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# Introduction

ANTHONY MUSSON AND CHANTAL STEBBINGS

On a balmy summer evening in July 2009, delegates from over twenty countries met over a glass of Pimm's in the arboretum of the University of Exeter, an event heralding the opening of the Nineteenth British Legal History Conference – three days devoted to intellectual exploration of the Making of Legal History. The approaches to and methodology of the writing of legal history was for the first time the subject of a major conference with lawyers and historians from common law jurisdictions of the world joining with their civil law compatriots to address the fundamental mechanics of their trade. A stimulating programme of some seventy presentations transcending period and subject specificity – some addressing the theme by means of a case-study, others espousing a particular approach – revealed the diversity and breadth of individual scholars' approaches to legal histiography. Its Catholic nature was underlined by the delegates attending: members of the legal profession, independent scholars, university teachers, archivists, librarians, doctoral students – representatives of every facet of the world of legal history research.

This volume reflects something of the eclecticism of the conference. The chapters, which have been contributed by legal historians from around the world, include the personal approaches of leading exponents, whose extensive expertise in the area has been acquired through decades of archival research. The basic components of a successful legal historian (as Senn asserts) comprise a broad knowledge of the necessary sources and a critical mind when approaching them. Methodology itself is accorded varying recognition amongst the individual scholars, whose approaches range from the conscious to the instinctive.

Legal historians can usually be characterised by whether the focus of their research addresses internal (essentially legal or doctrinal) developments within the law, legal institutions and the legal profession or examines the influences exerted on them by external factors. Rabban points out how legal history research in the nineteenth century contemplated

the influence of external factors on the law, but acknowledges that it was not until the later twentieth century that legal history evolved considerably as a result of researchers adopting methodologies from the social sciences, linguistics, anthropology and other cognate disciplines to interrogate their sources in the pursuit of valuable alternative perspectives.[1] The transformation of legal history through new methodologies and advances in technology (giving rise to digitised, searchable resources and specialised internet sites), which Prest notes has occurred during his professional career, not only yields possibilities for a greater understanding of the subject, but has also led to a growth in the popularity of researching in legal history, particularly by colleagues in other disciplines. Frecknall-Hughes demonstrates how an 'interloper' from the world of business with a background in the social sciences approaches research of the fiscal revolt that confronted King John in 1215, an area of legal history that intersects with her own professional interests in the field of tax. Interdisciplinary or cross-disciplinary research is now positively encouraged in applications for funding and acknowledged in research assessment exercises. But as both Senn and Musson warn, interdisciplinarity must be understood properly as a dialogue between experts in different fields and should not simply entail an uncritical adoption of methods and sources from another discipline. Indeed, legal historians must be prepared to accept that while fresh insights are possible (such as those that can be derived from analysing visual sources) there are limitations to such an approach.

While legal history has embraced the notion that there is more to law than its formal sources, for many the law itself forms that starting and end point. The legal historian's doctrinal knowledge, critical faculties and research skills are especially brought to bear in the production of materials for use by other researchers, be they fellow legal historians, members of the legal profession or academics in other disciplines. Indeed, the important role played by the legal historian in editing legal manuscripts (notably law reports) is often overlooked or underplayed. As Baker and Brand make clear, it is not just a matter of transcription and translation, but making

1 Stuckey and Brand, for example, highlight prosopography as a method or technique that legal historians might usefully employ for achieving data on social phenomena and patterns of interaction among groups of individuals (such as members of the legal profession). A number of papers presented at the conference but not included here demonstrated the advantages and disadvantages of using methodologies derived from other disciplines, notably quantification (Penny Tucker, Rebecca Probert, David Seipp and Henry Summerson), literary theory (Lorie Charlesworth) and music theory (Adolpho Giuliani).

the manuscript sources functional and able to be used as a springboard for further research. This involves a myriad of tasks, such as identifying surviving versions, dating manuscripts and collating texts in differing hands from various locations, correcting infelicities and pointing out discrepancies in texts, highlighting differences of detail and emphasis, identifying the names of persons and places, providing a context for cases and then marrying them up with associated records. Providing a translation of difficult areas of law that reflects contemporary practice and understanding not only requires a scholar equipped with the appropriate linguistic skills, but also demands a commanding knowledge of doctrinal matters, procedures and the personnel of the courts.

