

Studying the Past: The Nature and Development of Legal History as a Academic Discipline

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‘The past is a foreign country: they do things differently there.’

L.P. Hartley, *The Go-Between*

‘The past is never dead. It’s not even past.’

William Faulkner, *Requiem for a Nun*

‘Those who cannot remember the past are condemned to repeat it.’

George Santayana, *Reason in Common Sense*

Although some may wonder whether these invocations of the past have anything to do with the study of history and legal history, in fact they reflect three ideas about the past that have appeared continuously in the scholarship of historians and legal historians: the past is different and should not be confused with the present; the past is useful to understanding the present or solving present problems; and the errors of the past should be revealed so they are not repeated. Their persistence is one basis for my assertion that all the interest in and uses of the past have a commonality: there is a linkage between the reasons for this general interest in the past and the study of both history and legal history. In addition, I hope to use this notion as a foundation for discussing the reasons for studying legal history and reveal something about its nature as an academic discipline. As I began to study and write about English legal history,¹ I began to ponder

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1. Jonathan Rose, ‘Learning to be a Legal Historian: Reflections of a Non-Traditional Student,’ 51 *Journal of Legal Education* (2001), 294-304.

its historiography.² I have touched on it in some earlier scholarship, on which I hope to expand today.³ Moreover, this talk provides an opportunity for personal introspection: Why after three decades specializing in other fields did I turn to English legal history as my primary scholarly area? This is a question that I am often asked. I will begin with some general comments about the past and by recounting what some scholars have said about the study of history. Then I will turn to legal history and my own thoughts on the reasons for studying it and on its nature as an academic discipline.

I. Studying the Past: Developing The Why

Virtually all societies and cultures have viewed the past as fundamental, often worshiping or at least venerating it. They have exhibited a pervasive interest in their past and have attached a special importance to it. For all such groups, the past, whether mythical or real, had a nostalgic quality, both transcendent and emotional. Aeneas poignantly captured this nature of the past when he viewed the scenes of the Trojan war on the Temple walls: ‘There are tears for passing things; here, too, things mortal touch the mind.’⁴ But the past also has had a more functional role. It was the source of authority, wisdom, values, and morality. It served to guide, inform, and instruct those in the present. Each culture had individuals who were the keepers and tellers of the

2. Some might instead call it historiology, which has been defined as ‘the approaches, themes and concepts that underlie the academic study of history’ (or I suppose legal history as well) as contrasted with historiography, which is ‘the study of historical writings as a genre’ - perhaps why particular historians wrote what they did.. One commentator asserts that historiology ‘has become a flourishing field,’ although the term is a ‘sleeper.’ Penelope Corfield, ‘How to Get Back,’ *Times Literary Supplement*, 21 Nov. 2008, No. 5512, 22.

3. Jonathan Rose, ‘English Legal History and Interdisciplinary Legal Studies,’ in Anthony Musson, ed., *Boundaries of the Law: Geography, Gender and Jurisdiction in Medieval and Early Modern Europe*, Aldershot, 2005, 169-86; Jonathan Rose, ‘Doctrinal Development: Legal History, Law, and Legal Theory,’ 22 *Oxford Journal of Legal Studies* (2002), 323-40.

4. Translators have had difficulty translating the original Latin, *Sunt lacrimae rerum et mentem mortalia tangunt*, into English. The words used in the text are the longstanding Allen Mandelbaum translation. Allen Mandelbaum, ed. & trans., *The Aeneid*, New York, 1961, 17. More recently, Robert Fagles has translated them more poetically as ‘the world is a world of tears and burdens of mortality that touch the heart.’ Robert Fagles, ed. & trans. *The Aeneid*, New York, 2006, 63.

past. Initially they were the wise men and the poets.

But the fascination with the past has not been limited to the ancient era. The past continued to be important and functional over time and still is today. Faulkner's and Hartley's statements about the past quoted as the beginning of this article, as well as the work of Proust⁵ and T.S. Eliot,⁶ illustrate contemporary literary uses. The quoted statement by Santayana shows the continuing interest of philosophers. Further and in a much more analytical way, the legal use of precedent and the economic notion of path dependence⁷ both use the past in their methodologies and theories.

At first, these educational and didactic uses of the past were the product of an oral tradition, but it was replaced by a written one, producing venerated texts. Examples both from ancient and later times abound: The Bible, the Iliad and Odyssey, the Aeneid, Magna Carta, the Declaration of Independence and the United States Constitution, to name just a few. Over time, written records replaced memory as the repository of the past, with societies becoming more literate.⁸ As the interest in the past developed, societies soon had experts who specialized in capturing and recounting these stories (*historia*). These experts were called historians and their writings supplanted or augmented the oral Homeric story tellers. Some of them were associated

5. Marcel Proust, *À la Recherche du Temps Perdu*, Paris, 1913-1927. Proust used petite madeleines as a device for recalling the childhood past in *Swann's Way*. For decades, the English translation of this title was *Remembrance of Things Past*, but more recently it has been translated more literally as *In Search of Lost Time*.

6. Eliot, like other modernists, was interested in the notion of time: 'Time present and time past/ Are both perhaps present in time future./And time future contained in time past./ If all time is eternally present/ All time is unredeemable.' T.S. Eliot, *Four Quartets*, *Burnt Norton*, New York 1943.

7. The basic notion is that where you start determines where you end up and that you may have ended up somewhere else had you started at a different place. The seminal article is Paul David, 'Clio and the Economics of QWERTY,' *75 Am. Econ. Rev. Papers & Proc.* (1985), 332. For a more general discussion, see Richard Posner, *Law and Economics*, New York, 2007, 591-92 & authorities cited n. 2.

8. Michael Clanchy, *From Memory to Written Record; England 1066-1307*, 2nd ed., Oxford, 1993. The oral tradition, however, persists as seen in the creation stories of indigenous peoples. <http://www.indigenouspeople.net/legend.htm> (Last accessed June 1, 2010).

with contemporary monarchs, facilitating the development of national historiographies.⁹

From this beginning emerged the European historical tradition, which Richard Southern described as ‘a peculiarly elaborate, exacting, and artificial kind.’¹⁰ He examined this tradition and the developing ‘sense of the past’ from the 9th century through the 18th century.¹¹ His stated goal was to determine whether it was ‘possible to identify any central tradition in historical study leading to the practice and assumptions of most historians today.’ Southern thought that modern historians, in contrast to their predecessors, were united in their aim of ‘reconstituting the thoughts and experiences of the past in their total environment of social relationships and material and mental resources’ and that ‘this cultivation of a sense of the past [was] a fairly recent development.’¹² These historians recognized that the past was a foreign country. Nevertheless, at the inception of modern historical writing about English history by English scholars in the mid-19th century, ‘when a new and much more powerful impulse than ever before stirred men to historical study, the tradition of research, which had been started in the twelfth century and renewed in the sixteenth, was still strong enough to give a distinctive character to English historical writing.’¹³ The past’s continuing influence indicated that it was neither altogether dead nor past.

9. Chris Given-Wilson, *Chronicles: The Writing of History in Medieval England*, New York, 2004, 151-213.

10. Robert Bartlett, ed., *History and Historians: Selected Papers of R. W. Southern*, Malden, 2004, 14 .

11. *Id.* at 11-83. Modern scholars are also interested in how ancient societies perceived the past. See, e.g., Rosamond McKitterick, *Perceptions of the Past in the Early Middle Ages*, Notre Dame, 2006; Given-Wilson, *Chronicles*.

12. Bartlett., *History and Historians*, 66-67. Southern identified three types of earlier historical writing: classical, early scientific, and prophetic, each with purposes quite different than those of modern historians. Southern said the purpose of the classical was ‘to exemplify virtues and vices for moral instruction, and to extract from the confusion of the past a clear picture of the destinies of peoples;’ the purpose of the early scientific ‘to exhibit the divine plan for mankind throughout history, to demonstrate the facts of history as revealed in the Bible and facts provided by secular sources;’ and the purpose of the prophetic ‘to identify historical landmarks referred to prophetic utterances, then to discover the point at which history had arrived, and finally to predict the future from the still unfulfilled portions of prophecy.’ *Id.* at 66.

13. *Id.* at 83.

II. The Study of History: Expanding the Why

To create a foundation for my subsequent discussion of legal history, it is useful to describe the beginnings of historical writing. Not only do the nature of such work and its uses of the past have much in common with the later development of academic history, they also resemble common characteristics of legal history. In a recent book, *A History of Histories*, John Burrow identified the work of the ancient Greeks as the inception of history, which he defined as ‘the elaborated, secular, prose narrative . . . of public events, based on inquiry.’¹⁴ Starting with the great Greek historians Herodotus and Thucydides, numerous historians produced a substantial number of works recounting their society’s past and serving a variety of purposes. Burrow’s book provides an impressive discussion of these histories, starting with the ancient period and continuing through the 20th century. In doing so, he identified many different types of histories. They included universal, pragmatic, religious, secular, antiquarian, legal, philosophic, professional, Marxist, and micro-history. He recognized that history was ‘diverse’ and ‘contiguous with many other genres and lines of inquiry.’ He understood that the past was important for many reasons and that there were many ideas about it as well as different pasts. His objective was to reveal “the plurality of ‘histories’ and the interests embodied in them.”¹⁵ Focusing on more recent American history, Gordon Wood identified many similar and additional types of history. They included anachronistic, narrative, the New Historicism, fictional, political, comparative, postmodern, satirical, multicultural, and mythical.¹⁶ He felt that the more recent historical writing reflected the culmination of a ‘historiographical revolution,’ transforming

14. John Burrow, *A History of Histories: Epics, Chronicles, Romances and Inquiries from Herodotus and Thucydides to the Twentieth Century*, New York, 2008, 3. This section draws heavily on Burrow’s book.

15. *Id.* at xiii-xviii.

16. Gordon Wood, *The Purpose of the Past* London, 2008.

social history into cultural history and elevating theory. But many historians eschewed these directions and remained ‘meat-and-potatoes practitioners of a craft.’¹⁷ Wood disparaged an instrumentalist view of history, regarding it as a ‘manipulation of the past for the sake of the present’ and ‘undermining the integrity and pastness of the past.’ This type of history was unhistorical and anachronistic. Wood was skeptical about the ‘capacity of history to teach lessons,’ but still thought that the study of the past was important and could provide insight into present problems.¹⁸ He said that the justification was that

knowledge of the past can have a profound effect on our consciousness, on our sense of ourselves. History is a supremely humanistic discipline: it may not teach us particular lessons, but it does tell us how we might live in the world.¹⁹

In a somewhat similar vein, another historian has asserted that it is important for historians to communicate better with the public, for ‘knowledge of the past is supremely important, since it provides all humans with our collective stock of knowledge and experience.’²⁰ Gerda Lerner calling history ‘our collective memory’, ‘archives of human experiences and of the thoughts of past generations, said that ‘the only thing one can learn from history is that actions have consequences and certain choices once made are irretrievable.’²¹ Although these scholars thought

17. *Id.* at 2-5. Wood took a dim view of these post-modern developments and their impact on the influence of historical work. Peter Hoffer has examined the growing split between celebratory and critical history, between what he calls traditional consensus history and the new history. Peter Hoffer, *Past Imperfect*, New York, 2007. Assertions by two celebrated historians of different eras illustrate this contrast. Oscar Handlin said that truth was the objective of historians and bemoaned the rise of ‘politically correct’ history. Several decades later, Eric Foner said that ‘truth itself was culturally constructed in the past as it is in the present. History did not reveal truths; it revealed struggles among people to define their beliefs as truth and their opponents’ ideas as falsehoods.’ *Id.* at 4.

18. *Id.* at 8-11.

19. *Id.* at 6.

20. She continued that ‘understanding the intellectual rationale for studying the past is equally significant.’ She made these comment in reviewing four recent books about the importance, pitfalls, and paradoxes of studying the past: John Tosh, *Why History Matters*; Jeremy Black, *The Curse of History*; David Cannadine, *Making History Now and Then*; and Peter Hoffer, *The Historians Paradox*. Corfield, *Get Back*.

21. She also said that ‘it is not function of history to drum ethical lessons into our brains. Gerda Lerner, *Why History Matters*, Oxford, 1997, 52.

that the ‘past is a foreign country,’²² they acknowledge that there were still reasons to study it.

