Wilfrid E. Rumble

Doing Austin Justice

The Reception of John Austin's Philosophy of Law in Nineteenth-Century England

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John Austin was a towering presence in nineteenth-century English jurisprudence. He lived at the centre of the utilitarian movement in London during the 1820s and 1830s, and became its leading philosopher of law after Bentham's death (1832). Yet Austin's reputation sank very low during the twentieth century. 'He was a religion: today he seems to be regarded rather as a disease' (W.W. Buckland, 1945). And Austin's critics have become ever shriller in the last fifty years, often reducing his jurisprudence to a few of his ideas, vastly oversimplified.

Wilfrid E. Rumble's book analyses Austin's work in its historical context, and shows how much of it remains viable today – including his conception of analytical jurisprudence, his sharp distinction between law and morality, and his utilitarian theory of resistance to government. The end result is a richer, more nuanced portrait of Austin's legal philosophy than his twentieth-century critics have painted. *Doing Austin Justice* thus fills a large gap in the literature about this important figure. It will be of substantial interest to jurists, historians of political philosophy, and of the nineteenth century more generally.

Wilfrid E. Rumble has taught at Vassar College for more than four decades. Among his many publications are *American Legal Realism* (Cornell, 1968) and *The Thought of John Austin* (Athlone Press, 1985).

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DEDICATION

To Catherine, Bill, and Cynthia

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ABBREVIATIONS

The following abbreviations will be used in the notes and, frequently, in the text.

Commentaries: Sir William Blackstone, *Commentaries on the Laws of England in Four Books*, ed. William Draper Lewis (Philadelphia: Geo. T. Bisel, 1922).

Concept: H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961).

Concept, 2nd edn: H.L.A. Hart, *The Concept of Law*, Postscript, ed. Penelope A. Bulloch and Joseph Raz (2nd edn: Oxford: Clarendon Press, 1994).

DNB: *Dictionary of National Biography*.

'EQ': 'Events of the Quarter', *Law Magazine or Quarterly Review*.

ER: *Edinburgh Review*.

ESJ: 'The English School of Jurisprudence: Part I. – Austin and Maine on Sovreignty', *Fortnightly Review*, 24 (October, 1878), pp. 475–92; 'Part II. – Bentham's and Austin's Analysis of Law', ibid., 24 (November, 1878), pp. 682–703; and 'Part III. – The Historical Method', *Fortnightly Review*, 25 (January, 1879), pp. 114–30.

Essays: *Essays on Equality, Law, and Education, Collected Works of John Stuart Mill*, vol. 21, ed. John M. Robson (Toronto: University of Toronto Press, 1984).

ISLC: Albert Venn Dicey, *An Introduction to the Study of the Law of the Constitution*, 8th edn (Indianapolis: Liberty *Classics*, 1982).

JJ: *Journal of Jurisprudence*.

JSPTL: *The Journal of the Society of the Public Teachers of Law*.

Jurisprudence: Thomas Erskine Holland, *The Elements of Jurisprudence*, 7th edn (Oxford: Clarendon Press, 1895).

LEHI: Sir Henry Sumner Maine, *Lectures on the Early History of Institutions* (London: John Murray, 1875).

LJ: *Lectures on Jurisprudence or the Philosophy of Positive Law* (unless otherwise indicated, references to this book are taken from John Austin, *Lectures on*

Jurisprudence or the Philosophy of Positive Law, ed. and rev. by Robert Campbell [5th edn: London: John Murray, 1885]).

LM: *Law Magazine or Quarterly Review*.

LMLR: *Law Magazine and Law Review*.

LMR: *Law Magazine and Review*.

LQR: *The Law Quarterly Review*.

LOQR: *London Quarterly Review*.

PJD: *The Province of Jurisprudence Determined* (unless otherwise indicated, references to this book are taken from John Austin, *The Province of Jurisprudence Determined*, ed. Wilfrid E. Rumble [Cambridge: Cambridge University Press, 1995]).

PJD (1954) John Austin, *The Province of Jurisprudence Determined* and 'The Uses of the Study of Jurisprudence', intro. by H.L.A. Hart (London: Weidenfeld and Nicolson, 1954).

SHJ: James Bryce, *Studies in History and Jurisprudence* (New York: Oxford University Press, 1901).

SJR: *Solicitors' Journal and Reporter*.

Thought: Wilfrid E. Rumble, *The Thought of John Austin: Jurisprudence, Colonial Reform, and the British Constitution* (London: Athlone, 1985).

Three Generations: Janet Ross, *Three Generations of English Women: Memoirs and Correspondence of Susannah Taylor, Sarah Austin, and Lady Duff Gordon* (rev. edn, 1893).

Troubled Lives: Lotte and Joseph Hamburger, *Troubled Lives: John and Sarah Austin* (Toronto: University of Toronto Press, 1985).

'USJ': 'On the Uses of the Study of Jurisprudence', *Lectures on Jurisprudence or the Philosophy of Positive Law*, ed. and rev. by Robert Campbell (5th edn: London: John Murray, 1885).

WR: *Westminster Review*.

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1

Introduction

One of the most conspicuous developments in twentieth-century English jurisprudence is the remarkable decline in the standing of John Austin. The contrast between how he tended to be regarded for much of the nineteenth century, and how he now tends to be perceived, and has been so perceived for many decades, is astounding. Whether this sharp contrast says more about the skewed vision of the nineteenth, or that of the twentieth, century, is a good question. More probably what it says is nothing quite so dramatic. The moral of the story may be the simpler truth that the predominant opinions of the jurisprudential canon change and evolve in the course of time. If they do not shift as rapidly as the length of women's skirts or the width of men's ties, shift they do. Still, rarely have the twists and turns of academic fashion been as sharp as the turnabout in the prevailing attitudes towards Austin.

The transformation of Austin's reputation was concisely stated in an often quoted epigram of W.W. Buckland (1859–1946), the Regius Professor of Civil Law at Cambridge from 1914 to 1945. Buckland's primary scholarly specialization was Roman law, a field in which he truly distinguished himself, but he also had a long-standing interest in jurisprudence (his first article, published in 1890, was on this subject).[1] Since he lived almost half of his life in the nineteenth century, he was particularly well-situated to observe the changes in predominant attitudes towards Austin. Buckland noted in 1945, shortly before his death, that jurisprudence meant for Austin the analysis of legal concepts.[2] Buckland went on to point out that this is what jurisprudence also 'meant for the student in the days of my youth. In fact it meant Austin. He was a religion: today he seems to be regarded rather as a disease'.[3]

This epigram is of course clever hyperbole. Austin was never really a religion, or at least the only religion, of English jurists. There have always been dissenters, nonconformists, even heretics. This was true of the period from 1832 to 1861, and it became even more true in subsequent decades. Richard Cosgrove is fully justified in pointing out that 'though Austin appeared to sweep all before him in the latter part of the nineteenth century, opposition to analytic jurisprudence proved vocal and continuous'.[4] Although Henry Maine was the most influential critic of Austin, he was by no means the first, the only, or the harshest, one. In fact, his attitude towards Austin was much more favourable than his much shriller critics such as, say, James Bryce. He castigated Austin's contributions as 'really so scanty, and so much

entangled with error, that his book ought no longer to find a place among those prescribed for students'.[5]

In any case the deterioration of Austin's reputation during Buckland's long life is undeniable. The passage of more than a half century since his death in 1946 has only strengthened this unfavourable attitude among many legal theorists. Austin was once a marvel of legal literature, a staple of jurisprudence, and a jurist whose opinions were of the greatest weight. Now he has become a pariah and 'second rate' figure whose opinions are of little consequence except for purposes of refutation, or the history of legal theory. If it is not a requirement of political correctness in certain circles to trash Austin, it is certainly a more common practice than to defend him, or to elucidate his ideas. In 1929 R.A. Eastwood and G.W. Keeton wrote that criticism of Austin, both constructive and destructive, is 'unceasing'.[6] The last forty years have seen much more of the latter than the former. In the words of one scholar, 'The corpus of Austin's legal philosophy . . . now serves primarily as a straw man for aspiring jurists who attempt to earn a reputation with still another critique.'[7] Although three books rather sympathetic to Austin's jurisprudence were published in the 1980s, they did little to stem the tide.[8] Even a relatively charitable interpreter maintained in 1996 that he 'deserves to be reburied and allowed to rest in peace'.[9]

The purpose of this book is neither to rebury, nor to resuscitate, John Austin. Resuscitation is probably impossible, while reburying is unnecessary. No one has been more frequently interred than Austin. To rebury him once more, to sprinkle a handful of additional dirt on his coffin, would accomplish nothing. What Austin needs is not another interment – or revival – but a better understanding. This study attempts to *contribute* to such an understanding – much more would be necessary fully to achieve it – by analysing the reception of his work in nineteenth-century England. Its purpose is to do what W.W. Buckland advised when he wrote that Austin 'cannot be replaced on his pedestal; the intensely individualistic habit of mind of his day is out of fashion. But it is well to do him justice'.[10] To help to do Austin justice, by focusing on the reception of his jurisprudence, in a particular country, over a specific period of time, is then the underlying purpose of this study.

At the same time, the scope of this book is not as broad as this purpose implies. To begin with, it is impossible, in any literal sense, fully to grasp how Austin's work was received. The reaction to his books by most of the persons who read them is, and forever will be, unknown. The most that can be achieved is to unearth, and to grasp, the reactions of those who published opinions about Austin's works. In addition, I make no attempt to describe *all* of the comments expressed about Austin's jurisprudence. A mere reporting, or cataloguing, of views of it might be better than ignoring the reception of his work, but a more limited focus on significant responses to it is preferable.

At least this is the approach that I have adopted in this book. Of course, significance, like beauty, is, to some extent, in the eye of the beholder. A different person might emphasize somewhat different responses than I have stressed. Nevertheless, the inherent selectivity required by a focus on significant responses to Austin's work can be, and will be, justified as the selections are made.

Finally, I do not attempt to analyse even all of the significant comments about Austin's legal philosophy. In particular, two kinds of responses to it are either not discussed, or are not analysed systematically. One consists of the reception of Austin's criminal law theories, which K.J.M. Smith has exhaustively explained in his recent book.[11] The other is the impact of Austin's notions upon, and their use by, legislators and judges. Although their reception of his ideas is important, it is sufficiently complex to warrant treatment on its own rather than as part of a much larger study.

Nevertheless, this study encompasses a wide range of sources. The reviews of Austin's books constitute a particularly fertile and largely untapped source for learning how his ideas were received. It is for this reason that they receive more emphasis here than in other studies of Austin. To say this is not in any way to suggest, however, that additional sources for determining the reception of his works are de-emphasized. Textbooks, other sorts of books, articles in journals, and more, are also heavily relied upon. In short, and with the exceptions indicated, I have attempted to consult whatever sources illuminate how Austin's legal philosophy was received. Consequently, the scope of this book, while limited, is still quite broad.

The importance of doing Austin justice: his presence and impact

It is of course important to treat justly any thinker, or any person. Fulfilment of this purpose is particularly imperative in Austin's case, and for numerous reasons. A primary consideration is his extraordinary presence in the English jurisprudence of the nineteenth century. The high point of his reputation was the 1860s and 1870s, but he remained a highly visible figure throughout the remainder of the century. Indeed, he was at least as large a presence in these years as H.L.A. Hart was in the English jurisprudence of the last four decades of the twentieth century. Austin's status is impossible to appreciate, however, without extensive research into musty, seldom read journals, many of which no longer exist.

Evidence of Austin's large presence in late nineteenth-century English jurisprudence will be presented throughout this study. At the same time, his 'presence' must not be confused with something quite different, which is his 'influence'. While assertions of Austin's overwhelming influence are

commonplace, and may even be found in this study, few things are more difficult to *prove*, or to determine *precisely*. The root of the problem is the difficulty of determining the precise *extent* to which Austin was influential, and *upon whom*. At the outset there is the general difficulty of estimating accurately the influence of one thinker upon another. It cannot necessarily be inferred even if a later theorist praises the doctrines of an earlier thinker, or adopts similar positions. The praise may be an attempt to rationalize opinions arrived at independently of the previous theorist, and for quite different reasons. *Proving* influence requires *evidence* of what was going on in someone's mind, which may be difficult if not impossible to determine. In Austin's case his actual influence is easy to exaggerate. After all, his ideas have never been free from criticism, even in his heyday. Very few nineteenth-century jurists appear to have agreed completely with all of his ideas, just as numerous late twentieth-century jurists disagree, to a greater or lesser extent, with Hart. In addition, Austin's legal philosophy consists of a diverse cluster of ideas, some of which were more widely accepted, or at least favourably commented upon, than others. To assess his influence accurately it is necessary to specify *which* of his various ideas is being investigated, *who* seems to have been influenced by them, and *what* evidence there is of an actual influence. The mantra that Austin was influential only conceals the need to address these problems, which are not easily resolved. To say this is not to imply that ascriptions of Austin's influence are impossible to substantiate. To say that would be to throw the baby out with the bath water. It is to suggest the imperative of caution in the formulation of very broad generalizations, which must be substantiated.

What can be said is that Austin's *presence* in nineteenth-century English jurisprudence was large. Nowhere was it larger than in legal education, or, specifically, courses on jurisprudence. Yet, there was more to it than a disinterested appreciation of the merits of his work. His quite extraordinary visibility did not develop in a vacuum. Rather, it was rooted in a specific historical context which created a unique opportunity. As John Orth put it, to paraphrase Voltaire, if Austin did not exist, he would have been invented.[12] In the words of Stefan Collini, 'developments in legal education, especially within the newly revived universities, were initially the precondition for the greater public prominence of legal theorists'.[13] These developments included the creation in 1852 of the Council for Legal Education, the appointment by it of a number of Readers who lectured on law, and the institution of compulsory examinations in 1872 for admission to the bar. At Oxford examinations in law were introduced, the School of Law and Modern History was divided in 1872, and a Final Honour School of Jurisprudence was established. This professionalization of legal education had the effect of creating a 'fresh market for legal works, one of the first consequences of which was that Austin had examinational greatness forced upon him'.[14] The remarkable success of Robert Campbell's

student edition of Austin's *Lectures on Jurisprudence* [hereinafter cited as *LJ*] is a good indication of the extent of the market. From 1875 to 1920 the book underwent thirteen impressions.

Austin thus became a most conspicuous presence in courses on jurisprudence. Dicey wrote in 1880 that 'the study of jurisprudence has generally and inevitably meant the study of Austin'.[15] In 1882 Frederick Pollock somewhat unhappily acknowledged that jurisprudence means to English students 'at present, for all practical purposes, the two volumes of Austin's Lectures, or the one volume into which their matter has been more lately condensed by his able editor'.[16] A year later E.C. Clark described Austin's work as 'the staple of jurisprudence in all our systems of legal education'.[17] It remained such well into the twentieth century. In 1916 R.A. Eastwood wrote that 'nine out of every ten students who take up the study of jurisprudence are set to read Austin'.[18] Even as late as 1953 Denis Browne could say, in his Presidential Address to the Society of Public Teachers of Law: 'From what I have been able to observe in the course of examining at various universities, the general conception of the subject [of jurisprudence] shows few important variations. On the whole its scope is still regarded as being what Austin thought it was.'[19] One year later H.L.A. Hart reiterated this notion. He also emphasized that 'Austin's influence on the development in England of the subject has been greater than that of any other writer. For English jurisprudence has been and still is predominantly analytical in character.'[20]

These quotations pinpoint clearly the arena in which Austin's presence was most visible, and his impact was arguably the heaviest. The field was legal education, or, that part of it consisting of courses on jurisprudence. By his very presence in such courses he influenced how they were taught. His influence in this sense must be distinguished, however, from the impact of his specific conceptions of law, legal obligation, sovereignty, etc. Whether the teachers who assigned Austin, and the students who read him, agreed with him, or were influenced by him, is another story. To an extent, some of them may have been, and probably were, but no one can really say *how much* with a great deal of certainty. The appropriate biographical and empirical studies have simply not been conducted. What is clear is that Austin's conception of jurisprudence, or some elements of it, appear to have been more widely accepted than many of his other notions. Even in the period of his greatest triumph, from 1861 to 1880, many of his doctrines were criticized, a practice that intensified in the twentieth century. Finally, his approach to, or conception of, jurisprudence itself has more than one element, the influence of which varied. If Austin's approach is interpreted to mean a focus upon close, descriptive analysis of fundamental legal principles, notions, and distinctions, or 'analytical jurisprudence', then his influence was arguably profound. It appears to have been almost as heavy with respect to the necessity to distinguish between the

law as it is and as it ought to be. Other facets of his approach were less influential, and less enduring in their influence. A prime example is his assumption that certain legal principles, notions, and distinctions are inherent in not just specific legal systems, but the very idea of law.

Hart's own work illustrates the selectivity of the approach to Austin among even jurists within the analytical tradition, their tendency to pick and choose between his various ideas. It may be an exaggeration to say that Hart made his reputation by assailing Austin's conception of law, legal obligation, and sovereignty,[21] but the assertion captures a certain truth. The Oxford professor was in any case Austin's most influential mid- to late twentieth-century critic. Still, Hart not only accepted, but defended, such a crucial element of Austin's approach as his sharp distinction between law and morality. More directly to the point Hart employed a largely, if not completely, Austinian conception of general jurisprudence. The most compelling evidence of this is his posthumously published postscript to *The Concept of Law*. There he indicated that his 'aim in this book was to provide a theory of what law is which is both general and descriptive'.[22] By 'general' he meant that law has taken 'the same general form and structure' in different cultures, and at different times. He interpreted 'descriptive' to signify that his theory has no moral aims and does not attempt to justify what it describes. Austin's conception of jurisprudence was both general and descriptive in these senses of the words.

Furthermore, Austin is still a major presence in British legal education, or that part of it concerned with jurisprudence. Although the critical reaction to his thought has had its effects – he no longer predominates in the classroom – he is still taught and remains part of the jurisprudential canon. The extent to which he is part of the curriculum of law departments is apparent from three late twentieth-century surveys of the place of jurisprudence in British legal education. In 1974 R.B.M. Cotterrell and J.C. Woodliffe reported that the writings of H.L.A. Hart were considered in detail in more courses on jurisprudence than those of anyone else. Austin was in second place and his theories were considered in detail in more than 75 per cent of university jurisprudence courses. The authors commented that his writings 'seem to have survived surprisingly well'.[23] In 1985 Hilaire A. Barnett and Dianna M. Yach reported that Austin was considered 'fairly fully' in 68 per cent of university jurisprudence courses.[24] This percentage was substantially lower than that of Hart and slightly lower than that of Marx. It was higher, however, than that of any other theorist. In 1995 Hilaire Barnett reported the results of the third survey. Austin was still considered in depth in 59 per cent of the courses on jurisprudence offered in the United Kingdom. This percentage was lower than that of Hart, Dworkin, Finnis, Rawls, and Marx. Nonetheless, Barnett expressed some surprise at the fact that Austin is 'perhaps remarkably? – still read "in depth" or "in outline" in 84 per cent of courses'.[25]

Other reasons for doing Austin justice

Austin was thus a major presence in late nineteenth-century British legal theory and is still a presence in courses on jurisprudence. He also had a major effect upon the study of or approach to jurisprudence. These considerations alone warrant trying to do him justice, but there are also other reasons. To begin with, previous studies of his work have too often failed to do him complete justice, or anything close to it. Three approaches to Austin have tended to predominate. The first is simply to dismiss him with a wave (or back) of the hand after the most cursory summary of his ideas. A second approach is to use Austin as a stalking horse for the author's agenda, whatever it may be, usually at the cost of oversimplifying, or distorting, his ideas. Few writers have been as candid about what they were doing in this regard as H.F. Jolowicz. He indicated that he began his lectures with Austin's 'doctrine' because, in part, it '*forms a very good target – we must set it up and see it clearly in order to throw bricks at it*'[26] [emphasis added].

A third, and in principle fully justifiable, approach is to abstract Austin's legal philosophy from its historical context and to focus on an explication/critique of it. Although this approach can be very illuminating, it has limitations as a means of fully understanding Austin's intentions and ideas. For example, practitioners of this approach have frequently narrowed his legal philosophy to a few familiar notions, such as his conceptions of law, legal obligation, and sovereignty. To this extent, they exemplify the progressive narrowing of the focus of English jurisprudence emphasized by scholars such as William Twining, David Sugarman, and Richard Cosgrove.[27] The brunt of their interpretation is the argument for what Cosgrove calls the 'inward turn' of jurisprudence since the 1880s.[28] Twining attaches an earlier date to this development, 1850, which he describes as 'a progressive narrowing of general jurisprudence, broadly conceived, to particular expository jurisprudence, concerned almost exclusively with the exposition and analysis and application of English legal doctrine'.[29] In the process of this narrowing Bentham was marginalized and 'the followers of Austin used him selectively and developed a narrower and more particular conception of analytical jurisprudence'.[30] In short, as David Sugarman writes, 'Friends and foe alike tended to narrow his [Austin's] ideas'.[31]

Sugarman's reference to Austin's 'friends' bears particular note. They too have not only narrowed his ideas, but considered them independent of their historical context. The late Julius Stone, the author of one of the major twentieth-century interpretations of Austin, is a good example.[32] He has expressed contempt for what he has dubbed 'literary biography' of Austin.[33] Stone elaborated upon his perspective in these terms: 'We chose . . . that interpretation of Austin's position which would leave it some legal pedagogical

value rather than reduce it to an episode in literary history or in the history of ideas.'[34] In other words, Stone chose that interpretation of Austin's views which presents them in the most favourable light. This is to be distinguished from an interpretation that reduces Austin to an episode in literary history or the history of ideas.

The problem with Stone's approach is the subordinate value that it appears to attach to the *accuracy* of an interpretation of Austin. To be sure, he may portray Austin in terms that are more acceptable to contemporary jurists than, say, my interpretation. To this extent, I wish that certain facets of my interpretation of Austin were different than they are. The prime example is his conception of general jurisprudence. Nonetheless, I feel compelled to go where the evidence takes me even if I dislike the destination. I do so because accuracy ought to be *the* primary objective, at least for a study in the history of ideas, which is what this book is. Otherwise, opinions that Austin or commentators on his work expressed, and to which he and they attached importance, may be neglected or de-emphasized. In any case my approach accords primary value to accuracy in interpretation rather than utility for legal pedagogy, or anything else. Whether, or the extent to which, my interpretation *is* accurate is of course another matter, but accuracy is the goal.

This leads to the final reason for doing Austin justice, which is the complexity of his thought. No short summary can capture accurately the variety of his ideas, which are anything but a model of uniformity. There is not one Austin, but at least a half-a-dozen Austins. Many extant interpretations of his legal philosophy fail, however, to represent adequately all of them. To this extent, he indeed remains 'one of the great shadowy figures of English nineteenth-century intellectual history'.[35] Such is the case even though the authors of the various interpretations may have very important things to say. Hart's *The Concept of Law* is a prime example. His analysis of Austin takes no account of the three lectures of the *PJD* that discuss utilitarianism, a discussion that Austin insisted was relevant to jurisprudence.[36] From the point of view of *The Concept of Law* the lectures might as well never have been delivered. To say this is not to imply that Hart's very influential criticisms of Austin are unwarranted. It is to say that the account of him in *The Concept of Law* is quite incomplete.

The need to understand the nineteenth-century reception of Austin's jurisprudence

In order to understand how Austin's jurisprudence was received, it is necessary to appreciate not only *what* was written about it, but *who* wrote it. After all, neither his critics nor defenders were disembodied spirits, but flesh and blood human beings. As such, understanding something about their lives can

contribute to a better appreciation of their opinions of Austin. At least this assumption is the rationale for the brief biographical sketches sprinkled throughout this study.

To the quite substantial extent that Austin's ideas are considered in their historical context, this study differs from much of late twentieth-century English jurisprudence, which is often ahistorical. Yet, analysis of the nineteenth-century reception of Austin's jurisprudence contributes to a better understanding of it in several ways. To begin with, it discloses the distinctiveness of some of his ideas, at least in their time and place, if not *sub specie aeternitatis*. He is often regarded now as an outmoded, if not reactionary, figure. For a good portion of the nineteenth century, however, he was often seen as an innovator on the cutting edge of jurisprudential change. This consideration is one reason why comments about his work were often extremely enthusiastic. Jurists, or some of them, were excited by Austin's lectures and what he was trying to do. While the reaction to them was not as uniformly enthusiastic as that demonstrated for Henry Maine's books, it was often highly laudatory. An analysis of the reception of Austin's work also illuminates the different perspectives from which he has been perceived. In turn, they reinforce the previous observation that he is not the simplistic, monolithic thinker so frequently portrayed in the twentieth century. Rather, he is a complex legal theorist in whom different impulses are to be found, not all of which are easily reconcilable. Although these internal tensions raise questions of his consistency, they also signify that he is a much more interesting legal theorist than he has often been represented to be. Aside from this, certain nineteenth-century responses to Austin illuminate both his intentions and his achievements, what he was trying to do and what he actually did. Indeed, in some ways, though not in all, nineteenth-century commentators on Austin understood his jurisprudence better than his twentieth-century interpreters, or critics. Of course, what is true of some of the nineteenth-century commentators on Austin, and some facets of his jurisprudence, is definitely not true of all of them. Finally, some of the criticisms of him adumbrate objections developed by much better known twentieth-century critics, including H.L.A. Hart. To this extent, the adage that those who ignore history are destined to repeat it also applies to the history of legal theory.

The organization of this book and its relationship to my previous studies of Austin

The attempt to develop a better understanding of the nineteenth-century reception of Austin's jurisprudence in England, within the parameters specified, is then the purpose of this book. The focus is on the English reception of his

jurisprudence largely, though not entirely, for practical reasons. This book would have to be substantially longer if Austin's reception in other countries were to be analysed, illuminating as that could be. Moreover, he had a significance for English jurisprudence that he did not attain in any other country. At the same time, it would be unduly rigid never to exceed, if only briefly, these limits. Thus the views of a few jurists from other parts of Great Britain, as well as the Commonwealth, are also discussed. The reason, or reasons, for their inclusion are explained seriatim.

The book itself is divided into eleven chapters. The focus of the second chapter is Austin's life, an account of which facilitates understanding of the reception of his jurisprudence. The reception of Austin's lectures by his students is the subject of the third chapter. They were, after all, the first persons to receive it. The fourth chapter is an examination of a conspicuous, if generally unappreciated, theme of the reviews of the first and second editions of *The Province of Jurisprudence Determined*. It is praise of Austin's three lectures on the principle of utility, something widely ignored, as indicated, by modern critics of his work. The fifth chapter is a discussion of John Stuart Mill's analysis of Austin's jurisprudence. No other commentator was in as good a position as Mill to understand Austin's legal philosophy. Mill knew Austin personally, was tutored by him on Roman law, and dutifully attended his lectures at the University of London. The sixth chapter is an analysis of the perception of Austin as legal scientist. It is a perception that may be the single most important reason for the favourable responses to his work. The seventh chapter is a discussion of the relationship between Austin's jurisprudence and that of Henry Maine. Unlike Mill, Maine did not know Austin personally, which in some respects may have been advantageous. Maine was probably the single most important nineteenth-century critic of Austin's work, yet the relationship between their work has often been misunderstood. The eighth chapter focuses on the reception of Austin's crucial conception of general jurisprudence. This notion is vitally important because, among other things, it heavily conditioned how he approached the other questions that he addressed. The ninth chapter discusses three of the most important nineteenth-century precursors of H.L.A. Hart's influential critique of Austin. The tenth chapter presents an overview of the reception of Austin's jurisprudence, while the final chapter explains the conclusions to be drawn from this study.

The objective of developing a better understanding of Austin is not only the purpose of this book, but the thread that unites my previous work on him over the last twenty-odd years. I therefore feel obligated to explain the relationship of this book to my earlier work. Although there may be some overlap between this book and *The Thought of John Austin* (1985), it is very limited. The two books tend to be concerned with different things. Most notably, a conspicuous feature of *The Thought* ... is its lack of emphasis on the reception of Austin's

jurisprudence in the nineteenth century. Indeed, the absence of a comprehensive explanation of it is one of the greatest gaps in the book as well as much of the literature about Austin. I attempted to fill part of this void in three articles published in 1988, 1991, and 1996.[37] These essays provide the core of the third, fourth, and seventh chapters. While each of the articles has been revised for publication in this book, the one on Maine has been more substantially revised than the others. These revisions are designed to incorporate the more recent scholarly literature about Maine, additional research on my part, and certain modifications of my earlier opinions. The most important example may be the greater weight that I now give to the 'rationalist', *a priori* side of Austin's thought. In the last analysis it accounts for what is most distinctive about his general jurisprudence, which is the emphasis upon certain *necessary* and *universal* principles, notions, and distinctions. At the same time, I still believe that Austin's utilitarianism is more intimately connected to his jurisprudence than most scholars acknowledge. Of course, his utilitarianism and empiricism stand in some tension with his rationalism, if they are not incompatible. It is a conflict, Maine's perceptive awareness of which sets him apart from Austin's other nineteenth-century critics.

Notes

1. See Buckland, 'Difficulties of Abstract Jurisprudence', *LQR*, 6 (1890), p. 436. Buckland's most important, though far from his only, book on Roman law is his *A Textbook of Roman Law from Augustus to Justinian*, 3rd edn, rev. Peter Stein (1963).
2. *Some Reflections on Jurisprudence* (Hamden, Connecticut: Shoe String Press, 1974), p. 2.
3. Ibid.
4. 'The Reception of Analytic Jurisprudence: The Victorian Debate on the Separation of Law and Morality', *Durham University Journal*, 74 (1981), p. 50.
5. *SHJ*, p. 616.
6. *The Austinian Theories of Law and Sovereignty* (London: Methuen, 1929), p. vii.
7. Cosgrove, 'The Reception of Analytic Jurisprudence', p. 47.
8. See W.L. Morison, *John Austin* (Stanford, California; Stanford University Press, 1982); Robert Moles, *Definition and Rule in Legal Theory: A Reassessment of H.L.A. Hart and the Positivist Tradition* (Oxford: Blackwell, 1987); and *Thought*.
9. William Twining, 'General and Particular Jurisprudence – Three Chapters in a Story', *Positivism Today*, ed. Stephen Guest (Aldershot: Dartmouth, 1996), p. 125.
10. Buckland, *Some Reflections*, p. 2.
11. *Lawyers, Legislators and Theorists: Developments in English Criminal Jurisprudence 1800–1957* (Oxford: Clarendon Press, 1998).
12. Professor Orth's comment was made verbally in 1991.
13. *Public Moralists: Political Thought and Intellectual Life in Britain 1850–1930* (Oxford: Clarendon Press, 1991), pp. 255–6.

14. Ibid., p. 267.
15. Dicey, 'The Study of Jurisprudence', *LMR*, 5 (1879–1880), p. 386.
16. *Essays in Jurisprudence and Ethics* (London: Macmillan, 1882), p. 1.
17. *Practical Jurisprudence: A Comment on Austin* (Cambridge: Cambridge University Press, 1883), p. 5.
18. R.A. Eastwood, *A Brief Introduction to Austin's Theory of Positive Law and Sovereignty* (London: Sweet and Maxwell, 1916).
19. 'Reflections on the Teaching of Jurisprudence' *JSPTL*, 2 (1953), p. 81.
20. 'Introduction', in *PJD* (1954), p. xvi.
21. See H.L.A. Hart, *Concept*, pp. 18–78.
22. Hart, *Concept* 2nd edn, pp. 239–40.
23. R.B.M. Cotterrell and J.C. Woodliffe, 'The Teaching of Jurisprudence in British Universities', *JSPTL*, (1974), p. 80.
24. 'The Teaching of Jurisprudence and Legal Theory in British Universities and Polytechnics', *Legal Studies*, 5 (1985), p. 158.
25. 'The Province of Jurisprudence Determined – Again!', *Legal Studies*, 15 (1995), p. 119.
26. H.F. Jolowicz, *Lectures on Jurisprudence*, ed. J.A. Jolowicz (London: Athlone, 1963), p. 15.
27. See Twining, 'Academic Law and Legal Philosophy: The Significance of Herbert Hart', *LQR*, 95 (1979), p. 558; Sugarman, 'Legal Theory, the Common Law Mind and the Making of the Textbook Tradition', in *Legal Theory and the Common Law*, ed. William Twining (Oxford: Blackwell, 1986), pp. 38, 42–3; and Cosgrove, *Scholars of the Law* (New York: New York University Press, 1996).
28. Ibid., p. 209.
29. 'Maine and Legal Education: A Comment', in *The Victorian Achievement of Sir Henry Maine: A Centennial Reappraisal*, ed. Alan Diamond (Cambridge: Cambridge University Press, 1991), p. 216.
30. Ibid.
31. Sugarman, 'Legal Theory', p. 43.
32. See Stone, *Legal System and Lawyers' Reasonings* (Stanford: Stanford University Press, 1964), pp. 63–97.
33. Ibid., p. 69.
34. Ibid., p. 90.
35. Collini, 'Introduction', in Mill, *Essays*, p. xlii.
36. *PJD*, pp. 12–15.
37. See 'John Austin and His Nineteenth Century Critics: The Case of Sir Henry Maine', *Northern Ireland Legal Quarterly*, 39 (1988), pp. 119–49; 'Nineteenth-Century perceptions of John Austin: Utilitarianism and the Reviews of The Province of Jurisprudence Determined', *Utilitas*, 3 (1991), pp. 199–216; and 'Austin in the Classroom: Why were his Courses on Jurisprudence Unpopular?', *Journal of Legal History*, 17 (1996), pp. 17–40.

2

A sketch of Austin's life

If the reception of Austin's jurisprudence in the nineteenth century is to be fully understood, it is necessary at the outset to understand his life. The purpose of this chapter is not, however, to develop a comprehensive biography of Austin, which is available elsewhere.[1] Rather, it is to focus upon certain highlights of his life and career that facilitate an understanding of his legal philosophy and its reception. That they are useful for this purpose is clear. For example, familiarity with his ill-fated career as a professor of jurisprudence is essential for grasping why he was not a more productive writer on this subject. Austin published the *PJD* (1832) at the age of forty-two and he never wrote anything else on the subject. If he had done so, he might have become a major figure in English jurisprudence much earlier in the nineteenth century. To be sure, the extent to which his legal philosophy was unknown during his life has been exaggerated.[2] Nevertheless, his star shone much more brightly after his death in 1859, and his life helps to explain why.

I

Austin was born on 3 March, 1790, most probably at Creeting Mill, Suffolk. He was the eldest of the five sons and two daughters of Jonathan and Anne Austin, who lived near, or in, Ipswich (the precise location of their residence and John's birthplace is somewhat uncertain). Jonathan Austin was a miller and corn merchant who made large amounts of money as a government contractor during the Napoleonic wars. He was a handsome, self-educated, enthusiastic man who liked to read and became knowledgeable in both history and political economy. Anne Austin was a well-educated, able woman who evidently 'inspired her husband with her love for learning'.[3] However, she also had a delicate constitution, was subject to depression, and manifested 'a deep tinge of melancholy [which] . . . overshadowed her whole life'.[4] Several of her other children, including John, experienced similar problems.

Knowledge of Austin's childhood is sparse, but he was raised in Ipswich. Unfortunately, almost nothing is known about his education, though he was said to have been educated at a private school.[5] He enlisted in the army shortly before his seventeenth birthday and served under Lord William Bentinck in Malta and Sicily. Although he was idle for much of the time, his military

service was not without value. At the least he reached the decision that his happiness was 'commensurate with and inseparable from ... progress ... in the acquisition of knowledge'.[6] He therefore read widely and even studied John Locke's *An Essay Concerning Human Understanding*, which must have made a deep impression upon Austin. Otherwise, he probably would not have referred so frequently to the work or its author in the *PJD* (it includes an unusually long quotation – five pages – from Locke's *Essay*).[7] His classification of laws and his views on ethics appear to have particularly impressed Austin. It is not therefore surprising that he extolled Locke's 'great and venerable name'[8] and regarded him as 'the greatest and best of philosophers'[9]. At any rate, Austin was poorly suited for military life and, at the request of his family, resigned his commission in 1812. His younger brother Joseph, the Austin's second son, had enlisted in the navy and died at sea on 12 October, 1811.[10]

Austin appears to have begun the study of law in 1813,[11] when legal education in its modern form, or anything close to it, did not exist. Instead, the student was obliged 'to get his knowledge of law by means of undirected reading and discussion, and by attendance in chambers, in a law office, or in the courts'.[12] According to Richard Bethell, the student went 'untrained, unformed, uneducated, into the chambers of a special pleader or a conveyancer'.[13] Although not much is known about how Austin acquired his legal knowledge, he evidently studied in the office of Godfrey Sykes, an eminent pleader. Sir John Patteson, who became a highly respected judge, subsequently recalled an incident in Sykes' pupil room in which Austin adumbrated remarkably well the role that he was eventually to play:

> One day a singular man entered ... for the first time, and presently announced to his companions that he had come there, not only to qualify himself as a special pleader, but to study and elucidate the principles of Law. This was John Austin. Not unnaturally, the others smiled at his apparent presumption, but ... we were wrong, for he has done what he proposed.[14]

Austin's experience as an apprentice to an equity draftsman may, in any case, have affected his literary style. He virtually admitted as much in a letter that he wrote in 1817 to his fiancee, Sarah Taylor, to whom he had become engaged in 1814. He indicated that he would 'hardly venture on sending a letter of much purpose, even to you, unless it be laboured with the accuracy and circumspection which are requisite in a deed of conveyance'.[15] His remarkable proposal to her, which reads like a legal document, indicates that he was right.[16] The same tendency is also evident in his lectures and there is little doubt that it limited their appeal.

Austin was called to the bar at the Inner Temple in 1818. The next year he married Sarah Taylor, a very accomplished person in her own right. She not

only became her husband's prime supporter, but zealously promoted his work at every opportunity. In addition, she developed a career of her own as a reviewer and translator.[17] Since John Austin's income for most of their married life was small, Sarah's earnings were important for their support (their daughter Lucie was born in 1821). Sarah shared with her husband good looks, middle-class origins, intelligence, ability, and a Unitarian upbringing. The differences between them were at least as important as these similarities. He tended to be austere, reclusive, and insecure, while she was very determined, ambitious, energetic, gregarious, and warm.

II

The Austins moved to London shortly after their marriage. Their residence in Queen Square Place 'soon collected within its walls as remarkable an assemblage of persons as ever met in a London drawing-room'.[18] The Austins were neighbours of Jeremy Bentham and James Mill. Bentham was the intellectual leader of the utilitarians and no one did more than Mill to spread the Gospel. The Austins thus lived in the epicentre of a vital reform movement. Sarah Austin evidently became very close to Bentham, whom she loved 'with as much fondness as reverence'.[19] John Austin left no such moving testimonial of his affections. He did acknowledge in 1819 that he 'revered' Bentham, wished to see his doctrines 'widely diffused and generally embraced', and would not be the 'least zealous amongst ... [the] preachers of the gospel'.[20] Even so, these words were written at the height of Austin's infatuation with Bentham, of whom he gradually became more critical. The precise size and shape of his intellectual debt to Bentham is therefore complex. On the one hand, there is no doubt that it was substantial and that he was a major source of Austin's legal philosophy. On the other hand, the latter became much more conservative politically than Bentham and even 'dissented from many of [his] views of law and of the various subjects immediately connected with it'.[21] Moreover, other thinkers, English as well as continental, also cast a large shadow over Austin's work. The most important examples are the Roman jurists, Thomas Hobbes, and German jurisprudence. The end result is a legal philosophy that in certain respects is quite different from Bentham's. John Stuart Mill may have put it better than anyone: Austin 'had made Bentham's best ideas his own, and *added much to them from other sources and from his own mind*'.[22]

At any rate, Austin's prospects as a barrister appeared to be bright, a judgement evidently shared by a number of his contemporaries. He practised at 2 Old Square, Lincoln's Inn, and his name appeared on the Law List in 1819 and 1824 as an equity draftsman. Although little is known about his experiences at the bar, he was unsuccessful and may have held only one brief.[23] His

ineptitude as a litigator contrasted sharply with the success of his very talented younger brother Charles (1799–1874). After a brilliant career at Cambridge, he flourished in the practice of law. He was appointed a QC in 1841 and apparently refused an offer of the Solicitor-Generalship.[24] In the mid-1840s he became the leader of the Parliamentary Bar, where his earnings were legendary. His success in the committee rooms of Parliament was 'spectacular'.[25] According to a contemporary, 'his marvellous gifts as an advocate gave him a position there the like of which was never attained by any other man in any other branch of the profession .... His reputation was so great that he received many briefs merely in order to prevent his appearance on the other side.'[26] Clients virtually fought for his services. At least on one account, a 'posse' of them was 'ready to march him off to the particular committee room in which the client was engaged ... they tugged at his gown whilst he was speaking, they besieged his seat, they almost dragged him where they wanted him'.[27]

The reasons for John Austin's very different experience at the bar are largely a matter of speculation. However, his poor health, hypersensitivity, and perfectionism played a role. His orientation towards legal philosophy also was a factor. 'John is much cleverer than I', Charles Austin is alleged to have said, 'but he is always knocking his head against principles.'[28] Lack of self-confidence also contributed to John's inability to perform well at the Bar. He evidently practised on the Norfolk circuit and before the Ipswich Quarter Sessions. On one account, he 'broke down' in the middle of a case.[29] Another description emphasized his lack of self-confidence, as well as his focus on legal principles. According to 'Silverpen', John Austin

> had not the confidence necessary for a pleader, and his mind was of too philosophical a cast to enable him to enter heartily into the *details* of law. He could not bear legal quibbling, or learn the art of mystifying a jury. His inclination was for the principles of law and jurisprudence, in a knowledge of which he was unsurpassed and, indeed, unequalled by his contemporaries, and it was not long before he left circuit duties.[30]

Austin gave up entirely the practice of law in 1825. One year later he was appointed to the Chair in Jurisprudence and the Law of Nations at the newly founded University of London. Its purposes included creating opportunities for the study of subjects neglected at Oxford or Cambridge, one of which was law. He devoted much of the next two or three years to the preparation of his lectures. The task was difficult and to facilitate it he and his wife took up residence in Bonn for most of 1827 (they returned to England for the summer) and part of 1828.[31] Austin's choice of Germany as a place to enhance his knowledge of the law was quite understandable. According to Peter Stein, German legal science had become

> the dominant force in European legal thinking .... When it came to legal science, in the sense of the interpretation of the law by jurists, German scholarship reigned supreme. Students flocked to the great German law faculties in the way they had gone to Italy in the twelfth century, France in the sixteenth century and the Netherlands in the seventeenth. This was true even of some common lawyers from England.[32]

One of these lawyers was John Austin. The atmosphere at Bonn was very congenial to him and his wife and they apparently thrived in it. According to Austin, by early December, 1827, he had made 'considerable progress' in the preparation of his lectures.[33] He expressed optimism that he would be ready to deliver them on schedule, absent the return of his 'old disease', or some unforeseen reason for anxiety.[34] He described the routine that he followed in these terms: 'From eight to twelve, work; from twelve to two, exercise; from two to four (or half-past), dinner, rest, and reading some light book; from thence to ten or eleven, work.'[35] He also improved his knowledge of the German language and studied law-books with a young German tutor, whom he liked very much.[36]

Sarah Austin indicated that her husband departed from Bonn in 1828 an expert in the German language and master of some of its greatest works.[37] Yet, he derived much more from his residence in Germany than this. To begin with, he became much more knowledgeable about German legal literature and currents of thought. In addition, he very significantly enhanced his knowledge of Roman law, classical and modern, a major source of his legal philosophy. Aside from this, his exposure to German scholarship affected how he *did* jurisprudence, especially in his later lectures. Above all else, it reinforced his conviction that there were fundamental or leading principles underlying legal systems, the elucidation of which is the primary objective of the jurist. Savigny's 'historical' approach had, to this extent, the same objective as Austin's 'analytical' jurisprudence.[38] Finally, his residence in Germany contributed to his deep admiration for Prussian legal education. He particularly admired the priority that it gave to legal principles rather than rules of law. Indeed, his own lectures on jurisprudence mirrored the Prussian system in this respect. Whether his knowledge of it reinforced a pre-existing inclination on his part, or was the cause of the tendency, is very difficult to say. What can be said is that Prussian legal education had an impact on Austin. He described the system in these terms:

> In the Prussian universities, little or no attention is given by the Law Faculty to the actual law of the country. Their studies are wholly or almost entirely confined to the general principles of Law; to the Roman, Canon, and Feudal law, as the sources of the actual system: the Government trusting

> that those who are acquainted with such general principles and with the historical basis of the actual system, will acquire that actual system more readily, as well as more groundedly, than if they had at once set down to the study of it, or tried to acquire it empirically.[39]

The evidence is then ample that Austin's German experience contributed in various ways to 'stimulate his mind, to enrich his learning, and to develop his reflection'.[40] Yet, there is another side to the story. It is a side that argues against attributing to German sources a decisive influence on Austin's legal philosophy. In the first place, he regarded himself as not having a model, English or German, on which he could base his lectures. This is evident from an illuminating letter that he wrote to the University of London on 30 October, 1828, requesting a delay in the delivery of his lectures:

> In addition to the extent and the intricacy of my subject, to the laborious research and exact discrimination which it requires, I have lain under the great disadvantage of working without a model. The Lectures delivered by the German Professors as Introductions to Positive Law, are not only written in a method which Englishmen would not relish, but are also better fitted to refresh the memory of adepts, than to put the principles of Jurisprudence into the minds of law students.[41]

In the second place, it has been argued that nothing equivalent to Austin's work 'as a whole' existed in German legal works.[42] In the third place, the major sources of the basic notions developed in the *PJD* were English. Andreas Schwarz is right – in this introductory portion of Austin's lectures, German influences are hardly visible.[43] In the fourth place, even in the posthumously published lectures Bentham is cited as often as any other jurist. Finally, Austin was very critical of German philosophy, including the philosophy of law.[44] While he admired German jurists much more than German philosophers, he also expressed some reservations about many of them.[45]

Overall, then, the influence of German writers on Austin's jurisprudence was important, but not controlling. To this extent, his use of German sources typified his approach to the other major sources of his jurisprudence. Michael Hoeflich has argued that Austin used Roman law 'selectively and creatively',[46] and, I would add, critically. The same can be said of his use of German jurisprudence, or, for that matter, Bentham, Hobbes, and Locke. Although he used them, it was for his own purposes and in his own way. At the same time, the very diversity of Austin's sources lent a distinctive, cosmopolitan character to his lectures. To this extent, they illustrate a certain cultural broadmindedness that John Stuart Mill noted in the Austin of the 1820s:

> My intercourse with him was the more beneficial, owing to his being of a different mental type from all other intellectual men whom I frequented, and he from the first set himself decidedly against the prejudices and narrowness which are almost sure to be found in a young man formed by a particular mode of thought or a particular social circle.[47]

III

Austin was scheduled to begin his course in November, 1828. He was unable to complete the preparation of his lectures, however, and received permission to postpone them for a year. He eventually surmounted the obstacles of ill-health and the lack of a model and began lecturing in November, 1829. The enrolment in the class was large and impressive. It included John Stuart Mill, who had been tutored by Austin in Roman law and took his course more than once. Yet, no more than six or seven students enrolled in the subsequent three offerings of the course. Austin became very discouraged by this response and stopped teaching the class in 1833. While he taught a course on jurisprudence at the Inner Temple in 1834, it too did not go well. In fact, the enrolment dwindled to such a small number that the class was discontinued.

The various factors that contributed to the unpopularity of Austin's courses are discussed in detail in the next chapter of this book. The same is true of the significance of his inability to attract more than a handful of students. Suffice it to say here that it convinced him that he had to resign his Chair, which he did in 1835. His resignation was, Sarah Austin writes, the 'real and irremediable calamity of his life – the blow from which he never recovered'.[48] Although a person of greater determination and a stronger will might have recovered, Austin lacked these qualities. To this extent, his personal limitations heavily conditioned his failure to achieve more as a teacher and jurist. He never taught again nor did he publish in his lifetime anything else focusing on jurisprudence. He also refused to permit the mere reprinting of the *PJD*, which he was urged to do. He was a perfectionist and had evidently detected numerous defects in it. What they are is unknown, but he regarded them as sufficiently important to require a complete rewriting of the book, which he was unable to do.[49] Indeed, it is even arguable that had it not been for Sarah Austin, the *PJD* might never have been published. She apparently persuaded her reluctant husband to permit its publication, she found a publisher, and she negotiated 'everything'.[50]

A number of Austin's other experiences also contributed to his sense of estrangement from his vocation. They include his somewhat slanted perception of the reaction to the *PJD*, which did not receive the attention that he felt it merited.[51] His unhappiness was exacerbated by his experience as a

member of the Criminal Law Commission (its other members were Andrew Amos – Austin's colleague at the University of London – Henry Bellenden Kerr, Thomas Starkie, and William Wightman). The Commission was established by Lord Brougham in 1833 for the purpose of

> digesting into one statute all the statutes and enactments touching crime, and the trial and punishment thereof, and also of digesting into one other statute all the provisions of the common or unwritten law touching the same, and for inquiring and reporting how far it may be expedient to combine both those statutes into one body of the criminal law, repealing all other statutory provisions, or how far it may be expedient to pass into a law the first mentioned only of the said statutes and generally to inquire and report how far it may be expedient to consolidate the other branches of the existing statute law or any of them.[52]

A Commission with such purposes seemed to be ideally suited for Austin, a champion of codification. Nonetheless, his service on it did not work out well, despite the handsome remuneration that he received. According to Sarah Austin, he returned home each night 'disheartened and agitated'.[53] The reasons for his agitation were varied, but one of them was a belief that the powers of the Commission were too limited to authorize the 'fundamental reforms from which alone . . . any good could come'.[54]

He also disagreed with the other Commissioners about what ought to be done. From their perspective, his views were 'too abstract and scientific'.[55] Then, too, he questioned the general effectiveness of Commissions for achieving good results. He apparently told his wife that 'if they would give me two hundred a year for two years, I would shut myself up in a garret, and . . . I would produce a complete map of the whole field of Crime, and a draft of a Criminal Code. *Then* let them appoint a Commission to pull it to pieces.'[56] It is not therefore surprising that Austin resigned from the Commission in 1836 (he did sign two of its reports).

Residence in Malta and Europe

These considerations indicate why Austin could somewhat self-servingly lament that he was born 'out of time and place', or that he should have been a 'schoolman of the twelfth century – or a German Professor'.[57] In any case he accomplished relatively little in the final twenty-five years of his life. They were all-too-frequently marred by illnesses, depressions, social isolation, fits and starts of work, and huge wastes of time. It is no wonder that Sarah Austin bitterly complained in 1842 that 'the first three months of the year

passed by (like so many others) in attacks of illness and fruitless attempts at work .... Is life so long that one can afford to throw away years? To vegetate, without any sphere of usefulness, any interchange of ideas, any society?'[58] Still, not all of Austin's attempts at work were fruitless. His greatest accomplishment may have been the reports that he wrote, or helped to write, as a Royal Commissioner to Malta, a position to which he was appointed in 1836. The other Commissioner was George Cornewall Lewis, a former student and great admirer of Austin. Their reports covered a wide variety of subjects, they were of unusually high quality, and they reflected a deep concern for the plight of the Maltese people.[59] Moreover, in 1842 and 1847 Austin published two long and important articles on, respectively, free trade and political centralization, both of which have been analysed in detail elsewhere.[60]

The Austins lived in Germany and France for most of the 1840s. Despite their residence abroad, they did not lose touch with developments in England. In 1846 John Austin even became a candidate for the newly created position of Reader in Jurisprudence and Civil Law at the Middle Temple. Raymond Cocks has related how a Committee on Legal Education of the Middle Temple, chaired by Richard Bethell, took the initiative for fleshing out the proposal for the Readership.[61] Its definition of jurisprudence could have been lifted almost verbatim from Austin's lectures:

> By the term Jurisprudence, the Committee mean to indicate general Jurisprudence, as distinguished from the particular Jurisprudence of any individual nation; and which, in further explanation of their meaning, they would divide into positive Jurisprudence, or the philosophy of positive law, and comparative Jurisprudence or the exhibition of the principles of positive law in an embodied form, by a comparison of the Jurisprudence of modern nations.[62]

The Committee's definition of 'civil law', by which it meant modern Roman law, also reflected a very Austinian perspective. It argued that this law is of a 'universal character' and has formed 'the basis of the Jurisprudence of many continental nations, and entered so largely into our own'. In addition, the Committee advanced the Austinian claim that the combined study of the civil law and jurisprudence 'will furnish the best means of preparatory legal culture, and the formation of an enlarged and comprehensive legal mind'.[63]

These notions, as well as the very attempt to establish the Readership, are important for a number of reasons. To begin with, they reveal 'the extent to which the Bar of the 1840s and 1850s was attempting to do something novel'.[64] In addition to this, they indicate that at least a portion of the bar had absorbed Austin's, or Austin-like, ideas by the 1840s, if not sooner. The fit between the passages quoted from the Committee's work and Austin's views seems too

close to be fortuitous. For example, 'general jurisprudence', 'particular jurisprudence', and 'the philosophy of positive law' are specific terms that he employed. Indeed, the last of these phrases was the subtitle of the lectures for his course. Of course, it is impossible to say whether the Committee employed this terminology because one, or more, of its members had actually read Austin, or because his ideas were 'in the air'. If knowledge of his ideas was 'second-hand', so to speak, that is still significant. It is an indication that his doctrines were being heard by an influential segment, however small, of the bar.

Austin was a legitimate contender for the position of Reader in Jurisprudence and Civil Law. On the basis of his book and his experience as a lecturer in jurisprudence, among other things, he 'could expect to be taken seriously as an applicant for the post'.[65] His references also provided strong support for his candidacy. John Stuart Mill praised 'the remarkable accuracy, as well as the enlarged and philosophical character of his mind, and his unusual clearness and impressiveness as a lecturer'.[66] Although the extent to which Austin possessed this last virtue was highly problematic at best, Mill's recommendation was certainly enthusiastic. James Stephen's reference for Austin did not mention his ability as a lecturer, but extolled his prowess as a jurist (as well as his character and 'colloquial eloquence'):

> Mr. Austin ... possesses a compass and variety of knowledge respecting the science of jurisprudence, and all kindred sciences, exceeding that to which any other person I have ever happened to know, could justly lay claim. I think also that his power of imparting to that knowledge combination, system, and methodical arrangement, are of the highest order. So profound a thinker addressing himself to what is practical and substantial, could ... scarcely be pointed out elsewhere.[67]

Abraham Heyward – the translator of Savigny[68] – gave an unusual twist to his reference by emphasizing Austin's stature among continental and American jurists. Heywood claimed that he could procure strong testimonials on behalf of Austin from 'the leading jurists of the continent – and (as I will thank you to state) opinions to the same effect were expressed to me on the appearance of "Austin's Lectures" by Savigny, Hugo of Gottingen, the French Dean of Faculty; and the late Justice Story, with whom I was in constant correspondence'.[69] Unfortunately, it is difficult to know the extent to which this claim, which has a boastful air to it, is well-founded.

Austin's candidacy for the Readership was, thus, in a number of respects, quite impressive. At the same time, his candidacy was most peculiar in one respect. He did not himself apply for the Readership, but his friends applied for him! The reasons for this unusual arrangement are unknown, but Austin's

pride and hypersensitivity no doubt contributed to it. More important than this, the benchers of the Middle Temple must have been aware of his failures as a lecturer at the University of London and the Inner Temple. It is not therefore surprising that the appointment was offered to George Long, one of the other nineteen applicants for the post, and the first holder of the Readership.

The Return to England and Austin's Death

John and Sarah Austin were living in Paris when the Revolution of 1848 erupted. Their reaction to it was very negative and they decided to return to England. They eventually settled in Weybridge, Surrey, for the remainder of John Austin's life. If Sarah Austin is correct, these years were not only the happiest of his life, but of their marriage. This more or less idyllic period ended on 17 December, 1859, when John Austin died of bronchitis. His wife subsequently characterized his life as one of 'unbroken disappointment and failure'.[70] Of course this description is not fully accurate, and says as much about Sarah Austin's frustrated ambitions for her husband as it does his many failures. Still, Sarah's bitter lament contains a large element of truth. John Austin failed as a practising attorney; he resigned his professorship because of the low enrolment in his classes, a difficulty that also forced the discontinuation of his promising lectures at the Inner Temple; he resigned from the Criminal Law Commission; he did not complete his reports from Malta, for which he received no public recognition; he published nothing on jurisprudence, and relatively little on anything, after 1832; and he was not appointed to the Readership in Jurisprudence and Civil Law at the Middle Temple. At the same time, there is much more to the story of John Austin than these failures. Above all else he crafted a legal philosophy that eventually became a major force in English jurisprudence, and, to a lesser extent, in that of certain other countries as well.

Yet, this development very largely occurred after Austin's death. During his life he languished in relative obscurity. No doubt, there is a tendency to exaggerate the extent to which his work was unknown. For example, one nineteenth-century writer asserted that he was known only as the husband of Mrs Sarah Austin, the 'accomplished authoress and translatress'.[71] This assertion is false, as will become clear in the course of this study.[72] Austin's work was known by a select few, including Henry Maine. Closer to the truth is the remark of another commentator. He wrote of Austin in 1861 that 'there have been few instances of men of equal capacity who have been so little known to the general public'.[73] After all, Austin lived abroad for part of the 1830s and most of the 1840s. He was also anything but a prominent public figure during the last eleven years of his life, all of which he spent in England. The extent to

which his work was known by at least the educated public remarkably increased, however, after his death in 1859. As one writer put it in 1874, his 'work on the province of jurisprudence has, since his death, obtained a degree of fame and influence which it never acquired in its author's lifetime'.[74] Another writer even went so far as to say, in 1875, that the *PJD* is 'now not unfrequently spoken of as a "probably immortal work" '.[75] As such, it is 'as precious to the lawyer and the man of philosophic tastes as the fragments of the *Venus de Medici* to the artist and sculptor, if not far more precious'.[76]

Although there are various reasons for this radical transformation of Austin's stature, the catalyst for it was a decision of Sarah Austin. She chose to undertake the backbreaking task of editing for publication all of John's lectures and unpublished papers on jurisprudence. While she had initially hesitated to publish what he had refused to allow in print, her reservations were eventually overcome. She explained her decision in these terms:

> calmer thoughts have led me to the conclusion, that I ought not to suffer the fruit of so much toil and of so great a mind to perish; that what his own severe and fastidious judgement rejected as imperfect, has a substantial value which no defect of form or arrangement can destroy; and that the benefits which he would have conferred on his country and on mankind, may yet flow through devious and indirect channels.[77]

Other, more personal considerations may also have played a role in Sarah Austin's decision to edit and publish her husband's manuscripts.[78] Whatever the reason, she devoted the final eight years of her life – she died in 1867 – to editing her husband's lectures and to promoting his work. She would have been immensely pleased by the results of her efforts. They were instrumental in very substantially enhancing the exposure of John Austin's legal philosophy. To be sure, it is quite possible that Austin's *Outline* of his lectures and the *PJD* – they were published together in 1832 – would eventually have been reprinted. Nonetheless, it is unlikely that the other lectures and manuscripts would ever have been published without Sarah Austin's efforts. In the absence of their publication, Austin would never have developed into as conspicuous a presence in English jurisprudence as he eventually became. To this extent, Sarah Austin played a major role in the reception of her husband's philosophy of law after 1861. Without her, there would not in all probability have been nearly as much of it to be received as there turned out to be.

Notes

1. See *Troubled Lives* and *Thought*, Chapter 2.
2. See Sarah Austin's Comments, *LJ*, p. 10.

3. See *Three Generations*, p. 88.
4. Ibid.
5. Silverpen, 'Suffolk Worthies and Persons of Note in East Anglia: No. 78, John Austin', *Suffolk Chronicle* (no date).
6. The quotation is taken from a diary that Austin kept during the Peninsular War. It is reprinted in Gordon Waterfield, *Lucie Duff Gordon in England, South Africa and Egypt* (New York: Dutton, 1937), p. 13.
7. See *PJD*, p. 142–7.
8. Ibid., p. 217 note.
9. Ibid., p. 70.
10. *Ipswich Journal*, 25 January, 1812, p. 2.
11. Robinson, *Diary*, vol. 111, p. 63.
12. Sir William Holdsworth, *A History of English Law*, vol. 12 (1938), p. 77.
13. Bethel, 'Address', Juridical Society Papers, vol. 2 (1858–1863), p. 138.
14. As quoted by Janet Ross, *The Fourth Generation: Reminiscences* (London: Constable, 1912), p. 73.
15. *LJ*, p. 4.
16. Waterfield, *Lucie Duff Gordon*, pp. 25–9.
17. See Lottie and Joseph Hamburger, *Troubled Lives*, pp. 66–77.
18. *The Times*, 12 August, 1867, p. 10.
19. Harriet Grote, *The Personal Life of George Grote* (London: John Murray, 1873), pp. 80–81.
20. Letter from John Austin to Jeremy Bentham, 20 July, 1819, University College, London, Ogden MS 62. Little is known about Bentham's opinion of Austin, but see Andrew Lewis, 'John Austin (1790–1859). Pupil of Bentham', *Bentham Newsletter*, 2 (1979), p. 19.
21. John Austin, *A Plea for the Constitution*, 2nd edn (London: John Murray, 1859), p. vi. For additional discussion, see *Thought*, pp. 24–6.
22. See John Stuart Mill, *Autobiography and Literary Essays*, ed. John M. Robson and Jack Stillinger (Toronto: University of Toronto Press, 1981), p. 67 (emphasis added).
23. *Troubled Lives*, p. 29.
24. Mr. and Mrs. Lionel A. Tollemache, *Safe Studies* (London: William Rice, 1900), p. 218.
25. R.W. Kostal, *Law and English Railway Capitalism 1825–1895* (Oxford: Clarendon Press, 1994), p. 124.
26. *The Times*, 30 December, 1874, p. 8.
27. *Suffolk Chronicle*, 26 December, 1874, p. 5.
28. As quoted by Waterfield, *Lucie Duff Gordon*, p. 11.
29. *Suffolk Chronicle*, 26 December, 1874, p. 5.
30. Silverpen, in 'Suffolk Worthies and Persons of Note in East Anglia', No. 78 (no date).
31. *Troubled Lives*, p. 209 note 14.
32. *Roman Law in European History* (Cambridge: Cambridge University Press, 1999), p. 123.

33. Letter to George Grote, 9 December, 1827, in Ross, *Three Generations*, p. 68.
34. Ibid., p. 67.
35. Ibid., pp. 67–8.
36. See *LJ*, p. 5; Andreas B. Schwarz, 'John Austin and the German Jurisprudence of his Time', *Politica*, August, 1934, p. 187; and Letter to George Grote, 9 December, 1827, in Ross, *Three Generations*, p. 69.
37. *LJ*, p. 5.
38. See Frederick Charles Von Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence*, trans. Abraham Hayward (London: Littlewood, 1831). Austin characterized Savigny's *Das Recht des Besitzes* as 'of all books upon law, the most consummate and masterly; and . . . the least alloyed with error and imperfection', *LJ*, p. 53. Also see ibid., pp. 1080–81, 1083–4.
39. Ibid., p. 1083.
40. Schwarz, 'John Austin', p. 180.
41. Letter from John Austin to Leonard Horner, 30 October, 1828, University College, London, College Correspondence 583.
42. Schwarz, 'John Austin', pp. 193–4. Michael Lobban has emphasized even more heavily than Schwarz the impact of the 'German connection' on Austin. See his *The Common Law and English Jurisprudence 1760–1850* (Oxford: Clarendon Press, 1991), pp. 223–4, and 'Was There a Nineteenth Century "English School of Jurisprudence"?', *Journal of Legal History*, 16 (1995), pp. 34–62.
43. Schwarz, 'John Austin', p. 194.
44. See *PJD*, pp. 236 note, 279–80 note, and *LJ*, p. 940.
45. See *LJ*, pp. 697, 773, 820, 463, 714, 665, 678, and 32.
46. M.H. Hoeflich, *Roman and Civil Law and the Development of Anglo-American Jurisprudence in the Nineteenth Century* (Athens, Georgia: University of Georgia Press, 1997), p. 22.
47. *Autobiography*, p. 79.
48. *LJ*, p. 9.
49. Ibid., pp. 15–16.
50. Letter from Sarah Austin to Susan Reeve, 12 April, 1831, in Ross, *Three Generations*, p. 83.
51. See *LJ*, p. 10.
52. As quoted by Rupert Cross, 'The Reports of the Criminal Law Commissioners (1833–1849) and the Abortive Bills of 1853', in *Reshaping the Criminal Law: Essays*, ed. P.R. Glazebrook (Stevens & Sons: London, 1978), p. 5.
53. *LJ*, pp. 10–11.
54. Ibid., p. 10.
55. 'John Austin', *Law Magazine Review* (1860), p. 167.
56. *LJ*, p. 10.
57. Ibid., p. 12. An 'old friend' of Austin gave a somewhat different version of this sentiment, namely: 'I ought to have been a schoolman. In these days no life would suit me so well as that of a German professor', *The Times*, 30 December, 1874, p. 8.
58. Letter to Victor Cousin, 5 June, 1842, in Ross, *Three Generations*, p. 177.

59. For detailed analysis of the Commissioners' reforms, see Rumble, *Thought*, Chapter 5, and Lotte and Joseph Hamburger, *Troubled Lives*, Chapter 5.
60. See Rumble, *Thought*, pp. 185–92.
61. Raymond Cocks, '"That Exalted and Noble Science of Jurisprudence": The Recruitment of jurists with "Superior Qualifications" by the Middle Temple in the Mid-Nineteenth Century', *Journal of Legal History*, 20 (1999), p. 64.
62. Ibid.
63. Ibid., p. 64.
64. Ibid., p. 61.
65. Ibid., p. 66.
66. Ibid., p. 67.
67. Ibid., pp. 67–8.
68. See Frederick Charles Von Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence*, trans. Abraham Hayward (London: Littlewood, 1831).
69. As quoted by Cocks, 'Exalted and Noble Science', p. 69.
70. Letter to M. Guizot, 31 December, 1860, in Ross, *Three Generations*, p. 373.
71. 'Obituary', *SJR*, 4 (7 January, 1860), p. 167.
72. See, especially, Chapter 4.
73. Review of the *PJD*, *Athenaeum*, 4 May, 1861, p. 592.
74. *The Times*, 30 December, 1874, p. 8b.
75. John G.W. Sykes, 'Jurisprudence: A Review', *LMR*, 4 (1875), p. 489.
76. Ibid., p. 491.
77. *LJ*, p. 21.
78. For additional discussion, see *Thought*, pp. 56–7.

3

Austin in the classroom: why were his courses on jurisprudence unpopular?

A conspicuous feature of John Austin's ill-starred career as a teacher was the sparse enrolment in all but one of his classes. To say this is not to imply that he necessarily was a poor teacher. Pedagogical excellence is obviously not the same thing as the ability to attract large numbers of students. In fact, the one may be achieved by means which are incompatible with the other. Moreover, Austin had a lot to say and eventually became a very large presence indeed in nineteenth-century English jurisprudence. This development was made possible by books that were based almost entirely upon his lectures.[1] Nevertheless, he could only attract a few students to either of his courses on jurisprudence. The unpopularity of the class that he taught from 1829 to 1833 is well-known. It initially enrolled 32 students, but this number was approximately four times as large as any subsequent enrolment in the course. Indeed, it dipped so low that in 1833 he stopped offering the class. Attendance at the lectures on jurisprudence that he delivered at the Inner Temple in 1834 was also small. He was appointed on 8 November, 1833, to lecture on the general principles of jurisprudence and international law. The lectures were discontinued on 13 January, 1835, 'in consequence of the slight attendance of Members'.[2] It sometimes dropped to as low as three or four, while only eight persons attended the final lecture.[3]

The unpopularity of Austin's courses had a highly significant impact both on him and English jurisprudence. To begin with, it meant that he failed to complete them, including his course at the University of London. Although he actually delivered 57 lectures, he envisaged a far larger number. Also, the lectures that he did deliver did not fully satisfy him. He put the matter this way at the conclusion of the outline of his lectures: 'For the numerous faults of my intended Course, I shall not apologize. Such an exposition of my subject as would satisfy my own wishes, would fill, at the least, a hundred and twenty lectures ... though every lecture occupied an hour in the delivery, and were packed as closely as possible with strictly pertinent matter.'[4] Moreover, the unpopularity of his course convinced him that he had no future as a teacher of, or writer on, jurisprudence. While he lived until 1859, he never taught again after 1834. The low enrolment in his courses also contributed to the writer's block on legal philosophy that he experienced. Although he contemplated a much more ambitious tome than the *PJD* (1832), he never

completed it or any other work that focused upon jurisprudence.[5] In addition, the one book that he published during his lifetime consisted of less than 20 per cent of his lectures.[6] If they too had been published in 1832, he might have become an influential figure in English jurisprudence much earlier in the nineteenth century. To be sure, the publication of the *PJD* created more of a stir than has generally been acknowledged.[7] Nevertheless, Austin exerted a much stronger influence from the grave than he had exercised during his life. The situation might have been quite different if he had been more productive while he was alive, or written the *magnum opus* that he contemplated. At least this was the opinion of John Stuart Mill. He greatly admired Austin, was tutored by him in Roman law, and attended his class in jurisprudence at the University of London.[8] Mill wrote in 1863 that, if Austin had written 'a complete work on jurisprudence, such as he, and perhaps only he in his generation, was capable of accomplishing .... Before ... [1859] ... he might have stood at the head of a school of scientific jurists, such as England has now little chance of soon possessing'.[9]

Both Austin's career and his impact on English jurisprudence might have been very different, thus, if the enrolment in his classes had been higher. Of course, their unpopularity is no secret to students of his life and thought. The reasons for the low enrolments are, however, much less clear. Was it the highly theoretical nature of his course, the primitive state of legal education, or, in the case of his class at the University of London, the growing pains of this fledgling institution? Or was the personal equation – his failings as a teacher – even more influential in deterring students from taking his class? Although the scholarly writing about Austin has not ignored these questions, it does not contain a systematic discussion of them. Of course, only a limited amount of evidence exists on which to base such an analysis. Even so, it is sufficiently plentiful to provide the foundation for a much more thorough study of the problem than has yet been published. For example, an examination of the several legal periodicals that began to be published in the late 1820s does indeed provide 'entry into a Victorian world where few have gone; they represent an aspect of Victorian history too long neglected'.[10] In particular, these journals constitute an invaluable source of contemporary attitudes toward Austin's courses.

I

A major factor contributing to the unpopularity of Austin's course was its theoretical, or abstract, nature. He divided his lectures into four basic sections, the first, longest, and by far the most polished of which was entitled 'the Province of Jurisprudence Determined'. The focus of its six lectures was the nature

or essence of a law 'properly so-called'; the nature, alternatives to, and rationale of, the principle of utility; positive morality and its relationship to divine and positive law; and the concept of sovereignty.[11] The title of the second section was 'Analysis of Pervading Notions'.[12] The notions analysed included rights, things, obligation, injury, sanction, volition, motives, intentions, and many others. The third section was 'Law in Relation to its Sources and the Modes in which It begins and Ends'.[13] The topics discussed were, among others, the sources of law, written and unwritten law, customary law, the *jus gentium*, natural law, equity, statutory and judiciary law, and codification. The final section had as its focus 'the purposes and subjects of law'.[14] The matters that were explicated included status or condition, the law of persons and the law of things, primary and sanctioning rights, property, servitudes, and titles.

