

JURISPRUDENCE, THE SOCIABLE SCIENCE

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“*Jurisprudentia legis communis Angliae est scientia socialis.*”¹

–Sir Edward Coke

VERA PHILOSOPHIA

AT the close of his report of *Calvin’s Case*, Coke wrote that jurisprudence is a sociable science, “sociable, in that it agreeth with the principles and rules of other excellent Sciences, divine and human.”² Admittedly, it was the jurisprudence of the English common law that he so fulsomely characterized in this way, but his explanatory gloss invites a less insular application, echoing as it does the instruction opening the *Institutes*: “*Iuris prudentia est divinarum atque humanarum rerum notitia*” (“Learning in the law requires knowledge of things both divine and human”).³ Unwittingly, perhaps, Coke appropriated for English common law a Renaissance ideal of jurisprudence, based on a medieval gloss on the opening of the *Digest*—the idea of jurisprudence as *vera philosophia*.⁴ This may well have been an expression of the intellectual imperialism of Renaissance jurists, more academic snobbery than accurate description,⁵ but, as often happens, profession tended to shape

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¹ 1 Sir Edward Coke, 7 Reports 28a, in *The Selected Writings and Speeches of Sir Edward Coke* 161, 231–32 (Steve Sheppard ed., Liberty Fund, Inc. 2003) (1608).

² *Id.* at 231–32. Echoing Coke, Professor Hanoch Dagan writes, “If any discipline should be willing to incorporate insights from its neighbors, if synthesis is to be an acceptable, indeed important, part of the self-understanding and the disciplinary core of any academic field, it is law.” Hanoch Dagan, *Law as an Academic Discipline* 16 (Jan. 2012) (unpublished manuscript, available at <http://law.bepress.com/taulwps/art171>).

³ J. Inst. 1.1.1 (Peter Birks & Grant McLeod trans., Cornell Univ. Press 1987). The same thought can be found in Dig. 1.10.2 (Ulpian, Rules 1) (Alan Watson trans., Univ. of Pa. Press 1998).

⁴ Accursius, Gloss to Dig. 1.1.1.1 (Lyon, 1627): “*civilis sapientia vera philosophia dicitur.*” Donald R. Kelley, *Vera Philosophia: The Philosophical Significance of Renaissance Jurisprudence*, 14 J. Hist. Phil. 267, 267 n.2 (1976) [hereinafter Kelley, *Vera Philosophia*]; see also Donald R. Kelley, *The Human Measure: Social Thought in the Western Legal Tradition* 56–61 (1990). My sketch of the Renaissance ideal of jurisprudence as *vera philosophia* leans heavily on Kelley’s rich portrait.

⁵ Kelley, *Vera Philosophia*, supra note 4, at 269.

performance, or at least it shaped the expectations and ambitions of the practice of Renaissance jurisprudence. Jurisprudence strove to be a sociable science. “There is nothing either human or divine,” wrote a Renaissance student of jurisprudence, “which the jurist does not treat and which does not pertain to civil science.”⁶

This ambition was as complex as it was bold. Following Ulpian’s lead, it refused to relegate jurisprudence either to pure speculation or to mere practice.⁷ Jurisprudence was a science, a matter of knowledge and of theoretical understanding, not merely an applied art or practice of prudence innocent of theory. It was regarded as the very heart of theoretical studies, drawing to itself all that the traditional sciences of theology, metaphysics, and moral philosophy, as well as the newly emerging humanist sciences of philology and hermeneutics, had to offer. No less resolutely, however, it refused to abandon its foothold in the life of practice. “Jurisprudence consists not in speculation but in action,” wrote one fifteenth-century jurist, just after invoking Accursius’s notion of *vera philosophia*.⁸ Rather than reject philosophical reflection, he and other Renaissance jurists sought to locate it in concrete human life and experience. Law, on this view, embraced most comprehensively and penetrated most profoundly the practical dimensions of daily life. Philosophy, by contrast, was most true to its vocation, and was most engaged in human life, when its reflections were anchored in the social life acknowledged, comprehended, and informed by and informing law. Jurisprudence, *vera philosophia*, was neither serene speculation nor pure prudence, but the point at which the theoretical and the practical intersected. Jurisprudence, neither subordinating practice to theory nor theory to practice, at its “sociable” best sought to integrate them.

Such, at least, seems to have been the Renaissance ideal, the ambition. However, if humanist critics are to be believed, performance often fell short of profession. Guillaume Budé, for example, complained that, if we understand law to be “the art of goodness and fairness,” as Ulpian

⁶ Id. (citing François le Duoaren, *Opera Omnia* (n.p. 1598)). “*Civilis scientia*,” like *civilis sapientia*, Kelley tells us, was, at the time, the conventional term for academic jurisprudence. Donald R. Kelley, *Jurisconsultus Perfectus: The Lawyer as Renaissance Man*, 51 *J. Warburg & Courtauld Inst.* 84, 86 (1988) [hereinafter Kelley, *Jurisconsultus Perfectus*].

⁷ See Kelley, *Jurisconsultus Perfectus*, supra note 6, at 84–95; Kelley, *Vera Philosophia*, supra note 4, at 267–70.

⁸ Kelley, *Vera Philosophia*, supra note 4, at 270. Kelley was quoting Claude de Seyssel, who had just written: “Civil science is the true philosophy, and it is to be preferred to all other fields because of its purpose.” Id. at 267.

taught,⁹ then it must be the job of the jurist “to philosophize on this point.”¹⁰ Yet, judged by this standard, “the study of law has degenerated from its original state. Today there are no longer jurisconsults, or philosophers,” Budé wrote, “but only lawyers (*iurisperiti*).”¹¹ A student of twentieth-century English law made the same observation in response to Coke’s praise of the common law. “[M]odern Common Law has ceased to be ‘sociable’,” he wrote.¹² “It is impatient of other kinds and systems of law, and does not eagerly claim kinship with moral science or natural reason.”¹³

This complaint indicts with even greater justice the dominant practice of jurisprudence in the common law world since the late nineteenth century. Analytic jurisprudence began as self-consciously, even militantly, “unsociable,” and its matured and much-sophisticated descendant, *fin de siècle* analytic legal philosophy, remained largely if not exclusively so. Legal philosophers joined the *iurisperiti* in the jurisprudential ranks, but they have little to say to each other. As one who has long participated in this enterprise and recognizes its remarkable richness, I nevertheless have become increasingly aware of its equally remarkable rootlessness. It may be time, in this period of self-conscious attention to jurisprudential method, to press beyond the current limits of this debate over method to a reassessment of the ambitions of jurisprudence and of philosophy’s role in it. I hope to expose for our critical attention not an explicit methodological doctrine, but rather a certain widespread but not always or entirely self-conscious mentality. Yet, although I will offer critical remarks about contemporary Anglo-American legal philosophy, my aim is not critical but constructive. To this end, I seek in the next few pages to recover something of the ideal of jurisprudence as a sociable science, to retrieve as much as our disenchanting age can be challenged to embrace, or at least to entertain, of the ambition of jurisprudence as *vera philosophia*.

⁹ “[*Ius est ars boni et aequi*.” Dig. 1.1.0 (Ulpian, Institutes 1) (Alan Watson trans., Univ. of Pa. Press 1998).

¹⁰ Kelley, *Vera Philosophia*, supra note 4, at 269.

¹¹ *Id.* at 268.

¹² R.T.E. Latham, *The Law and the Commonwealth* 511 (1949).

¹³ *Id.*

POLICING THE BORDERS OF JURISPRUDENCE

It is widely believed that H.L.A. Hart wrought a profound transformation of jurisprudence, at least the jurisprudence practiced in the English-speaking world. He brought a moribund activity of dubious intellectual and pedagogical value and blinkered vision, it is thought, into the brilliant light of sophisticated but sober contemporary philosophy, directing it to provide the conceptual resources for a revitalized general and sociologically aware theory of law. There has been much debate, especially intense in the last decade or two, over the nature and merits of this transformation and the direction it set for analytic legal philosophy, but few dispute its profundity. Yet a careful review of the movement of analytic jurisprudence over the course of the twentieth century yields a somewhat different picture.¹⁴ From this vantage, the changes Hart made were, in some respects, superficial. The more profound transformation, a transformation of the project and ambitions of philosophical jurisprudence, was wrought by Austin, or rather by Austin as understood by Austinians at the end of the nineteenth century. The revitalized and redirected jurisprudence of Hart, and the half-century of writing in the Hartian tradition, is heir to, and still largely lives on, this Austinian estate.

Already by the first decade or so of the twentieth century, analytic jurisprudence, practiced in Britain and the Commonwealth, had challenged most of the main dogmas of Austin's theory of law. Curiously, however, these dogmas survived the challenges, not because of their intrinsic appeal or theoretical soundness, but because no serious, systematically articulated, and defended competitor took their place as the staple of thought about the nature of law. Several reasons may be offered for this theoretical vacuum, but among them must be counted the enormous power and range of the Austinian understanding of the jurisprudential enterprise. It was not the Austinian conception of law—the sovereign command theory—but the Austinian conception of jurisprudence that dominated thinking about law. *The Province of Jurisprudence Determined*¹⁵ did not usher in the positivist doctrine of law, but it did usher in a fundamentally new jurisprudential mentality, new at least to philo-

¹⁴ I briefly sketch here the story which is told in detail in Chapter 1 in 11 Gerald J. Postema, *Analytical Jurisprudence Established*, in *A Treatise of Legal Philosophy and General Jurisprudence: Legal Philosophy in the Twentieth Century: The Common Law World* 3, 3–42 (2011) [hereinafter Postema, *Analytical Jurisprudence*].

