

## Recent Trends in Legal Historiography

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My commission is to say something about the directions in which historians of American law have been moving in recent years. This is harder to do than it sounds, because there has never been a time when so much was going on in American legal history as now, or such a diversity of approaches to writing it. Legal historians, who have always had trouble defining their discipline, are now divided even on the issue of its existence—of whether legal history is coherent enough to be a field on its own. I am not going to attempt an exhaustive descriptive catalogue of recent trends, but would like to pick out from this tangled bank at least some of the more colorful and important specimens.

What is happening in this field at the present time has itself to be looked at historically to be understood. When the writing of history first got going as a profession in this country in the 1880's and 90's, there were no disputes over the aims and methods of legal history. The historian's job was to trace legal doctrines and institutions of the present back to their earliest discoverable origins, and then to show how they had evolved from those origins into their most recent and presumably most highly developed forms. Probably this is the conception most lawyers, and even most law teachers, still have of the legal historian—as someone who can tell you where the grand jury, or the writ of certiorari, or the defense of duress to a contract action, *came from*—that is, when some recognizable ancestor in form or name put in its first appearance.

Such a view of history implies that the best way to understand how a form assumed its present shape is to look at its prior shapes. This view made sense in light of the conceptions that late 19th century lawyers and historians held of law. One idea was that the law was the most careful and detailed expression of a civilization's evolving customary ideals: we study law because it provides the best evidence available of what people over time have held to be good. The other idea was—or at least seemed so at first glance—to be completely different. This was that the law was the rationally designed product of generations of professional men (judges assisted by lawyers), a science of right

behavior constructed by experts in that science. Lawyers sometimes combined the two theories, holding that law had been crystallized custom in ancient times, but had developed into a rational product, a science, upon the emergence of a professional judiciary.

In practical effect it did not much matter whether a legal historian believed that the law gurgled spontaneously upwards from the culture and deposited itself in the judgments of courts, or was carefully extracted from the culture by black-robed legal scientists. Separately or in combination, both ideas led to the same conclusion, that the only materials one needed to consult for the study of legal history were legal materials, the formal, internal products of the legal system. For historians employed by law schools, this defined legal historiography in practice as the study of the development of case-law doctrine: and thus defined, legal historiography had professional purpose as well as an academic one: the study of the evolution of rules over time could reveal the long-run tendencies of a body of doctrine, could weed out the occasional judicial error by identifying the stable and enduring core of scientific principle embedded in past cases.

But after 1900 these ideas of law and the historical methods they justified came increasingly under siege. The besiegers were led by Charles Beard and the other Progressive historians, and supplied ammunition by some distinguished lawyers, notably Holmes. They argued, basically, that a purely "formal" or internal historiography, studying the domestic details of the legal system, was a complete waste of time. The law of any given moment simply registered the outcome of political conflict among economic interest groups. Legal doctrine might rationalize these victories or compromises among economic forces in traditional language; but the language was merely a smokescreen for what was really going on. Now plainly, someone who thinks that the law is nothing more than a murky cover for something else much more important will think legal materials only worth studying for what they have to reveal about the something else; and will ordinarily think them rather bad evidence of the other thing because of their overlay of traditional and technical camouflage.

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Under these attacks the pressures to abandon conceptions of history as the development of legal-political forms became overwhelming, and most historians caved into them completely—leaving constitutional doctrine (which had been the staple of university history curricula before 1900) to the political science departments, and legal doctrine to the law schools. Thereupon a great gulf opened between legal and general historiography, which separates them to this day despite increasingly energetic bridging expeditions.

Yet intellectually isolated though they were, the law schools were not completely immune from the contagion of pragmatic thought that Morton White has called “the revolt against formalism,”<sup>1</sup> which infiltrated legal education through Holmes’ skepticism, Pound’s sociological jurisprudence, and legal realism. By the 1930’s and 40’s even those law teachers who could not digest—as for obvious reasons very few could—the raw materialism of the Progressive argument that law was nothing but disguised economic struggle would concede that it was not a rationalistic creation evolving in sublime self-determination, autonomous of social influences, but a product of the “felt necessities of the time.”<sup>2</sup> If that were so, even if the basic *task* of legal history remained the traditional one of explaining where upper court rules came from, would not the *methods* have to be altered? Would not explanations for the content of the rules of any particular time have to be looked for in the entire social context, a context of which the prior case law tradition was doubtless a part, but only a part? If the historian searched the legal context only, would not his work continue to present the misleading and now exploded view that doctrine develops genetically out of prior doctrine?