Austin's conception of jurisprudence heavily conditioned his analysis of these multifarious topics. He employed a number of labels for the kind of abstract approach that he employed in his lectures. The term that he most commonly used to refer to it was 'general jurisprudence', but it was not the only one. He occasionally referred to it as universal or comparative jurisprudence, or 'the philosophy (or general principles) of positive law'.[15] In one place he expressed a preference for this last phrase, which he borrowed from Gustav von Hugo (1764–1844).[16] According to Austin,

> Of all the concise expressions which I have turned in my mind, 'the philosophy of positive law' indicates the most significantly the subject and scope of my course ... [It] ... is not concerned directly with the science of legislation. It is concerned directly with principles and distinctions which are common to various systems of particular and positive law; and which each of these various systems inevitably involves, let it be worthy of praise or blame, or let it accord or not with an assumed measure or test. [For] ... general jurisprudence, or the philosophy of positive law, is concerned with law as it necessarily *is*, rather than with law as it *ought* to be; with law as it must be, *be it good or bad*, rather than with law as it must be, *if it be good*.[17]

Austin drew a number of other distinctions that also illustrate the abstract nature of his course. To begin with, he indicated that he would discuss particular legal systems only for illustrative purposes. Instead, he intended to focus on general jurisprudence, which he sharply distinguished from particular jurisprudence. He characterized the latter as the science of a system of positive law that exists, or existed, in a specific nation or nations.[18] General jurisprudence differs from this in at least two respects. In the first place, its focus is abstract. The emphasis would be upon fundamental legal principles, notions, and distinctions rather than specific rules of law. In the second place, it

concentrates on legal abstractions that are either 'essential', 'inevitable', and 'necessary',[19] or in fact occur 'very generally in matured systems of law'.[20] The first kind of principles, notions, and distinctions are necessary in the sense that 'we cannot imagine coherently a system of law . . . without conceiving of them as constituent parts of it'.[21] Although different systems may conceive of these abstractions somewhat differently, they may be found in *all* legal orders.[22] The second type of principles, notions, and distinctions are not necessary in this sense. Still, they occur generally, according to Austin, because they 'rest upon grounds of utility which extend through all communities, and which are palpable or obvious in all refined communities'.[23]

Austin maintained, thus, that certain principles, notions, and distinctions are universal.[24] He argued, however, that general jurisprudence would *not* concentrate on the principles and distinctions of *all* legal orders. Rather, it would focus on those inherent in, or at least common to, 'the ampler and maturer systems', which he sharply distinguished from the 'scanty and crude systems of rude societies'.[25] He justified this narrower approach on the ground that the more developed systems are, as such, 'pre-eminently pregnant with instruction'.[26] He elaborated upon this idea in an illuminating description of his course published in 1828, a description clearly illustrating his Eurocentric perspective:

> The principles and distinctions which the mere being of Law supposes, are the matter of Universal Jurisprudence. Taken in its *literal* import, it lies within a narrow compass. So different is Law amongst barbarians from Law amongst civilized men, Law amongst Asiatics from Law amongst Europeans, Law in Mahometan from Law in Christian communities, that Jurisprudence would be confined to the definitions of a few leading terms, supposing it confined to the matter which is *common* to *all* systems. But in the positive systems of Law which are worthy of accurate examination (in the positive systems, that is, of the civilized European Nations), *common* distinctions and principles, though they take various forms, are sufficiently numerous to constitute the subject of a science. Accordingly, these are the subject of the '*Universal* Jurisprudence' which it is the purpose of the Lectures to expound. And with this explanation and caution, the verbal impropriety can scarcely lead to a mistake.[27]

The subject-matter of general jurisprudence consists, thus, of principles, notions, and distinctions common to the 'civilized European nations'. At times indeed Austin described the focus of the science – and his course – even more narrowly than this. He once wrote that the systems of only two or three countries 'deserve attention . . . the writings of the Roman Jurists; the decisions of English Judges in modern times; [and] the provisions of French

and Prussian Codes as to arrangement'.[28] He apparently believed that the similarities between *all* mature legal systems may be 'presumed'[29] from the similarities between *these* systems. At least he expressed the opinion that the overlap between English and Roman law shows the large number of principles and distinctions shared by 'all systems of law'.[30]

Austin not only distinguished general jurisprudence from particular jurisprudence and the science of legislation, or what law ought to be, but from legal history. This is evident from his analysis of law and equity. He argued that the distinction between them is *not* to be found in the legal system of every nation. Rather, it is confined to certain systems only and varies substantially from one nation to another. The distinction itself is therefore neither necessary, essential, nor universal, but 'particular' and 'accidental'. As such, Austin argued, it constitutes a historical distinction the meaning of which can only be learned by study of 'the respective histories of the several systems of law to which it is respectively peculiar'.[31]

The effects of the abstract character of Austin's course on enrolments

It is difficult to imagine a course in legal theory more abstract than general jurisprudence as Austin conceived of it. To be sure, the lines demarcating it from particular jurisprudence, history, and ethics are fuzzier than he represented them to be. In addition, his actual lectures did not always conform, or appear to conform, to his notion of general jurisprudence, strictly construed. His very lengthy discussion of the principle of utility is a famous (or infamous) example,[32] while his exposition of equity in English and Roman systems is another.[33] Moreover, he unquestionably recognized the need to illustrate general principles, notions, and distinctions with examples from actual legal systems, especially English and Roman law.[34] Still, his lectures probably were sufficiently abstract to inhibit enrolment in his course.

The opinion that the abstractness of Austin's lectures contributed to their unpopularity does not depend on speculation. Rather, this hypothesis draws support from the views expressed by many of his contemporaries. For example, Sarah Austin argued that it could hardly be expected that courses with little practical relevance would attract large audiences.[35] She claimed that students of law tended to be 'profoundly indifferent to any studies but those which had enabled their predecessors to attain to places of honour and profit'.[36] J.J. Park (1795–1833) took much the same position. He was appointed in 1831 to the Chair of English Law and Jurisprudence at the newly founded King's College. Despite his acknowledgement of the accomplishments of English lawyers, he bemoaned the fact that nineteen out of twenty of them 'have never yet given a thought to the *theory* of that vast

machine, of which they are little more than the working engineers, who supply the fuel, and occasionally, perhaps, oil the pistons and axles'.[37]

The Report of the Select Committee on Legal Education of 1846 [hereinafter cited as Report (1846)] also emphasized the significance of the practical orientation of English lawyers. Indeed, it was said to explain the very different enrolments in Austin's course and that of his colleague Andrew Amos (1791–1860).[38] Amos was the Professor of English Law at the University of London from 1828 to 1834. His course was very popular. The first year that he taught the class it enrolled 144 students, while the next year 111 signed up. Although subsequent offerings of the course attracted fewer students, enrolment was never less than 50.[39] The Report (1846) maintained that Austin's lectures were less well-attended than Amos's because they were more abstract. The testimony of witnesses before the Committee provided ample support for this explanation. For example, Amos was asked which course of lectures he found to be the best attended. His response was: 'I found those that related to the practice of the law, from the number of attorneys that attended, the most attractive'.[40] He had expressed his opinion even more emphatically in a letter written in 1831 to J.J. Park:

> I am very happy in having a fellow-labourer ... in accomplishing what I consider an Herculean task; – the eradicating of a belief, almost universal among law students, that no knowledge is worth walking and paying for, however cheaply, which is not practical; – and that practical knowledge can only be acquired in an office. These notions, besides being sanctioned by prescriptive usage, recommend themselves very particularly to the indolence of students. And they will take a long time to remove, except in the minds of the intelligent and *the few*.[41]

The experience of other teachers of jurisprudence besides Austin indicates just how pervasive these notions were. His immediate successor was John Thomas Graves (1807–1870). He was appointed to the Chair in Jurisprudence in 1839, a post from which he resigned in 1843. He testified before the Select Committee that he had relinquished it because he was discouraged by the low enrolments in his course. Graves also stated that he had lectured on Roman law and international law in addition to general jurisprudence. He contrasted the lower attendance at these lectures with that at his lectures on more practical topics such as the law of equity.[42]

Moreover, students at King's College reacted in the same way to Park's courses on legal theory. Although it has been suggested that his opposition to Bentham may have contributed to his appointment,[43] the *Law Magazine or Quarterly Review* highly praised his qualifications. It was founded in 1828 and constituted the 'premier [legal] periodical from the outset'.[44] The journal

claimed that Park's knowledge of both foreign and English law equipped him 'admirably ... for promoting [the] ... union of general jurisprudence and English law'.[45] The magazine subsequently took the position that his good reputation must ensure a large number of auditors at the introductory lecture for his first course, which focused on the British constitution.[46] He delivered the lecture on 1 November, 1831, and it apparently was 'much admired'.[47] The course itself enrolled between 50 and 60 students, which was described as a 'very flattering commencement'.[48]

The reaction to the course on Scientific Law that Park began to teach on 3 February, 1832, was quite different. His students apparently demonstrated little interest in the more theoretical sections of the class. At least this inference may be drawn if the comments in the *Legal Observer, or Journal of Jurisprudence* are accurate. This journal was a weekly that began publication in 1830 as a competitor to the *Law Magazine*. It reported that Park's preliminary lectures were apparently suspended because of the desire of the students to proceed immediately to more practical subjects. The periodical concluded that 'it seems, from the experiments at the London University and King's College, that *Jurisprudence cannot be taught in this country in the Lecture Room*' [emphasis added].[49] A similar conclusion was drawn by the *Law Magazine*. It pointed out that the popularity of Austin's, Amos's, and Park's courses was in 'inverse ratio to the quantity of general principle they teach'.[50] The magazine carefully distinguished, though, between the popularity and the reputation of the professors.[51] The low attendance at Austin's lectures at the Inner Temple was also attributed to the lack of interest by English lawyers in theoretical questions.[52]

The evidence is legion, thus, that the abstract character of Austin's course inhibited enrolment in it. At the same time he appears to have been aware of this limitation of his class and took steps to counteract it. They included his attempt to illustrate abstractions by examples from particular legal systems, especially the English and the Roman.[53] He specifically characterized this practice as possibly relieving the dryness of the material he was expounding.[54] Moreover, he strongly emphasized the great value of theory for practice. Indeed the Roman jurists' facility in applying principles to cases was one of the reasons for his admiration of them.[55] He also vigorously challenged the widespread opinion that the study of jurisprudence would disqualify a student for the practice of law. Instead, he argued that such study has 'a tendency ... to qualify for practice, and to lessen the natural repugnance with which it is regarded by beginners'.[56] While he acknowledged a need for practising lawyers to check the theoretical excesses of law professors, he argued that the University of London was very well-situated in this respect. Its location would facilitate frequent contacts between practitioners and theorists, a development that would correct 'any tendency to antiquarian trifling or

wild philosophy to which men of science might be prone'.[57] In England, unlike Germany, 'theory would be moulded to practice'.[58]

Austin's attempts to relate theory to practice appear, in any case, to have had little effect on enrolments in his course. His lack of success *in this sense* is subject, however, to a number of very different explanations. On the one hand, it probably was due to his inability to convince students that theory as he understood it *was* important for practice. On the other hand, he may have succeeded all-too-well in this respect. It is possible that some of his students were not repelled by his failure to relate theory to practice, but by *how* he related them. In other words, they may have been dissatisfied by the radical implications of his theories for practice. They include such heretical notions as the inherent inferiority of the common law to statutory law and the desirability of codification. Austin made no effort to conceal his opinions on these matters, which he indeed stressed.[59] Although his position on codification was not as radical as Bentham's,[60] it may have been too much for certain of his students, actual or prospective. After all, he was extremely critical of the system in which they hoped to become successful practitioners.

II

The highly theoretical character of Austin's course was only one of the reasons for its unpopularity. The primitive condition of legal education also contributed to the problem. The education of lawyers as we now know it, or anything close to it, did not exist. For prospective members of the bar legal education meant, primarily, the apprenticeship system. The student learned law by 'undirected reading and discussion, and by attendance in chambers, in a law office, or in the courts'.[61] In 1859 Richard Bethell, a former Solicitor-General and Attorney-General who became Chancellor in 1861, described the situation in these colourful terms:

> But in London no provision whatever was made for the education of students .... The student went, untrained, unformed, uneducated, into the chambers of a special pleader or a conveyancer. What was the repulsive occupation there? Drudgery; the meaning of which it was impossible for him to understand. After following it for some time, certain practical modes of procedure, certain habits of thought, and the knowledge of a few established cases, formed the staple of what was done. If the chambers were those of a conveyancer, a great book was brought down, and the unfortunate alumnus compelled to copy it from week to week, until his very gorge rose at the task .... [The provision of a proper course of legal education] is a plain, simple, and obvious duty, and yet, as is well known, it is for the most

> part secretly derided, often openly denied, and never faithfully discharged, or even the attempt made to discharge it.[62]

Bethell's denunciation was of course hyperbolical. It is hard not to conclude that it was designed more to demonstrate the need for the reforms that he so ardently desired than to describe dispassionately the status of legal education. Christopher W. Brooks and Michael Lobban have pointed out that by the early nineteenth century some pleaders and conveyancers 'were taking the education of their pupils seriously'.[63] For example, the elder Joseph Chitty provided lectures for his pupils and he was not alone in this respect.[64] Nonetheless, the 'pupillage' system was 'hardly perfect. Its lack of academic rigour was widely criticized.'[65]

To the extent that lectures on law were delivered, students frequently had little use for them. As late as 1864 it was argued that law students 'have a morbid objection to lectures. Forms and office-*cram* are deemed of more importance by them than the science of law. The latter may make a jurist, but the former pays best.'[66] Nor did the establishment by the Inns of Court of 'what may be denominated a legal university' 'do much to change the situation': 'this vile prejudice against legal lectures still exists among our students'.[67] Legal education in the long established universities was not unknown, but it lacked vitality. Oxford and Cambridge illustrate very clearly the highly unsatisfactory condition of academic instruction in law. J.W. Baker points out that the public teaching of law belonged to four men.[68] J.W. Geldart and Thomas Starkie taught law at Cambridge, while Joseph Phillimore and Philip Williams instructed in legal subjects at Oxford. All of them were accomplished scholars, but they were unable to revive English legal education from 'the throes of death'.[69] The findings of the Select Committee on Legal Education (1846) substantiate Baker's judgement. Lectures on law at Cambridge and Oxford tended to be nominal, non-existent, or unattended. Questions and examinations were either a matter of form only or did not exist.[70]

If there were lectures on law at the universities, they did not remotely resemble what Austin attempted to do. To characterize it as innovative would be to understate the matter. Nothing similar to his course existed, had existed, or would exist, for years to come. A Select Committee investigating Oxford pointed out in 1852 that 'the want of a preparatory instruction in the principles of Jurisprudence appears still to be felt by persons qualified to judge'.[71] Stephen Charles Denison, Deputy Judge Advocate General, was somewhat blunter. He testified before the Committee that 'at present no Englishman destined for the bar knows where he can acquire the rudiments of the science of law; for the plain reason, that no persons exist whose special business it is to teach that branch of knowledge in the manner in which it ought to be taught'.[72] The Report (1846) drew a sharp and unfavourable contrast

between this situation and that at German universities. Each of the latter had a faculty of law and provided every student with abundant opportunities for legal study. A large amount of preparatory study was required for admission, there was no shortage of professors, and attendance at both lectures and examinations was compulsory. The object to be attained was 'thorough and extensive knowledge of theory'.[73]

It is not therefore surprising that a reviewer of Austin's *LJ* argued that his fate would have been very different had he lived in Europe. For example, in Germany he would have risen from the position of a 'privatdocenten' or tutor in a university to that of a 'Professor extraordinarius':

> Then the Government would have decorated him. He would have been made first a 'Hofrath' – a Court-Councillor, and then a 'Geheimrath' – a Privy-councillor. Then would have come the struggle between rival universities to obtain the aid and distinction of the enrolment of such a man among their staff of professors.[74]

Of course no one can say with any real certainty that this imaginative scenario is accurate. Nevertheless, the very fact that it could be sketched illustrates the contrast between legal education in England and in Germany. At least the Select Committee (1846) left no doubt whatsoever of its opinion of the dismal state of legal education in England and Ireland. It was criticized as not only 'extremely unsatisfactory and incomplete', but as inferior to that of 'all the more civilized States of Europe and America'.[75] Despite the widespread practice of serving as apprentice to special pleaders, draftsmen, or conveyancers, the student of law was as a rule left entirely on his own. Indeed, the Committee expressed the opinion that 'no Legal Education, worthy of the name, of a public nature, is at this moment to be had in either country [England and Ireland]'.[76] A Select Committee on Inns of Court appointed in 1854 was much more positive, but not uncritical. On the one hand, it did not disparage or undervalue 'the present system of practical study in a Barrister's Chambers, which must be admitted to be very efficient in fitting the Student for the actual duties of his profession'.[77] On the other hand, the Committee did indicate that this system afforded no facilities for 'the study of the scientific branches of Legal Knowledge; including under that term – Constitutional Law and Legal History; and – Civil Law and Jurisprudence'.[78]

These comments indicate the formidable difficulties that Austin faced. Any kind of academic instruction in law was uncommon. A course on jurisprudence as he conceived of it was virtually unprecedented. As such, it represented a radical break with a tradition of academic lectures on law that was none too strong to begin with. His course might therefore have attracted few

students even if he had stood on his head or jumped through hoops. At least it was the view of Sir William Holdsworth that the failure of Austin's course was due 'principally ... to the fact that legal education had sunk to so low a level, that it was hardly to be expected that any great number of lawyers would feel any interest in an attempt to expound the theory of law'.[79]

The University of London

Another factor that conditioned the low enrolment in Austin's course was the small pool of students from which he had to draw. Indeed, if the enrolment in his course is viewed in proportion to the total number of students at the university, it is considerably larger than might otherwise appear to be the case. When he first began to teach his class, the university had been in existence for only three years. According to Hale Bellot, the initial expectations of the number of students who would enter were 'greatly exaggerated'.[80] Although 2000 students were anticipated, this figure was not reached until the outset of the twentieth century. Enrolment for the academic year 1828–9 was 624, while for 1829–30 the total increased only by six students. The number then began to decline and by 1831–2 the position of the university was 'alarming'.[81] The financial difficulties worsened in 1833. The Governing Council indicated that it might have to give notice that the university 'cannot reopen upon its present footing'.[82]

Although this crisis was surmounted, low enrolment continued to plague most of the law classes throughout the nineteenth century. The high enrolment in some of Amos's classes was an aberration, a kind of pedagogical sport. As late as 1867–8 none of the courses in law enrolled more than seven students. Enrolment remained at about the same low level for 1868–9,[83] and did not improve much for the remainder of the century.[84] What was true of the law classes in general was also true of the course in jurisprudence. Austin's four immediate successors evidently did not fare any better than he did. John Thomas Graves resigned after only four years for much the same reason as his predecessor. C.J. Hargreave, C.J. Foster, and John Philip Green apparently were also unable to attract very many students.[85] The pattern of low enrolment continued into the 1860s. In 1867–8, for example, the course in jurisprudence enrolled seven students. The number declined to five in the next year.[86]

These figures help to explain the rather pessimistic tone of the *Report of the Committee on the Law Classes* (1870). The Report doubted the likelihood of 'any great present success in connection with the Law Classes'.[87] The Committee also expressed sympathy for 'the past disappointments of the Professors and Readers, many of whom have laboured with great assiduity, and almost

without reward, to classes discouragingly small'.[88] The Committee recommended, however, that the course on jurisprudence be continued. It should include 'a thorough grounding in Austin'.[89]

III

These considerations indicate that more was involved in the low enrolment in Austin's course than his pedagogical limitations, whatever they were. At the same time there is little doubt that he had some limitations (as well as strengths). Analysis of them requires at the outset recognition that the legal culture of the time was not entirely inhospitable to his work. In fact, a certain element in the professional 'climate of opinion' was quite sympathetic to his 'enlarged cultivation of law'.[90] As Raymond Cocks has pointed out, in the 1830s 'some thoughtful members of the Bar ... were determined to break away and find a style of relating the actual details of the law to broader, more philosophical ideals. They had little respect for the mere technician.'[91] Christopher Brooks and Michael Lobban have also argued that, 'contrary to what is frequently assumed ... when the select committee [of 1846] set about its work, there had been at least twenty years of agitation about the need to reform legal education'.[92]

These developments and attitudes help to explain why Austin's work 'caused something of a stir ... [it] was recognized ... that he had something important to say'.[93] In fact, a number of lawyers expressed a very strong interest in his attempt to teach jurisprudence. A good example is the coverage that it received in the *Law Magazine*, which followed Austin's lectures and tended to be very supportive of them. The first report on them appeared in 1830 and indicated that he had begun his course 'inauspiciously'.[94] His introductory lecture was widely disliked, a fact that did nothing to help enrolment in his course. Nevertheless, the members of his class included a substantial number of 'the most talented young men of the day ... [who were] already exercising a perceptible influence on society'.[95] It was therefore 'a very high compliment to say that these, to a man, unite in commending him, and are making every exertion to ensure his success'.[96]

The coverage of Austin for 1831 was very explicit in support of his lectures. Both the University of London and the Inns of Court were encouraged to ensure their continuation. Deep regret was expressed at the absence of an announcement of a course to be offered by him at the University of London. 'Highly as this gentleman has qualified himself, and admired as his lectures have been by the small but accomplished and critical class who attended them, we should certainly regard his retirement as ... [a] fatal augury to the enlarged cultivation of law; and the university managers, we trust, will do

their utmost to deprecate it.'[97] The magazine also reported a rumour that the 'amateurs of jurisprudence' at the University of Bonn were preparing to establish a Chair for Austin.[98] The writer expressed doubt that they would succeed in this effort, but he used the occasion to hint that the Inns of Court might do the same. In the process he chided them for their inattention to legal education: '[A]re they bound ... to expend their revenues on eating and drinking exclusively, with the occasional purchase of a few practical works?'[99]

This hint may have planted the seed for what eventually grew into the Inner Temple's offer to Austin in 1833 to teach a course in jurisprudence. At any rate, the supportive coverage of him by the *Law Magazine* continued into 1832. It endorsed the attempt by private parties to secure his 'invaluable services' by underwriting for three years his salary at the University of London.[100] The article implored that, 'when, if ever, jurisprudence attains its maturity in England, let the names of those who sat by its cradle be recalled'.[101] The journal subsequently expressed the hope that Austin could be persuaded to teach a course on Roman Law or the Law of Nations. The author acknowledged, however, that it might be asking too much of him in light of the small audience that he had hitherto attracted. The account concluded by praising Austin highly and bemoaning the lack of appreciation for his work:

> Here then is a man, who, had his lot been cast in Germany, would go far towards founding the fame of a University; would do what Savigny, Thibaut, Mittermaier, Gans, are doing, and Gustavus Hugo has done; yet, merely for want of a public to appreciate him, his enlightened projects are announced as contingencies, his best conceptions are blighted as they bud, the seed he sows is scattered upon rocks, or seen struggling, weakly and rarely, through tares.[102]

This evidence tends to substantiate the opinion of John Stuart Mill that a portion of the legal profession was indeed interested in Austin's work.[103] His appointment to lecture at the Inner Temple provides additional evidence in support of this hypothesis. The decision to offer two classes was reached in 1833. The *Legal Examiner and Law Chronicle*, another newly established legal periodical, praised highly the decision of the Inner Temple to offer the classes.[104] The *Law Magazine* lost no time in urging Austin's appointment as the 'fittest person' for the position of Lecturer on Jurisprudence and International Law.[105] The journal expressed the hope that the benchers would do everything possible to secure his services. The hope was realized (Thomas Starkie was appointed to teach the class on equity and the common law). The *Legal Examiner and Law Chronicle* also reacted very favourably to Austin's appointment. It indicated that his character was familiar to all persons who

have attended his lectures at the University of London. Modern students of his jurisprudence may be surprised to learn that his industry and laborious research had enabled him to accumulate 'a mass of information' about international law.[106]

Austin's appointment to lecture at the Inner Temple is not the only evidence of the existence of substantial interest in his work, or that of other theorists. It is also apparent from the large attendance at his introductory lecture, as well as that of J.J. Park at King's College. Estimates of the number of persons in attendance range from 200 to 300.[107] Moreover, the seven reviews of the *PJD* were on balance very favourable.[108] In particular, two of the three reviews of the book in law journals were laudatory. The *Law Magazine* praised the work 'as the best book on jurisprudence, and one of the best books (speaking generally) of the day'.[109] *The Jurist* was founded in 1827 and 'aimed to publish anything pertinent to an attorney'.[110] It described Austin's book as marking 'almost . . . an era in the history of English jurisprudence'.[111]

Austin's limitations as a teacher

There was thus a certain amount of professional support, even enthusiasm, for what Austin was attempting to do. It is support that never completely died in subsequent decades prior to the surge of interest of the 1860s. For example, in 1846 the Select Committee bemoaned the exclusively practical orientation of English legal education. It had the effect of not only depriving the law of its scientific quality, but of driving out of the profession those who could remedy this unfortunate situation. Consequently, England has had few of those eminent thinkers and writers who, 'in other countries . . . have . . . [the] opportunity to keep the profession up to the intellectual height to which it should be its proudest boast to aspire'.[112]

Although the Report does not mention Austin, its authors may well have had him in mind. It is certainly difficult to think of as good an example of the class of thinkers and writers to whom the Report refers. A *Report on Oxford and Cambridge* issued in the early 1850s also expressed support for the kind of course that he tried to teach. The study of law at Cambridge should be broadened to include 'an examination of the principles on which existing systems of law are founded, and . . . on which all laws ought to be founded; in other words, that the study of General Jurisprudence and of the science of Legislation and of morals in connection therewith, ought to be encouraged'.[113] The Report even went so far as to recommend the establishment of 'an additional Professorship of General Jurisprudence'.[114] Although this report too does not mention Austin, it is quite clear that it was referring to him. What it recommended was what he tried to teach. Moreover, the Report uses the very terms that he

employed – general jurisprudence and the science of legislation – to describe what needed to be taught.

These various considerations raise the crucial question of whether Austin's performance in the classroom affected the enrolment in his course. Unfortunately, it is a question that is much easier to raise than to answer. First-hand reports by students of their reaction to his class are few and far between. The most comprehensive such account that I have found came from the pen of John Stuart Mill. He had apparently discussed the lectures with Mrs Austin and his letter to her on 7 August, 1830, was a follow-up to their conversation.[115] The letter contained a number of criticisms of the lectures, including their excessive length and repetitiveness. Mill indicated too that Austin's failure to complete a greater part of the course was a very great disappointment to the students. Indeed, his inability to do so was the only real threat to the 'permanent success & utility of the professorship'.[116] Finally, Mill discussed in some detail the substantial limitations of the introductory lecture. He emphasized that improvement of it was imperative if the course were to prosper. He also suggested the reorganization of the lecture, the details of which are most usefully discussed in a subsequent chapter.[117] Absent such a reorganization, Austin's class would remain 'comparatively small'.[118]

Mill's letter is not the only evidence of unfavourable responses to Austin's introductory lecture. According to the *Law Magazine*, it was 'pretty generally disliked, and his class has suffered accordingly'.[119] Lotte and Joseph Hamburger have unearthed the reactions of two students which support this generalization. According to Henry Crabb Robinson, 'I heard him [Austin] deliver an inaugural lecture [in 1829], but in so great terror that the hearers could not attend to the matter of his lecture from anxiety for the lecturer'.[120] Henry Cole described his response to the same lecture in these terms: 'Attended Mr. Austin's introductory lecture on Jurisprudence in which he endeavoured to show the difficulty of an introductory lecture on that subject which he certainly did.'[121] While Cole respected some of Austin's traits, he did not return for the remainder of the lectures.[122] Robinson did return, in March of 1832, and his response was much more favourable than it had been: 'The lecture was clear and intelligible and very well delivered – I never saw Austin look or heard him speak so healthily.'[123]

Austin's delivery of his subsequent lectures was not always, however, of a similar quality. At the least this was true of his introductory lecture at the Inner Temple, which appears to have been an unmitigated disaster. It certainly merits this characterization if the lively account of it in the *Legal Examiner and Law Chronicle* is accurate:

> The audience was very numerous, consisting of two or three hundred students and barristers and several benchers. We went prepared to give our

> readers a sketch of the lecture, but found it utterly impossible to note down a single idea. Although we were seated in an advantageous situation, we were compelled to toil all the evening and catch nothing; and every individual in the Hall, except the few benchers who sat on the right and left of the lecturer, was, we believe, in the same unfortunate predicament. The learned lecturer's delivery is neither emphatic nor energetic; his voice is so small and the Hall is so large, that his *lenes susurri* were lost in the desert air. The audience stared at each other, and looked extremely foolish: altogether the scene was truly ludicrous. No doubt the lecture was replete with wisdom; the reputation of the lecturer assures us that it was so; but he should have remembered that his audience were gathered together to *hear* a wise man and not merely to *see* one.[124]

Still, Austin's introductory lecture may not have been representative of his overall performance in the classroom. After all, he had certain strengths that could have redounded to his benefit as a lecturer. They include a rare gift for lucid and precise analysis that could rise occasionally to heights of eloquence. He also could be very articulate. For example, he had a prowess in conversation that his contemporaries widely praised.[125] Furthermore, some evidence indicates that the bulk of his lectures were well received. Although J.S. Mill claimed that they needed to be curtailed, he indicated that the members of the class would not desire them to be changed 'in any other respect'.[126] In fact, they were very pleased with the course 'as far as it went'.[127] Also, Austin's style of exposition evoked the admiration of everyone.[128] Nor is Mill the only person who took this position. William Markby claimed that the lectures elicited the 'profound admiration' of the persons who heard them.[129] Nassau W. Senior wrote a letter to Austin in 1829 which contained these words: 'I hear delightful accounts of your lectures & wish they were at an hour that wd admit of my hearing them.'[130]

Furthermore, one of the rare descriptions of Austin's lectures at the Inner Temple is laudatory. Sir John Rolt attended the classes of both Starkie and Austin and described them as 'very valuable'.[131] Rolt's comparison of the two lecturers is particularly instructive:

> Starkie was not happy as a Lecturer. His learning was great, and he began the History of any subject he touched upon too near the creation of the world. But he was replete with sound legal principles. John Austin, who did not deal with English positive Law at all, was a practical and business-like man compared with Starkie, and more useful than Starkie even to the English Law Student. His lectures were as clear as his writings, and much the same as if he had been reading from his works.[132]

A comparison of Andrew Amos and Austin as teachers

Austin's introductory lecture may not thus be representative of the remainder of his course. Still, he had certain pedagogical limitations which must have reduced the enrolment in his class. He certainly could have done more to make his course livelier to students. The best proof of this is the variety of steps taken by his gifted colleague Andrew Amos to enliven his classes. Amos was a mathematician, first-rate classical scholar, and successful practitioner. He evidently 'loved the fire and thunder of actual litigation, and felt the intellect most usefully engaged when exploring problems causally thrown up in the course of forensic warfare'.[133]

Amos was also, to a degree, an educational visionary. Although he taught English law rather than jurisprudence, he recognized the value of theory. This is evident, among other things, from the Introductory Lecture that he delivered in 1829.[134] He implored his students not to focus only on precedents, fictions, and technical forms, or to view law simply in 'the revolting form of a mere instrument of litigation'.[135] Instead, they should also concern themselves with the principles and maxims essential to 'the peace and order of mankind'.[136] Amos maintained that such a concern would have genuine practical value. As proof, he cited the comments to him of his students of the previous year.[137] Finally, he explicitly defended the utility of the philosophy of law. Indeed, he maintained that study of it may enable some law students to become great judges in the tradition of Lord Mansfield![138]

Amos testified to the same effect in 1846. He indicated that he tried to introduce into his course as much principle as was possible and still retain the attention of his class, which is 'the first thing'.[139] The qualification indicates his acute concern with the reaction of his students to his lectures. As he put it, in words that are as applicable today as when they were originally uttered,

> Nor . . . ought any professor to approach a class with a written lecture, from which he is not prepared to deviate, according as he observes the attention of students to flag or become animated, or as he may read in their countenances whether they are puzzled, or comprehend his meaning. Where the subject of a lecture does not admit of elucidation through the eyes as well as the ears, a professor cannot too often put to himself a question which does not admit of being expressed so forcibly in modern English, as in the language of our forefathers – 'Do I *take them with me*?'[140]

Amos utilized various strategies in order to take his students with him, one of which was to relate theory to practice. In his introductory lecture of 1830 he stated that he would try to draw attention to litigation actually pending, including 'cases standing for argument in the Courts of Westminster Hall . . .

trials at *nisi prius* in London, or at the assizes ... cases at the crown bar, and ... appeals at quarter sessions'.[141] He apparently drew heavily upon his own experience in the courtroom. He justified this practice on the ground of its utility for overcoming the great difficulty of commanding the attention of large numbers of young men.[142] He also introduced some of the evidence (actual or replicas) that he used in trials, to which he attributed great pedagogical value.[143] Moreover, Amos emphasized the value of legal history, broadly construed. He argued that it was essential not only for understanding the growth, development, and change of English law, which he explained in quite modern terms.[144] Aside from this, a historical approach helps to excite the interest of students.[145]

Amos utilized other methods as well for taking his students with him, including the institution of written examinations and prizes. He argued that they were necessary for most lecturers in order to instill in their students 'strong motives of hope or fear to stimulate their attention'.[146] What is more, he regularly engaged members of his class in 'legal conversations' for up to half-an-hour after each lecture. 'My rule was to select any one of them, and to ask, "What is your opinion upon that particular point of which I spoke in my lecture?" and then ask another as to the same or a different point, so as to make the whole class lecture each other.'[147] He used this technique both to keep the students on their toes and to rectify whatever mistaken ideas they held. They also asked questions of Amos, even in the middle of his lectures. According to Gerald Griffin,

> The manner of the students ... was singularly different from anything he had ever before observed of pupils under instruction. They were many of them grown up young men, some of them already at the bar, and, as if they were professors themselves, made no more ado about stopping the lecturer to ask him any question that arose to their minds, than if they were at a tea party. These questions however being generally very pertinent, the Professor seemed rather pleased at the attention they indicated; and they often gave rise to conversations on the point in debate, which were listened to with the utmost interest, and looked upon as no departure from the object with which they were assembled.[148]

Austin could have used many, if not all, of these methods in his course on jurisprudence. Effective employment of them might not have resulted in a course as popular as Amos's, but it probably would have made his lectures livelier and more popular. In particular, Austin's more frequent use of four of the techniques employed by Amos might well have had this effect. One was the discussion of actual cases for the purpose of showing the relevance of theory to real world conflicts and decisions. While Austin very occasionally referred

to cases, he seldom discussed them or used them to illustrate his generalizations. As a result, he missed a golden opportunity to relate theory to practice in ways that might well have interested his students.[149]

A second technique that Austin might have employed more often was the discussion of historical examples. Nor would such discussion be inconsistent with general jurisprudence. Such is the case because it would be designed only to illustrate general principles, notions, and distinctions. While he did some of this, he could have done much more of it, and in a way that might have fired the imagination of his students. The third method was to lecture from notes rather than completely written out essays, a practice well-designed to put students (or anyone else) to sleep. A final tactic was to encourage discussion. He not only could have questioned his students, but used the questions as a means to motivate them to disagree and to argue *with each other*. Nothing seems to me to be quite as effective in holding the attention of students and in stimulating their interest in the material. At least this is the conclusion that I have drawn as a result of teaching courses in political and legal theory for more years than I care to acknowledge. Amos evidently held the same opinion. His view was that 'young men are the best of *professors* for each other'. Indeed, he went so far as to claim that the best law lectures at the University of London in terms of improving the students were those 'given by the students themselves, in the way of familiar conversation'.[150]

Austin's failure to employ some, if not all, of these methods was not necessarily due to lack of appreciation of their value. For example, he was profoundly convinced of the great utility of theory for practice.[151] He was well aware, too, of the advantages of extemporaneous lectures. He acknowledged that they are not only more flexible than written ones, but more likely to hold the attention of students.[152] Austin also expressed the intention to emphasize discussion. On 28 November, 1829, he requested a class list in alphabetical order from the University. He justified the request on the ground that he intended to address his students individually, for which purpose it was essential to learn their names.[153] Moreover, at the conclusion of his first lecture in the course he virtually begged members of the class to criticize and to question him. His words were,

> I therefore wish, of all things, to form a habit of lecturing extempore: To this, I am at present not competent, but by dint of giving explanations, etc., I hope I may acquire the requisite facility and composure.
>
> Another advantage which will arise from these discussions: Errors in plan and in execution will be pointed out and corrected.
>
> I beg of you not to be restrained by false delicacy: Frankness is the highest compliment . . .

> I therefore entreat you, as the greatest favour you can do me, to demand explanations and ply me with objections – turn me inside out. I ought not to stand here, unless, etc.
>
> Can bear castigation without flinching, coming from a friendly hand. From this collision, advantages to both parties more advantageous than any written lectures.
>
> In short, my requests are, that you will ply me with questions . . .[154]

This evidence raises the question of why Austin failed to utilize more effective pedagogical techniques. To begin with, he never attended a university and was very largely a self-educated person. He therefore did not observe models of what did and did not work in the lecture room, an experience upon which he could have drawn for his own purposes. The infrequency of his discussion of actual cases as a means to illustrate his ideas is more difficult to explain.[155] Whatever the reason for it, he lacked the facility for relating principles to cases that he so admired in the Roman jurists.[156] Moreover, Austin probably continued to read his lectures because of his extreme stage fright. He evidently never mastered his self-described fear of 'breaking down for want of the habit of extemporizing'.[157] In fact, his anxiety was so intense that he apparently was unable to lecture until his material was 'completely written out'.[158] This inability reflected, in the last analysis, certain basic traits of his personality and character.[159] He tended to be austere, reclusive, sensitive, and insecure. He also lacked self-confidence and suffered from an 'anxiety too intense for his bodily health'.[160] This malady contributed to the debilitating illnesses, similar to migraine headaches, that plagued him throughout his life. In any event his 'fear of failure' was apparently so intense that it prevented him from experimenting with pedagogical techniques the value of which he acknowledged.

IV

No single factor explains thus the low enrolment in Austin's courses, which was the product of a cluster of influences. They include the primitive state of legal education, the difficulties of the University of London, the highly theoretical character of his innovative course, and his own pedagogical limitations. Although the precise impact of each of these different factors is impossible to gauge, some of them were less influential than others. In particular, the primitive state of legal education and the low enrolment at the University of London did not have the heaviest impact. At least it was possible to overcome them and attract large numbers of students, as Andrew Amos demonstrated.

The abstract character of Austin's course and certain of his limitations as a teacher thus appear to be the most influential factors. The evidence indicates quite conclusively that students were much more interested in practical than theoretical questions. Austin also had certain limitations as a teacher which must have reduced enrolment in his course. He admitted, with characteristic honesty, that his course had 'numerous faults',[161] though he did not explain what they were. In any case his introductory lectures were poor, his other lectures were unduly long and repetitive, and they were read rather than delivered extemporaneously or from notes. He also failed to exploit effectively the wealth of the cases, to inspire much discussion, or to complete his course.

Was the low enrolment in Austin's course due more to its highly abstract character or his limitations as a teacher? Unfortunately, there is not enough evidence to validate an answer to this critical question one way or the other. What is needed is the test case of: (a) a course in jurisprudence taught along the lines of Austin's lectures; (b) by someone with his strengths but without his limitations; (c) at about the same time and place. I know of no such course and therefore believe that the question is impossible to answer with any degree of certainty. On the one hand, Austin was swimming against a very strong current which other teachers of jurisprudence were also unable to buck. On the other hand, it was possible to do more than he did to try to stay afloat. Although 'more' might not in the long run have been 'enough', it could at least have prolonged the life of his course. In that event his career as a teacher and his productivity as a writer might have been quite different than they in fact were. The same can be said of the development of English jurisprudence in the nineteenth century.

Notes

1. For accounts of Austin's course and/or its historical context, see Sarah Austin, Preface to *LJ*, pp. 5–11; H. Hale Bellot, *University College London 1826–1926* (London: University of London Press, 1929); Raymond Cocks, *Foundations of the Modern Bar* (London: Sweet & Maxwell, 1983), Part 1; Lotte and Joseph Hamburger, *Troubled Lives*; Negley Harte, *The University of London 1826–1986* (London: Athlone Press, 1986); Michael Lobban, *The Common Law and English Jurisprudence 1760–1850* (Oxford: Clarendon Press, 1991); W.L. Morison, *John Austin* (Stanford: Stanford University Press, 1982); Wilfrid E. Rumble, *Thought*, 29–41; J.H. Baker, 'University College and Legal Education 1826–1976', *Current Legal Problems* (1977), p. 1; George W. Keeton, 'University College and the Law', *Juridical Review*, li (1939), 118; A.D.E. Lewis, 'John Austin (1790–1859): Pupil of Bentham', *Bentham Newsletter*, ii (1979), p. 19; and William Twining, 'Laws', in *The University of London and the World of Learning 1836–1986*, ed. F.M.L. Thompson (London: Hambledon Press, 1990); and Christopher W. Brooks and Michael

Lobban, 'Apprenticeship or Academy? The Idea of a Law University, 1830–1860', in *Learning the Law: Teaching and the Transmission of Law in England, 1150–1900*, ed. Jonathan A. Bush and Alain Wijffels (London: Hambledon Press, 1999). A number of other studies provide useful background information about, among other things, the period in which Austin taught his course. See, *inter alia*, H.G. Hanbury, *The Vinerian Chair and Legal Education* (Oxford: Blackwell, 1958); F.H. Lawson, *The Oxford Law School 1850–1965* (Oxford: Clarendon Press, 1968); and L.C.B. Gower, 'English Legal Training: A Critical Survey', *The Modern Law Review*, xiii (1950), p. 137. Various official governmental reports are also illuminating, but that of the Select Committee of Legal Education of 1846 is crucial. The same may be said of some of the testimony before the Committee. See 'Report from the Select Committee on Legal Education, together with the Minutes of Evidence, Appendix, and Index', Parliamentary Papers, 10 (1846), p. 1 [hereinafter cited as Report (1846)].

2. The quotation is from the testimony of George Bryant, Under Treasurer of the Inner Temple, before a Commission appointed to investigate the Inns of Court. See 'Report of the Commissioners appointed to Inquire into Arrangements in the Inns of Court and Inns of Chancery for promoting the study of Law and Jurisprudence', Parliamentary Papers, 18 (1854–1855), p. 488.
3. Justice Keating, as quoted by W.G. Hammond, 'John Austin and His Wife', *Green Bag*, 1 (1889), p. 50. According to another account, only five auditors attended Austin's final lecture. 'Central Criminal Court', *WR*, 22 (1835), p. 105. A different writer claims that Austin's lectures were suspended for reasons of ill-health rather than slight attendance. In fact, the attendance was said to be 'as good as the peculiar nature of the study (General Jurisprudence), and the limited numbers of the Society, had led even his admirers to expect'. 'Events of the Quarter' [hereinafter cited as 'EQ'], *LM*, 13 (1835), p. 282. This would seem to imply that attendance was larger than five persons, but the language is too vague to be certain.
4. *LJ*, pp. 73
5. See *LJ*, pp. 16–17. For bibliographies of Austin, see W.L. Morison, *John Austin* (Stanford: Stanford University Press, 1982), pp. 211–17, and Rumble, *Thought*, pp. 262–71.
6. See *LJ* (1863).
7. See *infra*, Chapter 4.
8. For Mill's relationship to Austin, see *infra*, Chapter 5.
9. John Stuart Mill, *Essays*, p. 203.
10. Richard Cosgrove, 'Law', in *Victorian Periodicals and Victorian Society*, ed. J. Don Vann and Rosemary T. VanArsdel (Toronto: University of Toronto Press, 1995), p. 12. Raymond Cocks is an exception to this generalization. He correctly points out that the Victorian lawyers were 'almost obsessed with the discussion of their ideas [in the legal periodical press]'. *Foundations of the Modern Bar*, 8.
11. See *supra*, Chapter 2, and *LJ*, pp. 79–342.
12. See *LJ*, pp. 343–507.
13. Ibid., pp. 509–681.

14. Ibid., 683–904.
15. Ibid., p. 1072.
16. *LJ*, p. 32.
17. *LJ*, p. 32.
18. Ibid., p. 31.
19. Ibid., pp. 32, 58, 1073–4.
20. Ibid., p. 1074.
21. Ibid., p. 1073.
22. Ibid., p. 1073–4.
23. Ibid., p. 1074.
24. Ibid., p. 1073.
25. Ibid., p. 1072.
26. Ibid., p. 1073.
27. John Austin, 'Jurisprudence', General Statement by the Council of the University of London explaining the Plan of Instruction (London: 1828), p. 79.
28. *LJ*, p. 1077.
29. Ibid.
30. Ibid., p. 1081. For a recent analysis of the relationship between Roman law and the common law, see A.D.E. Lewis, '"What Marcellus says is against you": Roman law and Common law', *The Roman Law Tradition*, ed. A.D.E. Lewis and D.J. Ibbetson (Cambridge: Cambridge University Press, 1994), pp. 199–208.
31. *LJ*, p. 614. Austin also cited feudalism as an example of an inessential concept that can only be understood historically: ibid., p. 850.
32. Ibid., pp. 103–66.
33. Ibid., pp. 614–20.
34. Ibid., p. 1079.
35. Ibid., p. 8.
36. Ibid., p. 12.
37. John James Park, *Juridical Letters addressed to the Right Hon. Robert Peel* (London: J.W.T. Clarke, 1830), p. 9, and *Introductory Lecture* (London: R. Clay, 1831), p. 16. Park attached great value to jurisprudence and its important place in legal education. Ibid., pp. 28, 33. His conception of jurisprudence was quite different, however, from that of Austin. See 'Professor Park's Introductory Lecture on Positive Law', *Legal Observer*, 4 (1832), pp. 112–13.
38. Report (1846), p. 478. The Report praised, however, Austin's 'high qualifications'. Ibid. It also advocated a central place in legal education for jurisprudence. Ibid., pp. 528, 509, 518–19. It was described in very Austinian terms as focusing upon 'the great principles of General Jurisprudence, or the Philosophy of Law and Legislation'. Ibid., p. 519. See also ibid., p. 528.
39. See Report (1846), p. 95, and Bellot, *University College London 1826–1926*, pp. 102–103.
40. Report (1846), p. 96. Although Amos only referred to Austin once or twice, his lectures were said to be 'excellent'. Ibid., p. 103.
41. As quoted by Park, *Introductory Lecture*, p. 25.
42. Report (1846), p. 60.

43. F.J.C. Hearnshaw, *The Centenary History of King's College London: 1828–1928* (London: George G. Harrap, 1929), p. 90. For a good account of Park's criticisms of codification, see Lobban, *The Common Law*, pp. 219–22. Austin was familiar with some of these criticisms, to which he objects in *LJ*, pp. 1032–3. Park probably had not read the *PJD*, which was published the year before his death. His comments about the 'living disciples of the school of Bentham' who are known 'only by report' may, however, be a veiled reference to Austin. See *Juridical Letters*, pp. 26–7.
44. Cosgrove, 'Law' , p. 17.
45. 'EQ', *LM*, 5 (1831), p. 258.
46. Ibid., 6 (1831), p. 517.
47. Ibid., 7 (1832), p. 258.
48. Ibid.
49. *Legal Observer*, 5 (1833), p. 437.
50. 'EQ', *LM*, 7(1832), p. 506.
51. Ibid. For the *LM*'s appraisal of Park, see 'EQ', 10 (1833), 254–5. The magazine claimed that 'his success was never equal to his expectations but possibly he expected more than the present condition of jurisprudence in this country could justify'. Ibid. For a discussion of Park, see Cocks, *Foundations of the Modern Bar*, pp. 42–3.
52. 'Central Criminal Court', *WR*, 22 (1835), p. 105.
53. *LJ*, p. 1079.
54. 'Jurisprudence', p. 79.
55. See *LJ*, pp. 1080–81.
56. Ibid., pp. 1083.
57. Ibid., p. 1089.
58. Ibid.
59. For examples of Austin's criticisms of English law and English lawyers, see *LJ*, pp. 58, 467–8. His objections to 'judiciary law' and defence of codification may be found ibid., pp. 647–81, 1021–39, 1092–100.
60. See Rumble, *Thought*, and Lobban, op. cit., pp. 223–4, 231–4.
61. Sir William Holdsworth, vol. 12, *A History of English Law* (London: Methuen, 1938), pp. 77–8.
62. Bethel, 'Address', *Juridical Society Papers*, vol. 2 (1858–1863), pp. 137–8.
63. Brooks and Lobban, 'Apprenticeship or Academy?', pp. 357–8.
64. Ibid., p. 358.
65. Ibid., pp. 356–7.
66. *LMLR*, 17 (1864), p. 124.
67. Ibid., pp. 125.
68. J.H. Baker, 'University College and Legal Education 1826–1976', *Current Legal Problems* (1977), p. 1.
69. Ibid.
70. Report (1846), p. 498.
71. The Report of Her Majesty's Commissioners appointed to inquire into the State, Discipline, Studies, and Revenues of the University and Colleges of Oxford, 1852, HMSO; 1852 B.P.P., vol. 22, p. 104.

72. Ibid., p. 583.
73. Report (1846), p. 492.
74. *LMLR*, 17 (1864), p. 119.
75. Report (1846), p. 526. For a comparison of American and British legal education, see M.H. Hofflich, 'The Americanization of British Legal Education in the Nineteenth Century', *The Journal of Legal History*, 8 (1987), pp. 244–59.
76. Report (1846), p. 526. The Select Committee argued, however, that legal education at the University of London presents 'very material improvements on the preceding system [of Oxford and Cambridge]'. Ibid., p. 477.
77. Report of the Commissioners appointed to inquire into Arrangements in the Inns of Court and Inns of Chancery for improving the Study of Law and Jurisprudence, 1855, HMSO; 1854–5 B.P.P., vol. 18 (1855), p. 359.
78. Ibid.
79. Sir William Holdsworth, *Some Makers of English Law* (Cambridge: Cambridge University Press, 1938), p. 257.
80. *University College London 1826–1926*, p. 175.
81. Ibid.
82. Ibid., p. 178.
83. See 'Report of the Committee on the Law Classes, to the Council of University College, London' (1869), p. 2.
84. See Twining, 'Law', at p. 95.
85. Baker, 'University College', p. 5.
86. 'Report of the Committee on the Law Classes', p. 2.
87. Ibid., p. 3.
88. Ibid., p. 5.
89. Ibid., p. 2.
90. 'EQ', *LM*, vi (1831), p. 517.
91. *Foundations of the Modern Bar*, p. 37.
92. Brooks and Lobban, 'Apprenticeship or Academy?', p. 370.
93. Cocks, *Foundations of the Modern Bar*, p. 49. The same could be said of John James Park, albeit to a lesser extent. For example, *The Legal Observer* reprinted in 1832 a large number of his lectures at King's College.
94. 'EQ', *LM*, 4 (1830), p. 517.
95. Ibid.
96. Ibid.
97. 'EQ', *LM*, 6 (1831), p. 517.
98. Ibid.
99. Ibid.
100. 'EQ', *LM*, 7 (1832), p. 258.
101. Ibid.
102. 'EQ', *LM*, 8 (1832), p. 535.
103. *Essays*, p. 202.
104. *Legal Examiner and Law Chronicle*, 2 (1833–34), p. 22.
105. 'EQ', *LM*, 10 (1833), p. 493.

106. *Legal Examiner and Law Chronicle*, 2 (1833–34), p. 386.
107. Ibid., p. 416, and Hearnshaw, *The Centenary History of King's College London: 1828–1928*, p. 98, note 1.
108. For examples, see the works cited in Chapter 4 of this study, note 5.
109. *LM*, 8 (1832), p. 313.
110. Cosgrove, op. cit., p. 17.
111. *The Jurist*, 105.
112. Report (1846), p. 504.
113. The Report of Her Majesty's Commissioners appointed to inquire into the State, Discipline, Studies, and Revenues of the University and Colleges of Cambridge, 1852, HMSO; 1852–3 B.P.P., vol. 44, p. 9.
114. Ibid.
115. See *The Earlier Letters of John Stuart Mill 1812–1848*, ed. Francis E. Mineka (Toronto: University of Toronto Press, 1963), pp. 51–3.
116. Ibid., p. 52. Fifty-seven of Austin's lectures are reprinted in his *LJ*. According to Sarah Austin, the fifty-seventh lecture is the last one that he delivered in his course. How many he gave in each offering of the course may have varied and, in any case, is not known.
117. See ibid., p. 53, and *infra*, Chapter 5.
118. Ibid. Austin may have followed quite closely this advice for the revision of his introductory lecture. At least the published edition of them embodies most of Mill's suggestions. Still, it is impossible to know whether Austin or his wife was responsible for the changes. The manuscripts of the lectures are not extant. For further discussion of this problem, see *infra*, Chapter 5.
119. 'EQ', *LM*, 4 (1830), p. 517.
120. As quoted by Lotte and Joseph Hamburger, *Troubled Lives*, p. 55.
121. Ibid.
122. Ibid., pp. 55–6. Cole did attend, however, the fourth and final offering of Austin's course in 1832–3. Ibid., pp. 59–60.
123. *Diary*, 27 March, 1832, p. 276.
124. *Legal Examiner and Law Chronicle*, 2 (1833–4), p. 416.
125. See Rumble, *Thought*, pp. 30–31.
126. *The Earlier Letters of John Stuart Mill 1812–1848*, p. 51.
127. Ibid., p. 52.
128. Ibid., p. 51.
129. 'Austin, John', *The Encyclopedia Britannica: A Dictionary of Arts, Sciences, Literature and General Information*, 11th edn, vol. 2 (New York: The Encyclopedia Britannica Co., 1910), p. 939. For Markby's more detailed appraisals of Austin's work, see his 'Analytical Jurisprudence', *LMR*, 1 (1876), pp. 617–30, and his *Elements of Law considered with reference to Principles of General Jurisprudence*, 6th edn (Oxford: Clarendon Press, 1905). Markby helped Mrs Austin edit her husband's lectures and eventually married her nephew's – John Edward Taylor's – daughter. See her *Memories of Sir William Markby* (Oxford: Clarendon Press, 1917).
130. Letter of Nassau W. Senior to John Austin, 1829, Nassau W. Senior Papers, c 64, National Library of Wales.

131. *The Memoirs of the Right Honourable Sir John Rolt: Lord Justice of the Court of Appeal in Chancery 1804–1871* (1939), p. 54.
132. Ibid. A remark in the *LM* indicates that Austin's second lecture, which was delivered with 'all his ordinary distinctness and force', was much better than his introductory lecture. 'EQ', *LM*, 11 (1834), p. 278.
133. Baker, *University College*, p. 2. For an illuminating comparison of Austin's and Amos's conceptions of legal education, see Twining, 'Law', at pp. 92–4.
134. Andrew Amos, *An Introductory Lecture upon the Study of English Law* (London: John Taylor, 1829).
135. Ibid., p. 8.
136. Ibid.
137. Ibid., p. 9.
138. Andrew Amos, *An Introductory Lecture on the Laws of England* (Cambridge: J. Deighton, 1850), note, pp. 50–51.
139. Report (1846), pp. 96, 100.
140. Andrew Amos, *Four Lectures on the Advantage of a Classical Education as an Auxiliary to a Commercial Education* (London: Richard Bentley, 1846), p. vi.
141. Andrew Amos, *An Introductory Lecture upon the Study of English Law* (1830), p. 18.
142. Report (1846), p. 98.
143. Ibid.
144. The best example of this is his attitude towards 'judicial legislation', a development that he praised highly. *Introductory Lecture upon the Study English Law* (1830), pp. 14–15. He even argued that the nation was indebted to it 'for the greatest and best part of its law'. Ibid., p. 15. For an analysis of Austin's quite similar opinion, see Rumble, *Thought*, 109–43.
145. These considerations help to explain why Amos intended to incorporate into his course a wide variety of biographical, historical, and literary materials. For a good example of his approach as applied to constitutional law, see *Introductory Lecture upon the Study of English Law* (1829), pp. 24–5.
146. Report (1846), p. 106.
147. Ibid, p. 97.
148. As quoted by Hale Bellot, *University College London 1826–1926*, p. 103.
149. See W.G. Hammond, 'John Austin and His Wife', *Green Bag*, 1 (1889), p. 51.
150. *Introductory Lecture upon the Study of English Law* (1829), p. 10.
151. See *LJ*, pp. 115–17, 1082–6.
152. Letter from John Austin to George Grote, 9 December, 1827, in Janet Ross, *Three Generations*, p. 68.
153. Letter of John Austin, 28 November, 1829, University College, London, College Correspondence, p. 24.
154. *LJ*, pp. 6–7.
155. A possible explanation is that Austin did not know the case law well enough to discuss it fruitfully. For expressions of this opinion, see Oliver Wendell Holmes, 'The Path of the Law', in *The Mind and Faith of Justice Holmes: His Speeches, Essays, Letters, and Judicial Opinions*, ed. Max Lerner (New York: Modern Library, 1943), p. 87; Sir Frederick Pollock, Letter to Holmes, July 5,

1899, in *Holmes–Pollock Letters: The Correspondence of Mr. Justice Holmes and Sir Frederick Pollock, 1874–1932*, ed. Mark DeWolfe Howe (Cambridge, Massachusetts: Harvard University Press, 1961), p. 94; Pollock, *Essays in the Law* (London: Macmillan, 1922), p. 158, note 2; and Hammond, op. cit., p. 48. Still, the extent of Austin's knowledge of English law is a complex question that cannot be resolved here.

156. See *LJ*, pp. 217, 1080–81.
157. Letter from John Austin to George Grote, 9 December, 1827, in Ross, *Three Generations*, p. 68.
158. Letter from John Austin to Leonard Horner, 30 October, 1828, University College, London, College Correspondence 583.
159. *LJ*, pp. 7–8.
160. Ibid., p. 6.
161. Ibid., p. 73.

4

Austin's utilitarianism and the reviews of *The Province of Jurisprudence Determined*

In 1954 H.L.A. Hart wrote that Austin's work has 'never, since his death ... been ignored'.[1] If it never has been completely ignored, interest in it has periodically waxed and waned. The interest definitely waxed in the 1980s, for at least a brief period of time. While more books were published about Austin in this period than in any other decade since his death in 1859,[2] 'few people noticed'.[3] Even if many people had noticed, they would not have found out very much about the nineteenth-century responses to Austin's work. Certain of the responses remain completely in the dark, while there is more light to shed on at least some of the others. In short, our knowledge of nineteenth-century interpretations of Austin's legal philosophy is very incomplete.

If Austin had been an unimportant figure in British jurisprudence, these gaps in our understanding of him would not matter. Very few informed jurists, however, would characterize him as an insignificant theorist. Mistaken, perhaps; unimportant, no. Numerous writers in the last quarter of the nineteenth century, at any rate, described him as a dominant influence.[4] To say this only accentuates, however, the need for more detailed knowledge of the reception of his work. The development of a better understanding of it than now exists requires a large amount of additional research. The questions that need to be addressed include such issues as, did the responses to his ideas tend to be uniform or diverse, favourable or unfavourable? How did the reception evolve or change in the course of the century? How was Austin 'seen'? Were the perceptions of him well- or ill-founded? Do they illuminate or distort his legal philosophy?

This chapter makes no attempt to answer definitively these very large questions, which are the focus of the entire book. Rather, it concentrates upon the reviews of the first (1832) and second (1861) editions of the *PJD*.[5] Although scholars have tended to pay relatively little attention to them, the reviews illuminate both the book and its reception. Of course, what is true in this respect of some of the reviews is definitely not true of all of them. Their length, quality, and insights vary tremendously. Nonetheless, at their best the reviews are of great value for understanding the *PJD* as well as its reception. For example, they clearly demonstrate the inaccuracy of a not uncommon opinion fostered by Sarah Austin. The nub of it is her view that her husband was, in effect, during his lifetime, a prophet without honour in his own country. She

expressed this opinion in 1861 in her Preface to her edition of the *PJD*.[6] Although the Preface is often characterized as 'touching' or 'moving', which in some respects it no doubt is, it is also a highly selective account of John Austin's life. Sarah Austin's opinion is in any case difficult to reconcile with what she wrote in 1831 to a friend: 'A passage from one lecture [of John Austin] has appeared in the *Examiner*, and been copied into several provincial papers with great approbation.'[7] While it is impossible to determine the accuracy of a statement one year later in the *Law Magazine* that 'everyone is praising his [Austin's] book',[8] almost all of the other eight reviews of the first edition of it were laudatory. One reviewer even argued that it 'claims the same place in a course of ethical studies, as Euclid's Elements in mathematical'.[9] The review of the *PJD* in *The Times* stated that it 'fairly entitles the author to rank high among original and profound thinkers, and those worshipers of science who have preferred the rare honours which are to be gained in the more difficult paths, to the easy fame which can be won in the more beaten tracks'.[10] Another reviewer of the work 'conscientiously' recommended it on the ground that it 'must certainly rank as the best book on jurisprudence, and one of the best books (speaking generally) of the day'.[11]

If the responses to the first edition of the *PJD* tended to be highly laudatory, there were dissenting voices. A reviewer in the *Legal Observer* was critical of Austin's dogmatism, his tendency to be 'confident even to arrogance'. According to this critic, while Austin 'sets at naught the sentiments of most other writers, he does not seem to conceive it possible that his own can meet with a doubt'.[12] The critics included Lord Melbourne, Prime Minister in 1834 and from 1835–1840, who may have uttered the harshest words of all, though not in a review. He allegedly said that all of the Benthamites were fools, and that Austin was 'a damned fool . . . his book on "Jurisprudence" . . . was the dullest book he ever read, and full of truisms elaborately set forth'.[13]

Yet, these criticisms tend to be exceptions to the rule. The responses to the *PJD* were, on balance, quite favourable. Sarah Austin's claim that its merits were appreciated 'only at a later period, and by slow degrees'[14] is, in a word, false. In fact, Austin's contributions were recognized immediately by almost all of the numerous reviews of the first edition of his book.

The purpose of this chapter is not to analyse all of the various themes of the reviewers, or the different reasons for their praise of Austin's book. Rather, it is to explain the nature and importance of one of their most striking interpretations of the work. Unlike the bulk of late Victorian, or modern, scholars,[15] the reviewers had relatively little to say about Austin's definition of a law, theory of sovereignty, or separation of law from morality. In other words, they did not stress the issues at the centre of the modern controversies about his legal philosophy. Instead, the reviews tended to focus upon other dimensions of the *PJD*, most notably the three chapters on utilitarianism. Austin devoted

approximately one-fourth of his book to this subject, the reviewers' discussion of which significantly enhances our understanding of the work. At least this conviction is the motivating force and primary justification of this chapter.

I

The reviewers' emphasis upon Austin's utilitarianism contrasts sharply with that of most subsequent scholars. They have tended either to criticize his discussion of it as an irrelevant aberration, or to ignore it completely. Sir Henry Sumner Maine is an example of the first tendency,[16] while H.L.A. Hart's *The Concept of Law* illustrates the second.[17] The reviewers reacted very differently to the pages of the *PJD* which discuss ethical theory. Only one of them, an American review, criticized this portion of the book as irrelevant,[18] few of them ignored it, and most of them praised it highly. To turn from the reviews to modern scholarship is indeed to encounter a very different Austin and a very different book. As Raymond Cocks has pointed out, in his excellent study of the Victorian bar,

> The modern legal mind with its reluctance to relate any analysis of the law to topics such as theology, finds it difficult to conceive of Austin as a man whose primary concern was not with the minute analysis of legal terms, but rather with their relationship to other elements in a universe dominated by a particular vision of God and the state. The fact that Austin went to such extreme lengths to show what was properly called law should not draw our attention away from his great concern with non-legal issues; the things that were *not* properly called law always fascinated him. In brief he appeared to integrate the legal and the non-legal into a larger understanding of human existence. Later analysts with their concern for the concepts of sovereignty and command would surely have struck Austin's contemporaries as having a most curious obsession with the less adventuresome elements of his lectures. They ignored his quest to explain man's place in the universe.[19]

The reviews of the *PJD* tend to substantiate this interpretation. Unlike subsequent commentators, the reviewers portrayed the work as much more than a treatise on jurisprudence or law. Instead, they tended to characterize it more broadly as a contribution to moral and political philosophy. According to a reviewer of the first edition of the book, for example,

> We find unavoidably included in this work the better part of all which the best elementary writers on ethics, politics, and jurisprudence are studied

> for; all which it is the professed object of such writers as Paley, Grotius, and (in his preliminary chapters) of Blackstone to teach; only mixed up with less rubbish, packed more neatly, and rendered more portable, than we have ever seen it before.[20]

This understanding of the *PJD* helps to explain the reviewers' emphasis upon Austin's exposition of utilitarianism. They also tended to praise it highly as leaving 'little to be desired'[21] and as being the most original and successful part of the entire book.[22] John Stuart Mill observed that he had never read as good a discussion of certain aspects of the doctrine of utility.[23] Still further, a majority of the reviews allocated a substantial proportion of their discussions of the *PJD* to this subject. The 'note' in *The Adventurer: London University Magazine* focused entirely on Austin's utilitarian theory of resistance.[24] The law journals also gave considerable attention to his exposition of the principle of general utility. The amounts ranged from ten out of the fifteen pages of the review in the *Law Magazine*,[25] to five of the seventeen pages of the review in *The Jurist*,[26] and to about one-third of the very brief review in the *Legal Observer*.[27] Finally, not a single reviewer criticized Austin's discussion of utilitarianism on the ground so strongly emphasized by his late Victorian critics. The gravamen of their complaint, as we shall see, was that the discussion was either irrelevant to or inconsistent with his conception of jurisprudence.[28] In contrast to this, the reviewers either assumed its relevance or accepted his justification of its propriety. For example, the review in the *Law Magazine and Review* described Austin's explanation of the pertinency of his discussion of ethical theories to his jurisprudence in these emphatic terms: 'We believe no thinking man will doubt of it.'[29]

The value of the reviews for understanding Austin

Although thinking men have in fact doubted it, the reviewers' interpretation of the *PJD* is crucial for understanding the book. To begin with, their conception of it as more than a treatise on legal philosophy accurately reflects Austin's intentions. This is evident from the Preface to the first edition of the *PJD*, in which he describes the audience to whom the book is addressed. He specified that the work was not intended only for students of the science of jurisprudence. Rather, it was 'so arranged and expressed, that any reflecting reader, of any condition or station, may ... understand it'.[30] He justified this broad conception of the audience for the book on the ground that the nature or essence of law and morality are of general significance and interest. He went on to maintain that an understanding of them requires a grasp of the distinctions he intended to draw.[31]

Unfortunately, these words were excised from the third, fourth, and fifth editions of the *PJD*, which did not include Austin's own Preface to his book. The same is true of H.L.A. Hart's edition of the *PJD*,[32] or, for that matter, my own edition of it. The omission of the passage in question is unfortunate because an appreciation of it is vital for understanding Austin's intentions. His words quoted in the previous paragraph unmistakably indicate that he did not intend and design his book only as a textbook for courses on jurisprudence. Although some of his late Victorian critics savaged its inadequacies in this regard,[33] the book was never intended solely for students of law. Rather, Austin organized and wrote it for 'any reflecting reader'.[34]

Moreover, Austin regarded his discussion of ethical theories as essential for achieving the principal purpose of his book. He characterized it as distinguishing positive laws from other kinds of laws 'properly and improperly so-called'.[35] Aside from this, he maintained that his exposition of ethical theories was necessary in a treatise on the *rationale* of jurisprudence.[36] Otherwise, 'many' juristic principles and distinctions could not be accurately interpreted or justly evaluated.[37] Furthermore, he argued that the sciences of jurisprudence and ethics were inextricably linked. While he distinguished sharply between them, he argued that the ties between the two sciences are both 'numerous' and 'indissoluble'.[38] Determination of the nature of the index to the tacit commands of the Deity is, clearly, 'an all-important object of the science of legislation'.[39] Since the theory of general utility *is* this index, discussion of it is also a 'fit and important object of the kindred science of jurisprudence'.[40] Finally, Austin stressed the need to rectify prevailing misconceptions of the theory of general utility.[41]

Austin was thus profoundly concerned with ethical questions when he composed his lectures and wrote his book. His interest in them apparently intensified in the years after the publication of the *PJD*. For example, he once expressed the intention to write an ambitious tome entitled *The Principles and Relations of Jurisprudence and Ethics*. He described it as about the same subject – jurisprudence – as his first book, but 'going more profoundly into the related subject of Ethics'.[42] While he never wrote this 'great work', it reflected his deep concern with improving the clarity and consistency of our ethical notions.[43]

Austin's rule-utilitarianism and theory of resistance

The reviews of the first edition of the *PJD* not only illuminate Austin's intentions and his deep concern with ethical theory. Aside from this, they facilitate understanding of certain limitations of his interpretation of utilitarianism. At least this may be said of the unduly neglected theory of resistance that he developed in the second lecture of the book. His discussion of it takes place in

the context of his well-known defence of rule-utilitarianism, which has been characterized as 'the first attempt to work out with some care a mode in which the utilitarian principle could be coupled with reliance on moral rules'.[44] His strong emphasis upon this reliance sharply distinguishes his version of utilitarianism from Bentham's. He showed little interest throughout his long life in the development of a 'credible indirect-utilitarian moral or political theory .... Quite to the contrary, he insisted ... that the sole fundamental, and always applicable decision principle is the principle of utility.'[45] Bentham apparently regarded it as not only the 'ultimate evaluative principle' but 'the sole sovereign *decision principle*'.[46]

Austin's position was very different from this. He could not have been more critical of act-utilitarianism (though he did not of course use this term), which he lambasted as 'a halting and purblind guide'.[47] The process of reaching 'on-the-spot' decisions by directly applying the principle of utility to the circumstances of the case is not only slow, difficult, and uncertain, but 'clearly superfluous and mischievous'.[48] He argued, however, that utilitarianism properly understood does not require such contextually based decisions. The controlling question is not whether the effects of *this particular act* on the general happiness are beneficial. Rather, it is, 'If acts of the *class* were *generally* done, or *generally* forborne or omitted, what would be the probable effect on the general happiness or good?'[49] If decisions were reached on a sound utilitarian basis, they would not therefore require calculation of specific effects. Instead,

> Our conduct would conform to *rules* inferred from the tendencies of actions, but would not be determined by a direct resort to the principle of general utility. Utility would be the test of our conduct, ultimately, but not immediately: the immediate test of the rules to which our conduct would conform, but not the immediate test of specific or individual actions. Our rules would be fashioned on utility; our conduct, on our rules.[50]

Austin was thus a classic rule-utilitarian. The weight that he attributed to rules raises the question of whether he regarded any exceptions to them as justifiable. Although sometimes he appears to take an absolutist position,[51] he did not consistently adhere to it. To do so would be to advocate a 'form of superstitious rule-worship' which is, according to J.J.C. Smart, 'monstrous as an account of how it is most rational to think about morality'.[52] Austin at times appeared to recognize this and maintained that exceptions to at least certain rules are ethically justifiable. His reasoning was that,

> so important were the *specific* consequences which would follow our resolves, that the evil of observing the rule might surpass the evil of breaking it. Looking at the reasons from which we had inferred the rule, it were absurd to

> think it inflexible. We should, therefore, dismiss the *rule*; resort directly to the *principle* upon which our rules were fashioned; and calculate *specific* consequences to the best of our knowledge and ability.[53]

The very important example that Austin gave – and upon which one of the notices of his book focused[54] – is resistance to established government. The principle of utility implies, he argued, that the general rule must be obedience. Otherwise, 'there were little security and little enjoyment'.[55] Even the evils of a bad government are less pernicious, Austin argued, than the 'mischiefs of anarchy'.[56] Still, he admitted that in certain situations resistance may be justifiable on utilitarian grounds. The rationale for obedience is, after all, the utility of government. It may become so dysfunctional, however, that the social benefits of disobedience outweigh the costs. Indeed, this conviction was the basis, as we have seen, of one of his very few criticisms of Hobbes. He allegedly failed to appreciate that in certain anomalous cases 'disobedience is counselled by that very principle of utility which indicates the duty of submission'.[57] As a result, he 'scarcely adverted to the mischiefs which obedience occasionally engenders'.[58]

Austin thus held that individuals considering resistance must directly apply the principle of utility to the case.[59] He carefully outlined the ethical procedure to be followed in this anomalous situation. It is in essence a cost–benefit analysis of the good and bad effects of resistance. Although his approach is in this respect similar to Bentham's, Austin delineated more thoroughly than his great predecessor the various steps of the process.[60] To begin with, individuals must calculate the mischief of the established government, the chances of getting a better one by resisting, the evils attendant upon resistance, and the likely good to result from it. Once these calculations have been made, these various effects and probabilities must be compared and weighed. It is a credit to Austin's candour that he acknowledged the difficulty and uncertainty of these computations. If they were applied in a particular case, the wise, the good, and the brave might be both perplexed and divided. 'A Milton or a Hampden might animate their countrymen to resistance, but a Hobbes or a Falkland would counsel obedience and peace.'[61]

Austin recognized thus the uncertainty of concrete judgements about the utility of resistance in specific cases. Even so, he defended a utilitarian framework for assessing it. He also maintained that the situations requiring the direct application of the principle of utility are 'comparatively few'.[62] In the vast majority of cases the general happiness mandates that rules shall be obeyed. Austin's theory of resistance has never received, at any rate, the attention that it merits as a carefully thought-out utilitarian approach to a recurring problem of political life. It was the subject, however, of a detailed critique published in the *The Adventurer: London University Magazine*.[63] This

recently founded and short-lived journal was managed by students at the University of London. Although there is no mention of this article in the scholarly literature about Austin, it constitutes in certain respects a quite penetrating criticism of his ideas. The author did not challenge the premise that resistance should be evaluated on the basis of its utility. Instead, he criticized Austin's criteria for determining the utility of resistance.

Austin's position was subject to a number of criticisms, the most basic of which is its incompatibility with the idea of a *rule* of obedience. His argument was interpreted to be that the expediency of resistance has to be determined on a case-by-case basis. The question is whether its benefits in a particular situation outweigh its costs. 'This . . . is as much as to say', the author maintained, that 'there is no rule [of obedience], and consequently there are no exceptions'.[64] The very idea of a rule implies, it was claimed, a universal course of action to which there are by definition no exceptions. Moreover, it was pointed out that Austin appeared to take precisely this position in his defence of the unconditional nature of the rule prohibiting theft. Although he admitted that a theft by a poor man of the property of his rich neighbour may seem to be harmless or even beneficial, he argued that this appearance is fallacious. The question is not whether this particular theft is expedient, which it may well be. Rather, the issue is whether thefts in general are expedient, which Austin strenuously denied. He pointed out that numerous invasions of the useful right to property would not only impoverish the rich, but 'what were a greater evil, would aggravate the poverty of the poor'.[65] If he were to apply the same reasoning to theft that he applied to the 'rule' of obedience to government, however, he would have to acknowledge that stealing may be expedient in certain cases. In order to discover whether it is justified the individual would then have to apply the principle of utility directly to his or her case. In other words, he or she would have to become an act-utilitarian. The result would be to make the *rule* prohibiting theft nugatory. It would in effect be converted into a directive that stealing is permissible whenever it is useful and prohibited when it is harmful. 'But if the duty of obedience be rightly stated by Mr. Austin, to obey can no longer be a *rule* of conduct in the same sense in which, "thou shalt not steal" is a rule of conduct.'[66]

The argument was, thus, that to acknowledge exceptions to a rule is to fail to understand what a rule is. To be sure, the author admitted that there can be exceptions to a *rule* of obedience in a purely quantitative sense of the term. A rule may be said to exist in that the number of cases in which obedience is expedient far outnumbers those in which it is inexpedient. If the process that Austin recommended for deciding whether to resist were followed, though, this 'rule' would be of no help. His analysis implies that '*as soon as the nature of the command* [of the sovereign] *begins to be examined* . . . we must decide between the duty of obedience and the duty of resistance, by an appeal to the principle

of utility itself'.[67] Any such appeal raises all of the problems that Austin himself pointed out in his critique of act-utilitarianism. While there may well be exceptions to many of the rules grounded in the principle of utility, the reviewer insisted that they must consist of a class or classes of cases rather than a single case.[68] As such, these cases are not so much exceptions to the rule as limitations of it.

