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Preface

The contributors to this year's volume of *Current Legal Problems* have taken seriously its title, focusing in the main on serious matters of contemporary legal concern. However, it is also fortunate that several contributors have reached beyond the 'current' and the 'legal' to bring different disciplinary and historical perspectives to bear on the law. These include the kaleidoscopic account of Frederick Pollock's legal writings (and life) by Neil Duxbury. In addition to shedding light upon legal academic life at UCL in the early twentieth century (in which students appear to be just as discriminating and vocal as now) his paper addresses many of the enduring, 'big', questions of jurisprudence, legal ethics, and legal history, not least of which is what is the value of comparative work. This question was the predominant theme of Andrew Lewis's Inaugural Lecture. In this lecture, the written version of which appears in this volume, he spans time and geography to advance comparative legal history as a way of deepening our understanding of what law is, how it comes into existence, and how it is effectively deployed in social relations. In terms of methodology he suggests, perhaps unusually, that chance, similarities and parallels, and 'weak' incidental comparisons can afford more fruitful results than 'strong' contrived ones. In summary, Lewis amply proves the point that an 'intimate alliance between comparative and historical research is not only natural and desirable, but necessary for either branch of work being efficiently done'.¹

Taking both a historical and comparative approach allows Carrie Menkel-Meadow to offer a more tempered analysis of the 'vanishing trial' than that currently being offered by many judges and politicians in the United States. Her long view of dispute resolution—reaching back to Roman legal practices and revealing the universality of the dispute 'triad' upon which modern forms of mediation and conciliation are based—makes clear that the adversary trial is not necessarily an evolutionary end point. Legal history encourages Menkel-Meadow to lay a positive cast on the apparent demise of the full-blown trial, in marked contrast to the views of so-called 'litigation romanticists'. Just as importantly, she employs this research to identify the ethical and methodological skills that lawyers must equip themselves with to deal with the particular problems raised by their engaging in alternative forms of resolving disputes. Her conclusion is that 'new' legal processes and institutions must be developed having respect to integrity and morality. This paper stands as a prime example of the importance of forging and sustaining Anglo-American links of a scholarly nature.

¹ Pollock, quoted by Neil Duxbury, in this volume, p. 21.

Joanne Scott brings us bang up to date with an analytical account of the legal relations and review procedures involved in the regulation of GMOs, that most contemporary of risks. She argues that in the setting of the WTO legal regime, 'judicial review' may be conceived as re-enforcing, rather than negating democracy, by enhancing the external accountability of states, although the legitimacy of its role may still be questioned. This paper emphasises that the problems which flow from the global reach of laws—democracy, accountability, legitimacy, governance—are in cases such as this amplified and refracted by the European Union. Particularly complex and thus worthy of Scott's crisp analysis is the Union's grudging acknowledgement of the autonomy of Member States to set their own standards of protection (at least when faced with the campaign of 'disobedience' by the Member States triggered by public antipathy to the use of GM technology in agriculture).

The autonomy of Member States in the face of European regulation, not of risk, but rather the conditions for competition is the main concern of Josh Holmes's paper. This habitual concern of the European Community is now placed under additional strain by the need more precisely to order the attribution of responsibility. Holmes therefore clarifies and categorises for analysis the limiting principles developed by the European Court of Justice to narrow the application of Community competition law to the action of the Member States. In so doing he marks out the boundaries and contours of EC competition law *vis-à-vis* national law in a manner which is also broadly applicable to other aspects of the relationship between the European Union and Member States.

The varying role of judicial review in constituting or re-enforcing democracy, discussed by Joanne Scott, resurfaces in Colm O'Conneide's paper, in which he assesses whether 'rights review', introduced by the Human Rights Act 1998, has effectively transfused into the bloodstream of the UK constitutional order. In this assessment he does not restrict himself to analysis of higher court decisions, but instead examines the overall impact of rights review throughout the legal and constitutional system, and in political debate. O'Conneide concludes that a 'rights orientation' in decision-making has been brought about by the Act and that this may be understood as a major new direction in United Kingdom public law, in contrast to the more extreme prophecy of judicial imperialism which dogged the passage of the Act.

Another major feature of public law is the creation and design of the independent regulatory agency. The legal importance and political resonance of this development is explained by Tony Prosser in a paper which gives a colourful account of the move from public ownership to privatisation of the railways, with the independent regulation of the rail sectors described as an abject and dismal failure. In particular he explains the role

carved out for law in the privatisation process, in which the provision of key engineering and maintenance services were contracted out. The importance of this paper lies in its contrasting of public law in the form of the new agencies established at privatisation, with the use of private law as a means of integrating a fragmented organisation.

The public/private nature of law is interpreted along an axis of exclusivity and inclusivity by Alison Clarke in her paper on use, time, and entitlement, in which she examines, and criticises, the insecure proprietary status of use rights, particularly in the case of adverse possession and the law of prescription. These are both areas which superficially at least are about acquired rights by sustained use, but Clarke makes clear that their legal status is more complex, and is subject to difficulties and inconsistencies.

The problematic evolution of legal categories, apparently without principle or system, is similarly scrutinised by Michael Bridge in 'Innocent Misrepresentation in Contract'. This is an area displaying the unhappy union of case law and statute, in summary, 'a body of law that has lost all sense of direction'. It is to be hoped that Bridge's demand for a high level reappraisal of the law of innocent misrepresentation will stimulate reform.

Jonathan Harris also searches for the rationale and internal coherence of law, in this case in choice of law decisions. This paper highlights the tension that this area is of 'fearsome theoretical complexity' and yet is increasingly required to provide commercially acceptable solutions. Harris discusses both whether choice of law is a logical process and how important logical process is to the development of choice of law principles, concluding that logic is far from an irrelevant consideration in the choice of law process.

Continuing the precise analysis of areas of law, Rizwaan Mokal turns his attention to the new administration procedure for cases of insolvency introduced by the Enterprise Act 2000. Little short of revolutionary, this procedure leads to a move away from administrative receivership, which in Mokal's view was not doing a good job of rescuing businesses. This paper scrutinises the 2000 Act's provisions, implications, and motivations.

Ben Pettet's Inaugural Lecture, published in this volume, gives an account of the pervasive grand influence of the European Union in this area, both in terms of the specific directives adopted to regulate the field, and more fundamentally to adjust company and legal culture, particularly by the fostering of corporate social responsibility. Whilst taking stock, Pettet also keeps an eye on the future, outlining possible areas of law reform.

The remaining few papers are concerned with legal problems derived from the blurring of traditional boundaries by science and medicine.

Emily Jackson subjects to scrutiny the boundary between lawful and unlawful practices employed to end a patient's life, and tackles the conventional justifications for an absolute prohibition on active euthanasia. She argues that such justifications have become entrenched by the law's protection of an abstract and anachronistic idea about the 'proper' role of the medical profession, which is out of step with a modern patient-centred approach to medical practice in other areas. Jackson envisages a carefully constructed regulatory framework in order to serve the best interests of individual patients who are currently consigned to a painful death.

In the penultimate paper of this volume, Sheila McLean and Laura Williamson address the legal and ethical problems raised by the transplantation of animal organs into humans. They particularly highlight the great difficulty of regulating an area of science driven by experiment and opportunity, with potentially grave implications—of risk, confidentiality, liability, and the balance of rights (of humans, and animal welfare). That xenotransplantation clearly calls into question what we mean by 'human' and 'animal' is taken up by Marie Fox. In her paper she explores the role of law in creating and reflecting a dividing line between humans and non-humans, invoking in particular feminist theories on corporeal philosophy and kinship. She argues that in general law fails to engage with the question of animal status, but where it does confront this issue it categorises animals of all species as human property. Fox contends that such a position is fundamentally incoherent given that the human/animal binary is problematic and unstable.

With this volume, Professor Michael Freeman finally hands over the editorial reins to *Current Legal Problems*. It is therefore entirely fitting to mark the significant contribution that he has made to the profile, standard, and standing of the annual volume and the supporting series of public lectures, both of which have served to foster a stimulating academic community clustered around, but also beyond, the Faculty of Laws at University College, London. It remains to convey our great thanks to all those who chaired the public lectures from which this volume is derived—Lord Steyn, Lord Rodger, Sir Andrew Morritt, Dame Mary Arden, Malcolm Grant, Sir Gavin Lightman, Lord Hope, Lord Justice Auld, Judge Wilkie, Baroness Hale, Lord Phillips, Advocate General Jacobs, Lord Justice Mance, Lord Justice Munby, and Lord Justice Brooke.

Jane Holder
June 2004

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Why English Jurisprudence is Analytical

Neil Duxbury

The reason that English jurisprudence is analytical has a good deal to do with the history of law at this institution. With the founding of the University of London in 1826 came the establishment of a Chair in Jurisprudence and the Law of Nations, the first incumbent of which was to become its most famous. John Austin was appointed as Professor of Jurisprudence at the University of London in the summer of 1827, although his first course of lectures did not commence until the beginning of the 1829–30 session. It is part of jurisprudential lore that the lectures were poorly received and audiences dwindled quickly, leading Austin—a delicate plant at the best of times—to cease lecturing some time between June 1832 and June 1833.¹ Around a quarter of a century later, his work began to attract the attention of many English jurists, largely because of the remarkable proselytising of his widow.² And for the next century Austinian jurisprudence seems to have been English jurisprudence—until, that is, another English analytical legal philosopher took the deficiencies of Austin's imperative theory and used them as the basis 'for a fresh start'.³

I am, of course, telling a familiar story crudely, and there cannot be any legal philosophers or historians around who could see much point in telling it again. And so I intend, in this lecture, only to touch upon that

¹ Anyone seeking the whole sad story should consult L. Hamburger and J. Hamburger, *Troubled Lives: John and Sarah Austin* (Toronto: University of Toronto Press, 1985), 53–77; and W. E. Rumble, 'Austin in the Classroom: Why Were his Courses on Jurisprudence Unpopular?' (1996) 17 *Jnl Leg Hist* 17–40; W. L. Morison, *John Austin* (London: Arnold, 1982), 20–4; along with Sarah Austin's candid yet defiant 'Preface', in J. Austin, *Lectures on Jurisprudence or the Philosophy of Positive Law*, 2 vols., 5th edn., R. Campbell (ed.) (London: Murray, 1885), i, 1–25. Austin did not formally resign from UCL until late 1834, taking effect early 1835. In 1834, he began but never completed a series of lectures at the Inner Temple, after which, it appears, he abandoned teaching for good.

² See Mrs Austin to M. Guizot, 31 December 1860, in J. Ross, *Three Generations of Englishwomen. Memoirs and Correspondence of Mrs. John Taylor, Mrs. Sarah Austin, and Lady Duff Gordon*, 2 vols. (London: Murray, 1888), ii, 102 ('I must vindicate . . . him from the charge of indolence or indifference to truth'); and also R. A. Cosgrove, *Scholars of the Law: English Jurisprudence from Blackstone to Hart* (New York: New York UP, 1996), 93–4.

³ H. L. A. Hart, *The Concept of Law*, 2nd edn. (Oxford: Clarendon Press, 1994; 1st edn. pub. 1961), 80.

story and to concentrate on a different one. But the story I shall tell is still a story about how the analytical nature of English jurisprudence has something to do with the history of law at this institution. It is a story which centres on a renowned jurist and jurisprudence professor who began his career—inexplicably, it has to be said—here at UCL: Frederick Pollock.

In the Shadow of Austin

Before we turn to Pollock, it is worth considering the background to his appointment as a professor of jurisprudence here. After 1833, Austin's post remained vacant for seven years. Thereafter, UCL endured a succession of jurisprudence professors who were basically part-time legal instructors, often with little interest in law, let alone legal research.⁴ That it should have been this way is not entirely surprising: the guaranteed remuneration for Austin and those who followed him was modest, the idea being that basic pay would be supplemented in accordance with the number of students providing fees to attend the lectures.⁵ Austin's successors were, in general, hardly any more successful than was he in securing enrolments, and so they tended to make up their income from other sources.⁶ The only notable break from this pattern was Sheldon Amos, son of the first Professor of English Law and Austin's contemporary at UCL, Andrew Amos. Elected to the Chair of Jurisprudence in 1869, Amos the younger distinguished himself from his precursors by showing some commitment to a career as a jurist, producing books and essays on jurisprudence and a variety of other legal topics.⁷ When ill health led him

⁴ See P. Schofield, 'Jeremy Bentham and Nineteenth-Century English Jurisprudence' (1991) 12 *Jnl Leg Hist* 58–88 at 68–9.

⁵ See J. H. Baker, 'University College and Legal Education 1826–1976' (1977) 30 *CLP* 1–13 at 4–5. '[I]n those harsh days,' Baker writes, 'the professor's living depended on the size of his class. After only four years of struggling, Austin felt obliged to resign, his hopes shattered, his efforts spurned . . . The four men who followed him all resigned for the same reasons. Their fate exposed a serious weakness in the College establishment, in that it had failed to secure to its professors financial independence' (p. 5). According to Rumble ('Austin in the Classroom', 36), Austin was not wholly at the mercy of student numbers: 'private parties in 1831 raised sufficient funds to endow a salary of £200 per annum for him for the academic years 1831, 1832 and 1833. Nevertheless, this possibility apparently was not attractive enough to overcome his disenchantment with the low enrolment in his course.'

⁶ See W. Twining, '1836 and All That: Laws in the University of London 1836–1986' (1987) 40 *CLP* 261–99 at 274–5.

⁷ For representative works, see S. Amos, *A Lecture on the Best Modes of Studying the Science of Jurisprudence. Being Introductory to a Course of Lectures on the Science of Jurisprudence, to be delivered in University College, London, during the session 1870–1871* (London: Ridgway, 1870); *A Systematic View of the Science of Jurisprudence* (London: Longmans, Green & Co., 1872); *The Science of Law* (London: King, 1874). On Amos as Professor of Jurisprudence at

to vacate the Chair in 1878, UCL was faced again with the difficulty of finding someone both suited and willing to demonstrate commitment to the post. In May 1882, fifty years after Austin's resignation, the chalice passed to Pollock.⁸

From the beginning, the omens were not good. Pollock attracted a class the size of which would have sent Austin to his bed. The fact that Pollock's predecessor enjoyed a larger class might have had something to do with Sheldon Amos—possibly the memory of him was still drawing in the students. This would not explain, however, why Pollock's successor attracted a still larger enrolment.⁹ In October 1882, Pollock's lectures began.¹⁰ 'The history of the modern scientific movement in our legal studies', he warned his audience, 'is written in books which all students who aim at real knowledge must have in their hands, and ought to be familiar with'.¹¹ His entire introductory lecture in fact proceeded on the assumption that the students had already read these books. Some books were, of course, most likely beyond their reach—I am not aware that anything of Bluntschli's has been translated into English, though no modern writer on the philosophy of politics and law better deserves a good English

UCL, see the brief account by R. K. Wilson in *Remembrances of Sheldon Amos. By a Few Friends* (Leeds: privately printed by Harrison and Waide, 1889), 60–9.

⁸ There were fifteen applicants for the Chair when Pollock was appointed. He apparently applied late, but was by far the strongest applicant: Report of Committee on applications for Professorship of Jurisprudence and of Constitutional Law, College Correspondence (AM/C/92), Special Collections, UCL Library. Having applied for the Chair on 3 May 1882, he accepted an offer of the post five days later: Frederick Pollock to the Council of University College London, 3 May 1882; and Frederick Pollock to Mr W. A. Hunter, 8 May 1882, in Pollock correspondence (Appointments. 1882: Jurisprudence).

⁹ For the 1882–3 session, thirteen students enrolled for Pollock's Jurisprudence lectures. The income for the course was £67.40, from which Pollock received a cheque for £57.12: *Professors' fees books, UCL Sessions [sic] 1882–83*, UCL Records Office, CA/UCL/Prof Fee Bks/2 f.123. Pollock's predecessor, W. A. Hunter, had eighteen students enrol for his course and was paid £92.16 (the overall income being £108.30): *Professors' fees books, UCL Sessions [sic] 1881–82*, UCL Records Office, CA/UCL/Prof Fee Bks/1 f.121. Pollock's successor, Alexander Henry, attracted nineteen students and was paid £110.50 (the overall income being £131.15): *Professors' fees books, UCL Session 1883–84*, UCL Records Office, CA/UCL/Prof Fee Bks/3 f.118. Apparently, UCL 'produced only 135 LL.B.s in the nineteenth century', and a 'majority of those . . . studied privately'. W. L. Twining, 'Laws', in F. M. L. Thompson (ed.), *The University of London and the World of Learning, 1836–1986* (London: Hambledon Press, 1990), 81–114 at 96.

¹⁰ For Pollock's notes, see 'Lectures, Michaelmas Term 1882, Liverpool and Univ. Coll; London', in Pollock notebooks, Lincoln's Inn Library, Misc. 793, 20–59. The lectures are titled: I. Introductory; II. Form of Positive Law; III & IV. System of Judicial Precedents; V & VI. Systematic legislation in England, and movements towards codification; VII. Matter of Positive Law; VIII & IX. Public and Private Law; X. Duty and Sovereignty.

¹¹ F. Pollock, 'The Methods of Jurisprudence' (1882) 8 *Law Magazine and Review* (4th Ser.) 25–53 at 48. The article is Pollock's introductory lecture delivered at University College, London, on 31 October 1882, reprinted in his *Oxford Lectures and Other Discourses* (London: Macmillan, 1890), 1–36. Citations here are to the original article.

translation'.¹² What would probably have perturbed many of Pollock's students was the ease with which he himself could move out of their reach. Jurisprudence, he told them, falls into three categories: Positive Jurisprudence (which sub-divides into practical, historical, comparative, and analytical); 'Final Jurisprudence, which has a practical side (theory of legislation) and a speculative one (ethical jurisprudence or *Naturrecht*'); and 'International Jurisprudence, which again is diversely treated by different authors, and might be, like municipal jurisprudence, subdivided according to their several methods if we were examining it more closely'.¹³ In taking his audience through this labyrinth, Pollock operated at a level of generality and assumed a degree of knowledge that would have defeated many a trained jurist. During the second term of 1882–3, he lectured to the UCL students on the topic of civil liability.¹⁴ While his notes for these lectures suggest that they would by no means have been easy going, they are certainly less recondite than those delivered in the first term. By the second term, however, the damage had most likely been done and the students put off.