Maybe so, but carrying research beyond the internal details of the legal system was a lot easier to suggest than to execute. For one thing, analyzing case law doctrine had come to be seen as the core enterprise of legal scholarship, and members of law faculties who stray far from that core are still likely to be asked, not always in a friendly way, “What has *that* got to do with law?” Moreover, if the whole wide world outside the law is potentially relevant to

explaining it, how do you go about finding the fragments of that world most likely to yield explanations? Where do you start to look? Except for the reductionist economic interpretations, there were no social theories of law available, nothing to suggest what might be productive hypotheses for research. The moment legal scholars recognized the importance of social context as an influence in shaping legal rules, traditional methods and occupational roles were in danger of being swamped by context.

But innocence once lost cannot be regained. Except in the Eden of textbook history, there could be no return to the simpler days when the begetting of the action on the case out of the writ of trespass sufficed to account for modern rules of tort liability. When the assumptions underlying the way a discipline has been practised are undermined, either the practice or the assumptions have to change. Legal historians have aspired ever since either to justify in new terms the old enterprise of internal legal historiography, or to find a comfortable place for the legal historian in the writing of social history. In the space remaining I should like to set out my impressions of the diverse ways in which legal historians have been trying to make theirs a coherent and useful discipline in the face of the Progressive challenge.

One response to Progressivism, interesting only because of the influence it had, was that of Dean Roscoe Pound. Pound acknowledged—indeed on occasion celebrated—the fact that law existed in a social context, but then refused to concede that its content was at all determined by that context. The fact was, he asserted, that American judges had held the law steadily in the groove of a “taught tradition” of common law doctrine, proof against the influence of “all manner of economically or politically powerful interests.”<sup>3</sup> If true this would certainly have validated purely doctrinal histories of American law; but it no longer holds up. Two generations of historiography influenced by the Progressives (much of it synthesized in Lawrence Friedman’s recent *History of American Law*<sup>4</sup>) has demonstrated that a good deal of our law is in fact readily explainable as the outcome of Beardian interest-group pressures.

Another way of defining the field of endeavor for legal historians was simply as an

<sup>1</sup> M. White, *Social Thought in America: The Revolt Against Formalism* (2d ed. 1957).

<sup>2</sup> O. W. Holmes, Jr., *The Common Law* 5 (Howe ed. 1963).

<sup>3</sup> R. Pound, *The Formative Era of American Law* 84 (1938).

<sup>4</sup> (1973).

occupational speciality: as people trained in law, their job was to discover and explicate the legal artifacts of the past. By itself this did not of course add up to a conception of history, since it did not suggest why it might matter to anyone to crack any particular cluster of technical nuts, what all of this knowledge of detail was being accumulated *for*; and the risk run in such ventures is always that of triviality.

Yet as it turned out the explication of primary materials—editions of or monographs on legal manuscript sources of the colonial period—which has been the main ambition of some of the most distinguished work in American legal history since 1930, was enormously productive. So little research of any kind had been done on these materials that the most basic facts about their general character and even sometimes their existence were unknown; and the technical quality of such little work as had been done set an extremely low standard. The colonial historians began to map the materials and raised the standard to one of excellence.<sup>5</sup> Moreover it is not really fair to reproach the generation that began writing in the 1930's for not coming up with a coherent idea of the role of law in history at a time when the majority of the historical profession thought it had little or no role of importance. Where historians still *were* talking about problems to which technical legal knowledge was relevant, as were the Andrews/Osgood students of British imperial administration of the colonies, the lawyers were able to bring their specialty to bear to correct errors or fill in gaps in the general history.<sup>6</sup>