¹⁵ John Austin, *The Province of Jurisprudence Determined* (Isaiah Berlin et al. eds., Weidenfeld & Nicolson 1954) (1832).

sophical jurisprudence. The thetic conception of law¹⁶ had been around for a long time before Austin made use of it. One can find it in the work of “positivists” like Marsilio, Hobbes, and Bentham, but also in natural law theorists like Suarez, Pufendorf, Kant, and (more controversially) Aquinas, and in self-professed common law theorists like Selden and Hale. All these theorists used the metaphor of command to capture what they took to be salient features of law. Unlike them, Austin used the same conception and metaphor to define *the province of jurisprudence*. The mentality that Austin introduced, although historically associated with legal positivist understandings of law, is not in any deep way implicated in positivism. Some of the historically most important theories of law with robust positivist elements—those of Hobbes, for example, or Marsiglio or Suarez or Kant—were never tempted by this distinctively Austinian mentality. Most notably Bentham, although he opens his classic work of analytic jurisprudence with a definition of a law as the command of a sovereign, was never tempted by this mentality.¹⁷

The mentality introduced by Austin is signaled by the title of his most famous work. At the opening of Lecture I of *Province*, Austin writes,

The matter of jurisprudence is positive law: law, simply and strictly so called: or law set by political superiors to political inferiors. But positive law (or law, simply and strictly so called) is often confounded with objects to which it is related by *resemblance*, and with objects to which it is related in the way of *analogy*: with objects which are *also* signified, *properly* and *improperly*, by the large and vague expression *law*. To obviate the difficulties springing from that confusion, I begin my projected Course with determining the province of jurisprudence, or with distinguishing the matter of jurisprudence from those various

¹⁶ By “thetic” I mean to refer to the idea that law is understood to be the product of the explicit imposition of normative demands over law-subjects by some agent that claims authority over them. For a general discussion of the career of this “thetic” concept, see Gerald J. Postema, Legal Positivism: Early Foundations, *in* The Routledge Companion to Philosophy of Law 31, 31–47 (Andrei Marmor ed., 2012).

¹⁷ Jeremy Bentham, *Of the Limits of the Penal Branch of Jurisprudence* 24 (Philip Schofield ed., Oxford Univ. Press 2010) (c. 1780). Hart’s edition of this classic work obscures this fact, see Jeremy Bentham, *Of Laws in General* 1 (H.L.A. Hart ed., The Athlone Press 1970), while Schofield’s edition makes it evident from the outset. But any further reading in the vast Benthamite corpus will convince one of the wide “sociability” of his jurisprudential intellect.

related objects: trying to define the subject of which I intend to treat, before I endeavour to analyse its numerous and complicated parts.¹⁸

The aim of *Province*, as Austin presents it here and as it was understood in analytic jurisprudence from the end of the nineteenth century onward, was to define or determine not the boundaries of *law*, but the boundaries of *jurisprudence*. With this in mind, he offered his familiar definition of law as command of a sovereign. The component concepts of his definition are elaborated, but the definition is not to any extent defended. Indeed, a reader, even only a little familiar with the history of philosophical reflection on the nature of law, coming to *Province* for the first time might find Austin's way of proceeding startling. This definition of law, to all appearances, is simply *stipulated*. But, seen in light of his stated aim to define the boundaries of the *province* of jurisprudence, stipulating a definition of law seems less surprising. The aim was not to establish the basis of an understanding of the nature of law, but rather to isolate a certain domain of practice, or better, a certain set of concepts used in that practice, that would then be the subject matter of (analytical) jurisprudence. According to followers of Austin (those who shared his mentality, that is), his work in *Province* analyzing the concepts of law, command, sanction, sovereignty, and the like, which generations of readers have been instructed to take as the core of his jurisprudential theory, was merely *prolegomenon* to jurisprudence, fixing its presuppositions and defining its subject matter.¹⁹ Jurisprudence on this conception was limited to analyzing the core concepts of the professional practice of law—concepts of legal right and duty, possession, ownership, liability, fault, person, thing, status, intention, will, motive, legal sources, legislation, precedent, custom, and the like (but *not* law, state, command, sanction, or the like). The task of jurisprudence was to offer an analysis of these concepts, in their ordinary, daily use, identifying the core elements, excluding the immaterial or accidental ones, and expressing explicitly what lawyers implicitly have always had in mind when they use them.²⁰

¹⁸ Austin, *supra* note 15, at 9–10.

¹⁹ See W.W. Buckland, *Some Reflections on Jurisprudence* 3 (1945). General jurisprudence “defines the phenomenon [positive law], as a preliminary to getting to work upon it.” *Id.* at 42; see also A.H. Campbell, *International Law and the Student of Jurisprudence*, 35 *Transactions Grotius Soc’y* 113, 119 (1949).

²⁰ Arthur L. Goodhart, *An Apology for Jurisprudence*, in *Interpretations of Modern Legal Philosophies: Essays in Honor of Roscoe Pound* 283, 283–84 (Paul Sayre ed., 1947).

At least since Hart's Holmes Lecture in 1958, the so-called "separation [or separability] thesis" has been widely, if not universally, taken to be one of the defining postulates of legal positivism. But the *separation mentality*, to which legal positivists have often been sympathetic (but not universally or deeply committed), was fundamental to the practice and self-understanding of analytic jurisprudence in its first half-century. The separation thesis, often traced to Austin's dictum—" [t]he existence of law is one thing; its merit and demerit is another"²¹—was given, by early analytic jurisprudence, a much wider field of application than indicated in the dictum. Defining the frontiers of law's study, rather than conditions of existence or validity of law, analytic jurisprudence "separated" the study of law not only from claims of morality and ideals of and for law, but also from social custom and practice (regarded as *positive* morality) and all phenomena which, viewed from the perspective of the professional practice of (modern municipal) law, are "law" only by some stretch of analogy. Thus, also denied entry into the province of jurisprudence were those modes of organizing and ordering domains of life that do not meet criteria of the stipulated definition: international law, modes of self-ordering like *lex mercatoria*, and, notoriously, parts of constitutional law. More generally, the proper study of law was separated from exploration and analysis of the empirical social dimensions of law. The focus of jurisprudence was to be trained on the core concepts of legal practice, without regard to the social structure or conditions on which they might depend or that might give them meaning. A few years ago, William Twining observed that Bentham "distinguished the is and the ought [of law] for the sake of the ought—in order to criticize and construct," but Austin "distinguished the is and the ought for the sake of the is: as a foundation for an objective general science of positive law."²² This is true, but only partly so, for this "objective general science of positive law" did not make any room for empirically focused social study of law.

This separation mentality of analytic jurisprudence sought with equal vigilance to prevent migration of systematic philosophy into jurisprudence. The aim of the "prolegomenon" to jurisprudence was to fix the object for detailed analysis, not systematic reflection on the nature and

²¹ Austin, *supra* note 15, at 184. Hart discusses Austin's dictum in H.L.A. Hart, *Positivism and the Separation of Law and Morals*, in *Essays in Jurisprudence and Philosophy* 49, 52–53 (1983) [hereinafter Hart, *Essays in Jurisprudence*].

²² William Twining, *Globalisation and Legal Theory* 111 (2000).

conditions of law's existence, its place in social life, and human experience more generally. In sum, its aim was programmatic delimitation, not systematic explanation. In a classic piece of understatement, A.H. Campbell wrote at mid-century,

The systematic philosophy of law . . . has not flourished in the English-speaking world. . . . Our Austinian jurisprudence, positivist and analytic, has done good service in its own province, clearing and ordering the lawyer's understanding of his working rules and concepts, but as a legal or political philosophy it rests upon assumptions and definitions which to the philosopher seem shallow and arbitrary.²³

Campbell explained this sociologically: "Few of our lawyers have been philosophers and few of our philosophers have been lawyers."²⁴ The root cause was a deeply entrenched understanding of the proper task of jurisprudence. Buckland gave voice to this understanding a few years earlier, writing, "Jurisprudence [is] not a Philosophy," because,

[P]hilosophy would have in view the whole scheme of thought expressing the relation of the immediate subject to other concepts of the mind. [However,] 'General Jurisprudence' analyses a group of phenomena carefully isolated from everything else. . . . It defines the phenomenon, as a preliminary to getting to work upon it.²⁵

"General jurisprudence" refused to get entangled in the "vague and viewy"²⁶ conjectures of systematic philosophy, which it associated with wild and dangerous speculations of natural law theorists. To be sure, jurisprudential analysis rests on assumptions, on a framework of important concepts, but extended defense of these assumptions and the components of this framework was seen to be someone else's (endless and inevitably inconclusive) job, a job that those engaged in jurisprudence proper need (must) not undertake. Jurisprudence, it was thought, could safely proceed on the assumption that preliminaries were firmly in place.

Two methodological assumptions are characteristic of this obsession with disciplinary boundaries. First, it is assumed that fundamental intel-

²³ A.H. Campbell, Introduction *to* Giorgio Del Vecchio, *Justice: An Historical and Philosophical Essay*, at ix (A.H. Campbell ed., 1952) (contrasting "English-speaking" and Continental jurisprudence).

