



THE VARIETIES OF LEGAL HISTORY

Résumé : Cet article examine les différentes approches qui ont été empruntées dans l'étude de l'histoire du droit en Angleterre et aux Etats-Unis par les historiens à la fois dans les facultés de droit et d'histoire. En Angleterre, le pionnier de l'histoire du droit fut F.W Maitland, pour qui les capacités du juriste étaient nécessaires afin de comprendre les sources juridiques qui sont à l'origine d'une grande partie de l'histoire sociale et économique du Moyen Age. Maitland, qui ne souhaitait pas utiliser l'histoire pour expliquer la doctrine contemporaine, a poussé une génération d'historiens médiévistes à se tourner vers les questions juridiques. Dans les écoles de droit anglaises, l'étude de l'histoire du droit fut à son tour transformée de manière révolutionnaire par S.F.C Milsom, qui croyait que l'essence de l'histoire du droit ne résidait pas dans l'application des techniques et du savoir du juriste contemporain au droit du passé, mais dans la tentative de comprendre en profondeur les esprits des générations passées de juristes. Dans les pas de Milsom, l'histoire du droit doctrinale a connu un essor en Angleterre. Aux Etats Unis, les écoles de droit ont été dominées par une tradition différente. Là, le précurseur fut J. Willard Hurst, grâce à qui l'attention des historiens se détourna d'une histoire doctrinale étroite pour s'attacher à une étude contextuelle du droit beaucoup plus large, étudiant l'opération du droit dans la société. Cet article examine le type d'historiographie qui se développa aux Etats Unis après Hurst, avant d'offrir une discussion sur le rôle qu'une histoire du droit doctrinale peut continuer à jouer, pour enrichir les débats à la fois dans le domaine de l'histoire et dans celui du droit.

Mots clefs : histoire du droit, historiographie, Maitland, Milsom, Hurst.

Abstract : This article looks at the different approaches which have been taken in the study of legal history in England and America by both historians in law and history faculties. The pioneer English legal historian was F.W. Maitland, who felt that the skills of the lawyer were needed to understand the legal materials which were the source of much medieval social and economic history. Maitland, who had no wish to use history to explain current doctrine, inspired a generation of medieval historians to look at legal questions. The study of legal history in English law schools was in turn revolutionized by S. F. C Milsom, who felt that the key to legal history was not to apply the skills of the present lawyer to the law of the past, but to attempt to get into the minds of previous generations of lawyers. Following Milsom, doctrinal legal history flourished in England. In the United States, a different tradition dominated law schools. Here, the pioneer was J. Willard Hurst, who turned attention away from narrow doctrinal history, to a broader contextual study of law, looking at the operation of law in society. The article discusses the kind of historiography which developed in America after Hurst, before turning to what discuss what role doctrinal legal history can continue to play, both to inform historical and legal debates.

Key words: legal history, historiography, Maitland, Milsom, Hurst.

I.

1. The title of this paper is borrowed from the subtitle of a lecture given by the late Patrick Wormald to the Selden Society in 2001¹. Wormald's own work is an appropriate place to start a discussion on this topic, since he was a *historian* - a member of Oxford Modern History Faculty - whose main subject of study was Anglo-Saxon *law*. In his work, he showed that legal materials were worthy subjects of study in themselves for generalist historians; for a close study of legislation and dispute resolution could teach important lessons about the nature of politics and governance in Anglo-Saxon England. At the same time, he also raised a fresh set of questions about some foundational topics in English legal history. In the century after F. W. Maitland, historians tracing the origins of the common law tended to focus on the tenurial disputes which arose in the mid-twelfth century and the consequent judicial reforms of Henry II (1154-89) which paved the way for the record-keeping central common law courts. Wormald drew attention to the fact that there were other questions we might care to consider, about public order, kingship and dispute resolution, which might suggest that the legal historian should begin his study in an earlier age², and think about law and its effects in different ways.

2. Bearing this model in mind, what I want to do in the following pages is to ask what the varieties of legal history are, and how far we can hope for a model which combines them. In England, though not (as we shall see) in America, legal history is usually done in different ways by those working in law faculties, and those who work in history faculties. Broadly speaking, those in the former camp - the lawyers - tend to focus their attention on the history of the legal doctrines whose contemporary manifestation they (or their colleagues) also teach. They are engaged with what is sometimes called the 'internal'

¹ P. Wormald, *Lawyers and the State: the Varieties of Legal History* (London: Selden Society, 2006).

² Other historians have also looked back to the Anglo-Saxon era in discussing the early history of English law: Paul R. Hyams, *Rancour and Reconciliation in Medieval England* (Cornell University Press, 2003), John Hudson, *The Oxford History of the Laws of England, vol. II, 871-1216* (Oxford: Oxford University Press, 2012).

history of the law³. Those in the latter camp - the historians - look not at the language and doctrines of law, but at the impact of legal agencies on particular historical societies, other features of whose lives they teach in other courses. They do what is sometimes called the 'external' history of law. It is curious to note that both of these kinds of legal historian would probably trace their professional genealogy to one man, F.W. Maitland. Maitland was one of the central figures who helped to turn the study of history into a professional pursuit, in which the scholar was encouraged to spend long hours in the archives reading primary sources, in order to produce thoroughly researched works on specific periods and subjects. This very Germanic method stood in contrast to the tradition of gentlemanly historiography in England, written by men such as E. A. Freeman, whose passion for the grand narrative matched their aversion for the archives⁴.

3. Maitland's approach to legal history also stood in contrast to that taken by his legal predecessors. Two approaches may be identified⁵. The first may be associated with the historical school of F. C. von Savigny and his followers, which argued that law was the product of the spirit of the people - the *Volksgeist* - as it developed over time. The Pandectists were not interested in the wider history of ideas in society to see what the *Volksgeist* actually *was*. Instead, they looked for its manifestation in legal doctrine, which was the preserve of jurists, who teased out and perfected the legal concepts which were

³ For a useful discussion, see David Ibbetson, 'What is Legal History a History of' in A. Lewis and M. Lobban, *Law and History* (Current Legal Issues 6, Oxford University Press, 2004), pp. 33-40. The distinction between 'internal' and 'external' legal history was made by Robert W. Gordon in 'J. Willard Hurst and the Common Law Tradition in American Legal Historiography', *Law & Society Review*, vol. 9 (1975-6), pp. 9-55 at p. 11, drawing on T.S. Kuhn, 'Relations between History and History of Science', *Daedalus*, vol. 100 (1971), pp. 271-304.

⁴ Freeman was the author of *The History of the Norman Conquest of England*, 6 vols (Oxford: Clarendon Press, 1867-79). In 1896, Maitland wrote to Henry Sidgwick, "I had it on the tip of my tongue to reply to your remark about Freeman and Florence that, just because the said Freeman believed that history was past politics, he never succeeded in adding anything to our knowledge of medieval politics but spoiled everything by inept comparisons." C. H. S. Fifoot (ed), *The Letters of Frederic William Maitland* (London: Selden Society, 1965), p. 148.

⁵ I omit from discussion the bland version of constitutional history written by men like E.S. Creasy, author of *The Text-book of the Constitution* (London: Richard Bentley, 1848) and *The Rise and Progress of the English Constitution* (London: Richard Bentley, 1853).

rooted in the customs and practices of the community⁶. Pandectism sought to interpret the history of legal doctrine better to understand and shape current doctrine. Although the early nineteenth century English jurist John Austin had studied in Germany and admired the Pandectist method, he was more attracted by its analytical lessons than its historical ones. However, a generation of scholars after Austin - notably in the United States - did seek to develop legal doctrine by applying the tools of analytical jurisprudence to historical common law cases. Men like C. C. Langdell at Harvard and his followers sought to tease doctrines and principles out of a series of leading common law cases, which stretched back to the middle ages. Legal 'formalism' was a form of Pandectism for the common law world, based on a notion that a rigorous study and analysis of case law could generate correct and coherent doctrine for the present day⁷.