It seems almost ironic that, today, the Faculty of Laws at University College London should award a scholarship bearing Pollock's name ('The Frederick Pollock Scholarship for Students from North America'), for Pollock lasted but one year in Austin's chair. Perhaps part of the problem for him was that, by 1882, it really was Austin's chair: Austin was by this time a legal philosopher held in high—Pollock would have said inordinately high—regard. Austin's jurisprudence, he told his students, was 'too much in the air'. Those who follow Austin's route 'run an appreciable risk . . . of regarding legal science as a thing apart from legal practice'.¹⁵ That Pollock felt the need to say as much indicates, nevertheless, that, by this point in time, Austin's route was being travelled.¹⁶ Perhaps Pollock was unhappy to find himself in the long shadow cast by a man for whom he had very little intellectual respect. For whatever reason, his association with University College London did not work out, and in February 1883

¹² Pollock, 'The Methods of Jurisprudence', 37. 'Bluntschli' is Johann Caspar Bluntschli (1808–81), Swiss jurist and political scientist, and student of Savigny. The first part of his *Lehre vom modernen Staat*, 2 vols. (Stuttgart: Cotta, 1851–2) was fairly soon to be published in English: J. C. Bluntschli, *The Theory of the State*, trans. D. G. Ritchie, P. E. Matheson, and R. Lodge (Oxford: Clarendon Press, 1885). On Bluntschli, see M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge: CUP, 2001), 42–7.

¹³ Pollock, 'The Methods of Jurisprudence', 40.

¹⁴ See Pollock notebooks, Misc. 793, 61–121. The lectures are untitled and the last one is dated 9 April 1883. It appears that Pollock presented the lectures in updated form at Oxford in the Hilary Term of 1885: see Pollock notebooks, Misc. 793, 123–43.

¹⁵ Pollock, 'The Methods of Jurisprudence', 52.

¹⁶ On the late nineteenth-century reception of Austin, see S. Collini, *Public Moralists: Political Thought and Public Life in Britain 1850–1930* (Oxford: Clarendon Press, 1991), 268.

Senate accepted his resignation.¹⁷ In March 1883 it was determined that Alexander Henry, a jurist in the Austinian tradition, would succeed Pollock to the re-named Professorship of Jurisprudence and Indian Law.¹⁸

This was the end of Pollock's association with UCL, but it was not the end of his association with jurisprudence. In 1883, he succeeded Maine as the Corpus Christi Professor of Jurisprudence in the University of Oxford. He remained in that post for twenty years. But what, as a jurisprudence professor, did he achieve? What did he stand for? The simple answer to these questions seems to be 'nothing in particular'. And the basic thesis of this lecture is that, for the purposes of understanding why English jurisprudence is analytical jurisprudence, this answer is significant.

The jurisprudence professor who does not really feel comfortable in the company of jurisprudence is an intriguing—and, surprisingly, not an uncommon—character. Pollock played the part to near perfection. Like his successor at Oxford and at the helm of the *Law Quarterly Review*, A. L. Goodhart, Pollock was essentially a common law jurist who sometimes clothed in the language of jurisprudence his discourses on common law doctrine, and who wrote books about the common law which just happened to have jurisprudence in the title. The French understanding of jurisprudence—jurisprudence meaning the case law of the courts—seemed to appeal to Pollock rather more than did the idea of jurisprudence as legal philosophy.¹⁹ While a comprehensive liberal education was, he believed, an advantage to any lawyer,²⁰ efforts to conceptualise legal phenomena in accordance with some philosophical scheme or model generally left him unimpressed. Jurists 'who think you can reduce law to rigorous chess problems' exasperated him,²¹ so it is hardly surprising that Wesley

¹⁷ Minutes of Senate, 22 February 1883, in *University College London: Minutes of Senate, No. 5*, UCL Records Office, CA/UOL/Mins/Sen/5, 91–2.

¹⁸ UCL, Minutes of Senate, 8 March 1883, in *University College London: Minutes of Senate, No. 5*, UCL Records Office, CA/UOL/Mins/Sen/5, 96. The Committee which recommended the appointment of Henry included Pollock: Minutes of Senate, 22 February 1883, 94. For Henry, see A. Henry, *Jurisprudence: or, the Science of Law, its Objects and Methods. An Introductory Lecture, delivered at University College, on 2nd November, 1883* (London: Stevens, 1884); and also Schofield, 'Jeremy Bentham', 82–3. Henry is perhaps primarily of historical note for having been John Salmond's jurisprudence teacher at UCL: see A. Frame, *Salmond: Southern Jurist* (Wellington, NZ: Victoria UP, 1995), 24–7.

¹⁹ Thus it is that he wrote privately of his preference for jurisprudence 'in its proper sense of development of the law by the living voice of the courts'. Frederick Pollock to Adolph S. Oko, 20 April 1936, in Oko papers, American Jewish Archives, Cincinnati, Ohio, MS 14, box 5, file 13, no. 2-187.

²⁰ See *Oxford Lectures and Other Discourses*, 108.

²¹ Pollock to Holmes, March 1916, in *The Pollock–Holmes Letters: Correspondence of Sir Frederick Pollock and Mr Justice Holmes 1874–1932*, 2 vols., M. DeWolfe Howe (ed.) (Cambridge: CUP, 1942), i, 234. See also Pollock to Holmes, 30 June 1924, in De Wolfe, *Pollock–Holmes Letters*, ii, 138 (lamenting how 'seemingly no Continental jurist will believe that any writer . . . does not intend to lay down a complete deductive system').

Newcomb Hohfeld's analysis of jural relations was not to his taste: 'it is strange', he declared apropos of Hohfeld, 'how many rational beings believe the ultimate truths of the universe to be reducible to patterns on a black-board'.²² The concept of 'right' and efforts to explicate it he would happily have seen banished from jurisprudence.²³ Much better, he believed, that jurisprudence be kept straightforward, easily intelligible, free from the technical vocabulary of professional philosophers. '[T]he older I grow', he declared to the law students of the University of Birmingham in May 1932,

the less inclined I am to trust any general theories of jurisprudence. For my part I have only one dogma about jurisprudence, which I will entrust to you in confidence. When you see a proposition of law which cannot be made intelligible to a jury of educated laymen, I think you may fairly presume that there must be something unsound about it. That dogma I am prepared to defend against all mankind.²⁴

It is worth recalling just who was saying all of this. Pollock was for twenty years a professor—the professor—of jurisprudence at Oxford. Yet jurisprudence—certainly if taken to mean legal philosophy—was, like philosophy generally, a subject which he approached with considerable suspicion. His detachment from philosophy and his tendency to look askance at the work of many philosophers can be explained: he was, he always insisted, nothing more than 'an amateur in philosophy',²⁵ an outsider looking in—and regularly bemused by what he found. But he was no amateur jurist. John Chipman Gray wrote to Pollock in 1911, for example, about how *A First Book of Jurisprudence* was inappropriately titled, given how much professional jurists could learn from it.²⁶ Yet Pollock seemed largely exasperated by the intellectual pursuit over which he was supposed to be a master. How are we to explain this?

The essence of the explanation is that he had serious reservations about analytical jurisprudence in particular. Unfortunately, this claim—while it may be correct—is not especially helpful. Pollock's dislike of the analytical

²² Pollock to Holmes, 9 February 1921, in De Wolfe, *Pollock–Holmes Letters*, ii, 63.

²³ See Pollock to Holmes, 21 January 1929, in De Wolfe, *Pollock–Holmes Letters*, ii, 236.

²⁴ Sir F. Pollock, *The Talkative Profession* (Birmingham: The Holdsworth Club of the University of Birmingham, 1932), 11.

²⁵ F. Pollock, *For My Grandson: Remembrances of an Ancient Victorian* (London: Murray, 1933), 109–10.

²⁶ John Chipman Gray to Frederick Pollock, 10 December 1911, in Pollock correspondence, Special Collections, Harvard Law School Library, Box 1, Folder 26. See also A. L. Goodhart, *English Contributions to the Philosophy of Law: The Seventh Annual Benjamin N. Cardozo Lecture Delivered before the Association of the Bar of the City of New York, 25 May 1948* (New York: OUP, 1948), 42–3 ('his *First Book of Jurisprudence*, based primarily on the common law, contains more original ideas than do the far lengthier tomes of many other writers'). Pollock seemed more or less to concur with Gray's assessment: see Pollock to Holmes, 1 November 1917, in De Wolfe, *Pollock–Holmes Letters*, i, 252 ('... a book which does not cater for the examination appetite or pretend to make hard things easy').

project was, we will see, not unequivocal. And although historical and comparative jurisprudence was more to his taste, he was not wholly wedded to that project either. About jurisprudence in general he could be markedly ambivalent, and it is invariably difficult to determine just where his beliefs and enthusiasms lay. Science provides the only semblance of an exception to this assessment: Pollock, like other Victorian jurists, was keen to see the study of law accorded scientific status—an enthusiasm of sorts—and while his analysis of law as a science never generated anything so grandiose as a theory, it is certainly possible to find within his work an argument to the effect that case law develops in accordance with scientific criteria. We will see, however, that the argument which Pollock developed is rather uninspired and anaemic, especially when considered alongside a similar line of argument elaborated around the same time by Holmes. Believing in the idea of law as a science is easy as compared with the task of developing a vision which makes the idea compelling: Pollock believed in the idea, but performed the task half-heartedly.

This is hardly surprising. After all, he resisted the idea of reducing law to some sort of model. But—and this brings us to an argument which is central to this lecture—late nineteenth- and twentieth-century juristic thought evolved mainly within a university culture which emphasised rigorous inquiry and the systematisation of knowledge. The analytical tradition, for all its shortcomings, fitted well within this culture: it provided a framework within which to try to provide insights into the nature of legal validity. Jurists were able to modify the framework on offer—indeed, eventually analytical jurists would no longer be modifying the Austinian model but rejecting it. But the basic questions inspired by the analytical project—Why does law bind citizens? To what extent, if at all, does the binding force of law depend upon the moral quality of law?—remained constant and intriguing. Analytical jurisprudence set an identifiable agenda.

By contrast, the goals of historical and comparative jurisprudence—which I will often refer to (as did Pollock) simply as comparative jurisprudence—were for the most part diffuse. This is not to claim that Maine, Vinogradoff, and other proponents of comparative jurisprudence had nothing of interest to say; but, without a distinct jurisprudential agenda, none of them was likely to capture to a significant degree the imaginations of later legal theorists. In this respect, jurisprudence was not alone: the ‘comparative method’ generally, it has been argued,

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.²⁷

Pollock may not have been an unequivocal purveyor of the comparative method, but his jurisprudence was rooted in that tradition and was to meet with much the same fate as awaited the works of many other comparatists of his era. His jurisprudential perspective—if, indeed, it is accurate to describe it as a perspective—set no obviously discernible or pressing tasks. Rather than identifying fundamental jurisprudential problems and proposing some sort of framework within which to tackle those problems, he left a tangled web of often interesting if invariably modest reflections on a variety of secondary jurisprudential quandaries. Besides tending to sidestep larger jurisprudential difficulties, Pollock was also convinced that no theory or method or system could prove as enlightening for the purposes of legal inquiry as could straightforward scholarly sincerity, assiduousness, and good sense. If any approach to jurisprudence was to complement the evolving university culture of the late nineteenth and early twentieth centuries, it would have to set itself a clearer agenda than anything suggested by the works of Maine, Vinogradoff, or Pollock. These men may well have been Oxford professors of jurisprudence, but their reflections on the subject were insufficiently well structured and focused to ensure that their own jurisprudential achievements would have lasting appeal. Ultimately, this judgement would be traceable to Oxford itself: in due course, jurisprudence there would shake off its comparatist associations and not only embrace the analytical tradition, but, more significantly, take charge of it.

Rechtswissenschaft, English-Style

Pollock hardly distinguished himself from his Victorian juristic contemporaries by connecting law with science. Indeed, the remarkable Victorian jurist would be the one who did not posit any such connection.²⁸ The presence of a shared goal, however, is not necessarily indicative of a shared outlook. During the nineteenth and early twentieth centuries, English jurists supported and promoted the idea of law as a science in a variety of ways. The various perspectives articulated throughout this period generally broke down into those two distinct though not wholly incompatible categories of thought which, for convenience, I have termed

²⁷ S. Collini, D. Winch, and J. Burrow, *That Noble Science of Politics: A Study in Nineteenth-Century Intellectual History* (Cambridge: CUP, 1983), 209.

²⁸ A point adverted to by Buckland, looking back in his eighty-fifth year on the history of modern jurisprudence: see W. W. Buckland, *Some Reflections on Jurisprudence* (Cambridge: CUP, 1945), 40–1.

analytical jurisprudence and *comparative jurisprudence*. Pollock's understanding of legal science belonged more to the latter than to the former category. But not entirely so: indeed, as noted already, Pollock was neither an unequivocal supporter of historical and comparative jurisprudence nor, despite his many vituperative condemnations of the work of John Austin, an out-and-out detractor of the analytical project. '[T]he closer one looks,' it has been remarked, 'the harder it is to find the "English School of Jurisprudence"'.²⁹ Pollock certainly did not make the task any easier, so committed was he to equivocating on the subject of legal science. Understanding his jurisprudence requires that we try to uncover and explain his arguments on that subject. But this is not the only or even the most valuable task at stake here. By putting these arguments in context, and by trying to show why, ultimately, they fell on deaf ears, we might also gain some insight into why English jurisprudence generally took the analytical rather than the comparative route.

The jurisprudence of John Austin has been the subject of so many nuanced and revisionist analyses that one hesitates to say anything straightforward about it. Yet one hardly goes out on a limb in claiming that Austin wanted to accord scientific status to the study of positive law. 'Though every system of law has its specific and characteristic differences,' he claimed, 'there are principles, notions, and distinctions common to various systems, and forming analogies or likenesses by which systems are allied'.³⁰ The purpose of jurisprudence as Austin preferred it to be conceived was to identify, clarify, and arrange these general principles—'General Jurisprudence', indeed, was his description of the task. '[T]he various principles common to maturer systems', he wrote, 'are the subject of an extensive science . . . named General . . . Jurisprudence, or the philosophy . . . of positive law'.³¹ A satisfactory definition of 'General Jurisprudence', he added, might be 'the science concerned with the exposition of the principles, notions, and distinctions which are common to systems of law'.³² This conception of jurisprudence is, to use Bentham's terminology, expository rather than censorial, concerned with what law is rather than what it ought to be. 'The *science of jurisprudence*', Austin confirmed, 'is concerned with positive laws, or with laws strictly so called, as considered without regard to their goodness or badness'.³³ Disregarding the quality of positive laws made good sense to Austin: 'the goodness or badness of a human law is a phrase of relative and varying import',³⁴ and so those concerned with developing the science of jurisprudence ought to address 'the existence of law' rather than 'its merit or demerit'.³⁵ Such

²⁹ M. Lobban, 'Was there a Nineteenth Century "English School of Jurisprudence"?' (1995) 16 *Jnl Leg Hist* 34–62 at 53.

³⁰ Austin, *Lectures on Jurisprudence*, ii, 1072.

³¹ *ibid.*

³² *ibid.* ii, 1073.

³³ *ibid.* i, 172.

³⁴ *ibid.* i, 174; and, in a similar vein, see 218, 268.

³⁵ *ibid.* i, 214.

development requires an appreciation of the fact that ‘laws or rules, properly so called, are a *species* of commands’³⁶—commands which are issued by a sovereign and which ‘the *bulk* of the given society’ habitually obeys.³⁷ Appreciation of as much holds ‘the *key* to the sciences of jurisprudence and morals’.³⁸

Paradoxically, we might say, Austinian jurisprudence, being focused on general principles common to legal systems but detached from normative or censorial considerations, is at once broad and narrow. Both the breadth and the narrowness came to be considered faults. Indeed, after the publication of the second edition of Austin’s *The Province of Jurisprudence Determined* and his *Lectures on Jurisprudence or the Philosophy of Law* in the early 1860s, critics gradually developed a range of objections to his legal philosophy.³⁹ ‘[F]or the student in the days of my youth’, Buckland recalled in 1945, ‘Austin . . . was a religion; to-day he seems to be regarded rather as a disease’.⁴⁰ By the early 1960s, the disease appeared to have been eradicated. ‘Austin wrongly claimed to have found in the notion of coercive orders . . . “the key to the science of jurisprudence” [*sic*]’, H. L. A. Hart wrote in 1961.⁴¹ Unfortunately, ‘the simple, Austinian formula of a general habit of obedience . . . only caters for what we may term the “end product” of the legal system’.⁴² We need, Hart claimed, ‘greater clarity’, an acknowledgement of ‘the deficiencies of the theory which has dominated so much English jurisprudence since Austin expounded it’, and the courage ‘to learn from our failure’.⁴³ Among other things, we ought to concede that the notion of ‘a general habit of obedience’ is neither sufficiently powerful nor precise to explain the validity of legal systems,⁴⁴ that legal obligation is not merely a matter of orders backed by threats,⁴⁵ that legal rules may confer powers as well as impose duties,⁴⁶ that ‘the judge’s own statement that a particular rule is valid . . . is an internal statement recognizing that the rule satisfies the tests for identifying what is to count as law’,⁴⁷ and that internalisation of a legal rule means looking upon it ‘as a legal standard of conduct’, to be referred to ‘in criticizing others, or in justifying demands’.⁴⁸ It is now necessary, Hart insisted, ‘to advance legal theory by providing an improved

³⁶ Austin, *Lectures on Jurisprudence*, i, 88.

³⁷ *ibid.* i, 220–1.

³⁸ *ibid.* i, 88.

³⁹ See R. A. Cosgrove, ‘The Reception of Analytic Jurisprudence: The Victorian Debate on the Separation of Law and Morality, 1860–1900’ (1981) 74 *Durham University Jnl.* 47–56; and A. Kocourek, ‘The Century of Analytic Jurisprudence since John Austin’, in *Law. A Century of Progress, 1835–1935: Contributions in Celebration of the 100th Anniversary of the Founding of the School of Law of New York University*, 3 vols. (New York: New York UP, 1937), ii, 195–230 at 199–201.

⁴⁰ Buckland, *Some Reflections on Jurisprudence*, 2. ⁴¹ Hart, *The Concept of Law*, 81.

⁴² *ibid.* 112. ⁴³ *ibid.* 6, 16, 20. ⁴⁴ *ibid.* 23–4, 51–5, 68–71.

⁴⁵ *ibid.* 28, 48. ⁴⁶ *ibid.* 27–9, 40–2, 77, 153. ⁴⁷ *ibid.* 105.

⁴⁸ *ibid.* 138; and also, on internalisation generally, 55–8, 82–91.

analysis of the distinctive structure of a municipal legal system and a better understanding of the resemblances and differences between law, coercion, and morality, as types of social phenomena'.⁴⁹ By the later decades of the twentieth century, notwithstanding the occasional (and often unconvincing) claim that Austin suffered harshly at the hands of modern legal philosophers,⁵⁰ the Austinian vision of a science of jurisprudence was but a reminder of a bygone age.