The article also in effect criticized Austin for oversimplifying the case for resistance. Determination of the expediency of acknowledging a right to resist in extreme cases depends upon the answers to three questions, the significance of which Austin allegedly failed to appreciate. They are:

> Firstly; – whether it were possible to except out of the rule of obedience, a class or classes of cases in which obedience is not dictated by utility;
>
> Secondly; – whether resistance be the only practicable method of escaping from a bad to a good government, and if it be not the only one, whether is be in all respects the best . . .
>
> Thirdly; – whether it be expedient to make the duty of obedience universal, or whether it be expedient to enjoin it as a duty upon subjects, to resist whenever they or any of them think that the probable advantages of their specific resistance would exceed its probable disadvantages; whether, in short, the evils that would result from universal non-resistance, are greater than those which result, or must ever be expected to result, from the doctrine which inculcates the practice of resistance in extreme cases.[69]

This critique of Austin is important because it accurately identifies a number of the limitations of his theory of resistance, valuable as it is. To begin with, his justification of this act is difficult to reconcile with his unqualified condemnation of theft. If exceptions to the rule requiring obedience are ethically justifiable, exceptions to the rule prohibiting theft would also seem to be warranted. Although the two rules could be distinguished on the ground that security for property is more useful than security for government, this does not appear to have been Austin's position. If there is a case to be made for distinguishing between the rules, he did not make it. It is of course understandable why he would be reluctant to acknowledge the existence of exceptions to rules grounded in utility. Any such acknowledgement brings into serious question the sharp contrast that he drew between rule-utilitarianism and act-utilitarianism. It would have this effect because it would be impossible to decide particular cases without directly applying the principle of utility to them. Determination of whether a case is controlled by a rule or is an exception to it requires the calculation of specific effects. While such calculations would not be required if the exceptions consisted of a class or classes of acts, Austin did not appear to conceive of them in this way. Rather, he evidently

regarded the exceptions at least to the rule of obedience as individual acts. If his position were that only some utilitarian-based rules had justifiable exceptions, then the same difficulty would arise for at least these rules.

To say this is not to criticize act-utilitarianism. It may or may not be the most plausible form of utilitarianism and the most satisfactory of ethical theories. Determination of whether it merits these characterizations is, obviously, far beyond the scope of this study. To argue that Austin's ethical theories cannot avoid the difficulties that *he* attributed to act-utilitarianism is, though, to criticize him. Of course, he was fully aware that the rule requiring obedience to government raised exactly these difficulties. Yet, there seems to be no good reason for regarding this rule as any different from other ethical rules. All of them, or at least many of them, appear to have justifiable exceptions under some circumstances. If they do, then rule-utilitarianism as interpreted by Austin would collapse into act-utilitarianism. It would be impossible to know whether a case should be controlled by a utilitarian-grounded rule or exceptions to it without calculating specific effects.

Moreover, Austin did fail to ask several important questions about the utility of resistance. Although the criteria that he enumerated are very important for assessing its expediency, their application would provide an incomplete account of its costs and benefits. A more complete calculation of them requires consideration as well of such issues as these: Is resistance the only means to effect the change from a bad to a good government? If it is not the only means to achieve this objective, is it the best means? Does it produce more good and less evil than other, equally effective ways? To be sure, these questions are anything but easy to answer. Nevertheless, consideration of them is necessary for a comprehensive assessment of the utility of resistance.[70]

II

Although *The Adventurer* was critical of Austin's interpretation of utilitarianism, it was an exception to the trend. Most of the reviews of the first edition of the *PJD* tended to emphasize and to laud his exposition of the theory of general utility. A number of the reviews of the second edition of the book, published in 1861, also contained praise of this aspect of it.[71] They tended to pay less attention to his ethical theories, however, than the reviews of the first edition. The reviews of the second edition of the book also were prone to be more critical of Austin's utilitarianism than the earlier reviews. In both respects, the reviews initiated a trend in the interpretation of the *PJD*. The culmination of it was the criticism of the chapters on utilitarianism as irrelevant to, or inconsistent with, Austin's jurisprudence. It is a criticism that will be discussed in detail in a subsequent chapter.[72]

A critique of Austin's 'theological' utilitarianism

The review in *The Solicitors' Journal and Reporter* not only adumbrates this criticism, but contains the most perceptive critique of Austin to appear in the reviews of the second edition of his book. An explanation of the argument requires at the outset a brief review of Austin's conception of divine law. The primacy that he generally accorded it sharply distinguishes his utilitarianism from that of either Jeremy Bentham or John Stuart Mill.[73] Unlike them, divine law was the stated basis of Austin's ethical philosophy. It is not only a form of law properly so-called, but the ultimate measure or test of positive law and positive morality. The ethical goodness of a legal or moral rule depends upon the degree to which it conforms to the law of God. It is, to this extent, the most basic source of the rules which ought ethically to control human actions. The divine law imposes religious obligations, disobedience to which is sinful. The sanctions for these offences are 'the evils, or pains, which we may suffer here or hereafter, by the immediate appointment of God, and as *consequences* of breaking his commandments'.[74] The liability to such punishment is a motive for obedience which is 'paramount' to all others.[75]

This perspective required Austin to address the crucial question of how to discern the divine will. If His commands were express, the source of His laws would be clear. Austin maintained, though, that many of God's laws are not expressly revealed. This consideration raises the crucial issue of how to identify His tacit commands and the obligations that they impose. Austin provided this answer: 'From the probable effects of our actions on the greatest happiness of all, or from the tendencies of human actions to increase or diminish that aggregate, we may infer the laws which he has given, but has not expressed or revealed.'[76]

The principle of utility thus provides the index to the tacit commands of God, which are numerous. Secular calculations and comparisons of the effects of actions had, to this extent, a very important place in Austin's ethical system. At the same time the stated basis of it was the law of God. This fact raises the important question of the internal consistency of his ethical theories. It is a problem heavily emphasized by the review of his book in the *Solicitors' Journal and Reporter*. The reviewer sharply contrasted Austin's exposition of human laws with his approach to divine laws. The former was described as empirical and factual, while the latter was said to have an unmistakable *a priori* or theoretical character. For example, Austin's explication of the different meanings of the word 'law' was marked by exact observation and accurate language.[77] He discussed in painful detail the external circumstances of laws and their manifestations in our experience. In this way he obtained an empirically based generalization of laws into distinct and identifiable classes. He did not enter the

lofty regions of theory or attempt to establish 'any *a priori* necessary principles'.[78] Indeed, he implied that any such efforts were improper and useless.

Austin's theological utilitarianism left a very different impression upon the reviewer. He claimed that it contained many assumptions of a strictly *a priori* character, assumptions that were 'quite as arbitrary as the much abused moral sense or practical reason'.[79] While Austin couched his interpretation of divine law in matter of fact language, it was filled with purely theoretical assertions. For example, unlike positive laws, there is no empirical test of either the source or the sanction of divine laws. Austin's claim of a divine sanction or threatened evil for violation of God's laws is a matter of faith purely and simply. If divine and positive laws are laws properly so-called, as he insisted, the sanction of the former is certainly very different in kind from the sensible fines, imprisonments, and compulsion of the latter.[80]

The reviewer adduced other examples as well of the allegedly theoretical character of Austin's treatment of divine law. They include his assumptions that the source of it is certain and determinate, that God desires the utility and happiness of mankind, and that our experience of the tendencies of actions is *the* index to *His* commands. The reviewer summarized his critique of Austin in this instructive passage:

> This theory [of divine law], judged by Mr. Austin's principles of adhering strictly to the indications of fact, stands out as mere assumption, and one of the boldest kind. The only matter of fact upon which it rests is that men can test the useful or pernicious tendencies of their actions by experience; and if Mr. Austin had left the principle of utility to stand on its own basis of human experience, he would have been more consistent, perhaps at the risk of being mistaken or opposed by the general sentiments respecting religion. To say that human experience discovers the laws of God is equivalent, in the absence of some *a priori* explanations, to saying that man imposes these laws, and the additional conception of God as a test of the law, is therefore useless.[81]

This passage contains a number of significant insights into Austin's exposition of utilitarianism. To begin with, the internal consistency of his ethical theories is problematic. At least there is a serious question of whether his notion of divine law is reconcilable with his conception of ethics as an empirical science resting upon observation and induction.[82] The reviewer also accurately identified the likely effect of a greater degree of consistency on Austin's part, which was to subject his course to criticism on religious grounds.

The rationale of Austin's 'theological' utilitarianism

This consideration raises the question of why Austin gave such a high priority to the law of God. Did he do so because he actually believed in it, or because it

was useful for his purposes? An accurate answer to the question would require determination of his actual religious beliefs, which are difficult to discover.[83] What is clear is the utility of his conception of divine law for avoiding offence to conventional religious beliefs. There was, after all, substantial religious opposition to the University of London, which had been founded in 1826. The thrust of the criticisms of it was not that it freely admitted persons of 'every religious persuasion',[84] or imposed no religious tests for graduation. Rather, the critics tended to focus on other policies of the university, such as the absence from the curriculum of any instruction in theology. The lack of any requirements or facilities for religious observances was also a subject of frequent criticism.[85]

Whatever the reason, opponents of the university assailed it as 'the Godless institution of Gower Street' and 'the Synagogue of Satan'.[86] The critics included members of the hierarchy of the Church of England such as T.W. Lancaster, Vicar of Banbury and chaplain to the Mayoralty of London. He preached a sermon in 1828 which assailed the University of London and which included an explicit criticism of Austin.[87] The date of the sermon means that he could have been familiar with it, or at least the kind of thinking that it represented. Lancaster began from the premise that religion is essential for morality, social well-being, and political stability. He insisted that the will of God is the ultimate source of ethical, legal, and political obligations. The fear of divine retribution is essential for the efficacy of oaths, truth-telling, the allegiance of subjects, and the restraint of rulers.[88] He was therefore a harsh critic of education independent of religion, his opposition to which strongly conditioned his denunciation of the University of London. Its failure to acknowledge the theological basis of morality was a fatal defect in its curriculum:

> If the *principle of obligation* be a *part* of morality; I do not see how it is possible, on the plan of omitting religion, to teach those principles at all. I have indeed heard of an oriental theory of gravitation, according to which, the earth is supported by an elephant, the elephant by a tortoise, and the tortoise by nothing: and exactly similar to this do I view all systems of ethics, jurisprudence, and international law, which are not grounded upon an explicit acknowledgement of the existence of a God, and of the accountableness of man in a future life.[89]

Lancaster illustrated this criticism by specifically attacking the fifteen page prospectus of Austin's course in jurisprudence. The final paragraph of it consisted of an analysis of the law of nations, which he considered from two perspectives. To the extent that it is adopted by a state and enforced by its tribunals, the law of nations is 'a branch of *Law*, though only of *municipal*

Law'.[90] Austin maintained, however, that 'since Nations are not amenable to a common superior, and therefore are not obnoxious to a *legal* sanction, International Law, apart from such adoption, is not Law but a department of Morals'.[91] He indicated that in his course international law will therefore be treated as a branch of morality. As such, it consists of rules which are either deducible from ethical principles or the practices of civilized communities.[92]

Lancaster strongly objected to this characterization of the law of nations as a branch merely of morality. He claimed that no one had ever thought of it in these terms prior to the founding of the University of London. Such an account of it may therefore 'justify a degree of surprise equal to that which was felt by Moliere's gentleman, when he found that he had been speaking prose all his life'.[93] To argue that the law of nations is not law because nations are not amenable to a common superior is to tear up the foundation of everything hitherto regarded by the world as 'firm and established'.[94] The most authoritative writers on the subject such as Grotius, Pufendorf, and Vattel uniformly speak of the law of nations

> *as law in the proper sense of the word: it is spoken of as a rule dictated by a superior: and the superior is, that holy and awful Being, to whom no reference whatever is made in all the schemes of ethics, jurisprudence, and politics, which the Council of the London University have published . . . If there be a God, and if he be the moral governor of the world,* then it *must* follow, that the moral rule of international intercourse is *a law: that nations are amenable to a common superior; and that they are obnoxious to a legal sanction.*[95]

It is difficult, if not impossible, to know whether Austin was familiar with this sermon. If he had read it, or similar criticisms of the University of London, their impact upon him is conjectural. In particular, it cannot be known whether the theological twist to his utilitarianism was a response to Lancaster. Still, there is no doubt that his conception of divine law was very useful for finessing religiously based criticism of his ethical theories. The stated basis of them was the existence of God and the accountability of man in a future life for violation of His law. As such, they could not be attacked as undermining the religious foundation of law, morality, or the state. Whatever his genuine religious beliefs were, the theological utilitarianism that he espoused in his lectures had this effect. At the same time, his emphasis upon divine law also raises a question about the consistency of his ethical theories. Still, at least one of the reviewers emphasized that Austin's exposition of ethical theories constituted the most original and valuable portion of the *PJD*. The parts of the book that explain how divine laws differ from their human counterparts represent '*the most ingenious and the most successful of the whole* [work]'.[96]

Although this interpretation is not entirely convincing, it is certainly defensible. To say this is not to imply that Austin's ethical theories were completely original, which is not the case. He was subject to the influence not only of Bentham, but the tradition of 'theological utilitarianism' represented by Archdeacon Paley.[97] Nor is it to argue that Austin's legal philosophy was simply a pale imitation of Hobbes's or Bentham's. The argument would be, rather, that the core elements of it discussed in the *PJD* are less original than Austin's ethical theories. Unfortunately, a thorough evaluation of this contention is beyond the limited scope of this study.

III

The reviews of the *PJD* illuminate, thus, Austin's intentions as well as his discussion of utilitarianism. At the same time, their interpretations of the book tend to be quite incomplete. The most important example is the failure of many of the reviews to discuss thoroughly – or at all – basic elements of Austin's legal philosophy. They include his definition of a law, separation of law from morality, and theory of sovereignty. His exposition of these notions takes up, after all, approximately three-quarters of the *PJD*. Moreover, his account of them is essential for achieving the stated purpose of the book.

The single most remarkable feature of the reviews of the *PJD* may then be their authors' perceptions of the book. They vividly illustrate the ancient adage that what one 'sees' depends upon where one 'sits'. The reviewers of the first and second editions of the *PJD* did not 'see' it in exactly the same way, but they tended to 'see' the book very differently from many of Austin's late nineteenth-century critics. The lenses through which the reviewers perceived the *PJD* both distorted and sharpened their vision of it. On the one hand, many of them hardly noticed Austin the Definer of a Law, Separator of Law and Morality, or Theorist of Sovereignty. On the other hand, there *are* other Austins some of whom the reviewers clearly and accurately perceived. If many of them had tunnel vision, their insights into certain parts and aspects of the *PJD* were 'twenty-twenty'. To this extent, their interpretations of it are an essential ingredient of a balanced understanding of the entire book.

Notes

1. John Austin, *PJD* (1954), p. xviii.
2. See the works cited *supra*, p. 11, note 8.
3. I.C. Harris, 'Reviews of *Troubled Lives* and *Thought*', *Cambridge Law Journal*, 48 (1989), p. 340.

4. See John G.W. Sykes, '11. – Jurisprudence: A Review', *LMR*, iv (1875), 491–2; Albert V. Dicey, 'The Study of Jurisprudence', *LMR*, 5 (1880), p. 386; E.C. Clark, *Practical Jurisprudence: A Comment on Austin* (Cambridge: Cambridge University Press, 1883), pp. 4–5; and W. Hastie, *Outlines of the Science of Jurisprudence: An Introduction to the Systematic Study of Law* (Edinburgh: T.&T. Clark, 1887), pp. xiv–xv.
5. For reviews of the first edition, see *The Legal Observer*, 3(1832), pp. 416–18, and 4 (1832), pp. 36–9; J.S. Mill 'Austin's Lectures on Jurisprudence', in *Essays*, pp. 51–60; *The Jurist*, 3 (1832), pp. 105–22; *LM*, 7 (1832), pp. 298–313; *The Times*, 9 August, 1832; *WR*, 18 (1833), pp. 237–49; *The Political Examiner*, 5 August, 1832; 'A Note on Austin's "Province of Jurisprudence Determined"', *The Adventurer or London University Magazine*, 2 (1833), pp. 137–43; and *WR* (October, 1833), pp. 329–33. For reviews of the second edition of the *PJD*, see *LOQR*, 110 (1861), pp. 60, 72–3; [James Fitzjames Stephen], *ER*, 114 (1861), pp. 233–49; *SJR*, 5 (1861), pp. 458–60; *LMR*, 11 (1861), pp. 204–205, 234–47; *The Athenaeum*, 4 May, 1861, pp. 592–3; *The Law Times* (1861), pp. 306, 452; *The Saturday Review*, 20 April, 1861, pp. 397–9; and *The Crayon*. There may be other reviews of the first and second editions of the *PJD*. The available indices are quite incomplete. See Leonard Augustus Jones *et al.*, *An Index to Legal Periodical Literature (1886–1937)*, 6 vols (Boston, Massachusetts: Boston Book Co., 1888–1924) and William Frederick Poole, *Poole's Index to Periodical Literature, 1802–1906* (New York: P. Smith, 1938).
6. *LJ*, p. 10. For reviews of this work, see *North American Review* 100 (January, 1865), pp. 246–53; *SJR*, 7 (1863), pp. 864–5, 877–8; *The Law Times* 39 (December, 1863), pp. 92–3; *WR* 82 (October, 1864), pp. 125–32; *JJ*, 7 (October, 1863), pp. 514–28; *LMR*, 17 (1864), pp. 115–37; and [John Stuart Mill], *ER*, 118 (October, 1863), pp. 222–44, reprinted as 'Austin on Jurisprudence', in *Essays*, pp. 165–205.
7. Letter to Susan Reeve, 12 April, 1831, in Ross, *Three Generations*, p. 83.
8. *LM*, 8 (1832), pp. 534–5.
9. *WR*, 18 (1833), p. 249.
10. *The Times* (1832).
11. *LM*, 7 (1832), p. 313.
12. *Legal Observer*, iii (1832), p. 416.
13. As quoted by Charles C.F. Greville, *The Greville Memoirs: A Journal of the Reigns of King George IV. and King William IV.*, vol. 3, 2nd edn, ed. Henry Reeve (London: Longmans, Green, 1874), p. 138.
14. *LJ*, p. 10.
15. For some examples, see Sir Henry Sumner Maine, *LEHI*, p. 368; James Bryce, *SHJ*, p. 613; W. Jethro Brown, *The Austinian Theory of Law* (London: John Murray, 1906); R.A. Eastwood and G.W. Keeton, *The Austinian Theories of Law and Sovereignty* (London: Methuen & Co., 1929); H.L.A. Hart, *Concept*; Julius Stone, *Legal System and Lawyers' Reasonings* (Stanford: Stanford University Press, 1964), p. 86; and W. Friedmann, *Legal Theory*, 5th edn (New York: Columbia University Press, 1967), p. 258. For an interpretation of Austin which strongly emphasizes the links between his utilitarianism and his legal philosophy, see

Rumble, *Thought*, 60–108. I was not aware when I wrote this book, however, of the very great stress of the reviews of the *PJD* (1832) on Austin's utilitarianism.

16. Sir Henry Sumner Maine, *LEHI*, pp. 369–70.
17. See H.L.A. Hart, *Concept*.
18. *North American Review*, 100 (January, 1865), p. 251. Another reviewer also pointed out that Austin's 'discussion of the theory of utility ... fills too large a space for the symmetry and compactness of the book', *LOQR*, 110 (1861), p. 72.
19. Raymond Cocks, *Foundations of the Modern Bar* (London: Sweet & Maxwell, 1983), p. 49.
20. *LM*, 7 (1832), pp. 301–302.
21. *The Jurist*, 3 (1832), p. 114.
22. *The Times*, 9 August, 1832.
23. Mill, 'Austin's Lectures on Jurisprudence', p. 57.
24. See 'A Note on Austin's "Province of Jurisprudence Determined" ', *The Adventurer or London University Magazine*, 2 (1833), p. 137.
25. *LM*, 7 (1832), pp. 302–12.
26. *The Jurist*, 3 (1832), pp. 112–18.
27. *The Legal Observer*, 3 (1832), pp. 416–418.
28. See Sir Henry Sumner Maine, *LEHI*; Frederic Harrison, 'The English School of Jurisprudence. Part I. – Austin and Maine on Sovereignty', *The Fortnightly Review*, p. 24 (1878), p. 479; and James Bryce, *SJR*, pp. 613–14. Even Sir William Markby, who was very sympathetic to many of Austin's ideas, criticized his discussion of the principle of utility. See Markby, 'Analytical Jurisprudence', *LMR*, 1 (August, 1876), p. 624.
29. *LM*, 7 (1832), p. 300.
30. *PJD* (1832), p. xx.
31. Ibid., xix–xx.
32. See Hart, *PJD* (1954).
33. For examples, see Frederic Harrison, 'The English School of Jurisprudence. Part I. – Austin and Maine on Sovereignty', pp. 482–3; A.V. Dicey, 'The Study of Jurisprudence', *LMR*, 5 (1880), pp. 388–9; and Sir Frederick Pollock, *Essays in Jurisprudence and Ethics* (London: Macmillan, 1882), p. 2.
34. *PJD* (1832), p. xx.
35. Ibid., pp. 8–9.
36. Ibid., p. xi.
37. Ibid., p. xi.
38. Ibid., p. xiv.
39. Ibid.
40. Ibid.
41. Ibid., p. xiv.
42. *LJ* (1885), p. 16.
43. Ibid.
44. J.B. Schneewind, *Sidgwick's Ethics and Victorian Moral Philosophy* (Oxford: Clarendon Press, 1977), p. 153. My exposition of Austin's rule utilitarianism draws upon my previous discussion of it in *Thought*, pp. 67–9.

45. Gerald J. Postema, *Bentham and the Common Law Tradition* (Oxford: Clarendon Press, 1986), p. 158.
46. Ibid., p. 159.
47. *LJ* (1885), p. 113.
48. Ibid., p. 115.
49. Ibid., p. 107.
50. Ibid., pp. 113–14.
51. See ibid., pp. 109, 114, 116, 118.
52. J.J.C. Smart, 'Extreme and Restricted Utilitarianism', in *Contemporary Utilitarianism*, ed. Michael D. Bayles (Garden City, New York: Anchor Books, 1968), p. 107.
53. *LJ* (1885), p. 118.
54. See 'A Note on Austin's "Province of Jurisprudence Determined"', *The Adventurer or London University Magazine*, 2 (1833), p. 137.
55. *LJ* (1885), p. 118.
56. Ibid.
57. Ibid., p. 280 note.
58. Ibid. It is problematic whether Hobbes actually held the views that Austin attributed to him. See Thomas Hobbes, *Leviathan: Or the Matter, Forme and Power of a Commonwealth Ecclesiastical and Civil*, ed. Michael Oakeshott, Intro. Richard S. Peters (New York: Collier Books, 1962), pp. 110, 163–5.
59. *LJ* (1885), p. 280 note.
60. See Jeremy Bentham, *A Fragment on Government*, eds J.H. Burns and H.L.A. Hart, Introduction by Ross Harrison (Cambridge: Cambridge University Press, 1988), pp. 93, 96, 104–105.
61. *LJ* (1885), p. 119. Austin did unequivocally reject the doctrine of tyrannicide as 'highly pernicious'. Ibid., p. 161.
62. Ibid., p. 122.
63. 'A Note on Austin's "Province of Jurisprudence Determined"', *The Adventurer or London University Magazine*, 2 (1833), pp. 137–43.
64. Ibid., p. 139.
65. *LJ* (1885), p. 107.
66. 'A Note', p. 139.
67. Ibid., p. 140.
68. Ibid.
69. Ibid., p. 142.
70. For an interesting brief criticism of the theories of resistance expressed by both Austin and the Note in *The Adventurer*, see the *WR*, 18 (October, 1833), pp. 329–32. According to Colonel Thomas Perronet Thompson, 'resistance to bad government is the moral duty, whenever the probable advantages of success are greater than the probable suffering from opposition. It is in fact the case of resistance to any kind of robbery and mischief'. Ibid., p. 332.
71. See, for example, *LMR*, 11 (1861), pp. 241–2, and *The Athenaeum*, 4 May, 1861, p. 593.
72. See Chapter 8.

73. See Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, eds J.H. Burns and H.L.A. Hart (1970), pp. 31–2, and John Stuart Mill, *Utilitarianism with Critical Essays*, ed. Samuel Gorovitz (Indianapolis, Indiana: Bobbs-Merril Co., 1971), pp. 27–8. It was the opinion of John Stuart Mill that the principle of utility was, for Austin, the ultimate ethical measure or test. The impression to the contrary was a 'mere appearance'. Mill, 'Austin on Jurisprudence', p. 177. Mill was able to cite one passage from Austin's book in support of this interpretation. See *PJD* (1954), p. 129. Still, Austin tended to characterize utility as an index to the divine will, which is the ultimate standard.
74. *PJD*, p. 38.
75. Ibid., p. 158.
76. Ibid., p. 41.
77. *SJR*, 5 (April, 1861), p. 459.
78. Ibid.
79. Ibid.
80. Ibid., pp. 59–60.
81. Ibid.
82. *LJ* (1885), p. 124.
83. For discussion of Austin's religious views, see Lotte and Joseph Hamburger, *Troubled Lives*, pp. 41–2, 170–71, and Rumble, *Thought*, p. 234, note 26.
84. Statement by the Council of the University of London (1827), p. 8.
85. For justification of these policies, see ibid., pp. 12–13. For criticisms of them, see, *inter alia*, *Quarterly Review*, 33 (1825–26), pp. 257–75; *Quarterly Review*, 39 (1829), pp. 126–35; Christianus, A Letter to the Rt. Hon. Robert Peel, on the Subject of London University (London: 1828); Rev. Henry Newland, *Thoughts on the London University* (Dublin: Richard Milliken and Son, 1828); and 'Modern Systems of Instruction', *British Critic*, 1 (1827), pp. 190–211. For discussion of both the policies of the University and the criticisms of them, see H. Hale Bellot, *University College London: 1826–1926* (London: University of London Press, 1929).
86. As quoted by Negley Harte, *The University of London: 1836–1986: An Illustrated History* (London: Athlone Press, 1986), p. 64.
87. T.W. Lancaster, *The Alliance of Education and Civil Government: with Strictures on the University of London* (London: Rivington, 1828), p. 75.
88. Ibid., pp. 10, 12.
89. Ibid., 80.
90. 'Jurisprudence', in Second Statement by the Council of the University of London Explanatory of the Plan of Instruction (London: 1828), p. 93.
91. Ibid.
92. Ibid.
93. Lancaster, *The Alliance*, p. 74.
94. Ibid., p. 75.
95. Ibid.
96. *The Times*, 9 August, 1832 (emphasis added).
97. For discussion of Paley's ideas and their relationship to Austin's ethics, see Rumble, *Thought*, pp. 63–4.

5

John Stuart Mill on Austin

John Stuart Mill's lengthy review of Austin's *LJ* – the authoritative modern edition takes up 38 pages[1] – has long been held in high regard. The essay was published in the *Edinburgh Review* in 1863 – two years after the same journal had reviewed the *PJD* – and 'attracted the attention of serious readers'.[2] Some of them had probably never heard of Austin, who was not widely known during his lifetime. Mill's review not only helped to publicize Austin's work, but became 'required reading' for 'several generations of [nineteenth-century] jurisprudence students'.[3] The reasons for this development are no doubt varied, but the review was an unusually thorough exposition of Austin's lectures. As such, it was highly useful for students who did not want to read all of his *LJ*. If William Markby is correct, the review was also very valuable as an appraisal of Austin's contributions. At least Markby implied in 1876 that Mill's essay and Maine's *Lectures on the Early History of Institutions* constituted the most significant attempts yet made to judge the value of Austin's work.[4] Seventy-eight years later H.L.A. Hart noted that Mill's review was one of the two 'best comprehensive accounts' of Austin's ideas.[5] More recently Stefan Collini has argued that Mill's essay was 'most remarkable' and indicates that his 'early immersion in the law was not, after all, without its effect'.[6]

Despite the widespread praise of Mill's review, it has seldom been the subject of detailed analysis. The purpose of this chapter is to fill part of this gap by discussing Mill's interpretation of Austin's conception of general jurisprudence. A close study of this limited portion of the review is desirable for a number of reasons, one of which is the great value of much of what Mill says. To say this is not to imply that his analysis is entirely original, which it is not. In some respects it reflects views of Austin widely shared in the nineteenth century. Nor is the argument that Mill satisfactorily resolves all the questions that he does discuss, or even raises all of the questions that need to be addressed. In fact, his interpretation of Austin has a number of significant limitations. Moreover, some of his opinions raise difficulties of which Mill seemed quite unaware. Nevertheless, he understood certain very important dimensions of Austin's conception of general jurisprudence better than any other nineteenth-century commentator.

There is also a second reason for the importance of a close study of Mill's review, or the portion of it discussed here. It is the pivotal significance of general jurisprudence for understanding Austin's legal philosophy. For example,

it strongly conditioned the lectures that he delivered at the University of London from 1829 to 1833. These lectures are quite literally the primary source of his legal philosophy despite Austin's acknowledgement of their incompleteness and 'great defects', especially of method and style.[7] Indeed, he once expressed the hope to 'be able to produce something more worth hearing'.[8] The hope was never realized. At any rate, his conception of general jurisprudence heavily influenced the orientation, subject-matter, and scope of his lectures. In short, it explains *how* he did jurisprudence, or *why* he asked certain questions rather than others.

Yet, Austin wrote relatively little about general jurisprudence itself, despite its importance for understanding his work. His treatment of it in this respect contrasts sharply with other fundamentals of his legal philosophy, such as his definition of a law, conception of sovereignty, and distinction between the law as it is and the law as it ought to be. Each of these dimensions of his philosophy of law is the subject of separate lectures in the *PJD*. In contrast, he does not explain in any detail his notion of general jurisprudence, which must be reconstructed from two sources. One is bits and pieces of his lectures, while the other is a posthumously published essay discussed below.

Moreover, Austin's conception of general jurisprudence has received much less scholarly attention than his conceptions of, say, sovereignty or law. For every ten or twenty pages in the literature devoted to them, there is one or two about general jurisprudence. Hart's *The Concept of Law* is a good example. Three of the first four chapters of his book are, he says, an exposition and critique of 'a position which is, in substance, the same as Austin's'.[9] Yet, neither in these, nor subsequent, chapters of the first edition of the text of the book is there any discussion of Austin's conception of general jurisprudence. What little discussion there is occurs in an endnote.[10] Only in the posthumously published postscript to the second edition of his book does Hart discuss general jurisprudence, and then quite briefly.[11]

There is in addition a final reason for the importance of closely analysing Mill's discussion of Austin's general jurisprudence. Notwithstanding its substantial value, Mill's analysis indicates the limitations of interpreting Austin as an empiricist. W.L. Morison is the foremost recent proponent of this interpretation,[12] but Mill set forth the essentials of it over a century ago. Although there is a significant amount of evidence for this way of looking at Austin, it cannot account for the most distinctive features of general jurisprudence. Such is the case, at least, if the arguments to be adduced are cogent.

I

Mill's review may be divided into three parts, only the first of which is the focus of this chapter. This section consists largely of an analysis of Austin's

conception of jurisprudence as well as his intentions, achievements, and relationship to Bentham and Maine.[13] The second, and by far the longest, part of the review is a précis of the contents of the *LJ* interspersed with a very occasional criticism.[14] The final two or three pages express Mill's opinion of Austin's style and language.[15]

Mill's relationship to Austin

In his *Autobiography* Mill characterized his review in very modest terms. He described it as giving him an opportunity 'of paying a deserved tribute to his [Austin's] memory, and at the same time expressing some thoughts on a subject on which, in my old days of Benthamism, I had bestowed much study'.[16] The review does much more, however, than pay tribute to Austin, though it does indeed do that. He was said to have had a 'most remarkable mind' and to belong in 'the highest rank' of the science of jurisprudence.[17] In addition, Mill argued that Austin's contributions transcended the law. In particular, he had a virtually unique capacity for 'initiating and disciplining other minds in the difficult art of precise thought'. Consequently, his *LJ* are not only required reading for students of jurisprudence, but 'have a claim to a place in the education of statesmen, publicists, and students of the human mind'.[18] It is therefore not surprising that Mill stressed the value of Austin for his own intellectual development. According to Mill, he was 'one of the men whom I most valued, and to whom I have been morally and intellectually most indebted'.[19]

Mill's ability to illuminate Austin's jurisprudence was not fortuitous. Mill was, in many respects, the best situated of all nineteenth-century commentators to understand Austin, to whom he was quite close at a formative period of his life. Mill was tutored by Austin and read Roman law, Blackstone, and Bentham under him in 1821 and 1822. In 1822 Mill began to discuss general subjects with a number of persons, including John Austin. Mill subsequently wrote that his early friendship with Austin was 'one of the fortunate circumstances of my life'.[20] Moreover, Mill attended more than one offering of Austin's course at the University of London. It is difficult to imagine a more conscientious student, or at least note-taker. Mill understated the matter when he wrote to Henry Reeve that he 'made and wrote rather full notes of the whole course'.[21] His notes were indeed so good that Robert Campbell relied heavily upon them in his editions of the *LJ* (the third, fourth, and fifth).[22]

Mill and 'On the Uses of the Study of Jurisprudence'

Mill also bears some of the responsibility for the very existence of the major source for understanding Austin's conception of general jurisprudence. It is

his posthumously published essay entitled 'On the Uses of the Study of Jurisprudence' [hereinafter cited as 'USJ'].[23] Sarah Austin edited the essay, which she based upon the introductory lectures that Austin delivered at the University of London and the Inner Temple. She initially published the piece as a pamphlet in 1863 and subsequently included it in her edition of Austin's *LJ*.[24] The importance of the essay stems from the fact that it is his only systematic explanation of his notion of general jurisprudence. As Mill accurately pointed out, in one of his few if indirect criticisms of Austin, the lack of such an account in the *PJD* 'was a real defect in the ... volume considered as a separate work'.[25] To be sure, this judgement is subject to a minor caveat. Austin's distinction between the sciences of jurisprudence and legislation does say *something* about the nature of the study of the former.[26] Nevertheless, it does not say very much. The gap was not filled until the posthumous publication of 'USJ'.

Mill's appreciation of the need for, and significance of, this essay was a product of his experience as a member of Austin's class at the University of London. In that capacity he became convinced of the substantial limitations of Austin's introductory lecture. Mill had evidently discussed it with Sarah Austin and on 7 August, 1830, wrote her a long letter stressing the need to improve the lecture.[27] He also suggested in very concrete terms how this could be done. Austin

> might explain, what is meant by general jurisprudence: in what respect a course of jurisprudence differs from a course of lectures on the law of any particular country, & also from lectures on the science or art of legislation: the grounds of the opinion, that there really is a science of general jurisprudence, & that it is worth studying: proof of the perverting & confusing effect of the study of law as it is commonly pursued, without being accompanied by the study of jurisprudence: examples of the erroneous notions usually formed as to what jurisprudence is, & the silly talk of Blackstone, & others of our lawyers, when they erect the technical maxims of their own law into principles of jurisprudence.[28]

The essay as finally published incorporates much, if not all, of this advice. Unfortunately, it is impossible to know whether John or Sarah Austin was actually responsible for the changes. The manuscript of the essay is not extant. Moreover, what was actually published reflects a large and unusual amount of editorial discretion on the part of Sarah Austin. She virtually acknowledged as much in her introductory comments on the essay. In the first place, she consolidated whatever she regarded as of 'permanent value' in Austin's introductory lectures at the University of London and the Inner Temple. In the second

place, she incorporated into the essay certain 'fragments' that Austin had written on the subject. In the third place, she omitted from the piece a number of 'inevitable repetitions'.[29]

The extent of the discretion that Sarah Austin exercised in editing the essay was thus large. If she 'chiefly' took its 'matter' from her husband's introductory lectures, she does not explain the sources of the other links. She stated in the introduction to her edition of the essay as a pamphlet that she was able to unite the two lectures 'with the greater confidence, as the matter is not of a technical or scientific kind'.[30] This opinion is questionable, but she wrote to Lord Brougham that she based the essay upon several fragments.[31] She also indicated, in a very revealing remark to her publisher John Murray, that she was 'concocting' it from material of her husband's on jurisprudence and codification.[32] Her use of the word 'concocting' is bound to give pause to any student of texts. The same is true of her comment that she preserved and consolidated what was of 'permanent value' in the two lectures.[33] This admission implies that she deleted what was, in her judgement, of less than permanent value. Whether her opinion coincides with John Austin's is impossible to know. Questions about the reliability of her edition of the essay are increased by her comment that she would 'spare no pains to *put it into a form* worthy of the substance'[34] [emphasis added]. Finally, she failed to explain *what* she had deleted from, or added to, the introductory lectures, and *where* she had removed or incorporated it.

There is thus a question about the reliability of the 'USJ'. Concern on this score is accentuated by the fact that Sarah Austin appears to have either disregarded or misunderstood the importance of the essay for understanding her husband's legal philosophy. Rather, she emphasized its value for prospective leaders of government, whom she regarded as its primary audience.[35] This emphasis may explain the title that she gave the essay, which highlights the 'uses' of jurisprudence. A more accurate title can be inferred from Mill's description of the 'real defect' in the *PJD* – the absence of an explanation of not merely the *uses* of the study of jurisprudence, but its *nature* as well.[36] After all, the focus of the first half of the essay is the *nature* of jurisprudence rather than its *uses*.

Still, the student of Austin's legal philosophy has very little choice about whether to use the essay in interpreting his ideas. The other sources of his conception of general jurisprudence are meagre at best. Moreover, there is only one substantial contradiction, or at least difference, between what he says in this essay and elsewhere.[37] Finally, Mill did not question the reliability of the essay, which he might well have done if it were significantly inaccurate. Instead, he welcomed its inclusion in Sarah Austin's 1863 edition of her husband's *LJ* and characterized it as 'instructive'.[38]

II

The single most arresting feature of Mill's interpretation of Austin's jurisprudence is an emphasis upon the necessity and universality of its core ideas. At least this is how Mill's review appears to a reader, or this reader, at the outset of the twenty-first century. To say this is not to criticize his interpretation, which in general accurately reflects Austin's position. Still, the extent to which Mill stressed the necessity and universality of the most basic principles, notions, and distinctions of general jurisprudence is striking. Moreover, in this respect he was not only interpreting Austin's views, but expressing his agreement with them. It is for this very reason that Mill's review illuminates his own ideas as well as Austin's.

This emphasis pervades the first few pages of the review. To begin with, Mill argued that the focus of Austin's distinctive efforts was the logic of law as differentiated from its morality or expediency: 'Its purpose was that of clearing up and defining the notions which the human mind is *compelled* to form, and the distinctions which it is *necessitated* to make, by the mere existence of a body of law of any kind, or of a body of law taking cognisance of the concerns of a civilized and complicated state of society' [emphasis added].[39] Mill sharply distinguished these notions and distinctions from those that have developed historically by 'mere aggregation'.[40] The latter lack any authoritative arrangement except the chronological and have no uniform terminology or concepts.[41] To the extent that any actual legal system has attained definiteness, order, or consistency, it is almost always due to the treatises of private writers, whose ideas have been adopted by legislators. According to Mill, the only remedy for this evil is to clarify 'those necessary resemblances and differences, which, if not brought into distinct apprehension by all systems of law, are latent in all, and do not depend on the accidental history of any'.[42] He argued that *these* resemblances and differences are the key to all others and the only ones that, from a scientific point of view, are important to understand in themselves.

Mill also maintained that only the necessary notions and distinctions provide the basis for a scientific arrangement of the law. As he put it, the fact that these resemblances and differences 'exist in all legal systems, proves that they go deeper down into the roots of law than any of those which are peculiar to one system'.[43] He sharply contrasted these necessary notions and distinctions with those that are purely historical and peculiar to one legal system. His contrast of them implies the ancient distinction between the essential, or necessary, and the 'accidental', properties of a thing. Mill not only quite accurately attributed this distinction to Austin, but appears to have embraced it himself. For example, he highly praised Austin's 'disentangling of the classifications and distinctions grounded on differences in things themselves, from

those arising out of the mere accidents of their history'.[44] A similar attitude is detectable in his endorsement of Austin's heavy reliance upon Roman law as a source of many of his basic notions and distinctions. Mill's argument was that since they belong to law in general, they 'must' exist in any legal system, and could be abstracted from any. The way to abstract them, he suggested, is by 'stripping off what belongs to the accidental or historical peculiarities of the given system'.[45] Mill added that the legal system that has been formed by the largest number of precise and logical thinkers will be the most useful one for this purpose. The universal elements are more likely to be express than latent in such a legal system. Mill claimed that the Roman law was unquestionably superior to any other body of law in this respect.[46]

Mill's defence of this claim expresses a most important implication, or corollary, of the argument that the basic notions and distinctions of jurisprudence are necessary. The heart of it is the idea that they are also universal. After all, to say without qualification that a notion or distinction is necessary *means* that it is indispensable, essential, or inevitable.[47] The statement that food is necessary for human life is an example. If the statement is true, then food must be required for any human life anywhere. Otherwise, it could not truly be said to be indispensable, or essential, or unavoidable. In any case, this is how Mill, following in Austin's footsteps, appears to have interpreted the *necessary* notions or distinctions of jurisprudence. This is evident from, among other things, his contention that Austin was primarily concerned with the 'organic structure' of legal systems, as opposed to their origin, or the psychological reasons for their existence.[48] This interpretation assumes that legal systems have a common structure, like the human body, Mill's belief in which is beyond question. He made little attempt to conceal his opinion that *every* legal order agrees with every other with regard to certain points. Although the systems of 'cultivated' and 'civilized' societies have more in common than those of less developed nations, all legal systems have something in common. It is also clear that Mill regarded these similarities as both substantive and conceptual.[49]

It is precisely for this reason that Mill could argue that a universally applicable terminology, nomenclature, and principle of arrangement is possible for legal systems. Indeed, he seems to have regarded the fulfilment of this possibility as the greatest practical benefit of jurisprudence. If the science were perfected, it would provide a legal terminology on the basis of which 'any' system could be expressed, distributed, and arranged. Every part of such an arrangement would be clearly intelligible, and an understanding of each would facilitate a grasp of the rest.[50] According to Mill, jurisprudence in this sense has tremendous value. Above all else it would give the student either of legal philosophy or a particular system of law 'a command over the subject such as no other course of study would have made attainable'.[51]

Although these various facets of Mill's interpretation of Austin's jurisprudence would seem to imply that it was based upon *a priori* rather than empirical reasoning, Mill interpreted it as just the opposite. This is evident, to begin with, from his argument that the principles of general jurisprudence are not pre-existent, but a result of abstraction.[52] As such, they emerge 'as soon as the attempt is made to look at any body of laws as a whole, or to compare one part of it with another, or to regard persons, and the facts of life, from a legal point of view'.[53] Moreover, Mill's comparison of Austin with Henry Maine also emphasizes their shared empiricism. According to Mill, both jurists take as their subject-matter positive law, or 'the legal institutions which exist, or have existed, among mankind, considered as actual facts'.[54] Finally, Mill was critical of an *a priori* approach as a means to discover the universal elements of a legal system.[55]

In any case, Mill claimed that the major problem of the science of jurisprudence is to clarify, make more precise, and render more consistent the 'juristical conceptions themselves'. He left no doubt of his tremendous admiration for Austin's accomplishments in this regard:

> What Mr. Austin has done towards this object, constitutes the great permanent worth of his speculations, considered as substantive results of thought. No one thoroughly versed in these volumes need ever again miss his way amidst the obscurity and confusion of legal language. *He will not only have been made sensible of the absence of meaning in many of the phrases and dogmas of writers on law, but will have been put in the way to detect the true meaning*, for which those phrases are the empty *substitute*. He will have seen this done for him in the *Lectures*, with rare completeness, in regard to a great number of the leading ideas of jurisprudence; and will have served an apprenticeship, enabling him with comparative ease to practise the same operation upon the remainder [emphasis added].[56]

This passage is not only important because it explains the principal reason for Mill's high praise of Austin's accomplishments as a jurist. In addition, Mill's reasoning reflects a crucial assumption of Austin's meticulous attempt to define terms, an attempt that is such a conspicuous feature of his lectures. The nub of it is the conviction, shared by Mill, that legal phrases and dogmas have a 'true meaning', which is to be detected rather than stipulated. It is precisely for this reason that he could argue that Austin's discussion of the meaning of the word 'law' in the *PJD*, like Plato's discussion of 'justice' in *The Republic*, was not purely semantic. No doubt, Austin's book is from start to finish the elucidation of a term – 'a law', in the political or juristic sense. Still, it was definitely not just a 'merely verbal discussion . . . . For the meaning of a name must always be sought in the distinctive qualities of the thing

named; and these are only to be detected by an accurate study of the thing itself, and of every other thing from which it requires to be distinguished.'[57]

III

Mill's interpretation of Austin's conception of general jurisprudence is of great value. In particular, it illuminates three key facets of this crucial element of Austin's legal philosophy. One is his conception of its purpose. The second is his emphasis upon the necessity and universality of certain basic legal principles, notions, and distinctions. The third is his assumption that legal terms and phrases have a 'true meaning'. To say that Mill's interpretation illuminates these notions is not of course to imply that they are well- (or ill-) founded, which is an entirely different matter. Nor is it to suggest that Mill's interpretation is entirely satisfactory, which is not the case. Nevertheless, he illuminated facets of general jurisprudence that are crucial for understanding it.

The strengths of Mill's interpretation

At the outset it must be admitted that Austin never explicitly stated that the purpose of general jurisprudence was to clarify, to make more precise, and to render more consistent, 'the juristical conceptions themselves'. Even so, what an author intends may be inferred not only from what he or she *says*, but actually *does*. What Austin primarily did was to attempt to clarify, make more precise, and render more consistent, legal concepts. Indeed, the attempt to elucidate, explain, and refine them pervades his 57 lectures. If this effort is not *the* thread that ties them together, it is certainly a most conspicuous one.

Austin also regarded certain fundamental legal principles, notions, and distinctions as necessary (as well as inevitable and essential). The most convincing evidence of this may be his various characterizations of general jurisprudence. To begin with, he excluded historical inquiries on the ground that they are contingent or 'accidental' rather than necessary. One example that he adduced is the distinction between law and equity, discussed in an earlier chapter.[58] A second example is feudalism, which he regarded as similar to a thousand of other allegedly universal or essential notions.[59] In reality, it is 'an exceedingly specific and purely historical notion, not to be got at by scientific speculation, but by diligent reading of the history of the middle ages'.[60] Principles, notions, and distinctions rooted in feudal systems are not therefore universal or necessary. Austin cited as an example the distinction, *as drawn by English lawyers*, between real and personal rights. He argued that this distinction, no hint of which he found in Roman law, was primarily derived from

feudal institutions.[61] The distinction is therefore 'purely accidental' and beyond the scope of general jurisprudence.

Austin's faith in the existence of necessary principles and distinctions is apparent, too, from his basic distinction between 'general', and 'particular', jurisprudence, or the 'science of particular law'.[62] He described the latter as the science of a specific system of positive law that actually exists, or existed, in a particular nation, or nations.[63] General jurisprudence, or the philosophy of positive law, a term that Austin also employs,[64] differs from this in two major respects. In the first place, it focuses upon fundamental principles and distinctions rather than particular rules of positive law. In the second place, these principles and distinctions are inevitable, 'essential or necessary'.[65] General jurisprudence is concerned with 'law as it necessarily *is*, rather than with law as it *ought* to be; with law as it must be, *be it good or bad*, rather than with law as it must be, *if it be good*'.[66] To be sure, in 'USJ' Austin somewhat broadened this conception of its focus. Here he distinguished between two kinds of propositions that general jurisprudence would discuss. Some are necessary in the sense that 'we cannot imagine coherently a system of law (or a system of law in a refined community) without considering them as constituent parts of it'.[67] Other propositions are not necessary in this respect, but are widespread in advanced legal systems.[68] As such, they merit a place in the science of general jurisprudence.

This conception of the focus of general jurisprudence implies that some of its principles and distinctions are also universal.[69] In Austin's words, many of them are 'common to all systems – to the scanty and crude systems of rude societies, and the ampler and maturer systems of refined communities'.[70] No doubt, he contended that general jurisprudence would focus upon the more developed systems. He justified this emphasis on the ground that such systems, 'by reason of their amplitude and maturity, are pre-eminently pregnant with instruction'.[71] He also fully acknowledged that the necessary and universal principles and distinctions may well be *expressed* differently in different systems. Nonetheless, he insisted that, 'in *all* [emphasis added], they are to be found more or less nearly conceived; from the rude conceptions of barbarians, to the exact conceptions of the Roman lawyers or of enlightened modern jurists'.[72] In fact, Austin appeared to believe that the very possibility of a science of law depended upon the existence of some universal notions. At least he wrote in 1844 to his friend Sir William Erle that he intended to demonstrate in his never written *magnum opus* that 'there are principles and distinctions common to all systems of law (or that law is the subject of an abstract science)'.[73]

Austin adduced six examples – he implied that there were many others – of necessary and universal principles, notions, and distinctions. However, five of the six were distinctions rather than principles or notions. The distinctions were between (1) written and unwritten law; (2) rights against the world at

large and rights against specifically determined persons; (3) subsets of rights against the world at large such as rights of property or dominion and the rights developed out of them; (4) obligations or duties arising from contracts, injuries, and occurrences that are neither the one nor the other; and (5) the classification of injuries or delicts into civil and criminal and the subdivision of the former into torts and breaches of contract.[74]

Austin adduced no examples of necessary *principles*, the absence of which is conspicuous and unexplained. Moreover, only the first of the six examples that he enumerated refers to notions, though they cover a wide range. The specific concepts mentioned are duty, right, liberty, injury, punishment, redress, law, sovereignty, and independent political society. The student of general jurisprudence would attempt to explain not only these ideas, but their relationship to each other.[75] Of course, it is problematic whether these notions, or the distinctions that Austin cited, are actually necessary, essential, inevitable, and universal. Still, the assumption that they are pervades his lectures. Correspondingly, he argued that the object of his lectures was 'to evolve and expound' the principles and distinctions involved in 'the idea of law',[76] the 'mere being' of which presupposes them.[77] He confidently maintained that only a 'little' examination and reflection will establish that 'every' legal system, or every one in a 'refined community', implies certain fundamental notions and distinctions. He claimed, too, that they imply in turn a 'multitude of conclusions' that are 'nearly inevitable'.[78]

Austin did not justify or explain at any length the foundations of his belief in necessary, universal, essential, and inevitable principles, notions, and distinctions. It appears, though, that three factors conditioned his faith in their existence. There was, to begin with, his opinion that it was impossible to imagine coherently a legal system without thinking of certain principles and distinctions as constituent elements of it.[79] A second factor was his acceptance of a certain conception of human nature. Although he never described it in any detail, he did claim that certain resemblances between legal systems are 'bottomed in the common nature of man'.[80] Or, as he put it elsewhere, all legal systems have 'a common foundation in the common nature of mankind'.[81] A final ground of his belief in universal and necessary principles was more comparative than philosophical. The long and short of it was his opinion of the resemblances between English and Roman law. Although both systems are indigenous, he argued that they have much in common. He confidently asserted that these coincidences demonstrate the numerous principles and distinctions that all legal systems share.[82]

Austin's faith in the existence of necessary and universal legal principles, notions, and distinctions was not only of theoretical significance. In addition, it strongly conditioned the tremendous educational value that he attached to general jurisprudence. While the advantages that he ascribed to the science

are varied, the single most fundamental one may be its utility for understanding a legal system. For example, he once wrote that while the principles of general jurisprudence will not coincide with those of any actual system, they 'are intended to facilitate the acquisition of any, and to show their defects'.[83] Mastery of general jurisprudence would enable a student to understand the law of any nation 'with comparative ease and rapidity'.[84] Such is the case because the student would appreciate that a legal system is an 'organic whole'.[85] Consequently, a student of, say, English law would be able to 'perceive the various relations of its various parts; the dependence of its minuter rules on its general principles; and the subordination of such of these principles as are less general or extensive, to such of them as are more general, and run through the whole of its structure'.[86] In short, the study of general jurisprudence would immensely facilitate the acquisition of knowledge of particular legal systems.[87]

Austin maintained that this specific advantage of general jurisprudence is not limited to English law. Rather, it also holds for the study of the law of virtually any nation. His view was that 'a lawyer who has mastered the law which obtains in his own country, has mastered implicitly most of the substance of the law which obtains in any other community'.[88] To the extent that there are difficulties in grasping the law of foreign communities, they are more terminological than substantive.[89]

Mill's illumination of Austin's approach to definitions

The third great value of Mill's interpretation of general jurisprudence is his explanation of Austin's approach to definitions. Of course, almost anyone who reads Austin's work is bound to notice the tremendous importance that he attached to them. It is not only evident from virtually every page of his lectures, but from his argument that the exposition of basic legal principles, notions, and distinctions will be useless or impossible 'until by careful analysis, we have accurately determined the meaning of certain leading terms which we must necessarily employ; terms which recur incessantly in every department of the science: which, whithersoever we turn ourselves, we are sure to encounter'.[90] If the import of these terms is not clarified at the outset of the inquiry, the subsequent analysis will be nothing more than 'a tissue of uncertain talk'.[91] Nonetheless, Mill grasped, as few other commentators have done, *how* Austin conceived of definitions, a dimension of his thought that has often been misunderstood. He believed, for better or worse: (1) that a definition of a term should encapsulate its 'true meaning'; (2) that *this* meaning is something to be detected, or discovered, rather than stipulated; (3) that the way to detect it is to identify the distinctive qualities of the 'thing' or 'object' named, its

'essence' or 'nature', which (4) can *only* be known by accurate study of the 'thing itself, and of every other thing from which it requires to be distinguished'.[92] To this extent, the analogy that Mill drew between Austin's 'delineations' and geometrical line drawing was apt. His explications were 'not intended to exhibit objects in their most impressive aspect, but to show exactly what they are'.[93]

The single most compelling sign of Austin's commitment to this approach may be a distinction that he frequently drew. It is between, on the one hand, the nature or essence of a thing or object to which a name refers, and, on the other hand, whatever the thing or object may be called. His concern was with the former rather than the latter. This is apparent from, to begin with, his own accounts of his approach. After all, what could be more reliable evidence of an author's intentions than his or her own words? What Austin said about his approach to the definition of a law in his first lecture also applies to his definitions of many other things: 'I determine the essence or nature which is common to all laws that are laws properly so-called. In other words, I determine the essence of nature or a law imperative and proper.'[94] For example, he indicated, with regard to his definition of a right, that he would 'endeavour to explain the nature or essence which is common to *all* rights'.[95]

Austin's differentiation between the nature or essence of objects, and whatever they may be called, is also apparent from one of his most conspicuous, if frequently criticized, practices. The short of it is his distinction between things or objects 'properly', and 'improperly', 'so-called'. For example, he indicated that the purpose of the first lecture in the *PJD* was to determine the nature or essence of a law properly so-called. As he put it, 'I shall [now] state the essentials of *a law or rule* (taken with the largest signification which can be given to the term *properly*)'.[96] He sharply distinguished such a law from an occasional or particular command. The best example of such an imperative might be a judicial decision ordering a specific punishment for a particular criminal. Bentham had maintained that such a mandate could be a law as he had defined it. His definition of law implies that 'a judicial order, a military or any other kind of executive order, or even the most trivial and momentary order of the domestic kind, so it be not illegal [is law]'.[97] In contrast, Austin argued that a particular or occasional command could not be a law. While it might be called a law, that is 'immaterial' because its nature or essence would be 'the same'. In short, a particular command is not a rule, and could not therefore be a law.[98]

Whether the name used for an object was proper or improper depended, for Austin, upon whether it possessed some, or all, of the properties of the class of which it is a member. When two 'things' with the same name possess all of the properties of the class of things to which they belong, they resemble each other. Their common name also applies 'strictly and properly' to both. When one of the things possesses only some of the attributes of their common class, they are

analogous to each other. Then their common name is improperly applied to the object that lacks some of the attributes of their common class.[99]

Austin's meticulous attempt to distinguish between the various kinds of laws or rules is probably the single most important example of his adherence to this position. At least he described this attempt as the 'principal' purpose of the *PJD*.[100] What must be done, he argued, is to explain how, and why, the different kinds of laws resemble and differ from each other.[101] For example, positive laws, the subject-matter of jurisprudence, not only resemble or are analogous to the other kinds of laws, but are connected to them as well by their common name. Consequently, they are all too often 'blended and confounded'.[102] Austin regarded the elimination of this confusion as essential for achieving the purpose of the book. He described his approach in these terms: 'By determining the essence or nature of a law imperative and proper, and by determining the respective characters of those ... several kinds [of laws], I determine positively and negatively the appropriate matter of jurisprudence.'[103]

The results that Austin reached on the basis of this approach are represented in his classification of laws. The basis of it is his definition of the nature or essence of a law properly so-called as a general command, tacit or express, of a determinate person, or body of persons. This is the genus to which all laws properly so-called belong. He regarded three kinds of laws as possessing all of the properties of this class and therefore resembling each other. They are: (1) positive laws, or laws strictly so-called; (2) divine laws; and (3) certain rules of positive morality. Other kinds of objects that have the name of laws are laws improperly so-called. International law, customary law, and laws set by general opinion are some of the highly controversial examples that he adduced.[104] These so-called laws are laws improperly so-called because they are not commands of a determinate person or persons. Since they have some of the properties of the class of laws properly so-called, however, they are analogous to such laws. In this respect they differ from the merely figurative or metaphorical laws, such as the laws 'observed by the lower animals ... regulating the growth or decay of vegetables ... [and] determining the movements of inanimate bodies or masses'.[105] The analogies between these 'laws' and laws properly so-called are 'slender or remote'.[106]

Still further, Austin sometimes wrote as if, or presumed that, definitions were true or false. After all, a *description* of the distinctive qualities of an object, or its nature or essence, would appear to be either accurate or inaccurate, true or false. That Austin so regarded them, at least at times, is apparent from his various references to such things as an 'erroneous' definition of a person;[107] the tendency of the modern scholars of the Roman law to confuse the 'true essence' of a personal servitude with its 'mere accidents';[108] a specific definition of right as 'nearest to a true definition';[109] and the truth of his assumption that intention or inadvertence is 'a necessary ingredient in injury or wrong'.[110] Moreover,

he criticized the various definitions of status as false,[111] 'erroneous',[112] 'thoroughly erroneous',[113] 'absurd',[114] and 'defective'.[115] In addition, he claimed to focus upon the 'true nature'[116] or 'true notion' of status.[117]

IV

Mill's interpretation of Austin's conception of jurisprudence accurately explains, then, a number of crucial elements of it. To say this is not to imply that Mill's account of these ideas is as detailed and complete as it might be, which is not the case. For example, he might have explained more thoroughly and in more detail Austin's conception of definitions, or of *necessary* principles, notions, and distinctions. Mill also failed to point out that Austin allowed a place in general jurisprudence for certain widespread, but non-necessary, legal propositions. Nor did Mill explain the utilitarian basis for these very generally occurring principles, notions, and distinctions.[118] In other words, Mill insufficiently emphasized the importance of Austin's utilitarianism for understanding his jurisprudence.

Mill's exposition of Austin's conception of general jurisprudence, despite its great value, is not then without its limitations. However, the most important limitation of it is *not* its occasional incompleteness, which is understandable in a review. Rather, it is Mill's generally uncritical attitude towards Austin's ideas. To be sure, his conception of rights and his scientific classification of law were subject to criticism.[119] Nonetheless, there are no criticisms of Austin's conception of general jurisprudence itself. The absence of such criticism may be explained on various grounds. In the first place, Mill's profound admiration for Austin may have skewed his vision. In the second place, Mill may not have regarded his review as the proper occasion for a full-blown critique of Austin. After all, one of its two purposes was to pay 'deserved tribute' to his memory.[120] Finally, Mill largely, though not entirely, as we have seen, agreed with the basic tenets of Austin's jurisprudence. As a result, Mill saw no need to criticize it.

Mill thus did not discuss some of the very real difficulties of general jurisprudence. The single most important example may be the conflict that it reflects between two underlying motifs of Austin's legal philosophy. One is his identification with empiricism, while the other is the implicit rationalism of some of his ideas. Mill does not address this problem for a very simple reason: he did not think that it existed.

Austin's empiricism

Although Austin never literally acknowledged that he was an empiricist, he appears to have regarded himself as one. At least his explicit statements

about empiricism were very favourable, which is not at all surprising. Empiricism was, after all, a major tenet of the nineteenth-century British utilitarians. For example, Jeremy Bentham argued that experience, observation, and experiment were the 'only processes by which real knowledge could be obtained'.[121] Mill took the same approach and was highly critical of the 'German, or *a priori* view of human knowledge'.[122] He described his *System of Logic* as a 'text-book of the opposite doctrine', the core of which was the derivation of all knowledge from experience.[123] He also assailed the very bad practical effects of the *a priori* view, which he portrayed as a bastion of erroneous doctrines and pernicious institutions.[124] This theory had such bad consequences, he argued, because it in effect dispensed with rational justification. Every firmly established belief or intense feeling was 'erected into its own all-sufficient voucher and justification'.[125]

Austin's agreement with empiricism is evident from various, though not all, facets of his thought. The most convincing sign of it may be his interpretation and defence of utilitarianism in the second, third, and fourth lectures of the *PJD*. He interpreted it to require that positive law and morality should be derived from analysis of the tendencies of human action: 'from what can be known or conjectured, by means of observation and induction, of their uniform or customary effects on the general happiness or good'.[126] He insisted that law as it ought to be cannot be deduced from *a priori* principles, but only those 'obtained (through induction) from experience'.[127] He also stressed the close connection between theory and practice. The principles that should guide practical decisions are, he argued, generalizations derived from experience and observation of particulars.[128] Indeed, he insisted that this is the principal use of theory, which is indispensable for practice directed by experience and observation.[129] A true theory is, he maintained, 'a *compendium* of particular truths' and therefore 'necessarily true as applied to particular cases'.[130] He argued too that there are a variety of sciences closely related to ethics in which, presumably, similar methods are applicable.[131] Although he never mentioned jurisprudence in this context, he did refer to legislation, politics, and political economy.[132]

Austin's identification with empiricism is also evident from his insistence that Bentham belongs – and that by implication *he* belongs – to the historical school of jurisprudence. Although the cogency of this argument is dubious at best, the grounds by which Austin supported it indicate very clearly his favourable attitude towards empiricism:

> the proper sense of that term [historical jurisprudence] as used by the Germans is, that the jurists thus designated think that a body of law cannot be spun out from a few general principles assumed *a priori*, but must be founded on experience of the subjects and objects with which law is conversant . . . .

> The meaning of the . . . historical school is simply this, that . . . law should be founded on an experimental view of the subjects and objects of law, and should be determined by general utility, not drawn out from a few arbitrary assumptions *a priori* called the law of nature. A fitter name . . . would be the *inductive* and *utilitarian* school.[133]

Finally, Austin sarcastically contrasted the 'high ideal philosophy' of the Germans to the empirical philosophy of Bacon and Locke.[134]

There is then a good deal of evidence that Austin saw himself as an empiricist. This is also how Mill interpreted him, as we have seen, in his review of the *LJ*. Moreover, in his *Autobiography* Mill described Austin in these terms: 'Like me, he never ceased to be an utilitarian, and with all his love of the Germans, and enjoyment of their literature, never became *in the smallest degree* [emphasis added] reconciled to the innate-principle metaphysics.'[135]

Still, there are a number of problems with this interpretation of Austin, none of which Mill addresses. To begin with, Austin made little attempt to substantiate empirically many of the principles, notions, and distinctions that he described. Instead, he tended to assume, or to maintain, that they are universal, or at least widespread, with very little systematic, comparative or historical corroboration. The best example of how he actually proceeded may be his highly controversial conception of the legally unlimited powers of the sovereign. He argued that this notion held true 'universally or without exception'.[136] In this respect he differed, or appears to differ, from Bentham. He had argued that to claim that the powers of the supreme body in a state cannot be limited even by 'express convention'[137] would be to say 'rather too much'.[138] In contrast, Austin claimed that it would be to say what is, and must be, true. He did not attempt to prove this, however, by comparative analysis of the legal systems of the world, though he did refer to a few of them. Instead, he argued that the legal omnipotence of the sovereign is 'indisputable'[139] and is 'involved in the notion of sovereignty, as the properties of a circle are implied by the definition of the figure'.[140] In short, it follows from the very definition of the nature or essence of sovereignty properly so-called. Limitations on the sovereign's powers are inconceivable or logically impossible.

These opinions help to explain why Austin did not make much of an effort to corroborate empirically his conception of the legally illimitable powers of the sovereign. Since it follows from his definition of the sovereign, just as the properties of a circle follow from the definition of the figure, there is no need to confirm it historically or comparatively. Of course, he did attempt to demonstrate that the powers of both the British and American sovereign were legally unlimited.[141] This is hardly a sufficient sample, however, on which to generalize about all sovereigns. Then, too, his identification of the American sovereign is certainly questionable.[142] This is not really the crucial point,

however, for present purposes. It is, instead, that Austin's assertion of the universality of the sovereign's legally unlimited powers was not intended to be a generalization from the facts. Rather, it was something that could be known to be true independent of observation and induction.

Austin's rationalism

These facets of Austin's jurisprudence imply that it has a rationalist rather than an empirical foundation. To be sure, the term rationalism is subject to a wide variety of interpretations. Nevertheless, it may be defined as 'the philosophical outlook or program which stresses the power of *a priori* reason to grasp substantial truths about the world'.[143] Austin's conception of a sovereign of legally unlimited powers was rationalist in this sense of the term. If the necessity and universality of this notion were to be established, it would seem to require that *a priori* reason has the power to grasp substantial truths about the world. A merely empirical reason, grounded in and limited by observation and experience, as well as history, could not be so categorical.

What is true of Austin's conception of sovereignty is also true of the other principles, notions, and distinctions that he regarded as necessary and universal. The assertion that they are necessary because we cannot 'imagine coherently a system of law ... without conceiving of them as constituent parts of it'[144] is not susceptible to empirical verification. Rather, it would seem to require the power of *a priori* reason to discover fundamental truths about the world. The same may be said of his contention that, 'on a little examination and reflection', every legal system can be found to imply certain fundamental notions and distinctions.[145] Whether this is true depends on how 'legal system' is defined, which is not an empirical question. A significant comment that Austin made about Hobbes also seems to imply the power of *a priori* reason to discover truths about the world. Austin indicated that his much admired predecessor had expressed well the subject and scope of general, as distinguished from particular, jurisprudence. Austin then quoted a long passage of Hobbes's, the final sentence of which is this: 'My design is to show, *not what is law here or there, but what is law*: As Plato, Aristotle, Cicero, and divers others have done, without taking upon them the profession of the study of the law.'[146]

Although Austin was a member of the legal profession, his design was the same as Hobbes's. In addition, Austin's praise of, and commitment to, the 'geometrical method' has rationalist overtones. He not only admired Hobbes and Locke, who were his 'favourite writers',[147] but specifically praised their use of this approach. No doubt, Austin acknowledged that ethics is sufficiently complex so that 'geometrical exactness and coherency' is not achievable. Still, he argued that writers on ethics 'might always approach, and would often

attain to them. They would acquire the art and habit of defining their leading terms; of steadily adhering to the meanings announced by the definitions; of carefully examining and distinctly stating their premises; and of deducing the consequences of their premises with logical rigour.'[148]

Although Austin never *said* the same thing about the science of jurisprudence, it is difficult for me to imagine that he would advocate one method for ethics and another for jurisprudence. Moreover, he certainly attempted to apply the same kind of 'geometrical approach' to it that he recommended for ethics. He methodically defined his leading terms; he adhered quite steadily to the meanings posited by the definitions; he tended carefully to examine and distinctly state his premises; and he tried to deduce with logical rigour the implications of these premises. Finally, Austin's wide exposure to and knowledge of German jurisprudence could have reinforced his commitment to this approach. His attitude towards it was discussed in detail in a previous chapter and need not be reiterated here. Still, it is important to emphasize that Friedrich Carl von Savigny (1779–1861), whom Austin greatly admired, was a strong proponent of the 'geometrical method'. Indeed, Savigny sometimes quite uncritically extols its advantages for jurisprudence.[149]

It is largely for this reason that Savigny argued, very much as Austin was subsequently to do, that 'in our science, every thing depends upon the possession of the leading principles, and it is this very possession which constitutes the greatness of the Roman jurists'.[150] The similarity between this passage and the language that Austin employs in one place is indeed remarkable: 'All depends upon firm intention: upon an accurate conception of the leading principles and distinctions, of the subordination of the detail under those leading principles, and of the relations of those leading principles to one another'.[151]

In any event, the geometrical method, as characterized by Austin, is just that, a method. As such, its use would only lead to substantial truths about the world if the premises or axioms from which implications, or theorems, are deduced are themselves true. If they were false, conclusions deduced from them would also be false, no matter how logically correct or rigorously drawn. The key question is then how, according to Austin, the truth of the premises of his jurisprudence was, or could be, established, or known. Although he may have regarded their truth as self-evident, he never said this. What he did say is that the principles (and presumably the notions and distinctions) of general jurisprudence are 'abstracted from positive [legal] systems'.[152] To this extent, *what* Austin abstracted from positive systems of law would seem to be an empirical question: do positive legal orders actually embody the principles, notions, and distinctions that he abstracted from them? The real issue is not this, however, but the persuasiveness of Austin's *interpretation* of these principles, notions, and distinctions. In particular, are they necessary, essential, inevitable, and universal? It is not a question that he ever really addresses.

The closest that he came to developing an answer was to assert that some of the principles, notions, and distinctions were necessary, in the sense previously indicated.[153] Yet, he never explained *why* it was impossible to imagine coherently a legal system without imagining his basic principles, notions, and distinctions, as he interpreted them, as constituent parts of it. Rather, he simply assumed their truth or necessity and proceeded to apply the 'geometrical method' to them. In other words, he elaborately explained and clarified their nature, or 'meaning', but seldom justified their substance or content.

Nothing illustrates the point better than Austin's definition of a law as a command, the foundation block of many of his other definitions. It is a definition the meaning and implications of which he explains clearly, precisely, and methodically.[154] His efforts in this connection are, at their best, very impressive and represent the quintessential Austin, a formidable figure. Yet, he never really justifies the substance of the definition, or *why* a law 'properly so-called' *is*, or should be defined as, a command. Instead, he assumed the truth of his definition, which he then explicated in meticulous detail. It is an assumption that appears to imply the power of *a priori* reason to discover basic truths.

Austin's important conception of a legal system as an 'organic whole' constitutes a final sign of his rationalism.[155] His most thorough explanation of this concept may be a passage from his posthumously published essay on codification and law reform. In it he insists that codification must be undertaken by 'enlightened practical lawyers' who combine 'all that philosophy can yield, with all the indispensable supplements of philosophy which nothing but practice can impart'.[156] He strongly emphasized that 'mere acquaintance' with the details of the system was insufficient. Rather,

> [i]t is necessary that those who are called to the task should possess that mastery of the system considered as an organic whole, which is the distinguishing characteristic of the consummate lawyer. It is pre-eminently necessary that they should possess clear and precise and ever-present conceptions of the fundamental principles and distinctions, and of the import of the leading expressions; That they should have constantly before their mind a map of the law as a whole; enabling it to subordinate the less general under the more general; to perceive the relations of the parts to one another; and thus to travel from general to particular and particular to general, and from a part to its relations to other parts, with readiness and ease; to subsume the particular under the general, and to analyse and translate the general into the particulars that it contains.[157]

This notion of law as an organic whole is not an isolated idea that Austin happened to assert in the passage quoted. Rather, it underlay and strongly conditioned several facets of his legal philosophy. They include his

justification of the tremendous educational value of the study of general jurisprudence,[158] his balanced defence of codification,[159] and his profound admiration of the Roman jurists.[160] The notion of law as an organic whole is not, however, an empirical generalization derived from the study of actual legal systems. Although some of them such as the Roman, if Austin is correct, demonstrate that it is possible for law to be an organic whole, the notion itself is more of an ideal than a fact. As such, it is much closer to a presumed truth about the world discovered by *a priori* reason than an induction based upon observation and experience. The reason is quite simple. The conception of law as an organic whole attributes a certain kind of structure to a legal system that it may not in fact have, or have only to a degree. Although a legal system might conceivably have the kind of relationship between its component elements that Austin assumed, it might not. Whether it does, and the extent to which it does, can only be determined by empirical analysis of the legal system itself. Such study might disclose that a particular legal system is an arbitrary potpourri with little or no underlying coherence, a ragbag of incoherent details unrelated to each other or fundamental principles. Indeed, Austin the reformer assailed the law of England on just this ground. He claimed that it is

> a chaos of incoherent details . . . . No other body of Law, obtaining in a civilized community, has so little of consistency and symmetry as our own. Hence its enormous bulk; and . . . the utter impossibility of conceiving it with distinctness and precision. If you would know the English Law, you must know all the details which make up the mess. For it has none of those large *coherent* principles which are a sure *index* to details.[161]

This criticism presumes that English law is not an organic whole, but a disorderly 'mess'. Austin is not arguing here that the large, coherent principles of English law are obscured by a fog of details and inconsistencies. Rather, he is advancing the stronger claim that it has no large, coherent principles that, once unearthed, can function as a sure index to details. A map of English law *as it actually exists* is impossible. Consequently, 'scientific' study, i.e., the study of general jurisprudence, could not lead to mastery of it. The only way to learn English law is by the 'merely empirical study' of the practising attorney, which in other contexts Austin disparaged.[162] If this is true, however, then the study of general jurisprudence might not have the practical value that he, or Mill, ascribed to it. Perhaps for this reason, Austin did not consistently maintain that it is completely impossible to understand English law distinctly and precisely. Rather, he at times argued that mastery of the principles of general jurisprudence would enable the student to penetrate behind the apparent disconnected assemblage of 'arbitrary and unconnected rules' of English law.[163] The student would thereby obtain 'a clear conception of it (as a

system or organic whole) with comparative ease and rapidity'.[164] In short, there is a conflict between Austin's defence of the utility of general jurisprudence, including its educational value for the study of English law, on the one hand, and his criticisms of this law, on the other hand. The former presupposes the rationalistic notion that a legal system – *any* legal system – is an organic whole, while the latter portrays at least English law as a chaos of unrelated details.

