

1

The Need for Legal History

‘The only direct utility of legal history ... lies in the lesson that each generation has an enormous power of shaping its own law. I don’t think that the study of legal history would make men fatalists; I doubt that it would make them conservatives. I am sure that it would free them from superstitions and teach them that they have free hands’.

Frederic W Maitland, ‘Letter from Maitland to AV Dicey, c. July 1896’, Quoted in C H S Fifoot, *Frederic William Maitland* (Harvard University Press, 1971) 143.

I Introduction

This book is addressed to you as law students and prospective law students, and seeks to tell you what you are unlikely to be told as part of your law degree, course or examination. It provides the ‘back stories’ of some of the main topics that you are likely to study during your degree. It will explain where the common law comes from and will explore the early origins of some of the main subjects that you will study on your degree such as constitutional law, land law, contract law, tort law, criminal law and the law of equity and trusts. It is a prequel to the conventional law degree. This book is designed to give you a head start and should mean that your study of the current law makes more sense.

The chapters that follow tell some of the main stories of the history of English law. They focus on stories told about the origins of the common law, tracing elements of the development of English law from around the time of the Norman Conquest to the outbreak of the Civil War in the Stuart period. Before we time travel through the centuries, this chapter and the following chapter pause to explore why a historical approach to law is needed and what it entails. You might want to skip these chapters for now and begin with Chapter 3, which starts our collection of stories about the origins of the common law. However, the discussions in these chapters are necessary because most introductions to and accounts of English law do not take a historical perspective.

On the face of it, it is perfectly reasonable that law schools ignore history. It is unclear why law students should bother looking at history. Every generation thinks that the challenges they face are unique. We are constantly being told that the legal, political,

social, economic and moral problems that we face are unprecedented. Law students are encouraged to look towards the future, not back at the past. History is simply the study of out-of-date law.

The role of the law student is to understand, critically evaluate and apply the law as it stands today, not the law from the medieval or Stuart periods, and to suggest changes for the future. The central method of the law degree is what is known as doctrinal or ‘black letter’ legal study – that is, the study of primary legal materials (mainly legislation and case law) in their own terms. The role of the law student is to develop a thorough knowledge of the law as it applies today. Law schools train you to become jurists. Lord Goff summed this up well in an article:

The prime task of the jurist is to take the cases and statutes which provide the raw material of the law on any particular topic; and by a critical re-appraisal of that raw material, to build up a systematic statement of the law on the relevant topic in a coherent form, often combined with proposals of how the law can be beneficially developed in the future.¹

However, by not taking a historical approach, many accounts present the common law as being autonomous, natural and universal. This is shown by how often we talk about ‘the law’. It is assumed that the law has always been similar to how it is today and will continue to evolve in a similar manner. This means that it is often accepted that legal change must be slow, piecemeal and conservative, working within clearly laid out parameters. These ideas about the law are perpetuated in law schools and in legal practice.

History is usually neglected by lawyers. When lawyers do refer to history, they misuse it. They tend to do so simply as a means of understanding what the law is today. Law textbooks will frequently cite statutes and cases from centuries ago and law lectures will often review how a case law has developed over time. However, law teachers and students are typically not interested in understanding these developments in the legal, social and political context of their times. They are seldom interested in the historical trajectory of areas of law or key legal ideas. Rather, old laws are typically cited either because they are still the source of law on a particular topic or because they help explain the current law, which is usually presented as a significant improvement. This common way in which lawyers use history is not history at all. Frederic W Maitland (1850–1906) gave the following example:

A lawyer finds on his table a case about rights of common which sends him to the Statute of Merton. But is it really the law of 1236 that he wants to know? No, it is the ultimate result of the interpretations set on the statute by the judges of twenty generations. The more modern the decision the more valuable for his purpose. That process by which old principles and old phrases are charged with new content, is from the lawyer’s point of view an evolution of the true intent and meaning of the old law; from the historian’s point of view it is almost a necessity a process of perversion and misunderstanding.²

¹ Lord Goff of Chieveley, ‘Judge, Jurist and Legislature’ (1987) 2(1) *Denning Law Journal* 79, 92.

² Frederic W Maitland, ‘Why the History of English Law Has Not Been Written’ in HAL Fisher (ed.), *Collected Papers of Frederic William Maitland, Downing Professor of the Laws of England* (Cambridge University Press, 1911) vol. 1, 480, 490–1.

As Robert W Gordon has put it, history is misused in law schools because they give ‘present effect’ to materials from the past.³ The picture usually drawn is a linear line of progress. The law has evolved and cleansed itself, fixing or at least lessening the problem. These progress narratives are ubiquitous in law textbooks, lectures and seminars. As Carolyn Steedman has noted, ‘[T]he lawyer’s “history” was about harmony, not difference, about making the past of the law conform to the present and to the future.’⁴ History in this sense is used to stabilise the present.