4. The second method was that of Sir Henry Maine. Maine's work appeared to many Victorians to be revolutionary because it brought a historical dimension which had seemed to be ignored by the analytical jurisprudence of John Austin. Maine was not interested in understanding the details of current doctrine, but at looking at how law developed in society. In fact, his work gave ambiguous messages. On the one hand, he challenged analytical jurisprudence by showing that the legal concepts which Austin had seen as timeless were contingent and reflected the needs and practices of the society in which they were developed. This held out the promise of a sociological jurisprudence in which legal development could be seen as the product of human agency and social choice. On the other hand, Maine's broad sweep of history was also highly teleological, tracing the evolution of all 'progressive societies' - including England - from "status to contract". The telos of Roman law development - the paradigm for all progressive societies - was the individualistic, consensually-contracting world of Savigny's will theory. Maine did

⁶ Roscoe Pound later described it as an idealistic interpretation of legal history, with Hegelian overtones: "An idea was realizing in legal history. It could be discovered by historical research and when discovered its implications could be developed logically." *Interpretations of Legal History* (Gloucester, Mass. 1967), p. 18 (first published Cambridge 1923).

⁷ For a recent work on the influence of Savigny's historical school on Francis Wharton, see Stephen A. Siegel, 'Francis Wharton's Orthodoxy: God, Historical Jurisprudence, and Classical Legal Thought,' *American Journal of Legal History*, vol. 46 (2004), pp. 422-46. On Langdell, see Bruce A. Kimball, *The Inception of Modern Professional Education: C.C. Langdell, 1826-1906* (Chapel Hill: University of North Carolina Press, 2009).

not explain how the common law got to that telos: he simply assumed that, as far as present law was concerned, the analytical jurists had got it right, and could be left to explain the law⁸.

5. Maine's work attracted huge attention in the later nineteenth century, particularly from social theorists, for it seemed to open up a new methodology which would explore the nature of legal change over the *longue durée*. But his influence soon faded. Since Maine's historical jurisprudence had proclaimed the discovery of universal trends from looking at ancient legal systems, the contextual message which could be taken from his work - that law was the product of choice and circumstance - was lost, at least in England, which would not see a flowering of Realism or sociological jurisprudence after Maine. Equally, he was soon seen to have been flawed on very much of the detail. With him fell both the promise of historical jurisprudence, and also a broader sociological jurisprudence⁹.

6. By contrast, Maitland was interested neither in being a kind of Pandectist, nor a Mainite historical jurist. He did not aim to use history to advance jurisprudence, far less to understand present day law; and he was famously sceptical about the utility of history to lawyers¹⁰. In an early essay which criticised the state of the English law of real property, Maitland dismissed the approach of the "historical school now fashionable", which said that property law was a product of social evolution and national life, which was not to be condemned because it failed to conform to modern notions of practical convenience. Maitland said,

"It is [...] our present lawgivers, and we who have elected them, that are to blame, if the right to land, and the right to vote, may still depend upon nonsense which it would be unjust to the schoolmen to call scholastic, nonsense which can only be explained by long stories about the quarrels between Courts which we have

⁸ On Maine, see George Feaver, *From Status to Contract: a Biography of Sir Henry Maine, 1822-1888* (London: Longmans, 1969), R. C. J. Cocks, *Sir Henry Maine: a Study in Victorian Jurisprudence* (Cambridge: Cambridge University Press, 1988) and Karuna Mantena, *Alibis of Empire: Henry Maine and the Ends of Liberal Imperialism* (Princeton: Princeton University Press, 2010).

⁹ See N. Duxbury, 'Why English Jurisprudence is Analytical,' *Current Legal Problems*, vol. 57 (2004), pp. 1-51.

¹⁰ As he put it, to do his job properly, a lawyer had to be orthodox; but an orthodox history was a contradiction in terms. Moreover, "If we try to make history the handmaiden of dogma she will soon cease to be history." 'Why the History of English law is not Written', p. 491-2.

abolished. If these quarrels ended in an illogical compromise, this may have been our ancestors' wisdom, but that the terms of this compromise are still retained as law for all time is no better than our own folly."¹¹

7. Indeed, his prime interest as a researcher was not in the law, but in history. However, he argued that to understand the periods of history which most interested him, one needed to have a lawyer's training, since "[l]egal documents, documents of the most technical kind, are the best, often the only evidence that we have for social and economic history, for the history of morality, for the history of practical religion"¹². His inaugural lecture thus contained a rallying cry to lawyers to spend time in the archives.

8. Maitland's influence on the study of history in England has long been recognised¹³. But what was his influence on *legal* history? In the first half of the twentieth century, Maitland's work inspired a succeeding generation of *historians* who were interested not in the doctrines of law as such, but who were interested in law as one of the means of governance in medieval society. It is notable that many of the figures who we would now account as the main legal historians of the middle ages at work in the first half of the twentieth century were not the trained lawyers Maitland wished to see at work, but historians working in history faculties. They were part of the first generation of historians trained by universities which by the 1920s were beginning to imitate the German idea that history was a subject to be studied scientifically, by students writing doctorates based on extensive research into primary sources - an approach which was certainly not taken in law schools, whose educational standards before the second world war remained often rudimentary. These historians include such names as H.G. Richardson (1884-1974) and G.O. Sayles (1901-94), Helen Cam (1885-1968) and Sir Frank (1880-1967) and Doris Stenton (1894-1971). Their work contributed importantly to an enriching of the medieval historiography of law, in the editions and monographs they produced.

¹¹ F.W. Maitland, 'The Law of Real Property,' in H. A. L. Fisher (ed) *The Collected Papers of Frederic William Maitland*, 3 vols (Cambridge: Cambridge University Press, 1911), vol. 1, pp. 162-201 at 194.

¹² 'Why the History of English law is not Written', in H.A.L. Fisher (ed) *The Collected Papers of Frederick William Maitland* (Cambridge 1911), p. 486.

¹³ See John Hudson, *F. W. Maitland and the Englishness of English Law* (London: Selden Society, 2007).

9. Their contemporary T.F.T. Plucknett (1897-1965) did teach in a law school - the London School of Economics - and he did write a *Concise History of the Common Law*¹⁴; but he was a historian, rather than a lawyer by training, and he seemed to be more interested in talking to medieval historians than to lawyers. As Keith Smith and John McLaren have observed, “beyond the *Concise History*, Plucknett’s scholarship displayed many of the characteristics of Maitland’s highly focused archival methods”¹⁵. Moreover, like Maitland, he held that law was not to be learned by history. “It is still too often said that English law can only be understood historically,” he observed: “Now, English law may be bad, but is it as bad as that?”¹⁶ Moreover, Plucknett himself noted that “[t]he completely opposite aims and methods of the lawyer and the legal historian are inherent in the very nature of history and of English law.” Whereas Maitland had bemoaned the fact that too few trained lawyers followed his example in going to the Public Record Office, Plucknett bemoaned the fact that students began their law studies in England at undergraduate level, something which made “it very difficult for the well-trained lawyer to think like a historian”¹⁷.

10. This is not to say that there was no interest in legal history of this sort among lawyers. In 1921, the Cambridge Studies in English Legal History series was launched, with Percy H. Winfield’s *The History of Conspiracy and Abuse of Legal Procedure*¹⁸. In his preface to the new series, the editor H.D. Hazeltine (a product of the Harvard Law

¹⁴ T. F. T. Plucknett, *A Concise History of the Common Law* (1st ed. London: Butterworths, 1929, 5th ed. 1956).

¹⁵ K. J. M. Smith and J. P. S. McLaren, “History’s Living Legacy: an Outline of ‘modern’ historiography of the common law”, *Legal Studies*, vol. 21 (2001), pp. 251-343 at p. 264. See Plucknett’s works, *Statutes and their Interpretation in the First Half of the Fourteenth Century* (Cambridge: Cambridge University Press, 1922), *Legislation of Edward I* (Oxford: Clarendon Press, 1949) and his collected *Studies in English Legal History* (London: Hambledon Press, 1983).