Despite this extensive variety of histories that Burrow and Wood discuss, they all have one thing in common: they studied the past and used it in multiple ways. Reflecting the Homeric tradition, Herodotus wrote his *Histories* ‘so that human achievements may not be forgotten in time and marvelous deeds--some displayed by Greeks, some by barbarians--may not be without their glory.’²³ He also began a long standing practice of telling a story of the triumph of freedom.²⁴ Thucydides’ *History of the Peloponnesian War* celebrated the greatness of Athens and explored its triumphs and trials.²⁵ It entrenched the annalistic narrative as a form of historical writing and introduced the social usefulness of history.²⁶ These works were the beginning of history as a narrative and literary tradition, which became its dominant form. Among the Roman historians, Livy was the most important ancient influence on the notion of history ‘as moral teaching by examples.’ He venerated the past because it contained the virtues that had been lost.²⁷ Tacitus also wrote about Rome’s moral decline. He saw the function of history as being to promote virtue and censure vice, suggesting an ‘affinity’ between him and Edward Gibbon.²⁸ These initial historical works established traditions in historical writing that persisted long into the future. Many characteristics of the writings of these Greek and Roman historians are reflected in works of medieval chroniclers.²⁹

After discussing the work of the ancient Greek and Roman historians, Burrow provided

22. Wood quoted this well-known phrase. The book’s introduction repeatedly and clearly reflects his strong belief in this aphorism and his rejection of the historian’s version of forensic history. Wood, *Purpose*, 1-16.

23. As quoted in Burrow, *Histories*, 13.

24. *Id.* at 29.

25. *Id.* 30-50.

26. *Id.* at 33-35, 47-48.

27. *Id.* at 92, 100, 110.

28. *Id.* at 122, 139-40.

29. Given-Wilson, *Chronicles*, 1-111.

his perceptions of the why of their interest in the past, noting a contrast in Greek and Roman historiography. He believed that the former viewed history as utilitarian, ‘in offering examples of success and failure, practical wisdom and folly.’ But the latter, whose purpose became the standard, believed that ‘the function of history [was] to inculcate virtue and castigate vice, through the presentation of examples of inspiring and ignominious behavior.’³⁰ Both views demonstrated that the past was not dead and also resonated with Santayana’s concerns.

There are several links between history and legal history. One of earliest involves the influence on the study of history of the adoption of ‘textual methods of Renaissance humanism,’ which was a ‘new beginning’ in the study of the past.³¹ This technique of ‘archival historical research,’ as it became known, was ‘a great transformation’ in the study of history.³² The most important and influential uses of this new critical scholarship were in legal history, the study of the *Corpus Juris Civilis*, the great work of Roman jurisprudence. In scouring the ancient texts, these humanist historians discovered ‘well-intentioned but anachronistic commentaries, interpretations, interpolations and misunderstandings, as well as scribal errors and forgeries, which to the humanist scholar were the silt and encrustations beneath which could be glimpsed pristine gold.’ Moreover, the impact on legal history was more extensive as this ‘literary archaeology led to and provided the tools for legal archaeology’ and the study of feudalism and

30. Burrow, *Histories*, 160-61. Burrow stated that both the Greeks and Romans believed that the ‘moral fibre of a people’ explained their successes and failures.

31. *Id.* at 283, 287.

32. *Id.* ‘The unparalleled achievements of the legal humanists in the historical study of Roman law have led some scholars to detect the beginnings of modern, critical, historical scholarship in their work. Douglas Osler, *Legal Humanism 2*,

<<http://www.mpier.uni-frankfurt.de/forschungsgebiete/mitarbeiterforschung/osler-legal-humanism.html>>accessed 14 April 2010.

legal humanism, ‘the application of humanist techniques to legal texts.’³³ Legal humanism has been called a ‘branch of legal history.’³⁴ More generally, it has been asserted that legal history as field of endeavor emerged from legal humanism and that legal history was to a certain extent the illegitimate ‘offspring of Renaissance humanism.’³⁵

But ‘the humanists recognized that the state of Roman law was related to the state of Roman society, and that as that society changed so did the law.’³⁶ Their critical study revealed that Roman law was not a model for present use. But instead it was ‘manifestly alien, the law of a past and different society.’³⁷ Indeed, the past was a foreign country. But Burrow also argued that the spirit of humanism and the failure of Roman law as a model for medieval law led to the tendency of historians to look for current authority and legal principles in one’s own past and produced early notions of ‘ancient constitutionalism.’³⁸ The past wasn’t dead!³⁹

In a chapter entitled, *History as the Story of Freedom: Constitutional Liberty and Individual Autonomy*, Burrow discussed a prominent historical theme. Focusing on Bishop Stubbs’ late 19th century work on medieval English history, he described how, in Lord Acton’s

33. Burrow, *Histories*, 288-90. In the 18th century, legal humanism, known then and earlier as *jurisprudentia elegantior*, was defined as ‘the study of Roman law in close conjunction with philosophy, antiquities, the Greek and Latin languages, the art of textual criticism, Roman history and literature.’ It rejected the ‘pragmatic, unhistorical application of Roman law to conditions of contemporary Europe. Osler, *Legal Humanism*, 1. These 16th century scholars were centered initially in France at the University of Bourges. Although they all focused on the texts of Roman law, their approaches to textual interpretation varied. *Id.* at 2-5; Michael Monheit, ‘Guillaume Bude, Andres Alciato, Pierre de l’Estoile: Renaissances Interpreters of Roman Law,’ 58 *J. Hist. Ideas* (1997), 21. Their work examined canon and feudal law as well as civil law. Donald Kelley, ‘The Rise of Legal History in the Renaissance,’ 9 *Hist. & Theory* (1970), 174, 176-90

34. Osler, *Legal Humanism*, 2.

35. Kelley, *Legal History Renaissance*, 175-76. ‘What began as a revolution in the science of law . . . ended as a revolution in the art of history.’ *Id.* at 175, 190-94.

36. Peter Stein, *Roman Law in European History*, Cambridge, 1999, 78.

37. Burrow, *Histories*, 290.

38. *Id.* at 292-93.

39. Despite the criticism of this type of forensic legal history, this scholarly antiquarianism and ancestral patriotism produced one of the greatest collections of rare books: the Parker Library at Corpus Christi College, Cambridge as result of Matthew Parker’s efforts to achieve Queen Elizabeth’s goal of finding a native English Christianity.

words, ‘progress towards more perfect and assured freedom’ began with its birth in the German woods and progressed incrementally to ‘a fully developed national parliamentary constitution.’⁴⁰ In asserting this story, Stubbs said that ‘the roots of the present lie deep in the past, and nothing in the past is dead to the man who would learn how the present comes to be what it is.’⁴¹ This use of the past also established a current political *zeitgeist*. Again the past was neither dead nor even past. Although Richard Southern called Stubbs, who was Regius Professor of Modern History, ‘without doubt the greatest of the Oxford historians,’⁴² his ‘Whiggish’ views would be attacked and rejected.⁴³ Nevertheless, from the early Greeks to current times, ‘societies [have promoted] the study of their own past as an element of national identity, resulting in the use of history as the ‘fuel for nationalism.’⁴⁴

III. The Study of Legal History: Focusing the Why

A. The Inception of Academic History and Law

Studying the development of history and the study of the common law as academic disciplines reveals some interesting parallels.⁴⁵ Both emerged formally in England and the United States in the mid to late 19th century and both asserted their scientific natures as the basis for

40. *Id.* at 380-83. Medieval historians also told a story of freedom. Given-Wilson, *Chronicles*, 179-85.

41. Quoted in *id.* at 385. Stubbs felt that England was unique in its freedom story. His teleological approach and exceptionalism story would characterize some future English and American legal history.

42. Bartlett, *History and Historians*, 93.

43. In some of his concluding chapters, Burrow revealed some further whys for studying history in his discussion of Marxist history, the Annales School, and others who integrated history with other disciplines such as economics, psychology, anthropology, and sociology and used history as a foundation for political theories. Burrow, *Histories*, 448-68.

44. Max Hastings, ‘Drawing the Wrong Lesson,’ Review of Margaret MacMillan, *Dangerous Games: The Uses and Abuses of History*, *The New York Review of Books*, 11 March 2010, 40 (vol. 57, No. 4). The book’s theme, as indicated by its title, is the way in which ‘history is used and abused by societies and leaders,’ which is problematic because it offers ‘epic opportunities for exploitation and distortion.’ *Id.*

45. The ‘learned law,’ canon and civil law, had been taught at Oxford and Cambridge since the medieval period.

intellectual acceptance and prestige.⁴⁶ In England, by the 1870s, both Oxford and Cambridge had independent faculties of history.⁴⁷ History as an academic discipline began at both university combined with other disciplines, in 1850 at Oxford as a School of Law and Modern History and about the same time at Cambridge as a Tripos that included Moral Philosophy, Modern History, and General Jurisprudence.⁴⁸ By 1867, at both Oxford and Cambridge, history was separated from the other fields and, within a few decades, well ensconced as an academic discipline.⁴⁹ In their emergence, the appointments of Montagu Burrows in 1862 as the Chichele Professor of Modern History and of Bishop William Stubbs in 1867 as the Regius Professor of Modern History at Oxford and of Sir James Stephens in 1849 as the Regius Professor of Modern History at Cambridge played an important role.⁵⁰ To achieve this status, history was viewed as a ‘new science,’ and ‘an important body of organized ascertainable truth . . . of a hitherto unimaginable universal applicability.’ The primary focus of this ‘universally useful’ and ‘scientifically established truth’ was the development of Parliament, a legally related topic.⁵¹ Blackstone had

46. The attraction of science was not novel as the medieval legal humanists ‘believed that law should be capable of being presented in the same way as other scientific disciplines, in particular by proceeding logically from what is universal to what is particular.’ Stein, 79-82. Renaissance humanism also asserted the scientific nature of law, a notion that continued into the 18th and 19th centuries. Jonathan Rose, ‘*Advocatorum Militia: The Chivalric Ethos of the Legal Profession—Loyalty and Honor*’ in Warren T. Reich and Jonathan Riley-Smith, eds., *Chivalry, Care, and Honor* (forthcoming), 20-21, 28, 41-43.

47. Burrow, *Histories*, 427. Initially, History’s entry into academia encountered resistance as some argued it ‘was not amenable to academic treatment.’ Peter Slee, *Learning and a Liberal Education*, Manchester, 1986, 20.

48. Bartlett, *History and Historians*, 89, 93-96; Slee, *Liberal Education*, 23. How to organize the subject the materials for study seemed to have caused particular concern at Oxford. *Id.* at 39-54.

49. . Bartlett, *History and Historians*, 123-27; Slee, *Liberal Education*, 56-120. Southern believed that Its institution at Oxford was a product of ‘opposition to theological dogmatism.’ Bartlett, *History and Historians*, 89-98, 123-27. Southern said that the establishment of the study of history was ‘the spearhead of an academic revolution’ and ‘an education for gentlemen.’ *Id.* at 90-91.

50. Bartlett, *History and Historians*, 90-92; Slee, *Liberal Education*, 23-24.

51. *Id.* at 126-27. According to Southern, history now gave the universities their dominant social position rather than theology and canon law as it had been in the past and history had replaced theology as ‘the queen of the sciences.’ *Id.* at 126-27. But he went on to recount how ‘history was one of the declining interests of this country, and the decline in medieval history was the most marked of all.’ *Id.* at 127-34

earlier referred to the study of legal knowledge as a science, as Daniel Boorstin later explored.⁵²

Dating the beginning of English university legal education in the common law is somewhat difficult. Although its inception is often tied to William Blackstone's appointment as the Vinerian Professor of Law in 1758, his lectures were not offered to educate professional lawyers, but for clergy and gentlemen who needed to know something about law.⁵³ University College London instituted a law school in 1826, which although initially successful, 'rapidly declined.'⁵⁴ Both Oxford and Cambridge began to offer B.A degrees in Jurisprudence combined with other subjects in 1849-50 and separate law degrees in the following decades.⁵⁵ In 1846, the teaching of legal science was the prescribed mission of legal education.⁵⁶

The study of American history followed the familiar pattern of starting outside academia with public and literate writers such as Bancroft, Prescott, and Parkman.⁵⁷ The establishment of history as an academic subject began in the mid-19th century.⁵⁸ Although history had been studied and degrees awarded for a number of years,⁵⁹ the professionalization of academic history likely did not occur until the latter decades of the nineteenth century, with significant emphasis on

52. 1 William Blackstone, *Commentaries on the Laws of England*, Oxford, 1764, repr. Chicago, 1979, 4; Daniel Boorstin, *The Mysterious Science of Law: An Essay on Blackstone's Commentaries*, Cambridge, 1941, repr. Chicago, 1996.

53. Cambridge established the Downing Professorship of the Laws of England in 1800. J.H. Baker *Introduction to English Legal History*, 4th ed., London, 2002, 170-7.

54. William Twining, *Blackstone's Tower: The English Law School* London, 1994, 25.

55. Cambridge established the Law Tripos in 1858. Oxford established a School of Jurisprudence in 1872. John Baker, *Introduction*, 171. F.H. Lawson, *The Oxford Law School 1850-1965*, 1968, Oxford, 31-39. Baker has recently discussed early legal education in greater detail. J.H. Baker, 2005 Annual Selden Society Lecture, *Legal Education in London 1250-1850*, London, 2007. Lawson has discussed the separation of the history and law schools and a independent law school at Oxford. Lawson, 1-60.

