Justice Denning, *The Universities and Law Reform*, 1 *J. Soc’y Pub. Tchrs. L.* (n.s.) 258, 268 (1951). Denning himself had little time for the subject. See Lord Denning, *The Family Story* 38 (1981).

⁴⁰³ Allen, *supra* note 95, at 22.

with the possible exception of the Austinians, so that it is difficult to classify them.⁴⁰⁴

Goodhart's colleague, C.K. Allen, offered a different explanation: "It is an affectation of the English to depreciate their own intelligence, and if we like to adopt that pose we may say that the neglect of jurisprudence in our country is due to a temperamental inability or disinclination to think."⁴⁰⁵ Both explanations have a grain of truth about them. "We *have* the diversities of opinion, the noisy conflicts; we do dispute on morality," John Stuart Mill wrote of the English, "but we do *not* philosophize on it, simply because we do not philosophize upon any thing—it is not our way; we set no value on systematic thought."⁴⁰⁶ Frederick Pollock, who epitomized Goodhart's jurist with an aversion to setting out a stall, would most likely have taken Mill's comment to be complimentary rather than exaggerated. The English distrust of grand theories, systems, and abstractions, though "a censorious critic might vilipend it negatively as want of imagination, or positively as a ballast of stupidity," is in fact, Pollock wrote, indicative of "practical wisdom Sometimes it is a gift rather than a defect not to see too far or too wide at once; it may save us from fighting against the gods."⁴⁰⁷

Even taking into account the observations of Goodhart and Allen, along with the hostility of the legal profession, this does not provide a proper explanation of why, during the period separating Austin and Hart, English jurisprudence should have been in a pitiful state. Perhaps Goodhart and Allen, being Oxford academics, were ill-placed to provide such an explanation. "[T]he problems are not the same for all of us," Haggren noted in his 1933 SPTL Address.⁴⁰⁸ While "Oxford and Cambridge may regard practical people with that equanimity which only age and independent means can give," he continued, "in the newer Universities . . . we

⁴⁰⁴ Arthur L. Goodhart, *English Contributions to the Philosophy of Law* 43 (1948).

⁴⁰⁵ Allen, *supra* note 95, at 25.

⁴⁰⁶ A. [John Stuart Mill], Letter from an Englishman to a Frenchman, on a Recent Apology in 'The Journal des Debats,' for the Faults of the English National Character, 8 *Monthly Repository* (n.s.) 385, 395 (1834).

⁴⁰⁷ Frederick Pollock, *The Expansion of the Common Law* 58 (1904).

⁴⁰⁸ Haggren, *supra* note 400, at 14.

are bound to meet professional requirements without sacrificing University standards.⁴⁰⁹

He had a point. Academic lawyers working within the Oxbridge system (and, to a lesser degree, within London) during the first half of the twentieth century were in a rather different business from their counterparts in the provincial universities. In the academic year 1938–1939, sixty-two percent of the 1515 law students in the whole of the United Kingdom (not just in England) were at Oxford and Cambridge.⁴¹⁰ The University College of Hull had during that year just six law students.⁴¹¹ The University of Manchester had 141 law students in total, “in the care of a staff of ten, four of whom were full-time and six part-time.”⁴¹² The University of Birmingham’s total number of law students was about 105, taught by a staff “of two Professors, two full-time Readers, and three part-time Lecturers, all of whom, with one exception, not only lectured but took students tutorially as well.”⁴¹³ (It almost goes without saying that English law teachers of this period were rarely afforded the luxury of specializing in their preferred fields.⁴¹⁴) During the Second World War, even Oxford and Cambridge suffered significant depletions in their student and staff numbers.⁴¹⁵

The provincial law faculties suffered in ways other than generally having few students and very few staff to teach them. In 1941, the Law Library of the University of Liverpool, which, like many

⁴⁰⁹ *Id.*

⁴¹⁰ See Twining, *supra* note 367, at 29. Although it would be a mistake to read much into the comparison, it is at least worth noting that in 1938 in the United States, which then had a population roughly three-and-one-half times the size of England’s, there were almost twenty-five times as many law students. See U.S. Dep’t of Commerce, *Statistical Abstract of the United States 1940*, at 118 (Kathleen H. Dugan ed., 1941).

⁴¹¹ See *Review of Legal Education During the War, 1939–1945*, 1 *J. Soc’y Pub. Tchrs. L. (n.s.)* 23, 47 (1947) [hereinafter *SPTL Review*].