V

Overall, then, Mill's interpretation of Austin's conception of general jurisprudence has both strengths and limitations. The strengths are, at least in part, a result of Mill's unique relationship to Austin. No other important commentator on Austin's work was both tutored by him and a student in his course in jurisprudence. This unique combination of experiences enabled Mill to understand particularly well Austin's intentions and basic assumptions (it no doubt also helped to have the intellectual ability and knowledge of a John Stuart Mill). Specifically, Mill illuminated three key facets of Austin's general jurisprudence. In the first place, Mill's explanation of its ultimate objective, purpose, or 'first object', was on target. Austin's most basic aim was to give 'clarity, precision, and consistency' to the principles, notions, and distinctions of jurisprudence, the 'fundamental juristical conceptions themselves'. In the second place, Austin regarded these conceptions as necessary, universal, essential and inevitable, as Mill properly emphasized. In the third place, he understood very well Austin's approach to definitions. He did assume that the basic legal principles, notions, and distinctions have a 'true meaning', which he tried to 'detect'.

Whatever the limitations of Mill's interpretation of general jurisprudence, these facets of it merit high praise. They go to the heart of what Austin was trying to do and without an appreciation of which his efforts cannot be understood. In particular, he did not regard his definitions as merely verbal constructs, to be justified by their pragmatic value. Instead, he perceived them as encapsulations of the nature or essence of the things to which the words referred. This may of course constitute a weakness of his legal philosophy, as it no doubt does, for many, given the contemporary hostility toward 'essentialism'. Be it a strength or a weakness, it is how Austin conceived of his definitions. Few, if any, nineteenth- or twentieth-century commentators on general jurisprudence understood this as well as Mill.

At the same time, Mill's interpretation of general jurisprudence has its limitations. If the strength of Mill's review is its first-rate exposition of Austin's ideas, its major weakness is its generally uncritical attitude towards them. The

most important single example is Mill's failure to recognize the ambiguities and tensions of Austin's legal philosophy. The most fundamental one is the conflict between his sympathy for empiricism, on the one hand, and his implicit rationalism, on the other hand. While he was very critical of *a priori* assumptions, some of his key ideas appear to reflect them. This is certainly true of his conception of the universality, necessity, and inevitability of certain principles, notions, and distinctions. He did not substantiate these ideas empirically, and some of them may not be subject to empirical substantiation. Rather, the establishment of their truth would appear to require that *a priori* reason has the power to discern substantial truths about the world. The same may be said of definitions that attempt to encapsulate the nature or essence of the thing to be defined.

Since Mill did not recognize the existence of these problems, he could hardly address or resolve them. His failure to do so may say something about the limitations not only of his understanding of Austin, but his own views. On the one hand, Mill did tend to be too uncritical of the legal philosophy of a man whom he profoundly admired. On the other hand, he apparently agreed with certain of Austin's ideas that raise serious questions. In any case, the penetrating quality of some of Mill's insights into Austin's jurisprudence are so crucial for understanding it that they outweigh whatever shortcomings his review may have.

Notes

1. See 'Austin on Jurisprudence', in *Essays*, pp. 165–205.
2. *Troubled Lives*, p. 197.
3. Stefan Collini, 'Introduction', *Essays*, p. xlvii.
4. William Markby, 'Analytical Jurisprudence', *LMR*, 1 (1876), p. 618.
5. 'Bibliographical Note', in *PJD* (1954), p. xx.
6. *Public Moralists: Political Thought and Intellectual Life in Britain* (Oxford: Clarendon Press, 1991), p. 265.
7. *LJ*, p. 29.
8. Ibid.
9. H.L.A. Hart, *Concept*, p. 18.
10. Ibid., p. 241 note.
11. See H.L.A. Hart, *Concept*, 2nd edn, pp. 239–44.
12. W.L. Morison, *John Austin* (Stanford: Stanford University Press, 1982).
13. 'Austin on Jurisprudence', pp. 167–76.
14. Ibid., pp. 176–203.
15. Ibid., pp. 203–205.
16. John Stuart Mill, *Autobiography and Literary Essays, Collected Works of John Stuart Mill*, vol. 1, eds John M. Robson and Jack Stillinger (Toronto: University of Toronto Press, 198), p. 268.

17. 'Austin on Jurisprudence', *Essays*, p. 167.
18. Ibid.
19. Letter to Janet Duff Gordon, in Janet Ross, *The Fourth Generation: Reminiscences* (London: Constable, 1912), p. 74.
20. Ibid., p. 74.
21. Letter to Henry Reeve, 15 January, 1863, in *The Later Letters of John Stuart Mill, 1849–1873*, eds Francis E. Mineka and Dwight N. Lindley (Toronto: University of Toronto Press, 1972), p. 822, and Letter to Henry Reeve, 30 January, 1866, ibid., pp. 1142–3.
22. *LJ*, p. v.
23. See *LJ*, pp. 1071–91.
24. See John Austin, *On the Uses of the Study of Jurisprudence* (London: John Murray, 1863).
25. 'Austin on Jurisprudence', p. 169.
26. *PJD*, pp. 14, 58, 112–13.
27. *The Earlier Letters of John Stuart Mill*, ed. Francis E. Mineka (Toronto: University of Toronto Press, 1963), pp. 51–3.
28. Ibid., p. 53.
29. *LJ*, p. 1071.
30. 'Preface', *On The Uses of the Study of Jurisprudence* (London, 1863), p. iv.
31. Letter from Sarah Austin to Lord Brougham, 9 November, 1862, University College, London, 22437.
32. Letter to John Murray, 25 September, 1862, in the archives of John Murray.
33. *LJ*, p. 1071.
34. Letter to John Murray, 25 September, 1862.
35. 'Preface', *On The Uses of the Study of Jurisprudence*, at v.
36. 'Austin on Jurisprudence', *Essays*, p. 169.
37. Nowhere else does Austin distinguish, as he does in this essay, between the two kinds of principles, notions, and distinctions of general jurisprudence. Some of them are universal, necessary, and essential, while others lack these characteristics, though they are widespread. See *LJ*, pp. 1073–4.
38. 'Austin on Jurisprudence', *Essays*, p. 169.
39. Ibid., pp. 168–9.
40. Ibid., p. 171.
41. Ibid., p. 172.
42. Ibid.
43. Ibid., p. 172.
44. Ibid., p. 168.
45. Ibid.
46. Ibid.
47. For example, see *The Concise Oxford Dictionary of Current English*, ed. Della Thompson, 9th edn (Oxford: Clarendon Press, 1995), p. 910.
48. 'Austin on Jurisprudence', *Essays*, p. 170.
49. Ibid.
50. Ibid., p. 172.

51. Ibid.
52. Ibid., p. 170.
53. Ibid.
54. Ibid., p. 169.
55. Ibid., p. 173.
56. Ibid., p. 174.
57. Ibid., p. 176.
58. See *LJ*, pp. 619, 584, 618.
59. Ibid., p. 850.
60. Ibid.
61. Ibid., p. 58.
62. Ibid., p. 31.
63. Ibid.
64. Ibid., p. 32.
65. Ibid., p. 58.
66. Ibid., p. 32.
67. *LJ*, p. 1073.
68. Ibid., p. 1074.
69. However, Austin sometimes expressed a different opinion. See ibid., p. 1077, and the syllabus for his course at the University of London, in Second Statement by the Council of the University of London explanatory of the Plan of Instruction (London: 1828), pp. 78–80 [hereinafter cited as Syllabus].
70. *LJ*, p. 1072.
71. Ibid., p. 1073.
72. Ibid.
73. Letter to Sir William Erle, 1844, in Janet Ross, *Three Generations*, p. 201.
74. *LJ*, pp. 1073–4.
75. Ibid., p. 1073.
76. Ibid., p. 122.
77. Syllabus, p. 79.
78. *LJ*., p. 1074.
79. Ibid., p. 1073.
80. Ibid., p. 1077.
81. Ibid., p. 1030.
82. Ibid., p. 1081.
83. Ibid., p. 29.
84. Ibid., p. 1082.
85. Ibid., p. 1092.
86. Ibid., p. 1082.
87. Ibid., pp. 1082–3.
88. Ibid., p. 1085.
89. Ibid.
90. Ibid., p. 1075.
91. Ibid.
92. 'Austin on Jurisprudence', *Essays*, p. 176.

93. Ibid., p. 175.
94. *LJ*., pp. 80, 81.
95. Ibid., p. 393 and p. 276.
96. *PJD*, pp. 20–21.
97. *Of Laws in General*, ed. H.L.A. Hart (London: Athlone Press, 1970), p. 3. Bentham is not completely consistent, however. See ibid., pp. 76, 154.)
98. *LJ*, p. 94.
99. Ibid., p. 168.
100. *PJD*, p. 11.
101. Ibid.
102. Ibid.
103. Ibid., pp. 11–12.
104. Ibid., pp. 20, 123–4, 171, 34–6, 141, 178.
105. Ibid., p. 20.
106. Ibid., p. 10.
107. *LJ*, p. 353.
108. Ibid., p. 820.
109. Ibid., p. 398.
110. Ibid., p. 468.
111. Ibid., p. 710.
112. Ibid., p. 695.
113. Ibid., p. 697.
114. Ibid., pp. 700, 716.
115. Ibid., p. 710.
116. Ibid., p. 719.
117. Ibid., p. 721.
118. Ibid., p. 1074.
119. See 'Austin on Jurisprudence', *Essays*, pp. 178–80.
120. Mill, *Autobiography*, p. 268.
121. *The Works of Jeremy Bentham*, ed. John Bowring (New York: Russell & Russell, 1962), vol. 8, p. 233.
122. *Autobiography*, p. 233.
123. Ibid.
124. Ibid.
125. Ibid.
126. *PJD*, pp. 74–5. Also see ibid., pp. 59, 69.
127. *LJ*, p. 1030.
128. *PJD*, p. 50.
129. Ibid.
130. Ibid., p. 51.
131. Ibid., p. 61.
132. Ibid.
133. *LJ*, p. 679.
134. Ibid., p. 324.
135. *Autobiography*, p. 185.

136. *PJD*, p. 212.
137. A *Fragment on Government*, eds J.H.Burns and H.L.A. Hart (Cambridge: Cambridge University Press, 1988), pp. 97–8., and *Of Laws in General*, pp. 15–16, 64–71.
138. *A Fragment on Government*, p. 101.
139. 'Centralization', *ER*, 85 (1847), p. 222.
140. Ibid.
141. *PJD*, pp. 208–10, 192–6, 240–41.
142. See *infra*, Chapter 9.
143. Bernard Williams, 'Rationalism', in *The Encyclopedia of Philosophy*, vol. 7, ed. Paul Edwards (New York: Macmillan, 1967), p. 69.
144. *LJ*, p. 1073.
145. Ibid., p. 1074.
146. Ibid., p. 32.
147. Mill, 'Austin, Lectures on Jurisprudence', p. 58.
148. *PJD*, p. 73.
149. Frederick Charles Von Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence*, trans. Abraham Hayward (London: Littlewood, 1831), pp. 38–9.
150. Ibid., p. 45.
151. Ibid., p. 1093.
152. *LJ*, p. 1072.
153. Ibid., p. 1073.
154. See *PJD*, Lectures I, V, and VI.
155. *LJ*, pp. 1082–3.
156. Ibid., p. 1094.
157. *LJ*, pp. 1092–3.
158. See ibid., pp. 1082–91.
159. *LJ*, pp. 647–81, 1021–39, 1092–1100.
160. See *supra*, Chapter 2.
161. *LJ*, pp. 467–8.
162. Ibid., p. 1095.
163. Ibid., p. 1082.
164. Ibid.

6

Austin and the science of law

Although there are various reasons for the high regard so often expressed for Austin throughout much of the nineteenth century, the basic consideration may be his perceived contributions to the *science* of law, or at least jurisprudence. This reason became increasingly apparent in the reviews of the second edition (1861) of the *PJD* and Austin's remaining lectures (1863). Difficult as it may be, at the dawn of the twenty-first century, to see him as a theorist of the science of law, this is how he in fact was represented by numerous jurists in the nineteenth century. More precisely it was how he often was portrayed until this image of him began to be attacked by late Victorian jurists. Their criticisms of his ideas from historical, comparative, and other perspectives, began to have their effect.[1] Moreover, his conception of a science of jurisprudence was not uniformly accepted in even early or mid-Victorian England. Older and different conceptions of jurisprudence had their votaries.[2] Nevertheless, the interpretation of Austin as a major contributor to the science of law persisted well into the twentieth century.

This consideration raises a fundamental question that it is the purpose of this chapter to answer: what explains the widespread praise of Austin's contributions to the 'science' of law, or jurisprudence (the two were often not sharply distinguished)? What reasons were adduced by the writers who applied this term to him and attempted to justify its application? Of course, many authors simply labelled Austin a legal scientist without any explanation of what they meant. Nonetheless, at least a few commentators on his work were more forthcoming and adduced reasons for regarding it as scientific.

I

The focus of this chapter is then the reasons why many Victorian jurists regarded Austin as a pioneer in fostering a science of law. Of course, this regard does *not* mean that he actually transformed the study of law. It was one thing to praise, for reasons to be discussed, his contributions to legal science. It was another and much less common thing actually to do jurisprudence in his sense of the word. Pre-Austinian and non-Austinian notions of a science of law retained, or had, considerable appeal.

This is evident from, among other things, an important, if neglected, article published in 1873 in the *London Quarterly Review*.[3] The *Review* has been characterized as a journal of 'high literary quality' that was 'generally recognized . . . [as] – for most of its history – [the] avowedly unofficial literary voice of Methodism'.[4] Although it published few essays on law, the study in question was the lead article and forty-three pages long. Ostensibly a review of five books and a pamphlet, it was much more than that. The anonymous author began by acknowledging that the study of jurisprudence as a science was, in the past, almost completely ignored in England.[5] Still, he insisted that this sorry state of affairs no longer existed. English 'juridical science' was undergoing a 'notable change'.[6]

The author cited various developments in order to substantiate this argument.[7] In the first place, it is the opinion of able writers that there is a science of law and that law deserves to be studied scientifically. In the second place, there is a revival of interest in Roman law. In the third place, the attention given to the study of law in English universities, the Inns of Court, and a number of colleges has increased. In the fourth place, there are the recent enthusiastic efforts of leaders of the profession to improve legal education. In the fifth place, numerous measures for the reform of law are based upon the assumption that law is a science. Finally, powerful works expounding the scientific principles of jurisprudence have been published in recent years. Although the author did not specifically indicate which works he had in mind, the remainder of his essay filled the gap.

The emergence of a more scientific approach to jurisprudence was attributed to various factors, one of which was Austin's impact. His influence was 'marked' and he directly contributed to 'awaken[ing] in England an interest in the science of jurisprudence'.[8] At the same time, the author emphasized that Austin was not the only cause of this development. Nor did he create the science, despite his undeniable influence upon it. It is also unwarranted to speak of his system as if it were 'the only form of scientific law cultivated in this country, or, as if it constituted *the* English School of Jurisprudence'.[9] In fact, many other English writers seek to put jurisprudence on a scientific footing, but disagree with Austin and his disciples about how to do it. In particular, these jurists reject the command conception of law and ground law on 'the moral nature of man, and the facts inevitably generated through the developments of this moral nature in society'.[10]

Herbert Broom (1815–1882) was one of the ten jurists listed as exemplifying this alternative notion of the science of law. He was a highly educated person who received three degrees from Cambridge – a BA in 1837, an MA in 1854, and an LLD degree in 1864. He had been called to the bar by the Inner Temple in 1840, after which he practised on the home circuit. He also served

for many years as reader of common law at the Inner Temple and, from 1873 to 1875, as professor of common law to the Council of Legal Education.

Broom's best known book is his remarkably popular *A Selection of Legal Maxims Classified and Illustrated* (the book underwent seven editions from 1845 to 1900).[11] His approach contrasts starkly with Austin's and illustrates what may be called a 'common law' conception of jurisprudence. The objective of Broom's treatise was highly practical. He characterized it as a compendium or repertory of legal principles designed for both the student and the practitioner. Unlike Austin, Broom's attitude towards the legal system the principles of which he was expounding was highly laudatory. He indicated that he would be pleased if his work were found to be

> instrumental in extending knowledge with regard to a science which yields to none either in direct practical importance or in loftiness of aim – if it be found to have facilitated the study of a system of jurisprudence, which though doubtless susceptible of improvement, presents, probably, the most perfect development of that science which the ingenuity and wisdom of man have hitherto devised.[12]

Broom justified his focus on first principles on the ground that such an approach was at least as essential in law as in any other science. He pointed out that the expansion of commerce and the relationships between peoples has complicated the law. There has been a marked increase in litigation which has in turn introduced into the law many nuances and fine distinctions. These developments have accentuated the need for more accurate knowledge of legal principles. Such knowledge is essential if 'fundamental rules' are to be 'either directly applied, or qualified, or limited, according to the exigencies of the particular case, and the novelty of the circumstances which present themselves'.[13] In the absence of a thorough familiarity with legal principles, 'grievous error' is likely to be committed.[14]

Broom emphasized that the first principles and maxims that he expounded did not have a single source. Rather, he drew them from the law reports, ancient and modern, established treatises on leading departments of the law, and previous collections of maxims. Chapter Five of his treatise provides a good illustration of his approach. Its focus was certain fundamental legal principles that are 'of such general application that they may be considered as exhibiting the very grounds or foundations on which the legal science rests'.[15] He supported the particular rules and maxims that he cited by quoting a statement of Blackstone's. Their authority rests 'entirely upon general reception and usage, and the only method of proving that this or that maxim is a rule of the common law, is by showing that it hath been always the custom to observe it'.[15a] Broom gave numerous examples of such fundamental maxims

and principles. They include but were by no means limited to the principles that wherever there is a right there is a remedy, that damages are not as a rule recoverable for acts that are impossible to perform, that ignorance of the law is no excuse, and that a person shall not profit from his own tortious act.[16] The remainder of the very long fifth chapter – 161 pages – consisted of a detailed explication, based upon case law, of these and other principles.

It is difficult to imagine an approach that could be more different from that of Austin, whom Broom never mentions. In the first place, Broom's aims were much more practical than Austin's. Broom wrote his book for students who wished to practise law and barristers who wished to apply legal maxims to their cases. Although Austin vigorously defended the utility of his theories for practice, his lectures were highly abstract and theoretical. In the second place, Broom was concerned with particular rather than general jurisprudence. His focus was the legal principles and maxims of one particular country, England. Austin's focus was the principles, notions, and distinctions that are either necessary and universal, or occur widely in mature legal systems.[17] In the third place, principles and maxims constituted the subject-matter of Broom's book. While principles had a place in Austin's general jurisprudence, he tended in practice to give them short shrift. For example, his most detailed list of necessary principles, notions, and distinctions contains *no* principles.[18] His lectures tend to focus on notions and distinctions rather than principles. Finally, Broom's principles and maxims were supposedly derived from, or at least illustrated by, the cases. His book also reflects a concern with updating his text and drawing his illustrations from the most recent reported cases.[19] However, Austin seldom discusses cases, or illustrates his fundamental notions and distinctions by referring to them.

II

These differences no doubt undergirded the often enthusiastic response to Austin's work, which was correctly perceived as highly distinctive. Whatever the reason for it, praise of his contributions to legal science was frequently effusive. The remark of a reviewer of the first edition of the *PJD* is typical. He strongly recommended the book to 'all who think clear notions in ethics and politics desirable, but most pre-eminently to all students of law who wish to qualify themselves for the scientific knowledge of it'.[20] A reviewer of the second edition of the *PJD* commented that it is 'so classical in the opinion of all who value law as a science, and has been so long out of print, that its re-publication will be in the highest degree acceptable'.[21] The *Law Magazine and Law Review* exuded that the 'students of the science of law at home and abroad ... will rejoice at the rescue of these scattered fragments of excellency from ...

oblivion'.[22] Another legal journal indicated that a 'more firm, clear, penetrating intellect than Mr. Austin's was never applied to legal science; and he gave himself to it with a devotion rare and almost unknown among English lawyers'.[23]

The comments in four of the law journals that reviewed Austin's *Lectures on Jurisprudence* in 1863 and 1864 also lauded their scientific character. The *Law Magazine and Law Review* confidently asserted that the volumes in question are 'assuredly the productions of a genius and a profound thinker'.[24] The reviewer predicted that Austin's work 'will remain an imperishable monument of his industry, his rare intellect, and his devotion to the Science of Law'.[25] As such, it deserved to find a home not just in the library of every jurist, philosopher, and statesman in England, but the entire British empire![26] The *Journal of Jurisprudence* was equally complimentary. Despite the poverty and lack of recognition that Austin experienced during his life, it was argued that no English writer has accomplished so much for the science of law. The reviewer also predicted that no one is likely to have a more lasting impact upon 'the ultimate form of the legal system cultivated in his own country'.[27] The review in *The Law Times* concluded by saying that the volumes under review constituted 'the most remarkable contribution to the science of law which English literature has received in our day, saving only, perhaps, the scarcely less remarkable work of Mr. Maine'.[28] Even the most critical of the reviews acknowledged that the merits of Austin's work are 'vastly, indeed incomparably, greater than its defects'.[29]

The *LJ* themselves underwent four editions from 1863 to 1885, the period in which Austin's reputation reached its zenith. In 1864 a reviewer of the *LJ* claimed that philosophers and statesmen, as well a lawyers, will applaud the publication of the book.[30] In 1867 Austin was extolled as 'the most accomplished writer upon jurisprudence that England has ever seen'.[31] A *critic* of Austin wrote that 'no greater contribution has . . . ever been made in this country to legal science. We have the true spirit of the scientific inquirer pervading every page.'[32] In 1873 he was given the honour of introducing into the study of law 'light where before there was darkness'.[33] Law students of the present generation cannot be 'too thankful' for the service he has rendered them.[34] His lectures 'have always, and in many respects have rightly, held the highest place among the text-books of English jurisprudence'.[35] While few persons today would agree with the judgement of an anonymous writer in 1874, especially his comparison of Austin and John Stuart Mill, his words are an indication of the repute that Austin had developed by this point in time: 'In gravity, force, and accuracy of thought he [Austin] equalled, if he did not exceed, the writers with whom it is natural to compare him, such as James and John Mill. The whole tone of his mind, his moral sympathies, and his religious feelings, were infinitely graver, deeper, more manly than theirs.'[36] In 1875 his lectures

were praised as a 'display of power, such as centuries may not produce, and which every lawyer should study, as one of the marvels of legal literature'.[37] Sheldon Amos subsequently argued that Austin 'may be said to have been the true founder of the Science of Law, if indeed such an honour can ever belong to any one man'.[38]

Unlike many of their twentieth-century counterparts, even Austin's critics tended thus to express admiration for his scientific contributions. The best known example of this tendency is Henry Maine, whose response to Austin will be discussed in a subsequent chapter.[39] Yet, even minor figures such as Charles James Foster expressed very favourable opinions of Austin's scientific prowess. Foster held the Chair in Jurisprudence at University College from 1849 to 1853 (the same Chair that Austin occupied earlier in the century). Unlike Austin, Foster was a proponent of natural law, a fact that heavily conditioned his criticisms of his predecessor. He also indicated that a reader of his book could infer that he was too anxious to refute Austin's positions.[40] Indeed, Foster acknowledged that he unconsciously may have done just that because of his extensive disagreement with Austin.[41] Despite this, Foster did not trash his predecessor. Rather, he praised the 'signal perfections' of Austin's treatise, which have established his principles as 'the foundation of the English School of Jurisprudence'.[42] Moreover, Foster knew of no writer 'who can bear comparison with him in the essential service he has rendered to the science [of law]'.[43] Foster even claimed that the public has waited 'far too long' for the publication of a second edition of the *PJD*.[44] He also expressed the hope that the appearance of his own book would persuade Austin to publish a second edition of his book, which 'ought not longer to be delayed'.[45] The author of an obituary notice of Austin put the matter quite accurately, then, in describing the *PJD* as a work that has been 'greatly admired even by those who are opposed to the peculiar views of the author'.[46]

III

It is one thing to hear the mantra of Austin's contributions to the science of jurisprudence. It is another thing to understand why so many jurists echoed this theme and what exactly they meant by it. Although Austin's contributions to the science of law were widely (though far from uniformly) extolled, the reasons for the praise of him are not entirely clear. The commentators on his work did not necessarily mean the same thing by 'science', they often defined it in 'the vaguest terms',[47] and they sometimes employed the term in its older meaning of organized body of knowledge, or philosophy.[48] Nevertheless, it is possible to identify some of the more frequently reiterated

reasons for Austin's contributions to what was characterized as the science of law.

The perceived need for a scientific approach

A basic factor conditioning the enthusiastic praise of Austin's 'scientific' jurisprudence was a widely, though hardly universal, perception of the backward condition of the science of law. Those who held this opinion welcomed Austin's work as a long-overdue, even novel, attempt to address a crying need.[49] A reviewer of the first edition of the *PJD* put it this way: 'The science of jurisprudence has been so strangely, not to say disgracefully, neglected in England, that the appearance of an able work devoted to that subject, is in all respects a great novelty.'[50] The reviewer was careful to mention, however, that it is 'just to the author to add, that its novelty is neither its only nor its principal merit'.[51] Thirty-two years later a reviewer of Austin's *LJ* claimed that 'while the science of general jurisprudence is new in this country, it has been ... handled by one whose peculiar qualities of mind were ... admirably fitted for clearly defining its terms, and sketching the plan of its compartments'.[52]

The conviction that Austin was doing something different that desperately needed to be done contributed, thus, to the enthusiasm with which his work was often greeted. The same may be said of the nineteenth-century reception of Henry Maine's work, but Austin elicited the same kind of response. This reaction to his jurisprudence did not of course develop in a vacuum. In fact, it was to some extent a reflection of a broader current of interest in science that developed in Victorian England.[53] This interest extended to certain members of the bar, who did not wish their 'science' to lag behind that of other professions. An advertisement for *The Jurist*, which was founded in 1827, provides an early expression of this concern: 'A spirit ... of rational inquiry seems to pervade the practitioners of the law: there is an evident disposition amongst them to extend their views beyond the narrow technicalities of the profession, and to shake off the reproach cast upon them, by a distinguished writer, "that law is studied in England rather as an art than a science".'[54] If Raymond Cocks is correct, the desire to shake off this reproach became more acute in subsequent decades. He writes that 'many Victorian lawyers thought that scientific analysis could be used to resolve major legal problems. In the period 1840 to 1870 writers on law were almost obsessed with scientific analysis.'[55]

A corollary, if not a cause, of this obsession was the belief that a scientific jurisprudence was almost non-existent. This was particularly, but not only, emphasized by commentators on Austin's work in the period from 1832 to 1861. In other words, it was somewhat less frequently maintained after the publication of Henry Maine's *Ancient Law* than it had been prior to that date.

At any rate, in 1832 a reviewer of the *PJD* referred to the 'almost total absence of the cultivation of the science of jurisprudence in this country'.[56] It is for this precise reason that he extolled the publication of the first edition of the *PJD* as marking 'almost . . . an era in the history of English jurisprudence'.[57]

This opinion was shared by jurists of quite different orientations, and for decades after the publication of the first edition of the *PJD*. Charles J. Foster once more furnishes a good example. In his *Elements of Jurisprudence* (1853) he quoted the French writer Lerminier's judgement that as 'regards the science of law, properly so-called, England sleeps on for ever'.[58] Foster expressed the opinion that this reproach was 'only too just'.[59] In his Inaugural Address before the Juridical Society (1855) Richard Bethell put it this way: '[A]s a body, English lawyers have done little for the advancement of the science of Jurisprudence. The neglect of this study is plainly evinced by the contrast between the legal literature of England and of Continental countries.'[60] In a paper subsequently read before the same Society, Henry Maine reiterated, in an article praising Austin highly, that England 'has no literature of Jurisprudence; consequently the English language comprises no true juristic phraseology'.[61] James Fitzjames Stephen took the same position in 1861. He maintained that there is 'no pursuit on which more ability and learning has been lavished than on the law of England, and there is no subject to which English literature has contributed so little as general jurisprudence'.[62] Two years later a reviewer of the second and third volumes of Austin's *LJ* bemoaned 'the extraordinary paucity of English writers on the theory of law . . . we shall look in vain for any systematic cultivation of juristical science'.[63]

Bethell was the author of a particularly thoughtful explanation of the reasons for the lack of any such cultivation. The factor that he most heavily emphasized was in effect the fragmentation of the study, practice, and administration of law. The field was divided historically among common law courts, courts of equity, Prize Courts, and Courts of Admiralty. In addition, the law of wills, marriage, and divorce was 'established upon distinct principles . . . regulated by a different procedure, and . . . [has] been made the subject of an independent system, and the inheritance of a separate body of practitioners'.[64] According to Bethell, these divisions influenced in a number of ways the common law lawyer's neglect of jurisprudence. For example, he became unfamiliar with some of the most important doctrines of legal science. He had no acquaintance with the law of trust, fiduciary relations, or the specific performance of contracts. He was also a stranger to the prevention of injustice by restricting anticipated wrongdoing, or the power to enforce the obligations of moral duty, conscience, and good faith. In addition, the common law lawyer tended to focus on special pleading, which was developed 'with all the subtlety of the scholastic philosophy'.[65] Overall, few lawyers, whatever their field of specialization, concerned themselves with law as a whole.

Bethell also cited a number of other factors as contributing to the neglect of the study and science of jurisprudence. One is the antagonism of English lawyers towards the civil law. European jurists regard this prejudice as similar to doubting the value of classical literature for 'enlightened education'.[66] A second factor is the absence of a thorough and well-organized system of legal education. Finally, there is the preference of the English legal mind for case law rather than a legal code or digest. According to Bethell, it has always been averse to arranging legal rules and principles 'in a plain and simple order and form'. Instead, it prefers 'that a rule should be painfully extracted for the occasion from a mass of statutes, passed at different times, expressed in terms of varying import, and frequently inconsistent with and contradictory of each other'.[67] As a result of this preference, cases are argued on the basis of precedents rather than principles, memory rather than reason. The best lawyer is regarded as the person who is able to cite the largest number of former decisions resembling the instant case.

However it was explained, the widespread opinion of the neglect of study of jurisprudence in England reflected a low opinion of the contributions of Austin's predecessors to 'juristical science'. Sir William Blackstone is an obvious example, but even Jeremy Bentham's contributions to legal science were sometimes contrasted unfavourably with Austin's. While most of the reviews of Austin's books did not specifically compare him with his predecessors, his relationship to them was not entirely ignored. The discussion in a review of the first edition of the *PJD* was particularly thoughtful.[68] The reviewer acknowledged at the outset that there were very able histories of English law as well as treatises upon specific branches of it. He even admitted that Blackstone's *Commentaries* treats 'the whole field of English law ... with considerable claims to the merit of scientific arrangement (so far as the task of exposition goes)'.[69] Indeed, Blackstone's work was said to have 'great merit' as a comprehensive and accurate 'exposition of the law of England'. In fact, it contains 'vast stores of legal information'.[70]

At the same time, the author coupled this praise with a critique of the shortcomings of the *Commentaries* from the perspective of the science of law. For one thing, it focuses on the law of England, and is, in this respect, insufficiently general. For another thing, to the extent that it attempts to go beyond this, it has many flaws. For example, Blackstone's borrowed nomenclature, which he often misapplies, 'serves rather to obscure than elucidate the divisions of his subject; and his philosophy seldom carries him farther than to cite or to devise ingenious reasons why every thing that is, however anomalous or absurd, is best'.[71] This disposition means that his work is 'infinitely more calculated to retard than to advance the science of the law'. The reviewer therefore rejoiced 'at the appearance of a work [the *PJD*] professing to treat

philosophically of the nature of law'. Such treatment is essential if the science of law is to develop and legal reform is to have any hope of success.[72]

The reviewer's interpretation of Bentham was much more favourable. His contributions to the science of legislation were extolled as of 'superlative merit and ... leave little to be accomplished in this department of philosophy'.[73] Nonetheless, the reviewer portrayed Bentham as contributing little to general jurisprudence, in which respect he was said to be typical of English jurists. They seem not to have realized, the reviewer lamented, that 'general jurisprudence – law in the abstract, and considered apart from all existing systems – could itself be the subject of a science'.[74] Accordingly, the reviewer concluded that, aside from a few fragments of Bentham's and an infrequent article in an encyclopedia, there is not 'a single English treatise on the philosophy of law'.[75]

Of course, other commentators such as Sheldon Amos appraised more generously Bentham's contributions to the science of jurisprudence.[76] Amos also distinguished between Bentham's tremendous influence on substantive legal reforms and the science of jurisprudence. While even more of Bentham's reforms will be enacted into law, Amos confidently predicted, 'it is most of all the methods, the system, the language, the inimitable sagacity for definition and separation which pre-eminently distinguish Bentham's mind, that have really and permanently influenced the progress of jurisprudence in this country'.[77]

The general and abstract character of Austin's work

There is much more, of course, to the praise of Austin's contributions to the science of law than a perception of their novelty. Otherwise, he would never have attained the lofty status that he enjoyed for at least part of the nineteenth century. Another and more substantial reason for the praise was his focus on very general and highly abstract propositions. Although this emphasis contributed heavily to the small enrolment in his course, it paradoxically was a major reason for the lauding of his work as 'scientific'. Many early Victorian scientists, it has been argued, maintained that the most abstract generalizations were 'the most important'.[78] The comments of some Victorian jurists on Austin's work expressed much the same attitude. The fact that he said relatively little about the law of England was, from this perspective, a strength rather than a weakness. His lectures were perceived as scientific because of his focus upon fundamental principles, or law 'in the abstract, and considered apart from all existing systems'.[79] This emphasis was distinguished from a concern with either the laws of particular communities, or law as it ought

to be. A reviewer in *The Jurist* of the first edition of the *PJD* put it particularly well:

> His [Austin's] business is with the science of law in the abstract – with that which necessarily belongs to law as it obtains in all civilized communities – with the principles and distinctions which every system of law inevitably involves – with the sources of law – its modes of operation – the subjects about which it is conversant – its various departments; – and all this without regard to the goodness or badness of the law, or its perfect or imperfect adaptation to what *ought to be* the end in view. The consideration of what *ought to be* law is the business of *legislation*, which is a branch of ethics quite distinct from the science of *jurisprudence*. If we may be pardoned a simile, we would say that jurisprudence is to legislation what the science of chemistry is to the science of medicine; the one deals with necessary properties, the other with their application to a proposed end.[80]

These remarks are in effect a description of Austin's conception of general jurisprudence. Its appeal for at least some mid-Victorian jurists is indicated by Edmund Smith's series of nine articles in the *Solicitors' Journal and Reporter*.[81] He acknowledged at the outset that he was inviting attention to a subject that his own branch of the profession had given little consideration.[82] He subsequently indicated that he wished to introduce his readers to the writings of a person of 'singular power of thought, of a later period than Blackstone, by whom much of [his] ... teaching has been canvassed, and ... corrected'.[83] Smith indicated that he was referring to Austin, whose conception of general jurisprudence he endorsed. Smith regarded it as almost self-evident that a limited number of legal ideas, notions, and principles are not only universal, but essential for the very conception of a legal system.[84] In addition, there are other abstractions which, though not necessary, are widespread in the more advanced systems.[85] He maintained that it is the role of general jurisprudence to identify the principles that are universal or widespread, to classify them, and 'in the end to trace out those more elegant and refined distinctions of which the science of law seems to be capable'.[86] Smith indicated that in his articles he intended to discuss a few of the fundamental principles of jurisprudence. He would also attempt to illustrate them by examples from English law, taking throughout Austin's *LJ* as his 'textbook'.[87]

The separation of law from morality

A third reason for praise of Austin's contributions to the science of law was his separation of law from morality. No doubt, he did not separate them as

sharply as he has often been represented to have done. He certainly never denied the existence of significant interactions between, or the overlap of, positive law, positive morality, and divine law. Moreover, he acknowledged that the sciences of jurisprudence and legislation, of what law is and what law ought to be, are connected by 'numerous and indissoluble ties'.[88] He also emphasized that positive morality and divine law are fertile sources of positive laws.[89] Indeed, he even maintained that the links between positive law and morality may be so close that any exposition of the former must include some account of the latter.[90] It is precisely for these reasons that the term 'separation' of law and morality is a misleading label for Austin's position. What he actually did what not so much 'separate' as sharply 'distinguish' them. Although they often are in fact connected or related, he argued, there is no *necessary* connection between them. In short, he never wavered from his deeply felt conviction that the 'existence of law is one thing; its merits or demerits another .... A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation or disapprobation.'[91]

Although this notion certainly had its critics among Victorian jurists, it also had many defenders. The grounds on which they defended Austin's separation of law from morality were various, but its contributions to the science of law were frequently mentioned. For example, Sheldon Amos contended that Austin effected 'the deliverance of law from the dead body of morality that still clung to it'. This achievement appears to have been the major reason for Amos's tribute to Austin as 'the true founder of the Science of Law'.[92] William Markby argued that Austin's distinction between positive law and morals was one of his most original and valuable contributions. It not only 'laid the foundation for a science of law, but cleared the conception of law and sovereignty of a number of pernicious consequences to which in the hands of his predecessors it had been supposed to lead'.[93] Moreover, some jurists defended very Austinian positions without alluding to Austin.[94]

Why was the separation of law from morality held to contribute to the science of law? The principal reason adduced was its avoidance of unnecessary intellectual and practical confusion. If the two are not clearly distinguished, the understanding of what law is will be impeded. As B.R.W. (Bernhard Ringrose Wise) put it, 'As a jurist, Austin owes his rank to the fact that he was the first to define the sphere of legal science, by distinguishing law from history and ethics – thus destroying a confusion which has produced many practical legislative evils.'[95] F.M. Maxwell claimed that Austin was the first jurist to define very clearly 'subjects in many respects distinct, but till this time invariable confused'.[96] Indeed, Maxwell even argued that 'the tests by which he [Austin] distinguishes the several subjects, by whatever name they may be called, can never lose their value until civilized society has sustained a fundamental

change'.[97] Maxwell particularly emphasized the value for the judge of Austin's distinction between law and morality. A judge well-schooled in his legal philosophy would not confuse principles of justice with the positive law of his country. Rather, he would recognize that moral principles are not necessarily part of the law of the land with legal sanctions attached to them.[98]

Other defenders of Austin explained the value of his distinction on other grounds. William Markby argued that an understanding of it is indispensable for appreciating what is at stake in resistance to law.[99] Frederic Harrison stressed the need for the lawyer and the student of law to grasp this facet of Austin's legal philosophy. Although the efficacy of law depends upon its reflecting the moral judgements of society, the lawyer must not be concerned with such matters. Rather, he or she must focus on the law as it is found in the statute book or court reports.[100] Harrison attached even greater value to the distinction between law and morality for fledgling students of law. He argued that they are prone to discount authority, which does not count for much in ethics or metaphysics. In law, however, authority is 'everything, and the reason of the thing, or philosophical probability, is nothing'.[101] In terms very similar to those subsequently utilized by Justice Oliver Wendell Holmes in 'The Path of the Law' (1897), Harrison argued that

> law is almost as distinct from ethics as political economy is distinct. *And there is nothing which can so brace upon the mental fibres of the student familiar with ethical and philosophical methods as to be plunged into the cold bath of Austin's clear but frigid reiteration of the truth that law means nothing but what the tribunals enforce by the delegated authority of sovereign power, and that nothing not so enforced is of account in law* [emphasis added].[102]

Austin's classification of the law

A fourth reason for the high regard often expressed for Austin's contribution to the science of law was his various classifications of the *corpus juris*. It is a reason that twentieth-century commentators on his work, especially critics of it, tend to ignore. There are various reasons for this, one of which is the focus of many writers on the *PJD*. Although Austin's *LJ* have not been ignored, they tend to receive less attention. Yet, it is in these volumes that he develops his classificatory schemes.

Few nineteenth-century jurists discussed Austin's classifications of the law, especially his most fundamental distinction between the law of persons and the law of things,[103] as thoughtfully, if briefly, as Sheldon Amos.[104] The son of Andrew Amos, Austin's colleague at the University of London, Sheldon Amos held the chair in jurisprudence at this very same university from 1869

to 1879. In no respect has Austin shown himself to be a more loyal or capable follower of Bentham, Amos claimed, than in his laborious arrangements and digests of the subject-matter of his 'science'.[105] After all, an accurate and useful system of classification was of crucial importance for any science. An incorrect and incommodious classificatory scheme may engender 'hopeless confusion', impede the advance of the science for hundreds of years, and impart to it 'so unsymmetrical and repulsive an aspect as to confine its cultivation to the dusky cells of the bookworm and the recluse'.[106]

Amos identified the subject-matter of Austin's classifications as the legal rights and obligations of the members of a political community. Although their variety is almost infinite, some of these rights and obligations share certain properties or attributes. Accordingly, they may be classified into a number of primary groups, which may in turn be subdivided into smaller classes, each of the members of which have certain generic attributes in common. If this method of classification is truthfully and judiciously pursued, the student of law can be saved a significant amount of 'time, repetition, and complexity'.[107] To be sure, Amos fully acknowledged the difficulty of the process. To do it well requires the highest rank of genius and erudition – comprehensive knowledge, wise discretion, and 'consummate sagacity'.[108] Nonetheless, Amos maintained that Austin had these qualities and had successfully crossed this Rubicon of jurisprudence:

> And if his work in its details is unfinished and abruptly closed, yet the grand attempt at a novel system of classification [the law of persons and the law of things], conceived not without reference to the methods known to Roman and English law and to the permanent principles of general jurisprudence, is left behind as a noble and immortal legacy.[109]

Amos properly emphasized that in his review only a brief outline of Austin's classificatory system was possible. It is in turn 'but a skeleton of the real living body of jurisprudence which, had life and health endured, he would himself have created'.[110] Amos concluded his review with these touching and heartfelt, if somewhat florid, comments. They are in effect not only a tribute to Austin, but a plea for the continued development of his classificatory schemes:

> Jeremy Bentham and John Austin laid the indestructible foundations. Like the Jews in the face of their Samaritan rivals, every man must work with his tools by day, and handle his arms by night. The hosts of prejudice, superstition, and narrow interests must be over and over again assaulted and laid low. Every workman must devote contentedly a lifetime to elaborate

> his special arch or secret niche. The gods see everywhere. Even momentary fame must be sacrificed, and that ultimate approval alone valued which a few wise men will gratefully accord in each succeeding generation to the lonely architects of the most enduring and glorious of England's works.[111]

This analysis presumes that the classificatory schemes of Bentham's and Austin's predecessors were much inferior to theirs. The presumption was made explicit in an article in the *Law Magazine and Review*,[112] at least with respect to Sir William Blackstone. His great *Commentaries on the Laws of England*, first published in the 1760s, had undergone 23 editions by 1849,[113] almost a quarter of a century before the publication of the article. The author (who was anonymous) made no attempt to question Blackstone's great authority for, and influence upon, law students, practitioners, platform speakers, political pamphleteers, and laymen. Still, it was pointed out that 'another teacher has arisen, a teacher also beginning to exercise a great influence; a teacher who has left behind him a work, which, when the scientific study of the law shall have been fully developed', will be just as venerated as Blackstone's.[114] The author left no doubt that he was referring to Austin. He was, admittedly, representative of a very different segment of the English bar than Blackstone. The latter's ideas were characteristic of the vast majority of English lawyers, while Austin represented the small but ever-growing school which advocates 'a scientific teaching of law'.[115]

The author argued that the major reason for Austin's leadership of the scientific school was his arrangement of the law. One of his greatest achievements was said to be his formulation, in the clearest imaginable way, of the principles upon which that arrangement ought to be based.[116] Anyone who examines his work soon understands that he has encountered a person who had 'thoroughly mastered the principles and distinctions upon which the framers of a code of law, and consequently of legal treatises, which are codes in miniature, ought to proceed'.[117]

The writer commented extensively upon Austin's division of the *corpus juris* into the Law of Persons and the Law of Things. The meaning that Austin attributed to this distinction was held to be very different from that which it has usually received. At his hands it signifies nothing more complicated than the classification of law into general and particular. The law of things embraces 'all that can be said of rights generally; the Law of Persons treats of the differences which result to an individual of a particular class by reason of his belonging to that class'.[118] According to the writer, this was without question how the Roman jurists employed the terms *jus rerum* and *jus personarum*.[119]

Although Blackstone too had classified the *corpus juris* into the law of persons and the law of things, Austin had been highly critical of his predecessor's efforts. According to Blackstone, the most basic division of the law is into

rights and wrongs. He further classified rights into 'those which concern and are annexed to the persons of men, and are then called *jura personarum*, or the *rights of persons*; or ... such as a man may acquire over external objects, or things unconnected with his person, which are styled *jura rerum*, or the *rights of things*'.[120] The rights of persons were then subdivided into absolute and relative rights. The first belong to particular persons as individuals, independent of society, or in a state of nature. The second are the rights that individuals enjoy as members of society.[121]

Austin was highly critical of Blackstone's conception of the law of persons and things. In particular, he misapprehended its 'true import' and 'turned that elliptical and dubious language into arrant jargon'.[122] The reasons for this are varied, but the most basic consideration can be inferred from Austin's own understanding of the terms. Blackstone failed to appreciate that the *jus personarum* did *not* signify the law or rights of persons, but the law of status or condition. 'A person is here not a physical or individual person, but the *status* or condition with which he is invested.'[123] Similarly, Blackstone erroneously presumed that *jura in rem* is related in some way to things, which is false. In fact, the term signifies rights which 'avail *generally* as distinguished from those which avail only against some determinate individual'.[124]

These criticisms, as well as others advanced by Austin, are quoted extensively in the article, and in general endorsed. According to the author:

> Nothing can be more obvious in comparing Blackstone's method with Austin's criticism, than that Blackstone had scarcely any idea of the useful purpose which the division of a body of law into the Law of Things and the Law of Persons may be made to serve. In his endeavour to copy the Roman lawyers, he has fallen into errors which they would have laughed at. In his hands the division into *jus personarum* and *jus rerum* loses the greater part of its value. Its great merit consists in this, that it separates the generalia of the law from what affects only persons of a special class. Under Blackstone's treatment it loses this merit, for he mixes what is general with what is special. It rightly includes most of those rights which Blackstone calls relative; but to insert here what he calls absolute rights argues ignorance of the essence of the division; for there are no rights so general, and consequently so unfit for treatment in the Law of Persons, as those which he calls absolute.[125]

The article concluded with an assessment of both Blackstone and Austin. The author tried to give the great commentator his due. Despite the limitations of his work, it was held to be very useful for students in teaching them the law that they were required to learn.[126] Whatever his errors, Blackstone's *Commentaries* was the only treatise of its kind available for many years and he

did 'good work in his generation'.[127] The ultimate verdict on Austin's contributions was much more favourable:

> He has rendered the law students of the present generation a service for which they cannot be too thankful. He has taught them to be cautious how they follow in the beaten track of authority. He has cleared their path of many inconsistencies and absurdities which caused them needless trouble. He has introduced into the study of the law light where before there was darkness. To him, to a great extent, is to be attributed that desire for a scientific study of the law which has at last awakened, and is now so rapidly advancing. He, too, has done a great work.[128]

IV

There is also a fifth reason why numerous nineteenth-century jurists praised Austin's work as scientific. In the long run it may have proven to be the most influential reason of all. The essence of it was his 'rigid scientific exactness of ... language',[129] his meticulous attempts to determine the precise meaning of the basic terms of the law. Although his admirers used words with slightly different meanings to characterize this quality, terms such as 'precision', 'accuracy', 'exactness', and 'perspicuity' occur most frequently. T.W. Heyck has argued that the bulk of Victorian scientists believed that 'precision and clarity in method counted for everything'.[130] The same attitude pervades Austin's lectures, in each of which he attempts to be as precise, exact, and clear as possible.

The rationale of Austin's attitude

Austin's penchant for precision and clarity long antedated his appointment to the University of London. Indeed, it may have been fostered by his experience as a law student in the chambers of an equity draftsman. At least in 1817 he indicated as much in a letter, previously quoted, to his fiancée Sarah Taylor.[131] Regardless of what he wrote to his fiancée, his lectures certainly reflect his view that it 'really *is* important ... that men should think distinctly, and speak with a meaning'.[132]

Austin defended this assertion on both theoretical and practical grounds. To begin with, he argued that clarity of thought and expression is essential for the development of law as a science. Otherwise, an exposition of the principles, notions, and distinctions of general jurisprudence will be impossible, or

useless. Nothing can be accomplished without an accurate determination of the meaning of 'certain leading terms which we must necessarily employ'.[133] The terms themselves have 'numerous ambiguities' and their meaning is 'extremely complex'.[134] The distinction between written and unwritten law is an example. 'I find it much vituperated, and I find it much extolled', he wrote, 'but I scarcely find an endeavour to determine *what it is*. But if this humbler object were well investigated, most of the controversy about its merits would probably subside.'[135]

Austin claimed that what is true of general jurisprudence is also true of political conflicts, many of which he regarded as unnecessary. He argued that most of the domestic clashes that have inflamed civilized societies have not been caused, or seriously influenced, by substantive disagreements between the parties. Rather, they have been produced by the nature of the prevalent '*talk*: by ... the topics or phrases which have figured in the war of words'.[136] He insisted that these topics or phrases have been 'more than pretexts: more than varnish: more than distinguishing cockades mounted by the opposite parties'.[137] Yet, these battle cries of conflicting factions have often been extremely vague or ambiguous. Austin adduced the example of the case of resistance to established government. Both proponents and critics of it have all too frequently justified their positions by appealing to 'unmeaning abstractions' or to 'senseless fictions'. He cited as examples such phrases as 'the rights of man', 'the sacred rights of sovereignty', 'unalienable liberties', 'eternal and immutable justice', an 'original contract or covenant', and 'the principles of an inviolable constitution'.[138] As a result of their use of these senseless abstractions or fictions, none of the conflicting factions has been able to make the cool calculations required to resolve their disputes peacefully. Consequently, they lacked the ability to make the complex cost–benefit analysis required in order to assess the value of a resort to violence or peacefully to compromise their differences. Instead, the parties who employed such meaningless slogans had inevitably to 'push to their objects through thick and thin, though their objects be straws or feathers as weighed in the balance of utility. Having bandied their fustian phrases, and "bawled till their lungs be spent", they must even take to their weapons, and fight their difference out.'[139]

Defenders of Austin's approach and James Fitzjames Stephen's review of the *PJD* (1861)

A number of the commentators on Austin's work shared his high opinion of the vital importance of thinking distinctly and speaking with a meaning. For example, a reviewer of the first edition of the *PJD* vigorously denied that semantic disputes are 'mere amusements of the closet, and of trivial

practical utility'.[140] To emphasize the point he drew a parallel between the pernicious effect of the use of imprecise words and the mislabelling of chemical compounds:

> By compounding a discourse with words the import of which is imperfectly known, intellectual disasters are occasioned, similar to the physical disasters which occur from the ignorant composition from unknown or imperfectly known substances, or from a mistaken composition of them in consequence of the bottles being marked with the wrong labels.[141]

Another reviewer of the first edition of the book expressed much the same opinion. He therefore strongly praised Austin's 'perspicuity', a word that occurs twice in the review.[142] Accordingly, the reviewer argued that the *PJD* unquestionably warrants close analysis not only by students of jurisprudence, but by anyone who aspires to precise reasoning about the related sciences of morals and politics. As things now stand, unfortunately, these matters are 'clouded ... with errors and difficulties of their own, and [afford] ... unbounded license for every man to dogmatize as he will, under cover of large, fluctuating, and undefined terms'.[143]

John Stuart Mill's two reviews of Austin's books also strongly emphasized his perspicuity. In 1832 Mill characterized the *PJD* as part of 'the grammar of a science' and lauded Austin's style as 'a model of perspicuity'.[144] Consequently, the links between his various propositions are 'free from all obscurity'.[145] Readers of the book will therefore encounter no difficulties except what is inseparable from the attempt to communicate exact notions. Mill indicated that he had seldom, if ever, read a work that has quite the same tendency to develop habits of 'close and precise thinking; of using every word with a meaning, or meanings accurately settled, rigidly adhered to, and always present to the mind'.[146]

Mill reiterated this argument in his lengthy review of Austin's posthumously published lectures.[147] He did not know of any other writer who was better at 'initiating and disciplining other minds in *the difficult art of precise thought*'.[148] His success in this regard was not accidental, for in 'expression as in thought, precision is always his first object .... Next after precision, clearness in his paramount aim; clearness alike in his phraseology and in the structure of his sentences.'[149]

Of course, Mill's tremendous admiration for Austin is well-known. It is therefore significant that some of Austin's critics also praised highly his striving for exactness and clarity. John M. Lightwood (1852–1947), a distinguished conveyancer and legal scholar, may be the best example. While he was critical of Austin's 'deficiencies',[150] Lightwood acknowledged his achievements. They have the potential to illuminate not only jurisprudence, but the

other social sciences as well. According to Lightwood, Austin's striving for exactness of thought and expression can therefore 'never be too highly praised, and considering the greatness of the task he attempted and the success he achieved in solving it, the defects which are sometimes charged against his style may well be excused'.[151]

James Fitzjames Stephen (1829–1894) was the author of the most comprehensive analysis of Austin's precision, exactness, or perspicuity. Stephen had a powerful mind and became a major figure in Victorian jurisprudence. He was also 'a notable influence and contributor to the intellectual climate of mid- and late Victorian England'.[152] His father was the legendary James Fitzjames Stephen, the Permanent Under-Secretary of the Colonial Office from 1836 to 1847. He greatly admired Austin, whom he once described as a 'profound ... thinker' possessing a 'compass and variety of knowledge respecting the science of jurisprudence, and all kindred sciences, exceeding that to which any other person I have ever happened to know could justly lay claim'.[153] Indeed, it is possible that the elder Stephen may have recommended Austin's appointment as a Royal Commissioner to Malta.[154]

The younger Stephen demonstrated much the same attitude towards Austin. According to Leslie Stephen, there were few men for whom his brother 'had more respect or who deserved it more'.[155] In fact, 'respect' may be too weak a word to describe James Fitzjames Stephen's attitude towards the *PJD*. He wrote that 'as long as jurisprudence is studied, it will remain as an imperishable monument of the conscientious labour, profound thought, and extraordinary powers of mind which its author bestowed on it'.[156] Stephen also adopted some of Austin's core ideas and has been described as, in general, a 'follower' of his.[157]

Stephen developed most fully his interpretation of Austin in a lengthy review of the second edition of the *PJD* (1861) and Henry Maine's *Ancient Law*.[158] A major theme of the review was the scientific necessity of terminological 'precision'. Stephen's use of the word is indeed *the* key to understanding his praise of Austin. Stephen attributed the backwardness of the moral sciences in general to the absence of this virtue. They contrast most unfavourably in this respect with the 'proverbial accuracy' of the physical and mathematical sciences.[159] The only true moral science is political economy, an opinion that was by no means unique to Stephen. Indeed, political economy was 'generally acknowledged in mid-century [England] as by far the most "developed" of the moral sciences'.[160] The reason for its status as a paradigm was, according to Stephen, the accuracy of the political economists' definitions of basic terms. It is their affixing of precise meaning to words the signification of which was graphic, but indefinite. As examples he cited terms such as 'wages', 'profits', 'capital', 'value', and 'rent'. He indicated that they were only a few of the numerous examples that could be adduced.[161]

This conviction underlies Stephen's high praise of Austin and Bentham. According to Stephen, the overall goal of jurisprudence is to explain the nature of law and to develop legal classifications of the different actions and relationships of human beings.[162] He too lamented the slight extent to which jurisprudence in this sense has been studied in England. He attributed its backwardness, paradoxically, to the satisfaction of most Englishmen with their laws. His argument was that in many societies the study of jurisprudence is retarded 'by a good administration of justice and a good system of legislation',[163] while it is helped by a bad one. In any case, Stephen's perception of the neglect of general jurisprudence in England no doubt contributed to his enthusiasm for Bentham and Austin. Their analysis of the nature of law and their legal classifications are superior to all others. More specifically, Stephen argued that their explanation of the basic notions of jurisprudence has a precision which leaves little, if anything, to be desired.[164] He even paid Austin the ultimate compliment by saying that his 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'.[165]

Stephen particularly praised Austin's definitions, none of which is more important than his definition of a law properly so-called as a general command. Stephen defended its utility on various grounds, one of which was its clear separation of law and morality, or what law is and what it ought to be.[166] A second reason was its distinction between metaphorical laws, such as the 'laws' of progress or biology and laws in the proper meaning of the term.[167] A final reason for the value of the command conception was its implication that neither international law nor positive morality are laws properly so-called. Overall, Austin's perspicuous definitions placed jurisprudence upon a foundation 'as systematic and truly scientific as political economy'.[168] In short, they enabled it to constitute a second example of a moral science 'in the true sense of the words'.[169]

A dissenting opinion: the criticism of Walter Bagehot

Although Austin's perspicuity and precision were admired by many of his Victorian commentators, Walter Bagehot (1826–1877) was an exception to the rule. A brilliant and talented person, he made his mark in other fields than the law, most notably journalism (from 1861 to 1877 he was editor of *The Economist*).[170] Although he had been called to the bar, he apparently found the law 'intellectually cramping' and eventually regretted that 'he had ever opened a law book'.[171] He is probably best remembered today for his brilliant masterpiece, *The English Constitution* (1867),[172] which Albert V. Dicey extolled as 'so

full of brightness, originality, and wit, that few students notice how full it is also of knowledge, of wisdom and of insight'.[173] Whether Bagehot's very brief critique of Austin embodies all of the same virtues is a large question, but it is certainly both original and insightful. At least I know of nothing similar to it in the literature of the nineteenth-century critics of Austin. The criticism also raises the important question of whether exact and perspicuous language has all of the numerous advantages that Austin attributed to it.

Bagehot's critique of Austin occurred in the context of a sympathetic but not uncritical memorial essay on Sir George Cornewall Lewis (1806–1863).[174] Lewis had not only been a student of Austin's, but also a colleague of his as a Royal Commissioner to Malta from 1836 to 1838.[175] Lewis expressed the highest admiration for Austin and was heavily influenced by him.[176] For example, in his best known work, *Remarks on the Use and Abuse of Some Political Terms*,[177] Lewis acknowledged that he 'generally followed the definitions laid down by Mr. Austin in the Outline of his Lectures on General Jurisprudence'.[178] Moreover, Bagehot has argued that Lewis was 'deeply penetrated' by Austin's insistence on the necessary resemblances between all governments, laws, and political communities: 'to the last day of his life, in the unphilosophical atmosphere of the War Office, he would use the phrases of, and would like allusions to, this philosophy'.[179] Bagehot was not convinced, however, that this influence was entirely beneficial. On the one hand, he indicated that a source of Lewis's 'power as a political thinker was, that he had, under Mr. Austin's guidance, studied political questions as it were in their skeleton. Once a jurist, always a jurist.'[180] On the other hand, Bagehot claimed that Austin, and persons subject to his influence such as Lewis, had exaggerated the baneful practical results of imprecise language. Bagehot in effect argued that words are but rationalizations for the passions and interests of human-kind. From his perspective there is 'no greater mistake' than the delusion that 'if you could put human language right, you would set the world in order'. The use of inaccurate and vague language is only the symptom of a deeper, more intractable 'mental disease'. As he therefore put it:

> You cannot calm the passions of men by defining their words. Mr. Austin's school was apt to forget this. The early treatise of Sir G.C. Lewis on the *Use and Abuse of Political Terms*, and some of his later too, are not exempt from this defect, though his strong sense and really practical turn of mind always kept it in check. A person wishing to watch his intellectual history, should look carefully at this book; it is a series of exercises in Mr. Austin's class-room.[181]

Did Austin believe that if you could put human language right, you would set the world in order? If he did, was Bagehot justified in arguing that there is

no greater mistake, or at least that this belief was mistaken? Although Austin may not have gone quite as far as Bagehot contended, there is no doubt that he came quite close to it. This is evident from his discussion of the case of resistance to government and his defence of a utilitarian approach to it, which were discussed previously in this book.[182] The tremendous practical value that Austin attributed to the use of precise and perspicuous terms is also apparent from his discussion of the American War for Independence, which he regarded as 'needless' and 'disastrous'.[183] If the English people had taken a cool, utilitarian approach, they would have realized that the war was not in England's interest. Moreover, the disadvantages of insisting upon the right of the mother country to tax her colony, and to collect the tax by force of arms, far outweighed the paltry revenue to be derived from the policy. If the public had taken this utilitarian, cost–benefit approach, Austin argued, they would have condemned the policy of taxing and coercing the American colonies. In that case the government would have abandoned its efforts to impose the tax and to collect it by force. According to Austin the consequence of abandoning the policy would have been an 'intimate and lasting' alliance between the two countries.[184] The basis of his projection was his faith that 'the interests of the two nations perfectly coincide; and the open, and the covert hostilities with which they plague one another, are the offspring of a bestial antipathy begotten by their original quarrel'.[185] Unfortunately, this utilitarian approach had little appeal for the 'dull taste of the stupid and infuriate majority', or the rabble 'great and small'.[186] Instead, the conflict over American independence was dominated by discussion of terms such as rights, as if 'a *right* were worth a rush of itself, or a something to be cherished and asserted independently of the good that it may bring'.[187]

This analysis seems to me to have a number of serious limitations. For one thing, it exaggerates the extent to which human conflict is a result of vague and imprecise language rather than, say, conflicting desires or interests. To a greater degree than Austin was prepared to acknowledge, the prevalent 'talk' is, or may be, pretext or varnish. Put differently, it sometimes is a rationalization for unacknowledged goals or objectives. For another thing, Austin underestimated the degree to which the use of exact, accurate, precise, and clear terms will eliminate the resort to arms. Just as proponents of natural rights disagree on certain issues, so may utilitarians. The issues on which they may disagree include resistance to government and wars of independence. To be sure, Austin recognized this in his discussion of resistance to government.[188] Still, the same thing could be said of a utilitarian approach to the American War of Independence. The abandonment of an appeal to 'rights' and the use of a utilitarian approach might have served to clarify the differences between the two sides, but not necessarily to eliminate them, or induce peaceful compromise in resolving them. Individuals, groups, and states can

understand their adversaries perfectly, and still resort to violence in order to protect or advance their interests or to achieve their desires. Finally, there is a utopian quality to the assumption that contending parties in revolutionary situations or prospective wars will measure or resolve their differences on utilitarian scales.

To this extent, Bagehot seems to me to have been justified in criticizing Austin for exaggerating the beneficial practical effects of the use of precise, exact, and clear language. Although it is obviously worthwhile, it is not the cure-all that he sometimes maintained.

V

Overall, a number of different factors conditioned, thus, the widespread praise of Austin's contributions to the 'science' of jurisprudence. They include the novelty of his work, the abstract, universal character of his propositions, his sharp separation of law from morality, the perceived utility of his classificatory schemes, and his perspicuous and exact language. Unfortunately, the relative influence or weight of each factor is difficult, if not impossible, to measure. Also, their precise impact on nineteenth-century English jurists is very difficult to calculate. On the one hand, he contributed significantly to an awakening of interest in jurisprudence as a science. There is also little doubt that he actually influenced how some jurists went about their tasks. On the other hand, it is easy to exaggerate the extent of his influence. Pre- and non-Austinian notions of a science of law retained, or had, considerable appeal. They included a common law approach, the tenacity of which is hardly surprising, given the character of the English legal system. Nor has this study attempted in general to determine whether the various reasons cited in support of Austin's contributions to the science of law were well-founded. Instead, it has addressed the narrower question of why he was held to have made such a large contribution. Although this is hardly the end of the matter, at least it is a beginning.

Notes

1. See *infra*, Chapters 8–10.
2. See *infra*, Chapter 8.
3. *LOQR*, 40 (April 1873), 1–43.
4. *The Wellesley Index to Victorian Periodicals*, vol. 4, ed. Walter E. Houghton (Toronto: University of Toronto Press, 1987), p. 371.
5. *LOQR*, p. 1.

6. Ibid., p. 2.
7. Ibid., p. 3.
8. Ibid., p. 2.
9. Ibid., pp. 33–4.
10. Ibid., p. 39.
11. Herbert Broom, *A Selection of Legal Maxims Classified and Illustrated*, 8th American, from the 5th London edn (Philadelphia: T. & J.W. Johnson, 1882).
12. Ibid., p. viii.
13. Ibid.
14. Ibid., p. ix.
15. Ibid., p. 190.

15a. Ibid. The original quotation is from Sir William Blackstone, *Commentaries*, Book I, p. 69.

16. Ibid.
17. *LJ*, p. 1074.
18. See *LJ*, pp. 1073–4.
19. 'Preface to Fifth London Edition', in *A Selection of Legal Maxims*.
20. *LMR*, 7 (1832), p. 313.
21. *LMLR*, 11 (1861), p. 204.
22. *LMLR*, 17 (1864), p. 115.
23. *LOQR*, 110 (1861), p. 72.
24. *LMLR*, 17 (1864), p. 136.
25. Ibid.
26. Ibid., pp. 136–7.
27. *JJ*, 7 (1863), p. 515.
28. *The Law Times*, 39 (26 December, 1863), p. 93.
29. *SJR*, 7 (26 September, 1863), p. 878.
30. *LMLR*, 17 (1864), p. 115.
31. *The Law Times*, 43 (1867), p. 250.
32. *JJ*, 15 (1871), p. 231.
33. 'Austin's Comments on Blackstone's Commentaries', *LMR*, 2 (1873), p. 931.
34. Ibid.
35. 'The Present Position of Austin in English Jurisprudence', *JJ*, 28 (1884), p. 449.
36. *The Times*, 30 December, 1874, p. 7.
37. John G.W. Sykes, 'Jurisprudence: A Review', *LMR*, 4 (June, 1875), p. 604.
38. *The Science of Law* (New York: D. Appleton, 1891), p. 4.
39. See *infra*, Chapter 7.
40. Charles James Foster, *Elements of Jurisprudence* (London: Walton and Maberly, 1853), p. x.
41. Ibid.
42. Ibid.
43. Foster, *Natural Law* (London: Taylor, Walton and Maberly, 1851), p. 17.
44. *Elements of Jurisprudence*, p. x.
45. Ibid.

46. *SJR*, 4 (7 January, 1860), p. 167.
47. R.C.J. Cocks, *Sir Henry Maine: A Study in Victorian Jurisprudence* (Cambridge: Cambridge University Press, 1988), p. 14.
48. *The Concise Oxford Dictionary*, ed. Della Thompson, 9th edn (Oxford: Clarendon Press, 1995), p. 1236.
49. However, not all commentators praised the novelty or originality of Austin's work. See *SJR*, 7 (26 September, 1863), p. 878.
50. *The Times*, August 1832.
51. Ibid.
52. *JJ*, 7 (1863), p. 528.
53. T.W. Heyck, *The Transformation of Intellectual Life in Victorian England* (London: Croom Helm, 1982), p. 81.
54. *The Jurist* (1827), p. iv.
55. *Sir Henry Maine*, p. 14.
56. *The Jurist*, 3 (1832), p. 107.
57. Ibid., pp. 105.
58. *Jurisprudence*, p. 1.
59. Ibid. Foster interpreted Lerminier to be referring to the science of jurisprudence rather than the science of law. According to Foster, English law has 'a highly scientific character'. Ibid., p. 2.
60. *Papers Read Before the Juridical Society: 1855–1858* (London: V. & R. Stevens & G.S. Norton, 1858), p. 2.
61. 'The Conception of Sovereignty, and its Importance in International Law', *Papers*, p. 29.
62. *ER*, 114 (October, 1861), p. 233.
63. *SJR*, 7 (26 September, 1863), p. 864.
64. 'Inaugural Address', *Papers*, p. 5.
65. Ibid., p. 4.
66. Ibid., p. 6.
67. Ibid., p. 5.
68. *The Jurist*, 3 (1832), p. 105–22.
69. Ibid., p. 106.
70. Ibid.
71. Ibid.
72. Ibid., pp. 106–107.
73. Ibid., pp. 105–106.
74. Ibid., p. 106.
75. Ibid.
76. *WR*, 82 (October, 1864), pp. 125–32.
77. Ibid., p. 125.
78. T.W. Heyck, *The Transformation of Intellectual Life in Victorian England*, p. 63.
79. *The Jurist*, 3 (1832), p. 106.
80. Ibid., p. 107. For similar views, see 'Austin's Lectures', *LMR*, 7 (1832), p. 313; 'Austin's Jurisprudence', *LMLR*, 17 (1863), p. 125; and *WR*, 18 (1833), p. 249.

81. Edmund Smith, 'General Jurisprudence', *SJR*, 10 (1865), pp. 42–3, 142–3, 228–30, 506–507, 570–71, 880–81, 1059–60; 11 (1866), pp. 73–4, 214–15. Smith was a Bath solicitor.
82. *SJR*, 10 (1865), p. 42.
83. Ibid.
84. Ibid.
85. Ibid., pp. 42–3.
86. Ibid., p. 43.
87. Ibid.
88. *PJD*, p. 14.
89. *LJ*, p. 754, 549–50, 545–6.
90. Ibid., p. 746, 754.
91. *PJD*, p. 157.
92. Amos, *The Science of Law, International Scientific Series*, vol. 10 (New York: D. Appleton, 1891), p. 4.
93. Markby, *Elements of Law Considered with Reference to Principles of General Jurisprudence*, 6th edn (Oxford: Clarendon Press, 1905), pp. 4–5.
94. See Stephen, 'English Jurisprudence', *ER*, 114 (October, 1861), pp. 233–49; Markby, 'Analytical Jurisprudence', *LMR*, vol. I (4th series, 1876), pp. 617–30; and Maxwell, 'Austin's Jurisprudence and its Latest Critic', *LMR*, 10 (1885), pp. 167–93.
95. *The Dictionary of English History*, eds Sidney J. Low and F.S. Pulling, rev. edn (London: Cassell and Co., 1897), pp. 97–100.
96. Maxwell, *op. cit.*, p. 170.
97. Ibid.
98. Ibid., p. 180.
99. Markby, *op. cit.*, pp. 622–3.
100. 'The English School of Jurisprudence: Part I. – Austin and Maine on Sovereignty', *Fortnightly Review*, 24 (1878), p. 489.
101. Ibid., p. 481.
102. Ibid., pp. 481–2. For discussion of Holmes' views, see *infra*, p. 231.
103. See *supra*, Chapter 2, and *LJ*, pp. 686, 689.
104. *WR*, 82 (October, 1864), pp. 125–32.
105. Ibid., p. 130.
106. Ibid.
107. Ibid.
108. Ibid.
109. Ibid.
110. Ibid., p. 132.
111. Ibid.
112. 'Austin's Comments on Blackstone's Commentaries', *LMR*, 2 (1873), pp. 922–31.
113. David Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain* (Cambridge: Cambridge University Press, 1989), p. 31.
114. 'Austin's Comments', p. 922.

115. Ibid., p. 923.
116. Ibid., p. 924.
117. Ibid.
118. Ibid.
119. Ibid., p. 925.
120. Sir William Blackstone, *Commentaries*, Book I, p. 107.
121. Ibid., pp. 108–109.
122. *LJ*, p. 42.
123. Ibid., p. 363.
124. Ibid., pp. 364.
125. 'Austin's Comments', pp. 927–8.
126. Ibid., p. 931.
127. Ibid.
128. Ibid.
129. *LMLR*, 17 (1864), p. 136.
130. *The Transformation of Intellectual Life in Victorian England*, p. 63.
131. Sarah Austin, 'Preface', *LJ*, p. 4.
132. *PJD*, p. 55.
133. *LJ*, p. 1075.
134. Ibid.
135. *PJD*, p. 1076.
136. Ibid., p. 55.
137. Ibid.
138. Ibid.
139. Ibid.
140. *WR*, 18 (1832), p. 244.
141. Ibid., p. 247.
142. *The Political Examiner*, 5 August, 1832.
143. Ibid.
144. John Stuart Mill, 'Austin's Lectures on Jurisprudence', p. 54 .
145. Ibid.
146. Ibid., p. 57.
147. 'Austin on Jurisprudence', in *Essays*, pp. 167–205. The review originally appeared in the *ER*, 118 (October, 1863), pp. 439–82.
148. 'Austin on Jurisprudence', p. 167 [emphasis added].
149. Ibid., p. 203.
150. Lightwood, *The Nature of Positive Law* (London: Macmillan, 1883), p. viii.
151. Ibid., p. 2.
152. K.J.M. Smith, *James Fitzjames Stephen: Portrait of a Victorian Rationalist* (Cambridge: Cambridge University Press, 1988), p. x. Stephen's major, but far from his only, works about law may be *A General View of the Criminal Law*, 2nd edn (London: Richard Clay and Sons, 1890), and *A History of the Criminal Law of England*, 3 vols. (London: Macmillan & Co., 1883). K.J.M. Smith has quite accurately claimed that either book 'would have been sufficient to establish [him] ... a criminal jurist of some distinction'. Smith, *James Fitzjames Stephen*, p. ix.