56. Baker, *Introduction*, 171.

57. Burrow, *Histories*, 397-414.

58. For a detailed discussion of the development of history as a discipline in the United State, see George Callcott, *History in the United States 1800-1860* (1970); Michael Kraus, *A History of American History*, 1937, New York.

59. Harvard founded a history department in 1839 and William and Mary perhaps somewhat earlier. The first modern history course was introduced at Michigan in 1853. Kraus, *American History*, 304-05.

legally related topics such as constitutions, legal theory, public law and the history of institutions.⁶⁰ The German scholarly tradition influenced the early American historians as it had their European counterparts. Henry Adams was probably the first American professional historian.⁶¹ He was appointed as a medievalist and his initial work and teaching involved Anglo-Saxon law. In his seminar, Adams and his students produced *Essays in Anglo-Saxon Law* (1876), characterized as ‘the first historical work ever accomplished by American university students working in a systematic and thoroughly scientific way under proper direction.’⁶² At this time, as had transpired in England, history was characterized as ‘scientific’⁶³ and Adams inaugurated and embraced the notion of ‘scientific history,’ asserting its ‘objectivity.’⁶⁴ He said the historian ‘should study his own history in the same spirit and by the same methods with which he studied the formation of a crystal.’⁶⁵

Although Litchfield Law School in Connecticut and William & Mary University Law School in Virginia were founded in the late 18th century, it is the familiar story of Langdell and his case-method that conventionally marks the beginning of American professional legal education in 1870.⁶⁶ Just as had been the case with history and law in England and history in the

60. The seminar method was first used at Michigan in 1869 and at Harvard in 1871. Kraus, *American History*, 304-09.

61. He was appointed as professor of history at Harvard in 1870 and in 1889-91 published his still valued *History of the United States of America* during the Administrations of Jefferson and Madison. Burrow, *Histories*, 414-24; Kraus, ‘Henry Adams,’ 321-35.

62. Kraus, *American History*, 308-09. Harvard awarded its first PhD in 1879 and Yale in 1882.

63. Kraus, Ch. IX, ‘*The Rise of the Scientific Method*,’ *American History*, 291-320.

64. Burrow, *Histories*, 414, 420-23; Kraus, *American History*, 321. Objectivity has continued as a significant issue among historians. Peter Novick, *That Noble Dream: The “Objectivity Question” and the American Historical Profession.*, New York, 1988.

65. Quoted in Burrow, *Histories*, 421.

66. Lawrence Friedman, *A History of American Law*, 2d ed., New York, 1985, 318-22, 606-54; Robert Stevens, *Law School: Legal Education in America from 1850s to the 1980s*, Chapel Hill, 1983, 3-72. Prompted by Thomas Jefferson, legal education began at William and Mary in 1780. W. Taylor Reveley III, ‘The Citizen Lawyer,’ *50 Wm & Mary L. Rev.* (2009), 1309. For a detailed discussion of the development American legal education, see William LaPiana, *Logic and Experience: The Origin of Modern American Legal Education*, New York, 1994; Steve

United States, the professionalization of American legal education was based on its characterization as a legal science.⁶⁷ Langdell said law was a ‘science’ and should ‘be studied scientifically.’⁶⁸ In the preface to his *Cases on the Law of Contracts* (1871), he said

Law, considered as a science, consists of certain principles and doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer; and hence to acquire that mastery should be the business of every earnest student of law.⁶⁹

Moreover, when the Harvard Law School was founded in 1816, Issac Parker, the first professor, had characterized law as a ‘science.’⁷⁰ More recently, Richard Posner said that ‘law is the most historically oriented . . . of the professions.’⁷¹ Thus, given the various connections and similarities between the disciplines of history and law, it should not be surprising that many of the reasons for studying legal history are similar to those for studying history.

B. The Inception of Legal History

Studying the legal past has an important function as it produces knowledge and information about legal institutions and concepts. Some of the earliest legal historians originated a tradition that the past had current utility. As true with Greeks, the initial American legal historians were interested in the past because of its present value. Adams, like Stubbs, both of whom were to some extent legal historians, told a somewhat familiar teleological story, one of

Sheppard, ed., *The History of Legal Education in the United States: Commentaries and Primary Sources*, 2 vols. Pasadena, 1999.

67. Sheppard, *Legal Science*, vol. 2, 589-670 (collected essays).

68. Friedman, *American Law*, 613-14.

69. C.C. Langdell, *A Selection of Cases on the Law of Contracts* vi, Boston, 1871, repr. Birmingham, 1983.

70. Friedman, *American Law*, 321.

71. He continued, ‘it venerates tradition, precedent, pedigree, ritual, custom, ancient practices, ancient texts, archaic terminology, maturity, wisdom, seniority, gerontocracy, and interpretation conceived of as a method for recovering the past.’ Richard Posner, ‘Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship,’ (2000), 67 *U. Chi. L. Rev.* 573, 573.

the ‘economical evolution of a great democracy.’ Henry Adams stressed the need to study the American rather than European past and identified and patriotically celebrated American ‘ideals’ and ‘character.’⁷²

But Frederic William Maitland, the first clear academic legal historian, was interested in the past for very different reasons than Stubbs and Sir Henry Maine, another early evolutionary historian. Maitland rejected the use of the past to tell an evolutionary or teleological story or for use ‘by modern courts to suit modern facts,’ which he called ‘a process of perversion and misunderstanding.’⁷³ He insisted on understanding the past on its own terms and in its contemporary context and ideas. Law was ‘not a thing which can be seen or handled, but a thing perceived in many ways of practical experience.’⁷⁴ This belief informed view of the role of the legal historian as one of ‘lightening the pressure that the past must exercise upon the present, and the present on the future.’⁷⁵ He rejected historical jurisprudence⁷⁶ and also questioned the notion of history as scientific.⁷⁷ He emphasized the use of original records and writings, sources often in manuscript form, a tradition that continues today and unites legal historians.⁷⁸ He was also

72. Burrow, *Histories*, 418-22.

73. Frederic William Maitland, ‘Why the History of English Law is not Written,’ in H.A.L. Fischer, ed., *The Collected Papers of Frederic William Maitland*, 3 vols., Cambridge, 1911, repr. Buffalo, 1981, vol. 1, 480, 491 (Downing Professor Inaugural Lecture).

74. Frederick Pollock & Fredric William Maitland, *The History of English Law Before the Time of Edward I* 2 vols., 2nd ed., Cambridge, 1898, repr. 1968, vol. 1, xciv.

75. He continued that ‘to-day we study the day before yesterday, in order that yesterday not paralyse to-day, and to-day may not paralyse to-morrow.’ F.W. Maitland, ‘A Survey of the Century’ in Fischer, ed., *Collected Papers*, vol. 3, 439.

76. Michael Lobban, ‘Introduction,’ Andrew Lewis & Michael Lobban, 6 *Current Legal Issues: Law & History*, Oxford, 2004, 22. Lobban reviewed the juristic tradition of explaining law in terms of its history. *Id.* at 15-28. In England, historical jurisprudence was associated with Sir Henry Maine and subsequently with Paul Vinogradoff, a Maitland contemporary, whose approach differed from that of Maine. Nick O’Brian, “‘In Vino Veritas’: Truth and Method in Vinogradoff’s Historical Jurisprudence,” 29 *J. Leg. Hist.* (2008), 39-61.

77. F.W. Maitland, *The Body Politic*, in H.D. Hazeltine, G. Lapsley, & P.H. Winfield, eds., *Maitland: Selected Essays*, Cambridge, 1936, 240-56.

78. In 1887, Maitland and others founded the Selden Society. < <http://www.selden-society.qmw.ac.uk/> >. Accessed 14 April 2010. The Society publishes annual volumes of edited legal-historical source materials.

influenced by the German scholars. Maitland recognized the difficulty of studying the past for modern scholars, stating ‘we are moderns and our words and thoughts can not be but modern.’⁷⁹ Over a century later, S.F.C. Milsom echoed the same thought, saying that ‘the largest difficulty in legal history is precisely that we look at past evidence in the light of later assumptions, including our own assumptions about the nature and working of law itself.’⁸⁰ The past was another country!

But Maitland posed some dilemmas for the study of legal history. He contrasted law’s ‘logic of authority’ with history’s ‘logic of evidence’ and was concerned that the two logics might be mixed up. Further, he said that lawyers must be orthodox, which would be a contradiction in terms for a historian.⁸¹ With regard to law and history, he felt that ‘their material, their method, and their logic were incompatible.’⁸² For all these reasons, he believed that legal history was history and not law.⁸³ Nevertheless, he said that ‘a thorough training in modern law is almost indispensable for any one who wishes to do good work in legal history.’⁸⁴ Like much of what Maitland said, this caveat remains true today. As Charles Donahue recently noted, ‘the legal

79. Frederic William Maitland, *Township and Borough*, Cambridge, 1898, 22.

80. S.F.C. Milsom, *A Natural History of the Common Law*, New York, 2003, xvi. He said that ‘the historian’s vision of the past is largely limited by the conditions of his own time.’ *Id.* at xix. Peter Hoffer said that the difficulty of knowing what transpired in the past created a paradox because of the importance of knowing the past. He advanced a philosophy of history to contend with this paradox. Peter Hoffer, *The Historians’ Paradox: The Study of History in Our Time*, New York, 2008.

81. Maitland, *Why the History of English Law is not Written*, in Fischer, *Collected Papers*, 488-92.

82. T.F.T. Plucknett, ‘Maitland: Law and History,’ in *Early English Legal Literature*, Cambridge, 1958, 13. John Reid also thought that ‘crossing of history with law’ involved ‘snares’ and ‘risks’ although his primary concern was with forensic and lawyer’s legal history. John Reid, ‘Law and History,’ *27 Loyola Los Angeles L. Rev.* (1993), 193-223.

83. Maitland, *Why the History of English Law is not Written*, in Fischer, *Collected Papers*, 487-94. J.A. Crook, a Roman historian, distinguished the approaches of the general historian and legal historian. He said that the latter studied the origins and evolution of legal institutions and ‘how they are embedded in the society to which they pertain. . . . The general historian, too, asks about how legal institutions are embedded in society, but does so in order to throw light on the society and not the legal institutions. J.A. Crook, ‘Legal History and General History,’ *41 Bull. Inst. Class. St.* (1996) 31.

84. Maitland, *Why the History of English Law is not Written*, in Fischer, *Collected Papers*, 493.

historian . . . has to be both an historian and a lawyer.⁸⁵

To deal with this dilemma, a scholar pursuing legal history must still ‘determine its own peculiar nature, and ask what methodological and theoretical approaches are appropriate to it.’⁸⁶

An important question persists about the ability of historians to write about legal history without legal training or the ability of legal scholars to do so without historical training.⁸⁷ This question has no simple nor single answer because it really depends on the specific nature of the scholarship. For example, a social historian might have difficulty writing about medieval pleading or the mesne process without legal training, but could, as some do, write about the characteristics and nature of litigation.⁸⁸ Similarly, lawyers might encounter problems writing

85. Charles Donahue, ‘Whither Legal History,’ in Daniel Hamilton & Alfred Brophy, eds., *Transformations in American Legal History: Essays in Honor of Professor Morton J. Horwitz*, Cambridge, 2009, vol. 1, 339. Another legal historian, in praising Morton Horwitz, said, ‘but a legal historians, to be great, must possess not just the gifts of the historian, but the gifts of the lawyer.’ He thought that ‘few people have the capacity to do both history and law well’ and, thus, “the term ‘legal historian’ is almost an oxymoron.” William Treanor, ‘Morton Horwitz: Legal Historian as Lawyer and Historian,’ in Daniel Hamilton & Alfred Brophy, *Essays*, 319. Moreover, in studying the work of the 16th century legal humanists, whose work he considered a form of legal history, Donald Kelley said that ‘for legal historians there was one important lesson to be learned: a truly historical view of law required not only a knowledge of sources and a philological method but a systematic understanding of jurisprudence.’ Kelley, *Legal History Renaissance*, 183.

86. Lobban, ‘Introduction,’ 2. Paul Brand has also noted this problem. He said ‘legal history has long been a marginal subject within the British academic life, falling somewhat clumsily between the two schools of law and history, although it is an essential part of both subjects.’ Paul Brand, ‘Legal History’ in Alan Deyermond, ed., *A Century of British Medieval Studies*, Oxford, 2007, 181, 192. One pessimistic commentator thought that legal historians faced ‘an identity crisis,’ that ‘strange and contradictory rules about the interrelations of law and history’ had developed, saying that ‘legal history lack[ed] general history and therefore had no theory or tradition.’ Graham Parker, ‘The Masochism of the Legal Historian,’ 24 *U. Toronto L.J.* (1974) 279, 288, 306. He extolled Maitland and reviewed his work and that of many early English legal historians as well as Willard Hurst. He concluded by raising eight debating points about legal history. *Id.* at 316-17.