⁴¹² *Id.* at 35.

⁴¹³ *Id.* at 30. Within the English university system a Reader is roughly akin to a Professor-in-waiting, although Readers do not always get to be Professors. The basic career path for an academic lawyer in the United Kingdom is Lecturer, Senior Lecturer, Reader, Professor. Some legal academics will skip one or even two levels on their way to a professorship, and many legal academics will never acquire the title of Professor. In recent years, personal chairs have become more common in U.K. universities, and one consequence of this is that the title of Reader is awarded less often.

⁴¹⁴ The situation began to change over the next decade or so. See, e.g., B.A. Wortley, *Law Teaching at Manchester*, 1 *J. Soc’y Pub. Tchrs. L. (n.s.)* 270, 273 (1951).

⁴¹⁵ See *SPTL Review*, *supra* note 411, at 23–26.

English law libraries, was in a building separate from the Faculty, was completely destroyed by an air raid.⁴¹⁶ It is not entirely flippant to wonder whether, even by the standards of the time, the monetary value of what was lost would have been all that great; for the holdings of the provincial university law libraries were often meager in the extreme. In 1969 Julius Stone, noting the death of his former colleague, J.D.I. Hughes, observed that Hughes had devoted “a long working life to a heartbreaking struggle to legitimate the study of law at the University of Leeds, amid conditions of premises, staffing, library, and part-time study which would now be scorned by even a second-rate private coaching college.”⁴¹⁷ Law faculties such as that at Leeds were generally understaffed and poorly equipped because money, either for salaries or for resources, was in short supply.⁴¹⁸ American law schools remedy such problems by raising funds from corporations and alumni, but to the English academic lawyer this strategy has, until recently, been considered somehow distasteful.⁴¹⁹

In any event, even if English law faculties had sought funding from their former students, it is unlikely they would have raised much, for few law students outside Oxbridge were likely to become attached to their alma maters. Today, English law students tend to enter university at eighteen and graduate with an LL.B. after three years. But during the early- to mid-twentieth century the majority of law students, particularly at the provincial universities, were not reading for a full law degree. Most of these students were already “articled” (that is, serving their legal apprenticeships in a solicitor’s office). They would attend university to study law for a year under

⁴¹⁶ *Id.* at 34.

⁴¹⁷ Julius Stone, John David Ivor Hughes, 1885–1969, 12 *U. Leeds Rev.* 200, 200 (1969); see also J.D.I. Hughes, From a Modern Law School, 1925 *J. Soc’y Pub. Tchrs. L.* 22. The Department of Legal Studies at the University of Birmingham appears to have recruited its first intake of law students before it had been able to establish much in the way of a library for them. See C. Grant Robertson, A Birmingham School of Law, 1924 *J. Soc’y Pub. Tchrs. L.* 22, 26 (“I hope we shall have . . . a Library equipped for all serious study . . .”). On the general inadequacy of British law libraries during this period, see J.L. Montrose, *University Law Libraries*, 4 *J. Soc’y Pub. Tchrs. L. (n.s.)* 1 (1957).

⁴¹⁸ See Denis Browne, Some Problems of Post-War Law Teaching, 1 *J. Soc’y Pub. Tchrs. L. (n.s.)* 19, 20 (1947).

⁴¹⁹ See Robert Stevens, *University to Uni: The Politics of Higher Education in England Since 1944*, at 17 n.2 (2004).

what was essentially a work release scheme.⁴²⁰ At the University of Sheffield during the early 1950s, the then-Dean of its Law Faculty noted that most of the law students were articled clerks who struggled with the “double burden”⁴²¹ of university courses and office work and so had little time “for independent thinking and reading.”⁴²² Sheffield would not have stood out from any other provincial English law faculty of this period. Indeed, all of these faculties were much the same: a handful of staff, a few shelves of books, and a body of mainly overburdened, part-time students who wanted little legal instruction apart from that which would aid them in practice.⁴²³ The key point for our purposes hardly needs spelling out: this was not an environment conducive to the study and production of jurisprudence.