The chapters highlight the multitude of legal and non-legal sources that can be drawn on to inform the writing of legal history. They also demonstrate an appreciation of the practical as well as the methodological problems that can surround analysis and interpretation of legal sources. Researchers may be blessed with a wealth of manuscript or printed material in certain jurisdictions and for specific historical periods, but barriers to effective research – whether it be into the legal issues debated in Elizabethan law reports (Baker), Victorian law reform and law making (Stebbings), or the biographies of nineteenth-century judges (Polden) – are presented by practical management of the voluminous records and the sheer time-consuming nature of manual searching (in the absence of an electronic facility).[2] A dearth of available material is equally dispiriting and a considerable hindrance. Irish historians, for example, face evidentiary problems posed by the unfortunate destruction by fire of centuries of Irish public records (Donlan), while those seeking to analyse lawyers' funerary monuments or illuminated legal manuscripts are faced with the desecration, damage and destruction wreaked variously by iconoclasts, robbers and those unaware of their significance (Musson).

Legal history has always been a dynamic subject and the chapters demonstrate how the particular concerns and priorities towards it in individual countries have fluctuated. Methodological approaches adopted by scholars in Australia, New Zealand and Canada (McHugh), post-colonial Ireland (Donlan) and post-war Germany (Senn), for example, have

2 Electronic search facilities are now available for some classes of record, but in order to secure funding, the projects usually have to conform to strict parameters and not only have to be manageable and achievable, but also provide value for money. The opportunities for resource-enhancement funding formerly offered by the Arts and Humanities Research Council (UK) have now been withdrawn.

been heavily influenced by prevailing social and political concerns. The intrusion of the physical sciences on the intellectual debate in the sixteenth and seventeenth centuries (Stuckey) and the social sciences in the twentieth (Rabban) undermined the prevailing dominance that historical analysis of the law enjoyed in the past and effectively relegated legal history to the category of a sub-discipline. Its slightly uneasy position, nestling between law and history, remains a potential source of tension and signifier of professional difference between academic lawyers and academic historians (Prest). As Heirbaut wryly comments, a perception still pertains amongst legal historians of the need to justify their historical work to colleagues in law faculties and seek the approbation of the legal profession as to its value. Stuckey, however, views legal history more positively as a hybrid discipline since exponents of law and history both seek representation of 'authentic' phenomena based on critically analysed evidence.

The crux lies in the significance placed on law and history by the various interested parties and how historical research in the law is understood and used. In this respect, several chapters tackle the relationship between legal historians and the legal profession. They do not investigate the respective positions of legal historians in different countries or the relative esteem accorded them by the profession, but they do highlight both the blurred boundaries and the differences of emphasis between what lawyers and legal historians want to know and how they portray the past, especially the posthumous contributions of members of the legal profession (Prest, Polden, McHugh, Rabban). The lawyer in search of 'truth' requires certainty and the best, most convincing evidence underscored with appropriate justification or legal authority. Legal historians, however, can show that legal 'truth' is no more in the past than in the present and that a historical framework must take account of a number of different legalities. Indeed, they embrace a different kind of truth – a historical 'truth' that accepts uncertainty and appreciates the contingency of legal authority and the sometimes shaky foundations of the law (which lawyers rarely admit). In examining the significance of manuscript case notes in legal practice, Oldham demonstrates how there were real-life practical dilemmas in the eighteenth century with regard to the quantity and quality of law reports and how reliant the justice system and legal profession were (and have become) upon a legal source that was moulded by chance factors. Similarly, Ireland and Polden go where lawyers fear to tread, exposing not only the elements of chance, but also the practical circumstances, the interaction of personalities and the role of incompetence

and other human failings (in the people behind the law) that proliferate and combine to affect the making of case law and professional reputations. It is, moreover, the attitude of the legal profession (and through them, the justice system) towards the legal past (and the presence of law in the past) that signifies a divergence from legal historians, namely when the historical use of and role of law is harnessed for resolution by the standards and authority of today's law in contemporary courts and tribunals (especially, as McHugh shows, in the relation to the land claims of indigenous peoples).