²⁴ *Id.*

²⁵ Buckland, *supra* note 19, at 42.

²⁶ James Bryce, *Studies in History and Jurisprudence* 623 (1901).

lectual progress is best made by making precise distinctions (among phenomena) and determining sharp boundaries (for example, of concepts, domains, and modes of inquiry). Second, it is assumed that important work can be done, and fundamental progress made, on issues arising within the boundaries of the province of jurisprudence without addressing issues or dealing with problems assigned to other disciplines. Although “jurisprudence trembles . . . uncertainly on the margins of many subjects,”²⁷ the results of jurisprudential analysis are modular, separable from and not fundamentally implicated in those other subjects. The modularity assumption and the separatist attitude to which it contributes do not deny the existence or even the importance of other questions or problems. On the contrary, the separatist attitude is keenly attuned to such questions lurking on the borders. A disciplined jurisprudence, it holds, takes as its first task to distinguish questions, to identify those that can be handled effectively within the province of jurisprudence, and to hand off the remaining questions to foreign disciplines. This aim in doing so is to preserve clarity of thought and sharpness of focus, and to keep law’s core concepts secure and free from controversy.²⁸

Thus, at mid-century, common law was unsociable, but so too was its dominant theory, analytic jurisprudence. According to a widely received understanding, this was changed radically by Hart’s revolution of the discipline. He reintroduced jurisprudence to sophisticated philosophy, it is said, and philosophy to jurisprudence. At the same time, he famously insisted in the preface to *The Concept of Law* that his work was not just friendly to theorizing about the social foundations of law, but could best be seen “as an essay in descriptive sociology.”²⁹ However, Hart’s own practice, and the vigorous enterprise of jurisprudential thought which followed in its wake, while surely more vital and more sophisticated,

²⁷ Hart, *Essays in Jurisprudence*, supra note 21, at 49.

²⁸ Latham’s critique of this comfortable assumption in 1937 is telling: “Questions on the margin of a subject necessarily stir more extraneous issues than do points which lie comfortably in the centre of established doctrine; in such frontier regions to require self-sufficiency of legal scholarship is to ensure not its chastity but its sterility.” Latham, supra note 12, at 521.

²⁹ H.L.A. Hart, *The Concept of Law*, at v (2d ed. 1994). Nicola Lacey reports that later in Hart’s notebook he reformulated the characterization, suggesting that *Concept* provided the “normative concepts required for a descriptive sociology.” Nicola Lacey, *Analytical Jurisprudence Versus Descriptive Sociology Revisited*, 84 *Tex. L. Rev.* 945, 949 (2006) [hereinafter Lacey, *Analytical Jurisprudence*].

was not and in general has not been fundamentally more “sociable” than the enterprise it replaced. Despite his characterization of his work as a contribution to “descriptive sociology,” Hart remained deeply skeptical of sociology.³⁰ His project, according to Lacey, “was essentially a philosophical project While legal practice could undoubtedly be improved by a systematic appreciation of the insights of other disciplines, legal theory, Hart insisted, was an autonomous intellectual approach in which philosophy was the appropriate disciplinary resource.”³¹ Already in his introduction to Austin’s *Province*, Hart spoke of “Austin’s important conception of an autonomous analytical Jurisprudence,” and mentioned dismissively “the complaint that there is something essentially wrong in the segregation of analytical from historical inquiries.”³² Those who followed Hart, including some of his most ardent critics, have shown no more interest in or tolerance for empirically inclined, socio-legal studies, even where, as is true of his notion of the efficacy of law, it would seem the philosophical analysis itself cries out for partnership.³³

Hart and analytic legal philosophy pursued after him, then, still at the end of the century seemed to accept something of the separatist spirit of the earlier analytic jurisprudence. This is true not only with respect to empirical social inquiry, but also with respect to philosophy. Surely, Hart reintroduced philosophy into jurisprudence and revitalized the philosophy of law, but it is philosophy with a limited remit. Hart was able to reintroduce philosophy into jurisprudence in a very substantial part

³⁰ See Nicola Lacey, *A Life of H.L.A. Hart: The Nightmare and the Noble Dream* 230–31, 260–61 (2004); William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* 57–58 (2009) [hereinafter Twining, *General Jurisprudence*]; Lacey, *Analytical Jurisprudence*, supra note 29, at 948–60. Professor Lacey attributes to Hart a more congenial attitude towards sociology in Nicola Lacey, ‘Philosophical Foundations of the Common Law’: Social Not Metaphysical, in *Oxford Essays in Jurisprudence* 17, 17–20 (Jeremy Horder ed., 2000) [hereinafter Lacey, *Philosophical Foundations*].

³¹ Lacey, *Analytical Jurisprudence*, supra note 29, at 950.

³² H.L.A. Hart, *Introduction to John Austin, The Province of Jurisprudence Determined*, at xv (Isaiah Berlin et al. eds., 1954).

³³ Shortly after publication of *The Concept of Law*, Joseph Raz acknowledged the dependence of an account of the identity of law across time (“non-momentary” legal systems) on broadly sociological matters. Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal System* 189 (2d ed. 1980). But this did not encourage him or any other legal philosopher at the time to explore such matters; indeed, he seemed to think that analytic jurisprudence could fruitfully carry on its project of exploring the conditions of the existence of “momentary” legal systems without exploring their (necessary) connections with the non-momentary systems of which they are a part.

because the philosophy of the day had been made safe for philosophy-phobic jurisprudence. When Hart launched his new enterprise, the emerging philosophical temperament, especially at Oxford, had much in common with the prevailing common law temperament. Philosophy was participant-oriented, ordinary-language philosophy that prided itself in being antimetaphysical, antisystematic, and liberated from the history of philosophy. It looked to ordinary experience, deposited in the sediment of ordinary language, in an effort to block the pernicious influence of the philosophical tradition. Hart very skillfully deployed the tools and techniques of the philosophy he had learned, but he did not seek to integrate jurisprudence into philosophy in a systematic way. Since Hart, the philosophy practiced in analytic jurisprudence has become sophisticated and no longer uses tools of ordinary-language analysis. Yet it is still (with some notable exceptions) largely innocent of the long history of systematic reflection on the nature of law. Only occasionally do analytic legal philosophers work to integrate reflections on the nature of law systematically into the general enterprise of seeking a comprehensive and fundamental understanding of human experience that is the vocation of philosophy, at least on an understanding of that vocation which has dominated its historical, if not always its current, practice.

Critics of contemporary Anglo-American jurisprudence tend to attribute its “unsociable” character to the fact that jurisprudence has been absorbed into alien and unsociable philosophy.³⁴ But it appears that the problem may not lie in philosophy, nor in positivist doctrine, nor even in an explicitly articulated methodology, but rather in a mentality that contemporary jurisprudence inherited from Austin, Austinians, and Hart. What is needed is not a theoretical approach resolutely focused solely on contemporary legal practice as seen and conceived by *iurisperiti* or on its socio-historical conditions, but a broader conception of philosophical jurisprudence which is decidedly philosophical, but which also freely and eagerly engages in a partnership with other distinctive theoretical disciplines to achieve a richer and deeper understanding of law.

PHILOSOPHICAL JURISPRUDENCE

To begin the process of retrieving this broader conception of jurisprudence—jurisprudence as *vera philosophia*—I invite consideration of a

³⁴ See generally, e.g., Roger Cotterrell, Why Jurisprudence Is Not Legal Philosophy, 5 Jurisprudence 41 (2014) (defending jurisprudence as a field distinct from legal philosophy).

remarkable, but entirely forgotten, essay by Michael Oakeshott written in the late 1930s.³⁵

Jurisprudence seeks a rational explanation of the nature of law, Oakeshott argued,³⁶ but British jurisprudence was in his view a cacophonous world of competing, incomplete explanations.³⁷ In this world of “confusion and ambiguity,” philosophy was largely “dismissed as a work of supererogation.”³⁸ Yet, what was dismissed was a caricature of philosophical reflection on law, or rather a confused overlay of a number of caricatures.³⁹ Philosophical jurisprudence, he argued, was seen either as *applied philosophy*, using law to illustrate favorite general philosophical doctrines or supplying presuppositions prior to and independent of consideration of legal concepts and experience, jurisprudence itself being seen as no proper concern of philosophy; or as *a priori natural law*, seeking to construct an ideal system of law by deduction from pure concepts, a kind of metaphysical theory of legislation; or as *philosophy of jurisprudence*, reflecting on categories and conclusions of a properly scientific study of law.

Each of these views of the nature and task of philosophical jurisprudence, according to Oakeshott, reflected a profound ignorance of the philosophy of law as practiced over its long history.⁴⁰ Moreover, philosophy conceived in each of these guises, he insisted, is profoundly unphilosophical.⁴¹ Philosophy, he argued, does not generate algorithms for use in the practical world; neither does it engage that world only as providing convenient illustrations of preconceived philosophical theses; and neither is it concerned with spinning out fantasies of ideal legal codes. Philosophy, rather, is engaged in the practical human social world of law, but with the aim of devising a fundamental explanation—a deep and comprehensive understanding—of it, along the way challenging comfortable, but partial and myopic, understandings. It is not the business of philosophy to accept the data or convictions of prevailing prac-

³⁵ Michael Oakeshott, *The Concept of a Philosophical Jurisprudence* (pts. 1 & 2), 3 *Politica* 203, 203–22, 345–60 (1938). My discussion here follows closely my account in Postema, *Analytical Jurisprudence*, *supra* note 14, at 36–39.