¹⁶ T. F. T. Plucknett, *Early English Legal Literature* (Cambridge: Cambridge University Press, 1958), p. 17.

¹⁷ Plucknett, ‘Frederic William Maitland,’ in *Studies in English Legal History*, XX 7. He wrote to Ames in 1888, “I very much wish that I could train up a few Cambridge men to use the Record Office; but they all believe they are going to succeed at the bar”: Fifoot (ed), *The Letters of Frederic William Maitland*, p. 41.

¹⁸ *The History of Conspiracy and Abuse of Legal Procedure* (Cambridge: Cambridge University Press, 1921), author’s preface; see also his *The Chief Sources of English Legal History* (Cambridge: Cambridge University Press, 1925).

School of the 1890s) wrote that the series aimed to explore the “place of English law in world history”. The series would include monographs based on original research on special periods or special topics, whose authors sought to uncover historical truth. The study of English legal history, Hazeltine wrote, “not only forms a contribution of far-reaching scope to the study of comparative legal development, it also serves to throw light on many aspects of the political, ecclesiastical, economic and social evolution of Western civilization”¹⁹.

11. However, for the most part, legal historians working in law faculties tended to focus more on doctrinal histories. This was true on both sides of the Atlantic. In America, the generation after Langdell continued his formalist project. Men like M.M. Bigelow, J. B. Ames, J. B. Thayer and J. H. Wigmore were very interested in Maitland’s work, and engaged in correspondence with him. Indeed, Maitland observed in a letter to Bigelow that “you seem to care a deal more for legal history on your bank of the Atlantic than we do here”²⁰. Nonetheless, these enterprise these law teachers engaged in was to a significant degree different from Maitland. They were not only interested in exploring the nature of medieval society and politics, but also sought to use history to help understand the current common law, or particular doctrines of it, which they felt could be better understood if their medieval and early modern antecedents were studied rigorously. According to a memoir of him, James Barr Ames “cared for the law of the past only for the light it threw on that of to-day”, and used the Year Books as “the source of the most practical knowledge of current principles”²¹. Ames used history to reveal how misconceptions led to erroneous views of the nature current law²². These lawyers - who included Oliver Wendell Holmes -

¹⁹ *History of Conspiracy and Abuse of Legal Procedure*, xi.

²⁰ Fifoot (ed), *The Letters of Frederic William Maitland*, p. 45. On the late nineteenth century American tradition, see also David M. Rabban, ‘From Maine to Maitland via America’ *Cambridge Law Journal*, vol. 68 (2009), pp.410-35.

²¹ J.B. Ames, *Lectures on Legal History* (Cambridge Mass, 1913), p. 18.

²² In his view, for instance, courts could be freed from the constraints which the puzzling doctrine of consideration seemed to impose in contract law, if only they better understood the early seventeenth century cases on which it had been developed: J. B. Ames, ‘Two Theories of Consideration. 1: Unilateral Contracts’, *Harvard Law Review*, vol. 12 (1899), pp. 515-31.

sought to apply a higher standard of historical scholarship to past cases in order better to understand and reorder present doctrine²³.

12. In England, doctrinal legal history continued to be studied by the relatively few scholars who engaged in legal historical work. In his later work, Winfield himself used history to make sense of the developments of areas of private law²⁴, which became his main focus of attention as a scholar. It was an approach shared by other scholars, who also turned to doctrinal historical studies to understand current law²⁵. The legal history done by lawyers remained firmly doctrinal and ‘internal’. Within English law schools, the dominant legal historian of the first half of the century was W. S. Holdsworth (1871-1944). Holdsworth did have a degree in history, but had also studied law and entered into an academic law career in Oxford. Holdsworth’s considerable fame derives from his sixteen volume *History of English Law*, which traces the history from the middle ages to 1875. Holdsworth’s forte was not archival research. Rather, he wrote up his manuscripts, often after a hearty college meal and with a bottle of port on his desk, directly from treatises taken from the college library. It was also a broad encyclopedic sweep of legal topics, a manual in which the reader could discover the history of particular doctrines or institutions. This was clear ‘internal’ legal history, seeing the law as developing autonomously. Reviewing the first volume of the great history in 1903, Maitland acutely observed that its readers would be law students and lay historians²⁶. Reviewing the twelfth in 1938, Lord Macmillan observed that Holdsworth’s encyclopaedic “account of the technical apparatus of the law in reports, abridgments, etc., and of the literature of the law is [...] perhaps more useful for reference than attractive to be read”²⁷. This was not the

²³ As Rabban points out, the fashion for this kind of legal historical scholarship did not survive into the twentieth century: “In law, as in many other fields, interest in social science, tied to social reconstruction, superseded historical analysis” (‘Maine to Maitland’, p. 434).

²⁴ E.g. P.H. Winfield, ‘The History of Negligence in the Law of Torts,’ *Law Quarterly Review*, vol. 42 (1926), pp. 184-201; ‘The Foundation of Liability in Tort,’ *Columbia Law Review*, vol 27 (1927), pp. 1-11; *The Province of the Law of Tort* (Cambridge: Cambridge University Press, 1931).

²⁵ Mention might also be made of F. H. Newark (1907-76), professor of law at Queen’s University Belfast from 1937-72 and of A. L. Goodhart (1891-1978), himself American by both and training. See also R. M. Jackson’s *The History of Quasi-Contract in English Law* (Cambridge: Cambridge University Press, 1936).

²⁶ *Law Quarterly Review*, vol. 19 (1903), p.335, quoted in Smith and McLaren, ‘History’s Living Legacy,’ p. 264.

²⁷ *Modern Law Review*, vol. 2 (1938), pp. 245-6.

work of original scholarship in the tradition of Maitland; and many of its judgments would not be sustained by empirical research.

13. All this may suggest that Maitland's impact on doctrinal history may not have been as great as one might have thought. The real revolution on doctrinal legal history was that brought about by S.F.C. Milsom (b. 1923). It is Milsom who in many ways has defined legal history as a subject within the law faculty. In a series of articles in the 1950s, a general textbook in 1969, and a monograph in 1976, he transformed the field²⁸. Unlike Maitland and his followers in history faculties, Milsom was only interested in the history of the law itself, rather than in how it worked in a broader polity and society. He was interested in the 'internal' or doctrinal history. Unlike the 'post-Langdellian' American legal historians of the late nineteenth century, Milsom was not interested in using history to understand present doctrine. He was, however, interested both in jurisprudential questions (about how law, and in particular the common law) works and in historical questions (about how the law at a certain period in its history was understood and practiced).

14. The great lesson taught by Milsom was that legal historians who wanted to understand the 'internal' history of the law - its doctrines and practices - had to attempt to think like a lawyer of the age they were studying. They should not look at past law through the lenses of contemporary legal doctrine. For Milsom, legal history was therefore a form of intellectual history. In undertaking it, one had to grasp the fact that terms and concepts which hold one meaning for us held a different meaning in different times. Milsom took up Maitland's lesson that the historian had to study the past on its own terms, and through careful, focused archival work. He took up Maitland's point that only the lawyer could properly understand medieval legal records. But his message seemed in one sense to 'out-Maitland' Maitland: for he seemed to say that it was not the legally trained scholar who understood *current* law who could make sense of it: but only the lawyer who had the imagination and historical skill to get inside the medieval lawyer's mind. It is therefore worth noting that no less a historian than Geoffrey Elton should have said that Milsom had "put his finger on some real weaknesses in Maitland's historical

²⁸ S. F. C. Milsom, 'Trespass from Henry III to Edward III', *Law Quarterly Review*, vol. 74 (1958), pp. 195-224, 407-36, 561- 90; id., 'Sale of Goods in the fifteenth century,' *77 Law Quarterly Review*, vol. 77 (1961), pp. 257-84; id. *Historical Foundations of the Common Law* (London: Butterworths, 1969); id. *The Legal Framework of English Feudalism* (Cambridge: Cambridge University Press, 1976).

method” and that his view “fits the experience of the historian but not of the lawyer” insofar as his “account incorporates the fact of continuous change in ways that Maitland’s fails to do”²⁹.