C. Beating Ourselves Up

Just as the English law faculties provided poor breeding grounds for jurisprudence, the English universities did little to encourage the emergence of law as an academic discipline. By the 1950s, law, let alone jurisprudence, hardly existed as a subject within the universities. England, it must be remembered, had no Langdell, no decisive moment marking the beginning of modern legal education. The first chair of English Law, Oxford’s Vinerian Chair, was not established until 1758, when Sir William Blackstone was appointed to it. When the next chair of English law was established three quarters of a century later at King’s College, London, its incumbent revealed that members of the legal profession had urged him to decline the post on the basis that “the office of a Law Professor was undesirable for a practising lawyer; for any one, in short, but

⁴²⁰ At Leeds, for example, “articled clerks were released from their offices to attend lectures at either end of the day.” Star, *supra* note 338, at 51. Those who trained to be barristers rather than solicitors likewise tended to learn most of their law not at university but on the job, as it were, while preparing for the Bar examinations or later in pupillage (the barrister’s version of apprenticeship) in chambers.

⁴²¹ Browne, *supra* note 137, at 82.

⁴²² Browne, *supra* note 418, at 20.

⁴²³ See H.C. Gutteridge, *Advanced Legal Studies*, 1929 *J. Soc’y Pub. Tchs. L.* 1, 5 (stating “the attitude of the legal profession” is “such as to deter many of our best students from undertaking research,” and that most law students tend to approach their studies “from a definitely utilitarian point of view”).

those who had nothing else to do."⁴²⁴ Though there had been established in the 1870s faculties of law at Oxford and Cambridge, Dicey noted in his inaugural lecture at Oxford in 1883 that "the non-existence till recent years of any legal professoriate" had ensured that there existed "no history of English law as a whole deserving the name."⁴²⁵ Pollock, in his Oxford inaugural of the same year, sounded an even gloomier note: "the scientific and systematic study of law," he lamented, is "a pursuit still followed in this land by few, scorned or depreciated by many."⁴²⁶ By the end of the nineteenth century, the scientific study of law was still in the hands of a few, and a new generation of English jurists capable of carrying forward such study was not much in evidence. "We have accomplished less than we hoped," James Bryce wrote in his Oxford valedictory lecture of 1893,

in raising up a band of young lawyers who would maintain, even in the midst of London practice, an interest in legal history and juristic speculation. The number of persons in England who care for either subject is undeniably small, probably smaller, in proportion to the size and influence of the profession, than in any other civilized country; and it increases so slowly as to seem to discredit the efforts of the Universities. Of those who have undergone our law examinations comparatively few have either enriched these subjects by their writings, or have become teachers among us, or have taken any part in promoting legal studies elsewhere.⁴²⁷

So it was that, by the beginning of the twentieth century, law hardly existed as an academic discipline in England. The Society of Public Teachers of Law, which was founded by Edward Jenks in 1908, introduced the first volume of its journal, published in 1924, with Harold Hazeltine's Presidential Address to the Society from the previous year.⁴²⁸ Although there had been but a "slow process of legal educational reform in England and Wales since the time of

⁴²⁴ J.J. Park, *The Dogmas of the Constitution* 2 (London, Fellowes 1832).

⁴²⁵ A.V. Dicey, *Can English Law Be Taught At the Universities?* 22 (London, Macmillan 1883).

⁴²⁶ Pollock, *supra* note 30, 38-39.

⁴²⁷ James Bryce, *Valedictory Lecture: Legal Studies in the University of Oxford* (1893), *reprinted in* 2 Bryce, *supra* note 212, at 887, 900.

⁴²⁸ H.D. Hazeltine, *Forward Tendencies in English Legal Education*, 1924 *J. Soc'y Pub. Tchrs. L.* 1.

Blackstone,⁴²⁹ Hazeltine remarked, modern jurists had reason to be optimistic that academic law was beginning to develop significantly. “Let me not be misunderstood,” he continued,

I do not contend—nor do I think that anyone would be bold enough to contend—that the millennium in English legal education has at last been reached. All I wish to say is that in the last few years substantial progress has been made along certain lines—that a fresh forward movement has been inaugurated.⁴³⁰