Stephen's *Liberty, Equality, and Fraternity*, 2nd edn (London: Smith Elder & Co.,1874) may well be the most powerful critique ever written of John Stuart Mill and the liberalism of his time. While Stephen's chosen profession was the law, he was much more than a barrister, judge, and legal scholar. In addition, he was also a very productive journalist who once wrote that, 'if my body ever had a call to anything by the voices of nature, I have a call to journalism' (as quoted by Smith, *James Fitzjames Stephen*, p. 9.) Indeed, journalism was 'a continuous occupation paralleling the various phases of his legal career' (ibid.) In any case, Stephen practised law from 1855 to 1869, served from 1869 to 1872 as Legal Member of the Viceroy's Council in India, and attempted unsuccessfully in the next seven years to codify the English criminal law. He ascended to the bench in 1879 and remained as a judge on the High Court until 1891.

153. As quoted by Raymond Cocks, '"That Exalted and Noble Science of Jurisprudence": The Recruitment of Jurists with "Superior Qualifications" by the Middle Temple in the Mid-Nineteenth Century', *Journal of Legal History*, 20 (August, 1999), pp. 67–8. The quotation is from a testimonial that Stephen wrote for Austin's appointment as Reader in Jurisprudence and Civil Law at the Middle Temple. See *supra*, Chapter 2.
154. See Rumble, *Thought*, p. 248, note 15.
155. Leslie Stephen, *The Life of Sir James Fitzjames Stephen* (London: Smith, Elder, 1895), p. 172.
156. See 'English Jurisprudence', *ER*, 114 (October, 1861), p. 243.
157. Smith, *James Fitzjames Stephen*, p. 46.
158. See Stephen, 'English Jurisprudence', pp. 233–49.
159. Ibid., p. 238.
160. Stefan Collini, Donald Winch, and John Burrow, *That Noble Science of Politics: A Study in Nineteenth-Century Intellectual History* (Cambridge: Cambridge University Press, 1983), p. 249.
161. 'English Jurisprudence', p. 239.
162. Ibid., p. 234.
163. Ibid.
164. Ibid., p. 248.
165. Ibid., p. 239.
166. Ibid., p. 240.
167. Ibid., p. 239.
168. Ibid., p. 237.
169. Ibid., p. 237.
170. For an account of his life and a selection of his writings, see Norman St. John-Stevas, *Walter Bagehot: A Study of his Life and Thought together with a Selection from his Political Writings* (Bloomington, Indiana: Indiana University Press, 1959).
171. Ibid., p. 7.
172. Ibid., pp. 192–401.
173. *An Introduction to the Study of the Law of the Constitution*, Foreword by Roger E. Michener (Indianapolis: Liberty Classics, 1982), pp. cxxxvii–viii.

174. See 'The Late Sir G.C. Lewis', *National Review*, 34 (October, 1863), pp. 492–523. According to Stevas, Lewis's views were very similar to Bagehot's. *Walter Bagehot*, p. 48.
175. See Rumble, *Thought*, pp. 144–92, 246, note 1, and Hamburger and Hamburger, *Troubled Lives*, pp. 95–118.
176. See *Thought*, pp. 246–7, note 2.
177. *Remarks on the Use and Abuse of Some Political Terms, A Facsimile of the 1832 Text With Preface and Introductory Essay* by Charles Frederick Mullet (Columbia, Missouri: University of Missouri Press, 1970).
178. Ibid., p. xxii.
179. Bagehot, 'The Late Sir G.C. Lewis', p. 516.
180. Ibid.
181. Ibid., pp. 516–17.
182. See *supra*, pp. 60–62 and Chapter 4.
183. *PJD*, p. 55.
184. Ibid., p. 56.
185. Ibid.
186. Ibid.
187. Ibid., p. 57.
188. Ibid., p. 54.

7

Maine and Austin

If Austin has usually been at the periphery rather than the centre of the jurisprudential landscape of much of the twentieth century, Sir Henry Maine has been almost completely absent from the picture. Although the editor of a recent collection of essays about Maine contends that he is one of the 'seminal thinkers' of the modern age, it is acknowledged that he seems 'all but forgotten today in those fields in which he hoped to exercise the greatest influence: jurisprudence and legal history'.[1] Austin and Maine were anything but forgotten, however, in the last three or four decades of the nineteenth century. If anyone can be said to dominate the discussion of English legal theory during this span of time, it was them. Chauncey Wright, the American philosopher, had good grounds for claiming in 1875 that they had done more than anyone else to revitalize the study of English jurisprudence.[2] George Feaver has accurately stated that 'Maine's generation of lawyers and historians, from the first appearance of *Ancient Law* [1861], viewed it with much the same sort of enthusiasm as natural scientists had received Darwin's *Origin of Species*'.[3] The responses to Austin's work were frequently very enthusiastic, too, despite the numerous criticisms of it that eventually developed.[4]

At the same time, the precise relationship between Austin's and Maine's ideas is not entirely clear. The oldest interpretation holds that they were polar opposites with little, if anything, in common. Although this study will be critical of this interpretation, it is understandable and obviously has a certain basis in the facts. The existence of various and important differences between these towering figures in nineteenth-century English jurisprudence is undeniable. Also, Maine lost few opportunities to criticize the 'analytical jurists' – he helped to popularize the term – and Austin.[5] In addition, William Markby, who understood Maine's attitude toward Austin much better than most nineteenth-century commentators, had good reason for a claim that he advanced in 1876. The nub of it was that Maine's critique of Austin was, aside from John Stuart Mill's review, 'by far the most important attempt which has been made to estimate the value of Austin's labours'.[6] Finally, a strong case can be made that Maine's achievements as a jurist depended upon his perception of certain limitations of Austin's system. What G. Laurence Gomme has said about Maine's work in India (he was Law member of the Council of the Governor-General of India from 1862 to 1869) applies to much of his writing about law: 'before Sir Henry Maine went out to India

almost all those who were sent out there were under the influence of the school of John Austin; but Sir Henry Maine's work in India would have been impossible unless he had first examined into that system, and found that it was inapplicable to that country'.[7] At the very least Maine's jurisprudence tended to focus on precisely those systems to which, he claimed, Austin's theories were inapplicable.

The contrasting lives and careers of the two jurists may have reinforced the widespread impression of the profound theoretical differences between them. The list of Maine's publications, honours, positions, and achievements is dazzling. To begin with, he was a leading figure in the educational, political, and legal establishment of his day. The positions that he declined to accept are more numerous than those that Austin actually held.[8] Furthermore, Maine was 'eminently successful in at least four separate capacities – as a professor, a journalist, a jurist, and a statesman'.[9] He indeed did so well that Fitzjames Stephen commented that 'he is at the top of the tree of respectability and splendour'.[10] No one would put Austin anywhere near the top of this particular tree. If his renown as a jurist has eventually eclipsed Maine's, this was the only capacity in which he had an edge. Unlike Maine, Austin was unpopular as a lecturer, unemployed for much of his life, and relatively unproductive as a writer. He also received few honours, exerted little influence during his life, and spent most of it in a condition close to genteel poverty.

These various considerations help to explain why the literature about Austin and Maine tends to emphasize the differences between them. Unfortunately, the overall effect of this interpretation is to obscure the numerous and significant similarities in their ideas. Indeed, even their lives are not as completely different as they seem to be. A striking similarity between them is their periodic ill-health. Neither man had a strong physical constitution, which is well-known in Austin's case. Yet, Maine's health too was 'essentially delicate' and 'never robust'.[11] If his ill-health did not affect his ability to practise law to quite the same degree as Austin, it had a detrimental effect. Maine evidently practised briefly at the common law bar on the Norfolk circuit, but quickly switched to the Equity division of the profession. What has been said about his poor health applies equally well to Austin: it 'much interfered with his work, and his liability to violent and varied attacks of illness, during the years when a practice is usually built up, would ... have made anything like the work of a fully employed lawyer quite out of the question for him'.[12]

The similarities between many of Austin's and Maine's ideas are substantial and far-reaching. For example, they agreed much more with each other than either would agree with the legal philosophy, say, of Ronald Dworkin.[13] Moreover, the most fruitful disagreement may well take place among those who share enough to disagree intelligibly. At any rate the differences between Austin and Maine are best understood against the background of

their similarities. At least this argument will be supported in this chapter. Its major purpose is to develop a better understanding than now exists of the actual relationship between these two seminal figures in nineteenth-century English jurisprudence.

I

The ideas that Austin and Maine shared span the width and breadth of the field of jurisprudence. They even agreed to a significant extent – though obviously not completely – about methodology. This agreement is important not only because it indicates that the two jurists are more similar than may appear to be the case. In addition, it suggests the possibility that Maine's historical jurisprudence is to some extent an outgrowth of Austin's legal philosophy. At the very least the one helped to clear the way for the other. Finally, Maine's discussion of Austin is one reason for the high repute that the latter's jurisprudence eventually enjoyed in the nineteenth century. Although his lack of recognition during his lifetime has been exaggerated, there is no doubt that he was much better known after his death than before it. In 1887 Maine wrote of the 'great authority which in our day has been obtained by the treatise of John Austin on the province of Jurisprudence'.[14] While Maine was hardly the only person or factor responsible for this development, he contributed to it. Maine assigned the *PJD* in the prospectus for the course on Jurisprudence and Civil Law that he taught at the Inns of Court in 1853 and 1854.[15] According to one of his students, both in 'his private and public lectures Maine constantly urged upon his hearers the importance of Austin's analytical inquiries into the meaning of law. He used to say that it was Austin's inquiries which had made a philosophy of law possible.'[16] In his subsequent lectures at Oxford – and the books based upon them – his discussions of Austin publicized his work.[17] No one who heard the lectures or read the books could doubt that he was a figure with which any serious student of jurisprudence had to reckon. In short, William Markby had good reason to say that it was 'well known to all those who studied law under Maine [as Markby had done in the 1850s] that he was from the first a warm admirer of Austin, and that it was largely due to his teaching that Austin acquired that wide and deep influence over English jurisprudence which up to that time he had not enjoyed'.[18] Carleton Kemp Allen made a similar point when he claimed that Maine 'did more than any other man to commend to English lawyers the real merits of Austin's efforts after legal analysis . . . both by his writings and by his lectures to the Inns of Court . . . [he] rescued [Austin] from oblivion'.[19]

Maine's conviction of Austin's 'real merits' is apparent from his many tributes to his predecessor. He lauded Austin's sagacity and originality[20] and

acknowledged to the utmost the value of *The Province of Jurisprudence Determined*.[21] Maine also expressed appreciation for Austin's role in the development of a new philosophy of law, which is what English lawyers most require aside from a new history of law.[22] Maine praised the work of Austin and 'the analytical jurists' on several grounds, one of which is in effect its therapeutic value for students of jurisprudence. He claimed that the conclusions of Bentham and Austin are indispensable for the purpose of 'clearing the head',[23] argued that their conception of law and society had removed a larger mass of 'undoubted delusion'[24] than any other, and insisted that mastery of it is a requirement of clear thinking about law or jurisprudence.[25] In addition to this, Maine expressed great admiration for the terminology of the analytical jurists. Indeed, he once maintained that the development of it represented their most valuable contribution to jurisprudence and morals.[26] Finally, Maine paid Austin the high compliment of appealing to him as an authority in the course of arguing before the Council of the Governor General of India. In his capacity as Law Member of the Council Maine developed finely honed legal opinions on a wide variety of subjects.[27] They included the question of the proper classification, in the codes, of the specific performance of contracts. The Indian Commissioners had cited Austin in order to support their classification of the right. Maine disagreed, however, with their use of 'an authority to whom all who have bestowed the least thought on this class of inquiries will bow'.[28] Indeed, Maine went so far as to say that Austin was 'the only writer on jurisprudence whose opinions outweigh Bentham's in the few instances in which they differ'.[29]

These considerations help to explain why Maine wrote in 1875 – while he was Corpus Professor of Jurisprudence at Oxford – that Austin's lectures on jurisprudence 'must always, or for a long time to come, be the mainstay of the studies prosecuted in this Department'.[30] Maine could never have uttered these words unless he agreed with many of Austin's ideas. To begin with, they shared the goal of making the study of law more scientific. Indeed, it was Maine's belief that Austin's object was 'strictly scientific'.[31] In this respect he differed from Hobbes, whose aim was more political than scientific.[32] Moreover, Austin and Maine agreed about many of the steps necessary to achieve their common goal of a science of law. The most basic of their shared methodological postulates may be their empiricism. Of course, we have seen that Austin's commitment to this epistemology was qualified and imperfect, if not contradictory.[33] Nevertheless, a very favourable attitude towards empiricism underlies much of his work.

Maine's commitment to empiricism is even more pronounced than Austin's. At the outset, Maine was highly critical of empirically unverifiable theories. The best evidence of this is his strong reaction against the conceptions of a law and state of nature. He represented them, rather than either

utilitarianism or analytical jurisprudence, to be the 'great antagonist' of the historical method.[34] The theory of the state of nature either originated, or stimulated, such serious intellectual vices as 'disdain of positive law, impatience of experience, and the preference of *a priori* to all other reasoning'.[35] Three years prior to his death in 1888 he summarized the approach that he applied in his first and most famous book in these terms:

> Many years ago [1861] I made the attempt, in a work on *Ancient Law*, to apply the so-called Historical Method of inquiry to the private laws and institutions of Mankind. But, at the outset of this undertaking, I found the path obstructed by a number of *a priori* theories which, in all minds but a few, satisfied curiosity as to the Past and paralyzed speculation as to the Future. They had for their basis the hypothesis of a Law and State of Nature antecedent to all positive institutions, and a hypothetical system of Rights and Duties appropriate to the natural condition.[36]

Aside from this, Maine explicitly praised Bentham and Austin for their pioneering attempts to develop a scientific jurisprudence based upon 'the observation, comparison, and analysis of the various legal conceptions'.[37]

Moreover, both Austin and Maine emphasized the imperative need to distinguish between the law that is and the law that ought to be. Maine was, in this respect, no less of a legal positivist than Austin. Of course, he is famous – or infamous – for his denunciations of what he perceived to be the widespread practice of confusing what is and what ought to be law or morality.[38] While Maine did not highlight the necessity to eliminate this confusion nearly as much as Austin, he fully agreed with it. He too was critical of the confounding of what is and what ought to be,[39] argued that 'the jurist, properly so called, has nothing to do with any ideal standard of law or morals',[40] and stressed that the scientific historian is not concerned with the goodness or badness of any specific institution. Rather, he deals with its existence and evolution rather than its utility.[41]

Paradoxically, this bond between Austin and Maine was strongly conditioned by their shared political values. This is evident not only from their disapproval of the allegedly anarchical consequences of a confusion of positive and ideal law, but the intensity with which they denounced it. Moreover, both men expressed their opinions in their *legal*, as contrasted with their *political*, books or writings. The point is *not* that they criticized anarchy, which might be expected from the authors of *A Plea for the Constitution*[42] and *Popular Government*.[43] It is, rather, that their strong feelings about anarchy appear to have influenced their opposition to the confusion of law and morality. In other words, it had an impact on their *legal*, as well as their *political*, philosophies.

The extent to which a fear of anarchy influenced Austin's legal philosophy is most apparent from his harsh criticism of Sir William Blackstone's natural law

position.[44] A similar attitude underlies Maine's strong criticisms of the modern conception of a law and state of nature, which he criticized even more harshly than Austin. The depth of Maine's feelings on the subject is clearly indicated by his condemnation of Jean Jacques Rousseau. Sir Paul Vinogradoff had reason to assert that this 'highly polished and fair-minded writer waxes almost savage in his diatribe against Rousseau'.[45] While Maine acknowledged Rousseau's potent imagination and intense love for mankind, he was alleged to be an unlearned person with 'few virtues, and no strength of character'.[46] Maine even argued that Rousseau's ideas bore at least partial responsibility for the evils of the French Revolution. In particular, the theory of a state of nature to which he gave classic expression had this effect. It either caused or stimulated 'the vices of mental habit all but universal at the time, disdain of positive law, impatience of experience, and the preference of *a priori* to all other reasoning'. In addition, the impact of Rosseau's philosophy on less thoughtful and experienced minds is 'distinctly anarchical'.[47]

Moreover, it is not always clear in Maine's writings when historical description ends and political prescription begins. At the very least his historical pronouncements often provide support for the public policies that he favoured. The best example of this tendency may be his most famous generalization – if that is what it is – that 'the movement of the progressive societies has hitherto been a movement *from Status to Contract*'.[48] This utterance represents what the author of the leading biography of Maine has called the basic concept of his account of legal history and 'the manifesto of his life work'.[49] On the surface it appears to be a brilliant epigrammatic description of the pattern of change in progressive societies. Maine was also careful to specify that he was describing what this pattern had 'hitherto' been. This qualification leaves open the possibility that 'hereafter' the movement of progressive societies will be different. Nevertheless, the generalization seems to imply that any limitation upon freedom of contract is retrogressive. At the least it shifts the burden of proof upon advocates of limitations and, to this extent, impedes their imposition. Of course, Maine himself was a staunch proponent of freedom of contract[50] and assailed many of the recent limitations on it. He also lauded the protections for the principle in the American Constitution. He even argued that none of its provisions was more important than the clause prohibiting the states from impairing the obligation of contracts.[51] He therefore extolled it as 'the bulwark of American individualism against democratic impatience and Socialist fantasy'.[52]

The close relationship between some of Maine's historical generalizations and preferred public policies is also evident from a revealing paragraph in *Village-Communities*. He began by denying that it is the function of the scientific historian to appraise a particular institution as good or bad. His or her concern is with its existence and growth rather than its expediency.[53] Despite this

injunction, Maine immediately deviated from it by arguing that private property has been, and is, indispensable for the progress of civilization. No one may attack it and 'say at the same time that he values civilization. The history of the two cannot be disentangled.'[54]

Neither Austin nor Maine[55] always practised, thus, the positivist ideal that both professed. Indeed, it is the opinion of Raymond Cocks that all of Maine's work is 'set within a critical framework concerned with the best methods for obtaining legal reforms'.[56] The agreement of Austin and Maine on methodology also included the attachment of a very high priority to terminological clarity. Austin's commitment to this goal is apparent from every page of his lectures, as we have seen. Although Maine did not stress the value of perspicuity as much as Austin, he was strongly committed to it. This is evident from his concern for it in his own writings. It is also clear from his Austin-like observation that 'in abstract or moral questions which appear hopelessly insoluble, a great part of the difficulty usually arises from persons confidently employing words without having quite ascertained their meaning, and their true relation and correspondence with things'.[57] Moreover, he harshly criticized the slight attention given in England to the study of legal and legislative expressions. He argued that the bad effects of this indifference have become 'patent and flagrant'.[58] Although he was not a visionary, he pleaded for more definiteness, distinctness, and consistency in legal language. He even went so far as to say – in words that Austin would have applauded – that legal terminology should become a distinct field of legal education, the improvement of which might be carried on almost *ad infinitum*.[59]

It would be most unusual if jurists who accepted these methodological postulates did not agree on at least some substantive matters. In fact, the agreement of Austin and Maine on such issues was substantial. It included their Malthusian diagnosis of social and economic problems;[60] similar perceptions of the use of fictions to conceal the reality and necessity of judicial legislation in common law systems;[61] a shared opinion of the bar as the most powerful restraint on the exercise of judicial discretion;[62] a belief in the tremendous importance of Roman law, which Maine took 'as a typical system'[63] and knowledge of which he regarded as 'indispensable, if the study of historical and philosophical jurisprudence is to be carried very far in England;[64] and an emphasis upon the desirability of codification.[65] Austin's staunch, if quite balanced, support of the latter is well-known.[66] Maine's advocacy of codification is not as well-known, but it is just as enthusiastic. For example, he praised it as 'one of the highest and worthiest objects of human endeavour'.[67] A major reason for his attitude was his Austinian conviction of the 'undoubted faults' of English law, including its lack of 'simplicity, symmetry, intelligibility, and logical coherence'.[68] His admiration for the Indian codes indicate what he felt could be accomplished (he was not only Law Member of the Council of

the Governor-General of India, but served on the Council of the Secretary of State for India from 1870 until his death).[69] He took the position in 1887 that British India is 'now in possession of a set of codes which approach the highest standard of excellence which this species of legislation has reached . . . in form, intelligibility, and in comprehensiveness the Indian codes stand against all competition'.[70] Consequently, he praised India as one of the few countries 'in which a man of moderate intelligence, who can read, may learn on any point emerging in practical life what is the law which should regulate his conduct'.[71] Whether the Indian codes actually merited these words of praise is another matter, but they reflect a very Austinian reason for the desirability of codification.

What is more, Maine fully endorsed Austin's conceptions of positive law and sovereignty for at least progressive Western legal systems. Indeed, an early paper of Maine's expressed *no* qualifications to his agreement with Austin.[72] In particular, his conception of a positive law and sovereignty was quite uncritically endorsed by Maine.[73] He also employed them in his paper. As he wrote, 'I can only venture at present to illustrate shortly the value of the cardinal terms which have been used in defining "sovereignty", and I do so at the risk of stating much which Mr. Austin's language has already suggested.'[74] Moreover, his conceptions of law and sovereignty were in effect lauded as the last word on these intricate subjects. Maine not only argued that 'the ultimate analysis of every positive law inevitably resolves it into a command of a particular nature, addressed by political superiors, or *sovereigns*, to political inferiors, or *subjects*'. In addition, he emphasized that there is no 'theory of the standard of law, or of law in its relation to moral philosophy or moral theology, to which this definition, if properly understood, refuses to lend and adjust itself'.[75] Although he acknowledged that it would be hazardous to conclude that Austin's theory of sovereignty was exhaustive, he praised it as 'the only exposition of the ingredients of sovereignty which is not plainly defective in some parts of the definition'.[76]

No one could predict, on the basis of this paper, that Maine would subsequently become Austin's leading nineteenth-century critic. Although Maine subsequently qualified his agreement with Austin's conceptions of a positive law and sovereignty, he maintained throughout his life that at the least they had a very large amount of validity for developed societies. While

> the Analytical Jurists failed to see a great deal which can only be explained by the help of history, they saw a great deal which even in our day [1874] is imperfectly seen by those who . . . let themselves drift with history. Sovereignty and Law, regarded as facts, had only gradually assumed a shape in which they answered to the conception of them formed by Hobbes, Bentham, and Austin, but the correspondence really did exist by their time,

> and was tending constantly to become more perfect. They were thus able to frame a juridical terminology which had for one virtue that it was rigidly consistent with itself, and for another that, if it did not completely express facts, the qualifications of its accuracy were never serious enough to deprive it of value and tended moreover to become less and less important as time went on.[77]

Indeed Maine occasionally expressed his agreement with Austin's conception of law in even more unqualified terms than these. For example, in *Ancient Law* he claimed that it corresponds perfectly to the realities of mature jurisprudence.[78]

This judgement suggests another very important respect in which Maine agreed with Austin. The short of it is his acceptance of force as a constituent element of law. In fact, Maine was at least as tough-minded, as positivistic, as brutal, if you will, as his predecessor in this regard. To begin with, he argued that all laws depend upon 'the efficacy of the penalty which they threaten in the event of disobedience'.[79] To be sure, Maine acknowledged that the force which underlies modern law may be relatively inconspicuous.[80] He cautioned, however, against inferring its disappearance from its relatively low visibility. The reason for his caution was his conviction that force is as much of a reality in the modern world as in ancient Rome. He therefore sympathized with

> [t]he great difficulty of the modern Analytical Jurists, Bentham and Austin, [which] has been to recover from its hiding-place the force which gives its sanction to law. They had to show that it had not disappeared and could not disappear; but that it was only latent because it had been transformed into law-abiding habit. Even now their assertion, that it is everywhere present where there are Courts of Justice administering law, has to many the idea of a paradox – which it loses . . . when their analysis is aided by history.[81]

In other words, historical jurisprudence can help to validate a central tenet of the 'modern Analytical Jurists'.

Maine's analysis of international law provides an important, perhaps surprising, example of the extent to which he agreed with Austin. He had insisted that the law of nations is law improperly so-called.[82] Although Maine did not use this terminology, he fully accepted the substance of Austin's analysis. This is apparent from his claim that all international law has the 'weakness', at least in modern eyes, that breach of its rules is not subject to direct sanctions or punishment. This kind of law 'cannot command the assistance of force'.[83] Its absence is 'a most lamentable disadvantage. The system owes to it every sort of infirmity. Its efficiency and its improvement are alike hindered.'[84]

II

This analysis demonstrates that the similarities between Austin and Maine are striking, numerous, and important. It is clear that Maine agreed fully, or to a significant extent, with some of the basic principles of Austin's legal philosophy. To this extent, Frederick Pollock (of all people) was correct to say that Maine regarded Bentham and Austin, with important qualifications, as his 'masters'.[85] Still, to say this is not in any way to deny the significance of the various differences between them, or of Maine's criticisms of Austin. An appreciation of their divergent positions is indeed vital for understanding Maine's distinctive contribution to English jurisprudence. It is also imperative for comprehending that his approach is in certain respects an outgrowth of premises that he shared with Austin.

The most obvious differences between Austin and Maine do not lie in the area of substantive doctrine. Rather, they are to be found in their contrasting styles, purposes, approaches, and foci. Their literary styles could hardly be more different. Chauncey Wright may have understated the truth when he wrote that Austin's 'stiff, laborious sentences, in which nothing is ever sacrificed to grace or sound, and everything is sacrificed to clearness and precision, have repelled many promising students'.[86] The same may be said of the repetitiveness of his lectures, which were published pretty much as they were delivered. The contrast with Maine's works is stark. The reviewers of the first edition – 1861 – of *Ancient Law* were quick to point out the difference. They argued that the book was more likely to attract than to repel readers and was anything but dull. Indeed one reviewer commented that, though law books are supposed to have a 'prescriptive right to dullness', Maine's work 'when once taken up ... is almost impossible to lay ... down'.[87] A major reason for its readability was the beauty and frequent brilliance of its style.[88] 'Mr. Maine evidently does not write for lawyers only', a reviewer wrote, and few would disagree. His elegant style, precise language, and 'apparent simplicity' were highly praised, as was his 'command of a fund of metaphor'. Yet, the reviewer cautioned that the reader should not be tempted by the charm of Maine's style to downgrade his scholarship. '[E]ven the most flowing and brilliant passages are in many cases charged with much condensed thought and research.'[89] Moreover, Maine may have very consciously attempted to avoid the pitfalls of Austin's style in order to broaden the public appeal of his work. At least Raymond Cocks has convincingly argued that Maine's style of writing was, to a significant extent, 'a reaction against the work of Austin'.[90] In particular, it was a reaction against his 'obsession ... with very precise expression and shades of meaning result[ing] in long chapters which are very difficult to read'.[91]

Moreover, we have seen that Austin's legal philosophy has an irreducible *a priori* dimension to it.[92] It is a dimension that Maine, unlike John Stuart Mill, perceptively recognized and criticized. In particular, Maine was critical of what he regarded as Austin's occasional *a priori* deviations from his allegedly empiricist core. Although Maine regarded Austin's approach as in general more scientific than Hobbes's, he agreed with the latter's concern with the origin of government and sovereignty. In contrast, Austin 'barely enters on this inquiry; and indeed he occasionally, though perhaps inadvertently, uses language which almost seems to imply that Sovereignty and the conceptions dependent on it have an *a priori* existence'.[93] Maine also expressed the opinion that both Bentham and Austin at times erroneously assumed that legal conceptions are not only very stable, which is true, but 'absolutely permanent and indestructible', which is false. At least Maine argued that both of the utilitarians 'sometimes write as if they thought that, although obscured by false theory, false logic, and false statement, there is somewhere, behind all the delusions which they expose, a framework of permanent legal conceptions which is discoverable by an eye looking through a dry light, and to which a rational code may always be fitted'.[94]

In addition, the focus of Maine's lectures was very different from Austin's. Unlike his predecessor, the questions that Maine asked were much more historical and comparative than conceptual. If he had a dominant objective, it was to explain the relationship between ancient and modern law, to connect 'past and present'. His account of the major purpose of his first and greatest book – *Ancient Law* – is applicable to virtually all of his work. He described his goal as being to explain some of the earliest ideas of humankind embodied in ancient law and to relate them to modern thought.[95] He elaborated upon his approach in a revealing letter to the American anthropologist Louis H. Morgan:

> I began as a Professor of Jurisprudence and should very probably have never interested myself in primitive usage, if I had not been profoundly discontented with the modes of explaining legal rules which were in fashion when I began to write. I am still apt to limit my enquiries to ancient institutions which I can more or less distinctly connect with modern ideas and ways of thought.[96]

A brief comparison of the first lecture of *The Province of Jurisprudence Determined* and the first and second chapters of *Ancient Law* vividly illustrates the contrasting approaches of the two jurists. The bulk of Austin's lecture[97] is an explanation of his definition of a law or rule in the largest sense that can properly be given the term. The explanation proceeds by way of the very careful and acute conceptual analysis for which he is justly famous. It involves very

little, if any, reference to the earliest notions of humankind. Maine's approach could hardly be more different. The first chapter of *his* book[98] consists largely of an account of the historical eras characterizing the evolution of primitive societies, which were either stationary or progressive. Although Maine was concerned solely with the latter, he felt that they were extremely rare and only a tiny proportion of all societies. He pointed out, too, that in the progressive societies social needs and opinions are always more or less in advance of law. He maintained that the happiness of the people depends on the size of this gulf and how promptly it is narrowed. Most of the second chapter of the book[99] is an explanation of the three instrumentalities by means of which law catches up with social changes – legal fictions, equity, and legislation.

Maine thus wrote at great length about what today might be called less advanced societies. In other words, he analysed in depth the very societies which Austin excluded from the purview of general jurisprudence. Of course, Maine's desire to relate the ideas of these societies to modern thought meant that he did not focus exclusively upon them. Indeed, one of his greatest strengths was his rare ability to relate ancient and modern notions. Still, he paid at least a thousand times more attention to ancient law than John Austin. In this respect – though not necessarily in others – to turn from the *PJD* to almost any of Maine's books is quite literally to enter a different world.

It is difficult to explain the exact date of, or the underlying reason for, Maine's utilization of his historical approach. The crucial question is one that the literature about Maine has not really addressed: what explains the transformation of his attitude towards Austin and the historical approach in the period *from 1856 to 1861*? In 1855 Maine could not have been more laudatory in his remarks about Austin's conception of sovereignty. By 1861, the date of the publication of *Ancient Law*, he and 'the analytical jurists' were being criticized for their neglect of history. Since the book must have been written prior to 1861, the period of time in which Maine's position changed is even less than six years. Unfortunately, a cloud of mystery hovers about *why*, or exactly *when*, Maine began to entertain different opinions about Austin than he expressed in 1855.

Even so, it is possible to identify some of the factors that might possibly have conditioned Maine's adoption of a different approach to jurisprudence than Austin. There is to begin with the very different intellectual climate of opinion to which Maine was exposed. Scholars such as William Stubbs in history, E.B. Tylor in anthropology, Andrew Lang in mythology, and Max Muller in comparative mythology introduced a 'new vitality and inventiveness to historical studies'. In particular, George Feaver has argued, they 'propagated the leading theme of social investigation in the post-Darwinian decade, that, in order to understand society as it is, we must examine it as it was'.[100]

Of course, Maine had developed his historical approach more than a decade prior to his assumption in 1871 of a chair at Oxford. The more specific factors that may have conditioned his utilization of it are varied, and their precise weight is probably impossible to assess, but some of them can be identified. One was the German school of historical jurisprudence and its leader Friedrich Carl von Savigny, in whose 'mighty and still present shadow' Maine began his work.[101] While the precise extent to which Savigny actually influenced Maine is unclear, he praised the German jurist as 'great'[102] and a 'genius'[103]. A second factor was Maine's keen sensitivity to the evolution and modification over time of legal rules, doctrines, and institutions, or the reasons behind them. A third influence was the burgeoning interest in unobservable states of affairs that characterized the climate of advanced scientific opinion in Victorian England.[104] This concern is evident from the emergence in the first half of the nineteenth century of such sciences as geology, paleontology, evolutionary biology, comparative philology and prehistoric archeology.[105] A fourth and related factor was the perception that study of ancient societies was required by a fundamental canon of scientific method. The essence of it is to begin with the simplest rather than the most complex phenomena.[106] The rationale of this opinion is evident from Maine's famous statement that the early types of legal conceptions are 'to the jurist what the primary crusts of the earth are to the geologist. They contain, potentially, all the forms in which law has subsequently exhibited itself.'[107] Indeed he even suggested that earlier societies contain 'the germs out of which assuredly has been unfolded *every form of moral restraint which controls our actions and shapes our conduct at the present moment*'.[108]

The extent to which this assumption had percolated among jurists is indicated by the reviews of *Ancient Law*. One reviewer expressed it particularly well: 'All theories of society or history must, *it is a well-known axiom* [emphasis added], before all things start with a sound conception of the earliest phases; to ignore or misconceive these is fatal to the whole subsequent reasoning . . . So it is with the jurist. He too must base his science on the simplest legal forms.'[109] Moreover, Maine's work was sometimes praised as 'scientific' because he did precisely this. For example, another reviewer wrote that his tendency to begin with ancient law 'only follows the example of scientific men in other departments, as for instance in that of philology, where the most effectual mode had been to start from the most ancient language, and to trace from that the evolution of other languages'.[110]

A final consideration may also have influenced Maine's commitment to the study of ancient law. It is his belief that this focus is essential for realizing the promise of the empirical and scientific approach which he so deeply admired. His admiration for it underlies, along with a fear of anarchy, the opposition to *a priori* theories which is such a conspicuous feature of his work.

As Paul Vinogradoff put it, Maine 'conceived his whole literary career as a constant struggle against pure abstractions and *a priori* assumptions'.[111] Or, in the more colourful language of Carleton Kemp Allen, Maine 'never relaxed his protest against that unscientific, uncritical, and very prevalent habit of thought which has been called, barbarously but succinctly, "a-priorism" '.[112]

Maine's dissatisfaction with 'a-priorism' strongly conditioned his attitude towards the 'analytical jurists', though not in the way that might be expected. Instead of leading Maine to *criticize* them, it induced him to *praise* their work. He lauded Bentham and 'in a higher degree ... Austin ... *for the only existing attempt* [emphasis added] to construct a system of jurisprudence by strict scientific process and to found it, not on *a priori* assumption, but on the observation, comparison, and analysis of the various legal conceptions'.[113] Yet, Maine obviously believed that this attempt was not entirely successful. He indeed complained, as we have seen, that Austin occasionally uses language that seems to imply that sovereignty and the notions dependent on it exist *a priori*.[114] Maine may well have concluded that his new approach was essential for realizing the unfulfilled promise of the 'strict scientific process' initiated by Bentham and Austin. If it is to reach its very great potential, the *a priori* elements of Austin's work must be sloughed off. While Maine never expressed himself in exactly these terms, two very important passages from *Ancient Law* virtually say as much. In one of them he attributed the 'unsatisfactory condition' of the science of jurisprudence to the failure to examine carefully 'the early forms of jural conceptions'. Juristic inquiries 'are in truth prosecuted much as inquiry in physics and physiology was prosecuted before observation had taken the place of assumption'.[115] Elsewhere Maine lamented the widespread dissatisfaction with current theories of jurisprudence. He attributed it to the belief that they 'do not really solve the questions they pretend to dispose of, as to justify the suspicion that some line of inquiry, *necessary to a perfect result* [emphasis added], has been incompletely followed or altogether omitted by their authors'. Maine explained this failure on the ground that these 'speculations' take 'no account of what law has actually been at epochs remote from the particular period at which they made their appearance'.[116]

Maine's empirical orientation explains his conviction of the profound significance of this omission. It also strongly conditioned what he regarded as the most important question to be asked about Austin and the analytical jurists: to what extent do the facts support their theories? A comparison that Maine drew between Hobbes and Austin illustrates the importance that he attached to this question. Although Hobbes's speculations about the origin of society and government were without value and subject to countless objections, he at least asked the right question. Maine cited sovereignty as an example: 'The duty of enquiring, if not how ... [it] arose, at all events through what stages it has passed, is ... indispensable. It is only thus that we can assure

ourselves in what degree the results of the Austinian analysis tally with facts.'[117] Indeed, Maine even went so far as to claim that 'there is, in truth, *nothing more important to the student of jurisprudence* [emphasis added] than that he should carefully consider how far the observed facts of human nature and society bear out the assertions which are made or seem to be made about Sovereignty by the Analytical Jurists'.[118]

Maine's answer to this pivotal question was unambiguous and constitutes his most basic criticism of Austin. Despite the substantial merits of the latter's analysis, it does not tally with all of the facts. In particular, his conceptions of a positive law and sovereignty do not fit the facts of a large number of ancient societies. Maine reiterated at every opportunity that nothing in them corresponds to these conceptions, or many of Austin's related ideas, a fact that explains *why* his indifference to the history of law was so significant. If he and Bentham had paid more attention to ancient law and the development of legal systems, Maine argued, they would not have had the dogmatic and mistaken 'impression that the world had always been more or less as they saw it'.[119] While Maine fully acknowledged the stability of legal conceptions, he did not believe that they were eternal and indestructible. Even jurisprudence cannot escape the 'great law of evolution'.[120] He found evidence of anti-evolutionary thinking in both shallow minds as well as forceful and lucid intellects such as Bentham's and Austin's. At least they sometimes write, he charged, as if they believed that a framework of permanent legal conceptions underlies all law.[121]

Maine's studies of ancient law convinced him that there were very few, if any, of these conceptions. Almost all of his books radiate the theme that the legal world had not always been as it is now, or as Bentham and Austin saw it. Indeed, Maine claimed that the more we penetrate into the history of ancient thought, the less likely are we to discover a conception of law that in any way resembles Bentham's and Austin's.[122] Maine even argued that analytical jurisprudence was *inconceivable* prior to the transformation – if it occurred – of the ancient communities.[123] He stressed that the analytical jurists would never have produced their doctrines without observing the activities of legislatures, the energy of which is the 'capital fact in the mechanism of modern States'.[124] Their ideas have no value, at any rate, for the study of the stationary societies in which this development has not taken place.[125]

Maine thus distinguished between two Weberian-like ideal types of 'organized political society',[126] which he sometimes labelled as the 'stationary' and the 'progressive'. His point was that the kind of law that exists in the two societies is radically different. In the more ancient type there is nothing that corresponds to an Austinian positive law or sovereign. The overwhelming bulk of the population derive their 'rules of life' from the customs of their local village or city. Although they may well obey the mandates of an absolute ruler, his dictates are infrequent, and he never legislates in the Austinian sense. All of

his commands, which Maine interpreted as demands for taxes, are 'occasional' rather than 'general'. The second type of organized political society is marked by the ever more frequent legislation of a sovereign, 'while local custom and idea are ever hastening to decay'.[127] Maine traced the origin of this kind of largely Western society to the direct or indirect influence of the Roman Empire, which he sharply distinguished from 'Oriental despotisms', ancient and modern, or even the Athenian empire. His view was that the latter were tax-taking empires that did not interfere with local customs. In contrast, the Roman Empire was also a virtually unparalleled legislating machine that 'crushed out local customs, and substituted for them institutions of its own'.[128] To the extent that the modern European states were influenced by the Roman Empire – and for Maine its impact was large – their origin differed 'from the great empires of antiquity (save one) [the Roman] and from the modern empires and kingdoms of the East'.[129] Yet, Austin and the analytical jurists focused their attention exclusively on the Roman Empire and the states originating from it. As a result, Maine argued, they completely ignored the older type of organized political society, to which their ideas are inapplicable and have no value.[130]

Maine cited a wide variety of evidence to substantiate this criticism. His comments in *Ancient Law* about the distinction between the law of persons and the law of things is a particularly good example. It is the most basic classification of the law drawn by Austin and one to which he attached tremendous importance. Yet, Maine argued that the distinction 'has no meaning in the infancy of law, that the rules belonging to the two departments are inextricably mingled together, and that the distinctions of the later jurists are appropriate only to the later jurisprudence'.[131] Although Maine did not mention Austin in this context, he certainly was one of the 'later jurists' who strongly emphasized the distinction between the *jus personarum* and the *jus rerum*.

Maine also adduced, in *Ancient Law*, numerous examples from the different stages of the evolution of Greek and Roman law. His analysis of the epoch of heroic kings illustrates the conclusions that he reached. This era knew nothing of the enactment of positive laws in the Austinian sense. The kings did not issue *general* commands prescribing or forbidding a *course of conduct*. Rather, they decided cases in accordance with the prevalent mythology of 'a divine influence underlying and supporting every relation of life, every social institution'.[132] In other words, decisions were reached on the basis of divine inspiration and these *Themistes* or dooms were unconnected by any 'thread of principle'.[133] The only 'law' that existed in this period of ancient man consisted, thus, of the occasional or particular commands which Austin explicitly refused to classify as law 'properly so-called'.[134]

In his *Lectures on the Early History of Institutions* Maine cast a somewhat wider net. It embraced the Assyrian, Babylonian, Median, Persian, and, even, the

Athenian empires.[135] He described them as largely 'tax-taking empires' which interfered but little with the everyday lives of their subjects. Their rulers did not legislate but issued what Austin would call a 'particular command', a 'sudden, spasmodic, and temporary interference with ancient multifarious usage left in general undisturbed'.[136] According to Maine the difficulty of applying Austin's terminology to these 'great governments' is 'obvious enough'.[137]

Maine relied more heavily upon Indian examples. He found little in India that resembled the Austinian conception of a positive law. Although he did not specifically accuse Austin of the prejudice that Indian affairs are of less interest than those of Western European states, he no doubt felt that his great predecessor was guilty of it. Maine insisted that Indian phenomena are 'as equally natural, equally respectable, equally interesting, equally worthy of scientific observation, with those of Western Europe'.[138] Indeed, he argued that knowledge of India, like knowledge of Roman law, is essential, if the study of historical and philosophical jurisprudence is to progress very far in England. Such is the case because India is 'the great repository of verifiable phenomena of ancient usage and ancient juridical thought'.[139] Much of the data is very difficult, if not impossible, to reconcile with Austin's notions.[140] Maine particularly stressed the inapplicability of Austin's conception of law to certain Indian village communities 'without the most violent forcing of language'.[141] Although it fits reasonably well some of these communities, it is definitely inapplicable to a large number of others.

Numerous factors explain this limitation of Austin's legal philosophy. The fundamental consideration is the rule of the villages by customary rather than positive law in Austin's sense of the term. In particular, there is definitely no person or body of persons issuing *general* commands habitually obeyed by the bulk of the society. As proof Maine cited the case of Runjeet Singh, the despotic ruler of the province of the Punjab. His regime was held to be of great importance for a number of reasons. For one thing Maine regarded it as representative of Oriental communities in their original condition, at least during their uncommon periods of peace and order.[142] For another thing the kind of political society that Maine characterized as Indian or Oriental was for him much more typical of the previous state of most of the world than the contemporary social institutions of Western Europe.[143] At first glance, to be sure, Runjeet Singh seemed to be the perfect embodiment, the very model, of an Austinian sovereign. His powers were completely despotic, his rule was an exemplar of order, and instant death was the consequence of the slightest disobedience to his commands. Even so, Maine doubted whether Runjeet Singh ever legislated or issued a command that satisfied Austin's requirements for a law proper.[144]

Maine discussed two possible ways of reconciling Austin's principles with the legal systems of the village communities, both of which he rejected, or

appeared to reject. One was by resort to the 'great maxim' for disposing of objections to the Austinian system, that 'What the Sovereign permits, he commands'.[145] This principle enabled the rulings of the village councils to be construed as the tacit commands of Runjeet Singh: 'The Sikh despot permitted heads of households and village-elders to prescribe rules, therefore these rules were his commands and true laws.'[146] If that were the case, then the Indian villages would provide examples of positive law in Austin's sense.

For example, this was the type of reasoning that Austin used to reconcile his realistic perception of the existence of judicial legislation with his theory of sovereignty.[147] The problem that he addressed was this: If judges make law, how can every positive law be a command of the sovereign? Is not the one inconsistent with the other? He could have responded to the question in at least four ways. First, he might have acknowledged the contradiction, which he was unwilling to do for obvious reasons. Second, he could have denied that judges made law, a position of which he was critical.[148] Third, he might have argued that the judges were in fact sovereign, which he also regarded as unrealistic. Fourth, he could have maintained that judicial legislation is in effect the product of the sovereign or state,[149] the option that he chose. If the judges make a legal rule based upon custom, or anything else, he claimed, the rule that they have made is actually instituted by the sovereign legislature. He justified this opinion by the argument that the judge is a subordinate or subject official in the legal hierarchy. Whatever power or authority he has is simply delegated to him by the sovereign. The delegation may be express, or tacit, in which case it would be imparted by acquiescence.[150] In short, judge-made rules that are not expressly authorized are the '*tacit* commands of the sovereign legislature'.[151] Austin defended this proposition on the ground that the sovereign may reverse at any time the judge-made law. Its unwillingness or failure to exercise this power signifies its desire that judicial legislation 'shall serve as a law to the governed'.[152]

Maine did not think that this argument was entirely cogent for the Western societies that Austin had in mind. For example, it was less applicable in an earlier period of the development of the common law than it may now be. '[M]y Oriental example shows', he wrote, 'that the difficulty felt by the old lawyers about the Common law may have once deserved more respect than it obtained from Hobbes and his successors.'[153] Maine even expressed lingering doubts about the extent to which Austin's formula was fully applicable to contemporary states. 'It is a better answer to this theory than Austin would perhaps have admitted', he wrote, 'that it is founded on a mere artifice of speech, and ... assumes Courts of Justice to act in a way and from motives of which they are quite unconscious.'[154] No doubt, Maine fully acknowledged the very great extent to which Parliament has encroached upon the common law. He also admitted that it may eventually owe all of its legal force to statutes.[155] The

very terms of this admission imply, however, that the common law does not yet derive *all* of its binding force from statutes.

However, Maine's primary argument was that the Austinian formula was completely inapplicable to the Indian village councils even under the despotic rule of Runjeet Singh. The notion that the immemorial rules of custom to which his subjects gave unswerving obedience consisted of his tacit commands had no support in the facts. Indeed he had nothing to do with these rules and 'never did or could have dreamed of changing [them] . . . . Probably he was as strong a believer in [their] . . . independent obligatory force . . . as the elders themselves who applied them.'[156] The notion that he commanded these rules would be regarded by an Eastern or Oriental legal theorist as absurd.[157]

At the same time, the precise conclusion that Maine drew from this criticism is not altogether clear. On the one hand, it seems to imply that Austin's conception of a positive law is unacceptable. On the other hand, Maine was reluctant to go this far. 'I do not for a moment assert', he stated, 'that the existence of such a state of political society falsifies Austin's theory, as a theory.'[158] Maine indicated that 'the theory remains true in such a case, but the truth is only verbal'.[159] The question then is how to interpret these rather enigmatic assertions, a question that is easier to raise than to answer. Nonetheless, it seems to me that Maine probably meant that Runjeet Singh had the power to change the immemorial rules under which his subjects lived, if he had wanted to exercise it. To this extent, Austin's 'theory' remains true, at least in principle. Since the despotic ruler of the Punjab never thought of exercising his power to change customary rules, however, the notion that they are his tacit commands is absurd and has no practical value.

A second possible way of reconciling Austin's theory of sovereignty with Indian phenomena would be to argue that the village councils were themselves the sovereigns. He fully recognized, after all, that sovereignty could rest in a group of persons rather than a single person.[160] Maine rejected this argument on the ground that the councils do not legislate in the Austinian sense. They do not constitute, by any stretch of the imagination, a political superior *commanding* a course of action.[161] The council of village elders commands nothing, but simply declares what has always been the case.[162] The business of the council was thus not to make law, but to administer rules derived from long established practices.[163] Although Maine was reluctant to categorize in modern terms the powers of the council, he argued that its legislative power was much less distinctly conceived than its judicial power.[164] Moreover, he pointed out that the communities governed by the councils were frequently too small to qualify as *political* societies in Austin's sense of the term.[165]

Maine also highlighted another reason why Austin's conception of a positive law did not apply to Indian village communities. It is the different

relationships between law and force in these organizations and more advanced societies. In the first place, the customary law of archaic societies is not obeyed from fear of the threat of punishment. Rather, the sanctions by which it is enforced are public opinion, superstition, and 'to a far greater extent an instinct almost as blind and unconscious as that which produces some of the movements of our bodies'.[166] In contrast, coercion is much more influential in more advanced societies than any of these factors.[167] In the second place, the amount of force necessary to induce compliance is much less in the older than the newer societies. According to Maine, the constraint behind customary law is infinitesimal.[168] Finally, disobedience to the awards of the village council or dispute settling agency is virtually inconceivable.[169] If it occurred, the sole certain punishment would be universal disapprobation. This consideration implies that Austin would have to characterize the customary law of India as positive morality. Maine claimed that any such blatant inversion of language was obviously and completely unsatisfactory.[170]

Maine implied that the Austinian conception of law is also inapplicable to Indian village communities for a third reason. It is the intimate links between, rather than the separation of, law, morality, and religion. For example, in Brahmanical India irreligious behaviour was subject to civil sanctions and civil transgressions to divine punishment.[171] It is also difficult to draw a clear line between law, morality, and religion. Indeed it is 'of the very essence of Custom, and this indeed chiefly explains its strength, that men do not clearly distinguish between their actions and their duties – what they ought to do is what they have always done, and they do it'.[172]

III

These various considerations explain the ground of Maine's most basic criticism of Austin's legal philosophy. The essence of it is that his conceptions of a positive law and sovereignty are culture-bound and blind to history. Despite their high degree of validity for contemporary Western European societies, they are inapplicable to many other non-Western, or pre-modern, organized political societies.

Maine also developed a number of other criticisms of Austin. They include the expression of reservations about his definition of a law 'properly so-called' besides its inapplicability to ancient societies. To begin with, Maine pointed out that the word 'law' does not always mean force or command. Rather, it just as frequently has been, and is, used to signify order or invariable succession. Phrases such as the law of gravity or the law of rent illustrate this usage of the term. '[I]f dignity and importance can properly be attributed to a word', Maine argued, 'there are in our day few words more dignified and more

important than Law, in the sense of the invariable succession of phenomena, physical, mental, or even politico-economical.'[173] He indeed claimed that this meaning of the term pervades modern thought and has almost become a necessary condition of its existence.[174] He also referred to the Duke of Argyll's recently published *The Reign of Law* [175] as an example of this use of the term. Austin's characterization of this usage as figurative, metaphorical, and improper[176] is thus a reminder, Maine argued, that he wrote 'before men's ideas were leavened to the present depth by the sciences of experiment and observation'.[177] Aside from this, it is very difficult to establish which of these two uses of 'law' – invariable succession or command – is primary and which is derivative. The difficulty is all the greater because history shows the notions of force and order interacting with one another.[178] Finally, Maine implicitly rebuked Austin for suggesting that uses of 'law' with a meaning other than general command are improper. Although he did not express his criticism in precisely these terms, he implied that Austin failed to recognize the arbitrary character of definitions. At least this seems to me to be the thrust of passages such as this, which have a very modern ring to them:

> Nobody is at liberty to censure men or communities of men for using words in any sense they please, or with as many meanings as they please, but the duty of the scientific enquirer is to distinguish the meanings of an important word from one another, to select the meaning appropriate to his own purposes, and consistently to employ the word during his investigations in this sense and no other.[179]

Maine also criticized Austin's conception of jurisprudence as far too narrow and limited. If this field of study were confined to terminological clarification and the exposition of widely or universally shared principles, notions, and distinctions, many important problems would never be addressed. One such issue is the more or less political question of how a person or group of persons becomes, remains, or ceases to be, sovereign. Austin's theory fails to address the process by which this takes place.[180] Accordingly, he had to class together sovereigns as diverse as the King of Persia, the Athenian demos, the latter Roman emperors, the Russian Czar, and the British Parliament. A second important problem is the nature of the factors that limit or condition the exercise of the sovereign's powers. Maine interpreted Austin to conceive of this supreme authority as possessing irresistible force.[181] He criticized this conception on the ground that some of the sovereign's powers could never realistically be exercised. The famous examples that he gave are the power of the British Parliament to 'direct all weakly children to be put to death or establish a system of *lettres de cachet*'.[182] In short, the narrow focus of Austin and the analytical jurists leads to the neglect of the myriad factors – historical, sociological,

economic, religious – restraining the exercise of power.[183] Maine argued that this neglect clearly showed that the Austinian view of sovereignty is the result of abstraction. It is arrived at by sweeping aside all of the attributes of government and society except force, which is held to be the only link uniting all forms of political superiority.[184] The effect of this approach is to exclude from consideration the complete history of each nation.[185]

Maine found the same kind of limitation in political economy, a discipline for which he had in general the highest admiration. He portrayed it as a science consisting of deductions from the assumption that certain motives act on human nature without restraint or variation.[186] The example *par excellence* is the desire to maximize profits, or to buy at the cheapest, and sell at the dearest, price. Maine both praised and criticized this presumption. On the one hand, he said of political economy much the same thing that he wrote about analytical jurisprudence. There can be no doubt, he claimed, of the 'scientific propriety of its method, or of the greatness of some of its practical achievements'.[187] On the other hand, he admitted that even the best political economists occasionally 'generalize to the whole world from a part of it . . . speak of their propositions as true *a priori*, or from all time; and . . . greatly underrate the value, power, and interest of that great body of custom and inherited idea which . . . they throw aside as friction'.[188] Maine therefore found a very close parallel between the methodology of political economists and that of analytical jurists. Both groups were so preoccupied with their own narrow focus that they were apt to ignore other important factors. The desire to maximize profits is not the only motive of human behaviour. There is also more to sovereignty than force, and more to the commands of the sovereign than 'regulated force'.[189]

Yet, it is not certain that Maine intended to apply this criticism to Austin himself. The person who *may* be tempted to forget that there is more to sovereignty than force is the *pupil* of Austin. There is also a certain amount of ambiguity in Maine's attitude towards Austin's emphasis on force. The heart of the problem is uncertainty about why Maine believed this focus to be objectionable. On the one hand, the preceding two paragraphs imply that it is objectionable because of the significance of factors besides force. On the other hand, Maine sometimes placed as much weight as Austin upon force. For example, Maine occasionally expressed the opinion that force was behind all law.[190] Moreover, he acknowledged that the analytical jurists' exclusion of everything except force is 'for purposes of classification . . . perfectly legitimate philosophically, and . . . the application of a method in ordinary scientific use'.[191] If these statements represent his most deeply held views, which they well may, then his real objection to Austin's conceptions of law and sovereignty was *not* the central place that they accorded force. Rather, it was the erroneous assumption that the force behind law is everywhere and always

the same. Maine's position was that 'the Force . . . which is at the back of laws was not always the same'[192] and can only be called the same by 'a mere straining of language'.[193]

Maine criticized Austin on other grounds as well, such as his alleged failure to clarify sufficiently his basic postulates. If certain assumptions are made, Maine pointed out, then most of Austin's doctrines are deducible as theorems from axioms. Unfortunately, he did not fully state and elucidate these premises of his jurisprudence.[194] To this extent, he is subject to the same criticism as certain of the luminaries of political economy. They too failed to clarify the limited objectives of their discipline, which explains why it has attracted a volume of prejudice of which it may never be free.[195]

Finally, Maine was critical of the organization and 'positively repulsive'[196] style of the *PJD*. A major weakness of its structure was the discussion of sovereignty in the last rather than the first chapter. Maine felt that this order was both illogical and inexpedient. It was illogical because Austin's conceptions of law, right, duty, and punishment depended upon his conception of sovereignty, 'just as the lower links of a chain hanging down depend upon the highest link'.[197] The order was inexpedient because it fostered unnecessary misunderstandings of Austin's ideas. If sovereignty had been discussed at the outset of his book, then his definition of other legal terms would have appeared to be both blameless and self-evident.[198]

Maine also criticized (as did many others) Austin's discussion of the principle of utility in the *PJD*. We have seen that Maine was as much of a legal positivist as Austin, who would most certainly agree that it is not 'the business of the scientific historical enquirer to assert good or evil of any particular institution. He deals with its existence and development, not with its expediency.'[199] Precisely for this reason, Maine criticized Austin's lengthy analysis of the principle of utility in the *PJD*. Indeed it allegedly constituted the 'most serious blemish' in the entire book. Although many of his observations were 'just, interesting, and valuable', his attempt to identify the law of God with the rules required by utility were 'quite gratuitous and valueless for any purpose'. Looked at in its most favourable light, his discussion of ethical theory belongs 'not to the philosophy of law but to the philosophy of legislation. *The jurist, properly so-called, has nothing to do with any ideal standard of law or morals* [emphasis added].'[200]

IV

More than a century has passed since Maine articulated these criticisms. Although the reaction to them has varied, many of the nineteenth-century writers who commented upon them agreed with him. Of course, jurists can

be found who defended Austin against Maine's criticisms, such as William Markby,[201] F.H. Maxwell,[202] and G. Laurence Gomme.[203] Nevertheless, they were outnumbered by the critics of Austin, who sometimes expressed strong opinions about his limitations. For example, in 1887 W. Hastie assailed the 'wilful and untenable narrowness of the Austinian System'[204] as well as the defects of its basic positions.[205] He went on to extol Maine's solid and brilliant exposition of ancient law and custom. It clearly demonstrated the inability of Austin's theory of sovereignty to explain the origin, nature, or range of even positive law.[206] Six years later no less of a figure than Sir Frederick Pollock argued that Maine's critique was 'the very foundation of sound judgement on both the strong and the weak points of the doctrine laid down by Hobbes, developed by Bentham, and elaborated with dogmatic minuteness by Austin'.[207] In 1896 an American argued that Maine had demonstrated that every proposition of Austin's is either completely false, or only partially true.[208] His definition of law allegedly held good 'only for one aspect of the law, in one part of the world, and for only a brief period in the development of that part'.[209] This opinion evidently became widespread in the twentieth century and was attributed to Austin's ahistorical approach. At least Carleton Kemp Allen could refer to the general agreement that the exclusion of history from the province of jurisprudence is responsible for some of Austin's most radical fallacies.[210]

The strengths of Maine's critique

If there was, or is, general consensus on this point, Maine bears a significant amount of responsibility for it. There is little doubt that he was Austin's most influential and important nineteenth-century critic. There are various reasons for this, but they boil down to the cluster of qualities that Maine's critique, and his alone, possessed. It reflects a good, if in some respects quite flawed, understanding of Austin, as well as a just appreciation of his substantial and real contributions. Moreover, some of Maine's criticisms, or comments, about Austin disclose fundamental limitations of his work. Unlike virtually any other nineteenth-century critic, for example, Maine understood the competing drives underlying Austin's legal philosophy. Despite his many expressions of support for an empirical approach, we have seen that his conception of general jurisprudence has a strong *a priori* cast to it. It is to Maine's credit that, unlike many others, he recognized the existence of these different orientations and the tension between them. In addition, he was fully justified in arguing that Austin did not sufficiently explain the basic assumptions or postulates of his jurisprudence.

Moreover, Maine was a trenchant critic of what may be called Austinian universalism. He convincingly demonstrated that there are organized

political societies which do not have positive laws and sovereigns as Austin understood them. Some of the other principles, notions, and distinctions of general jurisprudence may also not be universal. To this extent, Maine's critique is 'still useful as a source of correction to arguments that any particular concepts are useful in the analysis of all legal arrangements in all places at all times'.[211]

Furthermore, Maine's explanation of the limitations of a purely analytical approach to jurisprudence is compelling. Such an approach could not address such important questions as why sovereign governments gain, hold, or lose power. Nor could it explain the factors that condition the exercise of sovereign powers – legislative, executive, or judicial. Maine also pointed out quite persuasively the bad effects of excluding historical inquiries from jurisprudence. Although a strict adherence to the canons of general jurisprudence as Austin conceived of it requires such an exclusion, its possibility and desirability is questionable. I for one find it very difficult to understand how historical investigations can be, or why they should be, completely avoided. For example, they might well be indispensable for determining whether a principle, notion, or distinction is actually universal. Indeed, Austin himself, in his lectures, did not in fact come anywhere close to totally avoiding historical analysis. His analysis of the distinction between law and equity illustrates the point. His discussion of it entailed a largely historical comparison of Roman and English law. Without such a comparison it would be impossible to *demonstrate* that the distinction is 'accidental and anomalous'[212] rather than inherent in the very nature, or being, of law. Similarly, historical inquiry would be crucial in order to substantiate the contention that the only way to understand English equity is by a careful study of case law, i.e. the situations in which the Chancellor had intervened to correct the flaws of the common law. To this extent, Maine's criticism of Austin's exclusion of historical studies from jurisprudence seems to me to be well-founded. Better that it enter by the front, than the back, door.

Finally, Maine identified a genuine problem with Austin's repeated use of the terms 'properly', and 'improperly', so-called. The nub of it is his right to characterize definitions of the term law different from his own as 'improper'. Of course, William Markby had an interpretation of Austin's usage which, if accurate, would avoid the problem. According to Markby, Austin meant nothing more by the terms 'proper' and 'improper' than that 'only those laws which possess certain attributes are such laws as the author is about to consider; and he excludes all other laws because they do not possess those attributes'.[213] Markby also denied that Austin would have disagreed, as Maine claimed he would have, with the Duke of Argyll's phrase 'the reign of law'. After all, the Duke himself argued that 'the idea which lies at the root of Law in all its applications is evident enough. In its primary signification, a "law" is the authoritative expression of human Will enforced by Power.'[214]

If Markby's interpretation of Austin were accurate, no one could reasonably object to his use of the terms 'proper' and 'improper'. He was certainly as free as anyone else to indicate what he would, and would not, consider as laws in his book. The use of the terms 'properly so-called' and 'improperly so-called' in order to achieve *this* objective is, however, highly unusual. Why not simply say that for the purposes of this book 'law' means general command and all other meanings of the term will not be considered? Does not the categorization of a usage of 'law' as 'proper' or 'improper' suggest it meets, or fails to meet, a standard of what is right or wrong, correct or incorrect? If Austin had intended merely to characterize uses of 'law' that he would, or would not, consider in this book, he certainly chose odd terms to do it. Such a choice would have been particularly unusual for a person such as Austin. His laborious and meticulous efforts to choose exactly the right words to express his thoughts are legendary.

Aside from this, the evidence indicates that Austin used the words 'proper' and 'improper' in a very different sense than Markby indicated. Although it is difficult to be absolutely certain about Austin's intentions, he appears to have meant by a law 'properly so-called' a law that has the nature or essence of a general command.[215] A law 'improperly so-called' is one which does not have this nature or essence, but to which the term is nonetheless sometimes, or even usually, applied. In other words, by his use of these terms Austin did not intend to signify merely what meanings of 'law' he would include in, or exclude from, his book. In addition, he wished to indicate whether a usage of the word accurately depicted the nature or essence of a law. Only the use of 'law' to signify a general command did this and therefore referred to a law 'properly so-called'. All other usages of the term referred to objects other than general commands. Such objects were therefore laws 'improperly so-called'.

The limitations of Maine's critique

Maine's critique of Austin is thus in certain respects very impressive. At the same time, it has a number of significant limitations, the character of which has all too seldom been appreciated. Yet, such an appreciation is essential for understanding the actual relationship between these two titans of nineteenth-century English jurisprudence. To begin with, Maine's interpretation of Austin is in some respects quite flawed. The most important example may be his failure to acknowledge the significant extent to which Austin qualified his universalism. For example, he clearly limited the focus of general jurisprudence to the principles, notions, and distinctions common to, or widespread in, the 'ampler and maturer systems of refined communities'.[216] To be sure, he also claimed that they shared common principles with the 'scanty and crude systems of rude societies'.[217] Nonetheless, he maintained that general

jurisprudence has as its focus the commonalities of the 'ampler and maturer systems which, by reason of their amplitude and maturity, are pre-eminently pregnant with instruction'.[218] No doubt, his conception of ample, mature, and refined systems is extremely vague. He never explains exactly what he means by them, or the criteria for identifying them. Nor does he ever list the systems that he regarded as ample and mature. Although it is clear that he regarded Western European states as core examples of such systems, the other states that he would characterize as such are uncertain. Nevertheless, this vagueness, important as it is, is in a way irrelevant to the present discussion. Whatever the vagueness of Austin's conception of 'ample' and 'mature', he limited the study of general jurisprudence to them, rather than all societies, ancient and modern, a fact that Maine ignores.

Moreover, Austin recognized (and in the *PJD*) that his definition of a positive law and sovereignty did *not* apply to *all* societies, some of which do not have them. The best evidence of this is his sharp distinction between political and natural societies. It clearly demonstrates that he did *not* intend his definitions of a positive law and sovereignty to apply to every actual society. Rather, his view was that they are applicable only to every independent *political* society *as he defined it*. That is to say, they are applicable only to a society of a certain size, the bulk of the members of which habitually obey a common and determinate human superior. Although he may well have exaggerated the extent to which *all* politically organized societies fit this pattern, he did distinguish between a number of different types of societies.

Austin in effect classified societies as either political or natural. The latter take at least two forms, one of which is a society whose population is very small.[219] He cited as an example a single family of 'savages' who lived in a state of nature in absolute isolation from every other community. Since the size of the family is 'extremely minute', it cannot count as a *political* society, which is a prerequisite for the existence of positive law. Austin then approvingly quotes Montesquieu's dictum that 'la puissance politique comprend nècessairement l'union de plusieurs familles'.[220]

This argument raises the obvious question of how large the union of several families must be for a society to be *political* rather than *natural*. The answer requires at the outset a distinction between two kinds of political societies – dependent and independent. Austin maintained that the size of a dependent or subordinate political society may be infinitesimal.[221] Although a society incorporated by the state for a public purpose might be no larger than a small family, it would still be a political society. The situation is very different for independent political societies, the size of the population of which must be considerable.[222] While Austin fully acknowledged the vagueness of this requirement, he pointed out that a society is commonly considered to be political though 'the number of its members exceed not a few thousands, or

exceed not a few hundreds'.[223] Yet, he denied that the size of the population alone is sufficient to make a society political rather than natural. This is evident from his discussion of an independent society the population of which is *not* extremely minute. If it is in what he characterized as a savage or extremely barbarous condition, the bulk of its members could not *habitually* obey a common and determinate human superior. Although they might *occasionally* obey such a person or persons for the purpose of resisting external attack, their obedience could not be habitual. If it were, the society would be political rather than natural.[224]

Austin did not explain in much detail the law of this second kind of natural society. He did argue that, absent habitual obedience to a common superior, there is no law 'simply or strictly so-called'. Rather, the so-called laws that exist 'are purely and properly customary laws: that is to say, laws which are set or imposed by the general opinion of the community, but which are not enforced by legal or political sanctions'.[225] It is uncertain who enacted the law or who will enforce it against transgressors. A customary law is therefore merely an opinion or sentiment and is a law 'improperly so-called'.[226] Austin cited several examples of this kind of natural society. He portrayed them as extending from many of the German nations described by Tacitus to the 'savage and independent societies which live by hunting or fishing in the woods or on the coasts of New Holland ... [or] range in the forests or plains of the North American continent'.[227]

Austin's contention that customary laws are laws 'improperly so-called' has been the object of much criticism. It is therefore important to note his opinion that a customary law is closely analogous to a law 'properly so-called'. It thus differs from other types of law improperly so-called which are related to law proper only by slight analogies.[228] A law set by general opinion and a law proper are analogous in at least four respects. In the first place, both express the wish, or signify, that a certain kind of conduct shall be pursued or forborne. In the second place, a person who does not comply with this wish or signification will probably suffer an evil or inconvenience. In the third place, this probability inclines the persons subject to the evil or inconvenience to comply with the law. Finally, the conduct of the parties subject to the law tends to be steady, constant or uniform.[229] In other words, persons who are subject to customary law usually comply with it.

These analogies are important because they signify that Austin attributed considerable importance to custom as a form of social control. Unfortunately, he did not explain in any more detail than this how it would function in undeveloped societies. His account of it in the *PJD* – the only place where he discussed it – is very brief. Still, he said enough to indicate the position that he sometimes took, which was very different from that which Maine ascribed to him. This position was that 'natural' societies do not have sovereigns and

positive law as he defined them. Rather, they exist only in 'political' societies. Indeed, the absence of a sovereign and thus of positive law is a constituent element of his very conception of barbaric or savage society. To characterize a society in this way *meant*, for him, that it lacked positive law and a sovereign.[230] Moreover, Austin recognized that they were the product of a certain stage in the evolution (a term of course that he never used) of societies. He described the process by which they emerge in these terms:

> The natural or customary order in which the law of any country arises, or is founded, seems to be this:
> 1st. Rules of positive morality.
> 2ndly. The adoption and enforcement of these rules by the tribunals.
> 3rdly. The addition of other rules drawn from the former by consequence or analogy.
> 4thly. The introduction of new rules by the judges, *propria arbitrio*; and illations from these.
> 5thly. Legislation proper, by the sovereign legislature, in the same order.
> 6thly. The action and reaction of judicial legislation and legislation proper ...
> 7thly and lastly: A Code.[231]

Austin did not thus deny that societies existed which had no positive law or sovereignty. Such societies were largely, or entirely, 'governed', if the term may be used, by custom and customary rules. He also had a conception of how these societies had evolved into the more complex societies in which he was primarily interested. Unfortunately, Maine tended to ignore, or to de-emphasize, the significance of, these dimensions of Austin's legal philosophy. Admittedly, he was said to have 'fully' recognized the existence of societies, or aggregates of human beings, which did not have a sovereign as he defined it.[232] Maine cited the examples of a state of anarchy, and a state of nature. Nevertheless, he failed to discuss the other type of natural society to which Austin alluded – the independent society the population of which is 'considerable'. Since the bulk of its members do not habitually obey a common and determinate superior, it is a 'natural' rather than a 'political' society. Maine's omission of any discussion of this kind of natural society is important because the argument could be made that it is similar to that of the Punjab as ruled by Runjeet Singh.

Another inadequacy of Maine's interpretation of Austin

The accuracy of Maine's interpretation of Austin is also questionable in another respect. The heart of it is Maine's interpretation of the 'great maxim', or formula, 'What the Sovereign permits, he commands.'[233] A number of

Austin's defenders argued, and with good reason, that he never held this principle, in the very broad form that Maine interpreted it. They also argued that, accurately interpreted, the principle made sense.