³⁶ Oakeshott, *supra* note 35, at 203.

³⁷ *Id.* at 214.

³⁸ *Id.*

³⁹ See *id.* at 215–21.

⁴⁰ *Id.* at 217, 220–21, 347.

⁴¹ *Id.* at 221.

tice; on the contrary, it recasts them through critical examination of their presuppositions.⁴²

Genuine philosophical jurisprudence, Oakeshott urged, is in one way far less pretentious than its detractors assume, although at the same time more subversive. It *seeks*, rather than dogmatically delivers, a framework for explanation that relates and makes epistemically coherent the various otherwise-partial conceptions and approaches⁴³ by subjecting them to “the revolutionary and dissolving criticism of being related to a universal context,”⁴⁴ and it does so without presupposition, reservation, or limit.⁴⁵ “[S]uspicious of every attempt to limit the enquiry,”⁴⁶ philosophical jurisprudence effaces boundaries, explores connections, demands deeper understanding of superficially disparate phenomena. It starts from ordinary ideas, from what is already commonly understood, in the expectation that, by relating apparently isolated ideas to a broader conceptual and experiential context and by subjecting them to unrestricted criticism, it will enable us to understand law and its place in human social life more fully.⁴⁷ Philosophical jurisprudence begins with our concrete experience in and of law, but this requires, he insisted, locating immediately visible institutional manifestations of modern law in their natural habitat of human social life and experience in general.⁴⁸ Moreover, a truly philosophical understanding of phenomena, according to Oakeshott, seeks to relate rather than distinguish, to find the deeper connections that fund and legitimize the distinctions that, on first inspection, seem so important.

The greatest obstacle to a revitalized philosophical jurisprudence at the time, in Oakeshott’s view, was “the prevailing ignorance about what has already been accomplished in this enquiry, and the prejudice, that springs from this ignorance.”⁴⁹ So the first item on his agenda for regeneration of philosophical jurisprudence was re-engagement with the work of major figures in the great tradition of philosophical jurisprudence.⁵⁰ The aim of such study, however, was not, as Burke suggested in a dif-

⁴² Id. at 220.

⁴³ Id. at 352–53.

⁴⁴ Id. at 345.

⁴⁵ See id. at 345–50.

⁴⁶ Id. at 348.

⁴⁷ See id. at 345–46.

⁴⁸ Id. at 352–53.

⁴⁹ Id. at 357.

⁵⁰ Id. at 357–58.

ferent context, to learn “how and what we ought to admire,”⁵¹ and surely not to absorb and internalize any particular philosophical doctrine as *credo*. On the contrary, our approach to this tradition must itself be thoroughly philosophical, Oakeshott insisted. We fail to engage this tradition philosophically if we consider only its *obiter dicta* and ignore its *rationes decidendi*; indeed, to engage philosophically involves addressing its doctrines and the arguments advanced in their defense, not only rethinking its answers, but also reformulating its questions. This thoroughly philosophical engagement with this philosophical tradition offers us “a firmer consciousness of what we are trying to do . . . [and] the knowledge that we cannot understand our own questions and answers without understanding the questions and answers of others,” thereby also “bringing to light the questions which have never been fully considered.”⁵²

Notice how different this criticism is from recent challenges to the contemporary practice of analytic legal philosophy. Dworkin, for example, attacked it as “scholastic,” pursued on its own without experience, training, or familiarity with legal practice and offering nothing of value to it.⁵³ Andrew Halpin has suggested that greater insight into the law might result from deeper familiarity with the practice of law itself combined with less philosophical sophistication, rather than the other way around.⁵⁴ Halpin has argued further that the debate over methodology in jurisprudence is entirely detached from legal practice and its controversies and must be anchored again to them if we are to make any progress.⁵⁵ But this is not Oakeshott’s complaint, and I think he is right not to press this particular objection. Philosophical jurisprudence is, of course, fundamentally a part of practical philosophy; it focuses on one

⁵¹ A.V. Dicey, *Introduction to the Study of the Law of the Constitution* 1 (8th ed. 1915) (quoting the works of Edmund Burke).

⁵² Oakeshott, *supra* note 35, at 360.

⁵³ Ronald Dworkin, *Justice in Robes* 213 (2006). The use of the term “scholastic” is especially unfortunate at this point. Scholastic philosophy of law, whether that of Occam and Marsilius of Padua, or of Vitoria and Suarez later, not to mention Aquinas, was intensely engaged in the practice and politics of the time, *while at the same time* setting their accounts of the nature of law in a broad, systematic, and rigorously developed philosophical (and theological) context. Scholastics were among the least “scholastic” philosophers of law.

⁵⁴ Andrew Halpin, *Methodology*, in *A Companion to Philosophy of Law and Legal Theory* 607, 617 (Dennis Patterson ed., 2d ed. 2010) (citing Frederick Schauer, (Re)Taking Hart, 119 *Harv. L. Rev.* 852, 863 (2006)).

⁵⁵ Andrew Halpin, *The Methodology of Jurisprudence: Thirty Years Off the Point*, 19 *Can. J.L. & Juris.* 67, 68–70, 92 (2006).

very important aspect of practical life. To fully recognize this does not commit us either to thinking that the domains of the practical and the theoretical are entirely autonomous (the mistake of separatism) or that philosophical reflection, to prove its value for us, must be directly useful for practice, such that, for example, it helps solve disputes and controversies that arise within it.⁵⁶

Oakeshott insists that philosophical jurisprudence must be anchored in concrete practice, but this practice must be taken in all its richness, not that practice abstracted in the experience and point of view of professional performers and their performance, nor limited to the puzzles, problems, and controversies that at any point in time may consume the energies of reflective participants. Philosophical jurisprudence, in Oakeshott's vision, is constitutionally critical and, thus, critical of the obsessions that generate those controversies and, even more, critical of the baselines of agreement which define the boundaries of debate. Philosophical jurisprudence, so conceived, is Socratic and inherently destabilizing.

Oakeshott's vision of philosophical jurisprudence was of a concretely anchored but robustly theoretical enterprise. Note, however, that he did not call merely for more, or more sophisticated, theory with respect to law; neither did he call for more skilled and sophisticated use of theoretical or philosophical tools. A very sophisticated theoretical interest in law, or sophisticated use of theoretical tools to analyze aspects of law, while important, may nevertheless fail to participate, or participate fully, in the enterprise of philosophical jurisprudence as Oakeshott envisioned it.⁵⁷ Rather, he encouraged the search for a comprehensive understanding of law and its place in human experience, anchored in robust philosophical engagement in the history of that search.

A measure of the distance between Oakeshott's vision and the practice of contemporary analytic legal philosophy is evident in the recent debate over methodology in jurisprudence. This debate has focused almost exclusively on the *possibility*, the internal consistency, of what are

⁵⁶ Halpin suggests that the task of legal theory is to resolve controversies that arise within legal practice due to some deficiency. *Id.* at 68–70. According to Cotterrell, the vocation of jurisprudence is to inform and assist “jurists”—“those who are enduringly (usually professionally) concerned with the well-being of the idea of law.” Cotterrell, *supra* note 34, at 42. (Who are these *juris doctors* and why do they deserve our exclusive theoretical efforts?)

⁵⁷ Andrew Halpin usefully calls attention to the difference between “us[ing] the practice of law as a subject of theoretical interest” and “developing a theory of the practice of law.” Halpin, *supra* note 55, at 73.

taken to be the two contenders: “descriptive” and “normative” (or “interpretive”) jurisprudence. But that is a threshold matter, at best. The more important issue is the viability or value of these (or some further) alternatives, measured not by their usefulness for practice, but by the depth of the illumination such methods provide. Of course explanation is interest-relative, but to leave the discussion there is superficial; indeed, it is intellectually irresponsible. If we are honest with ourselves, we can all recognize that some interests are simply idiosyncratic, leading to explanations that are limited or shallow. We seek explanations that are deep and comprehensive—comprehensive in the sense that they illuminate the connections of the experience and practice of law to other core elements of social and political life. To pursue these explanations, however, requires setting the practice and experience of law in its larger habitat of human social experience, setting the exploration of law in a larger philosophical context, and setting both of these in the context of the history of this philosophical enterprise. The current *Methodenstreit*, however, has proceeded almost without any attention to the history of reflection on the nature of law and on the most fruitful approaches to philosophical explanations of it.⁵⁸ The debate has been pursued on the cheap, leading some observers to conclude that retreating to the methodological level from substantive debates over the nature of law has exposed, rather than expelled, the idiosyncrasies of the disputing parties.⁵⁹ This judgment may be too harsh, but, as Waldron has recently pointed out, the debate has been impoverished by its failure to proceed from a robust philosophical engagement with the history of the enterprise.⁶⁰

CLIO'S CONTRIBUTION: WHY HISTORY?

For most of us currently in the business of thinking philosophically about law, the past—the past of law and of theorizing about law—is a foreign country. Some of us, on holiday from serious work, might venture there, feeling especially pleased with ourselves if we return carrying in our bags an intriguing idea-souvenir or two. A few of us may be tempted to extend our stay, or even take up residency for a while, but we

⁵⁸ One very notable exception, of course, is John Finnis, *Natural Law and Natural Rights* 3–19 (1980). I also tried to make some progress in this direction in Chapter 9 of Gerald J. Postema, *Bentham and the Common Law Tradition* 302–36 (1986).

