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The Nature of Legal History as an Academic Discipline

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I. Introduction

In this presentation, I would like to talk about the nature of legal history as an academic discipline. My presentation is drawn from several historigraphical articles I have written, in particular, "Studying the Past: The Nature and Development of Legal History as a Academic Discipline," 31 J. Leg. Hist 101-128 (2010) and "English Legal History and Interdisciplinary Legal Studies," in Anthony Musson, ed., *Boundaries of the Law: Geography, Gender and Jurisdiction in Medieval and Early Modern Europe* (Ashgate, 2005). These works and other related ones are available on my SSRN website. John Burrow's book, *A History of Histories: Epics, Chronicles, Romances from Herodotus and Thucydides to the Twentieth Century* (New York, 2008) has been a catalyst for much of thinking about historiography and legal history.

In exploring this topic I would like to touch on two issues. First, a fundamental and critical initial issue: what is legal history. Second, after offering some ideas on what it is, I would then like to offer some thoughts on the different kinds of legal history. Having put forth some ideas about its nature, I would like then like to talk a bit about the relationship, if any, between legal history and legal theory. My focus will be on English legal history since that is my primary scholarly field.

II. What is Legal History

Somewhat perversely, I will start with what legal history is not. While some might characterize English legal history as interdisciplinary, it seems different than the numerous "law ands" that populate the intellectual landscape. There is a difference between "legal history" and "law and history." First, it is not clear that there is any "boundary" (a favorite commentator word) between the two different fields, in this case law and history. In thinking about legal history scholarship, the use of the typical terms, "inside" and "outside" (of law) seems inappropriate. Scholars of different orientations work together and use each other's work. Second, although the focus of much of the scholarship has internal characteristics, which some consider myopic, good scholarship cannot ignore contemporary mores, customs, and context.

English legal history also seems dissimilar from the "law and" phenomena as the notion of the decline of law's autonomy seem irrelevant to legal history. The endeavors of legal historians are not the product of any dissatisfaction or dysfunction relating to law as an independent discipline nor of its unfashionability. Moreover, most of the current criticisms of legal interdisciplinarity scholarship seem inapplicable. Legal history is not imperialistic, parasitic, and scavenging nor is it, as Brian Leiter characterized interdisciplinary scholarship, 'intellectual voyeurism': superficial and ill-informed treatment of serious ideas apparently done intellectual 'titillation' or to advertise, in a pretentious way, the sophistication of the writer." Nor can English legal historians be charged with the high sins of "presentism" and anachronism. They have not engaged "in the artful manipulation of historical sources to serve adversarial positions in contemporary disputes," "roaming through history looking for [their] friends."Thus, they are not practitioners of "forensic history," which has led critics to challenge its current use in American constitutional and political theory, labeling it "lawyers history" and "history-in-

law" or more pejoratively, "law office history" and "history lite." None of these criticisms seems relevant in appraising the nature or value of the scholarly contributions to English legal history. Thus, "legal history" is different than "law and history."

But if this is what legal history is not, then what is it? Is it history? Is it law? Or is it something else? I would argue the latter and that it is a separate discipline like jurisprudence or philosophy of law. My rationale follows. For over one hundred years, historians and lawyers, united in their focus on original sources, have engaged in the study English legal history. They have produced a truly successful intellectual tradition and a rich body of scholarship.

An inquiry into the nature of English legal history begins, not surprisingly, with Frederic William Maitland. In his Downing Professor lecture, Maitland took the view that legal history was history and not law. Maitland contrasted law and history and found that "their material, their method, and their logic were incompatible." He noted that history involved comparison, but lawyers focus only on their own system; history requires evidences and law depends on authority and thus there is the temptation to confuse "the logic of evidence" and the "logic of authority;" and lawyers are orthodox, which would be a contradiction in terms for a historian. Plucknett said that "once the professor of law embarks upon legal history he has become a historian, for legal history is not law, but history." The Maitland legacy has persisted in this view as John Baker recently explicitly stated.

But to characterize the enterprise as history rather than law does not necessarily make its practitioners historians. Maitland believed that thorough training in modern law was indispensable to be a good legal historian. Although his memorial tablet in Westminster Abbey calls him a historian and historians have claimed him, Milsom on several occasions emphasized Maitland, the lawyer. In fact, the legal history scholar, whether located in a Faculty of Law or a

Faculty of History, needs to know something about both fields. But this assertion leaves uncertain how much knowledge of history is required by those scholars who emphasize law or knowledge of law by those whose scholarship is more contextual. Perhaps, it depends on the issue being explored. However, whatever the scholarly orientation, some knowledge of legal institutions and doctrine, contemporary context, and the historical nature of institutions are all necessary for competent legal history scholarship. The mixed backgrounds of the contributors to the ongoing Oxford History of Laws of England are an apt illustration. Thus, a legal historian is distinct from both a lawyer and a historian. As Charles Donahue recently noted, 'the legal historian . . . has to be both an historian and a lawyer.'

If so, some reconsideration of the nature of legal history is in order. First, it seems unlikely that it should be characterized as law although the perspective of some legal historians is distinctly legal. But legal history scholarship seems quite different than the typical doctrinal scholarship and courses that have been the traditional focus of the legal academy. Despite the pedigree of Maitland and his successors, I am reluctant to call it history as it requires a significant knowledge of law and legal institutions, at both a conceptual and practical level. Moreover, it seems to be more than just another kind of history. Law is a more formal discipline than seems to be true of the adjectival "others," such as social and political history. But if English legal history is neither history nor law and is different from the "law ands," how should one characterize it? I would argue that it is a distinct intellectual endeavor, separate from both law and history, but one that combines the methodology, objectives, insights, and knowledge of both law and history.