Hazeltine was an American—a fact which might account for his essentially optimistic assessment of the prospects for early twentieth-century English legal education. SPTL Presidential Addresses published after Hazeltine’s were rarely quite so upbeat, and indeed often conveyed the impression that English legal education was in the doldrums. William Holdsworth’s Address, which came the year after Hazeltine’s, candidly acknowledged that the relationship between the work of university lawyers and the “branches of the legal profession . . . is not altogether easy to define.”⁴³¹ The difficulty to which Holdsworth adverted was reinforced by Lord Atkin’s 1931 lecture on “Law as an Educational Subject.”⁴³² Although Atkin was by no means dismissive of the teaching of law in the universities, he nevertheless took it that the enterprise needed to be justified. English lawyers, he pointed out, have traditionally been educated on the job.⁴³³ Why should it suddenly become desirable to educate them at university? Atkin’s answer was that university legal education brings specific benefits—“in addition to acting as a mental gymnastic, it at the same time has a bearing upon character and discipline and training.”⁴³⁴ Conspicuously absent from his claim is an explanation of why lawyers cannot acquire such benefits from learning on the job. What Atkin had to say was no doubt what many academic lawyers wanted to hear—that they were needed—

⁴²⁹ *Id.* at 2.

⁴³⁰ *Id.*

⁴³¹ W.S. Holdsworth, *The Vocation of a Public Teacher of Law*, 1925 *J. Soc’y Pub. Tchrs. L.* 1, 7.

⁴³² Lord Atkin, *Law as an Educational Subject*, 1932 *J. Soc’y Pub. Tchrs. L.* 27.

⁴³³ *Id.* at 27.

⁴³⁴ *Id.* at 30.

but he did nothing to demonstrate that his message was in fact true.

A senior judge like Lord Atkin might have been happy to pay the university lawyer a compliment, but the academics themselves were under no illusions about their position in the world, be it the world of legal practice or the university world. “[I]t is necessary to bear in mind,” Markby observed in 1874,

that, until very lately, the only study of law known in England was that preparation for the actual practice of the profession which was procured by attendance in the chambers of a barrister or pleader. The Universities had almost entirely ceased to teach law; and there was nowhere in England any faculty, or body of learned persons, who made it their business to give instruction in law after a systematic method. Nor were there any persons desirous of learning law after that fashion.⁴³⁵

By the middle of the twentieth century, there had not been any significant change. Goodhart noted in 1950 that there was in England still a good deal of doubt about “whether the law is a fit subject for academic study.”⁴³⁶ In 1933 Oxford’s Regius Professor of Civil Law, Francis de Zulueta, lamented not only that academic law in England was “still regarded as inferior to other subjects,” but also that “academic law teaching is still too ready simply to accept and impart the law produced by the recognised sources as something given and necessary.”⁴³⁷ Many academic lawyers were indeed convinced that English law teaching—that what they did—was done badly, that it was done without much thought or imagination. “When I started to read law over thirty years ago,” E.C.S. Wade recalled in 1951, “there was seldom a choice of good students’ text-books on each subject” and “there were too many teachers who contributed little beyond the tedious annual dictation of notes.”⁴³⁸ Wade believed that, by the 1950s, there had been sub-

⁴³⁵ Markby, *supra* note 22, at ix.

⁴³⁶ Goodhart, *supra* note 374, at 336.

⁴³⁷ F. de Zulueta, *The Recruitment of Public Teachers of Law*, 1933 *J. Soc’y Pub. Tchr. L.* 1, 2.

⁴³⁸ E.C.S. Wade, *Legal Education: The Changing Scene*, 1 *J. Soc’y Pub. Tchr. L.* (n.s.) 415, 418 (1951).

stantial progress,⁴³⁹ but not everyone was so convinced.⁴⁴⁰ Indeed, by the mid-twentieth century, English academic lawyers, though sensitive about their low standing within the wider university, were inclined to come down hard on themselves. There was a good deal of fretting about the standard and range of textbooks, and about whether the reorganization of teaching along American lines might be the key to improving the quality of classes.⁴⁴¹ There were one or two stirring, hortatory voices to be heard.⁴⁴² But for the most part English academic lawyers seemed rather lacking in self-confidence and were rarely more articulate than when pronouncing on their own shortcomings.

Jurisprudence was unlikely to emerge from this peculiar critical culture unscathed. The jurists were no different from the rest of their law colleagues in expressing doubt about the suitability of some of the texts that they regularly recommended to their students;⁴⁴³ indeed, in due course, English jurisprudence teachers would produce some wonderful essays on the pitfalls of textbooks.⁴⁴⁴ Nor were the jurists any less likely to give themselves a hard time. In 1951, when the Dean of the Faculty of Laws at King's College, London, carried out a survey of the teaching of jurisprudence in England and Wales, the responses from the teachers themselves were largely critical of the subject over which they presided. One professor "said he was far from happy about the rut into which the subject had fallen"; the teachers at "both Cambridge and Wales expressed the hope or opinion that the Society of Public Teachers of Law or some such body would undertake an inquiry into the nature and value of jurisprudence as at present conceived"; indeed generally, it was noted, there was "some dissatisfaction, or at least uneasiness, about the present state of

⁴³⁹ *Id.* at 418–19.