The notion that the purpose of legal history is to understand, restate and reform the law purely on the basis of study of the evolution of doctrine is shown to be limited and dated. As Stebbings concludes, a proper evaluation of the formal sources of law in itself forces a researcher of historical developments in law in the Victorian age (and probably other periods too) to break out of their traditional approach to doctrinal legal history. Moreover, the chapters in this volume reveal that the direction in which legal history is travelling is much more 'how the law works' rather than the traditional 'what the law is', showing a concern for both 'law in action' and 'legal outcomes' (the final decisions emerging from the legal process), together with an emergent field of 'how the law is perceived and received' (and the impact of that on its operation). This does not mean that internal legal history is no longer of any value. While it is fashionable to pursue the external influences on law, nevertheless as Heirbaut maintains, a thorough evaluation of the legal context should not be ignored. This, indeed, is a special task for the legal historian, whose training enables him or her to understand the practical as well as the theoretical operation of the law. As several contributors indicate, it is also important to be aware that what is found through investigation of the legal past is often merely a guideline to what happened, a gloss on the mixed and (to the ordered legal mind) wholly unsatisfactory muddle of reality.

The chapters in this volume are arranged thematically rather than chronologically and provide initially an assessment of sources and approaches to doctrinal legal history, then an examination of comparative methods from various national and historical standpoints, followed by an evaluation of a range of interdisciplinary approaches to the sources for legal history. These chapters attest to the inestimable value that can be placed on accumulated experience – from familiarity with particular source material through time spent in the archives and from the habit of critical legal and historical analysis – and demonstrate that much of the

burden of undertaking legal history research cannot easily be delegated to a research assistant as the science (or social science) model would have us do in order to obtain the money needed to pursue research in the subject today. They also celebrate the diversity present in legal history writing and show a robust underlying discipline to legal history research across the world. Its exponents do not advocate an all-purpose, 'one-size-fits-all' methodology, nor do they avow that one particular technique is more correct than another, though recommendations are made as to best practice in certain fields and appropriate approaches for answering particular legal research questions. Legal historians should not be afraid to adopt a multitude of approaches and experiment in finding different ways to ascertain the 'truth' of the legal past. Continued cooperation across national boundaries and legal traditions and across the different cognate disciplines is a research imperative that the contributors duly acknowledge. Use of a comparative approach to provide a 'strand of cosmopolitanism' and explore the complexity of historical and legal traditions is advocated by Ibbetson (and others),[3] both to avoid excessive national insularity and to explore the relationship between law and the extra-judicial and extra-legal, especially where it is not easily disentangled from official law and established legal order (Donlan).

Finally, the editors would like to express their grateful appreciation to those organisations which generously sponsored aspects of the conference that gave rise to chapters in this volume (the Legal History Forum at the Oxford Faculty of Law; William S. Hein & Co.; the *Journal of Legal History*; and the Royal Historical Society); and thanks to all participants, whose pertinent and insightful questions afforded a stimulating debate both in and outside the conference hall, which itself is the life of making legal history.

*This volume is offered in memory of Brian Simpson, who was to have attended as a plenary speaker, but was forced to withdraw through sudden ill health. His work has been an inspiration for many generations and his death in January 2011 represents a tragic loss to legal history.*

3 The editors note the formation of the European Society for Comparative Legal History, whose inaugural conference was held in the University of Valencia in July 2010. Several contributors to the volume were present and David Ibbetson's chapter was delivered as a paper there.

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# Reflections on 'doing' legal history

SIR JOHN BAKER

When I was asked, some while ago, to give a talk on how I go about 'doing' legal history, it seemed – as these distant invitations always do – an opportunity to be grasped. I was quite interested to hear the result myself. It is, I fear, banal and not very surprising. After due reflection, I have come to the conclusion that I have no easily describable method, perhaps no method at all apart from the indulgence of curiosity. My main thesis here is that there may be some merit in this.