⁵⁹ See Halpin, *supra* note 55, at 74–75.

⁶⁰ Jeremy Waldron, *Legal and Political Philosophy*, in *The Oxford Handbook of Jurisprudence and Philosophy of Law* 352, 380–81 (Jules Coleman & Scott Shapiro eds., 2002).

know that the risk of lingering too long is that neighbors in our home philosophical community will assume we have renounced our citizenship. Most of us are happy to return home to our familiar places and practices, entertained and refreshed, possibly even inspired, but not much changed. We say to ourselves and sometimes to each other that there is a reason why the past is the past: because it has been left behind, decisively. We have outgrown our predecessors' preoccupations, overcome their confusions, and abandoned the outworn arguments of past practices and thinking about them. A new world has emerged and with it new practices; more importantly, new and improved conceptual tools are now available to manage it. We may be inclined to say with Bentham, "Our business is not with antiquities but with Jurisprudence."⁶¹ From history we may learn about the present context of our practices, and consequences of alternative, obsolete ones, but beyond that, we believe, history is at best a distraction.

However, this attitude, which is pervasive even if rarely expressed, is deeply mistaken about law's history and the history of reflective thought about law. Moreover, it is philosophically irresponsible. The mistakes on which this attitude rests become clear if we attend to some obvious facts about law and reflective understandings of it.

Simply stated, jurisprudence must pay attention to history because jurisprudence seeks understanding of law, and law and reflection on it not only have a history, but that history is intrinsic to them. Not everything that exists in and through time, and in that sense has a history, is illuminated by study of that history. But law is different. Law is by nature time-oriented and reflective.⁶² Time is not only among the conditions of the existence of law, but (if we are willing to put it this way) it is of its essence. In this respect, like melody, law not only exists in time and persists over time, but it orders time;⁶³ and this ordering of time is essential to its fundamental *modus operandi*, that of providing normative guidance to deliberative agents who must act in a social space consisting of other deliberative agents interacting with them. The deliberation of such

⁶¹ Jeremy Bentham, *A Comment on the Commentaries and A Fragment on Government* 314 (J.H. Burns & H.L.A. Hart eds., London, The Athlone Press 1977).

⁶² I am grateful for David Luban's helpful elaboration of the themes of this and the following two paragraphs. See David Luban, *Commentary, Time-Mindedness and Jurisprudence*, 101 *Va. L. Rev.* 903, 909–13 (2015).

⁶³ I have argued this thesis more fully in Gerald J. Postema, *Melody and Law's Mindfulness of Time*, 17 *Ratio Juris* 203, 203–26 (2004).

agents is rationally meaningful in part because it places present choices in a trajectory from past actions into a meaningful future. Furthermore, because their actions intersect, and rational choices of any one agent depend on the choices and actions of others, the trajectories they each construct inevitably overlap in a kind of polyphony of public action. Although they may have begun their stories before or after me, I figure in their stories just as they figure in mine, and they figure in the stories of others, and they with others, and so on. Their deliberative polyphony is fugal, reverberating throughout the community. This is the rational deliberative milieu, the deliberative public space that law must address and seeks to underwrite and order. It should be no surprise then that law's temporality is fundamental to its nature. Those who participate in law's practice are mindful of time in a distinctive way. Law practice exhibits its mindfulness of time in a wide variety of ways, and perhaps the most obvious is that it anchors official decisions, especially judicial decisions, to trajectories from the past projected into the future. Particular decisions—indeed, any normatively significant acts or enactments—have meaningful content just insofar as they can be integrated into the constellation (or system) of past decisions, actions, and enactments and projected into a normatively intelligible future. Holmes put the point with characteristic irony when he wrote, in the law of any stable society, “historic continuity with the past is not a duty, it is only a necessity.”⁶⁴

Law is not only intrinsically temporal, it is also fundamentally recursive and reflective—or rather it is reflectively recursive. All rule-following engages the judgment of rule-subjects, which in turn involves (at some level) their grasping the nature of their actions, the circumstances of its performance, the normative content of the rule meant to guide them, and the congruence or lack thereof between rule and action in the circumstances. Thus, in following rules of law, rule-subjects, officials, and lay people alike inevitably shape the rules. Their behavior is recursive. And because this recursive effect depends on their deliberative grasp, it is inevitably reflective. More generally, law is the kind of

⁶⁴ 3 Oliver Wendell Holmes Jr., *The Collected Works of Justice Holmes* 492 (Sheldon M. Novick ed., 1995); see also *id.* at 406 (“[C]ontinuity with the past is only a necessity and not a duty.”). Of course, Holmes’s attitude toward history in and of the law was ambivalent. Although history must always play some role, and at present plays a very large role, in determining the content, scope, and limits of legal rules, see *id.* at 399, 412, 477, he looked forward to a time in which it would be replaced largely by what he called the *science of policy*. See *id.* at 403, 492.

practice in which how we understand what we are doing actually shapes what we are doing—not causally or accidentally, in the way that thinking hard about one’s tennis stroke may distort it—but intrinsically. The shape that law practice takes is in part (but not simply) a function of what participants take it to take.⁶⁵ Moreover, this “taking” or understanding is public or collective, a kind of conceptual commons on which individual participants draw for their particular understanding and to which they contribute from their understanding.

Moreover, this reflective recursivity of law as a practice also has a temporal dimension. Public reflective understandings of the practice arise in, respond to, and persist through specific social, political, and cultural circumstances at specific points in time. And as those circumstances change over time, so too may the understandings of law change, although these understandings may lag behind changes in the law; by the same token, because reflection is able to abstract from the practice and achieve a degree of critical distance on it, changes of understanding may anticipate and even shape social, political, or cultural changes. Time-mindfulness sometimes is an explicit and even central component of the understanding, as it tends to be in some customary systems and was, for example, in English common law, especially in the seventeenth and eighteenth centuries. But even when it is not manifest, law’s temporality will shape participants’ understanding of it, for changes in understanding of the practice must in some way or another take into account the intrinsically temporal character of the practice; the understanding must reflect in its content and structure the time-mindfulness of law and the necessary role of law in providing the ballast of continuity for the political community it seeks to order.

Thus, legal theory, which makes reflective understandings explicit, and seeks critical self-awareness of practice-shaping understandings of law, must acknowledge not only that reflective understandings change over time, but also that such changes, reflecting changes in the practice in response to changes in its social and political context, are intrinsic to

⁶⁵ If we are to understand law as (socially fundamental) practice, we must understand that its reflexivity leaves intact a robust distinction between the practice and participants’ beliefs about the practice. How participants have conceived their practice shapes that practice, but it is the practice that is normative for them, that governs their actions and interactions, not their beliefs about the practice. To learn how to participate in the practice, it is never sufficient to learn what current participants think about the practice. See Gerald J. Postema, *Jurisprudence as Practical Philosophy*, 4 *Legal Theory* 329, 355–56 (1998).

the nature of the practice. Law and our understandings of it not only have a history, but that history is an intrinsic part of them. History, then, is an intrinsic part of the enterprise of jurisprudence.⁶⁶

This need for attention to history is intensified when jurisprudence is self-consciously philosophical, as Oakeshott understood it. Russell seems to challenge Oakeshott's view of the philosophical enterprise when he writes,

[A] certain emancipation from slavery to time is essential to philosophic thought. The importance of time is rather practical than theoretical, rather in relation to our desires than in relation to truth. . . . Both in thought and in feeling, to realise the unimportance of time is the gate of wisdom.⁶⁷

Since this comment appears in the context of Russell's discussion and rejection of ancient philosophical denials of the metaphysical reality of time, it is not clear how we should read it. It seems to express a certain Platonic conception of the philosophical enterprise, but this conception is puzzling in Russell's mouth and patently false as a characterization of the practice of philosophy over its history. Rather, what Braudel said of historians can equally be said of philosophers: History—the problems, theories, and arguments that unfold over time—“sticks to [their] thinking like soil to a gardener's spade.”⁶⁸ Philosophy is an intellectual discipline like many others, but it is characteristic of its discipline that its history is inseparable from its practice and from the texts in which that practice is recorded. The tradition of philosophy is a tradition of ongoing critical engagement with itself.

Jazz improvisation is a spontaneous, musically intelligible novelty. Improvisation is paradigmatically free, but its freedom is made possible by the tradition within which it operates. Outside of that tradition, play-

⁶⁶ Thus, philosophical analyses of law restricted to uncovering conditions of existence and validity of “momentary legal systems,” as proposed in Raz, *supra* note 33, at 189, can offer very little illumination of law and legal practice. To isolate a static time slice of a legal system is like isolating a note or a short sequence of notes from a melody. We can learn a little bit about those melody components, but almost nothing about them as parts of the melody, since their musical significance is determined by their relationship to preceding and succeeding notes in the melody. Their musical significance is determined by their place in the temporally unfolding whole. This is equally true of law.

⁶⁷ Bertrand Russell, *Our Knowledge of the External World as a Field for Scientific Method in Philosophy* 166–67 (1914).