⁴⁴⁰ See generally Lord Chorley, *The Progress of Academic Law in the United Kingdom*, 3 *J. Soc'y Pub. Tchrs. L.* (n.s.) 65, 68–69 (1955); F.H. Lawson, *The Academic Lawyer as Jurist*, 5 *J. Soc'y Pub. Tchrs. L.* (n.s.) 182, 184–85 (1960).

⁴⁴¹ See, e.g., W.W. Buckland, *Curricula*, 1927 *J. Soc'y Pub. Tchrs. L.* 1, 1–2, 8–9; Goodhart, *supra* note 374, at 340–41; P.H. Winfield, *The Harvard Law School*, 1924 *J. Soc'y Pub. Tchrs. L.* 30, 34.

⁴⁴² See, e.g., Goodhart, *supra* note 374.

⁴⁴³ See Browne, *supra* note 137, at 83.

⁴⁴⁴ See H.L.A. Hart, *Dias and Hughes on Jurisprudence*, 4 *J. Soc'y Pub. Tchrs. L.* (n.s.) 143, 143, 149 (1958); W.L. Twining, *Is Your Textbook Really Necessary?*, 11 *J. Soc'y Pub. Tchrs. L.* (n.s.) 81, 88–89 (1970).

jurisprudence.”⁴⁴⁵ Beginning his Presidential Address to the SPTL two years later, the Dean at the University of Sheffield, Denis Browne, confided that he had decided to take the teaching of jurisprudence as the topic of his lecture “partly because . . . my own Jurisprudence course has got into that desperate palimpsestal condition that comes with time.”⁴⁴⁶ Whether, in fact, Browne really believed that he should have been teaching a jurisprudence course is not clear. “[W]e are under a primary responsibility,” he wrote, “to teach the law as it is; . . . the law school which . . . neglects the law . . . will . . . do no service either to itself or to” its students.⁴⁴⁷ And so what is the role of jurisprudence? Although jurisprudence cannot improve the student’s “practical competence,” Browne maintained, it nevertheless “enlarges and clarifies his understanding, and enriches his more technical studies by inviting him to consider more critically what he is doing, and to relate the technical rules of law to their wider context.”⁴⁴⁸

One would expect this last statement to be a summary of Browne’s thesis—that he was offering the jurisprudence teacher’s familiar refrain that the subject provides the student with the benefit of a broader, more critical perspective. However, this was not Browne’s thesis. “[W]hile I have every sympathy with this view,” he continued, “there is . . . some danger of its proving too much.”⁴⁴⁹ If one accepts that it is desirable to introduce students to a broader perspective on law, that is, then law faculties should be ensuring that all courses have a jurisprudential dimension rather than teaching jurisprudence as a discrete subject.⁴⁵⁰ “I cannot see my way to argue,” Browne confessed, “that the study of Jurisprudence is a necessary preliminary to the successful and competent conduct of a professional practice; the facts seem irreconcilable with such a contention.”⁴⁵¹

“If the teaching of law is to be vocational,” A.L. Goodhart wondered in 1950, “what . . . will happen to jurisprudence?” His answer

⁴⁴⁵ Graveson, *supra* note 128, at 137.

⁴⁴⁶ Browne, *supra* note 137, at 79.

⁴⁴⁷ *Id.* at 80.

⁴⁴⁸ *Id.* at 79.

⁴⁴⁹ *Id.*

⁴⁵⁰ See *id.* at 79–80.

⁴⁵¹ *Id.* at 79.