William Markby (1829–1914) probably developed the argument in more detail than anyone else. He was well-situated for a number of reasons to make the argument. He was a student of Maine's, was a well-known legal scholar,[234] and had considerable experience in India. Markby took a first class degree from Oxford's Honour School of Mathematics in 1850. He then studied for the bar and attended Maine's lectures as Reader in Jurisprudence and Civil Law at the Middle Temple. In 1856 Markby was called to the bar at the Inner Temple and joined the Norfolk Circuit. He was appointed Puisne Judge of the High Court in Calcutta, India, in 1866, the same year that he married Lucy Taylor, Sarah Austin's great niece.[235] The Markbys returned to England in 1878 when he was appointed Reader in Indian Law at Oxford University. Although Markby had an unusually full life at Oxford, India apparently remained 'ever paramount' in his thought.[236]

Markby knew India then on the basis of first-hand experience. Indeed he lived there for almost twice as long as Maine. It is not therefore surprising that he used Indian examples to challenge Maine's interpretation of Austin. There are two major sources of Markby's rejoinder to Maine's critique of Austin. One is an article – 'Analytical Jurisprudence'[237] – that he published in the *Law Magazine and Review* in 1876, while the other is his textbook on jurisprudence.[238] In his article Markby discussed two hypothetical cases, which he was prone to do. The first involved an Indian village tribunal, during the regime of Runjeet Singh, administering rules derived from 'immemorial usage'. If the president of the tribunal had been told by an Austinian that these rules are the tacit commands of Runjeet Singh, he would no doubt have laughed at such a ridiculous suggestion. Markby argued, however, that this principle was much more applicable than Maine represented it to be. Markby asked his readers to imagine a hypothetical case involving two Mohammedan litigants. The plaintiff claimed interest on a loan, which the defendant refused to pay. The basis of the plaintiff's case was his contract. The defendant relied primarily upon the Koran and other religious writings holding that contracts for interests on loans were unlawful. Runjeet Singh had never invalidated these restrictions, and no doubt would say, or had said, that his subjects are bound by Mohammedan laws. Yet, for many years the custom was for every Mohammedan merchant in the Bazaar to ask for and pay interest. The custom had been embodied in innumerable decrees and the requirement for the payment of interest had been enforced. In this situation the judge who had to decide the case faced a difficulty. The nub of it was the conflict between the Mohammedan prohibition of interest and the usage permitting it. According to Markby,

> I think that the suggestion if now made, that 'what the Sovereign permits he tacitly commands', might be very differently received; that it might even be welcomed and adopted as a wise answer to a troublesome objection. Indeed I have not as yet seen any more satisfactory answer to it than that which is afforded by the assertion that the custom of the people recognized by the decision of the Courts over-rides every other rule, because it has the force of a command emanating from the Sovereign himself.[239]

Although this case was hypothetical, Markby denied that it was imaginary. Instead, he argued that it is 'within the experience of every judge in India'.[240] He said much the same thing about the second case that he discussed, which illustrated his conception of how custom is transformed into law. He found it difficult to explain the case on any other basis than that which Austin would employ. The text of ancient Hindu law recognized marriages between the four great castes as lawful. Still, according to modern custom such marriages are definitely illegal. The illegality of intermarriage among the different subdivisions of the Sundras, the lowest of the four classes, is much less clear. Although they do not usually intermarry, it is unclear whether this practice has the sanction of law or custom. Under these circumstances, Markby asked, assume that the Privy Council ruled that such marriages are unlawful. His contention was that it would be impossible to apply and enforce such a law 'except by treating it as the tacit command of the Sovereign'.[241] To be sure, arguments for the illegality of such intermarriages could be constructed which make no mention of this maxim. Nevertheless, Markby argued that the Privy Council's rule could only be enforced against a recalcitrant party by resort to it. The officer of justice could only do it 'by an authority the very essence of which is, that it is entrusted to him by a Sovereign Government in order that he may execute its commands, and the Government will, if necessary, bring down upon resistance the whole force which it wields . . . It is only because resistance to authority is so rare that we forget this.'[242]

The position that Markby took in his *Elements of Law* was somewhat different from this. In this book he acknowledged that Maine's description of the absence of positive law from the Punjab under Runjeet Singh was 'probable enough'.[243] Markby then subjected Maine's interpretation of Austin's 'great maxim' to a number of different criticisms than he expressed in his article. To begin with, Markby argued that Austin never expressed the formula that Maine attributed to him. What Austin actually said was *not* that the sovereign commands whatever he permits. Rather, it was that 'a rule which the sovereign permits *a judge* [emphasis added] to lay down, and which, when laid down, he will himself enforce, he must be taken to have commanded'.[244] In addition, Austin never denied that customary rules existed, or that people

may, and often do, regulate their behaviour in accordance with them. Nor does their existence or efficacy affect his conception of positive law or sovereignty, which is quite different from them. Finally, Markby claimed that the 'vague maxim' suggested by Maine would lump together different types of laws that Austin so zealously tried to distinguish.[245]

F.M. Maxwell developed a quite similar, if somewhat different, and much more harshly expressed, version of this argument. He too denied that Austin ever expressed, or implied, the 'flimsy . . . device' that 'what the sovereign permits he commands'. Indeed, Maxwell found it remarkable that Maine should have attributed 'so feeble an argument to so logical a mind as Austin's'.[246] The argument was feeble because it 'patently' conflicted with Austin's laborious attempts to distinguish between different kinds of law.[247] Maxwell adduced the examples of a man who imposed a rule upon his friend, the sanction of which was ending their friendship, or upon his son, under the pain of disinheriting him. While Austin would classify such rules as commands and therefore laws properly so-called, he would insist that they are not positive laws. They lack the indispensable requirement of being commands of a political superior, or sovereign. Instead, Austin classified these kinds of rules as part of positive morality. Yet, on Maine's interpretation Austin would have been required to classify the rules as positive laws because the sovereign permits them. Maxwell ridiculed any such notion as 'sufficiently absurd to expunge this maxim from Jurisprudence'.[248]

Maxwell not only criticized this 'extraordinary maxim' on the ground indicated, which is very similar to Markby's reasoning. In addition, Maxwell developed a somewhat more original interpretation of what Austin meant. It is that whatever the sovereign *enforces*, rather than *permits*, he commands. Maxwell gave the example of a judge who had to decide a case of first impression in which by definition no prior law exists that can be applied. Assume that the judge decides the case by applying a customary rule upon which both parties have acted and that, to this extent, a law has been established. The question is, who established it? Was it the judge, or the sovereign? Maxwell's answer is that the rule was established directly by the judge, but indirectly by the sovereign. It remains law even if the latter dislikes it as long as he continues to enforce it,

> for the decision of the Judge is powerless unless enforced by the Sovereign. And if the Sovereign give an implied authority to its Judges to make law, and ratifies their law, when made, by enforcing it, is it a forced use of the term 'set', to say that this law is 'set' by the Sovereign. The true formula, then, is not 'what the Sovereign *permits* he commands', but 'what the Sovereign *enforces* he commands'. This is the correct test by which to try cases like that of Runjeet Singh.[249]

Implications of the criticisms

The evidence is then quite convincing that Maine's interpretation of Austin is, in a number of respects, flawed. He never claimed that a customary rule is a tacit command of the sovereign, or that whatever the sovereign permits, he commands. Rather, Austin limited this principle to judicial decisions or rules that the sovereign enforces.[250] It can also fairly be argued that he would say the same thing about the decisions or rules of other 'ministers' of the sovereign. Moreover, Maine failed to note how Austin qualified his universalism. To say this is not of course to deny that he sometimes expressed views that are subject to Maine's criticisms. In fact, there is evidence in the corpus of Austin's work that both supports, and invalidates, this facet of Maine's interpretation. In the last analysis then the most fundamental criticism of his opinions may not be that they are fundamentally wrong. Rather, it is that he overlooked some, though far from all, of the ambiguities of Austin's positions on certain issues. It is a tendency that is not uncommon among critics anxious to make a point, including the critics of John Austin.

To say this is not to deny that Maine was certainly warranted in emphasizing that Austin's conceptions of positive law and sovereignty are inapplicable to some societies that are both organized and political as we ordinarily use these terms. At the same time, Maine's evolutionary perspective is in one respect quite similar to Austin's pre-Darwinian point of view. After all, Maine believed that both the direction and the ultimate destination of the progressive societies are pretty much the same. The evidence of this is not only his most famous single pronouncement that 'the movement of the progressive societies has hitherto been a movement *from Status to Contract*'.[251] An even better, because less ambiguous and more complete, expression of his perspective is this passage. It is a passage that, with minor exceptions, Austin could have written:

> It is not because our own jurisprudence and that of Rome were *once* alike that they ought to be studied together – it is because they *will be* alike. It is because all laws, however dissimilar in their infancy, tend to resemble each in their maturity; and because we in England are slowly, and perhaps unconsciously or unwillingly, but still steadily and certainly accustoming ourselves to the same modes of legal thought and to the same conceptions of legal principles to which the Roman jurisconsults had attained after centuries of accumulated experience and unwearied cultivation.[252]

In any case, the subject-matter of Austin's general jurisprudence was *not* the basic principles, notions, and distinctions of *all* legal systems. Rather, its focus was on the ampler and maturer systems, which excluded the 'scanty

and crude systems of rude societies'.[253] It is hard for me not to conclude that Maine either ignored, or unduly de-emphasized, this limitation of the scope of Austin's general jurisprudence. The evidence of this is indeed so compelling that it raises the question of why he failed to take account of the limitation. If Maine had not been a brilliant, highly perceptive, and in general fair-minded writer, the answer to the question might be obvious. Since he exemplified these qualities, the answer is anything but self-evident. Nevertheless, it is possible to identify one of the factors that might possibly have influenced his misinterpretation, such as it is, of Austin's general jurisprudence.

The short of it is Maine's intensely felt desire to make the most persuasive case for the value of his historical and comparative approach. He was, after all, a pioneer in the development of what seemed to him to be a methodological imperative. He was profoundly convinced that his approach was not only different from, but superior to, that of his contemporaries. What better way to demonstrate its superiority than to show how neglect of it could mislead, to an even greater degree than it in fact did, an intellect whose strength and clarity he praised highly? To say this is not to imply that he completely, or consciously, misinterpreted Austin. Nonetheless, Maine did to some extent misinterpret him, or at least fail to take account of how he sometimes qualified the scope of his doctrines. The failure was extremely useful for realizing the larger purposes that Maine had in mind.

General jurisprudence and history

Maine not only criticized what he in effect regarded as the unwarranted universalism of the doctrines of the analytical jurists, but explained it in terms of their indifference to history. The explanation raises the question of the nature of Austin's attitude towards history, which is more complex than Maine acknowledged. On the one hand, history had no place in general jurisprudence. In this respect Austin's approach was narrower not simply than that of Maine, but that of Bentham, for whom historical analysis was one of the two branches of 'expository jurisprudence'.[254] On the other hand, Austin recognized the value of historical inquiries, which are not completely absent from his lectures.

History had no place in general jurisprudence because of its focus, as Austin conceived of it, on what is local and contingent rather than universal and necessary, or at least widespread. His explanation of the habitual obedience to the sovereign by the bulk of the members of an independent political society provides a good illustration of this distinction and his application of it. His argument was that such obedience

> partly arises . . . in almost every society, from the . . . perception, by the bulk of the community, of the utility of political government, or a preference by the bulk of the community, of any government to anarchy. And this is the only cause of the habitual obedience . . . which is common to all societies, or nearly all societies. It therefore is the only cause of the habitual obedience . . . which the present general disquisition can properly embrace. The causes of the obedience in question which are peculiar to particular societies, belong to the province of statistics, or the province of particular history.[255]

Austin's use of the phrase 'particular history' in the final sentence of this quotation is intriguing. It implies that there might be a universal history, and, if there were, it would fall within the parameters of general jurisprudence. He never mentioned this implication, however, and his use of the phrase 'particular history' may be of little or no significance. In any case his exclusion of historical inquiries from general jurisprudence sharply differentiates his approach from Maine's.

At the same time, Austin was not as indifferent to history as its exclusion from general jurisprudence, or Maine's critique, implies. In fact, Austin recognized the value of historical knowledge for the study of law and jurisprudence. His appreciation of its usefulness is evident from various considerations, one of which is his inclusion of the history of English law in the curriculum of his ideal system of legal education.[256] Aside from this, he explicitly acknowledged the utility of historical knowledge for understanding law. No doubt, he maintained that legislation 'must be bottomed in general principles drawn from an accurate observation of human nature, and not in the imperfect records called history'.[257] Still, he admitted that 'there are cases in which historical knowledge has its uses'.[258] He elaborated upon the point in these highly significant terms: history is useful in order to 'explain the origin of laws, which are venerated for their antiquity. To explain much of the law, which now exists; and to enable us to separate the reason of modern times from the dross of antiquity.'[259] Finally, he argued that feudalism is 'like a thousand other notions which have been supposed to be universal and of the essence of law . . . [but] are really an exceedingly specific and purely historical notion, not to be got at by scientific speculation, but by diligent reading of the history of the middle ages'.[260]

Maine did not appear to be familiar with these passages. At least I have been unable to locate any references to them in his writings. Still, the extent to which they express ideas that he strongly emphasized is truly remarkable. An obvious example is Austin's description of the utility of historical knowledge for the purposes of explaining the origin and content of laws that now exist. Yet, the most striking example may be his recognition of the value for legal *theory* of reading history. His contention of its utility for demonstrating

that a thousand notions supposed to be universal and of the essence of law are in fact nothing of the kind is a major theme of Maine's jurisprudence.

This evidence establishes quite conclusively that the differences between Maine and Austin about the value of history for jurisprudence are not as large as they may appear to be, or that Maine's critique signifies. To say this is obviously not to contend that their differences on this score are insignificant, which would be false. Austin did exclude historical inquiries from the province of general jurisprudence. Still, they logically could be incorporated into particular jurisprudence. Moreover, Austin recognized the value of history for the student of law. In fact, the utility that he attributed to historical analysis was so great and so closely connected to general jurisprudence that he probably should not have excluded it. It might well be imperative for no other reason than determining whether a particular principle, notion, or distinction is universal. Moreover, Austin himself utilized a historical approach in his lectures *when it suited his purposes*. For example, he devoted an entire lecture (#31), which takes up seventeen printed pages, to the history of the *jus gentium*.[261] Moreover, his discussion of the Praetorian Edict and equity has a strongly historical cast to it.[262]

The respective approaches of Austin and Maine are not, thus, as different as they have often been represented to be. Austin recognized the utility of history for understanding both law and legal theory, while Maine certainly appreciated the value of analytical jurisprudence. While it is unclear precisely how large a place he felt it should occupy in the field of jurisprudence, he clearly assigned it a very important role. Otherwise, he would never have asserted that Austin's lectures must always, or for a long time, be a basic part of legal studies at Oxford.[263]

V

If the argument of this chapter is well-founded, Maine's critique of Austin has both substantial strengths and significant limitations. One of its most impressive features is Maine's unapologetic and generous appreciation of Austin's achievements, which are substantial. In this respect Maine differs not only from Austin's most extreme late Victorian, but twentieth-century, critics. Unlike them, Maine took Austin very seriously, read him carefully if selectively, and extolled the value of his work. Moreover, some of Maine's criticisms of Austin are indeed penetrating. His lectures do reflect a tension between their rationalist and empiricist foundations; he did tend to exaggerate, or failed to establish, the universality of certain principles, notions, and distinctions; and general jurisprudence did exclude historical inquiries, with the unfortunate results that Maine noted. Overall, his critique

constitutes the most comprehensive, insightful, and balanced evaluation of Austin's work by any nineteenth-century jurist.[264]

At the same time, Maine's response to Austin's work has its definite limitations. In particular, he is a more three-dimensional and interesting legal theorist than Maine, in his most critical moods, suggests. Indeed, the conclusion is difficult to avoid that his understanding of Austin's philosophy of law is, in certain respects, flawed. Specifically, Austin never claimed that whatever the sovereign permits, he commands. He also qualified his universalism, at least at times, and recognized the value of historical inquiries, to a much greater extent than Maine acknowledged. These misunderstandings are not only unfortunate because they influenced Maine occasionally to criticize Austin for opinions that he did not hold, or at least qualified. Aside from this, they may have affected the tendency of a number of subsequent jurists to misrepresent Austin. Maine was, after all, a figure of very great stature in the English jurisprudence of the last three or four decades of the nineteenth century. Although his work was instrumental in publicizing Austin's ideas, it may also have contributed to the development of certain stereotypical misunderstandings of them. Chauncer Wright developed the argument very persuasively well over a century ago. Wright pointed out that while Maine accepted Austin's 'fundamental ideas', he also strongly emphasized that they are subject to substantial reservations and limitations. Unfortunately, Maine emphasized so heavily these qualifications that many of his readers 'may begin to doubt the value of the conceptions themselves. To produce this result is undoubtedly not the intention of Austin's critic, but it is the effect of the indirect historical form of criticism in which Maine excels.'[265]

At the least Maine's criticisms of Austin helped to obscure the numerous similarities between their doctrines, to conceal the extent to which the former's distinctive approach was an outgrowth of certain principles that he shared with the latter, and to encourage the mistaken impression that their respective approaches are necessarily incompatible with each other. To be sure, Maine himself is not completely, or perhaps even primarily, responsible for the use that was made of his work. There is little doubt that his analysis of Austin's legal philosophy was read very selectively by the latter's more extreme critics. Otherwise, they would never have swept under the rug Maine's extensive praise of Austin, which has been a rather well-kept secret. Nonetheless, Maine himself cannot be absolved of all responsibility.

In any case, it is not true to say that Austin rejected history, or that Maine had no use for analysis. In fact, both of them appreciated the value of the approach that has come to be associated with the other. What is true to say is that the foci of their work tended to be very different. Austin's *forte* was the analysis of principles, notions, and distinctions that he regarded as fundamental to advanced societies. The ancient or pre-modern societies that he

excluded from general jurisprudence tended, however, to be of primary concern to Maine. To this extent, their work was in general complementary rather than contradictory. They would contradict each other only if they gave conflicting answers to the same question, which is usually not the case. Rather, they tend to give different answers to different questions. As such, their approaches are for the most part complementary to, or at least consistent with, each other. No one stated the case for this judgement better than another important nineteenth-century legal theorist who admired the work of both Austin and Maine. James Fitzjames Stephen explained the relationship between their approaches in a brilliant passage that merits quotation at length:

> It is not uncommon to write of the historical and analytical methods as if they were two independent roads to the same result, one of which was proved by experience to be right, and the other wrong. This is a mistake as dangerous as it is common ... History and analysis, so far from being inimical, are complementary to each other, and neither can be safely dispensed with. History without analysis is at best a mere curiosity; and analysis without history is blind, though it may not be barren. No better instance could be given of the importance of each of these two branches of inquiry to the other than is afforded by a comparison of Mr. Austin's book [the *PJD*] with Mr. Maine's [*Ancient Law*] ... though analysis is the main purpose of the one and history of the other, each (and especially Mr. Austin) recognizes the necessity to his own inquiries of the line of thought which he does not pursue.[266]

Of course, the conclusions of Austin and Maine are not always complementary. To the extent that the Austinian and historical jurists raise different questions, their answers cannot contradict each other. The findings of the latter can, however, demonstrate the limitations of the premises of the former. Nothing illustrates the point better than the results of Maine's historical inquiries. If they are well-founded, then Austin's conceptions of positive law and sovereignty are not found even in all independent political societies. To this extent, Austin's acknowledgement of the value of historical knowledge may have come back to haunt him. Nonetheless, this fact may in the last analysis only confirm the wisdom of Stephens's contention that neither the historical approach, nor the analytical, 'can be safely dispensed with'.

Notes

1. *The Victorian Achievement of Sir Henry Maine: A Centennial Reappraisal*, ed. Alan Diamond (Cambridge: Cambridge University Press, 1991), p. 1. Maine's publications

include *Ancient Law: its Connection with the Early History of Society and its Relation to Modern Ideas*, 10th edn (Gloucester, Massachusetts: Peter Smith, 1970); *Village-Communities in the East and West: Six Lectures Delivered at Oxford to which are added other Lectures, Addresses, and Essays*, (New York: Henry Holt, 1889); *LEHI* [originally published in 1875]; *Dissertations on Early Law and Custom chiefly selected from lectures delivered at Oxford* (New York: Arno Press, 1975) [originally published in 1886]; and *International Law: A Series of Lectures delivered before the University of Cambridge 1887* (Farmingdale, New York: Dabor Social Sciences Publications, 1978) [originally published in 1888]. A very comprehensive and high-quality bibliography of Maine's writings may be found in *Victorian Achievement*, pp. 402–14.

2. 'Maine's Early History of Institutions', *The Nation* (1 April, 1875), p. 225.
3. *From Status to Contract: A Biography of Sir Henry Maine, 1822–88* (London: Longman, 1969), p. 43.
4. See *infra*, Chapters 8–10.
5. Maine's reference to the 'so-called Analytical Jurists' suggests the possibility that he did not originate the term. *LEHI*, p. 343. If he was not the first to use the phrase, his extensive employment of it certainly contributed to its popularity – see ibid., pp. 357, 394, 396, 358–9, 360, 375, 372, 385.
6. Markby, 'Analytical Jurisprudence', *LMR*, I (August, 1876), p. 618.
7. *Journal of the Society of the Arts*, 18 March, 1898, p. 403.
8. See Stefan Collini, *Public Moralists: Political Thought and Intellectual Life in Britain* (Oxford: Clarendon Press, 1991), pp. 46–8, and Sir M.E. Grant Duff, *Sir Henry Maine: A Brief Memoir of His Life* (New York: Henry Holt, 1892), pp. 48–9.
9. Charles Lewis Tupper, 'India and Sir Henry Maine', *Journal of the Society of Arts*, 18 March, 1898, p. 390.
10. As quoted by Collini, *Public Moralists*, p. 46.
11. Duff, *Sir Henry Maine*, p. 79.
12. Ibid., p. 14.
13. See his *Taking Rights Seriously* (Cambridge, Massachusetts: Harvard University Press, 1977), and *Law's Empire* (Cambridge, Massachusetts: Belknap Press, 1986).
14. *International Law*, p. 47.
15. See Report of the Commissioners appointed to enquire into the Arrangements in the Inns of Court and the Inn of Chancery for promoting the Study of the Law and Jurisprudence 1855 HMSO; 1854–5; B.P.P., XVIII, pp. 497, 499, 513, 534.
16. 'Austin', *Encyclopedia Britannica: A Dictionary of Arts, Sciences, Literature and General Information*, 11th edn (New York: Encyclopedia Britannica Co., 1910), p. 939. The author of the entry was William Markby. Ibid., pp. xii, 940.
17. The most thorough discussion occurs in *LEHI*, pp. 342–400.
18. *Elements of Law Considered with Reference to Principles of General Jurisprudence*, 6th edn (Oxford: Clarendon Press, 1905), p. 6.
19. *Legal Duties and Other Essays in Jurisprudence* (Oxford: Clarendon Press, 1931), p. 144.
20. *LEHI*, p. 376.
21. Ibid., p. 345.

22. Ibid., p. 342.
23. Ibid., p. 343.
24. Ibid., p. 397.
25. *Village-Communities*, p. 67.
26. *LEHI*, p. 369.
27. For examples, see Duff, *Sir Henry Maine*, pp. 26–7, 82, 382–3.
28. 'Specific Performance of Contracts – Minute on the Same Subject', in Duff, ibid., p. 175.
29. Ibid., p. 172.
30. *LEHI*, p. 345.
31. Ibid., pp. 355.
32. Ibid., p. 356.
33. *Supra*, Chapter 5.
34. *Ancient Law*, p. 87.
35. Ibid., p. 88.
36. Sir Henry Sumner Maine, *Popular Government*, intro. George W. Carey (Indianapolis, Indiana: Liberty Classics, 1976), p. 21.
37. *LEHI*, p. 343.
38. Austin, *LJ*, pp. 214–19.
39. *Popular Government*, p. 162.
40. *LEHI*, pp. 370.
41. *Village-Communities*, p. 230.
42. John Austin, *A Plea for the Constitution*, 2nd edn (London: John Murray, 1859).
43. See Maine, *Popular Government*.
44. See Sir William Blackstone, *Commentaries*, Book I, p. 41; *PJD*, pp. 158, 159.
45. *The Teaching of Sir Henry Sumner Maine: An Inaugural Lecture* (London: Henry Frowde, 1904), p. 5.
46. *Ancient Law*, pp. 83–4.
47. Ibid., p. 88.
48. Ibid., p. 165. For example, Maine's dictum may have been intended as a definition, or conception, of a progressive society rather than an empirical generalization about such societies. Also, see *The Victorian Achievement of Sir Henry Maine*, pp. 15–18.
49. Feaver, *From Status to Contract*, p. 56.
50. *Ancient Law*, pp. 163–5.
51. *Popular Government*, p. 242.
52. Ibid., p. 243.
53. *Village-Communities*, p. 230.
54. Ibid.
55. Feaver, *From Status to Contract*, p. 148.
56. Raymond Cocks, *Sir Henry Maine: A Study in Victorian Jurisprudence* (Cambridge: Cambridge University Press, 1988), p. 200.
57. 'Re-Marriage of Native Converts', in Duff, *Sir Henry Maine*, p. 145.
58. *Village-Communities*, p. 348.
59. Ibid., p. 349.

60. See *PJD*, p. 65; *Popular Government*, pp. 59, 70; *Village Communities*, pp. 225–6; and Maine, 'India', in *The Reign of Queen Victoria: A Survey of Fifty Years of Progress*, ed. Thomas Humphrey Ward (London: Smith, Elder, 1887), vol. I, pp. 518–19.
61. See *LJ*, pp. 609, 610, and *Ancient Law*, pp. 25–7, 29–32.
62. See *LJ*, pp. 645–6 and *Village Communities*, pp. 48–9.
63. Peter Stein, 'Maine and Legal Education', in *The Victorian Achievement of Sir Henry Maine*, p. 206. Maine regarded Roman law as a typical system in the sense that it 'demonstrated what heights of technical legal science could be achieved by an exceptional progressive society'. Ibid. Austin's view was very similar to this. See *LJ*, pp. 58, 1079–80, and *supra*, Chapter 2.
64. *Village-Communities*, p. 22. Roman law is indispensable because 'viewed in the whole course of its development, it connects ... ancient usages and ... ancient juridical thought with the legal ideas of our own day'. Ibid.
65. See *LJ*, pp. 660, 662, 1099–1100, and *Village-Communities*, pp. 364–5, 367, 60, 76.
66. See *LJ*, pp. 662–81, 1021–39, 1092–1102.
67. *Village-Communities*, pp. 364–5.
68. Duff, *Sir Henry Maine*, p. 198. For a good discussion of Maine's critical attitude toward the bar and the common law, see Cocks, *Sir Henry Maine*, pp. 94 and 84.
69. For a very generous appreciation of Maine's contributions to Indian policy, administration, and studies, see Tupper, 'India and Sir Henry Maine', *Journal of the Society of the Arts*, 18 March 1898, p. 390.
70. Maine, 'India', *supra*, note 60, p. 503.
71. Ibid. According to Charles Tupper, it 'did not fall to his lot greatly to advance the [Indian] Code by specific enactments, but no one more clearly perceived or forcibly defended its necessity'. Tupper, 'India and Sir Henry Maine', p. 394.
72. 'The Conception of Sovereignty, and its Importance in International Law', *Papers Read Before the Juridical Society: 1855–1858* (London: V. & R. Stevens & G.S. Norton, 1858), pp. 26–45. The paper was actually read on 16 April, 1855.
73. Ibid., pp. 26, 29, 30.
74. Ibid., p. 30.
75. Ibid., p. 26.
76. Ibid., p. 29.
77. *LEHI*, pp. 396–7.
78. *Ancient Law*, p. 7.
79. Duff, *Sir Henry Maine*, p. 355.
80. *Dissertations on Early Law and Custom*, p. 388.
81. Ibid., pp. 388–9.
82. See *PJD*, pp. 20, 123, 171.
83. *International Law*, p. 220.
84. Ibid., p. 221.
85. 'Sir Henry Maine as a Jurist', *ER*, 178 (July, 1893), p. 105.
86. 'Maine's Early History of Institutions', *The Nation* (1 April, 1875), p. 225.
87. 'Review of Ancient Law', *SJR*, 11 May, 1861, p. 495. For a rather similar opinion, more guardedly expressed, see 'Review of Ancient Law', *The Law Times*, 9 March, 1861, p. 231.

88. See *SJR* (11 May, 1861), p. 495, and 'Mr. Maine on Ancient Law', *National Review*, 12 (April, 1861), p. 360.
89. 'Ancient Law', *LMLR*, 1861, p. 124.
90. Cocks, *Sir Henry Maine*, p. 119.
91. Ibid., p. 63.
92. See *supra*, Chapter 5.
93. *LEH*, pp. 356.
94. Duff, *Sir Henry Maine*, p. 60.
95. *Ancient Law*, p. vii.
96. Quoted by Feaver, *From Status to Contract*, p. 160.
97. *PJD*, pp. 18–37.
98. *Ancient Law*, pp. 1–19.
99. Ibid., pp. 20–41.
100. *From Status to Contract*, p. 111.
101. Sir Frederick Pollock, 'Sir Henry Maine and his Work', in *Oxford Lectures and Other Discourses* (London: Macmillan, 1890), p. 153.
102. *Ancient Law*, p. 247.
103. Ibid., p. 281.
104. For an excellent analysis of this development and its impact upon Maine, see Burrow, *Evolution and Society: A Study in Victorian Social Theory* (Cambridge: Cambridge University Press, 1966).
105. Ibid.
106. *Ancient Law*, p. 115.
107. Ibid., p. 3.
108. Ibid., p. 116 (emphasis added).
109. 'Maine on Ancient Law', *WR*, 75 (January–April, 1861), p. 251.
110. 'Mr. Maine on Ancient Law', *National Review*, 12 (April, 1861), p. 365.
111. *The Teaching of Sir Henry Sumner Maine*, p. 3.
112. *Legal Duties and Other Essays in Jurisprudence* (1931), p. 143.
113. *LEHI*, p. 343 (emphasis added).
114. Ibid., p. 356.
115. *Ancient Law*, pp. 2–3.
116. Ibid., p. 114.
117. *LEHI*, pp. 356–7.
118. Ibid., p. 357.
119. Ibid., p. 396.
120. Duff, *Sir Henry Maine*, p. 60.
121. Ibid.
122. *Ancient Law*, p. 7.
123. *LEHI*, p. 386.
124. Ibid., p. 398.
125. Ibid., p. 386.
126. Ibid., p. 392.
127. Ibid.
128. Ibid., p. 330.

129. Ibid., p. 385.
130. Ibid., p. 386.
131. *Ancient Law*, p. 251.
132. Ibid., p. 6.
133. Ibid., p. 4.
134. *PJD*, pp. 25–9.
135. *LEHI*, p. 384.
136. Ibid.
137. Ibid., p. 385.
138. *Village-Communities*, p. 224.
139. Ibid., p. 22.
140. *LEHI*, p. 379.
141. *Village-Communities*, p. 67.
142. *LEHI*, p. 382.
143. Ibid., p. 383.
144. Ibid., p. 380; *PJD*, pp. 25–9.
145. *LEHI*, p. 381.
146. Ibid.
147. *PJD*, pp. 35–7.
148. Ibid., p. 163, and *LJ*, p. 634. For discussion, see Rumble, *Thought*, pp. 109–43.
149. *PJD*, p. 35.
150. Ibid.
151. Ibid., p. 36.
152. Ibid.
153. *LEHI*, pp. 381–2.
154. Ibid., p. 364.
155. Ibid., p. 381.
156. Ibid., p. 382.
157. Ibid.
158. Ibid., p. 381.
159. Ibid., p. 382.
160. *PJD*, p. 166.
161. *Village-Communities*, p. 67.
162. Ibid., p. 68.
163. *LEHI*, p. 381.
164. Ibid., pp. 388–9.
165. Ibid., p. 381. For Austin's conception of a political society, see *PJD*, pp. 176–9.
166. *LEHI*, p. 392.
167. Ibid., p. 393.
168. Ibid., p. 392.
169. *Village-Communities*, p. 68.
170. Ibid.
171. *Ancient Law*, p. 22.
172. *Village-Communities*, p. 191.
173. *LEHI*, p. 372.

174. Ibid.
175. See Duke of Argyll, *The Reign of Law*, 5th edn (New York: John B. Alden, 1884).
176. *PJD*, pp. 148–50.
177. *LEHI*, p. 373.
178. Ibid.
179. Ibid., p. 374.
180. Ibid., p. 360.
181. Ibid., p. 350.
182. Ibid., p. 360.
183. Ibid., p. 359.
184. Ibid.
185. Ibid., pp. 359–60.
186. *Village-Communities*, p. 232.
187. Ibid.
188. Ibid., p. 233.
189. *LEHI*, p. 361.
190. *Dissertations on Early Law and Custom*, pp. 388–9, and *LEHI*, p. 394.
191. Ibid., p. 359.
192. Ibid., p. 394.
193. Ibid., p. 392.
194. Ibid., p. 346.
195. Ibid., p. 347.
196. *Village-Communities*, p. 346. For a good discussion of how Maine's critical attitude toward Austin's style influenced his own work, see Cocks, *Sir Henry Maine*, p. 63.
197. *LEHI*, p. 363.
198. Ibid., p. 365.
199. *Village-Communities*, p. 230.
200. *LEHI*, pp. 369–70.
201. 'Analytical Jurisprudence', *LMR*, 1 (August, 1876), pp. 617–30.
202. 'Austin's Jurisprudence and Its Latest Critic', *LMR*, 10 (1884–85), pp. 167–93.
203. 'Law and Sovereignty', *LMR*, 2 (1877), pp. 466–90.
204. *Outlines of the Science of Jurisprudence: An Introduction to the Systematic Study of Law* (Edinburgh: T. & T. Clark, 1887), p. xvi.
205. Ibid., p. xvii.
206. Ibid., p. xvi.
207. 'Sir Henry Maine as a Jurist', *ER*, 178 (1893), p. 120.
208. Taylor, 'The Conception of Morality in Jurisprudence', *Philosophical Review*, 5 (1896), p. 38.
209. Ibid.
210. *Legal Duties*, p. 142.
211. Cocks, *Sir Henry Maine*, p. 210.
212. *LJ*, p. 584.
213. Markby, 'Analytical Jurisprudence', p. 624.
214. *The Reign of Law*, p. 39.
215. See *PJD*, pp. 10–12, 27, 29, 31.

216. *LJ*, p. 1072.
217. Ibid.
218. Ibid., p. 1073.
219. Ibid., p. 231.
220. Ibid.
221. Ibid., pp. 233–4.
222. Ibid., p. 233.
223. Ibid.
224. Ibid., pp. 231–2.
225. Ibid., p. 232.
226. Ibid.
227. Ibid.
228. Ibid., p. 185.
229. Ibid.
230. Ibid., pp. 231–2.
231. Ibid., pp. 635–6.
232. *LEHI*, p. 377.
233. Ibid., p. 381.
234. His best known work is probably his *Elements of Law Considered with Reference to Principles of General Jurisprudence*, 6th edn (Oxford: Clarendon Press, 1905). This book became one of the leading Victorian textbooks on this subject (the first edition was published in 1871 and it underwent five more editions). It was based upon a series of lectures that Markby delivered in 1870 to some Hindu and Mohammedan law students in Calcutta.
235. Markby knew Sir William Erle, who at the time was Chief Justice of the Common Pleas. He was also an old friend of the Austins and in 1863 Sarah asked him to introduce her to a young barrister who could help her edit John's lectures. Erle introduced her to Markby and the two of them developed a 'close friendship'. Mrs. Markby, *Memoirs of Sir William Markby K.C.I.E.* (Oxford: Clarendon Press, 1917), p. 19. He evidently met Lucy Taylor, Sarah's great niece, on one of his visits to Weybridge. Their friendship ripened into something more intimate and they were married on 22 March, 1866.
236. Ibid., p. 120. Markby became, among other things, a Fellow of Balliol College, where he was Estates Bursar and Benjamin's Jowett's right hand man. In addition to his various University honours and posts, he was elected to the Oxfordshire County Council, on which he served until 1912. He also mediated, after 1895, numerous labour disputes.
237. See Markby, 'Analytical Jurisprudence', pp. 617–30.
238. See Markby, *Elements of Law*.
239. Markby, 'Analytical Jurisprudence', p. 626.
240. Ibid.
241. Ibid., p. 627.
242. Ibid.
243. *Elements of Law*, p. 7.
244. Ibid., p. 8.

245. Ibid., pp. 8–9.
246. F.M. Maxwell, 'Austin's Jurisprudence and its Latest Critic', *LMR*, 10 (1885–7), p. 191.
247. Ibid., pp. 191–2.
248. Ibid., p. 192.
249. Ibid., p. 193.
250. *PJD*, p. 35.
251. *Ancient Law*, pp. 165.
252. *Village-Communities*, pp. 332–3.
253. *LJ*, p. 1072.
254. The business of the expositor is to explain what the law is, a task that Bentham subdivided into history and demonstration. History explains what the law has been, in any past period of its existence, while demonstration represents 'the Law in the state it *is* in for the time being'. *A Comment on the Commentaries and A Fragment on Government*, eds J.H. Burns and H.L.A. Hart (London: Athlone Press, 1977), p. 414. Bentham further subdivided demonstration into 'arrangement, narration, and conjecture'. Ibid.
255. *PJD*, p. 247.
256. *LJ*, pp. 1088–9.
257. Ibid., p. 1030.
258. Ibid.
259. Ibid.
260. Ibid., p. 850.
261. Ibid., pp. 550–67.
262. Ibid., pp. 605–20.
263. *LEHI*, p. 345.
264. *Elements of Law*, p. 7.
265. 'Maine's Early History of Institutions', *The Nation* (1 April, 1875), p. 226.
266. 'English Jurisprudence', *ER*, 114 (1861), 246–7.

8

Criticisms of Austin's conception of general jurisprudence

Although Austin's conception of general jurisprudence did not elicit as much commentary as certain other facets of his legal philosophy, it certainly was not ignored. Criticisms of it took various forms, some of which raised more fundamental objections than others. One of their most striking features, however, is the very limited extent to which the existence of universal and necessary principles, notions, and distinctions was questioned. Of course, Austin's specific interpretations of these principles, notions, and distinctions were frequently criticized. His conception of a positive law as the command of a sovereign, which was subject to a vast amount of criticism, is an example. The criticism usually did not extend, however, to the underlying assumption that there are universal principles, notions, and distinctions.

Although there may well be several reasons for this, the primary consideration is quite apparent. It is the general acceptance of the assumption even by Austin's critics, moderate or extreme. Thomas Erskine Holland (1835–1926), who admired many aspects of Austin's work, falls into the first category. The first paragraph of his influential *Elements of Jurisprudence* begins with these words: 'The present treatise is an attempt to set forth and explain those comparatively few and simple ideas which underlie the infinite variety of legal rules.'[1] W.M. Best is an example of a much more extreme critic of Austin, or at least positions that he held. Best's opinion of codification, legal reform, the common law, and Jeremy Bentham could not have been more different from Austin's.[2] Yet, even Best claimed that the principles of jurisprudence are 'universal and eternal; being based in the human mind, and the constitution of human nature and society; and no nation, people, or system, can ever claim a property in them'.[3] James Bryce (1838–1922) is a more important example of the acceptance of a similar assumption by one of Austin's harshest critics. Although Bryce had almost nothing good to say about Austin, the two jurists had more in common than Bryce may have liked to acknowledge, or was even aware. For example, he too assumed that there are 'notions and conceptions which are essential to law and lie at the bottom of all systems'.[4] They are not very numerous, but certain categories, conceptions, and institutions 'belong to the science of law in general, because they appear in every fully developed system'.[5] While Austin had got them wrong, Bryce never seems to have doubted that they were there to be found.

I

The prevalence of this assumption is a major reason for the importance of a brief article – it was only ten pages long – by W.W. Buckland (1859–1946).[6] Buckland had been a brilliant student at Cambridge where he received a first in the law tripos for 1884. One year later he won the Chancellor's Medal for legal studies. He was called to the bar by the Inner Temple in 1889, the same year in which he became a fellow of Caius College, Cambridge. He became a college lecturer in 1895, a tutor of Caius College in 1903, and a senior tutor in 1912. In 1914 he succeeded E.C. Clark as Regius Professor of Civil Law, a post that he held until 1945.

Buckland was arguably 'the greatest master of Roman law that the English-speaking world has ever produced'.[7] His *magnum opus* was *A Text-Book of Roman Law from Augustus to Justinian*, the first edition of which was published in 1921 (a third edition appeared in 1963).[8] In addition to his focus on Roman law, he retained throughout his life an interest in jurisprudence. His very first article, published in 1890, was about it,[9] as was his last book.[10] The major problem that Buckland discussed in the article was the widespread assumption of an underlying conceptual unity of all legal systems. Jurisprudence was commonly said to consist of the analysis of this unity, or of the principles, notions, and distinctions that are universal. Buckland was sceptical of the actual existence of any, or at least very many, such principles, proof of which was desperately needed. Accordingly, he expressed sympathy for the puzzled student who fails to find in his textbooks any justification of the universal principles that are posited. Instead, he finds 'the free assumption of those very principles which he had thought it the business of the writers to demonstrate'.[11] Buckland emphasized that it must be proven rather than assumed that 'the same jurisprudence is a part of all law'.[12] He was doubtful that it could be proven, though he did not categorically deny the possibility. He seemed to place particular emphasis, in this connection, on the fact and pervasiveness of legal change. If legal principles do change, if jurisprudence is in this sense a progressive science, then 'what is likely to be the fate of a principle found in the law of, say, ten states which go on developing on different lines? The probabilities are against its continuance as a general principle.'[13] He implied too that these changes are, or may be, the product of causes that vary from one system to another in accordance with changing conceptions of morality and the need for legal protection. He therefore expressed doubt about the reasons 'for assuming any universal philosophy of law other than that vast study of the causes which lead to differences in different systems'.[14]

This conclusion was reinforced for Buckland by what he characterized as the extremely guarded comments of numerous writers on jurisprudence about the universality of certain principles, notions, and distinctions. He discussed the

textbooks of a number of prominent jurists of the period to illustrate the point. One is E.C. Clark, whose *Practical Jurisprudence: A Comment on Austin*, was published in 1883. According to Clark the existence of principles common to all systems is 'generally and not unreasonably assumed'.[15] A second jurist discussed by Buckland is Sir William Markby. In his *Elements of Law* he mentioned 'those principles of law which are generally deemed universal'.[16]

W.H. Rattigan (1842–1904) is a third writer whose textbook on jurisprudence, though not discussed by Buckland, illustrates very clearly his argument. Rattigan, who wrote primarily for Indian students, was born and educated in India, where he developed a large practice before the Punjab Chief Court. He came briefly to England in 1871 for the purpose of studying law, in which capacity he distinguished himself. He was called to the bar by Lincoln's Inn in 1873 and returned to Lahore. He served on four occasions as Chief Judge of the Court of Punjab, but in 1886 he resigned his position in order to devote full time to his law practice. From 1887 until 1895 he was Vice-Chancellor of the Punjab University. In 1900 he retired from India and settled in England, where he practised before the privy council. In 1903 he became a Bencher of Lincoln's Inn.[17]

Rattigan was an accomplished linguist who had mastered five European languages, a number of Indian vernaculars, and Persian. He also published widely on Indian law as well as other legal topics. In *The Science of Jurisprudence* he emphasized that it was his objective to teach his students at the outset of their legal education the general principles on which the science of law is based. In the absence of knowledge of these principles, he argued, their ability as practising lawyers will be substantially reduced. They will be unable to understand the codified laws of India, much less apply them to 'the recurring events of everyday life'.[18] However, 'once they have mastered those elementary principles, which *more or less* underlie the Jurisprudence of all Nations, they will have laid a foundation of legal knowledge which will be of incalculable benefit to them hereafter' [emphasis added].[19] In other words, Rattigan fudged his answer to the question of whether the principles are truly universal. To be sure, he was critical of a 'purely empirical' approach to learning the underlying general principles.[20] He also favoured putting jurisprudence upon a 'loftier pedestal'[21] and of showing that law can be learned as a science. Nonetheless, he could not bring himself to declare unequivocally that the general principles that he wished to teach were universal. As he put it in another passage, his goal was 'to expound the principles and distinctions which prevail *generally* in *most* bodies of law' [emphasis added].[22]

Thomas Erskine Holland may be the most significant example of all because of the wide use of his *The Elements of Jurisprudence*, which had thirteen editions from 1880 to 1924. In his textbook Holland defined jurisprudence as 'the formal science of positive law', the precise nature of which will be discussed

subsequently.[23] At times, to be sure, he made no attempt to conceal his opinion that there is a unity underlying 'all' of the phenomena that it is the business of jurisprudence to investigate.[24] The truths of this science, as of any science, are of 'universal application'.[25] In other words, he regarded scientific principles as necessarily universal, or inherent in the very notion of science. Yet, on other occasions he appeared to hedge his bets. He put it this way in the seventh edition of his treatise, which was published in 1895:

> For a science is a system of generalizations which, though they may be derived from observations extending over a limited area, will nevertheless hold good everywhere; *assuming the object-matter of the science to possess everywhere the same characteristics* . . . the principles of Jurisprudence, if arrived at entirely from English data, would be true if applied to the particular laws of any other community of human beings; *assuming them to resemble in essentials the human beings who inhabit England.* The wider the field of observation, the greater, of course, will be the chance of the principles of a science being rightly and completely enunciated; but, so far as they are scientific truths at all, they are always general and of universal application [emphasis added].[26]

Needless to say, the assumptions captured in the italicized passages in this quotation beg the question. Holland is *not* saying that scientific generalizations do in fact hold good everywhere *because* the subject-matter of the science possesses everywhere the same characteristics. Rather, his argument is that these generalizations hold good everywhere *assuming* that the objects of the science possess everywhere the same characteristics. But is the assumption accurate? Holland is reluctant to say so unequivocally, thus confirming Buckland's argument. The same can be said of his assumption that the people of other communities resemble in essentials the people of England.

At the same time, Buckland may have overstated his argument. At least some writers of textbooks on jurisprudence demonstrated no reluctance whatsoever to state that certain principles, notions, and distinctions were indeed universal. For example, there is no equivocating whatsoever by two lesser known jurists, Sheldon Amos (1835–1886) and B.R. Wise (1858–1916). Although neither of them is discussed by Buckland, their work embodies the assumption which he criticized. Amos was the son of Austin's old colleague at the University of London, Andrew Amos. The younger Amos was a reader at the Inner Temple until 1869, when he was appointed to the chair in jurisprudence at the University of London. He held this position until 1879, while also serving for briefer periods as reader for the Council of Legal Education and examiner in Constitutional Law and History at the University of London. He was a quite prolific writer and the author of two books on jurisprudence. His health was poor, however, and he eventually settled in Egypt, where he died on 3 January, 1886.[27]

Amos was a firm believer in the existence of a science of jurisprudence. One of its main objects was to facilitate the prompt understanding of '*every* system of national law, through a firm hold being obtained upon its technical structure, its topics, its logical subdivisions, and the methods of its application' [emphasis added].[28] This notion would make no sense, however, unless all of the various systems of national law were similar, at least in some respects. This was exactly Amos's position. He indicated that 'in every State there are some institutions and conditions which are permanent and essential'.[29] These institutions extend to the law, the basis of the true science of which is 'the irrefragable, permanent, and invariable facts of the constitution of human society, as exhibited in the state of the physical, logical, and ethical constitution of man'.[30]

Wise was the author of a textbook on jurisprudence published in 1881.[31] Although he intended his book to be mainly a primer for examinations, he expressed the hope that students of jurisprudence may also find it 'useful and suggestive'.[32] According to Wise the ethical, intellectual, and physical nature of all men is the same.[33] He also emphasized that 'the definitions of Jurisprudence should describe universal phenomena and the definition of a crime should therefore show the character of every criminal offence from the moment at which it was committed'.[34]

The assumption that certain principles or conceptions are universal was, thus, commonplace in late Victorian textbooks on jurisprudence (among other places). This fact is not, in and of itself, particularly remarkable. The writers of textbooks of any era probably tend to reflect certain widely shared assumptions of their era, which change over time. It is precisely because they are widely shared that the assumptions are not justified but postulated. At least this is exactly what Clark, Holland, Amos, Wise, and even Markby did. None of them made any sustained attempt to substantiate their conviction of the universality of certain principles, notions, and distinctions. At the same time, most of them were reluctant to express unequivocally their belief in the truth of this assumption. To this extent, they are subject to Buckland's criticism that one is 'surely entitled, without denying the existence of some universal principles, to regard with suspicion a science the exponents of which base it on an assumption of which they seem so much afraid'.[35]

Buckland acknowledged that Austin was much less guarded than were Clark, Holland, and Markby.[36] He unequivocally expressed his opinion that a substantial number of principles, notions, and distinctions are universal and necessary.[37] Still, Buckland was critical of Austin's attempt to establish that certain principles are actually necessary. If Buckland is correct, scarcely any of the principles Austin enumerated are necessary, 'unless this word be a synonym for "obviously convenient"'.[38] For example, Buckland doubted that Austin's distinction between crime and civil injury belongs to this 'exalted rank'.[39] According to Austin, the difference between the two does not lie in

their tendencies, but how the two wrongs are pursued, or their sanctions are applied. 'An offence which is pursued at the discretion of the injured party or his representative is a Civil Injury. An offence which is pursued by the Sovereign or by the subordinates of the Sovereign, is a Crime.'[40] Buckland was not convinced. While the aims of the two kinds of rules may differ – punishment is not the same thing as redress – this does not mean or imply that the distinction between them is necessary. Many of Austin's other allegedly necessary notions or distinctions are subject to the same criticism. Moreover, similarity of terminology or even rules does not signify an identity of underlying principle. 'If we limit ourselves to those cases where principle and rule based on it are the same in all systems, or even in the English and Roman systems, we shall find ourselves left with a very small residuum.'[41]

The conclusions of Buckland's critique

Buckland drew a number of important conclusions from this critique of general jurisprudence. To begin with, he expressed scepticism about its utility as an introduction to the study of law. The reasons for its value in this sense are unclear, he argued, and have not been demonstrated. He specifically questioned the assumption that the truths of jurisprudence stand in the same relationship to law as the truths of mathematics to, say, watchmaking. Of course, as long as legal theories were viewed as eternal truths underlying the universe, the analogy could be justified. Since few English thinkers now take this position, however, the analogy is without foundation.[42] Moreover, the student who has little or no knowledge of legal rules is in no position to judge many of the disputes of jurisprudence. Buckland cited as examples such standard questions as whether the law of persons should precede, in a code, the law of things; whether the law of actions should be secondary to, or coordinate with, the law of things; or whether usufruct should be handled as a servitude.[43]

Buckland also recommended replacing general, with particular, jurisprudence. He apparently believed that only a small change in the textbooks was required to implement this new focus. He explained that such a study would have two main objects. One was the exposition of the true significance of the basic principles of a particular legal system by analysing and comparing them with those of other systems.[44] The other goal was 'rational codification of the law'. Such a conception of jurisprudence would be much less confusing than the current approach, he argued, with its unproven assumption of universal principles. It would also have the advantage of being studied at the same time as students are learning the practical dimensions of law.[45] For particular jurisprudence, as Buckland thought of it, 'is nothing outside the law. It is the theoretical side of law, the study of the principles underlying the rules in any

existing system. The discussion of the nature of sovereignty and law is a fitting introduction to this study, but even as to this part of it it is doubtful whether any claim of universality is maintainable or useful.'[46]

Despite his differences with and criticisms of Austin, Buckland had a high regard for his predecessor. This is perhaps most evident in an article that he published in 1921 in memory of F.W. Maitland. Buckland began by disagreeing with Maitland's curt dismissal of Austin as J.A. = 0 (see *infra*, p. 254, note 60). According to Buckland, to say this is

> to ignore the real significance of Austin. Austin did, once for all, as Bentham had not wholly succeeded in doing, compel attention to the actual facts of the modern English conception of law, and drove from our books the half-thought-out matter which served for a philosophy of law in this country under the influence of Blackstone. No doubt the doctrines of Natural Law have been revived in our own day – some of us do not admire them even in their new form – but they are a very different matter from the philosophy of Blackstone. One cannot justly ignore a man who so influenced thought as Austin did. One of the most notable men of my acquaintance, not a lawyer, has told me that of the half-dozen books which influenced him most in his youth Austin's *Lectures on Jurisprudence* was one.[47]

Aside from this, Buckland did not entirely reject, by any means, Austin's conception of jurisprudence. What he rejected was not an analytical approach, but the assumption of the universality of the principles that are analysed. Indeed he fully accepted the Austin-like notion that the analysis of legal principles is 'the real subject of jurisprudence'.[48]

II

Very few, if any, late Victorian critics of Austin completely rejected 'analytical', or general, jurisprudence, facets of which they accepted. Instead, the critics tended to emphasize the limitations of Austin's work and the need for alternative approaches. Those that were recommended, however, tended to point in two quite different directions. Some jurists narrowed Austin. The narrowing was not so much, if at all, of his formal *conception* of jurisprudence, which was largely accepted. Rather, it was his *practice* of jurisprudence, what he actually discussed in his lectures, that was criticized and narrowed. Other writers broadened the province of jurisprudence to embrace matters that Austin had formally excluded from it. Although it is sometimes implied that post-Austin conceptions of jurisprudence served only to narrow its scope, this was by no means always the case.

Holland's narrowing of Austin

While Thomas Erskine Holland was not by any means the only writer to narrow the province of jurisprudence,[49] he may have been the most influential. Holland himself was a pillar of the Oxford professoriate, if there ever was one. He graduated from the university with a second class in classical moderations in 1856 and, two years later, a first class in *literae humaniores*. He was also elected to a fellowship at Exeter College in 1859, where he briefly taught philosophy. He subsequently studied law and in 1863 was called to the bar by Lincoln's Inn. After practising on the home circuit, he was elected to the Chichele Chair of International Law and Diplomacy in 1874. In 1875 he was elected to a fellowship at All Souls College, which he retained until his death (he resigned his Chair in 1910).[50]

Holland's major field of professional interest was international law and he only published one book about jurisprudence. Nonetheless, *The Elements of Jurisprudence* [hereinafter cited as *Jurisprudence*] was far and away his best known work. Although it now is 'a museum piece omitted from the canon of influential works', in its time and place the book was immensely successful.[51] Indeed, it has been characterized as 'the most successful book on jurisprudence ever written'.[52] What other textbook on the subject has ever undergone thirteen editions? The popularity of the book was no doubt due to several factors, but a major reason was its usefulness for students. 'Not only did it provide an introduction to the serious study of jurisprudence, it also functioned well as a last review of the law before examinations.'[53] However it is explained, the popularity of Holland's book gave his opinions an exposure of which other jurists could only dream. Generations of students of jurisprudence were also exposed, through Holland's work, to numerous ideas of Austin even if they never read them in the original. As Richard Cosgrove has pointed out, 'the thrust of Holland's jurisprudence bore a prominent Austinian imprint. The fullest dissemination of analytic jurisprudence resulted from the extraordinary success of Holland's text.'[54]

Holland set forth his conception of jurisprudence in the first chapter of his book. He summarized his position in these terms:

> The term Jurisprudence is wrongly applied to actual systems of law, or to current views of law, or to suggestions for its amendment, but is the name of a science. The science is a formal, or analytical, rather than a material one. It is the science of actual, or positive, law. It is wrongly divided into 'general' and 'particular', or into 'philosophical' and 'historical'. It may therefore be defined provisionally as 'the formal science of positive law'.[55]

Although Holland described this definition of jurisprudence as provisional, he never modified it. As a *formal*, rather than a *material*, science of positive law,

jurisprudence 'deals rather with the various relations which are regulated by legal rules than with the rules themselves which regulate those relations'.[56] For example, unlike the material science of comparative law, jurisprudence does *not* attempt to describe the similarities between the legal systems of various nations. Instead, it analyses 'those relations of mankind which are generally recognized as having legal consequences'.[57] Still, Holland argued that jurisprudence is *not* a science of legal relations *a priori*, or as they might have been, or ought to be. Rather, the propositions of jurisprudence are 'abstracted *a posteriori* from such relations as have been clothed with a legal character in actual systems, that is to say from law which has actually been imposed, or positive law'.[58]

In these respects jurisprudence was said to be similar to the formal science of abstract grammar, to which Holland frequently alludes.[59] Grammar furnishes formulae on the basis of which all linguistic phenomena find 'appropriate places'.[60] Similarly, the science of jurisprudence elaborates the formal unity underlying the legal systems of the world. To this extent, it catalogues 'the topics with which every system of law had to deal, however each may differ from the rest in its mode of dealing with them'.[61]

While Holland sharply distinguished between the 'formal' and 'material' sciences, he acknowledged a close relationship between them. He evidently believed that a material science serves its corresponding formal science by providing it with the basic materials of its work. His conception of the relationship between the material science of comparative philology and the abstract science of grammar illustrates the relationship. The one collects the facts that provide the foundation of the other. For example, the possessive case of a substantive noun may be expressed in different ways in different languages. Exactly how it is expressed is for comparative philology to determine. Still, the idea of the possessive form is a matter for the formal science of abstract grammar to analyse.[62]

Holland in effect argued that comparative law is to jurisprudence as comparative philology is to abstract grammar. He gave the examples of prescription and marriage. Comparative law ascertains how the periods of prescription, or the requirements of a valid marriage, have varied in time and place. Jurisprudence elucidates the meaning of prescription, or explains the legal dimension of marriage. At the same time, Holland emphasized that it was not absolutely essential for jurisprudence to be preceded by comparative law. Jurisprudence might have developed based on the observation of a single system of law, in one epoch of its growth. Nevertheless, he admitted that this is not in fact how the science of jurisprudence evolved. Indeed he took the position, which he expressed in Austinian language, that its growth would have been 'extremely tardy but for the possibility of separating the essential elements of the science from its historical accidents, by comparing together laws

enforced in the same country at different epochs, and indigenous laws with the differing, though resembling, laws of foreigners'.[63]

At first glance, Holland's conception of jurisprudence seems more abstract and formal as well as less substantive than Austin's. The aim of the latter was to expound universal, necessary, and essential legal *principles*, *notions*, and *distinctions*. Holland's object was to explain the 'formal unity' of legal systems. That is, it was to catalogue the shared topics with which each of them deals, to analyse relations widely recognized as having legal consequences rather than legal rules themselves. However, the actual differences between these two conceptions of jurisprudence are not in fact large. On the one hand, Austin's general jurisprudence was *not* an exposition of legal rules. On the other hand, Holland's formal science of positive law was more than an analysis of formal unity, a catalogue of topics, or an explanation of legal relationships. For example, he denied that a person who had a detailed knowledge of every European legal system would possess only a body of heterogeneous information:

> Suppose however, *as is the case* [emphasis added], that the laws of every country contain a common element; that they have been constructed in order to effect similar objects, and involve the assumption of similar moral phenomena as everywhere existing; then such a person might proceed to frame out of his accumulated materials a scheme of the *purposes, methods, and ideas common to every system of law*. Such a scheme would be a formal science of law.[64]

Holland's other remarks indicate that the scheme of a formal science of law would also include commonly shared general principles.[65]

In sum, both Holland and Austin assumed that legal systems share an underlying conceptual unity that it is the business of jurisprudence to explain. They distinguished these 'essentials' of law from the historical 'accidents' of particular systems, which vary from one nation to another. Like Austin, Holland also regarded the broader distinctions of jurisprudence as permanent, reflecting 'deep-seated human characteristics'.[66] He also followed Austin in claiming that these ideas would be abstracted from the systems of positive law that have actually existed, or exist. Moreover, both were also hostile to natural law, which Holland dubbed 'Jurisprudence in the air'.[67] In addition, inquiries about the factors that may have influenced the growth of law, or speculation about what it might or ought to be, were said to be outside of the province of jurisprudence. In short, historical and ethical inquiries were for other disciplines. What is more, both regarded, or tended to regard, jurisprudence as in this respect an *a posteriori* rather than an *a priori* science. Finally, whether they practised what they preached in this regard is questionable. At the least the opinions of both men are riddled with unproven assumptions.

To say this is not to imply that Austin's and Holland's conceptions of jurisprudence were identical. For example, Austin partitioned general jurisprudence into two basic spheres. One of them would focus upon principles, notions, and distinctions that are widespread, but neither universal nor necessary. The other would have as its focus abstractions that are both universal and necessary. Holland rejected all subdivisions of jurisprudence, which he portrayed as a unified field. He was thus critical of Austin's division of jurisprudence into 'particular' and 'general'. The basis of the criticism was his dissatisfaction with the term 'particular' jurisprudence. He argued that to use it as the name for acquaintanceship with the laws of a particular country is a misnomer. While Holland did not say this, he came close to arguing that it is demeaning to use the word 'jurisprudence' to refer to such 'merely empirical and practical knowledge'. Rather, the term ought to be used exclusively as the name of a science.[68] Since there thus is no such thing as a particular science of jurisprudence, Holland argued that the term 'general jurisprudence' should also be discarded. The word needs no qualifiers.

However, this criticism can hardly be taken as an indication of a fundamental difference between Austin and Holland. The fact of the matter is that in many respects their respective conceptions of jurisprudence are very similar. The same is true of their notions of law, sovereignty, and judicial legislation. It is therefore not surprising that Holland quite generously praised his predecessor, whom he characterized as a 'great jurist'.[69] The praise is particularly evident in the Preface to the very first edition of *Jurisprudence* (1880). Indeed Holland's acknowledgement of Austin's achievements was much more generous than that of many of his critics. For example, Holland noted a recent and beneficial change in the intellectual habits of English lawyers. 'Distaste for comprehensive views, and indifference to foreign modes of thought, can no longer be said to be a national characteristic.'[70] Although he attributed this transformation to various factors, Holland gave the greatest weight to Austin's writings.

> [To them] especially most Englishmen are indebted for such ideas as they possess of legal method. The *Province of Jurisprudence Determined* is indeed a book which no one can read without improvement. It presents the spectacle of a powerful and conscientious mind struggling with an intractable and rarely handled material, while those distinctions upon which Austin after his somewhat superfluously careful manner bestows most labour are put in so clear a light that they can hardly again be lost sight of.[71]

At the same time, Holland criticized the defects of Austin's work. The criticisms embody two quite dissimilar themes, one of which is that Austin's writings are too narrow. They are not only fragmentary, but substantial portions

of his subject are left 'wholly unexplored'.[72] The other criticism was in effect that the scope of Austin's lectures was too broad. Such is the case because they discuss at great length questions that have no necessary connection with jurisprudence. The examples adduced by Holland include Austin's digressions upon the psychology of the will, codification, and the principle of utility. To this extent, Austin's writings illustrate the generally unsystematic quality of the treatises of English jurists, including Bentham.[73] Holland indicated that his intention was to compose a treatise that 'should at least be free from this particular fault'.[74]

In at least one sense Holland was eminently successful in achieving this objective. He quite explicitly refused, for better or worse, to consider many of the questions that fascinated Austin. Holland's refusal was a reflection of his opinion that works of jurisprudence have been marred by digressions and polemics upon issues beyond its proper scope. He obviously aimed at rectifying this situation, a goal that he accomplished. Nothing that fell outside of the parameters of his conception of jurisprudence, strictly construed, was discussed in his textbook. Typical in this respect was his insistence that it was no part of his undertaking to discuss how far law should go in order to promote the well-being of its citizens.[75] He consequently refused to express opinions on some of the burning issues of the day. Such problems as paternalism, centralization, factory acts, or state churches are for politicians rather than jurists to resolve. Also, the resolution of some issues frequently discussed by jurists belongs to disciplines other than jurisprudence. For example, Holland was critical of Austin's discussion of the definition of a physical thing.[76] Such matters are questions for metaphysics rather than jurisprudence to settle.[77] Moreover, it is for psychology to determine if there is any special mental faculty by which the existence of rights can be affirmed or denied. Similarly it is for history to uncover the origin and evolution of whatever conceptions of rights now prevail. According to Holland, '*Jurisprudence is absolved from such researches.*'[78]

The most important implication of this absolution may be Holland's refusal to discuss the ethical questions that so intrigued Austin. The best example of this is the problem of the criterion of morality, the standard of ethically correct actions. Holland rather contemptuously dismissed Austin's discussion of this issue as a mere digression, all too typical of his work. Whether the criterion of virtue be the principle of utility, nature, or something else, is not for the jurist to say. The same is true of whether there is an innate moral sense, or a categorical imperative of the practical reason. Such questions may be important, but answers to them belong to metaphysics rather than jurisprudence.[79]

Overall, then, the most basic differences between Austin and Holland are not about their explicit conceptions of jurisprudence. Indeed, Holland's notion of it is, in some respects, an outgrowth of, or at least very similar to, Austin's. Rather, the most fundamental differences between them primarily

lie in how they *practised* jurisprudence, their actual approach to the subject. There is a plethora of qualifications and digressions in Austin's lectures, while there are very few in Holland's book. To this extent, he can be said to have been more of an Austinian than Austin. Any such judgement is more problematic than it may seem, however, because of Austin's attempts to reconcile what he actually did with his conception of jurisprudence.[80] Still, the fields that he actually ploughed are much broader than those tilled by Thomas Erskine Holland. In point of fact, he 'took the narrowing influence of Austin's definitions a great deal more seriously than Austin did himself, and Holland's canvas is simply not Austin's canvas'.[81]

The descriptive focus of other English jurists

To the extent then that Holland refused to discuss ethical questions about law, he can be said to have narrowed Austin's *practice* of jurisprudence. In doing this, Holland had plenty of company. The notion that jurisprudence is the exposition of what legal principles, notions, and distinctions *are* rather than what they *ought to be* was accepted by many, though not all, mid- and late Victorian legal theorists. Indeed, this principle may constitute Austin's most enduring legacy to English jurisprudence. It certainly was an idea accepted by numerous jurists who were highly critical of some of his other ideas.

The most compelling evidence of the widespread acceptance of this idea took the form, paradoxically, of a criticism of Austin. While his critics never put it in exactly these terms, some of them in essence attacked him for not being enough of an Austinian. The principal example of this flaw was his lengthy discussion of utilitarianism in the *PJD*. It is a discussion that was said to conflict with his conception of jurisprudence, which is purely descriptive. As such, it implies that the proper place for analysis of the principle of utility is the science of ethics and its subdivision legislation. The latter's focus is what positive law ought to be rather than what it is, which is the concern of jurisprudence. John Sykes's review in 1875 of a new Students' Edition of Austin's *Lectures* is a good example of this criticism.[82] Sykes's attitude towards Austin was ambivalent. On the one hand, his work was extolled as being 'as precious to the lawyer and the man of philosophic tastes as the fragments of the *Venus de Medici* to the artist and sculptor, if not far more precious'.[83] On the other hand, Sykes insisted that Austin's discussion of utility was not only too long, but 'altogether out of place, and involved . . . logical blunders'.[84] He also criticized Robert Campbell, the editor of the Students' Edition of the *PJD*,[85] for not rectifying this error.[86] It was not specified how exactly it should be rectified, but deletion or abridgement of the discussion was the implication.

Sykes was only one of the numerous critics of Austin's discussion of utilitarianism. Frederick Harrison assailed it as 'perfectly idle', 'needless', 'almost worthless', and 'perfectly beside his own avowed method'.[87] In 1884 the author of an article explaining Austin's current status in English Jurisprudence expressed similar opinions. The theory of utility was attacked as unhistorical, unscientific, and '*quite irrelevant as the Preface to Austin's analysis of Positive Law*'.[88] 'To take account of utility at all', the anonymous critic argued, is 'to admit a censorial element into an expository treatise, and to abandon the basis on which the whole system of Positive Law is made to rest'.[89] James Bryce echoed this criticism and argued that the principle of utility is unrelated to either the analytic method or positive law. While it has a place in the study of law, it is only in the science of legislation. There is also little or nothing that is new about it. All legislators, he optimistically claimed, 'have at all times professed, and many have honestly sought, to be guided by it'.[90] Although Bryce was willing to excuse Bentham's insistent emphasis on the principle of utility, he had no such tolerance for Austin. After all, he was supposedly 'a writer on law rather than a reformer [like Bentham], so in him the fault is less excusable'. Bryce was also critical of Austin's theological utilitarianism, his identification of utility with the law of God.[91]

Nothing illustrates more clearly the widespread acceptance of this particular criticism of Austin than William Markby's agreement with it. Although Markby was probably Austin's 'foremost champion',[92] his discussion of utilitarianism in the *PJD* was held to be inexcusable. Indeed, Markby blamed it for substantially impeding the success of the book. It is not only that the theory of utility is unpopular, but that the exclusion of ethical inquiries from jurisprudence was one of Austin's major objectives.[93] According to Markby, who was a utilitarian,[94] Austin's notion of law is independent of ethics, politics, and religion, 'and this independence is one of its greatest merits'.[95] The independence implies that Austin's conception of a law could be accepted by a Hindu, a Mohammedan, or a Christian, or 'by the most despotic of monarchs or ... the staunchest of republicans'.[96]

Dicey's critique of Austin

The pervasiveness of this criticism of Austin is one of the reasons – it is not the only one – for the quite remarkable popularity of Holland's *Jurisprudence*. His narrowing of the jurisprudential landscape had great appeal for a number of leading late Victorian jurists. In particular, his refusal to discuss ethical questions appealed to them. For example, Frederick Pollock praised Holland's book on the ground that it constitutes 'the first work of pure scientific jurisprudence ... that is, of the general science of law distinctly separated from the

ethical part of politics'.[97] Albert Venn Dicey (1835–1922) is an even more important example of this tendency than Pollock. Dicey was not only a leader of late Victorian jurisprudence, but a figure whose works are still read and debated. Unlike Pollock, Dicey profoundly admired Austin, and was heavily influenced by him. It is this admiration and influence that lends particular significance to Dicey's criticisms of Austin's discussion of utilitarianism. Whatever else may be said of them, they were not the Pavlovian response of an inveterate Austin basher.

Dicey himself had a distinguished academic record at Balliol College, Oxford, from which he graduated in 1858. In 1860 he won a fellowship at Trinity College as well as the Arnold Prize Essay for his study of the Privy Council. Three years later he was called to the bar by the Inner Temple and joined the Northern Circuit. In 1876 he was appointed junior counsel to the Commissioner of Inland Revenue. He established his reputation as a legal scholar in the 1870s with the publication of two well-received works – *A Treatise on the Rules for the Selection of the Parties to an Action* (1870) and *The Law of Domicil* (1879).[98] These books paved the way for his appointment in 1882 as Vinerian Professor of English Law at Oxford, a position that he held until 1909. It was during his tenure on this chair that he published what are probably his two greatest works. One is an *Introduction to the Study of the Law of the Constitution* (1885) [hereinafter cited as *ISLC*], which has been called 'the most influential constitutional textbook of the last [nineteenth] century'.[99] The other is his magisterial *A Digest of the Law of England with Reference to the Conflict of Laws* (1896) [hereinafter cited as *Digest*], which is probably his greatest work.[100]

Dicey's relationship to Austin is complex. On the one hand, Dicey praised Austin highly and was heavily influenced by him. On the other hand, Dicey was also quite critical of his predecessor. The criticisms can be duly appreciated, however, only in the context of an understanding of the praise and influence. The extent of Dicey's high regard for Austin is indicated by comments about him in a lengthy review of the first edition of Holland's textbook. According to Dicey it was impossible to praise Austin's merits too highly.[101] He revived the 'speculative study of law', he drew attention to Roman law, and he exhibited 'extraordinary powers of logical analysis'. According to Dicey, 'No student who has once sat at Austin's feet will on a certain very limited number of points ever feel astray.'[102] It is for this last reason that Dicey compared Austin to Ricardo. The one is to lawyers what the other is to economists. Dicey elaborated the point in these revealing terms: 'When you have once imbibed Austin's doctrine as to the meaning of the law, you can no more use the term vaguely than after you have studied Ricardo you can doubt what is meant by rent. Both teachers ... force on their pupils a certain number of views or dogmas with such vigour that the impression once made is never obliterated.'[103]

To an important extent, Dicey was one of these pupils. Certainly the impression that Austin's conceptions of law and sovereignty made upon him were never obliterated.[104] Yet, Dicey's debt to Austin is deeper than this and extends to his fundamental approach to legal analysis.[105] This is evident from Dicey's adoption of a very Austinian conception of jurisprudence. He defined it as the unerring definition or analysis of basic legal ideas or conceptions,[106] their relationship to each other, and the proper classification of a system of law.[107]

A no less fundamental aspect of Dicey's approach is his acceptance of Austin's restriction of jurisprudence, general or particular, to the study of the law that is. Dicey's commitment to this idea is evident from, among other things, the approach that he utilized in his major works. His description of his task in *ISLC* is a good example. The job of the professor of law is *not* to explain either the history or ethical merits of legal principles. Rather, it is 'to know and be able to state what are the principles of law which actually and at the present day exist in England'.[108] More specifically, 'The duty . . . of an English professor of law is to state what are the laws which form part of the constitution, to arrange them in their order, to explain their meaning, and to exhibit where possible their logical connection.'[109]

It would be difficult to envisage a more Austinian conception of the duty of an English professor of law. The large shadow that Austin cast over Dicey is also apparent from his *Digest*. In the 'Introduction' to the book Dicey discussed the different methods that have prevailed in studying the conflict of laws. One is the theoretical method utilized by continental jurists, the most significant of whom is Friedrich Carl von Savigny. According to Dicey these writers begin from the premise that the rules for the choice of law that prevail in various countries are largely the same and becoming ever more similar. From this it is inferred that these rules constitute in some fashion a common law implicitly accepted by all civilized countries. Although the jurists who take this position acknowledge that the law of each country deviates to some degree from this overarching law, they argue that such deviations should be avoided. They also claim that the field of the conflict of laws has underlying principles which it is the business of the scholar to unearth. These fundamental axioms provide the standard on the basis of which the soundness of the rules of any particular country can be judged. They also indicate that, and how, 'a consistent body of rules is, or might be, adopted by all nations for the determination of questions of the choice of law'.[110] In other words, practitioners of the theoretical method combine the study of what are the principles of private international law with the study of what they ought to be.[111]

Although Dicey did not deny that this approach to the conflict of laws had merit, he was convinced that it had fatal defects. From his perspective its results are 'essentially subjective, often diverge widely, and in no case represent faithfully the laws of any given country'.[112] Dicey himself obviously

preferred the 'positive method'. He characterized the writers who adopt it, such as the American scholar and Supreme Court Justice Joseph Story, as treating the rules making up the choice of law as a portion of the municipal law of any specific nation that enforces them. As such, Dicey argued, in a passage that Austin could have written, these jurists begin from 'the fact that the rules for determining the conflict of laws are themselves "laws" in the strict sense of that term, and . . . they derive their authority from the support of the sovereign in whose territory they are enforced'.[113] The writers who employ this method do not thus focus upon any alleged common law of Europe. Instead, they attempt to determine the law of a specific country with regard to its courts' 'extra-territorial recognition of rights'.[114] Of course the proponents of the positive method may also try to articulate the underlying principles on which the rules that they expound rest, expressly or implicitly. This is the end, however, of their inquiries, which are purely expository, in Austin's sense of the term. The work of the advocates of the positive method is analytical and descriptive rather than speculative and philosophical. In short, it is no part of their agenda to determine what the rules of the conflict of laws ought to be.

Dicey left no doubt about which method he had adopted in his treatise. His adherence to the positive method precluded the necessity, he pointed out, of 'justifying the maintenance of one rule rather than another as soon as it is ascertained to be part of the law of England. An expositor or commentator is not required to be an apologist.'[115] He was careful to add, however, that the systematic statement of the law that is is perfectly compatible with an explanation of the principles on which rules are based.