If one were trying to develop a method for doing research in legal history, based perhaps on one's impressions of what others do, there are a number of different approaches to consider. One might simply read what others have written and pick holes in it – there are always holes in anything. This is a rather negative method, but one which suits some temperaments well and is not devoid of value. It is more effective when coupled with sensible positive suggestions for setting the story straight. A second approach might be to pose some fundamental question about law and society, law and economics, or law and something else, or even just law, and then set off to see what can be found by way of a possible answer. This is a more beguiling method, but quite a risky one, because it may be that there is *no* evidence – or insufficient evidence on which to base an answer worth considering – in which case there is a temptation to fill the gaps with speculation. There is nothing wrong with speculation, in lectures and even written works. We all do it. But it is not the same as research. Even if the question posed is a good one, which one would like to have answered, a question which cannot be answered has to be left open and filed in the back of the mind. I will return to the recesses of the mind later.

The third approach, which is closest to my own, and in my case may owe something to a passing youthful interest in archaeology, has been to delve into the available sources first and see what kinds of question they raise or might answer. Now that I am close to retirement I can safely confess that this is completely out of kilter with the current thinking of

our paymasters. I was fortunate to spend most of my career before the need to participate in research assessment exercises, and I have never applied for a research grant. When expenditure needs to be accounted for, rapid results are needed – or, at any rate, visible results. An applicant for a grant is supposed to indicate what is hoped to be proved before knowing whether there is any evidence to be had – and I am told by experts that in practice it is really only practicable to apply for grants to prove what has already secretly been discovered. I have benefited from the freedom to collect material at random over a long period of years, stuffing notebooks and wearing out many pencils, until it became necessary to introduce finding aids to access my own notes. I was especially lucky to be able to read miles of plea rolls in central London,[1] an exercise which did not require grants, though admittedly I lacked the immense advantages of digital photography and the internet resources which have so transformed record research in the last few years. I was also fortunate to be able to buy seventeenth-century law books at a time when they could be had for a few pounds each.[2] This is no trivial point: there is a world of difference between having books at one's constant beck and call, at any time of day or night, and having to order them up in libraries; the increasing inability of young scholars to build up libraries of the old kind threatened at one time to become a serious obstacle to research in legal history. The problem has been largely solved now by means of digital photography and the internet, though I wonder whether people will ever really find screens as comfortable to use as pages which can be turned.[3] Legal research in particular often requires several books to be open at once, and split screens are not well suited to easy reading.

When I started looking at manuscript reports and year books, in the 1960s, I thought that only about 1 per cent could possibly be of interest to anyone today – and even that 1 per cent was pretty obscure and

1 In the original Public Record Office in Chancery Lane, now part of King's College London. The removal of the records to the less accessible repository at Kew was a serious blow to scholars. The establishment at Kew is often called the National Archives, but this is a solecism. The National Archives is the administrative organisation which oversees the archives, besides its other responsibilities; but the physical repository, the 'office' where records are produced, is still in law the Public Record Office.

2 With the exception of the year books, which were always more expensive. For them I had (in my London days) to venture down to the Inner Temple, where at one time they were on the open shelves. The problem was solved by the relatively inexpensive reprint by Professional Books Ltd.

3 It has to be admitted that when it comes to transcribing from a book, the task may be easier to achieve with a photograph in a split screen.

inaccessible. And when I started looking at plea rolls, in the same period, I remember thinking I would never understand more than perhaps 5 per cent of them. I was wrong on both counts, though not entirely so. If we find the greater part of the law reports and legal records of the past useless and uninteresting, that may tell us as much about ourselves as it does about the materials.