87. Mike McNair has recently noted some of the problems encountered by ‘historian legal historians.’ Mike McNair, ‘Equity and Conscience,’ 27 *Oxford J. Leg. St.* (2007), 659, 667. In the 1930’s, law professors strongly criticized the legal history work of Richard Morris, a historian. Stephen Botein, ‘The Scientific Mind and Legal Matter The Long Shadow of Richard B. Morris’s Studies in the History of American Law,’ 13 *Reviews in American History* (1985) 303, 309-13. Donahue has identified some of barriers that confront legal historians trained only in history. Donahue, *Whither Legal History?* in Hamilton & Brophy, *Essays*, 336. Stanley Katz argued the Critical Legal Studies movement has caused historically trained legal historians to encounter ‘the intellectual dilemma of the law teacher: is law a scholarly discipline?’ Stanley Katz, ‘The Problem of a Colonial Legal Hist,’ in Jack Greene & J.R. Pole, *Colonial British America: Essays in the New History of the Early Modern Era*, Baltimore, 1984, 478.

88. See, e.g. Christopher W. Brooks, *Lawyers, Litigation and English Society Since 1450*, London, 1998.

about community or family structure or norms, but could write, as some do, about property law and its relation to preserving familial patrimony.⁸⁹ Perhaps, it is not just a matter of training in terms of methodology or knowledge, but that the culture of each discipline inclines scholars of the respective fields to raise different questions and pursue different ideas.⁹⁰ However, in current scholarship, no bright line divides legal history from the social history of law. In that respect, it is noteworthy that contributors to both the Oxford History of the Laws of England and the Cambridge History of Law in America include scholars trained in law, history, and both fields.⁹¹ Donahue has urged that there be more collaborative work between law and history.⁹² It may be that methods and approaches of historians and legal historians, although not the same, are less sharply differentiated than once was true.⁹³

89. See, e.g. Joseph Biancalana, *The Fee Tail and the Common Recovery in Medieval England, 1176-1502*, Cambridge, 2001.

90. Crook has criticized Roman historians for 'making insufficient use of Roman law in their treatments of social and economic history.' He advocated its use by all historians, 'not [as] the goal of the inquiry, but a means, a tool, to be used in the enquiry.' Crook, *Legal History*, 31. But, in the context of studying Roman law, he identified the questions that the general historian pursues that are different from those studied by the legal historian, including the historian's understanding of the meaning of 'thinking like a lawyer.' *Id.* at 34-36.

91. Donahue has explored the issue of proper training to do legal history, noting that in the past many scholars have been trained in one field and autodidacts in the other. Although he recognized the potential problem of this practice, he recognized that training in both fields was time consuming and expensive. Although he welcomed the newer practice of younger academics getting degrees in both fields, he had reservations about the need, usefulness, efficacy of obtaining degrees in both law and history. Donahue, *Whither Legal History*, in Hamilton & Brophy, *Essays*, 339-41. I have written earlier on the nature of legal history as a discipline and the training of legal historians. Rose, 171-74.

92. Donahue, *Whither Legal History* in Hamilton & Boyer, 341. He perceived that a gap had developed between the manner in which legal history was practiced in law schools and history departments that was traceable in part to changes in teaching and curriculum in history departments. *Id.* at 329-32. But twenty-five years ago, an historian viewed the 'cherished ideal of interdisciplinary inquiry' skeptically, suggesting that legal historians and historians ought to proceed on their separate paths. Botein, 313.

93. Milsom has opined on this subject on several occasions. He has stated that imagination plays a large role in the work of legal historian because 'his law had no abstract existence' and his primary interest is in difficult conflicts that require visualization and 'sympathy for both sides.' S.F.C. Milsom, 'Maitland' in *Historical Studies in the Common Law*, 1969, 2nd ed., London, 1981, 267. A decade later he said that historians worked in 'institutional hedgerows of the law, but they do not work well in the legal field itself, where one is looking not so much for hard datable facts as for shifting assumptions, analyses, and perceptions.' S.F.C. Milsom, "'Pollock and Maitland': A Lawyer's Retrospective" in John Hudson, ed., *The History of English Law: Centenary Essays on 'Pollock and Maitland'*, Oxford, 1996, 259. More recently, he said that there were large differences in the approaches of nonlegal historians and legal historians and that the approach of the former had shifted from an 'interest in the general to the

Maitland seems ambivalent about the usefulness of studying the past. In one statement, he appeared dubious, saying that ‘The only direct utility of legal history (I say nothing of its thrilling interest) lies in the lesson that each generation has an enormous power of shaping its own law.’⁹⁴ But he also recognized a broader utility for such work. As he said, ‘The forms of actions we have buried, but they still rule us from the grave.’⁹⁵ Although English legal doctrine had been evolving for sometime, the nineteenth century was a time of legal change, particularly in the context of the Industrial Revolution.⁹⁶ In such a context, there may have been a tendency for judges to look for guidance and authority in the past. Maitland’s work provided useful insights in understanding and shaping current law and was useful for identifying the ideas and concepts that had survived over time and had influenced the development of later law. He also said that historical insights could inform ‘broad principles of justice and jurisprudence’ arising out of current legal debates.⁹⁷ Maitland also viewed the past as useful for identifying notions that had been erroneously asserted by prior legal historians and should be discarded. The continuing influence of such ideas was detrimental as ‘its besetting sin [was] that of antedating the emergence of modern ideas.’⁹⁸

particular,’ which was ‘a shift legal historians cannot make’ because the ‘law consists of generalizations.’ He said that ‘the core business of the regular historians is the establishment of facts, one at a time; that of lawyer is the analysis of situations, and therefore the consideration of many facts as the same time.’ Milsom, *Natural History*, xx-xxi.

94. C.H.S. Fifoot, *Frederic William Maitland*, Cambridge, 1971, 143.

95. Frederic William Maitland, *The Forms of Action at Common Law*, Cambridge, 1909, repr. Cambridge, 1997.

96. W.R. Cornish & G. De N Clark, *Law and Society in England 1750-1950*, London, 1989. Michael Lobban, a leading legal historian of this period, said that ‘it is really striking how often they [19th century judges] look to the middle ages to try to get an answer to current questions.’ E-mail Michael Lobban to Jonathan Rose (Feb. 9, 2009).

97. *The Unincorporate Body*, in H.D. Hazeltine, G. Lapsley & P.H. Winfield, *Maitland: Selected Essays*, Cambridge, 1936, 128.

98. I Pollock & Maitland, *History of English Law*, civ. Maitland singled out Blackstone and Reeves for criticism. He also rejected some of approaches and ideas of Stubbs and Maine. Paul Vinogradoff, ‘Frederic William Maitland,’ *22 Eng. Hist. Rev.* (1907) 280, 283-85, in David Sugarman, ed. *Law in History: Histories of Law and Society*, 2 vols. New York, 1996, vol. 1, 3. Maitland said he only spoke about Maine ‘with reluctance, for on the few occasions on which I sought to verify his statements of fact I came to the conclusion that he trusted much to a memory that played him tricks and rarely looked back to a book he had once read.’ I C.H.S. Fifoot, *Letters of F.W. Maitland*, Cambridge, 1965, Letter 279, 222 (1965).

Perhaps the past was not completely dead.

Maitland is the founder of modern legal history and all legal historians, no matter what kind of legal history they pursue, are in his debt. Although his best known work, *The History of English Law Before the Time of Edward I*⁹⁹ focuses on institutional and doctrinal development, it is not purely legal, as he understands the relationship of law to a broader social and political context. Moreover, his work is extensive, varied, and eclectic, abounding in ideas, insights, and concepts.¹⁰⁰ James Holt said Maitland's genius was his 'recognition that the law dealt with individuals who in turn lived within the framework of the law' and that he moved 'from the general to the particular and vice-versa with astonishing ease,' deploying 'a subtle and humane historical imagination' and the 'incisiveness of a legal mind.'¹⁰¹ Not surprisingly, Maitland's reputation and influence continued to grow long after his death in 1906 and he still remains the most revered legal historian, even by the critical legal historians. Southern explained this phenomenon with one word, 'sociology,' stating that 'most historians are sociologists . . . interested in the structure of society.'¹⁰² Moreover, the approach of some current legal historians is sociological. Thus, Maitland is both the discipline's most important pioneer and one whose

99. I & II Pollock & Maitland, *History of English Law*.

100. Among his numerous scholarly works, some significant ones are: F.W. Maitland, *The Constitutional History Of England*, Cambridge, 1908, repr. Cambridge, 1974; F. W. Maitland. *English Law And The Renaissance*, Cambridge, 1901, repr. Littleton, 1985; F.W. Maitland, *Introduction*, Otto Gierke, *Political Theories of the Middle Ages*, Cambridge, 1900, repr. Beacon Hill, 1958; F. W. Maitland, *Township And Borough*, Cambridge, 1898; F.W. Maitland, *Domesday Book And Beyond*, Cambridge, 1897, repr. Toronto, 1966. He wrote a number essays on legal personality. Hazeltine, Lapsley, & Winfield, *Maitland*. His collected papers have also been published. 1-3, H.A.L. Fischer, ed. *The Collected Papers of Frederic William Maitland* (1911, 1981 reprint). James Holt said that *Domesday and Beyond* was 'just about the best book ever written on medieval England' and a 'masterpiece.' J.C. Holt, *English History 1066-1072* in Alan Deyermond, ed., *A Century of British Medieval Studies*, Oxford, 2007, 27, 29-3.

101. Holt, *English History*, 30-31. The noted Tudor historian, Geoffrey Elton called Maitland the patron saint of historians. G.R. Elton, *F.W. Maitland*, New Haven, 1985, 97.

102. Bartlett, *History and Historians*, 143. Crook criticized the tendency of general historians 'to throw the baby out with the bathwater, and reduce everything, including law, to something else, usually Social Science;' and thus he 'champion[ed] legal history against the general historians. Crook, 32.

work connects with legal history's more recent manifestations.

In America, the earliest legal historians, such as James Bradley Thayer, Melville Bigelow, and James Barr Ames, viewed studying the past as useful. They studied the English legal past as an aid to understanding the developing American common law.¹⁰³ As David Rabban, a leading scholar of early American legal historiography, has shown, they constituted 'an American school of historical jurisprudence' and were 'much more sophisticated and complex scholars' than others have suggested.¹⁰⁴ But he recognized, as Horwitz and Gordon have pointed out and Daniel Boorstin had asserted decades earlier,¹⁰⁵ that, unlike Maitland and more like Stubbs and Adams, these early scholars used history to tell a teleological story about 'the growth of liberty in the Anglo-American' world and, comparable to historians' use of the past, to understand 'the internal evolution of legal doctrine' and the 'organic and progressive development of legal principles.'¹⁰⁶ More generally, post- Civil War American intellectuals saw 'history as qualitative change, so that the course of a culture's development could not be seen as a cyclical process of birth, maturity, and decay, but as a constant progression in which the future was always an improvement on the past.'¹⁰⁷ In the view of these early American legal historians, the past was neither dead nor past!

103. Almost all of the 71 essays on legal history compiled by the Association of American Law Schools in the early 20th century deal with English legal history. I-III Association of American Law Schools, *Select Essays in Anglo-American Legal History*, Boston, 1907-1909.

104. David Rabban, 'The Historiography of Late Nineteenth-Century American Legal History,' 4 *Theoretical Inquires in Law* (2003), 541, 546. He strongly disagreed with earlier criticisms of their work.

105. Morton J. Horwitz, 'The Conservative Tradition in the Writing of American Legal History,' 17 *Am. J. Leg. Hist.* (1973) 275-95; Robert Gordon, 'Introduction: J. Willard Hurst and The Common Law Tradition in American Legal Historiography,' 10 *Law & Soc. Rev.*(1975), 9, 14-18. More than 30 years earlier Boorstin criticized the adoption of "the categories of the modern 'developed' legal system [so] that much of legal history has become a sort of legal embryology-- a search for the rudimentary forms of the 'full grown' legal system. The present becomes the culmination of the past, and present forms of institutions seem to be their inevitable forms." Daniel Boorstin, 'Tradition and Method in Legal History,' 54 *Harv. L. Rev.* (1941), 424, 428-29.

106. Rabban, *Historiography*, 546. Stephen Botein also felt that Richard Morris's 1930 book, *Studies in American Law* asserted that there was 'a progressive trend toward social democracy in seventeenth-century America.' Botein, *Scientific Mind*, 304.