was simple: jurisprudence would go from strength to strength, for he knew “of few subjects which are more truly vocational.”⁴⁵² Goodhart’s sentiment echoed that of his colleague, C.K. Allen, who wrote about the capacity of jurisprudence to assist legal practitioners in understanding the totality of their craft.⁴⁵³ At institutions less elite than that to which Goodhart and Allen belonged, however, academic lawyers would have been unlikely to take their proclamations in earnest. It is not surprising that English law faculties should have taught jurisprudence—this was one of the few legal subjects, after all, that others within the university were likely to recognize as genuinely academic. But it is equally unsurprising that, during the first half of the twentieth century, jurisprudence in England should have been advanced hardly at all, and that most of what was written under the heading of jurisprudence should have been aimed primarily at helping undergraduates understand the basic principles and mechanisms of the English legal system.⁴⁵⁴ Generally, the law faculties of this period were not places which would have brought out of anyone with a passion for jurisprudence the confidence to take the subject all that seriously. H.L.A. Hart, surveying the state of English jurisprudence from the end of the Second World War to 1952, maintained that English jurisprudence “is still predominantly . . . analytical”⁴⁵⁵ and proceeded to “hazard a guess . . . that English jurisprudence will remain predominantly analytical in temper.”⁴⁵⁶ But who, in England, would take it upon themselves to develop jurisprudence at all, be it as analytical legal philosophy or as anything else? At that time, Hart noted, responsibility for the development of the discipline seemed to have fallen into the hands of philosophers rather than lawyers.⁴⁵⁷ Certainly there was no obvious reason to believe that the future for jurisprudential research in England lay in the law faculties.

⁴⁵² Goodhart, *supra* note 374, at 341.

⁴⁵³ See *supra* note 373 and accompanying text.

⁴⁵⁴ When, in the 1930s, the Lord Chancellor’s Committee examined the state of legal research in England, it found no jurisprudential projects that it considered worthy of report. See B.A. Wortley, *Some Reflections on Legal Research*, 1935 *J. Soc’y Pub. Tchr. L.* 52.

⁴⁵⁵ Hart, *supra* note 107, at 359.

⁴⁵⁶ *Id.* at 363.

⁴⁵⁷ See *id.* at 357.

CONCLUSION

If this study were to extend beyond 1952 it would become apparent that worries about the status, purpose, and development of jurisprudence within the English law faculties did not suddenly disappear. English jurists became, if anything, more adept at brooding over their discipline.⁴⁵⁸ This does not mean that English jurisprudence remained unchanged. The conception of legal positivism devised by H.L.A. Hart brought to jurisprudence a new intellectual challenge which to this day keeps legal philosophers (particularly, it has to be said, American legal philosophers) busy.⁴⁵⁹ That story, the story of Hart and his legacy, has not been our concern here. Rather, we have been concerned with a period during which English academic lawyers had little at all to contribute to jurisprudence.

Our first objective in this study has been to show how English jurisprudence during the period separating Austin and Hart was essentially inert, unimaginative, under the stultifying shadow of Austin. Many of those who followed in Austin's wake—jurists like Pollock, Holland, Buckland, Goodhart, and Allen—seemed unsure of what to do in the name of jurisprudence; often the subject seemed to exasperate them, and rarely did it inspire them. In the United States during the same period, there was no shortage of jurisprudential innovation. This is not to say that such innovation always met with success, nor is it to deny that some of the most incisive jurisprudential inquiries were undertaken by American judges rather than law professors. The point, however, is that one cannot identify with English jurisprudence of this period anybody

⁴⁵⁸ See, e.g., Hilaire Barnett, *The Province of Jurisprudence Determined—Again!*, 15 *Legal Stud.* 88 (1995); Hilaire A. Barnett & Dianna M. Yach, *The Teaching of Jurisprudence and Legal Theory in British Universities and Polytechnics*, 5 *Legal Stud.* 151 (1985); Roger B. M. Cotterrell, *English Conceptions of the Role of Theory in Legal Analysis*, 46 *Mod. L. Rev.* 681 (1983); Ian W. Duncanson, *The Strange World of English Jurisprudence*, 30 *N. Ir. Legal Q.* 207 (1979); Peter Sheldrake, *Jurisprudence in the Law Course*, 13 *J. Soc'y Pub. Tchrs. L. (n.s.)* 342 (1975); R.H.S. Tur, *Jurisprudence and Practice*, 14 *J. Soc'y Pub. Tchrs. L. (n.s.)* 38 (1976); William Twining, *Some Jobs for Jurisprudence*, 1 *Brit. J.L. & Soc'y* 149 (1974).

⁴⁵⁹ See, e.g., *Analyzing Law: New Essays in Legal Theory* (Brian Bix ed., 1998); *Hart's Postscript: Essays on the Postscript to *The Concept of Law** (Jules Coleman ed., 2001); Ronald Dworkin, *Hart's Postscript and the Character of Political Philosophy*, 24 *Oxford J. Legal Stud.* 1 (2004).

akin to, say, Roscoe Pound or Karl Llewellyn, or even Wesley Newcomb Hohfeld or John Chipman Gray. There was, in England, the occasional effort to show how jurisprudence might make a fresh start. But these efforts fell on stony ground and have generally been forgotten.