⁶⁸ Fernand Braudel, *On History* 47 (Sarah Matthews trans., 1980).

ing is not freer; it is unintelligible. Likewise, the best philosophical work not only finds its tools in, and sharpens them in dialogue with, its history, but also enlarges and deepens our understanding of experience through critical engagement with that history. Engagement of philosophical inquiry in the history of philosophy is a philosophical, rather than historical, exercise; exploration of and engagement with the history of philosophy is an intrinsic and indispensable part of the philosophical enterprise, as philosophy is central to the study of the history of philosophy.⁶⁹ And, Oakeshott reminded us, to engage in the history of philosophy philosophically is to engage its doctrines and arguments critically.⁷⁰

Clio's contribution to jurisprudence, then, is obvious. First, the study of law cannot be responsible, nor can it be responsibly philosophical, without due attention to law's history and the history of reflection on law. Philosophical jurisprudence needs continual engagement with its history and with the history of the practice it seeks to understand, not to fill its closets with ideas that might someday prove interesting or even useful and not for the opportunity it offers to build young philosophical muscles, but because such engagement lies at the heart of the enterprise.

Second, insofar as philosophical jurisprudence is resolutely critical, it must be equally resolutely historical. As we have seen, law has a history, and over this history it has taken a number of forms—often several forms simultaneously—responding, sometimes more sometimes less self-consciously, to varied social or political circumstances and wider human needs and understandings. Moreover, because law is fundamentally reflective, the history of law also involves the history of reflective understandings of law. Accompanying the practice of forms of law across much of its history, philosophical or at least broadly theoretical (including theological) modes of reflection have sought to understand this practice—its structure, its purpose, its value, its limits, and its relations to other fundamental features of human social life. These understandings also more or less self-consciously responded to circumstances and understandings of the time. But, as Holmes reminds us, the result of the “struggle for life carried on among ideas . . . [is] that some [prevail, while some] perish and others put on the livery of the conqueror.”⁷¹ Of-

⁶⁹ See Martin Stone, *History Meets Theory: Postema on Law and Command*, in *1 Legal and Political Philosophy: Social, Political, & Legal Philosophy* 267, 273–74 (Enrique Vil-lanueva ed., 2002).

⁷⁰ See Oakeshott, *supra* note 35, at 358–59.

⁷¹ Holmes, *supra* note 64, at 435.

ten the articulate, critical reflections of one period were incorporated into the practice of the next or influenced that practice by being decisively rejected as heterodox. Some lively and at the time illuminating ideas receded into the background, becoming subsurface presuppositions, like dead metaphors that now strike us as literal expressions, which lose their ability to challenge or even move to the foreground of reflection about the practice, but still have power subtly and silently to influence it. Other notions, equally lively and challenging at one time, were squeezed from thought and practice, losers in the intellectual or political battles of the time.⁷²

The lesson to draw from this is not the banal thought that conceptions of law must be understood in their specific historical circumstances,⁷³ nor the shallow historicist skepticism of broadly philosophical inquiry which insists that legal philosophy be replaced with strictly historical, locally focused socio-legal inquiry.⁷⁴ The lesson, rather, is that a truly philosophical, and thus critical, jurisprudence must not only be mindful of the history of law and theoretical reflection on it, but must engage philosophically with it, drawing wherever it can on the best of what historians and socio-legal theorists can offer.

Thus, in view of the facts about law and reflective thought about it that we have rehearsed, the widespread contemporary attitude of analytic legal philosophy to the history of both cannot responsibly be sustained. We cannot shed the effects of the past by ignoring it, nor can we safely assume the Whiggish view that the concepts or arguments of the past are no longer our concepts or arguments because they were replaced by intellectually more powerful or successful ones, or obviated by philosophically more sophisticated modes of thinking.

If seeking comprehensive explanations is the ambition of philosophical jurisprudence, its bounden duty is to maintain a resolutely critical

⁷² One such idea, or complex of ideas, was the conciliarist notion of constitutional authority (in the Catholic Church) which flourished in the fourteenth and early fifteenth centuries, but was dealt a decisive political defeat in the middle of the fourteenth century. Francis Oakley tells the story of the rise and development of this complex of ideas, its political defeat, and its subsequent emergence as a dissenting voice heard and amplified by some of the reformers of the sixteenth century and beyond. See generally Francis Oakley, *The Conciliarist Tradition: Constitutionalism in the Catholic Church 1300–1870* (2003).

⁷³ See Morton J. Horwitz, *Why Is Anglo-American Jurisprudence Unhistorical?*, 17 *Oxford J. Legal Stud.* 551, 551–53 (1997).

⁷⁴ Here, if I understand it properly, I part company from the otherwise rich and illuminating approach to the social history of law advocated by Nicola Lacey. See Lacey, *Philosophical Foundations*, *supra* note 30, at 4–6.

stance, especially to its own presuppositions and modes of thought. To maintain its critical edge, philosophical jurisprudence must engage philosophically, that is, critically, with its own history and the history of reflective understandings of law. In doing so, we are enabled, in Waldron's words, "to grasp conceptions of law and controversies about law other than our own conceptions and our own controversies,"⁷⁵ and thereby better understand our own questions and answers.⁷⁶ But more importantly, we are enabled to see how those conceptions and controversies, those questions and answers, are related to social and political circumstances of their time and place and to larger philosophical frameworks used to understand them. We are also enabled to appreciate how they might have influenced—or for important political or philosophical reasons decisively failed to influence—our own practice. We may also learn the important lesson that "*plus c'est la même chose, plus ça change*":⁷⁷ that while a concept might retain its place in understandings of law over a long period, its content may have changed substantially such that the phenomena it once captured, or the aspiration it once expressed, are obscured. Uncovering that change can in some cases enrich our understanding by loosening the tight boundaries of our familiar contemporary use.

Moreover, by exploring seriously this history, contemporary jurisprudence can gain the distance and wider frame of reference necessary for critical reflection on our own practice of law and our attempts to philosophically explain it. Philosophical jurisprudence is not merely employed in the service of prevailing views of contemporary practice of law, even those of committed, self-identified participants. Philosophy that proceeds primarily by plumbing and pumping intuitions is inevitably and uncritically in thrall to the present. Philosophical jurisprudence needs critical distance and resources for critical assessment of current understandings of familiar practice, but such distance and resources rare-

⁷⁵ Waldron, *supra* note 60, at 381.

⁷⁶ Oakeshott, *supra* note 35, at 360. Waldron's illuminating retrieval of the notion of legislation by assembly from medieval jurisprudence, both the common law and the Roman law/glossator traditions, is a rare but persuasive example of how attention to the history of jurisprudence can open up avenues of thought about contemporary legal institutions that would otherwise not be clearly in our field of vision. See Jeremy Waldron, *Law and Disagreement* 49–68 (1999).

⁷⁷ Brian Tierney, *Religion, Law, and the Growth of Constitutional Thought, 1150–1650*, at ix (1982). Tierney wrote that this may be a "characteristic problem in studying the history of ideas." *Id.*

ly come from abstraction alone. A grasp of the forces that have shaped the practice and the presuppositions shaping it is more likely to provide the distance and resources needed for the task. It can help us break the tyranny of present intuitions shaped by preconceptions at or behind the horizons of our ordinary vision, and it can help us excavate, identify, articulate, and critically explore them. Locating familiar notions in initially unfamiliar conceptual and historical neighborhoods often sheds new light on those notions, revealing aspects or links to other notions and problems that we otherwise overlook.⁷⁸

These insights and critical perspectives are not readily available, and neither are they secured once they have been achieved. They are the result of serious study, engaging with texts and entertaining frames of thought that we may find on first encounter, and often well after, to be alien and elusive. We do not learn well from this history by rushing to make historical figures into our contemporaries, by casting their concerns and controversies into recently fashioned wineskins, and by treating them as primitive or naïve versions of contemporary views. We need to do the hard work of understanding their ideas and arguments in their native habitat—theoretical as well as historico-political.⁷⁹ We will not be able, I suspect, to proceed very far in our grasp of them—and so bring them usefully into dialogue with us—without listening long and hard be-

⁷⁸ I have argued that this is true for the idea of law as a command in Gerald J. Postema, *Law as Command: The Model of Command in Modern Jurisprudence*, 11 *Phil. Issues* 470 (2001). Also, through the work of Tierney (and others) on medieval and Renaissance philosophers (for example, Occam, Marsilius, and Vitoria) and Canon lawyers, we now have a much richer understanding of the philosophical and political foundations of the notion of individual rights. See Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law, and Church Law, 1150–1625* (1997). Similarly, (as I hope to show in other work), attention to the roots of the notion of covenant in Jewish and early Reformed-Protestant legal and theological thought promises to enhance and deepen our understanding of political obligation, and attention to the complex notion of the *potestas irritans* (“invalidating power”) of law in late Renaissance Roman and Canon law, deployed by Sir Matthew Hale, can add new depth to our understanding of phenomena that Hart tried to capture with his idea of power-conferring rules.