107. G. Edward White, 'Introduction,' Oliver Wendell Holmes, Jr., *The Common Law*, Cambridge, 2009, xxvi.

This type of presentism has continued over time and the criticism of lawyers' and forensic history, the use of history for present legal purposes, is commonplace.¹⁰⁸ As one commentator said, it involves "roaming through history looking for friends."¹⁰⁹ Nevertheless, it persists as indicated by controversial 'originalist' approaches to constitutional interpretation, today's 'ancient constitutionalism.'¹¹⁰

But on a more positive note, Rabban, in contrast to critics like Gordon and Horwitz,¹¹¹ asserted that these early legal historians recognized legal history's 'discontinuity and contingency,' were sensitive to 'false analogies,' 'anachronism,' and the false causality that similarities of past and present might suggest, and 'uncovered illogical remnants of past law in the present.'¹¹² Rabban's study of this early era continued with an examination of Holmes' *Common Law* and his use of history 'as means to understand current law and even to project its future.'¹¹³ Holmes said that 'in order to know what it [law] is, we must know what it has been,

108. Stuart Banner, however, has pointed out that there is virtue in 'emphasizing the similarity of past and present,' 'the pastness of present,' and even 'the presentness of the past.' He contrasted legal history with academic history, which emphasized the 'pastness of the past' and the past's irrelevance to modern conceptual and normative notions. Stuart Banner, 'Legal History and Legal Scholarship,' 76 *Wash. L.Q.* (1998), 37, 37-39, 42-44. More recently, one commentator has suggested ways to improve the quality of 'lawyers' history by treating the use of history to interpret current law as form of evidence subject to the rules of evidence. Matthew Festa, 'Applying a Usable Past: The Use of History in Law,' 38 *Seton Hall L. Rev.* (2008), 479-553.

109. Morton Horowitz, 'Republican Origins of Constitutionalism,' in Paul Finkelman & Stephan Gottlieb eds., *Toward a Usable Past: Liberty Under State Constitutions*, Athens, 1991, 148-49. Many historians claimed the history used by these lawyers was inaccurate and unrecognizable. "Constitutional discourse is replete with historical assertions that are at best deeply problematic and at worst, howlers." Martin S. Flaherty, "History 'Lite' in Modern American Constitutionalism," 95 *Col. L. Rev.* (1995), 523, 525. But perhaps such work should be judged by criteria different from those used for evaluating the practice of history. Mark Tushnet, 'Interdisciplinary Legal Scholarship: The Case of History-In-Law,' 71 *Chicago-Kent L. Rev.* (1996), 917, 932-35. Nor is this practice limited to lawyers as political leaders 'cherry pick historical evidence to justify current courses of action. Hastings, 'Wrong Lessons, 42.

110. Jack Rakove has provided a useful counterpoint. Jack N. Rakove, *Original Meanings : Politics And Ideas In The Making Of The Constitution*, New York, 1996.

111. Rabban summarized their criticisms. Rabban, *Historiography*, 547-55.

112. *Id.* at 547, 570-75. Holmes focused on Norman and Germanic sources in searching for the origins of the common law. Lawrence Friedman, *American Law*, 627.

113. David Rabban, "The Historiography of 'The Common Law'," 28 *Law & Social Inquiry* (2003), 1161, 1171-72.

and what it tends to become.¹¹⁴ Moreover, his evolutionary approach to legal development used history to develop his ‘theory of legal survivals,’ which adapted past legal rules to present needs.¹¹⁵ Again, the past was not dead. Yet, as Rabban explained, Holmes was sensitive to anachronism and the misuses of the past.¹¹⁶ In discussing the contract doctrine of consideration, Holmes said, ‘the source of the error can be traced partially, at least, to history.’¹¹⁷ He also ‘studied history to rid the law of rules that were only pointless survivals of a past that had disappeared.’¹¹⁸ But some modern legal historians view *The Common Law* as normative and entitled to less weight as legal history.¹¹⁹

Although agreeing with Holmes on the relevance of history to contract law, Judge Cardozo seemed to lean more toward Maitland’s view on the role of history in legal development.¹²⁰ More generally, referring to Maitland, Cardozo said the ‘directive force of history’ should not confine ‘the law of the future to uninspired repetition of the law of the present and the past.’ He said history ‘in illuminating the past, illuminates the present, and in illuminating the present, illuminates the future.’¹²¹ He did, however, see the past as having a further utility as well. He thought that some legal concepts such as restraints on alienation were

intelligible only in the light of history, and get their impetus from history which must shape their subsequent development . . . that they embody thought, not so much of the present as of the past, that separated from the past their form and

114. Oliver. W. Holmes, *The Common Law*, Boston, 1881, repr. Toronto, 1991, 1.

115. Rabban, *Common Law*, 1174-84. In his use of history ‘to construct a scientific classification of common law fields,’ Edward White characterized Holmes as a ‘Darwinist historian’ because of his evolutionary approach to legal history. G. Edward White, ‘Introduction’ Holmes, *The Common Law*, xx-xvi.

116. Rabban, *Historiography*, 1171-72, 1183.

117. Holmes, *Common Law*, 296.

118. Rabban, *Historiography*, 552.

119. White, ‘Introduction,’ Holmes, *The Common Law*, xvi-xvii.

120. Benjamin Cardozo, *The Nature of the Judicial Process*, New Haven, 1921, 51-58. Cardozo identified four sources or methods that guided judicial decision making: philosophy (analogy), history, tradition (custom), and sociology.

121. *Id.* at 53.

meaning are unintelligible and arbitrary, and hence that their development, in order to be truly logical must be mindful of their origins.¹²²

C. The Development of Legal History

From these early legal historians, legal history as a distinct discipline evolved in diverse ways, which determined the various ways in which scholars studied and used the past.¹²³

Although any taxonomy of its development is an oversimplification, I have divided legal history into three types to facilitate discussion: classical, liberal, and critical.¹²⁴ To some extent, each type of legal history builds on and reacts to what preceded it in the revisionist tradition.

Moreover, the types should not be compartmentalized and are not mutually exclusive, producing hybrid scholarship. But the succeeding types do not replace their predecessors and each type persists, reflecting different scholarly and ideological perspectives and resulting controversies.¹²⁵

Moreover, it has been argued that legal history, 'like law and economics . . . is becoming itself a mode of analysis. For legal history is not just a field; it is a method.'¹²⁶ Thus legal history has become a pluralistic discipline, although a different one in the United States than in England.¹²⁷

122. *Id.* at 55.

123. Writing in 1975, Gordon identified three periods of American legal history: a 'Classical' period from 1880-90, the 'First Revival' from the 1930's to the early 1960's, which followed a long period of inactivity, and a 'Second Revival' from 1970 to the present. Gordon, 'Introduction,' 12. Gordon discussed the first and second periods in detail.

124. Katz said that 'there have been four major scholarly traditions in American legal-constitutional history.' His taxonomy is both similar to and different from mine. His first two categories, traditional English legal history and the law school tradition at Harvard, resemble my classical category and his fourth type, Willard Hurst and the modern tradition, is very similar to my liberal type. But his third category, 'the arts and sciences school,' which has five different aspects, seems quite different than any of mine and includes several nonlegal historians and some social scientists. Katz, 'The Problem of a Colonial Legal Hist,' in Jack Greene & J.R. Pole, *Colonial British America*, 457-67.

125. 'Review Essay: An Exchange on Critical Legal Studies between Robert Gordon and William Nelson,' 6 *Law & Hist Rev.* (1988), 139-85; Morton Horwitz, 'The Historical Foundations of Modern Contract Law,' 87 *Harv. L. Rev.* (1974), 917; A.W. B. Simpson, 'The Horwitz Thesis and the History of Contracts,' 46 *U. Chi. L. Rev.* (1979), 533.

126. Hamilton & Brophy, *Essays*, xiii.

127. There are many interesting differences between English and American legal historians and their work. Likely explanations include the different structure of the academy and legal education and the differential impacts of positivism and realism as well as, perhaps, the national Protestantism of England. See David Ibbetson, 'Historical Research in Law' in Peter Case & Mark Tushnet, *The Oxford Handbook of Legal Studies*, Oxford, 2003, 870-71;

The classical tradition grew out of Maitland's scholarship as seen in England in the works of Paul Vinogradoff, William Holdsworth, Theodore Plucknett as well as a related body of work on the social and political history of law by historians such as F.M. Stenton, D.M. Stenton, T.F. Tout, H.G. Richardson, and G.O. Sayles.¹²⁸ In the United States the works of early American historians discussed above and later scholars such as Mark DeWolfe Howe, Julius Goebel, John Dawson, Samuel Thorne, George Haskins, and Joseph Smith reflected this tradition.¹²⁹ Classical legal history explores the intellectual history of law.¹³⁰ The scholarship relies heavily on primary legal sources such as reported cases, actions in the plea rolls and Yearbooks, statutes, and early legal literature. Current scholars, while praising it, have also criticized it (excepting Maitland, of course) as internal, instrumental, and formalistic. Although it is internal to the extent that it is based on primary sources that are legal, classical legal history takes several forms.¹³¹ Moreover, it has ceased to be entirely internal and positivist. Much of it

David Sugarman, "Legal History, the Common Law and 'Englishness,'" in Kjell Modeer, ed. *Legal History in Change*, Lund, 2002, 220-25; cf. John Langbein, 'The Later History of Restitution' in W.R. Cornish, Richard Nolan, Janet O'Sullivan & Graham Virgo, eds, *Restitution Past, Present and Future*, Oxford, 1998, 57,61-62; Chaim Saiman, 'Restitution in America: Why the US Refuses to Join the Global Restitution Party,' 28 *Ox. J. Leg. St.* (2008), 99.

128. Work on the history of canon and civil law are probably part of this tradition, but a discussion of that work and its scholars as well as European legal history have not been addressed in this paper.

129. Katz believed that contributions of the English scholars were 'enormous.' He also thought its 'lesser practitioners' 'tended to be teleological and Whiggish, two attributes that were accepted rather uncritically by American practitioners of the art.' But he stated that the 'English tradition [was] more central' to legal as opposed to other historians of colonial America. Katz, 'The Problem of a Colonial Legal Hist,' in Greene & Pole, *Colonial British America*, 458. Nevertheless, he said that late medieval or mid-17th century terminus of the work in English legal history contributed to the inadequate development of American colonial history. *Id.* at 468.

130. David Ibbetson has provided a valuable discussion of the initial tradition in legal history and its professionalization. Ibbetson, *Historical Research*, 864-70.

131. *Id.* at 870-74. But there are problems in determining what is law for the purposes of legal history. David Ibbetson, 'What is Legal History A History of,' in Andrew Lewis & Michael Lobban, 6 *Current Legal Issues: Law & History*, Oxford, 2004, 33-40; Jonathan Rose, 'Doctrinal Development: Legal History, Law, and Legal Theory,' 22 *Ox. J. Leg. St.* (2002) 323-40; J. H. Baker, 'Why the History of English Law Has Not Been Finished,' 59 *Cambridge L.J.* (2000) 62-66, 83-84 (Downing Professor Inaugural Lecture). Michael Lobban has cautioned that while modern jurisprudential concepts are useful to legal historians in determining the nature of law, they 'cannot simply apply its conclusions to the past,' but 'should study the past on its own terms.' Lobban, *Introduction*, 8. He discussed in detail various jurisprudential notions and their relevance to the study of legal history. *Id.* at 2-15.

involves political, social, and economic contexts, as internal legal sources cannot be fully understood in a vacuum that ignores the external context.¹³² Donahue suggested that the distinction between internal and external legal history was a ‘false dichotomy’ and that good legal history had to be both internal and external.¹³³ He said further all legal historians are interested in the interaction between law, ‘the economy of ideas, the politics and social structure of the society that produces it’ as well as ‘connections between legal history and intellectual, social, and political history.’¹³⁴ As it developed and changed over time, classical legal history became more concerned with ‘the history of the law in practice, of legal institutions at work in society.’¹³⁵ Classical legal history articulates many ideas and makes use of non-legal sources.¹³⁶ As John Baker said about English legal history, it is “an essential dimension in the social and intellectual history” of England.¹³⁷ It is less doctrinally formalistic and directed more at ‘exploring and explaining the shifts and ruptures’ of doctrine and ‘the relationship between what is happening in the courtroom, and what happens beyond.’¹³⁸ In England, the work of S.F.C.

132. Ibbetson, *Historical Research*, 871. Crook, in setting out the conditions for using Roman law in studying Roman society, said that the historian “must be ready to disregard the customary internal boundaries of Roman law and take into account the ‘unwritten law’ . . . The historian must disregard ‘the boundaries between what is law and what is other-than law, between law and custom, law and administration, law and politics . . . [which] correspond with the social realities of the culture being studied.’ Crook, *Legal History*, 34.

133. Donahue, *Whither Legal History?*, in Hamilton & Brophy, *Essays*, 337, 339.

134. *Id.* at 329, 332-333. Although he said most legal historians did not believe that law was autonomous, he stated that ‘legal specialization in most periods of Western legal history has made the law semi-autonomous’ and had led to the writing and teaching of internal history by legal historians in contrast to that of historians, which was external. But he voiced a somewhat different view about the meanings of internal and external as applied to legal history. *Id.* at 334-35.