III. The Different Kinds of Legal History

From these early legal historians, notably Maitland in England and perhaps Oliver

Wendell Holmes and Willard Hurst in the United States, legal history as a distinct discipline evolved in diverse ways. Although any taxonomy of its development is an oversimplification, I have divided legal history into three types to facilitate discussion: classical, liberal, and critical. To some extent, each type of legal history builds on and reacts to what preceded it in the revisionist tradition. Moreover, the types should not be compartmentalized and the succeeding types do not replace their predecessors. Each type persists, reflecting different scholarly and ideological perspectives and resulting. Thus legal history has become a pluralistic discipline, although a different one in the United States than in England.

Classical legal history grew out of Maitland's scholarship. It explores the intellectual history of law to understand the development of legal institutions and legal doctrine. The scholarship relies heavily on primary legal sources such as reported cases, actions in the plea rolls and Yearbooks, statutes, and early legal literature. Current scholars have criticized it as internal, instrumental, and formalistic. Although classical legal history is internal to the extent that it is based on primary sources that are legal, it takes several forms and has ceased to be entirely internal and positivist. Much of it involves political, social, and economic contexts, as internal legal sources cannot be fully understood in a vacuum that ignores the external context. Donahue suggested that the distinction between internal and external legal history was a 'false dichotomy'and that good legal history had to be both internal and external. He said further all legal historians are interested in the interaction between law, 'the economy of ideas, the politics and social structure of the society that produces it' as well as 'connections between legal history and intellectual, social, and political history'. As it developed and changed over time, classical legal history became more concerned with 'the history of the law in practice, of legal institutions at work in society.' Classical legal history articulates many ideas and makes use of non-legal

sources. As John Baker has noted, English legal history is "an essential dimension in the social and intellectual history" of England.

Liberal legal history emphasizes individual freedom and equal opportunity. Pragmatic philosophy, progressive politics, and legal realism influenced the development of this type of legal history. Willard Hurst was the pioneer of the liberal type of legal history. Liberal legal history rejected the notion of law's autonomy. Although it uses legal sources, it is predominantly external, focusing not on legal opinions, but, in the words of Lawrence Friedman, the law of society's 'cellar.' Hurst said that 'legal history is a way of studying the general history of the country's character and development. Liberal legal history's dominant characteristic is the integration of law with social and economic institutions and ideas; and to some extent, it engages disciplines outside of law. Today, it is the predominant form of American legal history. Perhaps its mainstream is most accurately characterized as the social history of law. It has become very diverse, ranging from those who study early doctrine and institutions to those who focus on specific subjects such as race and gender.

A more recent type of legal history is critical legal history as in the work of noted scholars such as Morton Horwitz and Robert Gordon. It is a product of the Critical Legal Studies movement and the ascendancy of radical thought in the broader academy. It asserts the 'historical and cultural contingency of law.' Legal concepts and historical ideas about law are contestable and contradictory. Critical legal history is strongly revisionist and attacks traditional juristic concepts and scholarly ideas. Its self-professed aims are to be 'unsettling'and to produce 'disturbances in the field' and to be 'destabilizing and subversive.' Critical legal history views law as inherently historical and with an ideological role. Critical legal history might be described as a sociological history of law. It engages many other non-legal disciplines and draws on ideas

of post-modern theorists and cultural historians.

IV. Legal History and Legal Theory

Both liberal and critical legal history seem to be strongly associated with legal theory. The liberal scholars use history to develop theories about the relationship between law and social change and to understand more completely and correctly a variety of social-legal issues. As a form of social history, liberal legal history may function as a form of legal and critical analysis of law to evaluate the legitimacy of past and present legal practices.1The critical legal historians assert new analytical paradigms, jurisprudence, and political theory. They have used the past to historicize law, believing that understanding 'the meaning of words and actions are to some degree dependent on the particular social and historical conditions in which they occur, and to interpretations and criticisms that are suggested by that perspective.' They reject the liberal tradition in legal scholarship. For example, Morton Horwitz refused to accept the orthodox theory that the foundation of American contract law was late medieval and early modern English law and asserted that, influenced by commercial interests, it developed to facilitate and protect the growth of business, rather than being guided by fairness and equity. Robert Gordon has asserted further that the benefit of the critical approach is achieving fundamental change 'without sacrificing every accomplishment of civilized legalism.'

Of the three types of legal history, the classical tradition has had the least connection with legal theory. From Maitland to present day scholars, it has been stubbornly anti-conceptual. This type of legal history has tended to be jurisprudentially agnostic, eschewing philosophical questions. In The *Law's Two Bodies*, John Baker said 'I am not trying to reinvent legal realism, still less to invent any new kind of -ism, and I am not keen to become involved in deep jurisprudential questions about whether law can logically be derived from cases alone . . . .'

Maitland said, "As to philosophy, that is no affair of mine."

But legal history scholarship raises interesting jurisprudential and conceptual questions. Despite their protests, both Maitland and Baker's work have explored these kinds of subjects. Morever, legal historians such as Brian Simpson, Morris Arnold, David Ibbetson, David Sugarman, and Robert Palmer have undertaken conceptual and philosophical inquiries. Fortunately, I think that current movement of the classical tradition is in that direction, which suggests the possibility of more interaction and collaboration between legal historians and legal theorists.