⁷⁹ This sort of patient reading has been notably missing from much contemporary discussion of the one or two representatives of the natural law tradition—usually Aquinas and Augustine—allowed into the province of analytic jurisprudence. Ignoring the complex and intricate theological and philosophical framework into which their discussions of law is carefully integrated by these natural lawyers, we tend to read them as primarily interested in questions of criteria of legal validity. Set in that context, *lex iniusta non est lex*, indeed, looks silly. However, sympathetic reading of systematic philosophers like Aquinas should proceed on the Silliness Reflection Principle: If a proposition attributed to an author looks silly on its face, it is likely that the silliness lies not in the author or the text but in the attribution.

fore we challenge or appropriate what they have to say, and enlisting other modes of inquiry—historical, sociological, perhaps even theological—in our activity of listening. We must patiently listen, not because earlier writers always get it right or even clear, nor because they always have illuminating things to say about their practice (or ours), but rather because whatever they have to say—true, useful, illuminating, or nonsense—was very likely not written with us in mind. So, to begin to understand what they have to say, and the arguments available to them to support it, we need to sit in their lecture theatres, listen to their peripatetic discussions, and gauge the reactions of their contemporaries. Having done that, we will have earned the right to join them on the philosophical stage, in hopes that we will have something to offer each other.

SOCIABLE PHILOSOPHICAL JURISPRUDENCE

But that means that our resolutely philosophical engagement in the history of law and theoretical reflection on it will have to be, as Coke put it, “sociable.” To make this work, we will have to give up the deeply entrenched separatism that has characterized analytic jurisprudence since the late nineteenth century. Without losing a firm grip on the core of the philosophical enterprise, we will need to entertain and be eager to learn from cognate disciplines and modes of inquiry. We must come to recognize that substantial progress in the philosophical understanding of law comes not from defining and policing sharp boundaries of the discipline, but from maintaining a secure, but always self-critical, center. One vitally important way to maintain that secure center is to continually engage philosophically and critically with major work in the tradition of the discipline, and therewith to integrate philosophical reflection on law into the larger philosophical enterprise of articulating a deeper understanding of human experience.

Another form of the separatist orientation that must also be abandoned, or at least tempered with its opposing complement, I contend, is the methodological impulse to seek explanations built on sharp distinctions and deep differences of kind. Opposed to this is a methodological inclination favoring explanations that focus on continuities rather than those that insist on sharp distinctions, and explanations that look for underlying continuities even where distinctions are illuminating. Peirce called this inclination “synechism” and thought of it as “a regulative

principle” of explanation.⁸⁰ We need not pursue the epistemology or metaphysics lying behind Peirce’s idea to recognize the contrast between the synechist and the analytic mentalities in jurisprudence. The analytic mentality seeks sharp boundaries for the concept of law, essential distinguishing properties of law that define its nature, and criteria that enable us to know with some confidence when we have law “properly so-called” in our observer-analyst’s field of vision. When it encounters an as-yet unclassified phenomenon, or phenomena about the nature of which we might be genuinely puzzled, among its first inquiry-structuring questions is: Is it or is it not proper law? (And, typically, when the answer is not unambiguously “yes,” further inquiry regarding the phenomena is assigned to the large file marked “for others to explore.”) By contrast, the synechist, no less interested in probing the nature of law, looks for continuities and illuminating similarities (and differences that build on continuities). The synechist asks, “What is law like?” and “(How) is this like law?” rather than declaring, “This isn’t like law, so it’s not law (properly speaking).” It seeks understanding by locating, relating, and integrating. It seeks to locate puzzling phenomena among other things somewhat better understood and in a larger context of experience. It seeks to locate puzzling concepts in a wider network of concepts, integrating them within that network and tracing out relations among them, thereby deepening our understanding of their content.⁸¹

To a jurisprudential mentality that insists on dichotomies and oppositions (especially “positivism” versus “natural law”), synechism is natu-

⁸⁰ 6 Collected Papers of Charles Sanders Peirce 117–18 (Charles Hartshorne & Paul Weiss eds., 1935). See Susan Haack, Not Cynicism, but Synechism: Lessons from Classical Pragmatism, 41 *Transactions of the Charles S. Peirce Society* 239–53 (2004), for a discussion and extended references.

⁸¹ David Luban is right to warn us of the metaphysical baggage that Peirce insisted to send along with his notion of “synechism” as a regulative principle. See Luban, *supra* note 62, at 914–15. By making use of his notion, I do not wish to embrace his assumption of the real existence of continua or his enterprise of uncovering these continua. It is also not my view that a properly philosophical jurisprudence looks only for continuities, ignoring qualitative breaks, or sharp discontinuities between concepts, or between historical periods. My concern regards the separatist attitude characteristic of analytic jurisprudence and counsels a contrasting attitude that is always open to exploring connections where they seem to exist, to treat apparent continuities or matters of degrees of (for example, conceptual) distance as invitations to further and deeper exploration. The enterprise of a truly philosophical jurisprudence, I argue, should not confine itself to discontinuities, but must always be open to exploring continuities. Moreover, I am inclined to say that the initial tentative response to encountering new phenomena should be synechist, which, however, can be silenced in the face of strong evidence of genuine discontinuity.

rally associated with (the derangement typical of) natural law thinking. This was clearly the attitude of analytic jurisprudence in the first half of the twentieth century and it has not disappeared from influential work in the new century. Viewed historically, there is something right, albeit misleading, about this association. For a broadly synechist mentality has characterized much philosophy of law over its history, a tradition which, until recently, was simply referred to as “natural law philosophy,” regardless of whether the substantive understandings of law offered more nearly resembled classic natural law or classic positivist conceptions. Indeed, a careful study of paradigm natural law theories would reveal, I believe, not (as often charged) a desire to justify existing legal practice, or to present it in an ideal light, but rather the synechist inclination toward integrating phenomena, practices, and concepts used to manage them into a systematic framework of comprehensive explanation. There is no clearer example of this than Aquinas’s theory of positive law.⁸² My point, however, is not that the synechist mentality of the sort I described above yields, or even makes it difficult to resist, natural law accounts of law, but rather that some of the best-known examples of natural law jurisprudence were methodologically synechist first and foremost, rather than idealist or idealizing. I am also inclined to say that, in this respect, in building the synechist principle into their most fundamental grasp of what could serve as an adequate explanation of the practice of law and its structuring concepts, they were more seriously and responsibly philosophical than jurisprudence that restricts its theoretical vision to what the separatist mentality permits.

We might say, then, that philosophical jurisprudence is “sociable” in two respects or in two different domains. It is “externally sociable” in respect of its openness to interaction and partnership with other modes of inquiry, and it is “internally sociable” in respect of its synechist methodological orientation or mentality. This leads me to propose a re-interpretation of the Renaissance conception of jurisprudence as *vera philosophia*.

⁸² To get a sense of this, one must read Aquinas’s theory of positive law, the so-called “Treatise on Law” (*Summa Theologiae* IaIIae Qq. 90–97), in its context—alongside the vast philosophical-theological *Summa* and, in particular, his discussion of *lex*, we should also read his illuminating discussion of *ius* (“right” or “right order,” especially, *Summa Theologiae* IIaIIae Qq. 57–58), government, and cognate discussions, and later elaborations of it in the scholastic tradition (for example, those of Suarez). See Thomas Aquinas, *Political Writings* 76–192 (R.W. Dyson ed. & trans., 2002).

VERA PHILOSOPHIA AGAIN

The above reflections on Oakeshott's argument lead me to think that there is an essential ambiguity in the suggestive idea of jurisprudence as *vera philosophia*. Something of this ambiguity may already have been present in the Renaissance notion, but I do not claim any warrant for my suggestion in this pedigree. So let me, rather, propose to introduce into the notion a useful ambiguity. *Vera philosophia*, I would like to suggest, sets the ambition both for jurisprudence understood broadly—"general jurisprudence" we might call it—and for legal philosophy as a key partner in the enterprise of general jurisprudence. On one side of this notional coin, we can see inscribed an ambition for philosophical jurisprudence, for what we might call, if we dared, a truly philosophical jurisprudence. Oakeshott's vision sketches the profile of this ambition. Philosophical jurisprudence, first, seeks fundamental *comprehensive explanations* that propose to understand phenomena of law as an integral aspect of human social life and human experience.⁸³ In this respect, it participates in a systematic philosophical enterprise of which jurisprudence is one, albeit a very important, part. Thus, second, its drive to locate, relate, and integrate marks a strong if not exclusive *synechism* in methodological orientation. Third, it is *constitutionally critical*. Its critical orientation will not permit it to rest content with giving an account of the prevailing understandings of current legal practice, nor with resolving controversies that may be taken to signal its ill health. Rather, it takes as part of its remit to destabilize stabilities due to ignorance, indolence, insufficient self-awareness, the powerful dynamics of communal thinking, or past victories in the polity or the academy. Most important, it is always prepared to be critical of its own performance and the pre-suppositions on which it rests.

⁸³ Luban worries that to insist on a comprehensive, systematic focus for philosophical jurisprudence we risk losing the benefits of careful local inquiry. See Luban, *supra* note 62, at 908–09. I agree that would be a loss, but I do not wish to deny the value or validity of the choice of particular scholars to focus their inquiries on local rather than global, broadly systematic philosophical matters. Rather, the poverty (or as Latham put it, sterility) of narrowly focused inquiry lies not in its localism, but rather in the accompanying refusal to think also more broadly and systematically. This refusal does not necessarily accompany the local focus, and, in my view, it should not. The aspiration of the enterprise of a philosophical jurisprudence is to provide deep, illuminating, and comprehensive explanations of fundamental elements of human social life. These may come from theoretical explorations that are locally as well as globally focused. Again, the enterprise of a truly philosophical jurisprudence should not confine itself to local analyses, as valuable as they can often be.