135. Ibbetson, *Historical Research*, 864.

136. Michael Lobban noted that English legal historians were skeptical about usefulness of sociological insights regarding history and ‘generally suspicious of theory, preferring empiricism to speculation.’ But he stated ‘theoretical concerns’ were inherent in the subject and ‘the perspectives of sociology, or anthropology, or philosophy can generate questions which may help the historian make better sense of his material.’ Lobban, *Introduction*, 21-24. But he thought that expanding the use of external sources posed particular problems for legal historians of the modern period because such sources were the more disparate and voluminous than those for the medieval and early modern periods. *Id.* at 26.

137. Baker, *Why The History of English Law Has Not Been Finished*, 63.

138. Lobban, *Introduction*, 6.

Milsom, Brian Simpson, David Ibbetson, and John Baker illustrate various types of classical history as it has evolved from its earlier manifestations as does work of nonlawyer legal historians such as James Holt, Paul Hyams, Paul Brand, and John Hudson. Some of the scholarship on pre-19th century English legal history and early American legal history are current manifestations of this type of legal history. In the United States, the research focused on the reception of the common law.¹³⁹

Liberal legal history emphasizes individual freedom and equal opportunity. Pragmatic philosophy, progressive politics, and legal realism influenced the development of this type of legal history.¹⁴⁰ Willard Hurst was the pioneer of the liberal type of legal history.¹⁴¹ He ‘brought a practical consciousness . . . to the task of generating legal responses to the mundane challenges’ of daily living.¹⁴² He understood ‘the embeddedness of economic decision making in a framework of cultural and social assumptions.’¹⁴³ Liberal legal history rejected the notion of law’s autonomy.¹⁴⁴ Although it uses legal sources, it is predominantly external, focusing not on legal opinions, but, in the words of Lawrence Friedman, the law of society’s ‘cellar.’¹⁴⁵ Hurst

139. William Nelson & John Reid, *The Literature of American Legal History*, New York, 1985, 7-14. Katz believed that law school tradition in legal history ‘has had an Anglo-American colonial orientation,’ which has focused on tracing ‘the transit of legal ideas and institutions from the old country to the new.’ Katz, ‘The Problem of a Colonial Legal Hist,’ in Jack Greene & J.R. Pole, *Colonial British America*, 459.

140. Gordon, ‘Introduction,’ 44-51. The Legal Realists were very interested in legal history, but different scholars made various uses of history in their work. Laura Kalman, *Legal Realism at Yale, 1927-1960*, Chapel Hill, 1985, 39-42.

141. David Sugarman compared Hurst’s influence and efforts with those of Maitland. David Sugarman, ‘Reassessing Hurst: A Transatlantic Perspective,’ 18 *Law & Hist. Rev.* (2000), 215, 221. A frequent question has been when or whether an ‘American Maitland’ would write a comparable history of American law. Nelson & Reid, *Literature*, 125, 133-34; Botein, *Scientific Mind*, 312; Theodore Plucknett, ‘Book Review, Richard Morris, *Studies in American Law*,’ 3 *New Eng. Q.* (1930) 574, 577.

142. Robert Gordon, ‘Hurst Recaptured,’ 18 *Law & Hist. Rev.* (2000), 167, 168. Because of the approach of Hurst and his colleagues, it became known as the ‘Wisconsin Tradition’ in legal history.

< <http://www.law.wisc.edu/ils/legalhistory.htm> > accessed 16 April 2010

143. Gordon, ‘Hurst,’ 173.

144. Ibbetson has a good discussion of external legal history. Ibbetson, ‘Historical Research,’ 874-78.

145. George Fisher, ‘Historian in the Cellar,’ 59 *Stan. L. Rev.* (2006), 1, 1-3.

said that ‘legal history is a way of studying the general history of the country’s character and development.¹⁴⁶ Liberal legal history’s dominant characteristic is the integration of law with social and economic institutions and ideas;¹⁴⁷ and to some extent, it engages disciplines outside of law. After Hurst, this type of legal history developed with the varied efforts of Lawrence Friedman, John Reid, William Nelson and many others.¹⁴⁸ It is today the predominant form of American legal history.¹⁴⁹ It is less common as regards English legal history, but would describe the work of nonlawyer historians such as Wilfrid Prest and Christopher Brooks. Perhaps its mainstream is most accurately characterized as the social history of law. It has become very diverse, ranging from those who study early doctrine and institutions to those who focus on specific subjects such as race and gender.

A more recent type of legal history is critical legal history as in the work of noted scholars such as Morton Horwitz and Robert Gordon. It is a product of the Critical Legal Studies movement and the ascendancy of radical thought in the broader academy.¹⁵⁰ Critical legal history is conceptual and jurisprudential. It asserts the ‘historical and cultural contingency of law.’¹⁵¹

146. James Willard Hurst, *Law and Social Order in the United States*, Ithaca, 1977, 23. But he believed that widespread integration of law into everyday life ‘without also embodying a comparably broad philosophy of these uses creates problems for telling the history of law. *Id.* at 23-25. Katz thought Hurst’s ideology was ‘whiggish and presentist’ and his significant influence on younger historians led to abandonment of the colonial period as irrelevant. Katz, ‘The Problem of a Colonial Legal Hist,’ in Jack Greene & J.R. Pole, *British Colonial America*, 466. Katz found the insufficient development of colonial history disappointing. He spelled out his view of the reasons and recent progress as well as his suggestions for future research. *Id.* at 468-74, 477-84.

147. Botein asserted that Richard Morris used this approach to study American colonial history as *Studies in the History of American Law* ‘focused on the relationship of law to the social and economic realities of colonial America’ and endeavored to ‘make legal records the stuff of social history.’ Botein, *Scientific Mind*, 304, 307.

148. Katz said that Mark DeWolfe Howe, more than anyone else, was ‘the link between the older law school tradition and the more modern traditions pioneered by Willard Hurst.’ Katz, ‘The Problem of a Colonial Legal Hist,’ in Jack Greene & J.R. Pole, *British Colonial History*, 459.

149. For the last three decades, it has thrived in Canada as a ‘new legal history’ and aspect of ‘law and society’ scholarship. Philip Girard, ‘Who’s Afraid of Canadian Legal History?’, *57 U. Toronto L.J.* (2007), 727, 727-28.

150. See, e.g. Mark Kelman, *A Guide to Critical Legal Studies*, Cambridge, 1987.

151. Robert Gordon, ‘Historicism in Legal Scholarship,’ *90 Yale L.J.* (1981), 1017, 1017.

Legal concepts and historical ideas about law are contestable and contradictory. Critical legal history is strongly revisionist and attacks traditional juristic concepts and scholarly ideas.¹⁵² Its self-professed aims are to be ‘unsettling’ and to produce ‘disturbances in the field’ and to be ‘destabilizing and subversive.’¹⁵³ Its objective is to criticize “the tradition of historiography called ‘legal functionalism’ and ‘its dominant vision: evolutionary functionalism,’ both in its formalist and realist approaches.”¹⁵⁴ Critical legal history views law as inherently historical and with an ideological role.¹⁵⁵ Law is not limited to legal text, but includes ‘legal instruments, processes, rituals, interactions, [and] discourses,’ its ‘cultural artifacts, imaginative constructs, historically contingent and perpetually contested and renegotiated.’¹⁵⁶ David Sugarman, one of the very few English proponents of this type of legal history, said law and history are ‘important languages through which ideas of ethnicity and community are expressed.’¹⁵⁷ Critical legal history might be described as a sociological history of law. It engages many other non-legal disciplines and draws on ideas of post-modern theorists and cultural historians.¹⁵⁸ For example, William Fisher

152. Gordon has summarized the attack and identified six weaknesses of the classical approach . Gordon, ‘Historicism,’ 1041-42. Sugarman has reviewed the work of Maitland, Dicey, and Holdsworth, ‘the golden period of 1860 to 1920. David Sugarman & G.R. Rubin, ‘Introduction:Toward a New History of Law and Material Society in England 1750-1914’ in *Law, Economy and Society, 1750-1914: Essays in the History of English Law*, Abington, 1984, 104-111. In rejecting traditional ‘positivist-empiricist’ approaches to English legal history, he advocates ‘a more inter-disciplinary and theoretically informed history of law and society’ to produce a ‘historical sociology of law and economy,’ freed from ‘the confines of evolutionist and functionalist histories.’ *Id.* at 120-21.

153. Robert Gordon, ‘Foreward: The Arrival of Critical Historicism,’ 49 *Stan. L. Rev.* (1997), 1024; Gordon, ‘Historicism,’ 1023-24; Morton Horwitz, ‘The Historical Contingency of the Role of History,’ 90 *Yale LJ* (1981), 1057.

154. Robert Gordon, ‘Critical Legal Histories,’ 36 *Stan. L. Rev.* (1984), 57, 58-67. Gordon’s purpose in writing this article was to produce a ‘guidebook’ (but not the first he says) for interested ‘liberal lawyers.’ *Id.* at 58 & n. 5. At the end, he summarized the underlying tenets of the critical approaches to legal history and avenues for further expansion. *Id.* at 100-16.

155. Sugarman, ‘Ideological Dimensions of Law’ in David Sugarman & G.R. Rubin, ‘Introduction’ in *Law, Economy and Society*, 57-64.

156. Gordon, ‘Foreward’, 1023, 1029.

157. Sugarman, ‘Legal History,’ 217.

158. Robert Gordon makes several references to ‘mentalities,’ an important word in the Annales School lexicon. Robert Gordon, ‘Hurst Recaptured,’ 18 *Law & Hist. Rev.* (2000), 167, 169; Robert Gordon, ‘Critical Legal Histories,’ 57.

identified four linguistic and multi-disciplinary methodologies--structuralism, contextualism, textualism, and new historicism-- for use in writing about American legal history.¹⁵⁹

As legal history developed in this diverse manner, scholars of each type made very different uses of history and studied it for a variety of reasons.¹⁶⁰ The classical legal historians used history to study the development of legal institutions and legal doctrine.¹⁶¹ Paul Brand's exploration of the inception and development of the legal profession in medieval England exemplifies classical legal history.¹⁶² The liberal scholars used history to develop theories about the relationship between law and social change and to understand more completely and correctly a variety of social-legal issues.¹⁶³ Mary Bilder's examination of the relationship between English and early American legal institutions and the impact of a transatlantic culture on the development of the American colonial legal system is an example of the liberal type of legal history.¹⁶⁴ As a form of social history, liberal legal history may function as a form of legal and critical analysis of law to evaluate the legitimacy of past and present legal practices.¹⁶⁵ The critical legal historians assert a new analytical paradigm, jurisprudence, and political theory. They have used the past to

159. William W. Fisher III, 'Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History,' 49 *Stanford L. Rev.* (1997), 1065-1110. He then discussed the extent to which legal historians have used these methodologies. *Id.* at 1072-86. He identified nine uses or purposes of legal history and his objective was 'to encourage legal historians, by example, to think critically about what they are trying to achieve and which methodology (or combination or reconfiguration of methodologies) would best advance their ends. *Id.* at 1088-1109.

160. Nelson has explored the diversification of American legal history scholarship. Nelson & Reid, 'Literature,' 307-10.

161. But as Milsom said, discerning 'the mechanisms by which law first comes into being and then changes. . . . cannot be easily seen by historians today largely because they could not be seen to be happening at the time and left no explicit documentary evidence. He pointed out further that the change is so slow and incremental that contemporaries would detect any significance, 'let alone as steps toward an unimaginable future.' What most kinds of historian do is to identify 'still and close up pictures, assembling all the evidence for narrow subjects in short periods [which] is inimical to comprehending the largest legal developments.' Milsom, *Natural History*, 75-76. Moreover, blanks in the evidence are misinterpreted causing erroneous conclusions about legal change. *Id.* at 76-82.

162. Paul Brand, *The Origins of the English Legal Profession*, Oxford, 1992.

163. Gordon, *Introduction*, 44-55.

164. Mary Sarah Bilder, *The Transatlantic Constitution: Colonial Legal Culture and the Empire*, Cambridge, 2004.

165. Markus Dubber, *Historical Analysis of Law*, 16 *Law & Hist. Rev.* (1998), 159-62.

historicize law, believing that understanding ‘the meaning of words and actions are to some degree dependent on the particular social and historical conditions in which they occur, and to interpretations and criticisms that are suggested by that perspective.’¹⁶⁶ They reject the liberal tradition in legal scholarship.¹⁶⁷ For example, Morton Horwitz refused to accept the orthodox theory that the foundation of American contract law was late medieval and early modern English law and asserted that, influenced by commercial interests, it developed to facilitate and protect the growth of business, rather than being guided by fairness and equity.¹⁶⁸ In rejecting the conventional uses of the past, Gordon disparaged them as instrumental and identified a number of them as: ‘a curator of timeless tradition, wisdom or immemorial custom,’ an embodiment of ‘suprahistorical principles of fundamental law,’ a reflection of ‘principles of fundamental right as realized teleologically through historical experiences’ and the revelation through ‘a historical study of the origins and development of a legal rule,’ of its basis on ‘an enduring principle,’ and ‘mythic uses’ for present purposes.¹⁶⁹ He has asserted further that the benefit of the critical approach is achieving fundamental change ‘without sacrificing every accomplishment of civilized legalism.’¹⁷⁰ Almost all these uses of the past by these three different types of legal history can be linked to the pasts of Hartley, Faulkner and Santayana.