This role of auxiliary technical specialist has in fact become an increasingly useful one since historians began, in the last decade, to pay renewed attention to legal doctrine and institutions—since, for example, they began to take seriously the legal and constitutional arguments of the Revolutionary and Constitution-making periods instead of dismissing them as the propaganda of economic interests. Here one of the jobs that a specialist knowledgeable in law can most valuably do is to tell us whether a legal argument has a conservative or radical cast,

<sup>5</sup> For an excellent critical survey of this work, see Johnson, *American Colonial Legal History: A Historical Interpretation*, in *Perspectives on Early American History* 250 (A. Vaughan & G. Billias eds. 1973).

<sup>6</sup> The outstanding example is J. Smith, *Appeals to the Privy Council from the American Plantations* (1950).

whether it is a stock one for its time or pregnant with new implications.<sup>7</sup>

A third approach to legal history, which like the technical one produced some useful work while leaving the main issues of conceptualization unaddressed, has been through judicial biography, individual or collective. The biographies have usually been of judges (there are still hardly any competent biographies of practising lawyers who did not become judges), or of whole benches of judges, invariably judges of upper courts. Once the judge's pre-court career was briefly disposed of, these biographies quite often turned out to be the standard doctrinal histories all over again, but doctrinal histories given focus and coherence by being tied to a man's career.<sup>8</sup>

But it is only when doctrinal history comes to be treated as a species of intellectual history that some real progress begins to be made toward spelling out the relationships between legal and general history. In this perspective doctrine is seen as embodying the modes and categories of a specialized branch of thought, the professional consciousness of lawyers. Recall that the Progressive challenge was, in effect, "Who cares about the particular gimmicks lawyers pull out of their grab-bags to rationalize the social change produced by others?" Those who have treated legal as intellectual history would probably respond that lawyers' modes of thought are as interesting as those of philosophers or writers, and of special interest because their aim is to harmonize past and present, to justify present necessities as mandated by tradition; because unlike academic thinkers lawyers are often at the center of political and business affairs and often the most articulate group of that center; and finally because legal consciousness is active as well as reflective—that is, the way lawyers think influences the way a lot of other people think.

Probably the most ambitious attempt of this kind was that of our foremost intellectual historian, Perry Miller, in his book on *The Life of the Mind* in 19th century America.<sup>9</sup> The attempt is

<sup>7</sup> A classic of this type is Thorne, "Dr. Bonham's Case," 54 *L.Q. Rev.* 543 (1938), which has been repeatedly put to use by political and intellectual historians.

<sup>8</sup> On judicial biography generally, see the contribution to this conference by Botein, at 456.

<sup>9</sup> P. Miller, *The Life of the Mind in America: From the Revolution to the Civil War* (1965).

ultimately disappointing because his portrayal of the legal mind drew almost exclusively on the statements of lawyers in their ceremonial roles, as speakers at bar conventions or memorial dinners and as writers for popular journals. Only a historian prepared, as Miller was not, to draw also upon the documents of their working lives could have seen how little connection the great issues of the ceremonial rhetoric, such as the issue of whether to codify the common law, had with anything they did for a living. This is not to say that the rhetoric was not worth studying;<sup>10</sup> only that by studying it in isolation Miller missed the chance to ask the really interesting question of why the rhetoric and reality were so far apart, why lawyers engaged in such vehement public debates on issues of apparently so little practical importance to them.

The more common legal materials for intellectual history are, of course, the case reports. The danger lurking in such materials for the historian trained in law is that they will tempt him to use them as an occasion for what he does best, critical analysis of judicial reasoning; with the result that the new intellectual history of law may come to bear a disheartening resemblance to the old doctrinal history. The successful studies of past doctrine have avoided this danger by explicitly acknowledging the historicity of past doctrine, recognizing that it cannot be treated as if it were the same thing as, or an underdeveloped version of, the doctrine of our own time. When the judges of 1820 said "property" or "contract" their meanings were quite unlike ours, and syllogisms we would think eccentric struck them as obvious. The aim of a sound intellectual historiography should be the reconstruction of past reasoning modes as they were understood by the lawyers who used them.<sup>11</sup>