The general decline in the significance of Austinian jurisprudence ought to be considered in the light of two fairly obvious yet, for our purposes, crucial points. The first of these is that although Hart discredited the Austinian project, by no means did he undermine analytical jurisprudence generally. Hart recognised two phases of analytical jurisprudence, the first phase being that associated with Bentham and Austin and the second, modern phase having been inspired by the linguistic philosophies of Ludwig Wittgenstein and the Oxford moral philosopher, John L. Austin.⁵¹ Hart himself, being the pre-eminent representative of this modern phase, was very much responsible for the survival and the popularity of analytical jurisprudence in the second half of the twentieth century. The second point to note is that when Hart set about dismantling Austin's theory of law as coercive orders, the exercise was considered to be jurisprudentially worthwhile: Austin's theory may not have been the potent force that it once was, but its domination of English jurisprudence throughout an earlier era meant that subjecting it to sustained critique was not tantamount to attacking a figure of straw. Hart was able successfully to advance the second phase of analytical jurisprudence precisely because the first phase, for all its limitations, provided solid enough foundations upon which to build: it was, as Hart put it, the 'type of theory which has perennial attractions whatever its defects may be'.⁵²

It is important to keep in mind, in other words, that Austinian jurisprudence was sufficiently potent to be a religion as well as a disease. Even more importantly, the period during which it was more worshipped than dreaded coincided with that during which jurisprudence preoccupied Pollock. Austin was certainly not without his critics throughout this period—John Dewey, for example, argued at length that Austin's

⁴⁹ *ibid.* 17.

⁵⁰ See e.g. T. Broden, Jr., 'The Straw Man of Legal Positivism' (1958–9) 34 *Notre Dame Lawyer* 530–55 at 531–5; R. N. Moles, *Definition and Rule in Legal Theory: A Reassessment of H. L. A. Hart and the Positivist Tradition* (Oxford: Blackwell, 1987).

⁵¹ See H. L. A. Hart, 'Jhering's Heaven of Concepts and Modern Analytical Jurisprudence' (1970), in Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983), 265–77 at 271–7.

⁵² Hart, *The Concept of Law*, 18. See also H. L. A. Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 *Harv L Rev* 593–629 at 593 ('Like our own Austin . . . Holmes was sometimes clearly wrong; but, again like Austin, when this was so he was always wrong clearly. This surely is a sovereign virtue in jurisprudence.')

jurisprudence was both derivative (particularly from Hobbes) and premised on ‘a radical error concerning the mode in which sovereignty is exercised’⁵³—and even those who lauded his theory rarely did so unequivocally. The point, however, is that during the second half of the nineteenth century, Austin’s jurisprudence *was* being widely lauded. The publication of the second edition of *The Province of Jurisprudence Determined* in 1861 coincided 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.’⁵⁴ Indeed, ‘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’.⁵⁵ ‘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).⁵⁶ ‘[T]he remains which [Austin] has left, fragmentary though much of them be, are a mine of material for the future.’⁵⁷ Such assessments did not dry up during the later decades of the nineteenth century. Austin’s *Province*, T. E. Holland claimed in the first edition of *The Elements of Jurisprudence*, ‘is 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 . . . [T]hose distinctions upon which Austin . . . bestows most labour are put in so clear a light that they can hardly again be lost sight of.’⁵⁸ Critical reverence—a distinctly

⁵³ J. Dewey, ‘Austin’s Theory of Sovereignty’ (1894) 9 *Pol Sci Q* 31–52 at 34.

⁵⁴ J. Fitzjames Stephen, ‘English Jurisprudence’ (October 1861) 114 *Edinburgh Rev* 456–86 at 484.

⁵⁵ *ibid.* 466–7.

⁵⁶ J. Stuart Mill, ‘Austin on Jurisprudence’ (October 1863) 118 *Edinburgh Rev* 439–82 at 439; and cf. J. Stuart Mill, ‘Austin’s Lectures on Jurisprudence’ (1832) 2 *Tait’s Edinburgh Magazine* 343–8 at 344 (‘Mr. Austin’s work is part of the grammar of a science. As such, it is not a book for any but persons who are really anxious to learn; but to them, it is such a book as they delight in. The author’s style is a model of perspicuity: the concatenation of his propositions is free from all obscurity; and the reader will find no difficulty but that which is inseparable from the attempt to communicate precise ideas’).

⁵⁷ Mill, ‘Austin on Jurisprudence’, 480.

⁵⁸ Sir T. Erskine Holland, *The Elements of Jurisprudence*, 13th edn. (Oxford: Clarendon Press, 1924; 1st edn. pub. 1880), p. vii (preface to 1st edn.).

oxymoronic term—was, during the late nineteenth and early twentieth centuries, the predominant attitude towards Austin's project. It was an attitude that formed the backdrop, so to speak, against which Pollock developed his own thoughts on the scientific nature of law.

Certain jurists of this era were perhaps inevitably more critical than reverent when writing about Austin, and the classic line of late Victorian critique was that Austin tended to be insensitive to history.⁵⁹ Sir Henry Maine had anticipated 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.⁶⁰ 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 no shortage 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'.⁶¹ But the analysis quickly becomes critical:

the 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.⁶²

The argument that Austinian sovereignty theory generally ignored the actual history of legal systems was reiterated by other Victorian jurists, and remained popular well into the twentieth century.⁶³ Pollock was

⁵⁹ 'The ideas of Bentham and Austin attracted an enthusiastic following among liberal thinkers who favoured law reform. Those who opposed them had to find respectable counter-arguments. They concentrated on the failure of the Benthamites to give adequate consideration to historical factors.' P. Stein, *Legal Evolution: The Story of an Idea* (Cambridge: CUP, 1980), 72.

⁶⁰ H. Sumner Maine, *Ancient Law: Its Connection with the Early History of Society, and its Relation to Modern Ideas* (London: Murray, 1861), 7–8.

⁶¹ Sir H. Sumner Maine, *Lectures on the Early History of Institutions* (London: Murray, 1875), 345.

⁶² *ibid.* 359–60. For a vigorous defence of Austin against Maine's critique, see W. Markby, 'Analytical Jurisprudence' (1876) n.s. 1 *Law Magazine and Rev* 617–30.

⁶³ See e.g. F. Harrison, 'The English School of Jurisprudence' (1878) n.s. 24 *Fortnightly Rev.* 475–92, 682–703; (1879) n.s. 25 *Fortnightly Rev.* 114–30, part i, at 487 ('The analysis of sovereignty . . . contained in Austin's *Province of Jurisprudence*, is of the highest value provided that we recognize its relative character . . . [F]rom the point of view of scientific history and scientific politics, the [analysis] requires so much qualification and correction, that it ceases to be a complete account of the matter at all'); J. Bryce, 'The Nature of Sovereignty', in his *Studies in History and Jurisprudence*, 2 vols. (Oxford: Clarendon Press, 1901), ii, 49–111 at 89–97, and 'The Methods of Legal Science', in *ibid.* ii, 172–208 at 180–4;

among those who elaborated this argument. The critique of Austin to be found in the *Early History of Institutions* was, he proclaimed, 'the very foundation of sound judgement'.⁶⁴ Thanks to Maine, it had become clear that 'the analytical school . . . could not lead to any rational explanation of an actual historical system'.⁶⁵ The problem, for Pollock, was not just that Austin 'absolutely ignored history';⁶⁶ it was also that he failed to appreciate that a system of public international law is genuinely law, 'regard[ed] legal science as a thing apart from legal practice', and was a 'thoroughly amateurish' lawyer, being 'seldom well informed or accurate in the details of either English or Roman law'.⁶⁷ Austin's conception of law as command demanded the conclusion that statutes which are obsolete but have never been repealed must be treated as binding on citizens.⁶⁸ It also necessitated the conclusion that custom can never be law—had Austin explored Maine's Indian village, indeed, he would have determined that no laws existed there.⁶⁹ '[I]f one is to hold fast to the conception of law as command, and follow it into its consequences, the last result is this: that in British India, or in any other part of the world where a dominant race is strong enough to govern, but not strong enough to abolish institutions it found existing, there is so far as concerns those institutions no real positive law at all'.⁷⁰

To some degree, this distaste for Austin's jurisprudence was part and parcel of a broader critique of the analytical tradition.⁷¹ 'Just now',

C. Kemp Allen, *Legal Duties and Other Essays in Jurisprudence* (Oxford: Clarendon Press, 1931), 141–2 ('Neglect of history . . . produced in England a theory of law which is chiefly associated with the names of Hobbes and Austin . . . It may conveniently be called the imperative theory of law and sovereignty . . . It is still much canvassed in England, though scarcely anywhere else; but there is at least general agreement that its exclusion of historical considerations from the province of jurisprudence led it into the radical fallacy of regarding all systems of law as being typified by Western European monarchical states'); and A. B. Schwarz, 'John Austin and the German Jurisprudence of His Time' (1934–5) 1 *Politica* 178–99 at 187–9.

⁶⁴ Sir F. Pollock, 'Sir Henry Maine as a Jurist' (July 1893) 178 *Edinburgh Rev* 100–21 at 120.

⁶⁵ F. Pollock, 'Sir Henry Maine and His Work' (February 1889) 55 *Contemporary Review* 265–76 at 271.

⁶⁶ F. Pollock, *An Introduction to the History of the Science of Politics*, 2nd edn. (London: Macmillan, 1911), 111; and see also Pollock, *The Expansion of the Common Law* (London: Stevens & Sons, 1904), 4.

⁶⁷ *The Expansion of the Common Law*, 119–20; *Oxford Lectures and Other Discourses*, 35; De Wolfe, *Pollock–Holmes Letters*, i, 94; Frederick Pollock, *Essays in the Law* (London: Macmillan, 1922), 158 n. 2.

⁶⁸ F. Pollock, 'Law and Command' (1872) n.s. 1 *Law Magazine and Rev* 189–205. Pollock would later declare the tone of this article 'immature', though he never departed from its arguments: see (1895) 11 *LQR* 105.

⁶⁹ See Pollock, 'Law and Command', 192–5; and cf. H. Sumner Maine, *Village-Communities in the East and West. Six Lectures Delivered at Oxford* (London: Murray, 1871), 29–62, 101–28.

⁷⁰ Pollock, 'Law and Command', 196.
⁷¹ See e.g. Pollock, *ibid.* 204 (concluding from his critique of Austin that 'the analytical jurists have not succeeded in giving us a sufficient or final conception of the nature of law'); *Oxford Lectures and Other Discourses*, 11, 98.

Pollock wrote to Holmes in 1894, 'I am involved in a course of lectures on "Jurisprudence"'—lectures which would eventually comprise part of Pollock's *A First Book of Jurisprudence*—'in which I am deliberately burning the gods of the so-called English school'.⁷² Although Pollock distanced himself from this school, however, he was very much inspired by Hobbes and an ambivalent admirer of Bentham, whom he considered to have pioneered the analytical approach.⁷³ The fact is that he reserved for Austin an especial vehemence; indeed, leaving aside the occasional begrudging compliment,⁷⁴ Pollock could rarely resist denigrating him. 'I love him not', he wrote to Holmes; in print, he was willing to declare 'Austin's manner . . . so repulsive . . . that it is hard to be quite just to his matter'.⁷⁵ When, in April 1893, a commentator in the *Juridical Review* concluded that there is a need for more careful study of Austinian jurisprudence, Pollock's response was perfect in its curttness: '[i]t appears to us that what we have to do at present, if we are to have any adequate theory of law, is to forget it as soon as possible'.⁷⁶ 'Last night I greatly missed you at the Law Club,' he wrote to Bryce two years later, 'for Anson read a paper which amounted to a direct challenge to me to say what

⁷² Pollock to Holmes, 11 May 1894, in De Wolfe, *Pollock–Holmes Letters*, i, 51–2.

⁷³ See Pollock, 'Law and Command', 198 ('Hobbes' view as to the nature of law, though very near to that of Bentham and Austin, is in truth to be distinguished from it. For the sovereign power, as conceived by Hobbes, is far more than a political superior'); F. Pollock, *A First Book of Jurisprudence for Students of the Common Law* (London: Macmillan, 1896), p. vii ('[T]he philosophy of the English or "analytical" school is not mine; nevertheless I have learned much from Hobbes . . . It may be that I love Hobbes a little too well to be perfectly just to his successors, who, to my thinking, have often got more praise than they deserved for repeating Hobbes's ideas in clumsy and really less exact words'). Pollock held the political philosophy of Jean Bodin in similarly high regard: see e.g. *A First Book of Jurisprudence*, 248–9; *An Introduction to the History of the Science of Politics*, 53–6. Peculiarly, he is able to write of Bentham that his work displays 'trenchant clearness' (*Oxford Lectures and Other Discourses*, 23) and also that '[n]o man ever laboured more assiduously . . . to make the outward form of his thoughts repulsive or ridiculous to the public' (*An Introduction to the History of the Science of Politics*, 102). More often than not, his assessments of Bentham tend towards the positive. Although Bentham, like other English utilitarians, showed himself to be ignorant of history, he modernised English jurisprudence and pioneered the analytical form (*Oxford Lectures and Other Discourses*, 29, 26). 'Bentham has', Pollock believed, 'a decided and confident theory as to the purpose for which governments exist' and is almost entirely to be credited for '[t]he change which has come over the spirit and methods of law-making in the last few generations' (*An Introduction to the History of the Science of Politics*, 106, 108).

⁷⁴ Which, compiled, appear to amount to the observation that Austin was 'an acute dialectician' who 'did useful work in his own country and generation'. *Essays in the Law*, 158 n. 2; *An Introduction to the History of the Science of Politics*, 110. Elsewhere, he observes that the dialectic, while acute, was 'extremely narrow and ill-informed'. F. Pollock, review of H. J. Laski, *The Foundations of Sovereignty* (1922) 38 *LQR* 242–3 at 242.

⁷⁵ Pollock to Holmes, 20 September 1919, in De Wolfe, *Pollock–Holmes Letters*, ii, 26; *An Introduction to the History of the Science of Politics*, 109 n. 2.

⁷⁶ (1893) 9 *LQR* 200; and cf. M. J. Farrelly, 'The New Italian School of Private International Law' (1893) 5 *Juridical Review* 105–24, 197–211 at 122–4.

I really thought of Austin; and so I did—to wit, that when a man goes about to make a philosophy of law not knowing any law and being neither unable nor unwilling to understand any philosophy, the result is naturally pretty bad'.⁷⁷

This was not simply a case of character assassination. With Austin, legal science took what Pollock considered to be a wrong turn. To understand how this occurred, he claimed, we must first of all revisit Hobbes. In essence, Hobbes laid down two principles: 'the principle of sovereignty' and 'the theory of the origin of civil society in contract'.⁷⁸ Hobbes's mistake was to try too hard 'to fortify the doctrine of sovereignty and to leave no excuse for disputing the authority of the State', one consequence of which is that he provided an elaborate account of the construction of the State by reference to an imaginary original covenant between its members.⁷⁹ In fact, Pollock argued, Hobbes had no need to employ his imagination thus: firm support for contractarian political thought could be traced back to Ancient Greece via the Reformation.⁸⁰ 'Hobbes . . . supported a plain and sound doctrine by needless and untenable fiction, and for the purpose of deducing consequences from it which it would not bear.'⁸¹ The correct way for political philosophy to proceed after Hobbes was to refine the doctrine of sovereignty, to learn from Hobbes's mistakes. Austin, however, reinforced Hobbes's mistakes: whereas he ought to have made 'the doctrine of sovereignty the starting-point of fresh criticism and construction', he continued with Hobbes's wrongheaded endeavour 'to swallow up policy, and to a considerable extent even morality, in positive law'.⁸² In short, he accentuated 'the wrong part of Hobbes's work'.⁸³

After Austin, Pollock believed, English legal science continued to proceed down the wrong path. Principally to blame was Thomas Erskine Holland. Pollock admired Holland's jurisprudence much more than he did Austin's, not least because Holland rendered so many of Austin's arguments comprehensible.⁸⁴ Ultimately, however, Holland belonged to a jurisprudential tradition to which Pollock professed considerable aversion. Occasionally, Holland seemed to recognise the right direction—to appreciate, that is, that a satisfactory theory of sovereignty must embrace

⁷⁷ Frederick Pollock to James Bryce, 3 March 1895, in Bryce Papers, Department of Special Collections and Western Manuscripts (Modern Papers), Bodleian, MSS. Bryce 120, ff.44–5. The letter continues: '[a] lively discussion ensued, in which I thought the only words that showed any adequate grasp of the subject as a whole were Raleigh's. Those who are in the gall of so-called "ana-lysis" were in a majority. Dicey, rather to my surprise, is still shocked when you say that Austin was no lawyer. Holland did not seem to mind' *ibid.* (Raleigh is Sir Thomas Raleigh, Reader in English Law at Oxford, 1884–96.)

⁷⁸ *An Introduction to the History of the Science of Politics*, 59. ⁷⁹ *ibid.* 59–60.

⁸⁰ See *ibid.* 60, 30–1. ⁸¹ *ibid.* 60. ⁸² *ibid.* 67–8.

⁸³ *ibid.* 67. See also (1915) 31 *LQR* 375.

⁸⁴ See e.g. *Oxford Lectures and Other Discourses*, 98; *The Expansion of the Common Law*, 13.

the history and comparison of legal phenomena—but he never reoriented accordingly.⁸⁵ Pollock would have to do the work for himself. Both ‘the historical and the analytical manner of considering legal phenomena . . . are in truth useful and necessary’, he observed in 1882, ‘and either of them alone is imperfect’.⁸⁶ ‘There is a want of effectual contact and influence’ between the two approaches, he remarked in the same year, and so ‘[o]ur most useful ambition . . . will be to supply this want’. ‘[I]t will be my endeavour’, he declared, ‘to work in this direction’.⁸⁷

And so we have acquired our first proper glimpse of Pollock’s own jurisprudential project. Pollock wanted to discredit what he considered the least appealing elements of the analytical tradition—Austin’s contributions to it, in essence—and integrate what remained with comparative jurisprudence. This observation, however, raises at least three other questions. How was Pollock inspired by the analytical tradition? Did he successfully connect—and, if so, how did he connect—the analytical and comparative perspectives? And, most importantly of all for our purposes, in what way could Pollock’s effort to forge this connection be said to amount to a legal science? Addressing these last two questions will, in due course, push us towards a broader line of inquiry concerning what might tersely be described as the limitations of comparative legal science as a jurisprudential project. But that line of inquiry is still some way in the distance. First of all, we need to consider the questions that we have just posed.

The Utility of Analysis

According to Pollock, ‘jurisprudence or legal science’—he treated the terms as synonymous—is best understood as ‘a branch of politics’.⁸⁸ Jurisprudence itself, furthermore, splits into a variety of branches—historical and comparative jurisprudence, analytical jurisprudence, ethical jurisprudence (or natural law), and international jurisprudence, among others.⁸⁹ Pollock had something to say about all the branches that he identified, although what he had to say was not always enlightening. On the matter of what he called international jurisprudence, for example, he seemed thoroughly muddled. ‘International Law . . . is a true branch of jurisprudence,’ he proclaimed in 1882, ‘notwithstanding all that may be said about its want of sovereign power and a tribunal. You may define

⁸⁵ See Frederick Pollock, *Essays in Jurisprudence and Ethics* (London: Macmillan, 1882), 3–6.