Unlike his *ISLC*, Dicey does not discuss Austin in *A Digest*. Still, it is clear that the book reflects agreement with Austin's argument that jurisprudence – in this case particular rather than general – is the study of the law that is rather than the law that ought to be. To put it in these terms is indeed to understate the influence of Austin's argument upon Dicey. The point is not merely that he agreed with it, or that his book reflects the agreement, but that he felt very strongly about the matter. It is therefore understandable that Dicey could say that Austin 'ought never to be mentioned without profound respect'.[116] At the same time, Dicey was hardly uncritical of Austin, whose undeniable merits are balanced 'by at least as undoubted defects'.[117] These flaws are not limited to what Dicey characterized as Austin's 'crabbed' and 'laborious' style, his extraordinarily narrow focus on a few legal ideas, or lack of proportion. In addition, the defects of Austin's work include the fact that his 'main interest' allegedly lay 'in the polemics of Benthamism rather than in the calm analysis of legal ideas'.[118] Dicey emphasized that this defect, in particular, renders the *LJ* 'singularly unfitted for the guidance of students'.[119] This limitation of Austin's volumes was also one of the reasons why Dicey could praise Holland's *Jurisprudence* as 'just that kind of guide to

jurisprudence which has long been needed both by trained lawyers and by students, and [which] has, in fact, superseded Austin's treatise'.[120] Among other things, it demonstrates that dispassionate legal analysis that Dicey found all too absent from Austin's *LJ*.

It is impossible, at least for me, not to conclude that this truly extraordinary characterization of Austin's work says more about Dicey than it does about Austin. The assertion that the latter's 'main interest' lies in the 'polemics of Benthamism' is not so much an exaggeration as a simple falsehood, which is most unusual for a scholar of Dicey's probity.[121] To say that Austin had *an* interest in them is true; to claim that it was his 'main interest' is outrageous. Such is the case at least if his interest in them may be measured by what he says about them in his lectures. Although they do not consist entirely of 'calm analysis of legal ideas', the bulk of them does. Indeed, only someone deeply disturbed by the 'polemics of Benthamism', which do indeed occur in the lectures, would fail to recognize this. That Dicey was disturbed by them is clear. He does not simply say that the 'polemics of Benthamism' render Austin's lectures unfit for the guidance of students. Rather, he advances the much stronger argument that they render the lectures 'singularly unfitted' for the guidance of students. In other words, more than any of Austin's other faults, the polemics explain why the lectures are pedagogically unsound.

III

Numerous English writers agreed then with the Austin who argued that jurisprudence should focus on the law that is rather than the law that ought to be. Still, this was by no means the only Austin, or the only conception of jurisprudence that had currency in the Victorian era. Many legal thinkers developed notions of it that were much broader than Holland's or those who agreed with him. Although this broadening took a wide variety of shapes, three of them may be singled out. One consists of the very eclectic approach of Denis Caulfield Heron, an Irish jurist. A second was the pluralistic conception of jurisprudence developed by James Bryce. A third took the form of the restatement of an older, pre-Austinian, highly moralistic, 'natural law' tradition. The short of it is that jurisprudence is a branch of ethics or morality. To be sure, the specific proponents of this tradition, as well as Heron and Bryce, are widely ignored today. In addition, most of the jurisprudential roads that they mapped remained untravelled, either by them or others. Instead, the major thoroughfare became, and may still be, 'the exposition and analysis of legal doctrine'.[122] Nevertheless, a purely analytical approach to jurisprudence was by no means the only one that appealed to Victorian jurists. The notion that Austin's views dominated the field is, simply put, historically inaccurate.[123]

Herons's eclectic approach

Heron (1826–1881) was a well-respected Irish barrister. He received his BA degree from Trinity College, Dublin, in 1845. He then won a university scholarship, but was unable to enjoy it because he was a Roman Catholic. In 1848 he was called to the Irish bar and taught jurisprudence at Queen's College, Galway, from 1849 to 1859. He became a QC in 1860 and, twelve years later, a bencher of King's Inns. He also was an MP from Tipperary from 1870 to 1874. Finally, he was third serjeant at law from October, 1880, until his death. He departed this life in a manner that any angler might envy – while fishing for salmon in the Corrib river![124]

Although Heron was an Irishman, he is considered in this study of English jurisprudence for two reasons. To begin with, his major work, *An Introduction to the History of Jurisprudence* (1860), is unique. It is a massive tome – 846 pages long – tracing the history of jurisprudence from the Greeks through Savigny. As such, it is unlike any nineteenth-century English work with which I am familiar. More important, Heron's book represents an attempt to develop a much broader conception of jurisprudence than Austin developed. To this extent, it provides a useful perspective for understanding what he, and the English jurists who followed in his footsteps, excluded from jurisprudence. Admittedly, it is not altogether clear how self-consciously Heron attempted to do this. Despite the inordinate length of his book, he never mentions Austin. Nonetheless, there is textual evidence to support the interpretation that Heron had read Austin, or at least was familiar with certain of his ideas that were 'in the air'.[125]

Heron developed a conception of jurisprudence that was broader than Austin's in at least four respects. In the first place, it would include the study of history, which Austin excluded from the field. In contrast, Heron advocated the synthesis of what he regarded as the two dominant modern approaches to law – the analytical or philosophical and the historical.[126] Heron contributed to this end by focusing on the situations that attended the institution of existing positive laws. In the second place, jurisprudence as he conceived of it considers both what the law is *and* what it ought to be. Or, as Heron more colourfully expressed it, jurisprudence is not simply the science of positive law, but 'the Art of Legislation and the Practice of Advocacy. A Jurist may state principles of law in his study, enact laws in the senate, or advocate rights in the forum.'[127] It is for this reason that Heron could attribute tremendous practical benefits to the study of jurisprudence. The issues that it discusses are not visionary or completely abstract, but affect the well-being of the 'entire community'.[128] In the third place, Heron argued that international law falls within the ambit of jurisprudence. To this extent, he can be interpreted as implying that Austin's critique of international law is unwarranted. The language that he

sometimes employs tends to substantiate this interpretation.[129] Finally, Heron was an early proponent of the integration of law and the social sciences. Indeed, he conceived of law as one of the three social sciences (the others were ethics and political economy). He argued that the material with which each of them deals is in reality so interrelated that adequate treatment of it requires 'the equal assistance of the jurist, the economist, and the moral philosopher'.[130] Knowledge of the social sciences is also, he maintained, essential for general well-being and progress. For this reason, among others, he was a firm advocate of including jurisprudence, ethics, and political economy in the general education of 'the poorest as well as the richest in the land'.[131] He expected great things from such education, which he described in very idealistic, glowing terms.[132]

Although Heron's conception of jurisprudence was much broader than Austin's, a number of their ideas were very similar. In this respect, Heron resembled many of Austin's nineteenth-century critics, whose disagreement with him was far from unconditional. To begin with, Heron adopted a command conception of law.[133] It is for this reason that he somewhat inconsistently denied, at least at times, that a 'great portion' of international law is part of positive law. After all, 'No punishment can be assigned for the offences of the Sovereign. *Quis custodiet ipsos custodio*?'[134] In addition, he sharply distinguished law from ethics or morals. What differentiates the one from the other is 'compulsion by public authority'.[135] Heron claimed that the failure to recognize this is the fundamental error of modern jurists. It is a mistake that explains their 'confusion', 'vagueness', and 'obscurity of thought'.[136] As an example he cited Blackstone's definition of municipal law, his criticism of which is very similar to Austin's. The basis of it was the argument that a rule may be a law no matter how evil as long as it is enforced by the state.[137] Moreover, Heron, like Austin, emphasized the universality of the principles of jurisprudence, which is the science of positive laws.[138] The business of the jurist is 'merely' to describe 'those general principles which are true in all times and under all circumstances'.[139] Finally, Heron adopted a utilitarian conception of the true goal of legislation. He characterized it as utility or 'the greatest happiness of the greatest number'.[140]

Heron's legal philosophy was thus in certain respects similar to Austin's, and in other respects different from it. What stands out, however, are the differences, which are more striking than the similarities. Admittedly, Heron was not the most profound, clearest, or consistent of thinkers. Still, I agree with Raymond Cocks that Heron's ideas are important enough to 'merit further study: he has been totally obscured by Maine's achievements'.[141] At the least, Heron's work signifies that the notion of a jurisprudence that was purely analytical did not receive universal acceptance. Nor is Heron the only jurist whose work substantiates this argument.

Bryce's conception of jurisprudence

James Bryce was the author of another important conception of the province of jurisprudence – there were also others – [142] that was substantially broader than Austin's, or Holland's. Bryce was, among other things, a barrister, legal scholar, historian, politician, inveterate traveller, and embryonic political scientist. His academic achievements include a distinguished record as an Oxford undergraduate, a Regius Professorship of Civil Law at Oxford from 1870 to 1893, and the authorship of numerous books. His most famous work may be *The American Commonwealth*, the first edition of which was published in 1888. It was a path breaking effort based in part upon his three visits to the United States. He also served in three cabinets, was a member of the House of Commons from 1880 to 1906, and served as British Ambassador to the United States from 1907 to 1913. He became Viscount Bryce on 1 January, 1914. One biographer has perceptively commented that, 'Crowded with achievement as his life was, it leaves the impression that he possessed great reserve forces which were never called fully into action.'[143]

These words seem to be a clever way of saying that Bryce never fully realized his very large potential. The judgement seems particularly applicable to his legal scholarship. As one scholar has written, Bryce 'never produced the book that would have established him in the forefront of contemporary jurists'.[144] Still, in 1901 he did publish his *Studies in History and Jurisprudence*, a collection of essays (most of them were based upon his lectures at Oxford while he was Regius Professor).

Bryce distinguished between four methods of legal science – the metaphysical, the analytical, the historical, and the comparative. He did not explicitly rank them and indeed claimed that each of the four was 'legitimate and capable of being applied in a truly scientific spirit. None therefore is to be either neglected or disparaged.'[145] All of them had their appropriate sphere and distinctive merit and deserved a place in a thorough scheme of legal education. Nonetheless, Bryce's comments on each of the methods indicate quite clearly his preferences. His evaluation of them was heavily conditioned by what may be called his 'barebones' empiricism. For example, in his book on the American democracy he stated that he had always striven 'to avoid the temptation of the deductive method, and to represent simply the facts of the case, arranging and connecting them ... but letting them speak for themselves rather than pressing the conclusions upon the readers'.[146] While 'not all the facts of ... [the] environment are relevant ... till you have examined them, you cannot pronounce any irrelevant'.[147] Observation, accumulation, and connection of the facts was thus Bryce's great methodological imperative. His faith in them was unswerving. As he put it, in his Presidential Address to the American Political Science Association in 1908, 'I start by offering to you one maxim of

universal validity. Keep close to the facts. Never lose yourself in abstractions.'[148] 'The Fact is the first thing. Make sure of it. Get it perfectly clear. Polish it till it shines and sparkles like a gem. Then connect it with other facts.'[149] Nor did his faith in the facts diminish in the final years of his life. A year before his death he insisted that, 'It is Facts that are needed: Facts, Facts, Facts.'[150] No doubt, the extent to which he consistently adhered to this approach is open to some question. He certainly was capable of quite grand generalizations, if they suited his purposes. Indeed, he appears to have regarded the capacity to form such generalizations as integral to the very notion of science. At least he took this position for political science. His view was that there is a constancy, uniformity, and permanency in the tendencies of human nature so that 'we can lay down general propositions about [it] . . . and can form these propositions into a connected system of knowledge'.[151]

The metaphysical method – it also could have been called the 'ethical' method – may have ranked lowest in Bryce's estimation. He associated it with continental writers on legal philosophy or the law of nature. He characterized it as the investigation of the abstract notions of right and law as related to morality, freedom, and the human will. Its aim is to discover the form that a legal conception or institution 'ought to take . . . which God or nature designed it to take – in conformity to its essence and indwelling creative principle'.[152] A fact-bound empiricist such as Bryce could not be expected to evaluate this approach very enthusiastically. He argued that 'lubrications of this type', which occur in a 'forest of shadowy abstractions', are too abstract to illuminate 'the difficulties and controversies which the student of any given system encounters'.[153] Although Bryce expressed this criticism as the general conclusion of English lawyers, there is no doubt that it represented his own opinion.

Bryce had a somewhat more favourable impression of the analytical method. He indicated that it was most familiar to Englishmen in the form it took at the hands of Jeremy Bentham, whose disciples allegedly regarded it as 'the only helpful mode of handling the subject'.[154] Whether they actually did is problematic at best, but in any case Bryce conceived of the analytical method in terms of two features. One is its exclusion of metaphysical or ethical questions. The other is the attempt, based upon the terminology currently in use, to define, explain, and classify legal terms, as well as to show their relationships with each other.[155] Bryce approved of both of these components of the analytical method, which he regarded as superior to the metaphysical approach. Above all else the one adheres much more closely to legal realities than the other.[156]

At the same time, Bryce was critical of the analytical method and its major proponents, Bentham and Austin. One error that they committed was to base their legal science on the principle of utility. This was a mistake because it has little or nothing to do with either the analytical method or with positive law.

The principle of utility does not affect the classification, exposition, or application of law, except to the limited extent that it subserves legal interpretation. The disciplines that should consider the theory of utility are ethics and psychology, not jurisprudence. Of course it is relevant to the making of law, but in this respect it falls within the province of legislation rather than jurisprudence.[157]

A second error of the Analytical Jurists was their undue reliance on contemporary English concepts and terms. According to Bryce they failed to delve deeply enough into history, or the legal systems of other countries. He was particularly critical of Austin's limitations in this regard. Of course, it could well be argued that he had relied much more heavily on Roman than English law for most of his concepts and terms. At times Bryce seemed to recognize this and criticized Austin for a different reason, which was his inadequate understanding of Roman law. Although he tried to use it for his own purposes, he failed. His failure only compounded his other weaknesses. They include an 'overweening self-confidence', 'dogmatic censoriousness', and lack of subtlety. Moreover, his conceptions of law and sovereignty were 'palpably wrong'. Accordingly, many of his followers 'have been largely occupied in disclaiming and correcting his mistakes'.[158]

A third limitation of the Analytical Jurists was their unduly narrow perspective. According to Bryce, they tend to lack breadth and attempt 'to force definitions on facts, instead of letting the facts prescribe the definition. They have been unequal to the subtlety of nature (for law also is a product of nature).'[159] Bryce attributed this vice of the Analytical Jurists to their neglect of history. In short, his argument was that they have overlooked a most important source – historical evidence – of both generalizations *and* definitions. Of course, Bryce's lumping together of these disparate notions is highly questionable. Facts are no doubt the most reliable source of empirically accurate generalizations, but it is doubtful that they can ever *prescribe* a definition. The belief that they had this power is symptomatic, however, of Bryce's quite unconditional worship of the facts.

Although Bryce was critical of all of the Analytical Jurists, his *bete noire* was John Austin. Bryce was willing to acknowledge that Bentham's mind was 'vigorous', 'fertile', 'inventive', 'acute', and 'ingenious'.[160] It is not therefore surprising that he was said to have dropped 'plenty of good things as he goes along'.[161] The same most definitely was not true of Austin, whom Bryce tended to savage. His most extreme indictment of his predecessor may be this passage:

> Austin is barren. Few or no suggestive thoughts are to be gathered where he has passed. His dry, persistent iteration, with its honest struggle after precision of terms, has a certain value as a mental discipline, just as it tests one's

> powers of endurance to traverse a stony and waterless desert .... But it is generally better to get one's discipline from books which also yield profitable knowledge. Of this there is in Austin nothing which may not nowadays be found better stated elsewhere. Most recent authorities are now agreed that his contributions to juristic science are really so scanty, and so much entangled with error, that his book ought no longer to find a place among those prescribed for students.[162]

Despite such brutal criticisms, Bryce could be more appreciative of the contributions of the Analytical Jurists in general and Austin in particular. To begin with, Bryce acknowledged that they had unleashed a 'keen east wind of criticism' the net effect of which was to uproot 'a good many old and probably rotten trees'.[163] For example, Bentham was the first person brave enough to denounce 'the artificialities, absurdities, and injustices of the unreformed law and procedure of England'.[164] Moreover, the Analytical Jurists stimulated an interest in the discussion of abstract legal doctrines that had been absent in the final 75 years of the eighteenth century. Finally, they contributed to legal education, which was virtually non-existent in the late eighteenth and early nineteenth centuries. Bryce particularly praised Austin's contributions in this regard. He deserves credit for his efforts to overcome the prejudice that the law was 'a forest of details through which it was useless, even if possible, to drive paths for the student to follow'.[165] Moreover, the enthusiasm for general principles that he brought to his course received 'the sympathy and deference of the eager youth who believed, and rightly believed, that the practice of law, as well as its substance, would gain from the application of an independent and fearless criticism to it'.[166] Although Bryce limited his commendation of Austin to his educational contributions, by 'this service [he] ... has earned our gratitude, and deserves to be remembered with respect'.[167]

While Bryce ranked the analytical method higher than the metaphysical, the two methods of jurisprudence to which he attached the highest value were the comparative and the historical. From his highly questionable perspective, the metaphysical and the analytical approaches are applicable 'only to the rudiments and to some particular parts of ... [the study of law]'.[168] In contrast, the historical and comparative methods are useful for the study of any part, particularly when they can be joined.[169] Bryce never explains why this could not also be said of the analytical method, the value of which would not appear to be limited to the rudiments or particular parts of law. At least it would seem that any part of law could benefit from the kind of conceptual and terminological clarification that is a hallmark of the analytical approach.

There is little doubt that Bryce attributed the greatest value to the historical method. If we judge approaches by their fruits, he maintained, it has yielded the richest crop.[170] The historical method has two major advantages.

To begin with, it can explain legal notions, doctrines, and rules that would otherwise be inexplicable. Many of them do not stem from general human reason or the nature of things. Rather, they originate in the specific and varying conditions of a particular country or people. 'Pure analysis' can therefore never completely explain 'any legal system'.[171] In addition, the historical method alone can establish that legal rules and conceptions are subject to growth and decay.

Although Bryce did not put it in exactly these terms, he also ascribed another advantage to the historical method. The nub of it is its provision of the kind of knowledge required to test whether broad principles, notions, and distinctions are really universal and essential. Of course, Bryce himself never doubted that some of them pass this test. This is evident from, among other things, a significant comparison that he makes between the comparative and historical methods. It is a comparison that reflects the ancient distinction, reiterated by Austin, between what is 'essential', on the one hand, and 'accidental', on the other hand. The comparative method resembles the historical, Bryce claimed, in its ability to help us 'disengage what is local or accidental or transient in legal doctrine from what is general, essential and permanent, and in thereby affording some security against a narrow or superficial view'.[172] This disengagement would make no sense unless it were assumed that at least some legal doctrines are general, essential, and permanent. Indeed, this assumption paradoxically furnished the basis of Bryce's critique of Austin's command conception of a law:

> we always need to be warned by History against assuming that our present notions are sufficiently wide, and sufficiently possessed of the elements of necessity and permanence to secure that our propositions shall be generally true and enable our definitions to hit what is really essential. The once popular definition of law as a Command of the State is an instance of the danger of forgetting the past, for the fact that it would have been palpably untrue in certain stages of political development shows that it does not rest upon a sufficiently broad foundation.[173]

IV

A third broadening of Austin's position took the form of the notion that jurisprudence is a branch of morality or ethics. As such, it closely resembles the natural law tradition, the great rival of legal positivism in Western jurisprudence. This conception of jurisprudence is also the one staked out by Sir William Blackstone, a proponent of natural law. For example, in his introductory essay on the study of law, he heavily emphasized the need to include law in a university curriculum.[174] Indeed, he expressed astonishment and concern that

such an important science had ever been deemed to be unnecessary in a university. After all, it is

> a science which distinguishes the criterions of right and wrong; which teaches to establish the one, and prevent, punish, or redress the other; which employs in its theory the noblest faculties of the soul, and exerts in its practice the cardinal virtues of the heart; a science, which is universal in its use and extent, accommodated to each individual, yet comprehending the whole community.[175]

Moreover, he defended the proposition that law is a suitable object of 'academical knowledge' on the ground that 'ethics are confessedly a branch of academical learning; and Aristotle *himself has said*, speaking of the laws of his own country, that jurisprudence, or the knowledge of those laws, is the principal and most perfect branch of ethics'.[176]

The *London Quarterly Review* and the 'schools of jurisprudence'

An obscure article published in the April, 1873, edition of the *London Quarterly Review* provides convincing evidence that this conception of jurisprudence had its advocates in the Victorian era.[177] The article is not only an illuminating overview of the various currents in the jurisprudence of the day, but a good statement of an older, pre-Austinian position. Unfortunately, the author of the 43 page essay is unknown. Nonetheless, his article deserves more attention than it has received from scholars of Victorian jurisprudence, including myself. The reason for this is not that the conception of jurisprudence defended by the author is more persuasive than Austin's, or that of others, which it may, or may not, be. Still, it represents a conception of jurisprudence quite different from Austin's that did not lack adherents.

The author began his analysis by explaining the sphere of thought or field of knowledge to which jurisprudence properly belongs. Of course, he acknowledged that his explanation would be unacceptable to one group of contemporary English jurists, whom he did not name.[178] Nevertheless, it is clear from the remainder of his essay that he was referring to Austin and his school. Historically, jurisprudence has been regarded as a branch of ethics. After all, law deals with a host of questions that are 'necessarily ethical in their nature'. As examples the author cited the rightness or wrongness of human actions, or their motives or intentions. The solutions to such problems inevitably involve reference to man's 'moral consciousness'. Indeed, 'all the fundamental conceptions connected with law are essentially moral notions, and the philosophy of law must ultimately run up into ethical inquiry'.[179] The author was careful to point out that he was *not* arguing that the sciences of jurisprudence and

ethics are identical. Rather, his argument was that jurisprudence is a subdivision of the science of ethics, on which it ought to be grounded.[180] As such, it expounds not merely positive law, but natural law as well.

Of course, the author did not argue that all jurists adopt this conception of jurisprudence. In fact, in one place he classified the prevailing definitions of the subject into two groups. One emphasizes that jurisprudence focuses upon the universal aspects of law, or natural law and justice. Recent or current exponents of this notion were said to include Charles James Foster, James Lorimer, C.M. Phillipps, W.M. Best, Sir James Mackintosh, James Reddie, John George Phillimore, 'and a host of English jurists of the past and present time'.[181] Their doctrines about the nature and purposes of jurisprudence are very different from the ideas of members of the second group. They maintain that the only business of jurisprudence is to classify and analyse the positive, or existing, laws of a community 'without considering their character as good or bad, or without taking account of the moral principles on which law rests'.[182] In short, their focus is law as it is, not as it ought to be. Members of this group include Bentham, Austin, their disciples Markby and Poste, and Hobbes, their 'great English leader'.[183]

The author subsequently developed a broader classification of English jurists, or at least their notions of law. He divided them into five schools, one of which is that of Hobbes. Despite his power and originality, his impact on the legislation or law of England was minimal.[184] The Analytical School of Bentham makes up the second school. The author particularly stresses Bentham's utilitarianism, which is interpreted to be the foundation of his notions of law and morality. The third school is entitled the '*Historico-Analytical School of Austin*'. The most important argument developed in this context may be the weight given to Austin's utilitarian ethical theories. They are interpreted to be the basis of his legal doctrines and, as such, a crucial part of his legal philosophy. The author therefore criticizes recent disciples of Austin, such as Markby, who attempt to divorce his legal doctrines from his theory of utility.[185] The fourth school is entitled the '*Inductive School (Subjective and Objective)*'. In contrast to Austin, this school recognizes natural justice as the basic principle, or enduring element, in law. It is also portrayed as considering all of the relevant facts, internal as well as external. Members of this school reject, too, the command conception of law. Instead, they ground their approach on a wider, more profound scientific basis. It consists of the 'moral nature of man, and the facts inevitably generated through the developments of this nature'.[186] Members of this school include the figures previously listed[187] as well as Dr Whewell, J.G. Phillimore, Herbert Broom, William Lecky, Shadworth Hodgson, John Grote, Professor Blackie and 'many others, whose writings are now moulding English thought on legal questions'.[188] Despite its admitted shortcomings, the author particularly praises James Lorimer's

Institutes of Law. It is a 'masterly exposition of the nature, sources, and authority of natural law, and of its relation to positive law'.[189] The author also commends Charles James Foster's *Elements of Jurisprudence* and C.M. Phillipps' book on jurisprudence[190] as scientific accounts of the basis of jurisprudence grounded in natural law. The fifth and final group of English jurists is the '*School of Roman Law*'.[191]

Although this classification is questionable in a number of respects, it has one very important value. That is its demonstration of the existence of different trends within English jurisprudence circa 1873. There was no single school, be it Austin's or anyone else's, that dominated the field, or constituted '*the* English school of jurisprudence'.[192] Rather, there were different approaches branching out in different directions. They were not as numerous as the author claimed, but they existed. In particular, at least two distinctive and quite different groups of jurists may be identified – the followers of Austin and the adherents of the older tradition of natural law. Although virtually all of the latter are little remembered or read today, their ideas were part of the prevailing climate of opinion.

The author did more than explain and classify schools of jurisprudence. In addition, he concluded with a critique of the views of Hobbes, Bentham, and Austin. Despite the 'signal service' of the last two to the cause of law reform, the author dissented *in toto* from their doctrines about the nature of law.[193] Their ideas were said to be unsatisfactory in three respects. In the first place, their command conception of law reflects an untenable view of its nature and sources,[194] for reasons that are not explained. In the second place, the rejection by the 'empirical schools' of natural law and natural justice is unacceptable. The rejection of it implies that might makes right, that legally right or wrong and just or unjust mean whatever is prescribed or prohibited by the sovereign. This notion was said to be entirely unsatisfactory. According to the author, 'the moral nature of man demands a justification of a law in the nature of things, or in something behind the mere will of the lawgiver'.[195] Finally, some members of the empirical school mistakenly separate law from ethics, moral principles, and the 'moral nature of man'.[196] This separation is a mistake because it divorces law from its 'natural and necessary foundation'.[197] How can we reason about the 'most moral things in human life – laws, rights, obligation, duties, and wrongs – apart from moral facts and principles [?]'[198]

Examples of the moralistic conception of jurisprudence: Sir Edward Creasy

Numerous English writers took positions illustrating the conception of jurisprudence defended in the *London Quarterly Review*. To be sure, none of them

staked out a position as rigorously as did the Scottish jurist James Lorimer.[199] Even so, a number of English lawyers either defended the view that jurisprudence is a branch of morality, or strongly emphasized the links between them.

One such jurist was Sir Edward Creasy (1812–1878), who was both a barrister and a historian. He was appointed a fellow of King's College, Cambridge, in 1834 and three years later was called to the bar by Lincoln's Inn. He subsequently practised on the home circuit and served as assistant-judge at the Westminster sessions court. In 1840 he became professor of modern and ancient history at the University of London. He was appointed Chief Justice of Ceylon in 1860, the same year in which he was knighted. However, he was compelled by ill-health to return to England in 1870 and he retired two years later. Despite his active legal career, he was the prolific author of a wide range of historical studies (there are 48 entries under his name in the catalogue of the British Library). His best known work is *The Fifteen Decisive Battles of the World*, which has undergone thirty-odd editions since its initial publication in 1851.[200]

Creasy's criticisms of Austin were expressed in his 'Inaugural Address' (1875) as President of the Jurisprudence Department, Social Science Congress.[201] At the outset it should be emphasized that his remarks about Austin were not, by any means, entirely critical. In particular, his science of general jurisprudence was praised as of 'very great value'.[202] Creasy added, however, that the influence of the moral law must never be forgotten. In point of fact, it has had, and ought to have, a large impact on positive law.

This consideration furnished the basis of Creasy's argument that to restrict jurisprudence to positive law is to confine and mutilate it. It was his contention that this is precisely what the narrow teachings of the Benthamite school of English jurisprudence have done.[203] While he acknowledged that jurisprudence should focus mainly upon positive law, he insisted that there must be room for the moral law. It most definitely should not be shunted off to the science of legislation. The greatest value of general jurisprudence, as he interpreted it, was the legal guidance that it provided. It enables us 'to form and to enshrine in our minds and hearts ideal patterns of excellence in laws, according to which we should endeavour, as far as possible, to ameliorate existing institutions, and in the spirit of which all doubts arising as to the letter of the law should be interpreted'.[204] This value would be lost if jurisprudence were to embrace only the study of the law that is. Creasy added that he would not object to this limitation if the word 'law' were accurately understood to encompass not just *lex*, but *jus*. Unfortunately, 'our rigid Benthamites will not allow "Law" to mean anything beyond "Positive Law" '.[205]

Creasy was also one of the minority of late Victorian English jurists to identify openly with the natural law tradition. He especially admired the ancient Roman school of jurisprudence that flourished from the time of Cicero

through the end of the reign of the Antonine emperors. Its emphasis upon a lost law of nature provides an ideal model for both legislators and judges. The former could use it as the basis of 'prudent and practicable reforms', while the latter would employ it as a guide to interpretation in doubtful or novel cases.[206] Creasy expressed the hope that, in light of the great changes which the recent Judicature Act must produce in England, 'we shall see the dawn of a similar "Golden Age" of English Jurisprudence, indeed, of Jurisprudence throughout the whole Britannic empire'.[207]

Charles James Foster's conception of jurisprudence and morality

Foster developed the notion that jurisprudence is a branch of morality more fully than did Creasy. Although Foster's career ended on a very sad note, it began auspiciously. He studied law at University College, London, and was an exceptional student. He won a number of prizes and was awarded the Law Scholarship. He subsequently received both the MA and LL D degrees of the University, at which he held the Chair in Jurisprudence from 1849 to 1853. It was in this capacity that he delivered the lectures published under the title of *Elements of Jurisprudence* (1853).[208] Aside from his lecturing, he was involved in a number of other activities. He developed an equity practice after being called to the bar by Lincoln's Inn; he became an outspoken champion of the abolition of all religious tests for admission to the universities; and he chaired a committee designed to secure a Member of Parliament for London University. He resigned his Chair in 1853 in order to become a member of the Senate of the University, in which capacity he served with 'conspicuous ability and vigour'.[209] From 1858 to 1864 he was the Chairman of the Convocation of Graduates.

Beginning in 1860, Foster, who was married and had two children, tried unsuccessfully to develop his legal practice. He therefore decided in 1864 to try his hand at lawyering at Christchurch, New Zealand. In 1874 he was appointed Lecturer in Jurisprudence at Canterbury College, but he was unable to make a go of it. His classes were discontinued in 1879–80. In 1885 he published his final book, a *Treatise on the Principles and Practice of the Supreme Court Code*. Although it has been characterized as a 'large and learned work', it did nothing to revive his practice.[210] It dwindled to almost nothing by the end of the century and Foster was reduced to giving lessons in Latin and Mathematics. A contemporary described his unfortunate, poverty-stricken circumstances in these terms: 'He was poorly, even shabbily dressed. He walked everywhere, and I feel sure that he could not have afforded a horse. Dr. Foster's office was untidy and dirty. There was really nothing in it, not even books; and he had no clerks. I would say he was a desperate man.'[211] It is no

wonder then that G.W. Keeton could say that Foster's career, which had once seemed so promising, concluded in 'failure and patient resignation'.[212]

Foster's attitude towards Austin was a mixture of respect for his achievements and disagreement with most of his doctrines. He was said to have attained a continental reputation, which is most justly deserved. Foster also knew of no one who could compare to him 'in the essential service he has rendered to the science [of jurisprudence], however it be viewed, at once by his comprehensive conception of it, and rigorous development into the minutest details'.[213] Foster expressed particular admiration for Austin's close explanation of terms and detailed explication of jurisprudence 'within the limits he assigns to it'.[214] Foster was even one of the rare commentators on Austin who praised his 'rough and rugged style, so amply is it justified by the severe qualities of his thought'.[215] At the same time, Foster's disagreement with Austin could hardly be wider. 'I differ *toto caelo* from the principles which the signal perfection of his [Austin's] treatise have established as the foundation of the English School of Jurisprudence.'[216] In particular, Foster argued that it had become ever more difficult to fulfil his professional responsibilities on the basis of the currently held, or Austinian, notion of legal science.

The reasons for Foster's disagreement with Austin were numerous. However, the most fundamental one may have been his separation of law from morality. As Foster acknowledged, 'A jurist who looks upon Law as part of moral science cannot accept expressions which go to ignore our moral being.'[217] He therefore rejected Austin's sharp distinction between the sciences of jurisprudence, the focus of which is law as it is, and legislation, the focus of which is law as it ought to be. Despite Austin's recognition of numerous and indissoluble ties between them, he did not go far enough for Foster. Indeed, in one place he indicated that he regarded law as it is and law as it ought to be as 'one and the same thing'.[218] He defended this arresting proposition on the ground that law ought to be, and actually is, the enforcement of an existing morality. In point of fact, it expresses the moral consensus of the community, its 'average moral feeling'.[219] Although the coincidence between law and morality may not be absolutely complete, it is as close as possible given the inescapable imperfections of human institutions. He also pointed out that law cannot, and ought not, enforce moral principles or rights that are not held by the community, or acknowledged by members of it.[220]

These ideas posed a major dilemma for Foster, who was sensitive to the difficulty. The problem is this: if law as it is, and law as it ought to be, are one and the same, how can unjust laws, such as those prescribing religious persecution or slavery, be explained? He resolved the difficulty on the basis of two different, if not contradictory, arguments. One was unequivocally to acknowledge the logical implication of his previously stated opinions. Even a law upholding slavery or religious persecution is what it ought to be 'because it could and can

be nothing else'.[221] In sum, the law cannot protect rights which nobody acknowledges. The second argument in effect entailed a redefinition and modification of the position that Foster was defending. In this vein he admitted that morality may not be what it ought to be. If that were the case, then law would rest upon an imperfect foundation, and would not in fact be what it ought to be. He confessed that this was indeed the case in 'every Community on the face of the globe'.[222]

Still, Foster denied that this is the question. Rather, he argued that the issue is 'the practicability of accounting for law and also explaining its terminology by means of the same course of enquiry'.[223] Foster argued that it was practicable, while he represented Austin and his followers as denying it. Their view is that the 'is' and the 'ought to be' of law are 'practically so different from [each other] ... as to require a separate line of scientific investigation to explain it'.[224] They therefore allocate to the science of legislation the study of what law ought to be and focus upon what law is, or jurisprudence.

However, it is one thing to maintain that it is impossible to account for or explain the law that is without reference to moral rules or notions. Austin himself recognized that it may be impossible.[225] It is another thing to argue that the law as it actually exists and is enforced corresponds to the law as it ought to be. The question remains: What about evil or unjust laws? If they exist, which Foster did not deny, how can law in fact be what it ought to be? The only way in which the two could be identified would be to argue that law cannot express a morality higher than the prevailing moral sentiments or feelings. Although this is the position that Foster seems usually to take, his very liberal theory of disobedience and defence of the right of revolution run counter to it.[226] They presume that the law that is may not be what it ought to be and for this precise reason may be disobeyed. He also admitted that the sovereign's declaration of the law is not unconditionally binding even when it is enforced.[227] Finally, he defended his discussion of such matters on the ground that it was essential for the completeness of his lectures to determine the extent to which law is morally binding. Yet, could a law be held not to be morally binding unless it were not what it ought to be?

While Foster was critical of Austin's separation of law from morality, he tried not to go to the opposite extreme of completely merging the one into the other. To this extent, Foster too separated law and morality. The real question, thus, is not *whether*, but *how*, he distinguished between them. The thrust of his position is that both jurisprudence and morality stem from the same source, which is the notion of duty and the reasons for it. To this extent, they can be said to be unified. They differ in that the scope or province of morality is much broader than that of jurisprudence.[228] Morality concerns itself with everything that ought voluntarily to be done. Jurisprudence concerns itself only with a subsection of this broad class of actions, i.e. what ought to be enforced.[229]

This notion underlies Foster's critique of the command conception of law. It focuses only on what *is* commanded rather than what *ought to be* ordered. From Foster's perspective, however, commands, which threaten the infliction of pain, require moral justification.[230] No such justification is to be found in the science of jurisprudence as Austin defined it. Its subject-matter consists, among other things, of *legal* duties that *may* be enforced. The crucial question of whether a legal duty ought ethically to be enforced, or an ethical duty ought to be legally enforced, is for the science of legislation, not jurisprudence.

Although Foster heavily emphasized the moral basis of jurisprudence, he had little use for utilitarianism. In fact, he specifically criticized the idea, which he attributed to Austin, that the obligatoriness of an action depends upon its tendency to promote human happiness. This principle is not only questionable, but inadmissible.[231] Foster regarded it as self-evident that, though what is right is always expedient, what is expedient is not always right. He defended this proposition on two grounds. One was an appeal to the common assumption that we may justifiably deprive an individual of his happiness through arrest and imprisonment. If this is warranted, then happiness cannot be the standard for determining what ought to be done. What is subordinate in the case of the individual cannot become ultimate in the case of the community.[232] His other argument addressed the specifically theological twist that Austin gave to his utilitarianism. If the happiness of His subjects were the final purpose of God, then He would exist for a purpose 'inferior to Himself'. Indeed, it is conceivable that circumstances may arise in which the fulfilment of this objective would be 'irreconcilable with the Divine perfection'.[233]

Instead of the principle of utility, Foster argued that the Golden Rule was the ultimate moral standard. The fundamental law of duty is 'doing as you would be done by'. He characterized it as a self-evident truth analogous to an axiom of mathematics.[234] As such, it is not deducible from any other principle and is discoverable by man's 'intuitive consciousness'. His view was that if jurisprudence really is a science, then 'all its ideas may be presented as clearly, and ... all its conclusions are capable of as rigorous statement as appears in any of the problems of Euclid'.[235] He went even further and drew an analogy not only between mathematics and jurisprudence, but physics and jurisprudence. 'Doing as you would be done by' has the same relationship to action as space does to matter. Just as it is impossible to think of matter except as in space, so it is also inconceivable to imagine actions as not being right or wrong.[236] He also argued that the moral law always applies, just as the physical law always operates. It is not therefore surprising that he described 'doing as you would be done by' as a universal, immutable, absolute, and necessary law.[237] As such, it constitutes a fundamental natural law lying at the foundation of the science of jurisprudence. The contrast with Austin and his insistence that positive law is the subject-matter of jurisprudence could not be starker.

John Lightwood's conception of jurisprudence

Lightwood was the author of one of the most interesting as well as significant critiques of Austin. Unlike his more mainstream critics, Lightwood did *not* attack Austin for his discussion of the principle of utility or questions of what law ought to be. Instead, he was criticized for divorcing such questions from jurisprudence and placing them in the science of legislation. To this extent, Lightwood's position was similar to that of Creasy and Foster. At the same time, Lightwood's disagreement with Austin was not as fundamental as theirs. Although Lightwood rejected Austin's legal positivism, he did not embrace the tradition of natural law represented by Creasy and Foster. Lightwood also discussed Austin much more thoroughly, as well as sympathetically, than they did.

The professional lives of Lightwood and Foster could not have been more different. The former was a graduate of Trinity Hall, Cambridge, of which he became a fellow in 1874 (the same year in which he also achieved a first class in mathematics from the University of London). In 1879 he was called to the bar by Lincoln's Inn. He practised law as a conveyancer and draftsman for the remainder of his long life. According to a biographer, 'his abilities were held in the highest esteem by the profession, and his practice was very wide'.[238] Support for this opinion may be drawn from some of the appointments that he received. In 1925 he became editor of the *Law Journal*, a position that he held until 1939, and in 1932 he became conveyancing counsel to the Court. He was senior conveyancing counsel when he died in 1947.

Lightwood was not only an eminent practitioner; he was also a prolific writer on real property law. He was the author of a number of treatises on the subject as well as innumerable contributions to legal periodicals.[239] Yet, his first book was *The Nature of Positive Law* (1883), a work about jurisprudence which he wrote when he was 31.[240] While it is read today only by legal historians and bears the earmarks of the author's relative youth, it deserves more attention than it has tended to receive. In any event the book is an excellent illustration of the tendency of many commentators on Austin both to praise and to criticize him. Lightwood emphasized that he wished to show no disrespect to 'so great a master', to whose work he was under 'the greatest obligations'[241] and whose extraordinary analytical powers he admired.[242] Lightwood particularly valued, as we have seen, Austin's perspicuity and precision.

Despite this praise, Lightwood rejected Austin's very conception of jurisprudence, which was the subject of special criticism. Lightwood particularly objected to the limitation of the science to the mere classification or exposition of positive law, or the law that is. After all, the 'proper business' of jurisprudence is 'to seek to regulate the relations between man and man, in such a

manner that they may best be brought into harmony with the common sense of Right'.[243] To fail to do this is a basic error analogous to saying that we must 'seek to improve the current textbooks in Dynamics, but must not seek to alter their substance'.[244] To restrict the improvement of law[245] to the science of legislation is 'dangerous to the ultimate destinies of Law. We must allow Jurisprudence to cover the whole field of Law, both the discovery of new principles and the exposition of old ones.'[246] Ideally, the principles of law would be discovered by the teachers of jurisprudence. The role of the state would be simply 'to place upon these a mark by which they may be known in practice'.[247]

Lightwood's rationale of this position included, oddly enough, an appeal to Austin! The basis of it was an unorthodox interpretation emphasizing the distinction between the letter and spirit of his notion of jurisprudence. According to the letter of his approach this science must be confined to the study of positive law as it is. Still, Lightwood argued that Austin tacitly recognized the sterility of this limitation by his lengthy discussion of positive law as it ought to be. He also established, at least to his own satisfaction, the principle lying at the foundation of the science of legislation, that of utility. Lightwood therefore argued that Austin's mantra that jurisprudence is concerned only with law as it is should not be taken too seriously. Rather, 'we shall be safe in following the spirit rather than the letter of the Master's injunction'.[248]

Lightwood found additional support for this interpretation in Austin's admission of the many ties between the sciences of jurisprudence and legislation. Despite his insistence that they are distinct, he also acknowledged that they are so interconnected that it is impossible to study the one independent of the other.[249] Lightwood quoted this passage from the *PJD* in support of this interpretation: 'Since, then, the nature of the index to the tacit command of the Deity is an all-important object of the science of Legislation, it is a fit and important object of the kindred science of Jurisprudence.'[250] Lightwood concluded that 'it would be hard, perhaps, to express more clearly the fact that we cannot separate these two sciences, and that it would be more proper to take the word *Jurisprudence* as including the consideration of Law generally, both as it is and as it ought to be'.[251]

An appraisal of Lightwood's interpretation of Austin

Lightwood's interpretation of Austin is not only perceptive, but original. At least I am unaware of any other nineteenth-century commentary on his work that is similar to it. It is also an interpretation for which an even stronger case can be made than Lightwood developed. His explanation of Austin's defence of his discussion of the principle of utility is insightful, but incomplete.

The most obvious sign of this is Lightwood's failure to mention Austin's basic argument for his exposition of the various indices to the divine law. One of them is the theory of the moral sense, a second is the principle of general utility, and the third is a compound or mixture of the other two. His argument was that an exposition of these various indices is a necessary link in 'a chain of systematical lectures concerned with the *rationale* of jurisprudence'.[252] He defended its necessity on two grounds, the first of which Lightwood does not discuss. The brunt of it is the argument that, without such an exposition, many of the principles and distinctions of jurisprudence could not be explained 'correctly and clearly',[253] or 'in a complete and satisfactory manner'.[254] Austin gave the example of the distinction of modern jurists between positive law and morality. They have distinguished between them in terms of a contrast between positive and natural law. He argued that this distinction corresponds closely to that of the classical Roman jurists between the *jus civile* and the *jus gentium*. The former signifies the positive law that prevails in and is unique to a particular community. The latter represents the positive laws that obtain in all nations and the positive moral rules that all mankind observe. Since these rules are universal, it has frequently been argued (though not of course by Austin) that they cannot be of mere human creation. In this respect they differ from the positive laws that are peculiar to specific communities. Rather, the universal rules were held to be modelled upon the laws of God and were really 'divine or natural laws clothed with human sanctions'.[255]

Austin maintained that without a clear understanding of the three indices to the divine law these distinctions would be incomprehensible. Moreover, both the theory of the moral sense and the principle of general utility imply that they are 'senseless'.[256] *All* positive law is the creation of human sovereigns rather than the divine ruler. 'To say that it emanates, as positive law, from a Divine or natural source, is to confound positive law with law whereon it is fashioned, or with law whereunto it conforms.'[257] For Austin the law to which positive law should conform is not natural law, but the law of God as indicated by the principle of utility.

Lightwood did briefly discuss the second ground on the basis of which Austin justified his lengthy exposition of ethical theories. His argument was that, despite the differences between the sciences of jurisprudence and legislation, there are 'numerous' and 'indissoluble' ties between them.[258] Yet, Austin did much more than merely *assert* the existence of these links between the two sciences. Throughout his lectures he actually *referred to* and *used* them in order to resolve the problems that he confronted. One example is his discussion of the layman's ignorance of law, which he regarded as widespread. If the vast majority of people are ignorant of the laws that bind them, what explains their tendency to conform to legal precepts? According to Austin, the explanation lies in the fact that the existence of some laws is 'obviously' suggested by or

surmised from their utility. Indeed, 'most men's knowledge of the law is mostly of this kind. They see that a particular act would be mischievous, and they conclude that it must be prohibited. The conduct of nineteen men out of twenty, in nineteen cases out of twenty, is rather guided by a surmise as to the law, than by a knowledge of it.'[259] A second example is Austin's perception of the strong influence of the principle of utility upon the enactment of laws. He argued that it not only should guide, but has actually guided, legislators.[260] He therefore claimed that he would often be unable to explain the scope and purport of a law without discussing the principle of utility.[261] A third example is the heavy impact of perceptions of general utility upon the habitual obedience of the bulk of the population.[262]

Austin not only defended the necessity for a discussion of ethical theories in a treatise on the rationale for jurisprudence. In addition, he indicated that in certain kinds of cases the teacher of jurisprudence may justifiably express an opinion about the utility of a law. Although no commentators on his work of whom I am aware have alluded to this argument, it is one that Austin developed. Of course, he qualified the circumstances under which professors should evaluate the goodness or badness of laws. His major concern appears to have been the preservation of pedagogical impartiality. He pointed out that a teacher of jurisprudence probably has strong opinions of his own. He regarded it as questionable whether such earnestness 'be less favourable to impartiality than indifference'.[263] Austin therefore emphasized that whenever an instructor evaluates a law he should state impartially the conflicting opinions of its merits.[264] He also shrewdly warned against any attempt by a teacher to imply his own opinion under the pretext of attributing causes. Nevertheless, he indicated that in cases which do not 'try the passions' an instructor may advantageously discuss the goodness or badness of a law.[265] He gave two examples of such cases. One was rescission of contract because of inadequate consideration. The other was codification, an issue that obviously was of deep concern to Austin. He argued that it 'may be agitated with safety, because everybody must admit that Law ought to be known, whatever he may think of the provisions of which it ought to consist'.[266] He defended these occasional ventures into the science of legislation on the ground that they illustrate how such questions ought to be approached.

V

The very different interpretations of Austin discussed in this chapter raise an obvious question: Who is the 'true' Austin? It is apparent that there are at least two major candidates for this honour, or at least characterization. One is the person who insisted that the *exposition* of legal principles, notions, and

distinctions abstracted from positive laws is the exclusive and proper objective of general jurisprudence.[267] This Austin argued that jurisprudence has no direct concern with the goodness or badness of laws as measured by the test of utility, or any of the other tests that divide mankind. Such matters are the concern of the science of legislation. Its focus is the determination of 'the test or standard (together with the principles subordinate or consonant to such test) by which positive law ought to be made, or to which positive law ought to be adjusted'.[268] Still, there is also another Austin whose *bona fides* are equally well-founded. This person discussed the principle of utility and other ethical issues in three of the six chapters of the *PJD*. He also justified his exposition of it on the ground that it is an important and proper object of the science of *jurisprudence*. Moreover, he explicitly argued that expressions of opinion about the merits or demerits of a law are advantageous in certain kinds of cases.

The closest that Austin ever came to telling us which set of opinions represented his most fundamental outlook is a very brief, three-sentence passage in his 'Analysis of Lectures'.[269] In the first place, he acknowledged that he probably had spent too much time discussing the principle of utility. The reason that he in effect adduced was the conflict between this discussion and his conception of jurisprudence. His exact words were: 'I probably dwell upon the theory [of utility] somewhat longer than I ought . . . . I probably wander into ethical disquisitions which are not precisely in keeping with the subject and scope of my Course.'[270] In the second place, he explains this wandering on the basis of his deep-seated conviction of the truth and importance of the principle of utility. This belief explains why he was intensely committed to recommending it to others. In the third place, he begged to be forgiven if he had been inconsistent: 'If I am guilty of this departure from the subject and scope of my Course, the absorbing interest of the purpose which leads me from my proper path, will excuse, to indulgent readers, my offence against rigorous logic.'[271]

Unfortunately, these heavily qualified remarks do not provide a very conclusive identification of the 'real' Austin, if there is one. To begin with, he never explicitly admits that he should not have discussed the principle of utility. Rather, he only says that he had 'probably' spent *too much time* discussing it. In addition, there is no unequivocal admission by Austin that his exposition of the principle of utility *is* an offence against 'rigorous logic'. Instead, he indicates that he probably entered into ethical discussions that are not 'precisely' in keeping with the subject and scope of his course. Whether this refers to any discussion of the principle of utility, or only too lengthy a discussion of it, is not altogether clear. The latter would seem to be indicated, however, by his admission that he probably had dwelled upon the principle longer than he should have. The other thing that Austin says is that *if* his disquisitions on ethics are a departure from the subject and scope of his course, he should be excused.

I can only draw a very limited number of conclusions from these rather elliptical remarks. On the one hand, Austin recognized that his discourses on ethics could be criticized as inconsistent with his conception of jurisprudence, or the subject and scope of his course. On the other hand, he could not bring himself to say categorically that his discussion of ethical issues was a mistake. At the end of the day then it is unclear who the 'real' Austin is. Whether it is the person who set the stringent boundaries for the province of jurisprudence, or the person who so frequently transgressed them, remains unclear. To be sure, most of the nineteenth-century commentators (among others) on his work thought that they knew the answer to the question. *Their* Austin was the advocate of the position that jurisprudence is limited to the discussion of positive law as it is. This notion was the heart of what was eventually to become, in the twentieth century, 'the expository tradition' in English jurisprudence.[272] Its prevalence meant, as David Sugarman has put it, that the 'exposition, conceptualization, systematization and the analysis of existing legal doctrine became equated with the dominant tasks of legal education and scholarship'.[273] Yet, there is also the Austin portrayed, if incompletely, by John Lightwood in his original and, in some respects, compelling interpretation. *His* Austin was the person who was dissatisfied with the barrenness of such a conception of jurisprudence. It is for this reason that, according to Lightwood, Austin discussed the principle of utility at such great length. Moreover, what a person *does* may well be a better indicator of who he or she *is* than what he or she *says*. Still further, this Austin also rationalized his discussion of the principle of utility as *necessary* in a treatise on jurisprudence. At the very least Lightwood identified a side of Austin that needed, and needs, much more recognition than it has generally received. It may just be that *this* Austin is a much more interesting and significant, though obviously much less influential, jurist, than the exponent of the expository orthodoxy. He is also a figure whose legal positivism is not *as* different from the natural law tradition as is usually assumed.

Notes

1. *Jurisprudence*, p. 1.
2. See W.M. Best, 'The Common Law of England; with an Examination of Some False Principles of Law', in *Papers Read Before the Juridical Society, 1855–1858* (London: V. & R. Stevens & G.S. Norton, 1858), pp. 399–434.
3. Ibid., p. 420.
4. *SHJ*, p. 625.
5. Ibid., p. 627.
6. 'Difficulties of Abstract Jurisprudence', *LQR*, 6 (1890), pp. 436–45.
7. P.W. Duff, 'Roman Law Today', *Tulane Law Review*, 22 (October, 1947), p. 2.

8. See *A Text-Book of Roman Law from Augustus to Justinian*, rev. Peter Stein (Cambridge: Cambridge University Press, 1963).
9. See Buckland, 'Abstract Jurisprudence'.
10. *Some Reflections on Jurisprudence* (Cambridge: Cambridge University Press, 1946).
11. 'Abstract Jurisprudence', p. 437.
12. Ibid., p. 438.
13. Ibid., p. 444.
14. Ibid., p. 445.
15. 'Jurisprudence: Its Use and Place in Legal Education', *LQR*, I (1885), p. 203.
16. *Elements of Law Considered with Reference to Principles of General Jurisprudence*, 6th edn (Oxford: Clarendon, 1905), p. 5.
17. *DNB Supplement, 1901–1911*, vol. 1, pp. 162–3.
18. W.H. Rattigan, *The Science of Jurisprudence Chiefly Intended for Indian Students*, 2nd edn (London: Wildy & Sons, 1892), p. vi.
19. Ibid., pp. vi–vii.
20. Ibid., p. 2.
21. Ibid., p. 3.
22. Ibid., p. 9.
23. *Jurisprudence*, p. 12.
24. Ibid., p. 11.
25. Ibid., p. 10.
26. Ibid.
27. See *DNB*, 22 (Supplement), pp. 44–5.
28. Sheldon Amos, *The Science of Law, International Scientific Series*, vol. 10 (New York: D. Appleton, 1891), pp. 27–8.
29. Ibid., pp. 117–18.
30. Ibid., p. 27.
31. B.R. Wise, *Outlines of Jurisprudence for the Use of Students* (Oxford: James Thornton, 1881).
32. Ibid., Preface.
33. Ibid., p. 4.
34. Ibid., p. 89.
35. Buckland, 'Abstract Jurisprudence', p. 440.
36. Ibid.
37. *LJ*, pp. 1073–4.
38. Buckland, 'Abstract Jurisprudence', p. 440.
39. Ibid.
40. *LJ*, pp. 405, 1074.
41. Buckland, 'Abstract Jurisprudence', p. 441.
42. Ibid., p. 438.
43. Ibid., pp. 438–9.
44. Ibid., p. 445.
45. Ibid.
46. Ibid.
47. 'F.W. Maitland', *The Cambridge Law Journal* (1926), p. 293.

48. 'Abstract Jurisprudence', pp. 444.
49. For example, Wise praised Holland's conception of jurisprudence as a formal science, which he largely adopted. See Wise, *Outlines of Jurisprudence*, pp. 2, 3, 6.
50. *DNB* (1922–1930), pp. 427–9.
51. Richard Cosgrove, 'Sir Thomas Erskine Holland and the Treatise Tradition: The Elements of Jurisprudence Revisited', in *Learning the Law: Teaching and the Transmission of Law in England, 1150–1900*, eds Jonathan A. Bush and Alain Wijfels (London: Hambledon Press, 1999), p. 399.
52. *DNB* (1922–1930), p. 428.
53. Cosgrove, 'Sir Thomas Erskine Holland', p. 402.
54. Cosgrove, 'The Reception of Analytic Jurisprudence: The Victorian Debate on the Separation of Law and Morality 1860–1900', *Durham University Journal*, 74 (1981), p. 53.
55. *Jurisprudence*, p. 12.
56. Ibid., pp. 3–6.
57. Ibid., p. 8.
58. Ibid., p. 9.
59. Ibid., p. 7.
60. Ibid., p. 6.
61. Ibid.
62. Ibid., pp. 6–7.
63. Ibid., p. 8.
64. Ibid., p. 7.
65. Ibid., p. 2.
66. Ibid., p. 9.
67. Ibid., p. viii.
68. Ibid., p. 11.
69. Ibid., p. 127.
70. Ibid., p. vi.
71. Ibid., pp. vi–vii.
72. Ibid., p. vii.
73. Ibid.
74. Ibid.
75. Ibid., p. 70.
76. See *LJ*, pp. 357–64, 774–5.
77. *Jurisprudence*, p. 88.
78. Ibid., p. 72.
79. Ibid., p. 27.
80. For discussion, see *supra*, pp. 212–15.
81. W.L. Morison, *John Austin* (Stanford: Stanford University Press, 1982), p. 152.
82. 'Jurisprudence: A Review', *LMR*, 4 (1875), pp. 486–514, 575–604.
83. Ibid., p. 491.
84. Ibid., p. 504.
85. The Student's Edition, John Austin, *PJD*, abridged by Robert Campbell (London: John Murray, 1875).

86. Sykes, 'Jurisprudence: A Review', p. 504.
87. 'The English School of Jurisprudence: Part I. – Austin and Maine on Sovereignty', *Fortnightly Review*, 24 (October, 1878), pp. 479–80.
88. 'The Present Position of Austin in English Jurisprudence', *JJ*, 28 (1884), p. 450.
89. Ibid., p. 451.
90. *SHJ*, p. 613.
91. Ibid., pp. 613–14. This criticism of Austin has a number of quite debatable features, one of which is Bryce's vast oversimplification, if not misrepresentation, of Austin's position. He never claimed that positive law or legal doctrines are in fact based upon the principle of utility. He would no doubt say that any such opinion involves a confusion of the 'is' and the 'ought' of law, a confusion that he persistently tried to dispel. Moreover, Bryce completely ignored Austin's various attempts to explain his rationale for his lengthy discussion of the principle of utility. The rationale may, or may not, be persuasive, but it certainly needs to be taken into account by the author of a criticism such as Bryce's.
92. Cosgrove, 'The Reception of Analytical Jurisprudence', p. 49.
93. Markby, 'Analytical Jurisprudence', *LMR*, I (1876), p. 624.
94. See his *Elements of Law*, pp. 30–1.
95. Markby, 'Analytical Jurisprudence'. For Markby's utilitarianism, see his *Elements of Law*, p. 29 et seq.
96. Ibid., p. 5.
97. *History of the Science of Politics*, p. 63, as quoted by Richard Cosgrove, *Scholars of the Law: English Jurisprudence from Blackstone to Hart* (New York: New York University Press, 1996), p. 161.
98. See Albert Venn Dicey, *A Treatise on the Rules for the Selection of the Parties to an Action* (London: Maxwell & Son, 1870), and *The Law of Domicile as a Branch of the Law of England, Stated in the Form of Rules* (London: Stevens & Sons, 1879).
99. Albert Venn Dicey, *An Introduction to the Study of the Law of the Constitution*, 8th edn (Indianapolis: Liberty *Classics*, 1982); Richard A. Cosgrove, *The Rule of Law: Albert Venn Dicey, Victorian Jurist* (Chapel Hill, North Carolina: University of North Carolina Press, 1980), p. 113.
100. *A Digest of the Law of England with Reference to the Conflict of Laws* (London: Stevens & Sons, 1896). In this period of time he also published *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century* (London: Macmillan, 1905).
101. 'The Study of Jurisprudence', *LMR*, 5 (1879–80), p. 386.
102. Ibid.
103. Ibid.
104. See *The Law of the Constitution*, pp. 4, 19.
105. See Richard A. Cosgrove, *The Rule of Law*, p. 25.
106. Dicey, 'The Study of Jurisprudence', p. 383.
107. Ibid., p. 382.
108. *The Law of the Constitution*, p. cxxxiv
109. Ibid., p. cxlvi.
110. *Digest*, p. 12.

111. Ibid., p. 12.
112. Ibid., p. 13.
113. Ibid.
114. Ibid., p. 14.
115. Ibid.
116. Dicey, 'The Study of Jurisprudence', p. 388.
117. Ibid., p. 386.
118. Ibid., p. 387.
119. Ibid., p. 387.
120. Ibid., p. 389.
121. Dicey's rabid opposition to home rule for Ireland indicates, however, that he definitely had a polemical side to him. See Cosgrove, *The Rule of Law*, Chapters 6–7, 10–13.
122. William Twining, 'General and Particular Jurisprudence – Three Chapters in a Story', in *Positivism Today*, ed. Stephen Guest (Aldershot: Dartmouth, 1996), p. 138.
123. See R.M. Pankhurst, 'The Study of Jurisprudence', *LMR*, 4 (1875), 730–51.
124. See F. Boase, *Modern English Biography* (6 vols, 1892–1921).
125. See D. Caulfeild Heron, *The Principles of Jurisprudence* (London: Longsmons, Green, 1873), pp. 32, 49, 53.
126. D. Caulfeild Heron, *An Introduction to the History of Jurisprudence* (London: John W. Parker & Son, 1860), p. 775.
127. Ibid., p. 42.
128. Ibid., p. 151.
129. See ibid., pp. 63–4, 134.
130. Ibid., p. 11.
131. Ibid., p. 34.
132. Ibid., pp. 35–6.
133. Ibid., p. 5.
134. Ibid., pp. 134–5.
135. Ibid., p. 44.
136. Ibid., p. 7.
137. Ibid., p. 64.
138. Ibid., p. 2.
139. Ibid., p. 44.
140. *The Principles of Jurisprudence*, p. 56.
141. *Sir Henry Maine: A Study in Victorian Jurisprudence* (Cambridge: Cambridge University Press, 1988), p. 15, note 2.
142. For an analysis quite similar to Bryce's, see Frederick Pollock, 'Methods of Jurisprudence', in *Oxford Lectures and other Discourses* (London: MacMillan, 1890), pp. 1–36, and 'The Nature of Jurisprudence', in *Essays in Jurisprudence and Ethics* (London: MacMillan, 1892), pp. 1–41.
143. *DNB* (1922–1930), p. 134.
144. Cosgrove, *Our Lady the Common Law*, p. 63.
145. *SHJ*, p. 623.

146. James Bryce, *The American Commonwealth*, 2nd edn (London: Macmillan, 1890), vol. 1, p. 5, as quoted in Bernard Crick, *The American Science of Politics: its Origins and Conditions* (Berkeley: University of California Press, 1959), p. 115.
147. Bryce, 'The Relations of Political Science to History and to Practice', *American Political Science Review*, 3 (1909), p. 8.
148. Ibid., p. 4.
149. Ibid., p. 10.
150. As quoted by Stefan Collini, Donald Winch, and John Burrow, *That Noble Science of Politics: A Study in Nineteenth-Century Intellectual History* (Cambridge: Cambridge University Press, 1983), p. 243.
151. Bryce, 'The Relations of Political Science', p. 3.
152. *SHJ*, p. 609.
153. Ibid., pp. 611–12.
154. Ibid., p. 613.
155. Ibid., p. 612.
156. Ibid., p. 623–4.
157. Ibid., p. 613.
158. Ibid., p. 614.
159. Ibid., p. 624.
160. Ibid., p. 615.
161. Ibid.
162. Ibid., p. 616.
163. Ibid., p. 613.
164. Ibid., p. 616.
165. Ibid.
166. Ibid.
167. Ibid., p. 616.
168. Ibid., p. 636.
169. Ibid.
170. Ibid., p. 623.
171. Ibid., p. 617.
172. Ibid., p. 620.
173. Ibid., p. 625.
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175. Ibid., pp. 17–18.
176. Ibid., p. 18.
177. 'Schools of Jurisprudence', *LOQR*, pp. 1–43.
178. Ibid., p. 5.
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181. Ibid., p. 13. Also see pp. 6–7, 11.
182. Ibid., p. 13.
183. Ibid.

184. Ibid., p. 37.
185. Ibid., p. 38.
186. Ibid., p. 39.
187. See *supra*, p. 204.
188. 'Schools of Jurisprudence', p. 39.
189. Ibid., p. 42.
190. See Charles Spencer March Phillipps, *Jurisprudence* (London: John Murray, 1863).
191. 'Schools of Jurisprudence', p. 39.
192. Ibid., p. 34.
193. Ibid., p. 40.
194. Ibid.
195. Ibid., pp. 40–41.
196. Ibid.
197. Ibid.
198. Ibid.
199. See James Lorimer, *The Institutes of Law: A Treatise of the Principles of Jurisprudence as determined by Nature* (Edinburgh: William Blackwood and Sons, 1880).
200. See Creasy, *The Fifteen Decisive Battles of the World from Marathon to Waterloo*. 33rd edn (London: Richard Bentley & Son, 1893); *DNB*, vol. 4, p. 64; and *The Times*, 29 January, 1878, p. 11.
201. Creasy, 'Jurisprudence: Its Leading Principles and Characteristics', *LMR*, 1 (1875–76), pp. 63–88.
202. Ibid., p. 75.
203. Ibid., pp. 68, 69.
204. Ibid., p. 69.
205. Ibid., p. 70.
206. Ibid., p. 72.
207. Ibid., p. 73.
208. See Charles James Foster, *The Elements of Jurisprudence* (London: Walton and Maberly, 1853).
209. G.W. Keeton, 'C.F. Foster: The Story of a Failure', *The Solicitor Quarterly*, 4 (October, 1965), p. 352.
210. See Foster, *Treatise on the Principles and Practice of the Supreme Court Code* [of New Zealand] (Christ Church, New Zealand: Alfred Simpson, 1885), and Keaton, 'C.F. Foster', p. 353.
211. As quoted ibid., p. 354.
212. Ibid., p. 355.
213. *Natural Law* (London: Taylor, Walton and Maberly, 1851) p. 17.
214. Ibid.
215. Ibid., p. 18.
216. *The Elements of Jurisprudence*, p. x.
217. Ibid., p. viii.
218. Ibid., p. 109.
219. Ibid., p. 137.

220. Ibid., p. 115.
221. Ibid., p. 119.
222. Ibid., p. 113.
223. Ibid.
224. Ibid.
225. *LJ*, p. 754. He gave the example of the law affecting the constitution of a state and 'which determines the ends or modes to and in which the Sovereign exercises the sovereign powers'. Such law is 'an essential part of a complete corpus juris, although properly speaking, that so-called law is not positive law'. Ibid., p. 746.
226. *Jurisprudence*, p. 116.
227. Ibid., p. 137.
228. Ibid., p. vii.
229. 'Natural Law. A Lecture Introductory to the Course of Jurisprudence. University College, London' (London: Taylor, Walton, and Maberly, 1851), pp. 22–3; *The Elements of Jurisprudence*, p. 69.
230. Ibid., p. 30.
231. Ibid., p. 35.
232. Ibid., p. 62.
233. Ibid., pp. 35–6.
234. Ibid., pp. 54–5, vi–vii.
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239. Ibid., pp. 505–506.
240. John M. Lightwood, *The Nature of Positive Law* (London: MacMillan, 1883).
241. Ibid., p. 418.
242. Ibid., p. 255.
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246. Ibid., p. 65.
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251. *The Nature of Positive Law*, p. 315.
252. *PJD*, p. 13.
253. Ibid.
254. Ibid., p. 93.
255. Ibid., p. 13.
256. Ibid., p. 92.
257. Ibid., p. 142.
258. Ibid., p. 14.
259. *LJ*, p. 485.

260. *PJD*, p. 58.
261. Ibid.
262. See *PJD*, pp. 242–7, 249.
263. *LJ*, p. 1078.
264. Ibid.
265. Ibid.
266. Ibid.
267. Ibid., p. 1072.
268. Ibid.
269. *PJD*, p. 15.
270. Ibid.
271. Ibid.
272. David Sugarman, 'Legal Theory, The Common Law Mind and the Making of the Textbook Tradition', in *Legal Theory and the Common Law*, ed. William Twining (Oxford: Basil Blackwell, 1986), p. 48.
273. Ibid., p. 31.

9

Nineteenth-century precursors of H.L.A. Hart's critique of Austin: Frederic Harrison, Thomas Erskine Holland, and James Bryce

One of the most remarkable features of the nineteenth-century reception of Austin's work is the significant extent to which it foreshadows some of H.L.A. Hart's highly influential criticisms of Austin.[1] Of course, it is not altogether clear that the historical Austin is in fact the object of Hart's critique. On the one hand, he has acknowledged that his 'principal concern' is not with Austin. Rather, it is with 'the credentials of a certain type of theory which has perennial attractions whatever its defects may be'.[2] On the other hand, Hart has argued that the position that he has criticized is 'in substance, the same as Austin's doctrine, but probably diverges from it at certain points'.[3] Moreover, the critique has been widely interpreted to be directed at Austin.

In any case, a number of Hart's criticisms, whether of Austin or a position similar to his, definitely had antecedents in nineteenth-century English jurisprudence. The single most important example may be Frederic Harrison's critique of Austin's command conception of a law.[4] There are also other examples, including T.E. Holland's criticism of Austin's conception of custom. To a surprising degree, it foreshadows Hart's conception of the rule of recognition.[5] Finally, James Bryce criticized Austin's conception of the legally illimitable powers of the sovereign along lines very similar to Hart's.[6]

I

Harrison himself has been characterized as among 'the most ubiquitous, lively, and sympathetic personalities of the Victorian and Edwardian scene'.[7] He wrote more than two dozen books and expressed strong opinions on many of the most controversial issues of his time. The wide variety of roles that he played in the course of his long life (1831–1923) distinguish him from many, though not all, of the other figures included in this study.[8] He was not only, or even primarily a lawyer, but was also a journalist, historian, environmentalist, urban planner, literary critic, and commentator on art. Above all else he was a leader of the positivist movement in England. He interviewed Comte in 1855 – it was the only time that they met – and 'found inspiration for a lifetime'.[9] For the last fifty years, Harrison wrote in 1911, the Positivist Movement has been 'the constant occupation of my mind and the real business of my life'.[10]

Despite this remark, Harrison's mind did have other occupations, one of which was law. Admittedly, his decision to pursue it as a career was notable for its lack of enthusiasm and qualifications. 'I was quite willing to take up the law', he wrote, 'provided it did not entirely absorb my time and thoughts',[11] which it never did. In his *Memoirs* he wrote that he never threw himself fully into the law, much of which seemed to him to consist of 'intolerable trifling, and formalism'.[12] Even so, he took the study, practice, and teaching of it seriously. He began his legal education in the chambers of Joshua Williams, an 'eminent conveyancer ... [and] careful lawyer of the old school'.[13] Although Harrison expressed a high regard for Williams, and learned much from 'good old Joshua', he developed an unyielding antipathy to the 'whole conveyancing trade'.[14] Harrison lambasted it as 'a jungle of antiquated fooleries kept up by the pedantry and the interest of those who profited by it'.[15] He also had little use for his fellow pupils, whom he characterized as 'fine examples of early depravity ... [who] enter keenly into the peculiarities of our legal system'. For this reason, he related, 'I always address them as expert thieves, and they feel quite flattered'.[16]

These considerations help to explain why Harrison left Williams's chambers with 'utter disgust' for the 'whole Real Property business'.[17] His response to the next stage in his legal education was very different. In 1857 he became a private pupil of Henry Maine. His lectures on jurisprudence in the Middle Temple attracted numerous young lawyers and lit a fire under Harrison.[18] 'To tell the impulse my studies have received in law from Maine', he wrote to a friend, 'I cannot begin. I am quite employed all day & already 3 nights in the week are regularly taken up.'[19] He subsequently indicated that studying under Maine not only helped him to maintain his sanity while studying law, but stimulated 'a keen interest in Jurisprudence on its scientific side ... [that] ultimately enabled me to succeed to the seat of Maine as Professor to the Inns of Court'.[20]

After spending a final year under the tutelage of John Wickens, Junior Counsel to the Treasury, Harrison was called to the bar in 1858, and opened chambers at 7 New Square, Lincoln's Inn. Although he maintained them until 1886, he had ceased to use them long before then. The most active period in his practice of law was the 1860s. The brunt of his legal work consisted of drafts of conveyances and appearances in the Equity Courts or Parliamentary Committee Rooms. He evidently stopped doing most of these things in the late 1860s. In 1869 the Council of Legal Education appointed him Examiner to the Inns of Court in Jurisprudence, Roman Law, and Constitutional History.[21] His involvement with legal education strongly accelerated in the 1870s. In 1872 Harrison was appointed Examiner to the new Final Honour School of Jurisprudence at Oxford. Five years later he received a more important appointment. The Council of Legal Education selected him to be Professor of Jurisprudence,

International Law, and Constitutional Law, a position that he shared with James Bryce. Harrison once characterized his activity in this position as the only professional work to which he had been seriously committed.[22] Although this assessment seems unduly modest, he lectured regularly at the Middle Temple Hall from 1877 to 1889. He apparently focused on jurisprudence in the first few years of his term, after which he turned to international and constitutional law.[23]

II

While Harrison wrote relatively little about law, he did publish in 1878 and 1879 a series of three articles in the *Fortnightly Review* on the subject of English jurisprudence.[24] He subsequently characterized them as 'an attempt to settle the value of John Austin's contribution to the study of scientific jurisprudence'.[25] Although the articles are almost completely ignored today, they were well-received and quite widely read by students and others in the late nineteenth and early twentieth centuries. As a reviewer of Harrison's book *On Jurisprudence and the Conflict of Laws* (1919), which reprinted the articles, put it, 'their great value as a luminous critique of Austin's conception of sovereignty and definition of law, and as an instructive introduction to the study of Jurisprudence, was recognized at once'.[26]

The attitude towards Austin that the articles expressed is ambivalent. On the one hand, he impressed, and influenced, Harrison. At the least he held a more or less Austinian conception of jurisprudence,[27] sovereignty,[28] and the separation of law from morality. Harrison also credited Austin with introducing into England the foundations of rational jurisprudence,[29] characterized his doctrines as of fundamental significance,[30] and warned against underestimating his 'remarkable achievement'.[31] On the other hand, Harrison was highly critical of a number of Austin's ideas, especially his definition of a law properly so-called.