D. A More Difficult Why

166. Gordon, *Historicism*, 1017 n. 1.

167. Morton Horwitz, *The Transformation of American Law 1870-1960*, Oxford, 1992; Morton Horwitz, *The Transformation of American Law 1780-1860*, Cambridge, 1977; Gordon, ‘Critical Legal Histories;’ Robert Gordon, ‘Historicism.’

168. Horwitz, *Transformation 1780-1860*, 160-201. More generally, he believed that there was a significant change in American law by 1820 in which the influence of custom and natural law and objective of achieving justice in individual cases were replaced an ‘emphasis on law as an instrument of policy’ permitting judges ‘to formulate legal doctrine with self-conscious goal of bringing about social change.’ *Id.* at 30.

169. Gordon, ‘Historicism,’ 1028, 1039, 1040, 1055. In rejecting past approaches, Gordon has identified four alternative scholarly interpretations of American ‘historical traditions.’ Robert Gordon, ‘Exchange on Critical Legal Studies,’ 140-41.

170. *Id.* at 175-76. He then identified five ways in which history might facilitate that objective. *Id.* at 176-78.

The interests of the early legal historians and of the scholars of liberal and critical legal history in studying the past are not difficult to understand. Given the still developing nature of the English and American legal system at the time when the early legal historians did their work, it was important to uncover and understand the origins of legal institutions and doctrine. Gordon said that when the Harvard law school was founded, ‘every course was partly a legal history course.’¹⁷¹ Much later, in mid-20th century, some leading law schools had a required course in the development of legal institutions.¹⁷² Boorstin said legal history was ‘an alchemy for distilling legal principles.’¹⁷³ Moreover, the continuing interest in legal history on the part of scholars of the social history of law and the critical legal historians are based on uses of history that have a relation to current legal, social and ideological issues and controversies. Both of these types of legal history are predominantly American with at best very modest existence in England.¹⁷⁴ They

171. Gordon, ‘Historicism,’ 1051.

172. Columbia adopted a course entitled Development of Legal Institutions, in 1928-29. Harvard adopted a similar course after a controversial debate in 1960. Many of the courses focused on English Legal History. A critic on the Harvard faculty suggested the course should be called ‘English History Before 1600.’ The courses were not generally successful and were replaced by advanced courses and seminars. Donahue, ‘Whither Legal History,’ in Daniel Hamilton & Alfred Brophy, *Essays*, 327-29; Kalman, *Legal Realism*, 226-28. Katz has noted that these law school courses in legal history had an ‘ironic present-mindedness,’ as their professorial promoters to justify including these course in the curriculum ‘were forced to argue . . . the contemporary relevance of the historical material they were studying.’ Katz, ‘The Problem of a Colonial Legal Hist,’ in Jack Greene & J.R. Pole, *British Colonial History*, 459.

173. Boorstin, ‘Tradition and Method,’ 424.

174. In English legal history, criminal law is the field where the liberal and critical types of legal history have been more evident. See, e.g. J.M. Beattie, *Crime and the courts in England, 1660-1800*, Princeton, 1986; Douglas Hay, Peter Linebaugh, John G. Rule, E.P. Thompson, & Carl Winslow, *Albion’s Fatal Tree*, New York, 1975; E. P. Thompson, *Whigs and Hunters: The Origin of the Black Act*, London, 1975. Several of these authors are Canadian. David Sugarman’s work is significantly external, social, and critical. See, e.g. David Sugarman, “Review Article: Writing ‘Law and Society Histories,’” 55 *Modern L. Rev.* (1992) 292-308, repr. in *Law in History: Histories of Law and Society*, New York, 1996, 607-23; David Sugarman & G.R. Rubin, ‘Introduction’ in *Law, Economy and Society*, 1-123; David Sugarman, ‘Theory and Practice in Law and History: a Prologue to the Study of the Relationship between Law and Economy from a Socio-historical Perspective’, in Bob Fyer, Alan Hunt, Doreen McBarnet & Bert Moorhouse, eds. *Law, State and Society*, London, 1981, 70-106. Patrick Atiyah’s work is more like the second and third types of legal history. See, e.g. P.S. Atiyah And Robert S. Summers, *Form And Substance In Anglo-American Law : A Comparative Study Of Legal Reasoning, Legal Theory, and Legal Institutions*, Oxford, 1987; P.S. Atiyah, *The Rise and Fall of Freedom of Contract*, Oxford, 1979. In addition, Joshua Getzler’s legal history scholarship, like that of Atiyah, is eclectic, integrating internal sources with external social, political, and economic ones. See, e.g., Joshua Getzler, *The History of Water Rights at Common Law*, Oxford, (2004). One English

constitute what G. Edward White has called, ‘Modern American Legal History.’¹⁷⁵ But the strong continuing interest in medieval and early modern English legal history by at least a few English and American scholars is more puzzling. This legal history remains alive and well today in the United States, United Kingdom, and elsewhere, as legal historians continue trying to uncover and reveal more accurately this early legal past. But to bastardize Sir Henry Maine’s famous metaphor: In more mature and developed legal systems, the movement has been toward the declining interest and use of the legal past.¹⁷⁶

Why do legal historians continue to study the history of legal institutions and doctrine, especially those of medieval and early modern England? Perhaps the answer is personal. All scholars, including legal historians, do what they do because of their individual interest and curiosity regardless of whether their work is read or used by others.¹⁷⁷ At a more institutional

scholar advocated abandoning ‘orthodox’ legal history, ‘Kelsenian history,’ advocating ‘a radical, truly an alternative introduction to the history English law,’ and proposing ‘a socio-political history of English law.’ Igor Stramignoni, ‘At the Margins of the History of English Law: The Institutional, the Socio-Political and the ‘Blotted-Out,’ *22 Legal Studies* (2002) 420-22, 429-34. Most of the non-American scholarship deals with the 18th century and later and very little with medieval or early modern English legal history. Much of this work shows the influence of American scholarship, but also may have influenced the work of Americans. See Gordon, ‘Critical Legal Histories, 57 (acknowledging his debt to David Sugarman). A recent article suggests that the American academy may play a distinctive role in innovation in legal scholarship and influences new scholarly ideas in Europe. Nuno Garoupa & Thomas Ulen, ‘The Market for Legal Innovation: Law and Economics in Europe and the United States,’ *59 Ala. L. Rev.* (2008), 1555-1633.

175. G. Edward White, ‘The Origins of Modern American History,’ in Daniel W. Hamilton & Alfred L. Brophy, eds. *Transformations in American Legal History -- Law, Ideology, and Methods -- Essays in Honor of Morton J. Horwitz*, vol 2. Cambridge, 2010, 55, 59. White traces the difficulties in legal history in the academy after the death of Mark DeWolfe Howe and Willard Hurst’s rejection of an offer to join the Harvard Law School faculty. He sees the consequent inception of Harvard’s Charles Warren Fellowship program as a ‘one of those defining moments in the history of an academic discipline’ and the appointment of Morton Horwitz to the Harvard Law faculty ‘a transformative event.’ *Id.* 12, 18. He argues that these events had significant impact on the acceptance and growth of legal history as an academic discipline.

176. Maine said ‘the movement of progressive societies has hitherto been a movement *from Status to Contract*. Henry Maine, *Ancient Law*, London, 1861, repr. Boston, 1963, 165.

177. Erwin Chemerinsky said that scholarly writing was ‘an act of self-definition.’ Erwin Chemerinsky, ‘Foreword,’ *107 Mich. L. Rev.* (2009), 881, 893-94 (2009 Survey of Books Related to the Law). He said answering the question of why law professors write was ‘neither intuitive nor obvious.’ He suggested a variety of audiences to which legal scholarly writing might be directed. *Id.* at 881, 886-90.

level, ‘expressing ideas is intrinsically valuable’ and scholarship has ‘inherent value.’¹⁷⁸ Many types of scholarship produce knowledge and more knowledge is by definition valuable to society. As such, knowledge of the legal past might contribute to producing a more just, effective, and efficient legal system.¹⁷⁹ Or more ambitiously, would legal historians working on these subjects hope that their scholarship might be relevant and useful to the scholarship and teaching of legal scholars who are not legal historians. While one might be dubious about a positive answer to this question with regard to any legal scholarship, relatively more skepticism seems in order with regard to that involving legal history.¹⁸⁰ Moreover, although one might argue that legal scholars in particular fields ought to know about the history of their legal subjects, it may be too late in the day to suggest that one cannot be learned in the law without knowledge of legal history.¹⁸¹

Perhaps the strongest argument for the utility of classical legal history regards United States Constitutional law.¹⁸² The Seventh Amendment of the United States Constitution formally institutionalizes legal history in determining the existence of the right to jury trial. The language

178. *Id.* at 890.

179. Chemerinsky believed that legal history scholarship ‘contribute to the academy’s understanding about the legal system. *Id.* at 889.

180. Chemerinsky said that ‘scholarship is . . . an act of faith that writing can make a difference. Yet, all of us know the reality is that most of what is written in law reviews is read by relatively few people. *Id.* at 893.

181. Decades ago Boorstin argued to the contrary and said legal history supplied ‘lawyers with appropriate erudition.’ Boorstin, ‘Tradition and Method,’ 424.

182. Edward White, recognizing the increased use of history by American constitutional scholars, has constructed a very different theory to explain this phenomenon. He rejected the traditional dichotomy between the decline of law as an autonomous discipline and the forensic and normative originalist uses of history as objective and presentist explanations. He asserts instead a theory that eliminates the contrast between those approaches and combines them in a ‘neohistorical approach, which is ‘a product of an altered conception of the nature of historical change that surfaced in late twentieth- and twenty-first century American higher education’. This approach views that past and present as ‘interconnected rather than starkly separate segments of time.’ He believes that there has been a ‘disintegration of a conception of history as a continuous process of qualitative change [which] can be linked to a growing sense of cultural instability that has characterized the turning of the twentieth century.’ G. Edward White, ‘The Arrival of History in Constitutional Scholarship,’ 88 *Va. L. Rev.* (2002), 485, 485-98.

requires a jury trial ‘according to the rules of the common law.’¹⁸³ In addition, in some cases the Supreme Court has treated historical practice as determinative as with right to confrontation,¹⁸⁴ or relevant, as in recent cases involving the right to habeas corpus.¹⁸⁵ Moreover, some American constitutional scholars view constitutional history as an important aspect of constitutional law, although it may be exactly the opposite in England where constitutional history has played at best a minor and diminishing role in twentieth-century legal scholarship and education.¹⁸⁶ As a result, constitutional scholars are most likely to read legal history scholarship about the Supreme Court¹⁸⁷ and other scholars may be interested in scholarship involving more recent legal developments¹⁸⁸ or current legal controversies.¹⁸⁹ But as one moves away from these areas, it becomes more questionable whether many such legal scholars would read the recent work on the

183. In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

U.S. Const. amend. VII

184. *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004)

185. *Boumediene v. Bush*, 128 S. Ct. 2229 (2008); *Rasul v. Bush*, 542 U.S. 466; 124 S. Ct. 2686 (2004). Both cases involved the history of habeas corpus. Legal historians filed amicus briefs in both cases, which I signed. Since 1996, the Supreme Court has indicated that the law governing habeas corpus in 1789 would guide its current application. Paul Halliday & G. Edward White, ‘The Suspension Clause: English Text, Imperial Contexts, and American Implications,’ 94 *Va. L. Rev.* (2008) 575.

186. John Allison, Cambridge Faculty of Law, is a pioneer in attempting to integrate history into English constitutional law. See, e.g., *The English Historical Constitution: Continuity, Change and European Effects*, Cambridge, 2007; John Allison, ‘History in the Law of the Constitution,’ 28 *Journal of Legal History* (2007), 263-282.

187. William Wiecek, *The Birth of the Modern Constitution: The United States Supreme Court, 1941–1953*, New York, 2006 (Holmes Devise History of the Supreme Court of the United States Volume 12); Mark Tushnet, *Making Constitutional Law: Thurgood Marshall and the Supreme Court, 1961-1991*, Oxford, 1997; G. Edward White, *The Constitution and the New Deal* Cambridge, 2000.