⁸⁷ *Oxford Lectures and Other Discourses*, 35–6.

⁸⁶ *ibid.* p. viii.

⁸⁸ *ibid.* 4; *Essays in Jurisprudence and Ethics*, 27; *An Introduction to the History of the Science of Politics*, 32.

⁸⁹ See *Oxford Lectures and Other Discourses*, 19–20.

it as “positive international morality” not having the nature of law, but if you do the facts are against you.’⁹⁰ Some sixteen years later, by contrast, he was of the opinion that the rules of international law ‘have not fully acquired the character of law, but are on the way to become law’.⁹¹

Whereas Pollock’s position on the question of whether international law is really law was unsettled, his estimation of natural law, although on first impression equally ambiguous, was subtler and may profitably be explored before we move on to the jurisprudential themes which occupied him at greater length. Pollock believed that natural law—that body of ‘rules of conduct which the light of reason . . . can discover as generally applicable to man as a rational being’⁹²—has suffered at the hands of English lawyers. ‘[S]ome English writers, half a century behind their time, still maintain the obsolete Benthamite aversion to its name’.⁹³ Yet although ‘Bentham and his followers suppose[d] . . . that the Law of Nature meant nothing but individual fancy’, it could be argued, Pollock believed, that ‘the doctrine of the English utilitarians’ was ‘the most dogmatic of all systems of natural law’.⁹⁴ However systematised, natural law philosophy met with Pollock’s reserve: ‘[s]o far as my acquaintance with it goes, it appears to me to lump together in a cumbrous and over-ambitious manner a good many topics in the theory of government, politics, and legislation, which are better treated separately’.⁹⁵ Although he was wary of natural law devised as a distinctive philosophy, however, he did not renounce natural law as a phenomenon: about ethical jurisprudence he was cool, about the law of nature he was enthusiastic. ‘The Common Law . . . has largely enriched and is still enriching itself by associating the Law of Nature with its authority’; indeed, ‘in the course of the seventeenth century . . . the ideas of reasonableness and natural justice, which . . . belong to the Law of Nature[,] . . . became the vehicle

⁹⁰ F. Pollock, ‘The Methods of Jurisprudence’ (1882) 8 *Law Magazine and Rev. (4th Ser.)* 25–53 at 38.

⁹¹ *A First Book of Jurisprudence*, 13; and cf. D. H. N. Johnson, ‘The English Tradition in International Law’ (1962) 11 *ICLQ* 416–45 at 421–22, where Pollock’s contribution to the jurisprudence of international law is commended—though it is also noted that his critique of ‘Austin’s contention that, because they did not stem from a sovereign authority, the rules of international law were not legal rules at all’ was ‘exaggerated’ (at 422).

⁹² *Essays in the Law*, 86.

⁹³ *The Expansion of the Common Law*, 130.

⁹⁴ *Essays in the Law*, 62, 23; cf. also 47 (‘If Bentham had known what the Law of Nature was really like in the Middle Ages, he would have had to speak of it with more respect’) and 65 (‘If any one ever did lay down a dogmatic and immutable code of *Naturrecht*, it was not the schoolmen, but the utilitarians’). Unsurprisingly, Pollock considered Austin to be among those to blame for this dogmatism: see (1894) 10 *LQR* 100. In describing the Benthamite jurisprudential tradition as a natural law tradition, John Dewey points out, Pollock ‘fails to note that the ethical criterion of utilitarianism is prospective, future, based on foreseeable consequences, while that of other systems of natural law had been found in some antecedent state of affairs’. John Dewey, review of F. Pollock, *Essays in the Law* (1923) 23 *Columbia L Rev* 316–18 at 317–18.

⁹⁵ *Oxford Lectures and Other Discourses*, 15.

for spreading the distinctive principles and methods of the Common Law in lands where it did not and could not formally claim any jurisdiction.⁹⁶ Note the link that Pollock makes between the law of nature and reasonableness. In so far as he is attracted to natural law, it is because he regards the law of nature and reason as essentially synonymous.⁹⁷ Common law notions of ‘reason’ and ‘reasonable’—as St German had discerned in the sixteenth century—are simply ‘ideas which the civilian or canonist puts under the head of “Law of Nature.” Thus natural law may fairly claim, in principle though not by name, the reasonable man of English and American law’.⁹⁸

While Pollock paid tribute to natural law, to have described himself as a natural lawyer would have meant nailing his colours to a particular jurisprudential mast; and for someone inherently suspicious of grand visions and organising principles, this was probably too bold a proclamation to make.⁹⁹ To commit to a definite perspective—to declare oneself a particular type of ‘ist’ or subscriber to some form of ‘ism’—simply was not Pollock’s style. His writings are often distinctly pragmatic, for example, praising ‘practical instinct’ as ‘the spirit of the law and the true lawyer’, and emphasising experience as preferable to idealism and logic.¹⁰⁰ Yet he would have balked at being labelled a pragmatist. Identification with credos was, for Pollock, unsubtle and intellectually suspicious.

This observation might be used to explain his refusal to commit to a specific jurisprudential perspective. But in fact this refusal warrants a deeper explanation. Pollock, whether because of a lack of confidence or because he genuinely believed that there is something to be salvaged from even the most wayward theories, seemed unwilling to reject any jurisprudential perspective for good. Every view, it seems, had, in his eyes, the potential to bear fruit. Thus it is that he set himself up in what, at first glance, seems to be the unlikely role of conciliator in the jurisprudence family. Of course there are feuds and factions, he appreciated, but no member of the family is worthless. Indeed, ‘the several methods of jurisprudence . . . need not and should not be positively hostile to one another’—quite a claim from a man who made a hobby out of vilifying Austin—since ‘none of them can really subsist alone’.¹⁰¹ Pollock was keen to build bridges and urge breadth of perspective: so far as the advancement of jurisprudence was concerned, he

⁹⁶ *The Expansion of the Common Law*, 132; *Essays in the Law*, 62–3.

⁹⁷ See *Essays in the Law*, 31, 78. ⁹⁸ *ibid.* 69, and see also 17, 57–8.

⁹⁹ A year before Pollock’s death, his wavering attitude towards natural law doctrine in particular was criticised by Radbruch in the *LQR*: see Gustav Radbruch, ‘Anglo-American Jurisprudence through Continental Eyes’ (1936) 52 *LQR* 530–45 at 540.

¹⁰⁰ *A First Book of Jurisprudence*, 71; F. Pollock, *The Genius of the Common Law* (New York: Columbia UP, 1912), 113; also *Essays in the Law*, 258–9; *An Introduction to the History of the Science of Politics*, p. viii.

¹⁰¹ Pollock, ‘The Methods of Jurisprudence’, 44, 40.

maintained, only good could come of such an initiative. Yet the quest for a catholic approach seemed, with Pollock, to lead not to greater jurisprudential ambition or insight but to a dilution of ideas. Austin may have been too unsubtle for Pollock, but Pollock's own effort to supply what Austin had missed resulted—and here we are simply anticipating a line of critique which will unfold in due course—in a jurisprudential project marred by excessive guardedness, inordinate embellishment, a lack of critical focus, and a tendency to fall between two stools.

Analytical and comparative jurisprudence—the two stools in question—Pollock categorised together as perspectives on positive law.¹⁰² While he preferred comparative jurisprudence, he recognised the utility of and was often willing to adopt an analytical perspective—‘[w]e analyse’, after all, ‘to supply our want of clear terms and correct instinct’.¹⁰³ Certainly one chapter of *A First Book of Jurisprudence* is devoted to showing how the closely related notions of control, enjoyment, ownership, possession, and title are analytically distinct;¹⁰⁴ indeed, even though Pollock cautioned against turning jurisprudence into taxonomy,¹⁰⁵ he conceded that his approach to these notions is ‘analytical’.¹⁰⁶ Yet his taste for analytical distinction is revealed not, in the main, in his general writings on jurisprudence but in his work on possession. In Parts I and II of *An Essay on Possession in the Common Law*, Pollock set out to clarify the legal concept of possession through analysis.¹⁰⁷ Possession is not only distinguishable from cognate concepts (such as enjoyment, control, and title), but in itself permits of distinctions: for example, it is possible to differentiate a right *to* possession and a right *of* possession.¹⁰⁸ Behind the concept of possession, furthermore, there lie various distinct ‘remedies for wrongs to possessory rights’ (trespass, conversion, trover, larceny).¹⁰⁹ Most importantly of all, there is an analytical exercise to be undertaken for the purpose of distinguishing possession as a matter of fact and possession as a matter of right.¹¹⁰ And just as the concept of possession demands analysis if it is to be grasped, so too does the notion of relinquishing possession, which can be effected in a variety of distinct ways (such as delivery and abandonment).¹¹¹

To Pollock's eyes, then, there is something to be gained from analysing possession in a manner akin to that which a philosopher might adopt.

¹⁰² Pollock, ‘The Methods of Jurisprudence’, 40.

¹⁰³ *ibid.* 30.

¹⁰⁴ See *A First Book of Jurisprudence*, 160–78.

¹⁰⁵ See *ibid.* 80, 89.

¹⁰⁶ *ibid.* 176.

¹⁰⁷ The book is the composite, but not the joint, work of Pollock and R. S. Wright: see *An Essay on Possession in the Common Law* (Oxford: Clarendon Press, 1888). Wright wrote Part III of the book. On Pollock's and Wright's collaboration over this project, see C. H. S. Fifoot, *Judge and Jurist in the Reign of Victoria* (London: Stevens and Sons, 1959), 91–2.

¹⁰⁸ *An Essay on Possession in the Common Law*, 2.

¹⁰⁹ *ibid.* 5.

¹¹⁰ See *ibid.* 10–20.

¹¹¹ See *ibid.* 43–4.

‘Jurisprudence’, generally speaking, ‘must partake of the nature of Philosophy’.¹¹² But we must be careful not to overvalue philosophy. It is all fine and good, for example, to produce fine-grained philosophical analyses of the concept of possession, but ‘the practising lawyer’s instinct’ will often serve us as well as, if not better than, any philosophy.¹¹³ The insightful practitioner is, as compared with the philosopher, less likely to lose sight of legal objectives when pursuing and formulating analytical distinctions; and it is important, Pollock insisted, to keep in mind that the primary purpose of the exercise is to make sense of the law rather than to advance the philosophy of possession. Law, in short, must come first: ‘the comparative worth of the philosophical or semi-philosophical theories of Possession cannot be weighed to much purpose until one has mastered in some detail the actual contents of the law’.¹¹⁴ ‘General Jurisprudence’ may well be analytical jurisprudence: the analytical impulse may lead us to ‘attempt a general definition of such ideas as Duty, Intent, Negligence, Ownership, Possession, or (boldest ambition of all) of Law itself’.¹¹⁵ But General Jurisprudence need not be—indeed, preferably, will not be—exclusively analytical. If our jurisprudential inquiries are to be firmly grounded in, and to provide valuable insights into the composition and functioning of, real legal systems, we would do well to treat the techniques of the analytical philosopher only as supplemental to some broader perspective.

The Centrality of Comparison

While analytical perspectives must not be ignored, Pollock believed, equally they must never be regarded as anything other than ancillary to the methods of historical and comparative jurisprudence. History and comparison, although distinguishable as forms of jurisprudential inquiry, in fact go hand in hand: the primary lesson to be learned from Maine’s *Ancient Law* was that ‘intimate alliance between comparative and historical research is not only natural and desirable, but necessary for either branch of work being efficiently done’.¹¹⁶ Until 1869, when Maine was appointed as the first Professor of Historical and Comparative Jurisprudence at Oxford, the comparative jurisprudential project had ‘suffered . . . a somewhat cold and unintelligent reception from . . . the surviving high priests of a moribund utilitarian orthodoxy’.¹¹⁷ In his

¹¹² *Oxford Lectures and Other Discourses*, 63.

¹¹³ *An Essay on Possession in the Common Law*, 6.

¹¹⁴ *ibid.* 4.

¹¹⁵ Pollock, ‘The Methods of Jurisprudence’, 33.

¹¹⁶ *Essays in the Law*, 4. For Pollock’s acknowledgement that the historical and the comparative exercises can be treated as jurisprudentially distinct, see ‘The Methods of Jurisprudence’, 33.

¹¹⁷ *Essays in the Law*, 25.

Oxford farewell lecture delivered in January 1903, Pollock expressed confidence that the project had weathered the storm and was flourishing. The twentieth century, it seemed, would belong to the comparatists. '[O]ur master Maine', Pollock concluded, 'taught us to understand what it is that we inherit'.

The work of the present generation in the field of comparative jurisprudence is mostly work of detail . . . But there is no rest for knowledge, and for our children, if not for us, there will again be a time of large adventure. They will go forth to conquests, perhaps armed with the weapons we have forged for them, perhaps with others of such fashion and power as we cannot even guess . . . [T]he victory will be to truth; neither will our sons forget in their triumphs that we wrought, as best we might, to prepare the way for them.¹¹⁸

In his addresses, Pollock never tired of concluding with a crescendo. So wedded was he to this style, indeed, that there is always good reason to assume that the last few pages of a Pollock lecture will be strong on hyperbole, and will therefore play well into the hands of the interpreter who wishes to present him as a jurist prone to exaggeration and averse to subtlety. The passage quoted above—for all that it conforms to the style just described, and therefore ought to be treated with caution—contains two noteworthy observations. First, it points to the future: we can be confident, according to Pollock, that comparative jurists of the twentieth century will do great work. Secondly, the passage alludes to past achievements. Maine's heirs—Pollock being the most conspicuous of this group—had nurtured something powerful upon which later generations could build. Of course, Maine's own comparative-jurisprudential legacy is well known.¹¹⁹ But what did Pollock bequeath? After twenty years as the second Professor of Historical and Comparative Jurisprudence at Oxford, had he produced anything to compare with *Ancient Law*, or with Maine's lectures on village communities and on the early history of institutions, or even—to switch from Maine to Maine's real jurisprudential successor—with Vinogradoff's work on villeinage in early medieval England?

The momentum of the previous paragraph clearly invites a negative answer. In fact, this is the only conceivable answer. George Santayana observed that comparison is often the tactic of those who cannot reach the heart of a matter.¹²⁰ To read Pollock on comparative jurisprudence is to see

¹¹⁸ *Essays in the Law*, 29.

¹¹⁹ For a good summary of just what Maine bequeathed, see Collini *et al.*, *That Noble Science of Politics*, 210–11, 252–3.

¹²⁰ 'Comparison is the expedient of those who cannot reach the heart of the things compared'. G. Santayana, *Character and Opinion in the United States: With Reminiscences of William James and Josiah Royce and Academic Life in America* (New York: Scribner, 1924; 1st edn. pub. 1920), 166. Cf. F. W. Maitland, 'Why the History of English Law is not Written' (1888), in *The Collected Papers of Frederic William Maitland*, H. A. L. Fisher (ed.), 3 vols. (Cambridge: CUP, 1911), i, 480–97 at 489.

this observation come alive. While ‘comparative study discloses a certain amount of groundwork and typical conceptions which are common to all legal systems’, it must be remembered that ‘[s]imilarity of laws . . . is only a guide to inquiry; it is not conclusive evidence of dependence or of a common origin’.¹²¹ If comparative investigation is to prove valuable, then, it must be undertaken with sensitivity and circumspection. Pollock approaches the matter of comparison with such delicacy, however, that the investigative part of the project never gets off the ground. Most of what he has to say about the project can be found in the two lectures which mark the beginning and the end of his professorship at Oxford. His inaugural lecture of 1883 contains numerous assertions concerning how the English can learn much from comparing their legal arrangements with those to be found in the United States, India, Scotland, in Roman law, and even with those of the minor jurisdictions of the British Isles (‘[h]ere are opportunities of fruitful comparison . . . going to waste at our own door’).¹²² Yet only once in this lecture—when demonstrating the relevance of the Roman use of oaths to the treatment of promises in English contract law¹²³—does Pollock try to show how comparative inquiry can prove jurisprudentially valuable. For the most part, his discussion takes the hortatory form: not ‘this is what comparative inquiry achieves’, but ‘just imagine what comparative inquiry might achieve were we to engage in it’. As to the question of whether the comparative approach really will deliver the goods, Pollock’s answer is basically that we should take his, or better still take Maine’s, word for it.¹²⁴

Leaving aside Pollock’s dreams about the revenue that might be raised from comparative inquiries, his general paean to historical and comparative jurisprudence becomes yet more disappointing when he purports to promote some distinct methodology. For Pollock, there are such distinct entities as ‘[t]he historical method’ and ‘the modern comparative method’.¹²⁵ John Dewey professed to uncertainty over what Pollock meant when he referred to these methods, adding that Pollock’s understanding of them, in so far as it could be ascertained, seemed incorrect.¹²⁶ In fact,

¹²¹ *Oxford Lectures and Other Discourses*, 10, 164; cf. also *The Genius of the Common Law*, 116–17; and Sir W. Holdsworth, *Some Makers of English Law: The Tagore Lectures, 1937–38* (Cambridge: CUP, 1938), 284.

¹²² *Oxford Lectures and Other Discourses*, 50. For the various suggestions for comparison, see *Oxford Lectures and Other Discourses*, 47–58.

¹²³ *ibid.* 58–9.

¹²⁴ *ibid.* 62 (‘To pursue this subject . . . would take us I know not where, certainly as far as India. Therefore I shall be your suitor that these bare indications may suffice, and I will make an end by claiming as good company and alliance for the studies assigned to this Chair as at the beginning I did for my own person’).

¹²⁵ *Oxford Lectures and Other Discourses*, 41; *Essays in the Law*, 23 n. 1.

¹²⁶ Dewey, review of Pollock, *Essays in the Law*, 317 (‘Pollock appears to share the notion that the historical method, and the possibility of employing the comparative method in law, implies the notion of stages of evolution through which societies pass, some

Pollock is unequivocal about what ‘the historical method’ in particular should be taken to mean: ‘the historical method is nothing else than the doctrine of evolution applied to human societies and institutions’.¹²⁷ Certainly as applied to Maine, this depiction of the method has some resonance to it: it was Maine, after all, who purported to discern in ‘progressive societies’ a ‘gradual dissolution of family dependency’, and, in the place of such dependency, ‘the growth of obligation’—the evolution ‘from status to contract’, to use the classic Mainian epigram.¹²⁸ Pollock had a problem not with summarising method, however, but with developing it. ‘I have used by preference the historical method’, he declared in the Preface to his *Essays in Jurisprudence and Ethics*.¹²⁹ Neither throughout that work nor any of his other works does it become clear just how he used this method. The only thing that is ever clear is that he was besotted by it. ‘The historical method’, he observed in 1883,

is the newest and most powerful instrument, not only of the moral and political sciences, but of a great part of the natural sciences, and its range is daily increasing . . . That such a method should not be fruitful when applied to jurisprudence . . . would be a thing contrary to all rational expectation . . . [A]ready we have ample fruit, and ample promise of more. Enough, however, of these things in general. If any man is wilfully blind, let us leave him to his blindness. It will not be convenient for us, I think, to consider, not what may be done by historical and comparative jurisprudence in the abstract, but what we as Englishmen, here and now, have special opportunities for making of it . . .¹³⁰

Note the absence of specifics from this passage. Only the ‘wilfully blind’, it seems, would doubt its correctness, so why bother to elaborate? Pollock’s sole concession to elaboration is to sandwich the passage between references to some of those he credited with advancing the historical method—Savigny, Burke, Holmes, Stubbs, James Fitzjames Stephen, and the pioneer of the method, Montesquieu.¹³¹ The nature and details of what unites these men are never made clear. Perhaps this is only to be expected, for Pollock insisted that his goal was not to assess what had been achieved

of course being more advanced than others. I think the tendency of present competent specialists is to hold that the doctrine of parallel stages is but a refined survival of the older tendency, rejected of course by Pollock, to draw comparisons without reference to the past histories of the things compared’).