15. As Milsom explained at the beginning of his *Historical Foundations of the Common Law*, two jurisprudential questions drove his work. Firstly, how did the common law *originate*; or (to put it differently), how did a system of custom become one of *law*. This was a question he took up further in his later work, *The Legal Framework of English Feudalism*. Secondly, how did a system premised on an ideology that it was constant and unchanging adapt to a constantly changing world. This was to focus on the way lawyers adapted and manipulated old forms of procedure to meet the changing needs of clients. For Milsom “[t]he life of the common law has been in the unceasing abuse of its elementary ideas”³⁰. Legal rules designed for one purpose were diverted to new purposes. The common law remained fluid, and was in a constant process of reclassification. It was this point which made Milsom’s challenge so difficult and so exciting: for it often involved trying to capture what was in the minds of lawyers, who were apt to keep changing their minds, and who often failed to leave a written record of the crucial assumptions they were making. As Milsom saw it, lawyers were only ever interested in winning the case before them: and if the path of the law was tortuous and winding, this was because this is how it developed, from case to case³¹. Some doctrinal developments were intended; others accidental.

16. One of Milsom’s achievements was to reinvigorate legal history as a subject in English legal scholarship. Unsurprisingly, legal scholars following Milsom have largely concentrated on those areas which have generated the most legal doctrine, and the knottiest problems for lawyers to wrestle with. Milsom’s textbook (like Plucknett’s earlier

²⁹ G. R. Elton, *F. W Maitland* (London: Weidenfeld and Nicolson, 1985), p. 48.

³⁰ Milsom, *Historical Introduction*, xi. In the second edition (p. 6), he dropped the word ‘unceasing’.

³¹ As Milsom put it, “We look back and see a twisting path circumventing an inconvenient rule; but only the last steps can have been directed to that end. The earlier ones were individual solutions to different and smaller problems; and those who took them, far from willing the end, would have regarded it as a subversion of their legal order. But since in the nature of the legal process each step is made to seem to follow from the other, it is often difficult to tell at what point the end, desired or not, becomes a visible possibility.” *Historical Introduction*, p. 53.

Concise History and J.H. Baker's later *Introduction to English Legal History*³²) concentrated largely on the institutions of the common law (courts and procedures) and on private law - property and obligations. Subjects which have attracted the interest of social historians - notably crime and disorder - have attracted less attention from these scholars. "The miserable history of crime in England can be shortly told," Milsom wrote, "Nothing worth-while was created"³³. Milsom's intellectual project has been continued by Sir John Baker, who is not only the Literary Director of the Selden Society, but also General editor of the *Oxford History of the Laws of England*, a project which aims to supplant Holdsworth's history as the major reference point for English legal history. Appropriately enough, the first volume was produced by Baker. In his preface, he gives a useful definition of the subject: "The focus of this book, and of this series, is the intellectual and institutional framework within which the lawyers' opinions were formed and their arguments devised, the processes of litigation managed and recorded, and the legislative changes achieved"³⁴. As this suggests, this is a specialist enterprise, which is not designed to be either constitutional history or social history, but which aims to describe the subject matter of the law.

II.

17. In England, Milsom's work reinvigorated doctrinal legal history, and liberated it from being the handmaiden of current doctrinalists. Indeed, for Milsom and Baker, legal history was seen as a largely medieval and early-modern enterprise: dealing with an obviously *different* legal world. Milsom in a way continued Maitland's project, for he brought the legal mind to questions of the past. Yet in a world of increasing specialization among historians, this raised a potential danger that the generalist would not be taught by the legal historian, but would be baffled by his specialist language³⁵.

18. The United States also saw a legal-historical revolution in the mid twentieth century, but it was not a Milsomite one. Its roots were in

³² J. H. Baker, *An Introduction to English Legal History*, 4th ed (London: Butterworths, 2002).

³³ *Historical Introduction*, 2nd ed (London: Butterworths, 1981), p. 403.

³⁴ J. H. Baker, *The Oxford History of the Laws of England*, vol VI, 1483-1558 (Oxford: Oxford University Press, 2003), vi.

³⁵ Baker's preface includes the interesting remark, "I hope that most of the chapters will be reasonably accessible to readers who are not already experts in legal history."

the Realist reaction against Langdell's formalism. By the 1890s, Oliver Wendell Holmes, who had drawn heavily on history in *The Common Law* to tease out a theory of the common law, and its various doctrines, came round to the view that the role of history in explaining current law was limited. In the 'Path of the Law', he noted that history had to be part of the rational study of the law, since without history "we cannot know the precise scope of rules which it is our business to know." But the study of history (he now said) was only "the first step towards an enlightened scepticism, that is, towards a deliberate reconsideration of the worth of those rules"³⁶. Holmes inspired the Realist reaction against formalism, and by the 1930s, the kind of doctrinal legal history espoused by the likes of the formalist Ames were going out of fashion. Roscoe Pound's *Interpretations of Legal History* - the third volume in the Cambridge series³⁷ - spent much time criticizing jurists like Savigny and Ames for seeking ideas in history which were fundamental and necessary³⁸. Doctrinal legal history of that sort fell out of favour in America by the mid century. When James Willard Hurst was asked in the 1990s to cast his mind back to the world of legal history in America which existed when he began, he accordingly replied, "That would be a bit like studying snakes in Ireland, wouldn't it?"³⁹

19. It was Hurst whose work reinvigorated American legal history. His approach was very different from that practised in England for he turned the legal historian's attention away from the highest courts, and their development of doctrine. In his book of 1950, *The Growth of American Law*⁴⁰, Hurst wanted to look at all the institutions which dealt with law: not just the courts, but also the legislature, the executive, and administrative agencies. His vision of what 'law' was was a far broader one than what the doctrinalists thought. Instead of being an intellectual history of the concepts used by lawyers, he saw "the proper subject of legal history [as] coterminous with the whole history of governance, broadly construed - formal and informal, local

³⁶ O.W. Holmes, 'The Path of the Law', *Harvard Law Review*, vol. 10 (1896-7), pp. 457-78 at p. 469 (French translation : <http://www.cliothemis.com/Traduction-La-passe-etroite-du>)

³⁷ Plucknett's *Statutes and their interpretation in the Fourteenth Century* was the second.

³⁸ Pound, *Interpretations*, p. 42.

³⁹ H. Hartog, 'Snakes in Ireland: A Conversation with Willard Hurst', *Law and History Review* 12 (1994) 370. Ireland has no snakes. Legend has it that they were cast out by St. Patrick.

⁴⁰ James Willard Hurst, *The Growth of American Law: the law makers* (Boston: Little, Brown & Co, 1950).

and central, public and private, jural, legislative, and administrative”⁴¹. Law, in the Hurstian view, was about the practice of government, at every level where law structured or regulated the exercise of power between people. In his view, the proper way to study legal history was not to look at the development of single doctrines over the long term, but to look in great detail at the working of law in one particular context and era. Hurst did this himself with his 1964 book, *Law and Economic Growth: the legal history of the Wisconsin Lumber Industry 1836-1915*⁴². The fruit of 15 years of research, and running to nearly 1000 pages, this book looked at every legal agency dealing with the lumber trade at a time of its rise and decline. One of the key questions Hurst explored was how the exploitation of the lumber trade had led to massive deforestation in Wisconsin.