The man who pioneered this approach in America, though he did not think of himself as a legal historian, was Karl Llewellyn, who brought to legal scholarship a remarkable appreciation for the details of deciding appeals as a craft, and thus demonstrated the potential of recasting legal history as the history of a craft

technology. His enduring contribution is the concept of "period-style", the notion that judicial decision-making has tended to be dominated for 30 or 40 years at a time by successive paradigms of legal reasoning (a "Grand Style" and a "Formal Style").<sup>12</sup> Some of those who have recently put to work Llewellyn's ideas of period-style like Morton Horwitz and William Nelson see describing past modes of legal reasoning less as a kind of technological history than as a branch of the history of political thought—of changing ideas about the ways in which institutions of government ought to go about ordering social and economic life.<sup>13</sup> Eugene Genovese's work on the law of slavery combines a similar approach with a Marxist perspective, analyzing law as ideology, a means whereby ruling groups attempt to justify their domination.<sup>14</sup>

Once historians begin treating legal doctrine as a specialized type of political thought, the pressure builds up to push inquiry beyond strictly legal materials. It is hard to engage in describing different paradigm structures of legal thought without getting inquisitive about the conditions under which different styles come to flourish. Similarly, it is hard to study legal change as a set of intellectualized responses to social change without wanting to know what experiences it is responding to; knowing only the response is like listening to one side of a telephone conversation, with all its tantalizing ambiguities about what the other side is saying.

But as soon as you start thinking about legal and social change as a conversation, a relationship of interplay, even the familiar legal side seems suddenly very problematic. If the case law is a set of intellectualized responses, *whose* responses? Who is talking on that telephone, anyway? We tend to avoid this problem by concealing it under some set of phrases reifying the actual persons involved into something called "the law"—"the law promoted economic growth in the 19th century"; "the law discouraged divorce." But what, socially speaking, is this law?

<sup>10</sup> On this point I think I would differ with Lawrence Friedman's penetrating review essay on this book, "Heart Against Head: Perry Miller and the Legal Mind," 77 *Yale L.J.* 1244 (1968).

<sup>11</sup> Duncan Kennedy's work in progress on "classical" legal thought in the late 19th century promises to surpass any previous studies of this kind.

<sup>12</sup> K. Llewellyn, *The Common Law Tradition: Deciding Appeals* 36ff (1960).

<sup>13</sup> Horwitz, "The Emergence of an Instrumental Conception of Law," 5 *Perspectives in American History* 287 (1971); Horwitz, "The Rise of Legal Formalism," 19 *Amer. J. L. Hist.* 251 (1975).

<sup>14</sup> E. Genovese, *Roll, Jordan, Roll* 25-49 (1974).

Take for example the standard datum, the appellate case; what is that? The decision of a dispute litigated to appeal, to be sure, but what else? The court may be laying down a vital principle of public policy, or a decision of significance only to the immediate parties before it, and maybe not of significance even to them except for its delay or nuisance value. The forms, categories, analogies, and metaphors rationalizing the decision may be deeply revealing of underlying tendencies of social life; they may have been gathered from some stagnant backwater of the common law, may express the ideology of a powerful class or group; they are just as likely, depending upon the influence of the judiciary at the time, to express the incidental thoughts of a minor government functionary. But if you look at the case alone, there is usually no way of telling which if any of these things you are seeing. We used to think there were two realms: the realm of law and the realm of social context. On closer inspection "law" seems to dissolve and merge into context; we have been in the swamp all along without knowing it.