¹²⁷ *Oxford Lectures and Other Discourses*, 41. For what is essentially an elaboration of this statement—an elaboration of the type that Pollock signally did not provide—see E. Barker, *Political Thought in England from Herbert Spencer to the Present Day* (London: Williams and Norgate, 1915), 161–83.

¹²⁸ Maine, *Ancient Law*, 168–70. It would be wrong, however, to assume that Maine’s *Ancient Law* (1861) was specifically indebted to Darwin’s *Origin of Species* (1859). The manuscript for the former text appears to have been completed before the publication of the latter: see Stein, *Legal Evolution*, 88 n. 24, 100.

¹²⁹ *Essays in Jurisprudence and Ethics*, p. viii.

¹³⁰ *Oxford Lectures and Other Discourses*, 41–3.

¹³¹ See *ibid.* 41–6.

in the name of the historical method but to consider the opportunities for putting it to still greater use. But the point to be stressed is that Pollock himself never put the method to greater use.

The fundamental problem with 'that great vogue for the Comparative and Historical Method', Collini, Winch, and Burrow have observed, was that 'there was no single method, nor were the various fashions loosely grouped under this label always as novel as their proponents liked to claim; but what helped to generate an exaggerated sense of a coherent approach was a common contrast with the method of deductive Utilitarianism, supposedly, though never actually, dominant in the previous generation'.¹³² Pollock corroborates this assessment, keen as he was both to exalt 'the method' and to emphasise its superiority to the jurisprudential tradition of Bentham and Austin. Forty years after the occasion of his inaugural lecture, he was, after a fashion, still toeing the same line: 'the application of methodical historical criticism (from whatever school derived) to commonly accepted statements has exploded one baseless legend after another to the confusion of partisan writers and the relief of honest students'.¹³³ By this point in time, however, the jurisprudential landscape had changed. '[N]ot without cause', Pollock had claimed in 1918, the principal lessons of Maine's historical-jurisprudential project were being approached with suspicion.¹³⁴ Although Maine's achievements as a jurist were beyond doubt, this did not necessarily make him a good historian; indeed, as early as 1901, Maitland had cautioned Pollock about treating him as such.¹³⁵

Moreover, the inheritors of Maine's legacy could no longer be optimistic about the twentieth century belonging to them. 'The stubborn remnant' of the historical and comparative school, Pollock remarked gloomily at the end of the First World War, 'may console itself, if it can, with the reflection that the newer teaching now in vogue may prove not much more adequate to cope with the problems of a world which, for better or worse, will be transformed when it stands clear of the present confusion'.¹³⁶ Five years after the war, however, Pollock, although still romanticising the glorious yesteryears of comparative jurisprudence, seemed more eager to discredit than to commend the revival of the historical method. When Roscoe

¹³² Collini *et al.*, *The Noble Science*, 145.

¹³³ F. Pollock, 'A Plea for Historical Interpretation' (1923) 39 *LQR* 163–9 at 168.

¹³⁴ Sir F. Pollock, 'Introduction', J. Henry Wigmore *et al.*, in *The Progress of Continental Law in the Nineteenth Century* (London: Murray, 1918), pp. xli–xlix at xlix.

¹³⁵ 'You spoke of Maine. 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 too much to a memory that played him tricks and rarely looked back at a book that he had once read'. F. W. Maitland to Frederick Pollock, 21 January 1901, in *The Letters of Frederic William Maitland*, C. H. S. Fifoot (ed.) (London: Selden Society, 1965), 222. For Maitland's general reservations about historical jurisprudence, see C. H. S. Fifoot, *Frederic William Maitland: A Life* (Cambridge, Mass.: Harvard UP, 1971), 143.

¹³⁶ Pollock, 'Introduction', p. xlix.

Pound, in his *Interpretations of Legal History*, emphasised with notable passion the achievements of ‘the historical school’—its having ‘laid the foundations of a sound comparative legal history in place of the brilliant superficiality of the eighteenth-century universal legal history’, ‘its unification of jurisprudence and politics’, its having ‘led to the idea of the legal order as part of a wider social control from which it cannot be dissociated’, its having ‘prepared the way for the functional attitude of the legal science of today’¹³⁷—Pollock produced a snooty, quibbling response.

My own memory, fallible certainly, but founded on half a century’s observation, is that any domination of the historical school in English law covered not the whole of the nineteenth century but only the last quarter of it or at most the last thirty years . . . So, when I am confronted with Professor Pound’s unqualified assertion that a historical-metaphysical doctrine ‘was dominant in the science of law throughout the century,’ I feel tempted to ask which one of us is standing on his head.¹³⁸

Never mind that Pound was, as it were, on Pollock’s side, eager to accord the historical school its place in the jurisprudential pantheon. Rather than credit Pound for his effort, it was better to berate him for ‘not looking in quite the right places’¹³⁹ and giving the school more prominence than it deserved. Shooting at allies would, in due course, become a part of Pound’s *modus operandi* also, although that story is not relevant here.¹⁴⁰ But what is relevant is the question of why Pollock should have reacted thus. Although most of his criticisms of Pound concern footling points, the overall tenor of his attack seems to be that he disliked Pound’s insistence—and it is certainly correct to claim that Pound did insist¹⁴¹—on ascribing method to the historical method. ‘Professor Pound . . . saddles the historical school with excessive insistence . . . on the fulfilment of individual will or intention as a motive of legal decision’.¹⁴² Methods, in Pollock’s eyes, ought ultimately to be treated like all grand schemes and systems—with suspicion. The historical method should be valued not as a method, he appeared to believe, but as *bricolage*—as an exercise in rummaging through the past or through other legal systems to find new ways of exhibiting the genius of the common law.¹⁴³

Pollock’s claim that the analytical and comparative perspectives could survive symbiotically turns out to be hollow. The point is not that the two

¹³⁷ R. Pound, *Interpretations of Legal History* (Cambridge: CUP, 1923), 68.

¹³⁸ Pollock, ‘A Plea for Historical Interpretation’, 164. ¹³⁹ *ibid.* 169.

¹⁴⁰ See R. Pound, ‘The Call for a Realist Jurisprudence’ (1931) 44 *Harvard L Rev* 697–711; and, for the story in detail, see N. E. H. Hull, *Roscoe Pound and Karl Llewellyn: Searching for an American Jurisprudence* (Chicago: University of Chicago Press, 1997).

¹⁴¹ See Pound, *Interpretations of Legal History*, 12–18.

¹⁴² Pollock, ‘A Plea for Historical Interpretation’, 165.

¹⁴³ See *The Genius of the Common Law*, 110–11.

perspectives could never feed off one another. No doubt they could: even Austin devised a conceptual apparatus which allows for the historical evolution of law from custom through judicial legislation—a view more readily associated with the historical and comparative school than with analytical jurisprudence.¹⁴⁴ But Pollock himself, for all his talk about how the connection between the analytical and the comparative could bear fruit, never showed how that connection might be forged. In fact it is never clear with what, in Pollock's eyes, analytical jurisprudence would find itself connected.

This last observation points to an irony of sorts: while Pollock showed limited enthusiasm for the methods of analytical jurisprudence, it is at least clear where he uses them; for all his numerous erudite essays on legal history, and for all his eagerness to refer to the rewards that might be had from comparing legal systems, he never explained the historical and comparative project by reference to methods. Methodologically speaking, we might say, he was more clearly identifiable as an analytical rather than as a comparative jurist. Pollock, of course, would never have accepted this characterisation. The historical and comparative project, as we have seen, was more to his liking. Yet he approached that project in a literalistic and decidedly limited fashion, establishing hardly anything more than that it is often worthwhile to look backwards and outwards and compare one's own legal arrangements with what one finds elsewhere.

The Reliance on Science

There is more to be said about comparative jurisprudence. Specifically, we need to provide the explanation promised by the title of this lecture, and to do this requires an inquiry into why English jurisprudence eschewed the comparative route. It is necessary, however, to postpone that task until the following section, since we have yet to address properly the issue of legal science. I have tried in the preceding sections of this essay to establish four basic points: that Austin had a vision of the science of jurisprudence; that Maine disliked that vision and set about devising an alternative; that this alternative made a positive impression on Pollock; and that, although duly impressed by the historical method, Pollock did not significantly contribute to its advancement. If Pollock was more or less inarticulate over matters of method, it surely follows that he would have nothing significant to say on the subject of legal science. Indeed, had not Maine said it all? As Pollock appreciated, Maine epitomised the

¹⁴⁴ See M. Lobban, *The Common Law and English Jurisprudence 1760–1850* (Oxford: Clarendon Press, 1991), 227–34.

late nineteenth-century trend of equating science with the theory of evolution. Since Pollock failed to make any methodological advance on Maine, can we not confidently anticipate that Pollock's notion of legal science will be identical to Maine's? While we might anticipate as much, it turns out that Pollock does not play by the script.

'The connection between jurisprudence and political theory', Ernest Barker wrote in 1915, 'is close and obvious . . . [I]t was law which produced the radical doctrine of the Social Contract, and it is law, as interpreted by Maitland, which has of late years added new and radical ideas to the content of political theory'.¹⁴⁵ Although Barker would later question just how close this connection really was,¹⁴⁶ he was surely correct to posit it. For many Victorian intellectuals, Collini, Winch, and Burrow have observed,

the language of the law constituted something of a *lingua franca* . . . The study of the law, it hardly needs to be said, commanded a guaranteed audience both within and without the universities, but the teaching of jurisprudence at Oxford and Cambridge was not yet the narrowly professional training it was soon to become; in this period it managed to accommodate the authors of several of the most widely cited works of political science, such as Maine, Bryce, Dicey and Pollock, as Professors of Law. There is an appropriateness in the fact that the standard introduction to the history of the science of politics should have been written by the man who succeeded Maine as Professor of Jurisprudence at Oxford . . . who collaborated with Maitland on the classic *History of English Law*, and who became the first editor of *The Law Quarterly Review*.¹⁴⁷

As is well known, that collaboration with Maitland on *The History of English Law* was for the most part nominal. But the Introduction to the work, most of which Pollock claimed to have written, more or less begins with the following, intriguing assertion:

It has been usual for writers commencing the exposition of any particular system of law to undertake, to a greater or less extent, philosophical discussion of the nature of laws in general, and definition of the most general notions of jurisprudence. We purposely refrain from any such undertaking. The philosophical analysis and definition of law belongs, in our judgment, neither to the historical nor to the dogmatic science of law, but to the theoretical part of politics . . . The matter of legal science is not an ideal result of ethical or political analysis; it is the actual result of facts of human nature and history.¹⁴⁸

As Collini, Winch, and Burrow note, not only did Pollock belong to a generation of jurists that was uninhibited by disciplinary boundaries,

¹⁴⁵ Barker, *Political Thought*, 15.

¹⁴⁶ See Collini, *Public Moralists*, 251–2.

¹⁴⁷ Collini *et al.*, *That Noble Science of Politics*, 359.

¹⁴⁸ F. Pollock and F. William Maitland, *The History of English Law before the Time of Edward I*, 2nd edn., 2 vols., S. F. C. Milsom (ed.) (Cambridge: CUP, 1968; 1st edn. pub. 1898), i, p. xciii.

but he personally seemed thoroughly confident about venturing into and expounding upon the history of political science. It was not that the barriers were there to be straddled; the barriers simply did not exist. While jurists might profitably comment on political science, however, it must not be assumed, Pollock insisted, that there is anything to be gained from a branch of political science taking control of legal science. Pollock, we have seen, was keen to refer to the various branches of jurisprudence as if they made up one big happy family. But analytical jurisprudence—this much being clear from the quotation just taken from *The History of English Law*—was a science not of law but of politics.¹⁴⁹ At this point, we find the barriers erected. In his more bullish moments, Pollock was even churlish about according analytical jurisprudence the title of jurisprudence: ‘Austin’s second, third, and fourth Lectures’—a significant chunk of *The Province of Jurisprudence Determined*—‘are not jurisprudence at all,’ he complained, ‘but ethics out of place’.¹⁵⁰ The language of the law might well have constituted something of a *lingua franca*, but the language of legal science was a different matter. Whatever analytical jurists might have claimed, their project belonged to political rather than legal science. Dominion over legal science resided elsewhere.

Where, then, did it reside? Of course, comparative jurisprudence could stake a legitimate claim to scientific status—Pollock had no doubt that Maine and Vinogradoff were genuine legal scientists.¹⁵¹ But he resisted identifying legal science exclusively with comparative jurisprudence.¹⁵² When legal science is equated with one or another method, Pollock believed, the enterprise is easily corrupted by charlatans: ‘I really do think there is less danger to legal science from the frank and shameless ignorance of the illiterate practitioner than from the sciolism and wild guesswork of the half-trained amateur . . . What is more, the lay people may take those deluded adventurers for real explorers and discoverers’.¹⁵³ Even if a particular method is mastered, there is no guarantee that convincing legal science will follow—‘faith in the science of law’ is about more than ‘mere intellectual craft’.¹⁵⁴ But what was this craft? Did Pollock, in fact, have a conception of legal science?

¹⁴⁹ In a similar vein, see *An Introduction to the History of the Science of Politics*, 32.

¹⁵⁰ *Oxford Lectures and Other Discourses*, 17. Pollock did not always take this view of analytical jurisprudence: see e.g. his discussion of Holland in *An Introduction to the History of the Science of Politics*, 67; also *Essays in Jurisprudence and Ethics*, 27, 262.

¹⁵¹ See Pollock, ‘The Methods of Jurisprudence’, 270 (‘Maine was determined . . . that his science should speak the language of a scholar and a gentleman’).

¹⁵² See *Essays in Jurisprudence and Ethics*, 262–8. Others resisted similarly: see Collini *et al.*, *That Noble Science of Politics*, 40–1.

¹⁵³ *Essays in the Law*, 238; and cf. also *Essays in Jurisprudence and Ethics*, 6.

¹⁵⁴ *The Genius of the Common Law*, 1.

It seems odd that, in order to find anything akin to method in Pollock's jurisprudence, we should have to look not to what he had to say about the virtues of history and comparison, but to what he says specifically about the scientific study of law—and it ought to be noted immediately that while comparative jurisprudence may be tantamount to the scientific study of law, it is not really what Pollock has in mind when he refers to such study. Pollock did indeed have a conception of science—though to call it his own would be to distort its provenance. It was noted earlier that Holmes was among those whom Pollock associated with the historical method. The association, while easily overemphasised, was by no means inapt.¹⁵⁵ But when Pollock reviewed *The Common Law* in 1881, he wanted to emphasise how Holmes 'belong[ed] to an American school of legal criticism distinguishable from anything that has yet taken root [in England]'.¹⁵⁶ As is well known, in *The Common Law* Holmes contended that issues of civil and criminal liability must be determined by reference not to private or internal moral standards but to the shared or external standards of the community. 'The standards of the law are standards of general application . . . The law considers, in other words, what would be blameworthy in the average man, the man of ordinary intelligence and prudence, and determines liability by that.'¹⁵⁷ Although Pollock, in his review of the book, purported to be not entirely convinced by Holmes's treatment of external standards as objective standards,¹⁵⁸ in his first ever letter to Holmes—some seven years earlier—he was already edging towards Holmes's position: 'I am glad you so clearly expose the fallacy of treating legal negligence as a state of the negligent's consciousness', Pollock wrote in 1874; 'the true theory is that all attempts to get a scientific measure are out of place and we can only seek a rough measure in "the average opinion of the community"—or such of the community as are accustomed to dealings of the kind in question.'¹⁵⁹

By the time that *The Common Law* was published, Pollock's position was still closer to Holmes's. When employing 'an external standard', he

¹⁵⁵ For Holmes and the historical method, see J. W. Burrow, 'Holmes in his Intellectual Milieu', in *The Legacy of Oliver Wendell Holmes, Jr.*, R. W. Gordon (ed.) (Edinburgh: Edinburgh UP, 1992), 17–30 at 25–8. For an illustration of overemphasis in this context, see S. G. Utz, 'Maine's Ancient Law and Legal Theory' (1984) 16 *Connecticut L. Rev.* 821–52 at 844 ('Holmes's . . . essay, *The Path of the Law*, might almost have been ghostwritten by Maine').

¹⁵⁶ [F. Pollock], 'Holmes on the Common Law' (11 June 1881) 51 *Saturday Rev* 758–9 at 758.

¹⁵⁷ O. Wendell Holmes, Jr., *The Common Law* (Boston: Little, Brown, & Co., 1881), 108.

¹⁵⁸ '[T]he prudence required [to satisfy this standard] is not exactly the prudence of a common man, but the prudence of a man such as would commonly and properly be concerned in the matter in hand.' Pollock, 'Holmes on the Common Law', 759.

¹⁵⁹ Pollock to Holmes, 3 July 1874, in De Wolfe, *Pollock–Holmes Letters*, i, 3–4 (apropos of [O. W. Holmes, Jr.], 'The Theory of Torts' (1873) 7 *American L Rev* 652–63).

observes in *Essays in Jurisprudence and Ethics*, 'I judge not merely as an individual expressing my personal feeling . . . but as a citizen expressing a fellow-feeling as to things which concern the good or harm of my fellow-citizens'.¹⁶⁰ Pollock also at this point complicates the notion of an external standard slightly by connecting it to another classic Holmesian theme: that of prediction. An appeal to an external standard, he argues, may require a 'prediction of like judgments in like future cases, founded on an assumption of uniformity'¹⁶¹—a prediction, that is, about how our fellow citizens are likely to feel in particular circumstances, this prediction being derived from our experience of how citizens have felt in similar circumstances in the past. 'The predictions of that part of legal science which is called case law rest on the assumption that within the range of the particular system of law the same legal judgment will be passed by every competent court upon the same facts.'¹⁶² Within the English common law tradition, Pollock believed, it is safe to make this assumption of uniformity, for the English do indeed conform to collective standards. There is nothing at all controversial about appealing 'to the moral sense of Englishmen', because it is 'a matter of fact . . . that the moral judgment of an average-right-minded man does, on the whole, follow precedents, and is guided by settled principles'.¹⁶³ For Pollock, it is the English commitment to a collection of shared moral standards that makes the prospect of predicting future legal judgments seem so reasonable.