20. Hurst, who was well-read in continental sociology as well as Legal Realism, sought in his work to explore what jobs the law could do. Assuming that societies were based on a broad consensus, he looked at how law could channel scarce resources into productive ends. It was this interest which took him to economic questions, to see how law was used to serve the economy. However, his view of the law was far from being crudely functionalist: for he also showed how law often failed to fulfil the functions it was set. Hurst developed a theory of legal change. A key part of his view of law is that the important legal decisions are often not the high level ones of superior courts developing doctrine through conscious choices, but the routine decisions of lower level institutions. Routine decisions tend to follow old patterns: just as common law judges tend to try to resolve new cases by analogy with old ones, so lower level officials solve new problems by fitting them into the pattern of old solutions. In this way, Hurst argued, a kind of inertia creeps into the legal process. The result is that one gets unintended and unplanned consequences, which arise almost as a result of a failure of the legal imagination. The routine only breaks down when things become so complex that they cannot be fitted into the old boxes; or in other words, when new problems arise which cannot simply be fitted into the familiar categories.

⁴¹William J. Novak, ‘Law, Capitalism, and the Liberal State: the Historical Sociology of James Willard Hurst,’ *Law and History Review*, vol. 18 (2000), pp. 97-145 at p. 114.

⁴² James Willard Hurst, *Law and Economic Growth: the legal history of the Wisconsin Lumber Industry 1836-1915* (Cambridge MA: Harvard University Press).

21. Hurst focused attention on new topics of research, such as the relationship between law and the economy. As he explained it, early nineteenth century American economic actors, who looked for immediate, short term gains, wanted a law which would help them in this pursuit. They got what they wanted: the law was to be facilitative and not directive. In the early years of the American republic, when the continent was settled and the economy expanded, the law's response allowed (in Hurst's phrase) a release of energy, which drove economic growth. But the pragmatism which drove this expansion was a 'bastard' pragmatism, which looked to short term gains rather than long term consequences, which could be negative. Hurst's view was that law affected the economy by its impact on the decisions of entrepreneurs, who acted (as Mark Tushnet has suggested) very much like Holmes's 'bad man': they were not ideologues but shaped their behaviour by what they predicted the legal response would be. But unlike Law and Economics scholars, Hurst did not see the results as necessarily optimal.

22. Although written at a time when much American historiography was concerned with nineteenth century economic development, Hurst's work was not an economic or social history of the lumber industry: it was a *legal* history, taking up the concerns of Law and Society movement, which grew out of American Legal Realism. Firstly, its aim was to look at how *law* functioned in facilitating or hindering the development of a certain industry; rather than looking at the development of industry itself. Hurst did not overestimate the importance of law in society, and when there were social issues which he felt generated no legal issues, he omitted them⁴³. Secondly, he did have an interest in developing a theory about how law developed, and how it interacted with society. Legal history could also give us a theory of law. Moreover, as Robert Gordon has pointed out, Hurst saw his audience as one of lawyers and law students: his primary aim was "training reflective lawyer-statesmen through uncovering the historical 'record', largely one of short-sighted regulatory failures and mistakes punctuated by the occasional successful piece of rational planning"⁴⁴.

⁴³ Note his response in an interview to a comment that his book had ignored the labourers: "there's really not much to say about them in a legal history, because these people just didn't enter the realm that the law dealt with [...] there isn't much to say about labor in that history, because labor was not at that point an active force in what was brought to law and what was done in law." Hartog, 'Snakes in Ireland', p. 386.

⁴⁴ Robert W. Gordon, 'Hurst Recaptured,' *Law and History Review*, vol. 18 (2000) pp. 167-175 at p.172.

23. Hurst's work has had a great influence on American legal historiography since the 1960s, and in many ways has shaped the dominant methodology on that side of the Atlantic. Yet the work of younger American scholars looks very different from Hurst's. Besides attracting praise, his work has also attracted criticism. Firstly, critics charged him with assuming too much of a consensus, and overlooking the role of struggle. His general view seemed to be of a middle class consensus, inherited from the 'polite and commercial people' who had settled North America in earlier centuries, which drifted on by a process of inertia throughout the century until the unplanned social consequences of drift forced it to embrace new forms of regulation⁴⁵. In fact, critics said, there was far more struggle and contestation, much more use of the law as an instrument of power, than this model seemed to allow. Secondly, the fact that Hurst focused so much on law, and tended to make simple and unsophisticated assumptions about society, had deleterious effects on his view of law itself. The very fact that one decision might be seen as routine, and another as special, could be the product of a contest or a choice, rather than the result of inertia. To know why some problems were regarded as routine and others not, one needed to look more at society⁴⁶.

24. The generations which followed Hurst in America took legal history in two different directions. One direction was to return to doctrine. The 1970s and 1980s saw a flowering of critical legal histories, which sought to show how the doctrine which developed had been the product of contestation between rival interests. Morton Horwitz's *The Transformation of American Law*⁴⁷ was, like Hurst's *Law and Economic Growth*, a work which looked at law and the economy. But unlike Hurst - and in less than 350 pages - Horwitz surveyed developments in all of private law, looking at high level decisions - to argue that the law had played an instrumental role in developing capitalist growth. The aim of the critical legal scholars

⁴⁵ Gordon, 'Hurst Recaptured', p. 168.

⁴⁶ As Mark Tushnet argued, there is a danger in using only legal materials: one cannot know the effect of law on society and the economy by looking at law alone. As he put it, "we cannot evaluate Hurst's assumptions about how people view the law by examining the common sense implications of legal rules; we must know how people actually gather information, evaluate it, use it, and decide." Mark Tushnet, 'Lumber and the Legal Process,' *Wisconsin Law Review* (1972), pp. 114-132 at p. 122.

⁴⁷ Morton J. Horwitz, *The Transformation of American Law, 1780-1860* (Cambridge MA: Harvard University Press, 1977).

was to show that legal doctrine was not coherent and consensual, but that it advanced particular social and economic goals. For these scholars, putting doctrine into its historical context could show its incoherence and its nature as an instrument of power. The critical perspective has proved very influential on American legal historians, though it was unable to produce a replacement for the theories it challenged⁴⁸.

25. Another direction was to take up Hurst's call for focused and local studies, but to turn attention away from the economic development which Hurst concentrated on, towards social relations. Much of this history rejects Hurst's consensus model, looking at those who were largely excluded from political power in the nineteenth and twentieth centuries - slaves, Native Americans, women, immigrants, labourers. This work does not seek to discuss the nature of present day doctrine, or to develop sociological theories of legal change. Rather, it aims to contribute to our historical understanding of past eras, by rethinking the role and function of law. Like Maitland's early successors, these writers seek to explore a society's history through its law, as widely interpreted. For example, William J. Novak's *The People's Welfare: Law and Regulation in Nineteenth Century America*⁴⁹ draws on local and state level public law sources - local ordinances, legislation and cases in state courts - to give a radically different picture from that generally accepted in the historiography. Instead of seeing nineteenth century America as a small state, which gave individuals great freedom to pursue their own interests, by protecting contract and property rights but not otherwise interfering with them, he argues that public power expanded significantly in the period up to the 1870s. Judges were willing to subordinate the interests of individuals to the wider interest of a well-regulated society. There was, he argues, significant regulation of markets, highways and even morals, to a degree which historians who focus on other legal sources - such as the Supreme Court material - tend to overlook. Novak's view is that private law was not as dominant as many histories would lead us to believe, and that public regulation played a significant part. Other scholars focusing on questions of race, gender and exclusion have sought to show both how the material of social history shaped the law in the late nineteenth and early twentieth century, and how

⁴⁸ See the observations of Catherine L. Fisk and Robert W. Gordon in "Law As...": Theory and Method in Legal History', *UC Irvine Law Review*, vol. 1 (2011), pp. 519-41 pp. 522-3.

⁴⁹ William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth Century America* (Chapel Hill: University of North Carolina Press, 1996).

the law itself shaped social history⁵⁰. It is noteworthy that the history of doctrine - and the history of 'private law' in general - plays a very small part in this. The internal and institutional history which stands at the heart of *Oxford History of the Laws of England* plays a very small role in *The Cambridge History of Law in America*⁵¹. Broadly speaking, the American approach to legal history continues to focus more on 'Law and Society' than legal doctrine.