In the absence of guiding theory, it has not been easy to find solid pathways through the swamp. What legal historians needed, at least as a start, was to break the habit of treating all cases alike and all law as cases, to find social categories that would not crumble in their hands. One of the earliest and most successful new conceptions of the tasks of legal history appeared in the "public policy" studies in the 1940's, the histories of 19th century state governments by the Handlins, Louis Hartz, and others.<sup>15</sup> These histories, initially conceived out of an impulse to dispel the popular belief that America had enjoyed a laissez-faire political economy until the New Deal, took as their focus attempts by government to regulate social and economic behavior. In this scheme court decisions stood on the same footing as legislation and administration: the object of inquiry was the total scheme of regulation. The study of state policy began outside the law schools and was not actually recognized to be "legal" history at all until a law professor, James Willard Hurst

<sup>15</sup> This literature is surveyed in Lively, "The American System: A Review Article," 29 *Business Hist. Rev.* 81 (1955); and Scheiber, "Government and the Economy: Studies of the 'Commonwealth' Policy in Nineteenth Century America," 3 *J. Interdisc. Hist.* 135 (1972).

of Wisconsin, picked up its methods and through the unassailable distinction of his work gave them a respectable place in legal scholarship.<sup>16</sup>

The public policy school, in effect, redefined law as government. Another way of looking at law, for the purpose of finding sensible subjects of research, is to think of it as the work of lawyers. It is both natural and useful that while we are waiting for more sophisticated conceptions of the social aspects of law than was provided by the old model of doctrine-in-its-social-context, historians should seize upon the one subspeciality of the field whose coherence is beyond question, studies of the legal profession. One has only to call to mind the work of Nash and Gawalt on the social status of lawyers, Bloomfield and Auerbach on the relations of the profession to the public in the 19th and 20th centuries, Ellis on law reform, Calhoun on the frontier bar, Stevens on legal education, Klein and Harbaugh on practitioners' careers, and the splendid editions of documents from the practices of Adams and Hamilton, all published within the last fifteen years, to conclude that this has lately been the boom sector of legal historiography.<sup>17</sup>

So far I have chiefly been describing the pressures impelling the attention of historians whose starting point is the study of internal legal materials outward towards their social context. There was another and very different set of responses to the Progressive challenge, which was to reformulate legal history as social history—to write about law from the point of view not of the professionals who operate the

<sup>16</sup> For a bibliography of Hurst's work, see 10 *L. & Soc'y Rev.* 324 (1976).

<sup>17</sup> References are to: Nash, "Philadelphia Bench and Bar," 7 *Comp. Studies in Soc'y & Hist.* 203 (1965); G. Gawalt, *Massachusetts Lawyers: A Historical Analysis of the Politics of Professionalization, 1760-1840* (unpublished diss. Clark Univ. 1969); M. Bloomfield, *American Lawyers in a Changing Society, 1776-1786* (1976); J. Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* (1976); R. Ellis, *The Jeffersonian Crisis: Courts and Politics in the Young Republic* (1971); D. Calhoun, *Professional Lives in America: Structure and Aspiration, 1750-1850* (1965); Stevens, *Two Cheers for 1870: The American Law School, 5 Perspectives in American History* 403 (1971); M. Klein, *The Politics of Diversity: Essays in the History of Colonial New York* 129-77 (1974); W. Harbaugh, *Lawyer's Lawyer: The Life of John W. Davis* (1973); *Legal Papers of John Adams* (K. Wroth & H. Zobel eds. 1965); *The Law Practice of Alexander Hamilton* (J. Goebel et al. eds. 1964- ).

system but the outsiders who consume it. This emphasis on the social effects of (as opposed to social influences upon) the specialized activities of legal professionals has produced several sorts of studies. One I have already mentioned: studies of government regulation of the economy; the towering work in this tradition is Hurst's massive book devoted to asking what 19th century law did to the Wisconsin lumber industry. (The answer: it permitted 30 million acres of standing timber to be cut to exhaustion in little more than 30 years.)<sup>18</sup> Another type of study might be said to concern law at the field level, at its ordinary contact points with citizens: one thinks here of Friedman's and Laurent's work on the routine of trial courts, Lane's on the police, Rothman's on asylums.<sup>19</sup>