Our second objective has been to explain why, during this period, English jurisprudence should have been so uneventful. Throughout the second half of the nineteenth century, the dominance of Austinian jurisprudence seems largely attributable to the fact that it satisfied the epistemic requirements of an evolving university culture; unlike its main rival perspective, historical jurisprudence, it brought with it robust arguments and conclusions which could nonetheless be easily elaborated and debated. But while it is not surprising that the Austinian project should have dominated English jurisprudence, it does, on the face of it, seem odd that the situation should have persisted for so long. Why should English jurisprudence have remained so static not only for the best part of the nineteenth century, but for the first half of the twentieth as well? Hostility to jurisprudence among the legal profession and an instinctive distrust of schemes and theory may go some way to answering this question, but the crux of the answer, it has been suggested here, lies in the English law faculties themselves. For at a time when the American law schools were coming alive and discovering with a passion the complexity and controversy that could arise from theorizing about law, the English law faculties, even the best ones, were very much two-men-and-a-dog affairs, places where those with a taste and a talent for jurisprudence were unlikely to find much that would encourage them to pursue their dreams. The premise of this argument is not that that jurisprudence is incapable of existing without an academic environment. That premise would be absurd. Bentham and Austin were great legal thinkers, and not the only great legal thinkers, who made crucial and enduring contributions to legal understanding at a time when law barely existed as a university discipline. The premise, rather, is that jurisprudence is more likely to flourish as an activity—that there is likely to be more debate, general enthusiasm, and self-confidence on the part of its proponents and at the very least the recognition that it is a serious activity on the part of observ-

ers—when it is attached to a subject that commands respect within the university system.

“So, if you guys didn’t have Langdell and legal realism, what *did* you have?” The question came at a workshop I presented at an American law school some years ago. “Oh, you know, we just showed a profound dedication to underachievement and muddling along instead.” The reply received the sort of laughter that cheap quips deserve. Had I been less facetious, I might have recognized that there were, in fact, two questions that needed answering: Just what were English jurists doing while their American colleagues were making such a bold attempt at establishing law as an academic discipline? And whatever the English were doing, it clearly was not what the Americans were doing: why should it have been this way?

This study has addressed both of these questions. Answering the first question has required a report on what was essentially a non-event, though there would seem to be value in the initiative if it confirms what has previously for academic lawyers been a matter of impression and if it helps us to understand more thoroughly the evolution of a broader intellectual tradition. Answering the second question has the value of making clear something that has not been fully appreciated, even in England: that jurisprudence there has rarely found an environment congenial to its development. That environment was well portrayed by Harry Street, a former law professor at the University of Manchester, delivering his SPTL Presidential Address a quarter of a century ago.⁴⁶⁰ Reflecting on his arrival at Manchester after the Second World War, Street recalled that “the Law Faculty was a world apart from most of the rest of the University,”⁴⁶¹ that the bulk of the teaching was undertaken by local practicing lawyers,⁴⁶² that colleagues with research ambitions could often be rather clueless,⁴⁶³ and that all law teachers, unless they supplemented their salaries by finding “opportunities . . . to function in public life,”⁴⁶⁴ would inevitably end up penniless. So far

⁴⁶⁰ See H. Street, *The University Law Teacher*, 14 *J. Soc’y Pub. Tchrs. L.* (n.s.) 243 (1979).

⁴⁶¹ *Id.* at 244.

⁴⁶² *Id.*

⁴⁶³ See *id.* at 246–47, 250.

⁴⁶⁴ *Id.* at 249.

as the job was concerned, being a teacher was about the sum of it. Street's advice to anyone who was not first and foremost a teacher was simple: "Get out quickly."⁴⁶⁵ The advice was as appropriate for English legal academics of the late 1970s, he believed, as it was for those of the late 1940s. Nobody would say the same today. Modern British university departments are funded largely according to the standard of their research output, and so legal academics, like all academics, have to be research-oriented. But that is another story. Central to the story presented here is the fact that the advice offered by Street would have made good sense to many an English legal academic in the past. That this should have been the case explains to a large degree just why English jurisprudence remained dormant for so long.

⁴⁶⁵ *Id.* at 246.