26. Many of the leading American legal historians are scholars with both legal and historical training, who have found their scholarly homes (or at least one of them) in History Faculties. Their work often resembles the kind done in England by social historians outside the law faculty. Since the 1970s, there has been a flourishing and continuing interest among such historians in the crime. Although this area had been the subject of study by criminologists such as Leon Radzinowicz and his students from the mid twentieth century⁵², it grew significantly under the impetus given by a group of social historians at Warwick in the 1970s, notably Edward Thompson and Douglas Hay.⁵³ 1986 saw the publication of John Beattie's highly influential *Crime and the Courts in England 1600-1800*, and a

⁵⁰ As Barbara Young Welke has put it, "law was as central in the nineteenth century to the creation of the unfreedoms that cleared the path and, indeed, formed the foundation underlying the economic dynamism Hurst traced, as it was to the 'release of energy' itself": Barbara Y. Welke, 'Willard Hurst and the Archipelago of American Legal Historiography' 18 *Law and History Review*, vol. 18 (2000), pp. 197-204 at p. 203. See also her works *Recasting American Liberty: Gender, Race, Law, and the Railroad Revolution, 1865-1920* (Cambridge: Cambridge University Press, 2001) and *Law and the Borders of Belonging in the Long Nineteenth Century United States* (Cambridge: Cambridge University Press, 2010).

⁵¹ Michael Grossberg and Christopher Tomlins (ed), *The Cambridge History of Law in America*, 3 vols. (Cambridge: Cambridge University Press, 2008).

⁵² L. Radzinowicz *A History of English Criminal Law and its Administration from 1750*, 4 vols., (London: Stevens, 1948-68). See also Seán McConville, *A History of English Prison Administration* (London: Routledge & Kegan Paul, 1981); *English Local Prisons, 1860-1900: Next only to Death* (London: Routledge, 1994); *Irish Political Prisoners, 1848-1922: Theatres of War* (London: Routledge, 2003).

⁵³ See especially E. P. Thompson, *Whigs and Hunters: the Origin of the Black Act* (London: Allen Lane, 1975); D. Hay et al, *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (London: Allen Lane, 1975).

number of his students have continued to enrich the field⁵⁴. The centrality of this topic in the history curriculum - and indeed in the broader culture - can be gauged from the fact that the Old Bailey Sessions Papers - the records of London's prime criminal court, covering the period 1674 to 1913 - have been digitized and made publicly available, with generous government funding. It is not insignificant that the project was the brainchild of two social historians of the eighteenth century⁵⁵.

27. The social history of law long remained the preserve of non-doctrinal historians. Some attempts were made in law schools to encourage English legal scholars to cultivate a 'Law and Society' approach to their topic. Prime among these was the collection edited by G. R. Rubin and David Sugarman, *Law, Economy and Society* published in 1984, with an extensive editorial introduction, 'Towards a New History of Law and Material Society in England, 1750-1914'⁵⁶. Since that collection was published, a number of English lawyers have turned their attention more towards broader, contextual questions, applying the technical skills of the legal historian to broader historical questions⁵⁷.

III.

28. The 'American' style of legal history discussed in the last section is arguably more 'mainstream' now than the Milsomite one, insofar as there are many more historians who take this approach to law than

⁵⁴ See, e.g., Allyson N. May, *The Bar and the Old Bailey, 1750-1850* (Chapel Hill: University of North Carolina Press, 2003), Greg T. Smith, Allyson N. May and Simon Devereaux, *Criminal Justice in the Old World and the New: essays in Honour of J. M. Beattie* (Toronto: University of Toronto, 1998).

⁵⁵ They are Robert Shoemaker and Tim Hitchcock, neither of whom are specialists of legal doctrine or the legal profession.

⁵⁶ G. R. Rubin and David Sugarman (ed.), *Law, Economy and Society, 1750-1914: Essays in the History of English Law* (Professional Books, 1984).

⁵⁷ Examples range from crime through to family law and the poor law. See e.g. Stephen Cretney, *Family Law in the Twentieth Century: a History* (Oxford: Oxford University Press, 2003); Rebecca Probert, *Marriage Law and Practice in the Long Eighteenth Century: a reassessment* (Cambridge: Cambridge University Press, 2009); Lorie Charlesworth, *Welfare's Forgotten Past: a socio-legal history of the Poor Law* (Abingdon: Routledge, 2010).

the doctrinal one. Nonetheless, the doctrinal approach - with its focus on private law - remains alive and kicking in English law faculties. I want to turn now to ask what the role of doctrinal legal history should be in this historiographical world? Is there an audience for doctrinal history and what should it be?

29. A first audience to consider is the *historical* one. Although there has often been a temptation among some historians to disparage the narrowness of doctrinal history, historians have become increasingly aware of the relevance of legal doctrine for much social and economic history. Private law is an important instrument of governance: law provides a framework within which power is exercised by individuals and groups on society. While some parts of law are developed through legislatures after much public debate and as a result of conscious choice and political struggle, very much is developed either through the practices of lawyers drafting documents and instruments, or through legal contestations in court⁵⁸. One of the tasks of the legal historian speaking to a wider historical audience is to remind them that the language which lawyers and legal officials use, and the operation of their institutions play a crucial part in the governance of society and in structuring private relations. Legal historians can explain how these fundamentals of governance *work* in any given historical society; and to show how they *change*.

30. In recent years, an increasing number of historians have become aware of the importance of private law to social and economic life⁵⁹, particularly when dealing with questions such as the property rights of women⁶⁰. This is in many ways Maitland's project coupled with Milsom's methodology. Indeed, one might argue that much of the

⁵⁸ See M. Lobban, 'The Politics of English Law in the Nineteenth Century', in J. Getzler and P. Brand (ed), *Judges and Judging in the History of the Common and Civil Law* (CUP 2012), pp. 102-37 and id., "'Private Law' and the *Laissez-Faire* State', in M. Hewitt (ed), *The Victorian World* (London: Routledge, 2012), pp. 398-414.

⁵⁹E.g. Margot Finn, *The Character of Credit: Personal Debt in English Culture, 1740-1914* (Cambridge: Cambridge University Press, 2003).

⁶⁰ See e.g. Lee Holcombe, *Wives and Property: Reform of the Married Women's Property Law in the Nineteenth Century* (Toronto: Toronto University Press, 1983), Amy Louise Erickson, *Women and Property in early Modern England* (London: Routledge, 1993), Maria Cgren, *Domestic Secrets: Women and Property in Sweden, 1600-1857* (Chapel Hill: University of North Carolina Press, 2009).

fruitful work done by Hurstian and post-Hurstian 'law and society' scholars assumes a knowledge of doctrine⁶¹.

31. Historians have also long been interested in the language of law in the context of political debate. This is particularly true in England of the seventeenth century. Indeed, much of the revisionist history of the last three decades has focused attention on the legal and constitutional debates in the run up to the English civil war⁶². There has been much debate about the nature of the 'common law mind', and about common law constitutionalism. In such era, aspects of legal doctrine were turned into political dogma. To understand the political debates - many of which were conducted by lawyers - one needs also to understand the law itself. On a wider European level, the interest which has developed in post war Europe in the common legal past of Europe, and which has focused on exploring the tradition of the *ius commune* from the origins of the Bolognese law school to the French revolution, has not been limited to doctrinal questions, but has engaged with broader questions of politics and the ideology of governance. Although the number of English speaking scholars working in this field has not been great, those who have worked in this area - such as Peter Stein, Kenneth Pennington, James Brundage and Magnus Ryan - have used legal sources to explore questions about the nature of political power and governance.

32. A second audience to consider is the *legal* one. Lawyers often use legal history for different ends. Thus, in his preface to Winfield's history of conspiracy, Hazeltine wrote that the "functional use of legal history is the study of legal traditions, in their course of development and in the light of the conditions which produced them and gave them continuity, in order that they may be used with intelligence by

⁶¹ See e.g. Rande W. Kostal's *Law and English Railway Capitalism, 1825-1875* (Oxford: Clarendon Press, 1994) and his *A Jurisprudence of Power: Victorian Empire and the Rule of Law* (Oxford: Oxford University Press, 2006).