A third kind of external approach seeks to account for the role of law in bringing about major social change. This approach represents, of course, a modification of the pure Progressive position that law is only a mask for something else; it assumes there are some identifiable things—Professor Friedman calls them “structural variables”<sup>20</sup>—about the legal system that can be primary determinants of social change. The problems of method involved in trying to form verifiable hypotheses about the social effects of law are so daunting that they have yet to be squarely faced. To take a familiar example, it is frequently asserted that the adoption by 19th century courts of the “fellow servant rule,” insulating employers from liability for harms negligently done one employee by another, acted as a kind of judicial subsidy to young 19th century industries like the railroads, and thus helped to promote economic growth. To carry this proposition beyond assertion would not be easy. Granted that judges *thought* the rule was necessary to cut costs of infant industry, were they right? There is first of all the problem of establishing linkages be-

tween the upper court rule and the wallets of employers: trial judges or juries may have ignored the rule; paternalistic employers may have compensated injured workers anyway; the rule may have made no difference because even under a contrary rule requiring compensation workers could not afford lawyers or the risks of suing their employers. Even if one could establish direct linkages, one would be a long way from establishing anything about effects on economic growth—some historians even doubt the railroads themselves, much less indirect legal subsidies to them, were necessary to economic growth in 19th century America.<sup>21</sup>

Nonetheless it is heartening to see social and economic historians, after generations of writing off law as irrelevant, renew their interest in it. At any given time a legal system provides a limited variety of forms through which transactions that the state is used to expedite must be channeled—land transactions, rules of inheritance, enforceable contracts or commercial instruments, corporate forms of business organization. It seems reasonable to suppose that to some limited extent the types of form available will channel social activity and affect the ways in which people think of property rights, fairness in marketplace dealings, the risks and advantages of starting new ventures. Investigating this sort of issue happily combines the internal with the external study of law, intellectual with social and economic historiography.

If I had to make some guesses, based on current trends, at the directions in which legal historiography is likely to go in the near future, I should guess, first, that the older sort of doctrinal history, done for its own sake rather than to solve some special technical problem of general interest to historians, is probably on its way out. This work could flourish only in a climate of isolation from the rest of the university; the rapid recent influx into law schools of law teachers with Ph.D.'s as well as LL.B.'s, and the publication explosion in the newer modes of legal history have ended that isolation. There is still the danger of a backlash. The law schools tolerated history when Deans Langdell and Ames thought it contained the principles of legal science; when we start repeating Maitland's aphorism that legal history is history, not law, will they have any further use for us? The question is the more urgent because percep-

<sup>18</sup> J. W. Hurst, *Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin, 1836-1915* (1964).

<sup>19</sup> Friedman, “A Tale of Two Courts: Litigation in Alameda and San Benito Counties,” 10 *L. & Soc'y Rev.* 267 (1976); F. Laurent, *The Business of a Trial Court: 100 Years of Cases* (1959); R. Lane, *Policing the City: Boston, 1822-1885* (1967); D. Rothman, *The Discovery of the Asylum: Social Order and Disorder in the New Republic* (1971).

<sup>20</sup> Friedman, *Some Problems and Possibilities of American Legal History*, in *The State of American History* 3 (H. Bass ed. 1970).

<sup>21</sup> See R. Fogel, *Railroads and Economic Growth* (1964).

tions of the incredible complexity of the linkages between legal and social change are likely considerably to narrow the scope of our research. Like the New Social History of colonial America, much of the New Legal History will focus on short time periods and small localities. The only hope for saving such work from monographic obscurity is if those who do it see their task as helping to construct larger social theories of law—what we most need now is careful empirical research and daring generalization.

The older modes concentrated on those aspects of the legal order that appeared to be *different* from everything else in society; the newer ones are likely to emphasize similarities and connections—to compare courts to other

means of dispute resolution and norm creation, to study legislative as well as judicial reasoning, to compare legal with other social sanctions, lawyers with other professionals, jurisprudence with philosophy and the social sciences. And, finally, we can look forward to comparative study of another kind—though virtually nothing like this has yet appeared—in which the parts played by law and lawyers in American society will be compared to other societies, especially those of Europe and the other New Worlds of Canada and South America. There probably has never been a time, unless it was at the very beginnings of professional legal historiography in this country a hundred years ago, when our field was so rich in possibility, and when it was so exciting to be in it.