Fourth, philosophical jurisprudence is securely anchored at two points. It is anchored in the concrete experience and practice of law taken in all its richness, not legal practice abstracted in the experience and point of view of professional performers and their performance alone. Philosophical jurisprudence begins with our concrete experience in and of law, but, as Oakeshott insisted, this requires locating immediately visible institutional manifestations of modern law in their natural habitat of human social life and experience in general. That said, the aim of philosophical jurisprudence is not to change the world, but to understand it—not to make good law or good lawyers, good jurists or good citizens, any more than the aim of the philosophy of religion is to make us more pious,⁸⁴ but to deepen our understanding of a fundamental aspect of human experience and social life. Thus, it is also anchored in an active engagement in the history of philosophical reflection on the nature of law and its place in human experience. These complementary points of wider perspective—broad human experience and the history of philosophical reflection on it—enable philosophical jurisprudence to work by triangulation towards an understanding of current legal practice that is truly illuminating while remaining responsibly critical.

Finally, philosophical jurisprudence as *vera philosophia* is genuinely sociable. Since it is, as Oakeshott put it, “suspicious of every attempt to limit the enquiry,”⁸⁵ it effaces boundaries, explores connections, demands deeper understanding of superficially disparate phenomena, and recognizes that its carefully crafted disciplinary tools, while essential, are not adequate in themselves for the task. Being “internally synechist,” it is inclined to be sociable with respect to the modes or manifestations of law (or “law”) that it is willing to explore in its quest for a deep and illuminating understanding of the nature of law. Thus, it will not, except for temporary tactical reasons, restrict its attention to familiar municipal legal systems, but will throw its net wide, perhaps also catching public international law, forms of religious law, modes of private ordering, and potentially much else. The task of true philosophical jurisprudence,

⁸⁴ I paraphrase here William Galbraith Miller, *Lectures on the Philosophy of Law* 5–6 (London, Charles Griffin & Co. 1884), and William Galbraith Miller, *The Data of Jurisprudence* 3 (1903) [hereinafter Miller, *The Data of Jurisprudence*]. For Miller’s prescient critique of late nineteenth-century Austinian jurisprudence and his more richly sociable conception of the jurisprudential vocation, see Gerald J. Postema, *Analytical Jurisprudence*, *supra* note 14, at 33–35 (2011).

⁸⁵ Oakeshott, *supra* note 35, at 348.

however, is not to define a concept of law that will justify including all these disparate phenomena under one rubric—it is no more in the service of a socio-legal inquiry to justify its global scope⁸⁶ than of local practitioners of law. Rather, in true synechist fashion, it seeks an understanding of the nature of law that is fundamental and illuminating, oriented by the question “what is law like?” A “concept” of law—that is, a very general understanding—may be a product of this inquiry, but it will not be its starting point.

This might lead one to conclude that philosophical jurisprudence is not as externally sociable as I suggested earlier, but that conclusion would be too hasty. For, while philosophical jurisprudence must always be *philosophical* in order to be of any value, and so it cannot merely provide handyman services for other disciplines focused on law, still it is keenly aware that many of the questions it finds to be vital to its distinctive mode of inquiry into and understanding of law can be answered only by leaning heavily on contributions from these other disciplines, especially empirical socio-legal studies of law. For example, law is not understood even a little bit if it is conceived as a system of abstract propositions or norms. Law exists just insofar as it is *in force* or practiced in a community. Thus, we need to understand what it is for law to be practiced in a community, to be *used in the right way*. This, it turns out, is a very complicated question, on which we cannot hope to make any progress unless we understand how legal norms are learned and followed, questions for answers to which philosophical jurisprudence must turn to empirical social sciences.⁸⁷ The external sociability of philosophical jurisprudence calls for *partnership* in jurisprudential inquiry.⁸⁸ This leads me to the second side of *vera philosophia*'s coin.

It was jurisprudence in the wider sense—that is, “general jurisprudence,” which William Twining describes as “the theoretical part of law as a discipline”⁸⁹—that Renaissance jurists sought to portray as *vera philosophia*. In general jurisprudence, philosophical jurisprudence as I have characterized it above takes its place alongside other disciplines

⁸⁶ For a contrary view, see Twining, *General Jurisprudence*, supra note 30, at 42–45, 64.

⁸⁷ I have discussed this issue in Gerald J. Postema, *Conformity, Custom, and Congruence: Rethinking the Efficacy of Law*, in *The Legacy of H.L.A. Hart: Legal, Political, and Moral Philosophy* 45, 61–63 (Matthew H. Kramer et al. eds., 2008).

⁸⁸ Thus, Lacey is right that “legal philosophers are . . . intellectually dependent on sociologists of law,” but this should not be taken to imply that legal philosophy “must be grounded in a social theory of law.” Lacey, *Philosophical Foundations*, supra note 30, at 39.

⁸⁹ Twining, *General Jurisprudence*, supra note 30, at xiii.

and modes of inquiry that take law as the focus, if not the sole object, of their attention and energies. The working relationship among all these components of general jurisprudence must be characterized by sociability, rather than subordination, and partnership rather than subservience. Analytic jurisprudence at the opening of the twentieth century put philosophical analysis at the service of practitioners of law. The task of jurisprudence, on this view, was to analyze concepts in daily professional use in legal practice in the hope of making them more serviceable. Viewed in one way, Dworkin's jurisprudential approach, despite its radical departure from analytic jurisprudence before and after Hart, is, ironically, cast in a similar professional service role. William Twining has recently argued vigorously against both conceptions, while insisting still on its essential role in general jurisprudence "from a global perspective." On his view, the tasks of legal philosophy are to construct concepts that provide a starting point for a comprehensive map of law in the world, and to organize a framework of concepts useful for general and globally aware descriptive socio-legal accounts of law.⁹⁰ This, however, does not alter the model of a subservient discipline of legal philosophy, but only changes its master. For this essentially engineering task a truly philosophical jurisprudence is not needed; an acute stipulative definition will do the job. Such concepts are assessed in terms of their suitability to task, not in terms of their contributions to a fundamental understanding of law. An even more radical version of this understanding of jurisprudence may be Leiter's proposal of a thoroughly "naturalized" jurisprudence.⁹¹ This view, it would seem, effaces any ambition of a truly critical theoretical perspective on legal practice, for all the resources for such a perspective are pushed aside in favor of the techniques and resources of natural social science.

The mistake in these proposals, I believe, lies not in the subordination of *philosophy* to some other discipline, as if the dignity of philosophy is denied, but rather it lies in conceiving of the relationship among component modes of jurisprudential inquiry in terms of service rather than partnership. William Galbraith Miller, writing from within the broad, sociable Scottish tradition of jurisprudence at the turn of the twentieth

⁹⁰ Id. at 64. For a critical discussion of Twining's view of general jurisprudence, see Gerald J. Postema, Brief for a Globally-Aware Philosophical Jurisprudence (Apr. 6, 2009) (on file with the author, available at http://www.academia.edu/10790249/Towards_a_Globally-aware_Jurisprudence).

⁹¹ Brian Leiter, *Naturalizing Jurisprudence* (2007).

century, insisted that “[s]ince jurisprudence is a science of human activities, and touches humanity both on its social and its individual side, it has relations to all human sciences,” including history, sociology, ethics, and metaphysics.⁹² Miller, in my view, is right. General jurisprudence, with its immediate focus on law as a social practice, can hope to offer us deeper understanding only if it locates that practice in the context of human activity generally. For that understanding it must draw on all the human sciences and systematic philosophy, as well as the social sciences and history. And it profits most from these diverse approaches when it draws on them at their richest and strongest, not tethered to projects and purposes assigned to them from the outside.

In the enterprise of general jurisprudence, robust and systematic philosophical reflection on law and the ordering of social life, rooted in a critical appreciation of its history, meets and learns from systematic, comparative, socio-legal inquiry into the diverse practices of legal ordering, challenging assumptions and paradigms that have distorted our observations, and modestly offering the benefit of its more general reflections to ground those enquiries. Philosophy with larger systematic ambitions need not be the enemy of social or psychological inquiry with a distinctively empirical bent, nor history pursued with the full rigor of its distinctive discipline. Philosophy conducted in the spirit of Aristotle and Hume, rather than Quine, thinks in terms of intellectual partnership rather than priority. Always mindful of the fact that techniques and expertise have limits, it recognizes that questions calling for answers, problems calling for solutions, and areas of life and experience calling for illumination, do not respect those boundaries.⁹³ The human mind refuses to stop at the outskirts of the province of Austinian or Hartian jurisprudence. The practice of jurisprudence and the discipline of law call for integrated efforts addressed to problems and questions that do not naturally take the shape, nor should they be exclusively focused by the concerns, of any single discipline. Partners worth having retain their distinctive approaches, even to the point of being “subjects apart,” but they each bring to the partnership the tools, resources, and results of rigorous and sophisticated pursuit of these distinctive approaches.

⁹² Miller, *The Data of Jurisprudence*, supra note 84, at 16.

⁹³ I know of no theorist of law who more fully exemplifies this attitude than Bentham. Austin, whatever else he may have learned from his mentor, was immune to his latitudinarian methodological spirit.

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Thus, *general* jurisprudence conceived as *vera philosophia* is a genuinely sociable science and philosophical jurisprudence, one of the key partners in the enterprise, and shares this commitment to sociability. Historical inquiry is indispensable both within the philosophical enterprise itself and as a theoretical partner in the enterprise of general jurisprudence.