⁶² See e.g. J.G.A. Pocock, *The Ancient Constitution and the Feudal Law: a Study of English Historical Thought in the Seventeenth Century* (Cambridge: Cambridge University Press, 1957), Glenn Burgess, *The Politics of the Ancient Constitution: An Introduction to English Political Thought 1603-1642* (London: MacMillan, 1992); id. *Absolute Monarchy and the Stuart Constitution* (New Haven: Yale University Press, 1996); Alan Cromartie, *The Constitutionalist Revolution: an Essay on the History of England, 1450-1642* (Cambridge: Cambridge University Press, 2006); and esp. C. W. Brooks, *Law, Politics and Society in Early Modern England* (Cambridge: Cambridge University Press, 2008).

the courts or that they may be modified, or even abolished, by the law-making process”⁶³. Lawyers have long been aware of the need to understand the history of legal systems, to understand their nature. In the preface to his (significantly titled) *Historical Introduction to the Law of Obligations*, David Ibbetson writes, “If we are to make sense of today’s law we have to understand its history, and it is only when we can make sense of it that we can confidently begin to reform it”⁶⁴. His project also has comparative ambitions, seeking to demonstrate in what ways English law was influenced by continental ideas and shares in a *ius commune* tradition. Just as one cannot have a proper understanding of one’s own legal system without understanding its history, so a proper comparative law requires comparative legal history.

33. Some comparative legal work has been done in recent years by those who wish to trace the common legal roots of European countries, in order to promote greater integration and harmonization of its laws. This may raise the question whether doctrinal legal history is now expected by lawyers to be new form of Pandectism. Do we expect the past to teach us how to make a better and more coherent doctrine for the present? There are a number of scholars who do seek to draw on comparative legal traditions to help us rethink and reshape modern law. For instance, James Gordley’s *Philosophical Origins of Modern Contract Doctrine* argues that the incoherence of much modern doctrine is to be explained by a careful study of its intellectual history. In his view, the roots of modern contract doctrine are to be traced to the marriage of Roman law and Aristotelian philosophy made by the late scholastics. But a doctrinal crisis was created by the early modern attack on scholasticism, which undermined the philosophical bases on which rules were built. “For three and a half centuries,” he writes, “one of the most important facts about Western legal history has been that something is missing”. Moreover, “[b]y understanding what is wrong, we may be able not only to understand our history, but also to shape it”⁶⁵. For scholars such as Gordley, the wider social or economic context in

⁶³ *History of Conspiracy and Abuse of Legal Procedure*, xi-xiii.

⁶⁴ David Ibbetson, *An Historical Introduction to the Law of Obligations* (Oxford: Oxford University Press, 1999), vi.

⁶⁵ J. Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Oxford: Clarendon Press), p. 9. Since writing this book, he has written *Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment* (Oxford: Oxford University Press, 2006), which puts forward an argument about the nature of current private law, drawing heavily on history.

which legal doctrine develops is not particularly significant⁶⁶. Legal history by this view plays a part in contemporary doctrinal elaboration, but it is in essence a juristic enterprise.

34. Within English law, other scholars have also looked to history to help create a coherent doctrine, without being much interested in social contexts. One area where scholars have long sought to make fruitful use of history is in the law of unjust enrichment. It is not insignificant that the most influential theorist of the subject in England was Peter Birks, who was also a noted Roman lawyer and Regius Professor of Civil Law at Oxford. Birks used his knowledge of Roman categories and Roman taxonomies in developing his theories. Other scholars working in this field have made significant contributions to clarifying concepts in this field by looking closely at the historical cases which are sometimes taken to stand for propositions which turn out to be questionable. Since private law theorizing in the common law depends on interpreting legal material found in past cases, a close examination of the doctrinal context of past cases has often served to correct misconceptions in current law. This may help to recategorise cases, and thereby to reshape the law⁶⁷. For instance, historical articles by Lionel D. Smith (on the 1815 case of *Taylor v. Plumer*) and William Swadling (on the 1883 case of *Phillips v. Homfray*) have shown that these cases can not be taken to stand for the doctrinal and theoretical positions which have generally been associated with them⁶⁸. Such studies cannot produce a new doctrinal solution to an old problem, as if one were pulling a rabbit out of a hat: but they show that there is space to rethink the current law.

35. We may note that this kind of history study is not the crude, whiggish one, which would invite the scholar to find present answers in reading past printed case law. The point of the historical enterprise is to take the history seriously. When historians like Ibbetson invite current lawyers to read his historical introduction to their subject, it is to tell them, in the style of Milsom, that legal development was often shaped by short term arguments used by lawyers to win their

⁶⁶ See also J. Gordley (ed.), *The Development of Liability between Neighbours* (Cambridge: Cambridge University Press, 2010), pp. 1-2.

⁶⁷ Eg. Lionel D. Smith, 'Tracing in *Taylor v Plumer*: Equity in the Court of King's Bench', [1995] *Lloyds Maritime and Commercial Law Quarterly*, pp. 240-268.

⁶⁸ W. Swadling, '*Phillips v Homfray* (1883)' in C. Mitchell and P. Mitchell (ed), *Landmark Cases in the Law of Restitution* (Oxford: Hart Publishing, 2006), pp. pp.163-81.

cases⁶⁹. Gordley's reading of civilian writers equally seeks to be sensitive to their intellectual context. For such scholars, the history of doctrine may be said to be relevant to current concerns, since law is an interpretive pursuit, in which the material which is interpreted is in part historical. However, the notion that history can be used to help construct taxonomies of modern law has come in for recent criticism. This can be seen from Stephen Waddams's *Dimensions of Private Law*⁷⁰. The book is not a history of private law, but is historical in perspective, in that it directs attention to the past to show that no single organizational scheme or simple explanation can fully describe the law which preceded it or give a guide for future decisions⁷¹. History shows the fallacy of trying to uncover a single map of the law; for "[t]he image of mapping, and sometimes also the idea of schematic classification, imply a stability that cannot easily be reconciled with changes that have occurred in every aspect of private law in its recent history"⁷². History is the record of *change*. It is not just that a map of 1800 would look very different from a map of 1900: it is that those who draw up the maps would not agree what should be mapped - political boundaries, geological features, economic activity. For Waddams, when judges make decisions which change law, they can keep in their minds a variety of concepts and doctrines; so that it is artificial to claim that a case stands for only one of them.

36. This leads Waddams to be critical of the whole enterprise of seeking an artificial ordering of the law. "Proposed accounts of Anglo-American law," he says "have usually been in part derived from and in part imposed upon historical materials, the reader being invited to understand the past in light of the account, and then to apply the account to past, present, and future as a universal criterion of right judgment"⁷³. For Waddams, it is not enough to look more

⁶⁹ E.g. see his description of the nature of legal development in *Historical Introduction*, p. 294.

⁷⁰ S.M. Waddams, *Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning* (Cambridge: Cambridge University Press, 2003). Waddams is a prominent legal historian, as well as a distinguished Canadian private lawyer. He is the author of *Sexual Slander in Nineteenth Century England: Defamation in the Ecclesiastical Courts 1815-1855* (Toronto: Toronto University Press, 2000) and *Law, Politics and the Church of England: the Career of Stephen Lushington 1782-1873* (Cambridge: Cambridge University Press, 1992).

⁷¹ Waddams, *Dimensions of Private Law*, vi.

⁷² Waddams, *Dimensions of Private Law*, p. 12.