We have, for instance, become interested in contract and tort to an extent which lawyers before the nineteenth century would have thought absurd – not because either was unimportant, but because litigation in those areas was resolved by applied common sense and required only practical knowledge. We find ourselves poring over a tiny core of materials, reading between the lines to uncover the unspoken assumptions about questions we address every day in our own law schools. We may even, in the process, forget that our leading cases – such as *The Case of Thorns* (1466), or *Pykeryng* v. *Thurghgood* (1532), or *Slade's Case* (1602), or *Weaver* v. *Ward* (1616) – were not about the substantive law of contract and tort as we know it, but about procedure and pleading. The difficulty, of course, is that litigation in every age throws up myriad questions of form and procedure – or, in the present day, minute points of statutory or regulatory interpretation – which are intellectually uninteresting and essentially ephemeral. This accounts for our problems with the year books, which are largely about procedure, and the plea rolls, miles of which are simply entries in common form. But I would suggest that we cannot properly understand anything of the earlier common law unless we understand the dominance of form and procedure, and perceive the limitations which the procedural framework placed on the questions which could be asked at the time and therefore on the questions which can be answered now.[4] On this footing, our apprenticeship should begin, not with Google searches (or the printed equivalents) on keywords generated by our own preconceptions, but rather with much reading of cases which seem to be of no conceivable interest and with much struggling through records to understand what they can tell us and what they cannot. Ideally, we need to be able to switch our minds over to the same thought processes as the lawyers of the period in which we are working – and, of course, to be able to switch back again.

4 This is no new discovery, but its significance has been central to all our work since 1967: S. F. C. Milsom, 'Law and Fact in Legal Development', *University of Toronto Law Journal*, 17 (1967), 1–19; S. F. C. Milsom, *Historical Foundations of the Common Law* (London, 1969; 2nd edn, 1981).

This is not the time to digress on the shortcomings of the two forms of evidence I have mentioned, let alone the third and still badly neglected form – the doctrinal literature generated by the inns of court – or the yet more neglected private materials such as correspondence, opinions and precedents.[5] The legal archaeologist will not overlook these, for periods in which they may be available; but I will stay with the first two. One does not need to spend much time working on year books and law reports before discovering that some of the most illuminating material has still not been printed. That does not mean we should lay aside the printed books. On the contrary, they must be always within our reach, for they were the principal medium of transmission in the past. In understanding what Coke made of year-book cases, we do not need to know that there are better year-book manuscripts of which Coke was unaware. Moreover, in understanding the arguments based on cases within our law reports themselves, we may safely confine our attention to the texts which they were using. But in trying to find out how the law developed in the year-book period, we need the best evidence we can find and should not limit ourselves to what was available to Coke or the law reporters. That was Maitland's teaching, and it is the reason why Maitland devoted his declining years not to writing monographs but to editing the year books of Edward II. The same observation obviously applies to reports from later periods, although they have only begun to attract editorial attention in our own time.

Without modern editions, it is exceedingly difficult to exploit previously unpublished case law to the full.[6] First, one has to find the cases relevant to one's purpose, if there are any, often without the aid of indexes, in manuscripts scattered between Cambridge and California; next one has to weigh the imperfections in the texts, collating variants where available, and attempt to supply their deficiencies; and then one has to evaluate

5 For some preliminary reflections on all of them, see J. H. Baker, *The Law's Two Bodies* (Oxford University Press, 2001).

6 Even when there are modern editions, it is sometimes necessary to have recourse to the manuscripts. Two significant examples of omissions from the printed year books may be given from my own experience. A note of the creation of new serjeants in 1388, which contains the first references to three of the inns of court as legal societies, was omitted from the Ames Foundation edition of *12 Richard II*: see J. H. Baker, *LQR*, 98 (1982), 184–7; J. H. Baker, *The Order of Serjeants at Law*, SS, Supplementary Series, 5 (London, 1984), p. 256. And a series of reports of criminal cases at Newgate *c.*1315–28 was studiously omitted by editors of the Selden Society *Year Books of Edward II*, although they occur in the manuscripts which they used, presumably because they did not conform to their notions of what year books should contain: J. H. Baker, 'Some Early Newgate Reports' in C. Stebbings (ed.), *Law Reporting in England* (London, Hambledon, 1995), pp. 35–53.