Harrison developed his critique of Austin's definition mainly in the second of his three articles. The grounds on which it was criticized were varied, but they include the allegation that it was in effect too narrow. His explanation of this argument adumbrated, as was pointed out previously, one of H.L.A. Hart's most fundamental criticisms of Austin. The nub of it is the contention that he is guilty of what may be called – Hart does not use the term – the reductionist fallacy. It is the 'prejudice' that *all* legal rules *must* be reducible to a single type, i.e. commands, or orders backed by threats.[32] Hart criticized this assumption on the ground that it imposes a spurious uniformity upon legal rules, which in fact take many different forms. Of course, he acknowledged that the rules of the criminal law (especially) and the law of torts are analogous

to orders backed by threats.[33] Still, he argued that many other rules have little or no similarity to commands. These rules are of many different types, but Hart particularly emphasized those which confer private or public powers, which impose no duties or obligations. Instead, such rules vest individuals with legal powers by means of which they may realize their wishes.[34] He emphasized that we think, speak, and use these power-conferring rules differently than those which impose duties. 'What other tests for difference in character could there be?'[35]

While Hart was probably the most influential recent exponent of this argument, he certainly was not the originator of it. The person who warrants this characterization is uncertain, but it might well be Harrison (whether Hart had read Harrison's articles or was influenced by them is unclear, but I have been unable to find any reference to them in *The Concept of Law*). Unlike Hart, Harrison did not conclude that the command conception of law is a total failure. In fact, he was strongly influenced by it. No doubt, an argument can be made that the same thing is true of Hart, despite his criticisms of Austin.[36] While Harrison never formulated his position in exactly these terms, it seems to have been that force is a necessary but not sufficient condition for the existence of law. It is indeed precisely for this reason that he was able both to praise and to criticize the command conception. Despite its very great strengths, it is 'exceedingly one-sided ... [and] actively misleading if taken by itself'.[37]

Harrison began thus from the premise that force is only one side of law. The other is order, regularity, or generality, terms which he tended to use interchangeably. He perceived the basic flaw of Austin's position to be his highlighting of the one dimension of law and neglect of the other. If Harrison derived this notion from Maine – which may well have been the case – he elaborated and supported it in a relatively original manner.[38] He stressed at the outset that in certain cases the only immediately visible aspect of a law takes the form of a general rule recognized by the courts.[39] In such situations the element of command is virtually invisible and could almost be described as latent.[40] Of course, Harrison acknowledged that in a criminal law a command, obligation, and sanction are highly visible.[41] He also pointed out that Austin almost invariably drew his examples from this field of law, a point stressed by many of his critics.[42] Still, Harrison argued that in a vast number of rules the element of command is not at all evident. He calculated that these rules outnumber the others by a ratio of about ten to one.[43]

Harrison supported his argument by citing a veritable cornucopia of examples of laws which are not commands. They include laws or rules conferring franchises, affecting status, interpreting instruments, and guiding courts. He also discussed in some detail several enabling or permissive statutes, to which he seemed to attach particular importance. Laws authorizing the sale of property or the creation of new parishes are examples. So are laws

establishing the qualifications for public duties, such as serving on juries, or laws giving women the right to vote. The thrust of his analysis is illustrated by his discussion of a law enacted by Parliament that authorized the Lord Chancellor to sell in a certain way benefices of which he had the presentation. According to Harrison, this measure was undoubtedly a law, but in any immediate or direct sense it is hard to detect a command. No one is compelled to do anything, or is subject to a sanction for not doing it, except indirectly. Similarly, no person is placed under a legal obligation. Whether a benefice is to be sold seems to be 'entirely a matter of discretion . . . The entire enactment is permissive and enabling throughout.'[44]

Harrison was aware of a possible response to this argument, which he rejected, or appeared to reject. The essence of it is to interpret an enabling statute as a command to officials or the public not to interfere with the rights that it establishes. He cited the Female Suffrage Bill and the right to vote that it authorized as an example. If this bill became a law, it could be construed as a command to the relevant officials to treat qualified women as they would qualified men. Harrison had little use, however, for this response. He maintained that it conflicts with how we ordinarily think of laws. We usually conceive of them, he argued, as obligating the persons affected by the law rather than the officials administering it. He gave the example of a law imposing capital punishment for the crime of murder. This kind of law is normally thought of as imposing an obligation on *subjects* to abstain from the prohibited act, nonfulfilment of which is punishable by death. To interpret the statute as a command addressed to *officials* obligating *them* to arrest and execute murderers is 'an odd inversion of terms'.[45]

Harrison discussed many other types of laws or rules that do not conform to the Austinian model. They include: (1) the vast body of law relating to wills and the construction of written documents; (2) the bulk of the rules concerned with trusts, infancy, accounts, and the conveyance of property; (3) a high proportion of the business of courts of equity; and (4) laws of naturalization or legitimation.[46] If the latter impose obligations, they are quite indirect and the sanctions for breach of them are even more indirect. To claim that these enabling and permissive statutes or rules are commands is therefore 'exceedingly forced and circuitous'.[47]

The implications of Harrison's critique

It is one thing to explain this criticism of Austin's imperative conception of a law. It is another and more difficult thing to understand the conclusion which Harrison drew from it. In this respect his critique is quite different, at least superficially, from that of H.L.A. Hart. The latter used his critique of Austin

as a vehicle for demonstrating the 'record of a failure and [the plain] . . . need for a fresh start'.[48] Unlike Hart's explicit statements, Harrison was not altogether clear about what conclusion should be drawn from *his* critique of Austin. The root of the problem is his ambivalent attitude towards the command conception. On the one hand, he was acutely conscious of what he perceived to be its substantial limitations. On the other hand, he was very strongly attracted to it. No questionable reading between the lines is necessary in order to discern this almost magnetic pull. A compelling sign of it is his acknowledgement that Austin had correctly identified the elements that characterize every law.[49] It is 'always and everywhere *imperative* . . . [and] the one invariable element of . . . [it] is . . . the *obligation* which it imposes'.[50] Moreover, the existence of a sanction for non-compliance with this obligation is always inherent in law.[51] Still further, these three elements of law constitute the aspects of it which are of the greatest importance for the lawyer.[52] In addition, Harrison explicitly denied that he intended to reject Austin's conception of a law. 'I am far from saying', he wrote, that it 'cannot be applied to all . . . cases, or that it actually breaks down.'[53] Still further, Harrison conceived of a law as a '*regular* and constant rule which is *enforced in law courts*' [emphasis added].[54] He acknowledged that this conception ultimately involves all of the ingredients of law that Austin emphasized.[55] The statute, previously discussed, authorizing the Lord Chancellor to sell certain benefices of which he had the presentation is a good example. While it is not *prima facie* an imperative, there is ultimately an element of command, obligation, and sanction. If the benefice is sold, the sale must follow the specified procedure, to which officials are obligated to conform. If they fail to do so, the courts will enforce the obligation by invalidating the sale. According to Harrison, 'we can easily discover [therefore] in this enactment a potential command, an unexpressed obligation, and a dormant sanction'.[56] Harrison even stated that what is true of the statute authorizing the Lord Chancellor to sell certain benefices is also true of every other legal rule. If it is not *prima facie* a command, it lays down a 'hard and fast line; it is not advice; it is not an ideal, or a custom, or an example of any kind'.[57] Instead, each and every legal rule provides that something is to be observed. Moreover, the courts have the power to compel its observance and, to that extent, the rule is imperative.[58]

What precise conclusion then did Harrison draw from his critique of Austin's definition of law? It seems to be the contention that his definition is incomplete, or inadequate, as a 'strict or complete definition of *law*'.[59] Harrison justified this conclusion on the ground that a definition of a general idea is objectionable if its application requires lengthy and qualified explanations. The salient features of the thing defined should always be prominent rather than obscure, directly visible rather than indirectly discoverable.[60] The imperative conception of law is unsatisfactory because it fails to meet

this requirement. Commands, obligations, and sanctions are not direct and obvious features of many laws, their presence in which can only be detected indirectly and inferentially. 'It would [therefore] seem better in any definition of law,' Harrison concluded, 'always to keep in sight both aspects of the notion of *law*, i.e. the *command* and the *uniformity*.'[61]

Harrison not only advanced this standard, but offered a definition of law that he felt satisfied it. In his view a law is '*a general rule respecting the property, person, reputation, or capacity of the citizens of a state, which the sovereign power therein will cause to be observed by the authority it delegates to its tribunals (or, will enforce in its tribunals)*'.[62] This notion is both similar to and different from Austin's definition of a positive law as the express or tacit command of the sovereign. The two are similar in that both incorporate a reference to force and the sovereign. Harrison's definition of law differs from Austin's in at least two important respects. In the first place, it limits law to rules about the property, person, reputation, or capacity of the citizens of a state. No such limitation is explicit or implicit in Austin's definition of a positive law, which may be about anything. In the second place, Harrison's definition of law explicitly refers to the enforcement role of the courts. Although he was not entirely happy with the reference to them, he found it impossible to do without it. No definition of law can be framed without referring to 'the powers exercised by courts of law'. The question for the lawyer always is, 'Will the courts of justice cause the rule to be observed, and will they find a remedy for breach of it?'[63] Accordingly, Harrison defined a legal right as a claim enforceable in the courts,[64] or one which is enforceable by process. The test for its existence is, from this perspective, the power of a person to bring a suit to enforce the right.[65]

This conception of law and legal right accords tremendous weight to judicial power and the actions of courts. Such a notion was to have a much brighter future in American rather than English jurisprudence. Indeed Harrison's ideas adumbrate to a remarkable extent Oliver Wendell Holmes' and John Chipman Gray's judge-centred conceptions of law,[66] which constitute landmarks of modern American jurisprudence. Of course, their notions are not identical to Harrison's. His definition includes a reference to the sovereign that is absent from Holmes's famous definition of law as 'nothing more pretentious' than 'prophecies of what the courts will do in fact'.[67] Nor is there any mention of the sovereign in Gray's conception of the law as 'the rules which the courts ... lay down for the determination of legal rights and duties'.[68] Moreover, the absence of any such mention is not fortuitous. Rather, it reflects the view of both Holmes and Gray that in the last analysis what counts is not what the sovereign *says*, but how the courts *interpret* his, her, or its words. As the eighteenth-century Bishop Benjamin Hoadly put it, in a passage from a sermon that Gray quoted at least three times in his book, 'Whoever hath an *absolute authority* to *interpret* any written or spoken laws, it is *he* who is truly the

Law-giver to all intents and purposes, and not the person who first wrote or spoke them.'[69] Nevertheless, the similarity between Holmes's and Gray's definition of law and that of Harrison is striking. To this extent, the conception of law hidden between the covers of his now obscure and unread articles provides a kind of conceptual bridge across the Atlantic.

The significance of Harrison's critique of Austin

Harrison's intention, like that of Henry Sidgwick,[70] appears to have been not so much to refute as to qualify Austin's command conception of a law. Furthermore, Austin himself was keenly aware of the existence of laws or rules which may '*seem* not imperative'.[71] He even cited laws creating rights as an example of them.

Austin's explanation of these laws requires at the outset a brief review of his conception of duty and right. All the world knows that he defined obligation as liability to a sanction.[72] His classification of duties is less well known. A *relative* duty is correlative to a right, which it is implied by and implies. An *absolute* duty does not correlate with a right and neither implies it, nor is implied by it.[73] There are several kinds of absolute duties, such as duties to oneself or to the sovereign.[74] Austin found the term right to be more difficult to define than duty. Indeed, he once characterized its import as a 'shadow' verging upon the confines of '*no*-meaning'.[75] He did maintain that the conception of a right as a faculty, capacity, or power to exact acts or forbearances from others is 'nearest to a true definition'.[76] A party has a right whenever a person or persons are bound or obliged by the law 'to do or to forbear, *towards* or *in regard of* him'.[77] A legal right is thus a creature of a positive law imposing a duty on a person or persons other than the party on whom the right is conferred. As such, a legal right presupposes the existence of three distinct parties. They are the sovereign author of a positive law, the person or persons on whom the law confers the right, and the party or parties on whom the law imposes a duty. The existence of a legal right is thus dependent upon the existence of a legal duty, which is the basis of the right. No duty, no right. Persons have rights 'because other parties are bound by the command of the sovereign, to do or perform acts, or to forbear or abstain from acts'.[78] In the absence of this obligation, the party invested with the right would be unable to exercise or enjoy it. In short, the right would be 'merely nominal and illusory'.[79]

These notions suggest what Austin would very likely have criticized in Harrison's articles. It is the claim, which Harrison himself very seriously qualified, that some laws merely create rights. Austin would argue that they may appear to do this, but that the appearance is deceptive. In reality, these laws either impose or tacitly presume the existence of relative duties in the absence of

which no rights can be conferred. No duty, no right. 'Every law, really conferring a right, is, therefore, imperative.'[80]

Austin thus agreed with Harrison that laws exist which do not expressly issue commands, impose obligations, or specify sanctions. Austin's consciousness of such laws is also evident from his distinction between primary and secondary rights and duties.[81] While this terminology does not accord completely with H.L.A. Hart's use of the same terms, it is similar in some respects to them. Austin conceived of primary rights and duties as arising from laws stipulating that certain actions or forbearances shall be injuries, wrongs, or offences. If obedience were perfect, no other kind of rights and duties would 'exist; or, at least ... would ever be exercised, or ... assume a practical form'.[82] Since obedience is imperfect, secondary rights and duties exist and assume practical forms. These rights and duties provide the sanctions – punishments or remedies, such as compensation – stemming from infractions of other rights and duties, 'or from injuries, delicts, or offences'.[83] Although Austin characterized these rights and duties as secondary, from a logical point of view they were primary. For example, he insisted that only laws conferring secondary rights and duties are 'absolutely necessary'.[84] A primary duty or right 'owes its existence as such to the injunction or prohibition of certain acts, and to the remedy or punishment to be applied in the event of disobedience'.[85] If there were no such remedy or punishment, there would by definition be no legally binding duty or right. Even so, Austin was fully aware of the *existence* of rights and duties which do not *explicitly* refer to civil or criminal sanctions.

This evidence implies that Harrison's critique of Austin's conception of law does not raise fundamental objections to it. Not only did Austin fully appreciate that the command element is not obvious in many legal rules, but Harrison acknowledged that his own conception of law ultimately involved 'all the elements [of law] on which Austin insists'.[86] The two jurists agreed, thus, about the nature of law to a very significant extent. Indeed, Harrison's critique of Austin's definition of a law may be more significant as a defence than a criticism of it. At the least Harrison has implicitly demonstrated how to reconcile a conception of law in which force is a constituent element with the existence of rules that are not *prima facie* commands. The short of it is to argue that these rules, numerous and important though they be, must be enforceable in the courts to count as law. Nor is it far-fetched to suggest that Harrison intended to defend a duly qualified version of his predecessor's command conception of a law. The single most compelling piece of textual evidence supporting this interpretation is his explicit praise of Austin's 'clear but frigid reiteration of the truth that law means nothing but what the tribunals enforce by the delegated authority of sovereign power, and that nothing not so enforced is of account in law'.[87] Harrison has shown, thus, a plausible way to reconcile the existence of rules that are not commands with the command conception

of law. Whether it is an entirely satisfactory way and addresses, say, *all* of Hart's criticisms is another matter the resolution of which is beyond the scope of this book.

III

If Harrison' articles constitute the most important adumbration of Hart's critique of Austin, they were by no means the only one. T.E. Holland's critique of Austin's analysis of custom, which was a frequent object of criticism, is a good example. Frederick Pollock described the critique as 'particularly good'[88] and it represents an important contribution to legal theory. Unlike many of Austin's critics, however, Holland did *not* criticize the command conception of a law on the ground that it does not apply to pre-modern societies. In fact, he acknowledged that Austin's analysis of custom contained an important and neglected aspect of the truth. The brunt of it is that usage alone cannot, in the absence of state recognition, make a rule a law.[89] This claim is true, according to Holland, because the only legal source of laws is their recognition by a state. No state recognition, no law, 'in the strict sense of the term'.[90]

Nevertheless, Holland developed a somewhat different conception of state recognition than Austin held. His alleged mistake was to date such recognition from the point in time at which a court enforces a custom.[91] This is an error because a custom *may* be a positive law prior to its concrete enforcement by a court in a particular case. According to Holland, 'The contrary view supported by Austin is at variance with fact.'[92] From Holland's perspective the question is not whether a court in a specific case has enforced a particular custom. Instead, it is whether a custom satisfies the requirements or standards for valid law that the courts have developed over time. To this extent, a court's recognition of a custom is very similar to its interpretation of a statute.[93] Both were law prior to their application or enforcement in specific cases.

This analysis is not only perceptive, but foreshadows, in certain respects, H.L.A. Hart's conception of the rule of recognition. To say this is not to imply that Holland's views are identical to Hart's, which is not the case. The latter develops the notion of a rule of recognition much more systematically, and with a much greater degree of sophistication, than Holland. At the same time, it is striking that Hart uses the same term as Holland – 'recognition' – for this 'master rule' of a legal system.[94] More significantly, perhaps, the function that Hart attributed to it is similar to the process by which Holland felt a custom may become a legally valid rule. It becomes such by satisfying certain requirements, or standards, that the courts have developed over time. Hart's description of the process by which the existence or validity of a legal rule, customary or other, is established is very similar to this. The validity of a rule

depends upon whether it satisfies the rule of recognition, which specifies the 'authoritative criteria for identifying primary rules of obligation'.[95] Moreover, Hart insists that both the existence and content of the rule of recognition of a particular system is a question of fact to be learned by analysis of established practices, especially of courts.[96] Finally, he argues, as Holland did, that customs were law prior to their enforcement in particular cases.[97]

Bryce's critique of Austin's conception of sovereignty

Although H.L.A. Hart criticized Austin's conception of sovereignty on various grounds, a fundamental one is its failure to 'fit the facts'.[98] A prime example is his insistence that every political society not only has, but must have, a sovereign whose powers are legally unlimited. Among other things, Hart argued that this notion distorts the character of law in many modern societies that undeniably have law. For example, modern constitutions not only restrict *how* legislatures may make law, but *what* laws they may make.[99] Hart also had little use for Austin's attempt to salvage his conception of sovereignty by appealing to a sovereign behind the legislature. He had acknowledged that in a composite state the true sovereign is neither the general government, nor the several state governments, both of which are subject to legally binding restraints. Rather, sovereignty lies in 'the several united governments *as forming one aggregate body*, or they and the general government *as forming a similar body*'.[100] It is this body that conferred and specified the powers of the general government, which it may revoke, abridge, or enlarge.[101] Austin cited the United States of America as an example. He was of course fully aware that the powers of Congress and the President, as well as those of individual states, were legally limited. Neither the federal government, nor the several state governments, is then sovereign. Rather, sovereignty lies 'in the states' governments *as forming one aggregate body*: meaning by a state's government, not its ordinary legislature, but the body of its citizens which appoints its ordinary legislature'.[102] He evidently based this conclusion upon Article V of the Constitution, which he referred to in a footnote.[103] This provision stipulates that constitutional amendments shall be ratified 'by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof'.[104]

James Bryce may have been the author of the most systematic critique of this conception of sovereignty, though he was definitely not the only critic of it. While Bryce admitted that Parliament is legally omnipotent,[105] he strenuously insisted that it is in this respect much more the exception than the rule. If he is correct, Austin's theory of sovereignty does not hold for the vast majority of states, 'past *or present*' [emphasis added].[106] It is 'in truth as inapplicable to most . . . modern States as it is to ruder societies'.[107] The primary reason for

this, as far as modern states are concerned, is the limitations that their constitutions place on the sovereign's powers. Indeed, Bryce probably emphasized this criticism more heavily than any of Austin's other critics. His commitment to it was also the main reason for his opinion that Maine was in effect 'soft on Austin'. Although Bryce did not of course express his views in these terms, it is implied by his somewhat enigmatic comment about Maine's 'ingenious' criticism of Bentham and Austin in his *Lectures on the Early History of Institutions*. While Bryce argued that the criticism would now elicit general acceptance, he felt that Maine did not go far enough.[108] Unfortunately, Bryce did not explain in this context the conclusions that Maine should have reached. Still, one of them must have been that Austin's theory of the legally unlimited powers of the sovereign did not apply to many modern states. At least Bryce himself heavily emphasized this particular criticism, which clearly reflects the 'energetic empiricism [that] was his hallmark'.[109] Although he was willing to excuse Bentham's misunderstanding of Hobbes, Bryce was unwilling to do the same for Austin. Hobbes was writing about how authority ought to be constituted in a state in order to avoid anarchy. Austin wrote as a jurist professing to describe the normal, typical state. As such, he should have had at least some regard for the facts, which he utterly failed to do. According to Bryce, 'In nearly all free countries, except the United Kingdom, legislatures are now restrained by Rigid constitutions, so that there is no Sovereign answering the Austinian definition.'[110]

Bryce attributed Austin's disregard of the facts to three factors. One is his neglect of the history of states and governments. A second is his misplaced attempt to formulate summary definitions and descriptions suitable for all modern states. A final factor is the 'besetting sin' of persons who 'frame logical classifications upon ... abstract notions'. It is a transgression that Bryce believed characterized the Analytical Jurists. The essence of it is a tendency 'sometimes to ignore the most material facts, sometimes to twist their definitions into a sense far removed from the natural meaning of the words'.[111]

Bryce was also, like Hart, highly critical of Austin's identification of the sovereign in the United States. In the first place, there is the infrequency of amendments to the Constitution. There was none from 1810 to 1867, and from 1870 until 1901. Bryce asked, 'Is there not something unreal and artificial in ascribing Sovereignty to a body which is almost always in abeyance?'[112] In the second place, the special majorities required for the ratification of amendments are very rarely achievable. The assent of three-fourths of the state legislatures, or conventions in the states, is very difficult to obtain. If they are unattainable, he argued, 'there would therefore seem to be no Sovereign at all'.[113] Finally, there is at least one legally binding limitation on the power of state legislatures to amend the Constitution. No state may be deprived of its equal representation in the Senate without its own consent.[114]

Bryce inferred from this that Austin's notion fails the test of the adequacy of any theory, i.e. its conformity to the facts.[115] His theory can be made to conform to the facts 'only by an elaborate process, either of rejecting a large part of the facts, or else of twisting and torturing the conception itself'.[116] Bryce put it in these terms, in a passage which neatly encapsulates his conception of the relationship between theories and facts:

> A rule which consists chiefly of exceptions is not a helpful rule. In the human sciences, such as sociology, economics, and politics, just as much as in chemistry or biology, a theory ought to arise out of the facts and be suggested by them, not to be imposed upon the facts as the product of some *a priori* views. If it needs endless explanations and qualifications in order to adapt it to the facts, it stands self-condemned, and darkens instead of illuminating the student's mind.[117]

IV

Several themes of Hart's critique of Austin had, thus, their nineteenth-century precursors. To say this is obviously not to express a judgement about the merits of the criticisms, which raises a whole set of different questions. Nor is it to deny that Hart's critique has a range and depth rarely, if ever, matched by Austin's earlier critics. It is to suggest, however, that certain of Hart's criticisms of Austin are not as original as they may appear to be. Of course, Hart himself acknowledged, in the Preface to the *Concept of Law*, that he was 'heavily and obviously indebted to other writers'.[118] Still, they do not appear to include the nineteenth-century English jurists whose views have been explained here. At the least they are not discussed in the extensive notes at the end of the book, the purpose of which was to relate the ideas expressed in the text to Hart's '*predecessors* and contemporaries'.[119] Whether he was unfamiliar with the nineteenth-century criticisms of Austin, or simply chose not to discuss them, is impossible, at least for me, to say. Whichever it was, some of the paths that Hart travelled had definitely been carved out by his predecessors in English jurisprudence.

Notes

1. See *Concept*, 2nd edn, pp. 18–78.
2. Ibid., p. 18.
3. Ibid.

4. Frederic Harrison, 'The English School of Jurisprudence: Part II. – Bentham's and Austin's Analysis of Law', *Fortnightly Review*, 24 (November, 1878), p. 682, and *supra*, pp. 227–32.
5. See *supra*, Chapter 9, pp. 234–5.
6. See *supra*, ibid., pp. 235–7.
7. Martha S. Vogler, *Frederic Harrison: The Vocations of a Positivist* (Oxford: Clarendon Press, 1984), p. 5.
8. The best biography of Harrison is Voegler, ibid. Her lively book also contains a useful list of Harrison's books and a bibliographical note of works about him. Ibid., pp. xvi–xvii, 390–91. For an excellent bibliographical essay on Harrison, see John W. Bicknell, 'Frederic Harrison', *infra*, note 24.
9. As quoted by Voegler, *Frederic Harrison*, p. 28.
10. *Autobiographic Memoirs*, 2 vols. (London: Macmillan, 1911), vol. 2, p. 251. The kind of Comtean positivism which influenced Harrison has little or nothing to do with legal positivism. As Karl Bergbohm accurately pointed out, 'Mit dem "Positivismus" und der positiven Philosophie Aug. Comtes ... hat dieser Terminus naturlist nichts zu tun'. Quoted by Roberto Ago, 'Positive Law and international Law', *American Journal of International Law*, 51 (Oct., 1957), p. 696, note 15. At the same time, Austin knew Comte quite well, thought highly of him, and intervened on his behalf with M. Guizot, the great French historian and politician. Austin characterized Comte as a man of merit, 'great sincerity and uprightness', and 'generous and affectionate temper'. Austin was critical, however, of Comte's dogmatism. 'But of all the men I ever saw (excepting Mr. Bentham)', Austin wrote to John Stuart Mill, Comte is 'the most confident in his own capacity and views, and the least inclined to attend to the suggestions of others'. He was also said to be 'wedded to his own devices and ... full of presumptuous contempt for all which has been done by others'. Letter from John Austin to John Stuart Mill, 25 December, 1844, Yale University Library.
11. *Autobiographic Memoirs*, I, p. 128.
12. Ibid., p. 153.
13. Ibid., p. 149.
14. Ibid., pp. 149, 155.
15. Ibid.
16. Ibid., p. 155.
17. Ibid., p. 152.
18. George Feaver, *From Status to Contract: A Biography of Sir Henry Maine 1822–1888* (London: Longmans, 1969), p. 24.
19. Ibid., p. 26.
20. *Autobiographic Memoirs*, I, pp. 157–8.
21. Ibid., p. 329.
22. Ibid., p. 158.
23. Frederic Harrison, *On Jurisprudence and the Conflict of Laws* (Oxford: Clarendon Press, 1919), p. 5.
24. See his three articles, 'The English School of Jurisprudence: Part I. – Austin and Maine on Sovereignty', *Fortnightly Review*, 24 (October, 1878), pp. 475–92; 'Part

II. – Bentham's and Austin's Analysis of Law', ibid., 24 (November, 1878), pp. 682–703; and 'Part III. – The Historical Method', *Fortnightly Review*, 25 (January, 1879), pp. 114–30 [hereinafter cited as ESJ]. I agree with John W. Bicknell, however, that no one 'has yet . . . evaluated his [Harrison's] work in jurisprudence': 'Frederic Harrison (1831–1923)', in *Victorian Prose: A Guide to Research*, ed. David J. DeLaura (New York: Modern Language Association of America, 1973), p. 495. See *supra*, note 11. The articles were also reprinted in *The Conflict of Laws*.

25. *Autobiographical Memoirs*, II, pp. 295–6.
26. *Juridical Review*, 32 (1920), p. 195. The reviewer's high opinion of Harrison's articles appears to have been widely shared by eminent scholars on both sides of the Atlantic. Moreover, they were scholars who had very different perspectives on law and politics. See Sir Frederick Pollock, 'Frederic Harrison: Jurist and Historian', *English Review*, 36 (1923), p. 412; Harold Laski, *Holmes–Laski Letters: The Correspondence of Mr. Justice Holmes and Harold J. Laski 1916–1935*, ed. Mark DeWolfe How (Cambridge: Harvard University Press, 1953), I, p. 525; Joseph Henry Beale, *Harvard Law Review*, 33 (1919–1920), p. 333; David Amram, *University of Pennsylvania Law Review*, 68 (1919–1920), p. 303; and Walter Wheeler Cook, *Columbia Law Review*, 19 (1919), p. 517.
27. ESJ, Part III, p. 127.
28. ESJ, Part I, pp. 491–2, 489, 490, and *Conflict of Laws*, p. 136.
29. ESJ, Part I, p. 475.
30. Ibid.
31. Ibid., p. 478.
32. *Concept*, 2nd edn, pp. 27–42.
33. Ibid., p. 27.
34. Ibid., pp. 27–8.
35. Ibid., p. 41.
36. 'Hart, Austin, and the Concept of a Legal System: The Primacy of Sanctions', *Yale Law Journal*, 84 (1975), 606–607.
37. ESJ, Part II, p. 682.
38. For Maine's views, see his *LEHI*, pp. 371–3.
39. ESJ, Part II, p. 684.
40. Ibid., pp. 687, 683.
41. Ibid., p. 687.
42. Ibid. For a good example, see A.V. Dicey, *Introduction to the Law of the Constitution*, 8th edn (Indianapolis: Liberty Classics, 1982), p. 27.
43. ESJ, Part II, p. 687.
44. Ibid., p. 684.
45. Ibid., p. 686.
46. Ibid., pp. 686–7.
47. Ibid., p. 687.
48. Hart, *Concept*, 2nd edn, p. 80.
49. ESJ, Part II, p. 682.
50. Ibid.

51. Ibid.
52. Ibid.
53. Ibid., p. 687.
54. Ibid., p. 697.
55. Ibid., p. 684.
56. Ibid., p. 685.
57. Ibid., p. 688.
58. Ibid.
59. Ibid., p. 682.
60. Ibid., p. 684.
61. Ibid., p. 688.
62. Ibid.
63. Ibid., p. 691.
64. Ibid., pp. 701–2.
65. Ibid., p. 695.
66. See Oliver Wendell Holmes, 'The Path of the Law', in *Collected Legal Papers* (New York: Peter Smith, 1952), pp. 167–202, and John Chipman Gray, *The Nature and Sources of the Law*, 2nd edn (Gloucester, Massachusetts: Peter Smith, 1972).
67. Holmes, 'The Path of the Law', p. 173.
68. Gray, *The Nature and Sources of the Law*, p. 84.
69. Ibid., p. 102. Gray also quotes this passage on pp. 125, 172.
70. See Sidgwick, *Elements of Politics* (1891), p. 22 note.
71. *PJD*, p. 33.
72. Ibid., p. 22.
73. *LJ*, p. 401.
74. Ibid., pp. 406–407.
75. Ibid., p. 396.
76. Ibid., p. 398.
77. Ibid.
78. Ibid., p. 395.
79. *PJD*, p. 234.
80. Ibid., p. 34.
81. *LJ*, p. 767.
82. Ibid., p. 763.
83. Ibid.
84. Ibid., p. 767.
85. Ibid., p. 767.
86. ESJ, Part II, p. 684.
87. Ibid., Part I, p. 482.
88. *Essays in Jurisprudence and Ethics* (London: MacMillan, 1882), p. 10.
89. *Jurisprudence*, p. 54.
90. Ibid., p. 49.
91. Ibid., p. 54.
92. Ibid., p. 53.
93. Ibid., pp. 54–5.

94. See H.L.A. Hart, *Concept*, 2nd edn, pp. 94–110.
95. Ibid., p. 100.
96. Ibid., p. 110.
97. Ibid., pp. 46–7.
98. Ibid., p. 80.
99. Ibid., p. 68.
100. *PJD*, p. 208.
101. Ibid.
102. Ibid., p. 209.
103. Ibid., p. 210 note.
104. Constitution, art. V.
105. As quoted by Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford: Clarendon Press, 1999), p. 228.
106. *SHJ*, p. 524.
107. Ibid., p. 538.
108. Ibid., p. 554.
109. Stefan Collini, Donald Winch and John Burrow, *That Noble Science of Politics: A Study in Nineteenth-Century Intellectual History* (Cambridge: Cambridge University Press, 1983), p. 243.
110. *SHJ*, p. 53.
111. Ibid., p. 542.
112. Ibid., p. 540.
113. Ibid.
114. See Constitution, art. V.
115. Bryce, *SHJ*, p. 504.
116. Ibid., p. 524.
117. Ibid.
118. *Concept*, 2nd edn, p. vi.
119. Ibid. (emphasis added).

10

An overview

How then was Austin's jurisprudence received in nineteenth-century England? To say that it was received quite differently, in different periods of time, and even in the same period, is accurate, but not very illuminating. The statement does suggest, however, the value of distinguishing between different spans of time in answering the question. In particular, an 'early' (1829–1860) and a 'late' (1861–1901) period need to be distinguished. Of course, to differentiate between them is not to imply that the reception of Austin's jurisprudence in each of these periods was either uniform, or entirely different. Nor is it to deny that the delimitation of 'periods' is, to some extent, arbitrary. Nonetheless, the substance of the responses in the decades indicated was sufficiently different to justify a distinction between them.

I

The first period extends, then, from 1829 until 1860. The year 1829 marked the outset of Austin's lectures on jurisprudence at the University of London. The first persons to 'receive' his jurisprudence, other than his family and friends, were thus his students. Although a few of them commented about it, or at least his course, the reaction of most of them is unknown.

The reception of Austin's work after 1832 is much easier to measure. The reason is the publication in that year of the *PJD*, the only work expounding his legal philosophy that he published during his lifetime. Although he had published two articles prior to 1832,[1] their focus was different. Admittedly, the published comments about the book are a quite imperfect measure of its reception. We do not know, and never will know, what the bulk of the readers of the *PJD* thought about it. All that can be known, by and large, are the comments about the work in reviews, articles, and books. Even so, these sources provide the basis for a much richer picture of the reception of the *PJD* than has heretofore seen the light of day.

Overall, the reception of Austin's jurisprudence from 1829 to 1860 has a number of distinctive features. To begin with, his work was not nearly as well-known as it subsequently became. To say this is *not* to claim that it was

unknown, or as little known as it often has been said to have been, most notably by Sarah Austin.[2] Still, Austin's legal philosophy was much less widely known than it became after 1860. Moreover, the responses to his work in the early period tended to be quite favourable, if not enthusiastic. There were of course exceptions. Lord Melbourne is reputed to have characterized Austin as a 'damned fool' and the author of 'the dullest book he ever read, and full of truisms elaborately set forth'.[3] Then too Austin's lectures on jurisprudence at the University of London eventually attracted so few students that they were discontinued after only five years. Yet, the enrolment was at least as much a response to *how* he taught as *what* he taught. In addition, the reception of his lectures by some of his students was very favourable. The most notable example may be John Stuart Mill, who held Austin in great esteem. Furthermore, the reviews of the first edition of the *PJD* were more numerous and laudatory than has generally been recognized. Still further, even Austin's critics – and he certainly had them – tended to express high regard for his achievements. Their attitude was typical, in this respect, of the nineteenth-century critics of his work. Their respectful disagreement with his ideas contrasts sharply with the contemptuous rejection of them by numerous twentieth-century commentators. Finally, Sir Henry Maine praised Austin extensively in an article published in 1855 to which modern scholars have paid far too little attention.[4] The reasons for the generally favourable responses to Austin's jurisprudence were varied, but a primary factor was his perceived contributions to the science of law. They were certainly praised by Maine and he was by no means alone in this regard.

The most remarkable feature of the responses to Austin's work in the early period may be their tendency to emphasize, and to praise, his discussion of utilitarianism. This was certainly true of the reviewers of the *PJD*, most of whom devoted a substantial portion of their reviews to this subject. In this respect their interpretation of the book and why it is important tended to be very different from that of jurists in the later period. To be sure, as late as 1873 an anonymous commentator could write that 'every reader of Austin will know that the utilitarian theory of morals underlies all his reasonings. It forms the groundwork of his doctrines and conclusions.'[5] Nevertheless, most of the commentators on Austin after 1861 did not 'know' this and interpreted him very differently. Whatever the explanation of this difference is, commentators in the early period understood Austin's intentions better than most subsequent jurists. He explicitly stated that he intended the *PJD* to be an introductory work suitable for a broader audience than students of jurisprudence. He justified this objective on the ground that the nature or essence of law and morality are of 'general importance and interest'.[6] Accordingly, he indicated that he had so designed the *PJD* that 'any reflecting reader, of any condition or status, may . . . understand it'.[7]

II

The early period in the reception of Austin's jurisprudence terminated in 1860, one year after his death, because of the watershed development that took place in 1861. The short of it was the publication of Sarah Austin's edition of the *PJD*. Two years later she edited the remainder of Austin's lectures (the three subsequent editions of his *Lectures on Jurisprudence* incorporated the *PJD*). The fifth and final edition was published in 1885.

There were not only many more published responses to Austin's work from 1861 to 1901 than from 1829 to 1860, but they tended to be more diverse. Generalizations about them are therefore more difficult and subject to more qualifications than is true of the earlier period. However, it is useful in this connection to distinguish between the 1860s and subsequent decades. Austin probably received a larger amount of praise in this decade than any other in the nineteenth century. Although the reviews of his work were not cut from the same cloth, they tended to be favourable and often highly laudatory. The reviews by James Fitzjames Stephen and John Stuart Mill were particularly important.[8] Their high praise of Austin in the *Edinburgh Review* gave his work a degree of exposure and stature that it had lacked during his life. The contrast between Mill's reviews of the first edition of the *PJD* in 1832 and Austin's *LJ* in 1863 illustrates the difference. The first review was short, in a relatively obscure journal, and by a very young man.[9] The second review was unusually long, in a leading journal, and by a major Victorian philosopher.[10]

Austin's reputation continued to evolve in the remainder of the nineteenth century. Ironically, the person who may have contributed the most to an appreciation of his contributions was also his most significant critic. Sir Henry Maine's *Lectures on the Early History of Institutions* was published in 1875 and contains two chapters on Austin.[11] The book was popular and underwent six subsequent editions, the seventh and last of which was published in 1914. Since the work was based upon lectures that Maine had previously delivered at Oxford, both his students and the general public were exposed to Austin's doctrines. Although Maine was critical of some of the latter's ideas, he also lauded Austin's achievements. Moreover, if the argument of this study is well-founded, Maine was more of an Austinian than has usually been recognized. More than any other single figure besides Mill, Maine, despite his criticisms, was responsible for Austin's enhanced stature. By 1884 a writer in the *Journal of Jurisprudence* rhapsodically claimed that, 'Terse in style, clear in meaning, severe in logic, by comparison with his predecessors, the great analytical jurist [Austin] still looks down "from his inner judgement-seat", and gives the laws to the University of Oxford, Cambridge, and London, as well as to the Council of Legal Education which he begat.'[12] In 1891 Henry Sidgwick, a man not given to hyperbole, could even say that the view of

fundamental conceptions of government and law 'held ... by the majority of instructed persons in England at the present day – is derived in the main from Austin'.[13]

Despite these comments, the amount and the intensity of the criticisms of Austin accelerated as the nineteenth century drew to a close. Although it did not produce another critic of the stature of Sir Henry Maine, there was no let-up in the attacks on Austin's ideas. In fact, a marked increase in their volume and intensity differentiates the late Victorian period from earlier decades. One reason for this development was the influence of Maine's critique of Austin, the most complete version of which was published in 1875.[14] For example, at least three widespread objections to his command conception of law echo ideas initially developed by Maine. One was the argument that this notion is incompatible with other, equally common meanings of the word 'law'. 'Order', 'regularity', 'arrangement', and 'uniformity' were the most frequently cited examples.[15] Another was the contention that nothing similar to Austin's notion of a command may be found in pre-modern societies, which are ruled by customs rather than enacted laws.[16] A third and much less common argument was that neither Austin nor anyone else has the authority to dictate which usages of 'law' are proper or improper.[17] In addition, many of the criticisms of his conception of sovereignty did little more than repeat a central argument of Maine. The short of it is that nothing corresponding to an Austinian sovereign can be found in pre-modern societies, past or present. Proponents of this criticism sometimes acknowledged, as indeed had Maine,[18] that the Austinian conception does hold for 'fully formed' states.[19] They insisted, however, that it is not to be found in other, less developed legal systems.

A second cause of the growth in the volume and intensity of the criticisms of Austin was the development of new objections to his ideas. Thus Frederic Harrison and T.E. Holland criticized the command conception of law for reasons not emphasized by Maine.[20] The same can said of some of the criticisms of Austin's conception of sovereignty. The most important example may be the argument of Bryce and others that the powers of the sovereign in the most advanced states need not be, and commonly are not, legally illimitable.[21] The late Victorian critics of Austin also attacked his explanation of the basis of the habitual obedience of the bulk of the population;[22] challenged his identification of the American and British sovereign;[23] and emphasized the need to study the concrete forces that condition the exercise of sovereign power.[24] Of course, not all of these criticisms raise fundamental objections to Austin's conception of sovereignty. Still, the criticism that the powers of the sovereign need not be, and often are not, legally illimitable does exactly that. If the criticism is well-founded, a basic attribute of the sovereign as Austin conceived of it would have to be rejected.

A third reason for the increased volume and intensity of the criticisms of Austin was dissatisfaction with his conception of international law as positive morality rather than law 'properly so-called'. His late Victorian critics assailed this notion on numerous grounds. To begin with, T.A. Walker (1862–1935) argued that Austin had no right to mandate for others how they should define law for their purposes, or to characterize definitions of the term different from his own as improper. In Walker's more colourful terms, Austin 'is free herein to act the Consult, but he is not free to play the Dictator, to deny the validity of the application of the name "Law" to such other varieties of rule as have hitherto enjoyed the appellation, to characterize a wider employment of the term as "mere jargon" '.[25] As far as the definition of 'law' is concerned, 'there must be equal liberty for all'.[26]

Most of Austin's critics, including Walker a good portion of the time, did not adopt this pragmatic perspective on the definition of 'law'. Instead, they tended to assume that there is a 'true' definition of international law, which Austin misconceived. At any rate, they criticized his notion of it on numerous grounds. One objection was that its practical effects were bad, if not disastrous. As E.C. Clark put it, to deny that international law is law necessarily casts 'a certain slur upon the principles which still go by that name. In lowering their nominal authority it ends by weakening their practical effect.'[27] A second criticism attacked Austin's characterization of international law as the positive *morality* between nations. As Frederick Pollock put it in 1882, international law is not a subdivision of morality, but 'a true branch of jurisprudence'.[28] A third criticism was Austin's alleged exaggeration of the differences between positive and international law. Although no one denied that there were differences, they were held to be less substantial, or significant, than he claimed.[29] A fourth criticism focused on Austin's alleged failure to recognize that conceptions of law, including the law of nations, are subject to change and evolution. It is a criticism that furnishes an unusually clear example of how evolutionary modes of thought began to undermine his conception of law.[30]

Although Austin's commentators drew various conclusions from these criticisms, almost all of them would probably agree with Frederick Pollock: 'If therefore we find that our definition of law does not include the law of nations, the proper conclusion is, not that there is no such thing as a law of nations and that we are to talk pedantically of positive international morality, but that our definition is inadequate.'[31] A second, widespread conclusion was the opinion that the critics had rescued international law from Austin's corrosive analysis. For example, T.J. Lawrence indicated that, 'If... the conclusions to which we have been led are valid, we may claim to have rehabilitated International Law .... It is a noble system, by whatever name we agree to call it.'[32]

A final reason for the growing disenchantment with Austin's work had nothing to do with the content of his ideas (at least on the surface). Rather, it consisted of their form, or how he presented them. For example, dissatisfaction with the presentation of his ideas heavily contributed to the judgement that his lectures were unsatisfactory as a textbook, the need for which was seen to be ever more imperative as legal education expanded. A remark of W.W. Buckland encapsulated well the gravamen of the indictment: 'Austin's work ... is not a good textbook. Its endless repetitions, its fragmentary form, its bulk and its incompleteness are enough, apart from its doctrine, to make it an unsatisfactory book for beginners.'[33]

The 'endless repetitions' to which Buckland referred were part of a widely shared indictment of Austin's style of writing. Although it elicited the admiration of John Stuart Mill,[34] his opinion was not that of a majority of commentators. A remark of W.H. Rattigan was typical: Austin's style was said to be 'so heavy and unattractive that it wearies even the patient English student'.[35] If few jurists condemned it quite as harshly as Sir Henry Maine, who castigated Austin's manner of writing as 'positively repulsive',[36] it was strongly criticized. The ranks of the critics included Dicey. He argued that Austin's 'undoubted merits' were counterbalanced by 'at least as undoubted defects'.[37] The first of these flaws that Dicey enumerated was Austin's repetitive, 'crabbed' and 'laborious' style. He was said to have 'greater command of thought than of expression. *It is hardly an exaggeration to say that he cannot handle the English language* [emphasis added] ... whilst he attains precision he never attains lucidity of statement.'[38] Moreover, Dicey argued that these deficiencies in form of Austin's work were not fortuitous. Rather, they corresponded to, or arose from, a shortcoming in the substance of his conjectures. 'Few men of so much power, and in one sense of so much originality, display so little fertility of mind.'[39] Dicey meant by this Austin's inability to get beyond the few ideas that he indeed analysed with 'unrivalled precision', but 'never ... quit'.[40]

Another first-rate Victorian thinker who criticized Austin's style was Walter Bagehot. His comments occurred in the context of an essay on Sir George Cornewall Lewis,[41] a former student of Austin's who also served with him in the mid-1830s as a Royal Commissioner to Malta. Bagehot attributed some of the flaws that he perceived in Lewis's work to the influence of Austin, one example of which was his style. Bagehot pointed out that Austin frequently referred to the 'formidable community of fools' and had little respect for popular opinion. Bagehot regarded this as a 'great error' and claimed that popular judgement on popular matters is 'crude and vague, but ... right'.[42] He argued that it was even clearer that a great writer on morals and politics should not employ a style of writing that bars him from popularity. According to Bagehot this is exactly what Austin did. His meticulous efforts to analyse

exhaustively every idea that he discussed turned away actual and prospective readers of his works. His writings 'read like a legal document; every possible case is provided for, every ambiguity is guarded against, and – hardly anyone can read them'.[43]

The fragmentary character of Austin's work was another frequently cited reason for its unsuitability as a textbook. It was something particularly stressed by Dicey, who regarded it as the 'main practical flaw' of Austin's treatises.[44] By characterizing it as fragmentary Dicey meant that Austin failed to give anything like 'a general view of the whole field of jurisprudence'.[45] Instead, he focused on only a few topics which he was unwilling or unable to leave. While he analysed these notions, such as sovereignty, with 'unrivalled precision ... the thoughts which occupy or preoccupy his attention are few, he never quits of them'.[46] Moreover, Dicey argued that Austin's narrowness in this sense was a reflection of a deeper weakness. The nub of it was his inability to envision his subject in its entirety. He was unable 'to give to different legal conceptions their right proportion, and to assign to each of them their appropriate place in a scheme of law ... A certain want of the sense of proportion is an essential element of his intellect.'[47]

Critics of Austin gave numerous other reasons as well for the unsatisfactory quality of his work as a textbook. High on the list was his lengthy discussion of the principle of utility, but there was no lack of additional objections. In the first place, advances in knowledge were said to render at least some of his ideas obsolete. Many of his views, as to matters of fact, were held to be questionable 'chiefly in consequence of historical and philological research which has taken place since his time'.[48] In the second place, certain of his illustrations were said to require a detailed knowledge of legal systems that is unreasonable to expect of a beginner.[49] In the third place, the vehemence of his censures of Blackstone, Montesquieu, and Hooker was criticized. As a result, he failed to recognize the very real achievements of these figures.[50] Finally, the very persuasiveness of some of his criticisms means that their repetition is no longer necessary. Frederic Harrison optimistically claimed, thus, in 1879 that 'there is no longer (thanks to Austin himself) any danger of confusing moral and legal obligation ... No one now attaches any distinct meaning to the vague rhetoric of Blackstone about obeying the law of God when it conflicts with the law of man.'[51]

This dissatisfaction with Austin strongly conditioned the quite remarkable outpouring of textbooks in jurisprudence in the final two or three decades of the nineteenth century. Although this development obviously had more than one cause, the perceived limitations of his lectures contributed to it. The textbooks, a number of which underwent several editions, included Holland's *Jurisprudence* (thirteen editions from 1880 to 1924), Markby's *Elements of Law* (six editions from 1871 to 1905), Sir W.H. Rattigan's *The Science of Jurisprudence* (three editions from 1888 to 1899), B.R. Wise's *Outlines of Jurisprudence* (1881),

and Sheldon Amos's *A Systematic View of the Science of Jurisprudence* (1872). Yet, Austin's works were hardly discarded. This is apparent from, among other things, two articles by E.C. Clark. In 1885 he argued for the supersession of Austin's *Jurisprudence* 'except as an exercise for more advanced students'.[52] Still, only three years later he indicated, in an article on legal education at Cambridge, that Austin's very uncompromising work could not yet be displaced as the textbook of jurisprudence. A more complete, elementary, and easier substitute has yet to appear. It is therefore 'unavoidable' that his lectures remain 'the *pièce de résistance*, supplementing them, where necessary, with books or portions of books on the same subject by other authors'. The instructor can also prune, enlarge, and correct the lectures as needed.[53]

The extent to which these and the other criticisms of Austin were shared by different commentators varied. His critics disagreed among themselves almost as much as they did with him. Some of the most penetrating criticisms, such as those advanced by W.W. Buckland[54] and Frederic Harrison,[55] were not widely shared. Others had a much broader base of support. Dissatisfaction with his discussion of utilitarianism and how he presented his ideas are the most important examples. Some of the criticisms also adumbrated, to a very significant extent, the much better known objections to Austin's views developed in the twentieth century by H.L.A. Hart.[56] Overall, the criticisms had their effect in discrediting, to a greater or lesser degree, some of Austin's key ideas.

III

Whatever the reasons for it, there can be little doubt that, as the nineteenth century closed, Austin was subject to more and more criticism. Yet, it would give a totally false impression to suggest that the reception of his ideas was entirely negative. To begin with, he remained a very large presence. What B.R. Wise and G. Grover Alexander wrote about Austin's conception of sovereignty also applied to other dimensions of his legal philosophy. In 1881 Wise wrote that Austin 'has rested the science of law so firmly upon a theory of sovereignty that Jurisprudence now conveys no meaning to an Englishman if it is disassociated from it'.[57] Six years later Alexander, at the outset of a two-part analysis of sovereignty in *The Jurist*,[58] wrote that 'for some time past there has been a disposition to think that Austin has exhausted the subject. What he had said upon it was regarded as final and complete. Nothing more remained to be said.'[59]

In addition, most of Austin's critics did not trash him. Indeed, they tended to praise him highly and even accept some of his ideas. In other words, they tended to pick and choose, accepting and/or endorsing some of his doctrines,

while discarding or criticizing others. Of course, a few well-known commentators had little, if anything, good to say about him. Maitland and Bryce are two extreme examples. Maitland's opinion was that 'J.A. = 0',[60] while Bryce savaged Austin as few others did.[61] The very harshness of their reaction to Austin distinguishes them, however, from most, though not all, of his critics. The bulk of them expressed more balanced opinions of his work. E.C. Clark and John Lightwood, both of whom in 1883 published books that were primarily critiques of Austin, are good examples.[62] While they were bit players in the drama of mid- and late Victorian jurisprudence, their response to Austin was more representative of the period than Maitland's or Bryce's. Despite their criticisms of Austin, both Clark and Lightwood praised his contribution to jurisprudence. Clark wrote of the 'high respect which every student must feel' for Austin,[63] while Lightwood indicated that he was under the 'greatest obligations' to 'so great a master'.[64] Moreover, the very fact that Austin was subject to so much criticism attested to the high stature that he had achieved. Unimportant figures are more apt to be ignored than to be criticized.

Aside from this, Austin definitely had his admirers and defenders, or, if you will, apologists, such as James Fitzjames Stephen, William Markby, and Frederick Maxwell. Each of them wrote highly laudatory articles or reviews in which Austin's ideas were explicitly defended.[65] Moreover, Austin-like ideas were frequently employed by jurists who made little or no mention of him. For example, several authors of influential textbooks on jurisprudence either explicitly endorsed his conception of law, or developed notions very similar to it. While few were as candid as William Markby, who indicated that he had simply 'repeated ... [Austin's] conclusions',[66] T.E. Holland[67] and B.R. Wise[68] held, and justified, very Austinian conceptions of law. Moreover, James Fitzjames Stephen employed and defended an Austinian conception of international law in his great *A History of the Criminal Law of England* (1883), the 'most impressive of all his works on criminal law'.[69]

Moreover, acceptance of Austinian ideas was not limited to scholarly treatises. Indeed, they were even employed in debates in the House of Lords! This is evident from a speech on 25 July, 1887, of the Marquess of Salisbury. He served as Prime Minister four times and 'played a major role in shaping British imperial and foreign policy'.[70] The Marquess of Bristol had introduced a motion in the House of Lords proposing the establishment of an international arbitration tribunal. He had justified it as a means to promote 'the great and glorious cause of peace and goodwill among men'.[71] His view was that at the present time 'nothing was seen or heard in Europe but the preparation and the operations of war. No effort, therefore, ought to be spared to lessen or minimize, and, if possible, to put an end to, the existing state of things.'[72] Lord Salisbury responded respectfully, but negatively, to the motion, which was

withdrawn at the conclusion of his remarks. At the outset he praised the earnestness and excellence of the supporters of the motion, whose objective he endorsed. He also expressed his disapproval of the 'terrible evils' and 'horrors' of war.[73] Nevertheless, he opposed the establishment of an international arbitration tribunal. Although he did not put it in exactly these terms, his basic argument was that it is unrealistic as a means to prevent war. To begin with, such a tribunal is 'contrary to the tendency of all modern nations, and is not likely to meet with acceptance at their hands'.[74] The spirit of peace is no more widespread among states now than it has been in the past and the chances of avoiding war are not high. In fact, 'all' nations are attempting to make their machinery of war as potent and perfect as possible.[75] If they were prepared to submit their disputes to a third party, and to abide by its decisions, the tribunal would be unnecessary.

Moreover, Lord Salisbury argued that there is little chance of forming a tribunal under which 'all nations would confidently feel that they would have equal law'.[76] He supported this notion on the basis of a very Austinian conception of international law. After all, there is 'no Legislature to lay down the law by which such a tribunal could be guided, and there is no authority to enforce its decrees when once they have been pronounced, and therefore it would be a mere form and its functions would be reduced to a nullity'.[77] He indicated, in terms that would have made Austin applaud from the grave, that

> we are misled in this matter by the facility with which we use the phrase 'International Law'. International Law has not any existence in the sense in which the term 'law' is usually understood. It depends generally upon the prejudices of writers of text books. It can be enforced by no tribunal, and therefore to apply to it the term 'law' is to some extent misleading, and ... has given rise to the somewhat exaggerated hope to which those persons who hold the views of my noble Friend approach this matter. I do not think there would be any advantage in committing this House to a barren statement on the subject ... it is idle to attempt to conceal from our minds the terrible realities of the case.[78]

Finally, Austin even had a certain unacknowledged appeal for jurists who tended to be critical of his ideas. T.J. Lawrence is a good example. Despite his critique of Austin's conception of law, he was more of an Austinian, or legal positivist, than is apparent from *Some Disputed Questions of Modern International Law*. The best evidence of his positivist outlook is a position that he takes in his textbook on international law, the first edition of which was published in 1895.[79] Here he distinguishes very sharply between two alternative approaches to the science of international law. One is what he calls the *a priori*, or transcendental, approach, which focuses upon what international

law ought to be. The other is the inductive, or historical, approach. Its main objective is to discover by observation what rules states actually follow in their interactions with each other. This method also involves the classification and arrangement of these rules in terms of the basic principles on which they are founded.[80]

Lawrence was a proponent of the second approach, which he defended on various grounds. One of them involved a very Austinian emphasis upon the need to distinguish between the law that is and the law that ought to be. It is a necessity that, Lawrence claimed, the practitioners of the *a priori* approach tended to ignore. For example, they are prone to mingle the 'is' and the 'ought' in ways that are both 'confused and confusing'.[81] Yet, the two, in international law as elsewhere, are often quite different.[82] Moreover, Lawrence argued that statesman who argue points of international law do not appeal to innate or transcendent ideas of justice in order to substantiate their case. Rather, they base their arguments upon established rules derived from such sources as the general practice of states, treaties, authorities on the subject, or precedents. The appeal to natural right or innate principles of justice and humanity is rare. In short, states base their arguments upon usage, or, if it is dubious, to principles accepted by 'all or most civilized nations'.[83] Finally, there is wide disagreement within the science of ethics about the proper standards to be used and how they should be determined. Lawrence therefore concluded by stressing that the rules of international law, be they morally good or bad, are still the law. 'To argue otherwise would be to blend the ideal with the real, to confuse what ought to be with what is, and to turn moral rightness into legal right.'[84]

The most remarkable feature of these various arguments is not their very definite Austinian character, which is quite obvious. More remarkable than that is the fact that Lawrence never mentions Austin *in this context*. To this extent, he was similar to a number of Austin's other critics, such as Frederick Pollock and William Edward Hall. They too were reluctant to acknowledge that they may have agreed with some of his views, critical as they were of others.[85]

Notes

1. See his 'Disposition of Property by Will – Primogeniture', *WR*, 2 (1824), pp. 503–53, and 'Joint Stock Companies', *Parliamentary History and Review* (1826), pp. 709–27.
2. *LJ*, p. 10.
3. As quoted by Charles C.F. Greville, *The Greville Memoirs: A Journal of the Reigns of King George IV. and King William IV.*, vol. 3, 2nd edn, ed. Henry Reeve (London: Longmans, Green, 1874), p. 138.

4. See Maine, 'The Conception of Sovereignty, and its Importance in International Law', *Papers Read Before the Juridical Society: 1855–1858* (London: V. & R. Stevens & G.S. Norton, 1858), pp. 26–45. The paper was actually read on 16 April, 1855.
5. *LOQR*, 40 (April, 1873), p. 33.
6. *PJD* (1832), p. xx.
7. Ibid.
8. See Stephen, 'English Jurisprudence', *ER*, 114 (October, 1861), pp. 233–49, and Mill, *ER*, 117 (October, 1863), pp. 222–44, in 'Austin on Jurisprudence', *Essays*, pp. 165–205.
9. Mill, 'Austin's Lectures on Jurisprudence', *Tait's Edinburgh Magazine*, 2 (December, 1832), pp. 343–8, in *Essays*, pp. 53–60.
10. See Mill, 'Austin on Jurisprudence'.
11. Maine, *LEHI*, Chapters 12 and 13.
12. 'The Present Position of Austin in English Jurisprudence', *JJ*, 28 (1884), p. 449.
13. Sidgwick, *The Elements of Politics* (London: MacMillan, 1891), p. 15.
14. Maine, *LEHI*, Chapters 12 and 13.
15. For a good example, see Frederic Harrison, 'The English School of Jurisprudence: Part II. – Bentham's and Austin's Analysis of Law', *Fortnightly Review*, 24 (November, 1878), p. 683.
16. See E.C. Clark, *Practical Jurisprudence: A Comment on Austin* (Cambridge: Cambridge University Press, 1883); W.H. Rattigan, *The Science of Jurisprudence Chiefly Intended for Indian Students*, 2nd edn (London: Wildy and Sons, 1892), pp. 13, 19, 58–9; and Frederic Pollock, 'Law and Command', *LMR* (April, 1872), pp. 194, 197.
17. Thomas Alfred Walker was the author of the best statement of this criticism with which I am familiar. See his *The Science of International Law* (London: C.J. Clay and Sons, 1893), p. 8. Walker also wrote *A History of the Law of Nations*, vol. 1 (Cambridge: Cambridge University Press, 1899), and *A Manual of Public International Law* (Cambridge: Cambridge University Press, 1895).
18. See *supra*, Chapter 7.
19. Clark, *Practical Jurisprudence: A Comment on Austin* (Cambridge: Cambridge University Press, 1883), p. 161.
20. See *supra*, Chapter 9.
21. Ibid.
22. See T.H. Green, *Lectures on the Principles of Political Obligation and Other Writings*, eds Paul Harris and John Morrow (Cambridge: Cambridge University Press, 1986), pp. 68, 69, 70, 74, 93.
23. See Bryce, *supra*, Chapter 9; Grover Alexander, 'Sovereignty', *The Jurist*, I (November, 1887), Part II, p. 372; Dicey, *Law of the Constitution*, pp. 29, 17, 79–81.
24. See Alexander, *op. cit.*, pp. 372–3; Bryce, *SHJ*, pp. 520–1, 509, 512, 514–15.
25. *The Science of International Law* (London: C.J. Clay, 1893), p. 8.
26. Ibid., p. 9.
27. *Practical Jurisprudence*, p. 187.
28. *Oxford Lectures and other Discourses*, p. 18.

29. See T.J. Lawrence, *Essays on Some Disputed Questions in Modern International Law* (Cambridge: Deighton, Bell, 1884), pp. 4, 29, W.E. Hall, *A Treatise on International Law*, 2nd edn, 1884 (Oxford: Clarendon Press, 1917), pp. 14–6; Clark, *Practical Jurisprudence*, pp. 186–7.
30. See Lawrence, *Some Disputed Questions*, pp. 17, 6, 21.
31. *Oxford Lectures and other Discourses* (London: MacMillan, 1890), p. 19.
32. *Some Disputed Questions*, p. 36.
33. 'Difficulties of Abstract Jurisprudence', *Law Quarterly Review*, 6 (1890), p. 436.
34. Mill, 'Austin on Jurisprudence', p. 203.
35. Rattigan, *The Science of Jurisprudence Chiefly Intended for Indian Students*, 2nd edn (London: Wildy and Sons, 1892), p. v.
36. Maine, *Village-Communities in the East and West: Six Lectures delivered at Oxford to which are added other Lectures, Addresses, and Essays* (New York: Henry Holt, 1889), p. 346.
37. Dicey, 'The Study of Jurisprudence', *LMR*, 5 (1880), p. 386.
38. Ibid., pp. 386–7.
39. Ibid., p. 387.
40. Ibid.
41. Bagehot, 'The Late Sir G.C. Lewis', *National Review*, 34 (October, 1863), pp. 492–523.
42. Ibid., p. 517.
43. Ibid., p. 517.
44. Dicey, 'Jurisprudence', p. 387.
45. Ibid., p. 388.
46. Ibid., p. 387.
47. Ibid., pp. 387–8.
48. E.C. Clark, 'Jurisprudence: Its Use and its Place in Legal Education', *LQR*, 1 (April, 1885), p. 205. Also see Frederick Pollock, *Essays in Jurisprudence and Ethics* (London: MacMillan, 1882), p. 2.
49. Clark, 'Jurisprudence', p. 205, and Clark, *Cambridge Legal Studies* (Cambridge: Deighton, Bell, 1888), p. 16.
50. Harrison, 'The English School of Jurisprudence: Part I', p. 483.
51. Ibid., p. 482.
52. E.C. Clark, 'Jurisprudence', p. 205. Although it is not entirely clear, it appears that Clark was referring to Austin's *LJ* rather than the *PJD*.
53. Clark, *Cambridge Legal Studies*, p. 17.
54. See Buckland, 'Difficulties of Abstract Jurisprudence', *Law Quarterly Review*, 6 (1890), pp. 436–45.
55. See *supra*, Chapter 9.
56. Hart, *Concept*, 2nd edn.
57. *Outlines of Jurisprudence for the Use of Students* (Oxford: James Thornton, 1881), p. 12.
58. See 'Sovereignty', *The Jurist*, 1 (November, 1887), Part I, pp. 337–9; Part II, pp. 371–3.
59. Ibid., p. 337.
60. As quoted by Richard Cosgrove, *Our Lady the Common Law: An Anglo-American legal Community 1870–1930* (New York: New York University Press, 1987), p. 170.

61. See James Bryce, *SHJ*, pp. 615–16.
62. See E.C. Clark, *Practical Jurisprudence: A Comment on Austin* (Cambridge: Cambridge University Press, 1883), and John M. Lightwood, *The Nature of Positive Law* (London: MacMillan, 1883).
63. *Practical Jurisprudence*, p. 140.
64. *Positive Law*, p. 418.
65. See Stephen, 'English Jurisprudence', *ER*, 114 (October, 1861), pp. 233–49; F.M. Maxwell, 'Austin's Jurisprudence and its Latest Critic', *LMR*, 10 (1875–76), pp. 167–93; and Markby 'Analytical Jurisprudence', *LMR*, 1 (August, 1876), pp. 617–30.
66. *Elements of Law Considered with Reference to Principles of General Jurisprudence*, 5th edn (Oxford: Clarendon Press, 1896), p. 4.
67. *Jurisprudence*, pp. 15, 68, 21, 37–8, 72.
68. *Outlines of Jurisprudence for the Use of Students* (Oxford: James Thornton, 1881), pp. 6–12.
69. K.J.M. Smith, *James Fitzjames Stephen: Portrait of a Victorian Rationalist* (Cambridge: Cambridge University Press, 1988), p. 53. For Stephens's views, see *A History of the Criminal Law of England* (London: MacMillan, 1883), vol. 2, pp. 34–7; vol. 1, pp. 4–5.
70. Martin Pugh, 'Lord Salisbury', in *Biographical Dictionary of British Prime Ministers*, ed. Robert Eccleshall and Graham Walker (London: Routledge, 1998), p. 213, and *Parliamentary Debates (Lords)*, 3rd ser., vol. 317 (1887), cols. 1832–4.
71. Ibid., 3rd ser., vol. 317 (1887), col. 1831.
72. Ibid.
73. Ibid., col. 1833.
74. Ibid., col. 1834.
75. Ibid.
76. Ibid.
77. Ibid.
78. Ibid.
79. See his *The Principles of International Law* (Boston: D.C. Heath, 1895).
80. Ibid., p. 2.
81. Ibid., p. 19.
82. Ibid., p. 18.
83. Ibid., p. 20.
84. Ibid., p. 23.
85. See Frederick Pollock, 'Law and Command', *LMR*, 1 (April, 1872), p. 202, and Hall, *A Treatise on International Law* (Oxford: Clarendon Press, 1884), 2nd edn, pp. 13–14, 16.

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Conclusion

Five conclusions may be drawn from this study of the nineteenth-century reception of Austin's jurisprudence. To begin with, it was more widely known and respected in the period from 1829 to 1860 than it has often been assumed to be. To say this is not to deny that Austin became a much larger presence in mid- and late Victorian jurisprudence than he had been earlier in the century. Although this (second) conclusion is not novel, it needed to be, and has been, substantiated by this study. I myself had no idea of exactly how large Austin's presence was until I did the research for this book. While the responses to his work do not exhaust the jurisprudential landscape of the period, they were a major part of it. He was a figure who had to be dealt with, one way or another, by anyone who took jurisprudence seriously. He even attracted the attention of major philosophers of the period, such as Henry Sidgwick, Thomas Hill Green, and, of course, John Stuart Mill. In fact, Austin's position was more or less analogous to that of H.L.A. Hart in late twentieth-century English jurisprudence. Hart too has had many critics, but his stature remains high and his presence is very visible. Coincidentally, his greatest work, *The Concept of Law*, was published exactly 100 years after the publication of the second edition of the *PJD*.

The evidence adduced in this study also warrants a third conclusion. Without an understanding of it an emphasis upon the largeness of Austin's presence would be very misleading. The nub of it is that his influence was never *in general* as heavy as the largeness of his presence might suggest. After all, for much of the nineteenth century he was perceived to be on the cutting edge of new jurisprudential developments. As such, it was inevitable that he would, as he did, meet all kinds of resistance. To this extent, one end result of my research is very similar to that of Michael Lobban. He too has questioned the substantive influence of Austin and the 'English School of Jurisprudence'.[1] Indeed, the more I study Victorian jurisprudence, the more I am impressed by its variety, including the responses to Austin. Although his work may have constituted the most conspicuous vessel in the armada of English jurisprudence, many of the other ships in the fleet did not follow in his wake. Rather, they charted their own course and went their own way. At no time did Austin's legal philosophy dominate the scene, or elicit the complete agreement of commentators. A certain amount of dissatisfaction with it was expressed from the outset, dissatisfaction that mounted in the mid- and late Victorian period. If many

jurists accepted Austin's analytical approach and separation of law from morality, these facets of his thought also had their critics. In particular, the natural law tradition continued to appeal to numerous writers who expressed views on jurisprudence. Other facets of Austin's legal philosophy elicited an even larger amount of opposition. The attitude of some commentators is illustrated by a review of William Markby's *Elements of Law* that appeared in the first volume of *The Law Quarterly Review*. According to the reviewer,

> We could wish, for our own pleasure, that he [Markby] loved Austin less and the common law more: for we think nobly of the Common Law notwithstanding its obvious defects, and in no way approve many of Austin's opinions. Austin did much good in this country by fostering the ideal of a science of law: but he was not a great or even a good lawyer, and it is nothing less than absurd to treat him at this day as a writer of authority.[2]

The fourth conclusion to be drawn from this study may be the most important of all. The varied nineteenth-century responses to Austin's jurisprudence indicate that it is anything but the simplistic, monolithic system of ideas that it has seemed to many to be. There is not a single Austin, but numerous Austin*s*, and some of them do not easily, if at all, blend together into a harmonious whole. To begin with, there are the stereotypical Austins familiar to every student of jurisprudence. One such Austin is the advocate of the command conception of a law 'properly so-called'. A second is the proponent of the notion that every independent political society has, and must have, a sovereign whose powers are indivisible and legally illimitable. A third is the quintessential legal positivist. This Austin insisted that the legal validity or existence of a law is independent of its ethical goodness or badness. He also argued that ethical inquiries are improper in the science of jurisprudence. Its focus is the study of what law is rather than what it ought to be. Investigation of the latter belongs to the science of legislation, a subdivision of the science of ethics.

To say that these Austins are stereotypes is not in any way to deny their foundation in his work, which is rock-solid. It is to imply that there are other, much less familiar Austins whose pedigree is also genuine. Although some of them were much more widely emphasized than others, it is possible to find at least six additional Austins in the nineteenth-century interpretations of his work. In the first place, there is the ardent utilitarian who not only discussed the principle of utility at considerable length. In addition, he argued that an exposition of it was a 'necessary link' in a 'chain of systematical lectures concerned with the *rationale* of jurisprudence'.[3] His argument reflects his deep conviction of the 'truth' and 'importance' of the theory of general utility.[4] Indeed, he went so far as to say that he was 'earnestly intent on commending it to the minds of others'.[5] In the second place, and closely related to the first less

familiar Austin, there is the theorist of resistance. This indicates beyond question that he was not the reactionary apologist for the status quo that he has sometimes been represented to be. The utilitarian framework for assessing resistance that he developed also constitutes one of the finest statements of this approach in the nineteenth century. In the third place, there is the innovative creator of a scientific approach to jurisprudence, the general absence of which was much lamented. In the fourth place, there is the legal reformer and fierce critic of the common law. Although Austin's criticisms of it are difficult to reconcile with his conception of the law as an organic whole, they underlie his strong support of codification. In the fifth place, there is Austin the empiricist. Henry Sidgwick had good reason to argue that it was the aim of Bentham and Austin to determine a criterion for what actually is law 'by pointing to some definite empirically ascertainable fact'.[6] This Austin was also very critical of German philosophy. Finally, there is a sixth Austin – the rationalist and essentialist. His rationalism is most evident in his conception of general jurisprudence, a cornerstone of his legal philosophy. In particular, it is apparent from his belief in the existence of certain necessary, essential, and universal principles, notions, and distinctions. They are implied by 'every system of law (or every system of law evolved in a refined community)'.[7] His essentialism is most apparent in his meticulous efforts to define the nature or essence of the 'leading terms' that 'occur incessantly in every department of the science'.[8]

There are also other Austins, the nature of which was not emphasized by nineteenth-century commentators on his work. The most important example may be Austin the perceptive analyst of judicial legislation. His explanation of not only its existence and forms, but its necessity and value, distinguishes his opinions from Bentham's, which Austin criticized.[9] Of course, it could be argued that the existence of so many Austins is a sign of nothing more profound than his inconsistencies and confusion. Although there may be something to this argument, it is only one way to interpret the undeniable tensions between different facets of his thought. Another interpretation, and to me a more satisfactory one, is to view them as signs of the richness and complexity of his jurisprudence. He was obviously pulled in different directions and did not appear to recognize that some of his ideas were incompatible with others. Yet, the very fact that he was subject to these different influences enabled him to see more broadly than might otherwise have been the case.

A fifth and final conclusion is the reinforcement of the notion that interpretations of canonical figures are not fixed in stone. Rather, they may, and often do, evolve and change in accordance with changes in the interests and perspectives of their interpreters. Although this proposition is no doubt a truism, it is still true and its truth is illustrated by the various interpretations of Austin that developed in the course of the nineteenth century. To take this position is *not* to claim that one interpretation is as good as another, which is the exact

opposite of what I believe. It *is* to argue that there were, as there are now, different interpretations of his legal philosophy. Recognition of this fact may have a salutary lesson for the understanding of Austin at the outset of the twenty-first century. The lesson is that the now fashionable interpretations of him may not be the last word, but only a stage in a never-ending process. It is even possible that an appreciation of interpretations developed in the nineteenth century leads to a better, more complete understanding of his legal philosophy than now exists. If the broader argument of this lengthy study could be reduced to a single sentence, it would indeed be precisely that. In short, intellectual history has its value for jurisprudence as well as other disciplines.

Notes

1. Lobban, 'Was there a Nineteenth Century "English School of Jurisprudence"'? *Journal of Legal History*, 16 (1995), pp. 34–62.
2. *LQR*, 1 (1885), p. 504.
3. *PJD*, p. 13.
4. Ibid., p. 15.
5. Ibid.
6. Sidgwick, *The Elements of Politics* (London: MacMillan, 1891), p. 19.
7. *LJ*, p. 1074.
8. Ibid., p. 1075.
9. *PJD*, p. 163.

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Note: John Austin will be referred to as JA throughout the index.