The significance of English character and temperament to the nature of the common law system is a theme to which Pollock devoted considerable attention throughout his writings. For our purposes here it is important only because it is integral to his understanding of law and prediction. During the 1870s, Pollock made prediction central to his own conception of legal science. The timing is interesting. Commonly, the so-called prediction theory of law is associated with Holmes's famous 1897 address, 'The Path of the Law'.¹⁶⁴ While it is quite correct to attribute the theory to Holmes, it is wrong to believe that he developed it in the late 1890s. The germ of the theory in fact emerges during the early 1870s, and does so out of his engagement with Pollock's early work on Austin. In April 1871, Holmes was appointed University Lecturer on Jurisprudence at Harvard College for the following year. The lectures that

¹⁶⁰ *Essays in Jurisprudence and Ethics*, 268–9.

¹⁶¹ *ibid.* 269. ¹⁶² *ibid.* 268.

¹⁶³ *ibid.* 270; and cf also 277 ('[W]hen admitted principles have to be applied to a complex particular case the conclusions of right-minded men may differ. Hence there is a discrepancy of moral judgments within certain limits; . . . here, . . . the comparison of case law will still be helpful').

¹⁶⁴ O. Wendell Holmes, Jr., 'The Path of the Law' (1897) 10 *Harvard L Rev* 457–78; and see also D. H. Moskowitz, 'The Prediction Theory of Law' (1966) 39 *Temple LQ* 413–31 at 413–17. For Moskowitz, the theory is born with Holmes's address.

he delivered in April and May of 1872 were structured around Austin's *Lectures on Jurisprudence*.¹⁶⁵ In that same year, Holmes published in the *American Law Review* a short notice dealing with Pollock's article on the command theory of law.¹⁶⁶ Pollock's conclusions about the command theory largely coincided with those which Holmes had already reached in his jurisprudence lectures.¹⁶⁷ But when one looks carefully at what Holmes and Pollock wrote, some significant differences begin to emerge. Pollock had concluded his article with a decidedly Savigny-esque definition of law: 'a condition, or assemblage of conditions, under which the evolution of a society proceeds, and the determination of which is part of the collective consciousness of that society'.¹⁶⁸ Holmes, by contrast, was making no appeals to the *Volksgeist*. Even in his note of 1872, Menand observes, 'Holmes's view of law was premised on the assumption that law is simply and empirically judicial behavior. A rule may be written down, it may express the will of the sovereign, it may be justified by logic or approved by custom; but if courts will not enforce it, it is not the law, and lawyers who bet their cases on it will lose.'¹⁶⁹ As Holmes himself explained:

It must be remembered . . . that in a civilized state it is not the will of the sovereign that makes lawyers' law, even when that is its source, but what a body of subjects, namely, the judges, by whom it is enforced, *say* is his will. The judges have other motives for decision, outside their own arbitrary will, beside the commands of their sovereign. And whether those motives are, or are not, equally compulsory, is immaterial, if they are sufficiently likely to prevail to afford a ground for prediction. The only question for the lawyer is, how will the judges act? Any motive for their action, be it constitution, statute, custom, or precedent, which can be relied upon as likely in the generality of cases to prevail, is worthy of consideration as one of the sources of law . . .¹⁷⁰

This passage is particularly interesting because it is possibly the first occasion on which Holmes explained law by reference to the prediction

¹⁶⁵ See M. H. Fisch, 'Justice Holmes, The Prediction Theory of Law, and Pragmatism' (1942) 39 *Jnl of Philosophy* 85–97 at 92; G. Edward White, *Justice Oliver Wendell Holmes: Law and the Inner Self* (New York: OUP, 1993), 119.

¹⁶⁶ [O. W. Holmes, Jr.], review of *The Law Magazine and Review* (1871–2) 6 *American L. Rev.* 723–5.

¹⁶⁷ Holmes was keen to stress that Pollock's article, which appeared in the April 1872 issue of the *Law Magazine and Review*, 'was going through the press' at the time that his jurisprudence lectures were being delivered: Holmes, *ibid.* 723. Apparently, Holmes wrote his lectures 'in the fall of 1871 and the early spring of 1872': White, *Justice Oliver Wendell Holmes*, 119. On the evolution of Holmes's critique of Austinian jurisprudence, see F. Rogers Kellogg, *The Formative Essays of Justice Holmes: The Making of an American Legal Philosophy* (Westport, Conn.: Greenwood Press, 1984), 23–9.

¹⁶⁸ Pollock, 'Law and Command', 205.

¹⁶⁹ L. Menand, *The Metaphysical Club* (New York: Farrar, Straus and Giroux, 2001), 343.

¹⁷⁰ Holmes, *The Law Magazine and Rev* 724.

of judicial action.¹⁷¹ The likelihood is that he further explored the implications of the prediction theory in his contributions to the meetings of the 'Metaphysical Club' during the early 1870s.¹⁷² Pollock, in his 1872 article on the command theory, never so much as mentions prediction. By 1874, however, he too was considering the jurisprudential implications of the idea. In his series of articles on 'Case Law and Inductive Science', first published during that year in the *Pall Mall Gazette*,¹⁷³ Pollock stamps his own mark on a Holmesian theme by arguing that the notion of prediction is crucial to the development of a science of judicial decision-making. Whether it would be right to assume that Pollock simply followed Holmes in linking science and prediction is open to question. In August 1872 Pollock's friend, William Kingdon Clifford, made precisely the same link in his lecture to the British Association: 'The aim of scientific thought . . . is to apply past experience to new circumstances; the instrument is an observed uniformity in the course of events. By the use of this instrument it gives us information transcending our experience, it enables us to infer things that we have not seen from things that we have seen; and the evidence for the truth of that information depends on our supposing that the uniformity holds good beyond our experience.'¹⁷⁴ It is very likely that Pollock would have been aware of this lecture when he wrote 'Case Law and Inductive Science'.¹⁷⁵ Possibly he was more influenced by Clifford than by Holmes in connecting science and prediction; though in fact such speculation is irrelevant, for what is clear is that the argument which Pollock develops, even if it was inspired by Holmes, is far from Holmesian in spirit.

Although '[m]uch has been said and written lately about making English law more scientific', Pollock begins, many of 'those who expound

¹⁷¹ See Fisch, 'Justice Holmes', 94.

¹⁷² See M. H. Fisch, 'Was There a Metaphysical Club in Cambridge?' in *Studies in the Philosophy of Charles Sanders Peirce. Second Series*, E. C. Moore and R. S. Robin (eds.) (Amherst: University of Massachusetts Press, 1964), 3–32 at 20; and M. J. Speziale, 'By Their Fruits You Shall Know Them: Pragmatism and the Prediction Theory of Law' (1978) 9 *Manitoba LJ* 29–51 at 31.

¹⁷³ See Pollock to Holmes, 26 July 1877, in De Wolfe, *Pollock–Holmes Letters*, i, 7. The articles were reprinted as ch. 9 of *Essays in Jurisprudence and Ethics*.

¹⁷⁴ W. K. Clifford, 'On the Aims and Instruments of Scientific Thought' (1872), in his *The Ethics of Belief and Other Essays*, F. Pollock and L. Stephen (eds.) (London: Watts & Co., 1st edn. pub. 1947), 1–27 at 7. The editorial history of this collection is a mystery, as both Pollock and Leslie Stephen had been long dead by the time of its appearance. The collection contains an Introduction by Archibald Robertson (*ibid.*, pp. vii–x) which offers no clues.

¹⁷⁵ Five years after this lecture was first printed (in *Macmillan's Magazine*, October 1872), it was included in the *Lectures and Essays by the Late William Kingdon Clifford*, 2 vols., L. Stephen and F. Pollock (eds.) (London: Macmillan, 1879), i, 124–57. Clifford died 3 March 1879. Although it is not known when Pollock and Stephen compiled *The Ethics of Belief* it is most likely that the *Lectures and Essays* mark the first time that Pollock dealt with 'On the Aims and Instruments of Scientific Thought' in an editorial capacity.

a so-called science of law' produce schemes which appear 'to have little to do with science, and less with the law of England'.¹⁷⁶ These schemes devote surprisingly little attention 'to the scientific character' of 'the records of decided cases', upon 'which a great part of English law has actually been built up, and by which it is still administered and developed'.¹⁷⁷ Demonstrating that judicial decision-making, and the reporting of judicial decisions, 'have a truly scientific character'¹⁷⁸ requires that we make use of the notion of prediction.

The object of both natural science and legal science 'is to predict events'—in the case of legal science, it is 'to predict . . . the decisions of courts of justice'.¹⁷⁹ Predicting legal results requires that we 'suppose that the same decision is always given on the same facts'.¹⁸⁰ Pollock considered it reasonable to make such an assumption. Although it may be objected that 'the legal order of things has only a relative and limited uniformity, whereas the order of nature has an absolute uniformity', the fact is that 'we do not know the order of nature to be absolutely uniform'¹⁸¹ and we have no reason to believe the legal order to be any less uniform. Granted, 'judges and lawyers are human, and their legal judgment is sometimes influenced by unscientific motives'; 'the want of a complete and homogeneous system of appeals', furthermore, 'leaves room . . . for conflicts and inconsistencies'.¹⁸² 'But . . . our comparison [between natural and legal science] is not the worse but the better for the approximate character of legal predictions. For no general proposition of science is known to be more than approximately true, nor is any prediction known to be more than approximately accurate.'¹⁸³ The claim that predictions regarding the decisions of courts are no more approximate than predictions regarding the laws of nature—as if the outcome of a case will be no less easily foreseeable than the consequence of an apple disconnecting from its branch—is unconvincing. Moreover, even if it is reasonable to assume approximate uniformity—to assume that similar cases are treated similarly—in judicial decision-making, what guarantees as much? Pollock's answer, laconic but intriguing, is that 'legal uniformity . . . springs from unconsciously formed habits of mind'.¹⁸⁴ Behind this statement lie two assumptions. First, there is the assumption that the promotion of uniformity will be a by-product of

¹⁷⁶ *Essays in Jurisprudence and Ethics*, 237.

¹⁷⁷ *ibid.* 237.

¹⁷⁸ *ibid.* 238.

¹⁷⁹ *ibid.* 238.

¹⁸⁰ *ibid.* 239. See also D. Ibbetson, 'Historical Research in Law', in *The Oxford Handbook of Legal Studies*, P. Cane and M. Tushnet (eds.) (Oxford: OUP, 2003), 863–79 at 866 ('a lawyer like Pollock could openly hold to the position that the lawyers' authorities were like the data of natural scientists, with the result that just as the natural scientists' laws were based upon an observed congruity of single instances, so the lawyers' rules were to be discovered from the observation of similar results in similar lawsuits').

¹⁸¹ *Essays in Jurisprudence and Ethics*, 253.

¹⁸² *ibid.* 255.

¹⁸³ *ibid.*

¹⁸⁴ *ibid.*

the activities of both lawyers and judges: those who hold these offices, after all, 'must select the right kind of cases for comparison with the case before [them]' and 'must observe the right points of likeness and unlikeness in the cases [they] compare'.¹⁸⁵ Over time, '[e]xperts acquire an unconscious habit of looking at the matters of their own art in the right way'.¹⁸⁶ Secondly, there is that matter of the English character to which we adverted earlier. Although Pollock did not pursue this matter in 'Case Law and Inductive Science', he would later argue that bound up in this character there is a belief in 'the sanctity of precedent'.¹⁸⁷ 'We and our kinsfolk in America love to think of ourselves as a law-abiding people. We like to have the sanction, or at least the analogy, of precedent and law for whatever we do . . . [T]his habit of mind . . . is the foundation of our modern jurisprudence'.¹⁸⁸ Where citizens are inclined to respect the decisions of the past, it is almost inevitable that there will be a marked degree of uniformity in judicial decision-making.

'[C]ase-law', then, 'has a scientific aim, namely, the prediction of events by means of past experience'.¹⁸⁹ This is as close as Pollock ever came to stipulating his own conception of legal science. Note how the conception depends on two classic Holmesian motifs: prediction and external standards. The resort to prediction proves unconvincing. Holmes used the notion to articulate a crucial insight: if we can predict that a law will not be enforced, its legal validity counts for nothing. Pollock, by contrast, seemed to settle upon the idea of prediction so that he could suck the life out of it. His thesis, in essence, is that law deserves recognition as a science because we can confidently predict that like cases will be treated more or less alike. Whereas Holmes was candid about judicial power—whereas he recognized that a judicial decision might be motivated by a variety of factors—Pollock depicted a decidedly more benign process whereby stalwart judges can be trusted to apply appropriate precedents. The resort to the notion of external standards, certainly in *Essays in Jurisprudence and Ethics*, fares little better. Holmes employed the notion in order to make a distinction between law and morality—to show that personal moral blameworthiness is not generally an ingredient of liability. When Pollock relies on the idea of an external standard, however, the distinction between law and morality is sometimes blurred. To some extent, this was a matter of disagreement: when writing about contractual obligations, Pollock simply did not accept Holmes's theory of liability.¹⁹⁰ In *Essays in Jurisprudence and Ethics*,

¹⁸⁵ *ibid.* 249. ¹⁸⁶ *ibid.*

¹⁸⁷ F. Pollock, 'The History of English Law as a Branch of Politics' (October 1881) n.s. 30 *Fortnightly Rev.* 478–98 at 487.

¹⁸⁸ *ibid.* 486–7.

¹⁸⁹ *Essays in Jurisprudence and Ethics*, 246.

¹⁹⁰ 'In all the long years of their correspondence, neither of them budged an inch'. P. S. Atiyah, *Essays on Contract* (Oxford: Clarendon Press, 1986), p. 59 n. 2.

however, it is noticeable that although Pollock adopts the notion of external standards, he departs from Holmes by treating them not primarily as objective but as moral standards—as embodying ‘the moral sense of Englishmen’, no less. Reviewing Pollock’s book, W. L. Courtenay professed to being confused: was Pollock trying to emphasise, or was he against making too much of, the role of morality in law? ‘He is troubled with many doubts, especially on two points—the bearing of scientific ethics on practical morality, and the relation of moral ideals to contemporary practice. And so it is not unnatural to find in his essays sentences which are not obviously consistent.’¹⁹¹

Whereas, from the early 1880s onwards, Pollock basically jettisoned the idea of prediction, the notion of external standards continued to preoccupy him. Sometimes he was careful to emphasise that his use of the notion did not conform to the way in which Holmes had used it.¹⁹² But on other occasions the Holmesian signature was pronounced. During the Hilary Term of 1889, Pollock delivered a series of lectures at Oxford on ‘Analytical Jurisprudence’.¹⁹³ Notwithstanding his criticisms of the Austinian tradition, he was keen in these lectures to capture the many ways in which law and morality diverge.¹⁹⁴ But in trying to capture these divergences he drew inspiration not from Austin, but from Holmes. Law, Pollock proclaimed,

is a distinct science. For, even if we assume that morality is capable of scientific definition, the subject-matter of law is not the same. Its field neither coincides with nor is included in the field of moral rules. Law does not aim directly at the perfection of individual character, but only at regulating social relations. It judges, as a rule, the conformity or otherwise of human conduct to an ‘external standard’, not the motive from which conduct proceeds.¹⁹⁵

The conception of external standard that Pollock employs in this instance is very clearly Holmes’s, rather than some modified version which makes reference to the morality of the common law mind. It is noticeable too that although Pollock’s argument is Holmesian, the purpose of its application is to establish an analytical-jurisprudential proposition: that law is a science because it does not necessarily correlate with morality. In *The History of English Law*, in a passage most likely written by Pollock, we find this manoeuvre more or less repeated. When Holmes wrote of the life of the law being not logic but experience, he seemed to echo Rudolph von Jhering.¹⁹⁶ Pollock and Maitland—though concerned with the hazards of reducing law to metaphysics rather than logic—seemed, in turn, to echo

¹⁹¹ W. L. Courtenay, ‘Modern Ethics’ (April 1883) 157 *Edinburgh Rev* 423–58 at 446–7.

¹⁹² See e.g. *The Genius of the Common Law*, 17.

¹⁹³ Pollock notebooks, Misc. 795, 137–75.

¹⁹⁴ *ibid.* 146–7.

¹⁹⁵ *ibid.* 145–6.

¹⁹⁶ See Holmes, *The Common Law*, 1; and cf. P. Stein, ‘Logic and Experience in Roman and Common Law’ (1979) 59 *Boston Univ L Rev* 433–51 at 437.

Holmes when they observed that '[L]aw, such as we know it in the conduct of life, is matter of fact; not a thing which can be seen or handled, but a thing perceived in many ways of practical experience'.¹⁹⁷ This passage is intriguing for our purposes because it shows Pollock again adopting a broadly Holmesian perspective in order to differentiate law and morality. '[T]here are and must be rules of law beyond or outside the direct precepts of morality', he continues, just as 'there are, and must be, rules of morality beyond the commandments of law'.¹⁹⁸ Practical experience teaches us that legal rules are often necessary to coordinate pursuits. Such rules, Pollock contends in both the *History of English Law* and elsewhere, may have no moral dimension. 'In England men drive on the left-hand side of the road . . . Morality has nothing to say to this, except that those who use the roads ought to know and observe the rule'.¹⁹⁹ Law and morality may often overlap, but they are not reducible to one another.

Yet again we see that Pollock was not wholly unsympathetic to the aims of analytical jurisprudence. He makes the rather bewildering move, however, of distinguishing law from morality while also insisting that what makes the common law unique is the fact that it is grounded in distinctive moral sentiments—more specifically, in the moral consciousness of the judiciary. In short, as Lobban puts it, Pollock 'smudged over the line between positivism and intuitionism'.²⁰⁰ While this seems fair comment, it ought to be emphasised that the move which Pollock makes, although somewhat bewildering, is not incoherent. Pollock believed that many laws are created for non-moral reasons. There is no inconsistency in the fact that he also believed (as we have already seen) that judges apply the law with some unconsciously acquired *Rechtsgefühl*—with the innate good legal sense of a 'right-minded man'.²⁰¹

Just as law is not reducible to morality, equally, for Pollock, it is not reducible to politics. '[L]aw is not law merely because the State enforces it,' he was to claim on more than one occasion, 'but on the contrary the State

¹⁹⁷ *The History of English Law before the Time of Edward I*, i, p. xcv. The words quoted in this sentence were written by Pollock: he used them five years before the first edition of *The History of English Law before the Time of Edward I* was published. See F. Pollock, 'The Origins of the Common Law' (December 1890) 58 *Contemporary Rev.* 849–62 at 850. Holmes is perhaps not the only one whom Pollock is echoing: cf. *Case of the Duchy of Lancaster* (1561) 1 Plowd. 212, 213 ('For the King has in him two bodies, viz, a body natural, and a body politic . . . But his body politic is a body that cannot be seen or handled').