⁷³ Waddams, *Dimensions of Private Law*, p. 22.

closely and carefully at past cases, to help develop a more accurate typology of concepts, since any attempt to read a past case for only one doctrinal view would be to oversimplify. He points out that in the twentieth century, the failure of any doctrinal scheme adequately to explain actual decisions led to alternative accounts which claimed that policy or utility determined the shape of law. In his view, none of these works in isolation. But there is a jurisprudential lesson: “though considerations of principle, utility, and policy have each played an important part, none, considered alone, supplies a full explanation of the past. It is not so much that various *alternative* approaches are *permissible* [...] as that various *complementary* approaches are *necessary*”⁷⁴. Waddams’s jurisprudential lesson has been rejected by theorists who defend the practice of private lawyers in building interpretive theories of the common law on the foundation of historical cases. They argue that legal history provides a starting point for the theorist, but cannot determine theory. Allan Beever and Charles Rickett have responded to Waddams by arguing that while the historian can describe the legal developments of the past, he cannot determine how the law is to be understood. “History is objectionable *qua* legal theory, and it is legal theory, not legal history, that lies at the heart of lawyering”⁷⁵.

37. Lawyers in other areas of doctrine have also used history to cast doubt on present taxonomies and policies. Often, current lawyers turn to legal history to show incoherence in current law, rather than to show that there is an underlying coherence. One might point to the history of intellectual property, a subject which has been very much in fashion recently. Much of the work in this field has been done by those who regard themselves primarily as intellectual property lawyers, rather than as legal historians in general. Much of the recent scholarship here seeks to show through their history that the shape which modern intellectual property law took was not inevitable, but was the product of a range of historical contingencies. According to Brad Sherman and Lionel Bently⁷⁶, the very notion of intellectual property, they argue, is not a philosophical or a natural one, but took its shape from the various different kinds of things which the law came to protect, and from how the law came to interpret them. A

⁷⁴ Waddams, *Dimensions of Private Law*, p. 232.

⁷⁵ Allan Beever and Charles Rickett, ‘Interpretive Legal Theory and the Academic Lawyer’, *Modern Law Review*, vol. 68 (2005), pp. 320-37 at p. 335.

⁷⁶ See Brad Sherman and Lionel Bently, *The Making of Modern Intellectual Property Law: The British Experience, 1760-1911* (Cambridge: Cambridge University Press, 1999).

number of writers exploring the history of copyright have shown that the history of their subject is more complex and more contingent than is sometimes assumed. This can help inform the view current lawyers take of their subject, both by showing that the theoretical justifications for the protection of intellectual property rights which are put forward today have been deployed and redeployed in a variety of different contexts in the past by interested parties, and by showing that the direction the law took was often shaped by interest groups arguing for particular protections⁷⁷.

38. Such work can at least convince us that historical study is *relevant* to current doctrinal debates, in Holmes's sense of showing us where we misunderstand and misinterpret⁷⁸. This is surely of value in systems whose law is based on older sources. What the recent histories of copyright and intellectual property also show is that legal history can tell us much about how law develops. The history of intellectual property is especially instructive, since its practitioners include not merely lawyers interested in current law, but also literary scholars interested in authorship and the book trade, and economic historians interested in the development of technologies. Locating doctrinal developments in their context helps to show how the law developed, and shows its locality and specificity.

39. Moreover, legal history has continuing value as a form of jurisprudence⁷⁹. Where jurisprudence is often abstract and philosophical - arguing about how lawyers reason and how courts behave without actually looking at what they *do* - legal history often gives us a test bed to see how legal ideas develop. This can be seen

⁷⁷ Catherine Seville, *Literary Copyright Reform in Early Victorian England: the Framing of the 1842 Copyright Act* (Cambridge: Cambridge University Press, 1999), id. *The Internationalisation of Copyright Law: books, Buccaneers and the Black Flag in the Nineteenth Century* (Cambridge: Cambridge University Press, 2006); Ronan Deazley, *On the Origin of the Right to Copy: Charting the Movement of Copyright Law in eighteenth century Britain* (Oxford: Hart Publishing, 2004); Isabella Alexander, *Copyright Law and the Public Interest in the Nineteenth Century* (Oxford: Hart Publishing, 2010).

⁷⁸ See also Catharine MacMillan, *Mistakes in Contract Law* (Oxford: Hart Publishing, 2010).

⁷⁹ Legal historians do not tend to engage directly in theoretical debates, though Brian Simpson's 1973 essay on 'The Common Law and Legal Theory' shows how fruitful an historian's contribution can be to contemporary jurisprudence. A.W.B. Simpson, 'The Common Law and Legal Theory,' in Simpson (ed), *Oxford Essays in Jurisprudence* 2nd ser. (Oxford, 1973), pp.77-99.

from the series of books on the history of tort law recently published by Cambridge University Press⁸⁰. A number of volumes in the series have shown that jurists working in systems with similar genealogies can come up with very different doctrinal solutions to similar problems. For instance, Simon Whittaker, editor of the volume on ‘product liability’, points out that five countries which had systems developed on the basis of the *ius commune* developed very different approaches to the problem of dangerously defective goods. For example, French case law in this area was “a rebellion against the shared Roman tradition and against the wording of the codes which adopted it”⁸¹. France developed a series of devices to allow the imposition of a liability for defective products which did not seem possible from the language of the code. French judges and jurists were not merely seeking to work out the complexities of ancient doctrine, but developed new jurisprudential approaches, and used them to rethink old doctrine, and reorientate it to new situations. This kind of study can show how different results can come from differing intellectual traditions, developing in different political and social contexts, and in economies at different stages of development. As the volume on product liability shows, the detailed development of doctrine can be shaped by events (such as the disastrous effects of the thalidomide drug, sold between 1957 and 1961), by ideas external ideas (such as the impetus given to European thought by American writings on product liability in the 1930s), and by political impetuses (such as the need to harmonise European rules on consumer protection, in such a way as to ensure a level playing field). Such studies show the complex and multifaceted nature of doctrinal development, which is enriched by its comparative element.

40. We have seen that the work of legal historians can serve the needs of both general historians and of lawyers. But are they necessarily separate audiences, served by *different* histories ? In conclusion, it may be suggested that the best kind of legal history is that which addresses both. Perhaps the richest kind of legal history now done is that done by those scholars who undertake deep archival research, which seeks to answer historical questions, but whose subject matter makes us rethink familiar legal and jurisprudential subjects. One recent example of this is Paul Halliday’s recent work on

⁸⁰ *Comparative Studies in the Development of the Law of Torts in Europe*, 6 vols, ed. David Ibbetson and John Bell (Cambridge: Cambridge University Press, 2010).

⁸¹ S. Whittaker (ed.), *The development of Product Liability* (Cambridge: Cambridge University Press, 2010) p. 15, quoting Gino Gorla.

the history of habeas corpus⁸². Based on a decade of research in the national archives - looking at the writs which were issued and how they operated, rather than at the case law and treatises which discuss them - he has written a masterly and definitive book on this most central of constitutional instruments. Along the way, he has managed to dispose of a number of myths about the writ, showing that it was an instrument of prerogative power which could be dislodged. As a major work by an early modern historian, this book will have an impact in its historical field. However, Halliday's research in this field has also had a significant influence on law. For in *Boumedienne v. Bush* in 2008⁸³, the US Supreme Court cited an article written by Halliday and G. Edward White⁸⁴, in a case which held that the writ of habeas corpus - which has constitutional status in the US - was available to detainees at Guantanamo Bay. Halliday's research in the archives disproved the state's contention that at the time the constitution was enacted, the writ could only be used to free those held within the king's realm. This legal history led to a reinterpretation of a central part of US constitutional law, and paved the way for real prisoners to get access to a court.

Michael Lobban
Professor of Legal History
Queen Mary University of London
School of Law

⁸² Paul D. Halliday, *Habeas Corpus: From England to Empire* (Cambridge MA: Harvard University Press, 2010). I reviewed this book at greater length in *International Journal of Law in Context*, vol. 7 (2011), pp. 257-69.

⁸³ *Boumedienne v. Bush* 553 US 723 (2008).

⁸⁴ Paul D. Halliday and G. Edward White 'The Suspension Clause: English Text, Imperial Contexts, and American Plantations,' *Virginia Law Review*, vol.94 (2008), pp. 575-714.