188. Lawrence Friedman, *American Law in the Twentieth Century*, Harrisonburg, 2002.

189. Stuart Banner, *The Death Penalty: An American Story*, Cambridge, 2002.

history of judicial review,¹⁹⁰ law and religion,¹⁹¹ or constitutional theory.¹⁹² Moreover, legal historians continue to produce strong scholarship involving the colonial legal system,¹⁹³ contracts,¹⁹⁴ property,¹⁹⁵ criminal law,¹⁹⁶ evidence,¹⁹⁷ administrative law,¹⁹⁸ family law,¹⁹⁹ legal procedure,²⁰⁰ corporate law,²⁰¹ trust law,²⁰² the judiciary,²⁰³ the legal profession,²⁰⁴ and legal institutions.²⁰⁵ That some of this work concerns 18th and 19th century English legal history reduces the likelihood that American scholars who work in these fields would find this

190. Philip Hamburger, *Law and Judicial Duty*, Cambridge, 2008; Mary Sarah Bilder, 'The Corporate Origins of Judicial Review,' 116 *Yale L. J.* (2006), 502-66; Larry Kramer, *The People Themselves : Popular Constitutionalism And Judicial Review*, New York 2004.

191. John Witte, *Religion and the American Constitutional Experiment*, 2d ed., Boulder, 2005.

192. William Nelson, *The Legalist Reformation: Law, Politics, and Ideology in New York, 1920-1980*, Chapel Hill, 2001; John Reid, *Rule of Law: The Jurisprudence of Liberty in the Seventeenth and Eighteenth Centuries*, DeKalb, 2004).

193. Daniel Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664-1830*, Chapel Hill, 2005; Mary Sarah Bilder, *Transatlantic Constitution*.

194. Roy Kreitner, *Calculating Promises: The Emergence Of Modern American Contract Doctrine*, Stanford, 2007.

195. Gregory Alexander, *Commodity and Propriety: Competing Visions of Property in American Legal Thought, 1776-1970*, Chicago, 1997.

196. Peter King, *Crime and Law in England, 1750-1840: Remaking Justice from the Margins*, New York, 2006; John H. Langbein, *The Origins Of the Adversary Criminal Trial*, New York, 2003; Bruce Smith, 'The Presumption of Guilt and the English Law of Theft,' 1750-1850, 23 *Law & Hist. Rev.* (2005), 133; Norma Landau, ed. *Law, Crime and English Society, 1660-1830*, Cambridge, 2002.

197. T.P. Gallanis, 'The Rise of Modern Evidence Law,' 84 *Iowa L. Rev.* (1999), 499; Barbara J. Shapiro, *A Culture Of Fact: England, 1550-1720*, Ithaca, 2000.

198. John Witt, *The Accidental Republic: Crippled Workingmen, Destitute Widows, and the Remaking of American Law*, Cambridge, 2004.

199. Lawrence M. Friedman, *Private Lives : Families, Individuals, And The Law*, Cambridge, 2005; Nancy Cott, *Public Vows: A History of Marriage and the Nation*, Cambridge, 2000.

200. Michael Lobban, 'Preparing for Fusion: Reforming the Nineteenth-Century Court of Chancery, Parts I & II,' 22 *Law & Hist. Rev.* (2004), 389-427, 565-99.

201. Ron Harris, *Industrializing English law: Entrepreneurship and Business Organization, 1720-1844*, New York, 2000); Stuart Banner, *Anglo-American Securities Regulation: Cultural And Political Roots, 1690-1860*, Cambridge, 1998.

202. Chantal Stebbings, *The Private Trustee in Victorian England*, New York, 2002.

203. James Oldham, *English Common Law in the Age of Mansfield*, Chapel Hill, 2004); Daniel Klerman & Paul Mahoney, 'The Value of Judicial Independence: Evidence from Eighteenth-Century England,' 7 *American Law and Economics Review* (2005), 1.

204. Allyson May, *The Bar and Old Bailey, 1750-1850*, Chapel Hill 2003.

205. James Oldham, *Trial By Jury: The Seventh Amendment and Anglo-American Special Juries* (2006); Chantal Stebbings, *Legal Foundations Of Tribunals In Nineteenth-Century England* New York, 2006; Daniel Klerman, 'Jurisdictional Competition and the Evolution of the Common Law,' 74 *University of Chicago Law Review* (2007), 1179.

scholarship useful even though it may have current relevance.²⁰⁶

Moving to a more ancient time and across the Atlantic brings me to the usefulness of medieval and early modern English legal history to nonlegal historians. A number of scholars in England, the United States, and other countries in both law schools and history departments continue to publish a significant amount of classical legal history and social history of law of these periods. In the last decade or so, considerable scholarship involving these earlier periods has appeared dealing with many traditional topics such as contracts,²⁰⁷ property,²⁰⁸ criminal law,²⁰⁹ family law,²¹⁰ evidence,²¹¹ legal procedure,²¹² courts,²¹³ the legal profession,²¹⁴ jurisprudence,²¹⁵ and legal institutions.²¹⁶ It is unclear whether nonlegal history scholars would

206. For example, in his review of Philip Hamburger's recent book on judicial review (*see supra* note 190), Judge Richard Posner suggested that the book 'has cast doubt . . . on the legitimacy of American constitutional law,' 'may alter the terms of the current debate,' and further 'a proper understanding of judicial behavior, ancient and modern.' Richard A. Posner, 'Modesty and Power,' [31 Dec. 2008] *New Republic*, 38, 41.

207. James Gordley, *The Philosophical Origins of Modern Contract Doctrine*, New York, 1991; David Ibbetson, *A Historical Introduction to the Law of Obligations*, New York, 1999. Ibbetson discusses the origins of tort law as well and discusses developments in both fields through the 20th century.

208. Joshua Getzler, *Water Rights*; Joseph Biancalana, *The Fee Tail and the Common Recovery in Medieval England, 1176-1502*, Cambridge, 2001.

209. Marjorie McIntosh, *Controlling Misbehavior in England 1370-1600*, Cambridge, 1998; R.H. Helmholz, Charles M. Gray, John H. Langbein, and Eben Moglen *The Privilege Against Self-Incrimination: Its Origins and Development*, Chicago, 1997.

210. Charles Donahue, *Law, Marriage, and Society in the Later Middle Ages: Arguments about Marriage in Five Courts*, New York, 2008; Shannon McSheffrey, *Marriage, Sex, and Civic Culture in Late Medieval London*, Philadelphia, 2006; Michael Sheehan, *Marriage, Family, and Law in Medieval Europe*, Toronto, 1997.

211. Mike Macnair, *The Law of Proof in Early Modern Equity*, Berlin, 1999.

212. Mike Macnair, 'Equity and Conscience,' 27 *Ox. J. Leg. St.* (2007), 659-81; Joseph Biancalana, 'The Legal Framework of Arbitration in Fifteenth Century England,' 47 *Am. J. Leg. Hist.* (2005), 347-82.

213. Maureen Mulholland & Brian Pullan, eds, *Judicial Tribunals In England And Europe, 1200-1700*, 2 vols., Manchester, 2003, vol., 1.

214. James Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts*, Chicago, 2008; Penny Tucker, *Law Courts and Lawyers in the City of London, 1300-1550* (2007).

215. J.W. Tubbs, *The Common Law Mind: Medieval and Early Modern Conceptions*, Cambridge, 2000.

216. Paul Brand, *Kings, Barons, and Justices: The Making and Enforcement of Legislation in Thirteenth-Century England*, Cambridge, 2003; Milsom, *Natural History*; J.H. Baker, *The Law's Two Bodies: Some Evidential Problems in English Legal History*, Oxford, 2001; Mike Macnair, 'Vicinage and the Antecedents of the Jury,' 17 *Law & History Review* (1999), 537-590.

find this work useful, but in any event, their lack of interest seems evident.²¹⁷

IV. Conclusion

Despite this pessimism, this type of scholarship is important and should continue. Let me suggest several reasons for the value of studying legal history.²¹⁸ I think that many legal historians, from Maitland to the present, believe that history helps us understand the present, but in a nonnormative, nonforensic manner.²¹⁹ Moreover, another reason is that there is still so much unknown about the legal past and the primary sources are so voluminous, particularly with regard to medieval and early modern England.²²⁰ Following Maitland's example, 'the best evidence' must be 'harvested.'²²¹ History is the 'data of law.'²²² As Southern said about historians, this kind of work is the first stage in a legal historian's 'historical experience . . . the individual perceptions which are the bricks out of which historical edifices are built.' What the legal

217. In contrast, Michael Hoeflich and Steve Sheppard state that 'the dawn of the twenty-first century has ushered in a period of both transformation in the study and expansion in the study and teaching of legal history. They said the teaching of legal history has 'mushroomed' and 'now is considered mainstream.' They detail the evidence that supports their conclusions. Although they believe legal history is misused polemically and is 'disorderly,' they conclude by opining that 'eventually, we believe that lawyers will come to see almost all questions of U.S. law as questions of legal history.' Michael Hoeflich & Steve Sheppard, 'Disciplinary Evolution and Scholarly Expansion: Legal History in the United States,' 54 *Am. J. Comp. L.* (2006 Supp.), 23, 23-44, 44.

218. Recently Hon. Michael Kirby, a justice of the Australian High Court and Sir Gerald Brennan, the former Chief Justice, emphasized the need to study legal history. Michael Kirby, 'Is Legal History Now Ancient History?,' 83 *Australian L.J.* (2009), 31; 'Brennan Calls for Focus on Legal History,' *The Australian* (Feb. 27, 2009) < <http://www.theaustralian.com.au/business/legal-affairs/history-must-come-out-of-its-shell/story-e6frg97x-1111118976809> > accessed April 22, 2010. Justice Kirby stressed importance of legal history in detailing the 'decline and fall' of its teaching. He said that history was 'fascinating' as it was 'the story of the human condition' and the societal development of 'a higher plane of peace and security, economic equity, and respect for fundamental rights.' He said further that history had 'an important legal component. That is why a life in the law should never be far from history.' Michael Kirby, 'Legal History: Teaching Legal History in Australia- Decline & Fall?,' 13 *Legal History* (2009), 23.

219. E-mail from David Ibbetson to Jonathan Rose (Feb. 27, 2009)(on file with the author). Katz has argued that understanding pre-industrial colonial law is useful in identifying 'ways in which industrial society requires particular legal regimes and that law of 'the colonial era [is] relevant to a national history of law.' Katz, 'The Problem of a Colonial Legal Hist,' in Jack Greene & J.R. Pole, *British Colonial History*, 474-77.

220. Baker, 'Why the History of English Law Has Not Been Finished,' 62-66, 83-84; J.H. Baker, 'Two Decades of English Legal History,' 8 *Zeitschrift für Neuere Rechtsgeschichte* (1986), 43, 48, repr. Sugarman, ed. *Law in History*, vol 1, 45; Maitland, *Why the History of English Law is not Written*, 481-87.

221. Baker, *Why the History of English Law Has Not Been Finished*, 64.

222. Boorstin, 'Tradition and Method,' 427.

historian discovers are the ‘minds, intentions, problems, and limitations of those who created them or for whom they were created.’²²³ In this way, the legal historian achieves Maitland’s purpose of showing what each generation can learn from its predecessors about shaping its law.²²⁴ This work, like all legal history scholarship, gives us a better ‘sense of ourselves,’ and by their ‘historical imagination,’ legal historians have added ‘another dimension to our view of the world and enriche[d] our experience.’²²⁵ Legal history may contribute to the ‘humane study of law’ in understanding ‘the complex totality of man’s past and present, material and spiritual concerns.’²²⁶ Perhaps these broader humanistic reasons suggest that medieval and early modern English legal history, as well as all legal history, ought to be more influential on the thinking of the current legal community.

For my part and to return to the personal question posed at the beginning, it is difficult for me to explain why I turned to legal history so late in my career. Initially it was a bit accidental as I was researching a quite different topic that required me to study the legal profession in its formative periods in medieval England and colonial American. But this initial foray into medieval English legal history first captivated me and soon consumed me. Making my way through medieval plea rolls written in legal Latin was new, fun, interesting, and challenging. In addition, I think it is important for all the reasons just mentioned. But whatever the reasons, I like other legal historians will continue to pursue my curiosity and interests to explore our legal and cultural heritage. Perhaps in the end, the best explanation of why legal historians do what they do

223. Bartlett, *History and Historians*, 104-05. Southern explored this ‘historical experience’ in some detail. *Id.* at 104-19. What he says about historians seems generally applicable to legal historians as well.

224. Fifoot, *Maitland*, 143.

225. Wood, *Purpose*, 6, 10-11. More generally, Chemerinsky said that scholarly writing reflects ‘a deep belief that ideas matter and . . . can advance understanding and perhaps sometimes even make a difference.’ Chemerinsky, ‘Foreward,’ 893.

226. Daniel Boorstin, ‘The Humane Study of Law,’ *57 Yale. L.J.* (1948), 960, 964-65.

is because, in Maitland's words, they are excited by 'the thrilling interest' of it.

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