¹⁹⁸ *The History of English Law before the Time of Edward I*, i, pp. xcv–xcvi; and cf. K. J. M. Smith, *James Fitzjames Stephen: Portrait of a Victorian Rationalist* (Cambridge: CUP, 1988), 56. On at least one occasion, Pollock suggests that moral rectitude is largely a matter of good manners: see *Essays in Jurisprudence and Ethics*, 373.

¹⁹⁹ *The History of English Law before the Time of Edward I*, i, p. xcvi; and, in the same vein, see *A First Book of Jurisprudence*, 49; *Essays in the Law*, 33.

²⁰⁰ Lobban, 'Was there a Nineteenth Century', 52.

²⁰¹ *Essays in Jurisprudence and Ethics*, 295.

enforces it because it is law'.²⁰² A. L. Goodhart considered this proposition to be 'the most important one that Pollock ever wrote', marking, as it does, 'a complete separation from the theory of law accepted by his three colleagues at Oxford—Sir Thomas Erskine Holland, Sir William Anson, and Professor A. V. Dicey'.²⁰³ Yet Goodhart also considered it exasperating. On the occasions that Pollock made the claim he immediately ducked out of discussing it, professing in one instance that 'the further pursuit of this subject seems to belong to the philosophy of Politics rather than of Law'.²⁰⁴

The basic purpose of the proposition seems to be to distinguish Pollock's understanding of law from Austin's command theory or any of its derivatives. But that is not its only purpose. For Pollock, law—certainly the English common law—could never be tantamount to State authority. 'The Common Law', he wrote to Lytton Strachey in 1918, 'is older than our political institutions and—not being tied to dogmas—will live to see them transformed'.²⁰⁵ To treat the common law as but part of the political apparatus would be to ignore the fact that the common law is very much the product of a special mindset. 'Law . . . means . . . the sum of those rules of conduct which courts of justice enforce, the conditions on which they become applicable, and the manner and consequences of their application. This is a matter of fact not in any way dependent on the view that we may take of the political and ethical foundations of government and positive law'.²⁰⁶ Note the equation of law not just with rules, but also with the conditions and the manner of their application. Pollock's principal concern was with 'the permanent mind and temper of the common law', with the way in which lawyers and judges think and work, rather than with 'the particular rules which judges administer to-day'.²⁰⁷ The autonomy of law—the reason that it can be the subject of a distinct science—is traceable 'to a certain continuous drift of thought which is called the legal habit of mind'.²⁰⁸ We get to the heart of a legal system, in short, by understanding the minds of its legal officials.

²⁰² F. Pollock, *Spinoza: His Life and Philosophy*, 2nd edn. (London: Duckworth, 1899), 304; and see also *A First Book of Jurisprudence*, 27.

²⁰³ A. L. Goodhart, 'Introduction', in Frederick Pollock, *Jurisprudence and Legal Essays*, A. L. Goodhart (ed.) (London: Macmillan, 1961), pp. ix–xlvi at xxx.

²⁰⁴ *A First Book of Jurisprudence*, 27; and see also *Spinoza: His Life and Philosophy*, 304 ('I am not here concerned to set forth my own opinions'). On at least one occasion, furthermore, he appeared to contradict the claim: see F. Pollock, 'The Continuity of the Common Law' (1898) 11 *Harvard L Rev* 423–33 at 424 ('When we speak of law we mean, for all practical purposes, those rules of conduct which the State deems binding on citizens, not merely as rational and moral beings but as members of that State, and accordingly thinks fit to enforce by public authority: in other words, the rules which are administered and applied by courts of justice').

²⁰⁵ F. Pollock to G. L. Strachey, 15 June 1918, in Strachey papers (20th Century Series), vol. xxxvii, Manuscript Collections, British Library, Add. 60691 f.71.

²⁰⁶ *A First Book of Jurisprudence*, 217.

²⁰⁷ *The Genius of the Common Law*, 8.

²⁰⁸ *Essays in Jurisprudence and Ethics*, 278.

The Path of Modern Jurisprudence

Fundamental to Pollock's own vision of legal science is the idea of rectitude. A single reason explains why we can plausibly conceive of external standards of liability, why it is possible to predict legal outcomes, and why we must see law as something distinct from morality and politics: the common law tradition has its own correct ways of doing things. Lawyers working within that tradition, if they are to do things correctly, must develop appropriate habits of thought. At first glance, this seems to be a reiteration of Sir Edward Coke's point about artificial reason.²⁰⁹ But in fact, it is not quite the same.²¹⁰ For Pollock, 'getting things right' as a lawyer is not guaranteed by years of study and experience;²¹¹ the quality of rightness requires good sense as well as expertise.

This link between rectitude and good sense Pollock made when reflecting on scholarship as well as on the practice of law.²¹² Scholarship, like law, demands a special temperament and mentality, as well as the acquisition of special skills. Scholarly talent ought to be more highly appreciated—Pollock feared for 'the poor scholar of Cambridge or Oxford who has a mind to be a *vir doctus* just for learning's sake'²¹³—although 'on the whole really good work does count even in this world'.²¹⁴ Meeting the demands of scholarship is more than a matter of becoming versed in method or theory. As we have noted, Pollock seemed only minimally interested in the methods of historical and comparative jurisprudence precisely because he was no lover of methods in general.

²⁰⁹ *Twelfth Reports, Prohibitions del Roy* (1607) 12 Co. Rep. 63, 64.

²¹⁰ Cf. J. Underwood Lewis, 'Sir Edward Coke (1552–1633): His Theory of "Artificial Reason" as a Context for Modern Basic Legal Theory' (1968) 84 *LQR* 330–42 at 340–1.

²¹¹ Introducing *A First Book of Jurisprudence*, he declared his belief that '[n]o practical art can really be taught' (pp. viii–ix). From this we might deduce that his position was closer to that of Michael Oakeshott than that of Coke. See M. Oakeshott, *Rationalism in Politics and Other Essays* (Indianapolis: Liberty Press, 1991; 1st edn. pub. 1962), 15 ('practical knowledge can neither be taught nor learned, but only imparted and acquired. It exists only in practice, and the only way to acquire it is by apprenticeship to a master—not because the master can teach it (he cannot), but because it can be acquired only by continuous contact with one who is perpetually practising it').

²¹² His principal reservation about Coke, ironically, was that Coke lacked the scholarly good sense that is required of the very best legal minds: see *A First Book of Jurisprudence*, 250; *The Genius of the Common Law*, 76. His did recognise, none the less, that Coke appreciated the jurisprudential value of historical research. See Pollock notebooks, Misc. 799, 'H': 'Historical research commended by Coke (Co. Lit. 43a). It is to be observed, that oftentimes for the better understanding of our books the advised reader must take light from history and chronicles, especially for distinction of times.'

²¹³ *Oxford Lectures and Other Discourses*, 230. See also Pollock to Holmes, 2 January 1921, in De Wolfe, *Pollock–Holmes Letters*, ii, 60 ('there is much more respect for learning in the U.S. and Canada than in England (I don't say Scotland)').

²¹⁴ *The Genius of the Common Law*, 112.

Historical scholarship he regarded very much as a craft—one which is attributable not to method but to scholarly ability—and he wrote about genuine historians (William Stubbs he seemed to revere most²¹⁵) rather as one might in modern times refer, albeit usually tongue-in-cheek, to ‘real men’. Hence, genuine historians have an eye for nuance,²¹⁶ eschew speculation,²¹⁷ know the value of a ‘considered opinion’,²¹⁸ are ‘careful . . . not to be misled into making familiar historical words bear a purely modern significance’,²¹⁹ and recognise the ‘danger . . . of over-rating . . . the trustworthiness of written documents’.²²⁰ Beware, Pollock warns, of those who are not the genuine article, who in fact contribute to ‘the general lowering of tone in matters of intellect’.²²¹ Often, those most responsible for the degradation of scholarly standards are eminent lawyers: ‘[s]ome of the worst nonsense I have met with about historical evidence was written by respectable lawyers from Coke downwards’.²²² The best legal historians, the true craftsmen, ‘are not frightened by the difficulties of legal history’.²²³ They appreciate that ‘tracing the pedigree of legal ideas is ticklish work’, that ‘[t]he most tempting resemblances of modern to ancient forms are often fallacious, and [that] ideas which are really of great antiquity may . . . lie comfortably concealed in modern terminology’.²²⁴

Pollock, of course, placed himself among the craftsmen. Part of his self-conceived task was to dispel legal myths accepted by those who cannot be expected to know better. While law ‘must have its proper terms, which can be understood only by training[,] . . . there is no reason why its broad principles . . . should not be set forth in language intelligible to all educated men’.²²⁵ A proper task of jurisprudence, therefore, is to correct ‘certain false opinions’ which ‘easily occur to the first thoughts of a reasonable but uninstructed layman’.²²⁶ But the bigger task was to combat egregious scholarship, to maintain standards. Why, Pollock wondered, were certain legal historians noticeably inclined to denigrate a juristic opinion when its

²¹⁵ See e.g. Pollock, above n. 167, 479–80, also 483 n. 1 (‘I am content to be inaccurate, if inaccuracy there is, in Professor Stubbs’s company’).

²¹⁶ See *The Expansion of the Common Law*, 38 n. (a).

²¹⁷ See *ibid.* 86, 90.

²¹⁸ *Oxford Lectures and Other Discourses*, 216.

²¹⁹ *The Genius of the Common Law*, 95.

²²⁰ *The History of English Law before the Time of Edward I*, p. i, 25. These words appear on the first page of a chapter to which Pollock only contributed, and so may well have been written by Maitland.

²²¹ *Oxford Lectures and Other Discourses*, 228. Legal-historical scholarship which, in Pollock’s view, did lower the tone was granted no mercy: see e.g. his annihilation of the work of Sir Travers Twiss: ‘Sir Travers Twiss’s Bracton’, *Saturday Rev* 1 February 1879, 153–4.

²²² *Essays in the Law*, 265.

²²³ *Essays in Jurisprudence and Ethics*, 201. See also F. Pollock, review of Vinogradoff *et al.* (1914) 30 *LQR* 502–3.

²²⁴ *Essays in the Law*, 221.

²²⁵ *ibid.* 278.

²²⁶ *ibid.* 258.

originator was no longer around to defend it? 'I have an odd prejudice', he declared, 'in favour of making sense of what has been said by men who . . . were not likely to talk nonsense'.²²⁷ Bewilderment was often his response when faced with what he considered to be departures from scholarly norms. When a Belgian international lawyer wrote asking if Pollock would arrange for the translation of an article and for its publication in the *Law Quarterly Review*, Pollock refused to do so, relaying the explanation for his decision to T. E. Holland in the form of a simple question: '[s]urely everybody who cares about the history of international law can read French?'²²⁸ The world of 'Maine, Pollock, Bryce, and Vinogradoff', it has been suggested, 'was one of scholarship, of learned languages, of documents, of critical historical methods and legal technicalities'; 'they represented a genuine, if snobbish commitment to a conception of respectable scholarship. The adherence to "history" was deep, the language of "science" usually perfunctory.'²²⁹ As an assessment of Pollock, this is to some extent inaccurate and misleading: scholarship was only a segment of his world, and within that segment there was little room for 'critical historical methods'. For the most part, however, the quotation is right. Pollock insisted on, and could barely tolerate departures from, scholarly correctness: far more concerned was he with the notion of proper historical inquiry than with the notion of legal science.

Rectitude, then, was very much a matter of proper form rather than analytical precision. Austin had always sought to be precise—it was his desire to be precise that often made him near unreadable—but he was, in Pollock's eyes, a poor lawyer and historian who produced lectures littered with 'damnable heresies'.²³⁰ To some extent, this was an issue of aesthetics. Pollock's idea of polishing his prose was to bring flamboyance to it—to find the most felicitous phrases and the most learned allusions, to find an epithet in (say) Persian to summarise a point.²³¹ For Austin, as for many analytical jurists since, polishing was first and foremost about attending to technicalities—about ensuring that phrases and arguments are carefully employed, developed, and (where necessary) qualified. But there was more than just aesthetics at stake. Juristic elegance meant, for Pollock, immersion in legal history and doctrine, and an ability to interpret this history and doctrine with discrimination: it is 'inelegant . . . for

²²⁷ *Oxford Lectures and Other Discourses*, 22. See also *Essays in Jurisprudence and Ethics*, 59 ('We . . . shall do much amiss if . . . we despise our fathers for not having known better').

²²⁸ F. Pollock to T. E. Holland, 10 October 1898, in Pollock correspondence, Box 1, Folder 34.

²²⁹ Collini *et al.*, *That Noble Science of Politics*, 213.

²³⁰ Pollock to Holmes, 2 October 1896, in *PHL* 1, 71.

²³¹ Of course, Pollock hardly differed from other Victorian jurists in using a variety of languages. His attraction to Persian, none the less, did rather single him out. For Pollock's love of Persian, see Sir F. Pollock, *A Little Persian Not a Dangerous Thing* (London: Hogg, 1913).

the law as a science' when a court 'talk[s] too much and about too many things'.²³² Analytical jurisprudence, being a species of 'General Jurisprudence', breeds inelegance. Of course, law 'has all the marks of a distinct science';²³³ but capturing the elegance of this science requires that we conceive of it not, primarily, as a philosophical abstraction but as a mass of historical and doctrinal detail in need of judicious interpretation.²³⁴

It is tempting, of course, to ask: who was right? Or, to put the question only slightly less crudely, who, as between Austin and the analytical tradition and Pollock and the historical and comparative tradition, had the better jurisprudential project? Pollock, as compared with Austin, was the more accomplished legal technician and the better writer. He was also writing as a critic, pointing out the shortcomings of the Austinian project and suggesting how jurisprudence could prove so much more fruitful. Certainly the comparative perspective represents the path not chosen. Should we not lament this? Would not modern jurisprudence be considerably more enlightening had we eschewed the analytical tradition and dedicated ourselves instead to the complexities of the historical and comparative quest?

The first two questions in the last paragraph not only permit of no satisfactory answer but also point us in the wrong direction. What we need to know is not which of the two traditions offered the 'better' project, but why one tradition should have proved more resilient than the other. Most of the remainder of this lecture will be devoted to explaining why this should have happened. As for the last two questions in the previous paragraph, it should become clear below that there is no compelling reason to assume either is best answered in the affirmative. Not that everyone would agree with this claim. Whereas we are concerned with the question of why English jurisprudence should be analytical, Morton Horwitz, in his Hart Lecture of 1995, poses more or less the obverse question: 'why is Anglo-American jurisprudence unhistorical?'²³⁵ When Horwitz elaborates this question, it becomes clear that he regards the capacity of 'analytical jurisprudence . . . successfully to resist the challenge of historicism'²³⁶ to be a cause for lament. 'Why', he asks, has Anglo-American jurisprudence remained 'staunchly indifferent to history? How has it been able to maintain its confident assumption that

²³² Pollock to Holmes, 30 March 1898, in *Pollock-Holmes Letters*, i, 84. 'Etymologically, elegance is connected with *eligere*, to choose, and essentially it suggests choice, a discriminating choice, choice governed by a nicety of feeling.' Peter Stein, 'Elegance in Law' (1961) 77 *LQR* 242–56 at 242.

²³³ *Oxford Lectures and Other Discourses*, 3.

²³⁴ On juristic elegance as 'exact historical scholarship', see H. F. Jolowicz, 'Utility and Elegance in Civil Law Studies' (1949) 65 *LQR* 322–36 (quotation at 336).

²³⁵ M. J. Horwitz, 'Why is Anglo-American Jurisprudence Unhistorical?' (1997) 17 *OJLS* 551–86.

²³⁶ *ibid.* 552.

the analytical and the historical can be neatly separated; and that one can engage in the analysis of concepts whose meaning is thought to be understood independently of the historical context in which those concepts are conceived, developed and deployed in argument.'²³⁷ The rather convoluted syntax does not disguise Horwitz's disappointment that the analytical project should have been so successful. '[A]nalytical jurisprudence has been able to resist the historicist challenge to its static and monolithic conception of meaning.'²³⁸ By separating law from history, furthermore, it became 'a tool for promoting conservative politics'.²³⁹

So much for Horwitz's dismay that analytical jurisprudence should have proved so potent at resisting history. Why should it have proved so potent? Credit—perhaps that should be blame—is due first of all to Austin, who succeeded in depoliticising Benthamite jurisprudence: 'as Austin's jurisprudence separated itself over time from Benthamite radicalism it became more politically acceptable because it was increasingly being read—and taught—apolitically'.²⁴⁰ Later, Hart 'followed in Austin's path' and sought 'to distinguish law from history and politics'.²⁴¹ The notion that Austin depoliticised Benthamite jurisprudence is a familiar one, as, indeed, is the idea that Hart continued in the same vein.²⁴² The most important point to note for our purposes is that, for Horwitz, Anglo-American jurisprudence is analytical because of the success of Austin and Hart in advancing their anti-historical, depoliticising initiatives. Our objective here is not to question that account but to offer a different one. Certainly analytical jurisprudence is a success story

²³⁷ *ibid.* 553–4. ²³⁸ *ibid.* 558. ²³⁹ *ibid.* 568. ²⁴⁰ *ibid.* 564.

²⁴¹ *ibid.* 573, 577.

²⁴² On Austin, see Schofield, 'Jeremy Bentham and Nineteenth Century English Jurisprudence', 61–5. On Hart see e.g. P. Goodrich, *Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis* (London: Macmillan, 1987), 44–9. Horwitz's discussion of what he considers to be Hart's depoliticising tendencies is heavily reliant on speculation and proves difficult to follow. For Horwitz, 'Hart surely was . . . struck by the way in which the vague constitutional argument [of 1931, when the Prime Minister, Ramsay MacDonald, sought a 'doctor's mandate'—a blank authority for the National government to do whatever it could agree on] was deployed in order to justify depriving Labour of its electoral advantage . . . The Crisis of 1931 reminded young Labour Party supporters like Hart that the English Constitution had . . . been invoked by conservatism as a defence against democracy' (Horwitz, 'Why is Anglo-American Jurisprudence Unhistorical', 578–9, emphasis added). Having read Hart's mind thus, Horwitz concludes that 'one might now understand why . . . Hart would wish to avoid deriving the rule of recognition from history' (*ibid.* 580). In fact, even if Horwitz's speculations are correct, it is not at all clear why we might deduce from them that Hart would be keen to emphasize law's autonomy; if anything, we might expect Hart to want to do just the opposite. For a study which attempts a manoeuvre comparable with Horwitz's, setting Hart's jurisprudence against the backdrop of post-Second World War British Labourism (which apparently 'entailed a belief in the withering away of class'), see Brendan Edgeworth, 'H. L. A. Hart, Legal Positivism and Post-War British Labourism' (1989) 19 *Univ. Western Australia L. Rev.* 275–300 (quotation at 294).

(though the success which we discuss here is rather different from that which Horwitz purports to identify); but, by the same token, historical and comparative jurisprudence was not a success story. Properly to account for the success of the analytical project requires that we understand the failure of the historical and comparative project. To understand this failure, we do well to look to Pollock. Before returning to him, however, it is worth reflecting briefly on the intellectual culture of the late-Victorian universities.

‘The modern university,’ it has been observed, ‘began with the Victorians’.²⁴³ It would also be true to say that the modern university evolved with the Victorians, for university culture throughout the Victorian period did not remain static. Not until the 1860s, for example, did academic activity begin properly to acquire its identity as professional activity.²⁴⁴ Furthermore, the research ideals of the late Victorian period were hardly present in the early nineteenth century. In 1845, John Stuart Mill lamented the English lack of intellectual rigour. ‘If we open an English book of history, jurisprudence, or any similar subject, we seldom find in it the real foundation, the ultimate reason of things. In all matters, and especially in politics, pure doctrine and philosophy—science properly so called—have prospered far more on the Continent than in England’.²⁴⁵ Note that we ‘seldom’ find among the English the intellectual qualities that Mill so admired: John Austin—who undertook much of his juristic training in Germany in the late 1820s, and for whom Mill had considerable admiration—would probably have been considered by Mill to be an exception to this generalisation.²⁴⁶ But then Austin was an exception in more ways than one. His career was, famously, one long false start. Although Mill might have welcomed the exceptional quality of his work, not until the 1860s did that work begin to resonate. ‘Part of the poignancy of Austin’s career comes from the fact that he was by nature a professor, but that he lived in a society which had not yet conceived the need for the academic treatment of his subject.’²⁴⁷ By the time of his death in 1859, however, the need for work of the type that Austin had produced was beginning to be felt.

²⁴³ A. H. Halsey, *The Decline of Donnish Dominion: The British Academic Professions in the Twentieth Century* (rev. edn., Oxford: Clarendon Press, 1995), 23. See also H. Perkin, *The Origins of Modern English Society 1780–1880* (London: Routledge & Kegan Paul, 1969), 121.

²⁴⁴ See T. W. Heyck, *The Transformation of Intellectual Life in Victorian England* (London: Croom Helm, 1982), 155–89.

²⁴⁵ J. Stuart Mill, ‘Guizot’s Essays and Lectures on History’ (1845), in his *Dissertations and Discussions: Political, Philosophical, and Historical*, 4 vols. (3rd edn., London: Longman’s Green, Reader, and Dyer, 1875), ii, 218–82 at 282.

²⁴⁶ On Austin’s German training, see Schwarz, ‘John Austin’, 180–92. On Mill’s admiration for Austin, see Collini, *Public Moralists*, 260–61.

²⁴⁷ Collini, *ibid.* 262.

Why so? Why, that is, should Austin's jurisprudence have been neglected in the early 1830s yet very much a topic for discussion by the late 1860s? To begin to answer this question, it is important to have some appreciation of the epistemic requirements of the late-Victorian universities. The second half of the nineteenth century witnessed what we might term a hardening of knowledge. The inquiries of economists, historians, and philosophers were becoming gradually more technical, their analyses more hard-wired and robust. 'It became very important', Soffer remarks, 'to agree upon the criteria for recognizing truth'.²⁴⁸ In economics, there was an ever more intense emphasis on measurement.²⁴⁹ '[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.'²⁵⁰ According to Harvie, similarly with philosophy: in the 1870s, he 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.²⁵¹

The second half of the nineteenth century marked the end of 'an age', as Milsom has put it, 'when have-a-go scholars of independent means and independent mind did it their way'.²⁵² In the late-Victorian universities, the casual erudition of many such scholars was rather out of place. Professionalised scholarship—research—entailed rigour and precision; erudition would always be an advantage for an academic, but from the late nineteenth century onwards it would never again be enough.²⁵³

²⁴⁸ R. N. Soffer, *Discipline and Power: The University, History, and the Making of an English Elite, 1870–1930* (Stanford, Calif.: Stanford University Press, 1994), 31.

²⁴⁹ See Collini *et al.*, *That Noble Science of Politics*, 316–20.

²⁵⁰ Soffer, *Discipline and Power*, 38.

²⁵¹ C. Harvie, *The Lights of Liberalism: University Liberals and the Challenge of Democracy 1860–86* (London: Allen Lane, 1976), 202–3.

²⁵² S. F. C. Milsom, 'Maitland' (2001) 60 *CLJ* 265–70 at 268. See generally R. N. Soffer, 'The Modern University and National Values, 1850–1930' (1987) 60 *Historical Research* 166–87; also G. C. Brodrick, 'A Nation of Amateurs' (1900) 48 *Nineteenth Century* 521–35.

²⁵³ See Collini, *Public Moralists*, 21, 23, 212–13. Cf also H. Perkin, *The Rise of Professional Society: England since 1880* (London: Routledge, 1889), 87 ('[T]he average Oxford and Cambridge don was transformed during the late Victorian age from a celibate clergyman awaiting a college . . . to a career-oriented, and usually married, teacher and scholar or scientist').

Sidgwick, in *The Elements of Politics*, first published in 1891, captured the tone of this new era as he set about explaining the ‘fundamental conceptions’ of politics: ‘[t]o obtain clear and precise definitions of leading terms is an important, and not altogether easy, achievement in all departments of scientific inquiry: but it is especially important in our present subject’.²⁵⁴ As interesting as Sidgwick’s emphasis on clarity and precision is the fact that the ‘present subject’ to which he referred was notionally politics, but in reality jurisprudence—indeed, *The Elements of Politics* is one of the great jurisprudential studies never to have been identified as such. Sidgwick wanted ‘to examine what is essentially involved in the terms “property,” “contract,” “executive” and “legislative” organs and functions’ and to explain what is meant by ‘the fundamental conceptions Government, Law, Right, [and] Obligation’.²⁵⁵ How was one to set about providing precise definitions and rooting out essences? For Sidgwick, the answer was obvious: one starts with Austinian jurisprudence.²⁵⁶

Recall our earlier notion of critical reverence. The point is not that Sidgwick and others followed Austin slavishly. Rather, the point is that analytical jurisprudence complemented the late nineteenth-century quest for greater rigour, robustness, precision, technicality, and the like. Even when those who epitomised the culture of the late-Victorian universities rejected Austinian analysis, they still tended to recognise its congeniality to the intellectual attitudes of that period. Austinian jurisprudence was a success story because, broadly speaking, it turned out to satisfy the epistemic requirements of late-Victorian university culture. Even Pollock appeared to appreciate as much, notwithstanding that he was never really a member of the critical reverence club.

Pollock seemed to be irritated by Austin not only because he felt he could see through Austin’s work, but also because he felt that others who ought to have been able to do the same did not.²⁵⁷ Of course, to some extent, Pollock did see through Austin—he was as astute as was Maine, and more hawkish, in highlighting the disparity between the Austinian analysis of the basis of legal validity and the facts about validity as revealed by the histories of a variety of legal systems. But Pollock’s jurisprudential critique was never likely to meet the requirements of late-Victorian university culture in the way that Austin’s did. For critique was the sum of it: Pollock offered no distinctive method, system, framework, agenda, or criteria. Austin’s jurisprudential writing—despite its many vacillations, circumlocutions, and eye-glazing embellishments (‘law properly or

²⁵⁴ H. Sidgwick, *The Elements of Politics* (London: Macmillan, 1891), 15.

²⁵⁵ *ibid.* ²⁵⁶ *ibid.* 15–28.

²⁵⁷ See e.g. Pollock to Holmes, 2 October 1896, in *Pollock–Holmes Letters*, i, 71; Pollock to Holmes, 5 July 1899, in *ibid.* i, 94 (‘I am a little bit disappointed that you only say Austin did not know *enough* law’).

strictly so called', 'law improperly so called', and so on)—contains a set of unequivocal arguments: '[l]aws properly so called are a species of *commands*'; 'customary laws, considered as positive law, are not commands'; 'every law properly so called is a *positive law*'; '[t]he matter of jurisprudence is positive law'; '[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'.²⁵⁸ The arguments are as easily multiplied as they are disputed. But then this is the key to understanding the longevity of Austinian jurisprudence: Austin provided a great deal with which natural lawyers, proponents of historical and comparative jurisprudence, and even other legal positivists could take issue. The historical and comparative project—even in Maine's hands, let alone Pollock's—never engaged an audience to the degree that Austin's eventually did.

Modern sympathisers with the historical and comparative jurisprudential tradition—the breed is not quite extinct—sometimes paint a somewhat different picture. 'Maine's comparative historical analysis inspired over half a century of scholarship in history and political science,' two such sympathisers have recently claimed, 'establishing itself as an analytical method to rival Austinian "autonomous analytical" jurisprudence'.²⁵⁹ While the first part of the quotation is more or less correct, the second part seems rather exaggerated.²⁶⁰ As an illustration of the point, consider the claim that we have just made concerning how Maine failed to engage an audience as did Austin. This claim can be interpreted literally. When Maine lectured Oxford undergraduates on historical and comparative jurisprudence, attendances dwindled.²⁶¹ '[T]he only lectures which draw a large number of undergraduates to my

²⁵⁸ Austin, *Lectures on Jurisprudence*, i, 178, 101, 171, 86, 263.

²⁵⁹ K. J. M. Smith and J. P. S. McLaren, 'History's Living Legacy: An Outline of "Modern" Historiography of the Common Law' (2001) 21 *LS* 251–343 at 257–58.

²⁶⁰ To support the claim made in the first part of the citation, Smith and McLaren cite chapter 7 of Collini, *Public Moralists*: see Smith and McLaren, 'History's Living Legacy', 257 n. 28. In fact, in that chapter Collini is primarily concerned with Maine's advancement of the notion of 'character' and the way in which Maine's 'prose invokes . . . a kind of moral authority' (*Public Moralists*, 276). On the matter of Maine's influence, Collini acknowledges that 'Maine's intellectual authority'—which 'only partly rested on his standing as a lawyer'—'was . . . widely felt in the 1870s' (ibid. 287); but he also argues that 'the Common Law tradition, always suspicious of "theorizing" as alien or at least irrelevant, had never been particularly responsive to the likes . . . of Maine', and subsequently 'entrenched rather than undermined these attitudes' (ibid. 307). Certainly Collini does not deny (though he is not particularly concerned with) Maine's influence upon history and political science; but he seems far from convinced that Maine significantly influenced thinking about law: 'notwithstanding his celebrated dicta about the modernity of societies based upon contract, it could not be said that he furnished his lay readers with any distinctively legal understanding of the nature of the English polity' (ibid. 287).

²⁶¹ See Collini *et al.*, *That Noble Science of Politics*, 357.

class are lectures on elementary Austinism', he complained to Bryce in 1875.²⁶² As Dicey proclaimed four years later, the reality was that 'the study of jurisprudence . . . generally and inevitably meant the study of Austin'.²⁶³ 'The Oxford school of historical jurisprudence' may well have 'broke[n] new ground in the transformation of Law into a university discipline'.²⁶⁴ But it failed, in the long term, to hold the attention of those studying law within the university. Pollock, implicitly, was willing to concede as much. About Maine he was prepared to declare in 1888 that 'I do not think [he] will leave much mark on the actual structure of jurisprudence'.²⁶⁵ About Austin, over forty years later, he could not but admit, albeit sourly, that a mark had been left: '[o]ne reason of his success in English law schools may be that a cocksure dogmatic theory, however bad, is good stuff to examine, and cram for examinations, upon'.²⁶⁶

If Austinian jurisprudence turned out to be a story of triumph, can we conclude also that the historical and comparative project was an unequivocal failure? To do so would be rash: contemporary academics who look sympathetically upon the historical and comparative tradition fairly point out that it has not left the grammar of general jurisprudence entirely unaffected, that the eclecticism of Maine and his successors at least partially paved the way for modern interdisciplinary legal scholarship, and that the methodology of modern comparative law remains rooted in standard historical-jurisprudential inquiries and debates concerning the evolution of law and the identification of legal families.²⁶⁷ In England from the late nineteenth century onwards, nevertheless, the tendency increasingly to identify the discipline of jurisprudence with the philosophy of law meant that the belief that jurisprudence should be grounded in history and comparison would become ever more marginalised. Frederic Harrison went so far as to declare in 1878 that 'the historical spirit is in strong contrast to the true spirit of jurisprudence'.²⁶⁸ While the historical method may be 'a

²⁶² H. Sumner Maine to J. Bryce, 25 November 1875, quoted in F. H. Lawson, *The Oxford Law School, 1850–1965* (Oxford: Clarendon Press, 1968), 49.

²⁶³ A. V. Dicey, 'The Study of Jurisprudence' (1879–80) n.s. 5 *Law Magazine and Review* 382–401 at 386.

²⁶⁴ J. Howarth, 'The Self-Governing University, 1882–1914', in *The History of the University of Oxford. Volume ii: Nineteenth-Century Oxford, Part 2* (M. G. Brock and M. C. Curthoys (eds.), Oxford: Clarendon Press, 2000), 599–643 at 617.

²⁶⁵ Pollock to Holmes, 4 March 1888, in *Pollock–Holmes Letters*, i, 31.

²⁶⁶ Pollock to Holmes, 17 April 1930, in *ibid.*, ii, 263.

²⁶⁷ For a representative sample of sympathetic literature, see P. Stein, 'The Tasks of Historical Jurisprudence', in *The Legal Mind: Essays for Tony Honoré*, N. MacCormick and P. Birks (eds.) (Oxford: Clarendon Press, 1986), 293–305; *Legal Evolution*, 124–7; and G. Samuel, 'Science, Law and History: Historical Jurisprudence and Modern Legal Theory' (1990) 41 *NILQ* 1–21.

²⁶⁸ Harrison, 'The English School of Jurisprudence', iii, 120.

potent and fruitful instrument of jurisprudence', he continued, we must recognise that it is 'merely an instrument of jurisprudence, and never take it for jurisprudence itself'.²⁶⁹ 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'.²⁷⁰ Looking to the historical school to discover where the action is could not, so far as Harrison was concerned, be considered a sound strategy for the student of jurisprudence.

The notion that the historical method was somehow suspect—that it offered plenty by way of exhortation, suggestion, and storyline, but comparatively little insight—spread beyond law. In November 1876 we find W. S. Jevons, the newly appointed Professor of Political Economy at University College London, proclaiming that 'the historical treatment of our science . . . may very properly do for political economy what Sir Henry Maine has done for jurisprudence'.²⁷¹ Not ten years had passed, however, before Henry Sidgwick sensed a false alarm: '[t]he proof of the pudding, as the proverb says, is in the eating; but our historical friends make no attempt to set before us the new economic pudding which their large phrases seemed to promise. It is only the old pudding with a little more ethical sauce and a little more garnish of historical illustrations.'²⁷² Among those who felt wary about the historical method we can, of course, count Pollock. But note that Pollock was neither a Harrison nor a Sidgwick. '[T]he keynote of [Harrison's] career', according to Kent, was 'amateurism': while 'not quite a full eccentric', he was 'a licensed irregular whose views were treated with the respect due to his sincerity, intelligence, and education, as well as his means and his numerous and important personal connections'.²⁷³ Sidgwick, by contrast, was very much the professional academic; like Harrison, however, he was no votary of the historical and comparative school. Pollock, let us remind ourselves, was for twenty years Oxford's professor of historical and comparative jurisprudence—a professor of historical and comparative jurisprudence who seemed to distrust, and who certainly showed little faith in, historical

²⁶⁹ Harrison, 'The English School of Jurisprudence', iii, 125, 124.

²⁷⁰ *ibid.* iii, 122.

²⁷¹ W. Stanley Jevons, 'The Future of Political Economy' (1876), in his *The Principles of Economics: A Fragment of a Treatise on the Industrial Mechanism of Society and Other Papers*, H. Higgs (ed.) (London: Macmillan & Co., 1905), 185–206 at 195.

²⁷² H. Sidgwick, 'The Scope and Method of Economic Science' (1885), in *Essays in Economic Method: Selected Papers read to Section F of the British Association for the Advancement of Science, 1860–1913*, R. L. Smyth (ed.) (London: Duckworth, 1962), 73–97 at 88.

²⁷³ C. Kent, *Brains and Numbers: Elitism, Comtism, and Democracy in Mid-Victorian England* (Toronto: University of Toronto Press, 1978), 159, 157.

and comparative methods. That the analytical tradition should have dominated over the historical and comparative tradition in English jurisprudence was perhaps inevitable, given the requirements of late nineteenth-century university culture. All the same, the historical and comparative project cannot have been aided by the fact that the man who for two decades was responsible for its advancement at Oxford seemed paralysed by his subject matter—capable of writing, certainly, but frozen by a fear of jurisprudential perspectives. It is difficult to avoid the conclusion that Pollock simply could not do jurisprudence. His opinions on the subject were neither here nor there. To no perspective did he commit, just as there was apparently none that he would reject. Even if Maine's successor had pursued historical and comparative inquiries as vigorously and successfully as had Maine himself, it is doubtful that English jurisprudence would not have turned out to be predominantly analytical. Given the non-event that was Pollock's jurisprudential career, the dominance of analysis seems, in retrospect, almost inevitable.

Conclusion

By no means, of course, did the whole of Pollock's career prove so undistinguished. A lecture about his contribution to the English treatise-writing tradition, for example, would strike many more positive notes. As regards this lecture, however, you have every right to feel baffled, if not duped. Why so many words to report what has ultimately been adjudged a non-event? The answer is that Pollock's failure as a jurisprudential writer is historically significant. His work embodied many of the least satisfactory elements—the ambiguousness, the lack of vision, indeed, after Maine, the largely unambitious nature—of the historical and comparative project. If historical and comparative jurisprudence was to compete convincingly with analytical jurisprudence in the late nineteenth century, the inheritor of Maine's mantle needed to ensure that the project directly addressed the epistemic requirements of the evolving university culture. Rather than investing the project with such directness, however, Pollock, ever suspicious of methods and systems, more or less guaranteed its consignment to the margins of English jurisprudence. He wanted the world to understand that Austin's jurisprudence was seriously flawed and ought to be more soberly assessed. He wanted to emphasise the value and the virtue of scholarly good sense. He had, and indeed articulated, a vision—modest and somewhat derivative, but a vision all the same—of the science of the common law. But this mixture of critique and exhortation did not amount to a distinctive jurisprudential position. Why is

English jurisprudence analytical? Primarily because it taught some challenging and (from a late nineteenth-century perspective) pertinent lessons, but also—and this has been the point of this lecture—because a similar quality of lesson was not being taught by Maine's principal successor.