This book argues that history can be used in a different sense, because looking at its history sheds a different light upon law. History can be used to subvert the present. It can challenge rather than stabilise what we think we know about ‘the law’. Reference to history shows that there were once other ways of doing things. Taking a historical perspective reveals that the legal landscape is not pre-determined and that significant amounts of legal change can occur. The study of the current law in isolation tends to suggest that only modest legal change can occur within the confines of the system. By contrast, a historical approach shows that the system itself is not universal and modest incremental development of the status quo is not inevitable. Comparison with the past underscores how the law and legal institutions are not fixed but are constructed, and that every line drawn in the law and everything the law holds as sacred is arbitrary. Every rule, every institution, everything we take for granted about the law once did not exist or at least did not exist in its present form. As Jim Phillips pointed out, it shows us that ‘we think of as the law today, and then assume to have always been the case, has in fact not always predominated’, and this underlines that ‘ways of thinking other than conventional wisdom are possible’.⁵ This means that other possibilities are possible because they once were possible. Legal change can be achieved on a greater scale than what is often imagined.

This means that a greater range of possibilities is available to us now. A historical approach to law shows that every sacred principle, distinction and dividing line drawn in the law has not always been there and so does not need to be there in its current form in the future. By showing that laws once operated differently in the past, we can appreciate how laws can be used more creatively in the future. This means that legal change is possible on a greater scale than is often imagined. This radical purpose of legal history was stressed by Maitland in the passage from his letter quoted earlier in this chapter. Exploring law from a historical perspective underlines ‘the lesson that each generation has an enormous power of shaping its own law’.⁶ The message of this book is that law students have ‘free hands’ as citizens and potentially as the legal professionals of tomorrow.

This book demonstrates how the historical study of English law is necessary in terms of showing that you have ‘free hands’, but also informing you of the true extent to the choices available to you. This introductory chapter provides a run-through of some of the main arguments. It will fall into three sections. Section II will explain what the common law is

³ Robert W Gordon, *Taming the Past: Essays on Law in History and History in Law* (Cambridge University Press, 2017) 223.

⁴ Carolyn Steedman, *History and the Law: A Love Story* (Cambridge University Press, 2020) 9.

⁵ Jim Phillips, ‘Why Legal History Matters’ (2010) 41 *Victoria University of Wellington Law Review* 293, 310.

⁶ Frederic W Maitland, ‘Letter from Maitland to AV Dicey, c. July 1896’, quoted in CHS Fifoot, *Frederic William Maitland* (Harvard University Press, 1971) 143.

and provide an introduction to Maitland, our chosen tour guide. Section III will identify seven reasons why a historical approach to law is needed.⁷ Section IV of the chapter provides a brief guide to further reading and an outline of the chapters that follow, which will explore some of the stories of the common law.

II Maitland and the Common Law

There are numerous stories that can be told about the history of the common law, from various different perspectives. This book provides a historical introduction to the common law by exploring stories told about its origins and early development. It uses the work of Frederic W Maitland as our tour guide. Maitland's work in the nineteenth century has now become the orthodox account of the history of the common law. This is so ingrained today that it is taken for granted and now rarely told. This book revisits Maitland's stories; it retells them but also questions them. This subverts our understanding not only of the historical genesis of the common law but of law and legal change generally.

This section will begin by introducing our tour guide, Frederic W Maitland, and his emphasis upon the historical study of law. However, before going any further, it is necessary to explain the definition of 'common law'. The term is used in a vague and a specific sense. In a vague sense, common law is sometimes used as a label to describe the entire system of law in England and Wales, and to contrast it to 'civil law' jurisdictions based on Roman law and the tradition of codifying law into books or codes. The label is sometimes used synonymously with the phrase 'English law'.

This book, however, uses common law in its specific sense. Common law specifically refers to the 'unwritten' general law of the land as administered by the royal courts. As Maitland noted, the word 'common' is used to mean 'general'.⁸ The term common law refers to the generally applicable law that governs the whole kingdom and the people in it. In other words, it is the law that is common to the whole land. Common law is used in particular to describe the law as administered by royal courts. It is the law that is declared and applied in the courts of the land, the law as adjudicated by judges in what are referred to as the common law courts.

It is perhaps easiest to define the common law negatively; to say what the common law is not. Maitland observed that the common law can be contrasted with three main other types of law. The first contrast is with statute law, also known as legislation. This is the law enacted by Parliament and other similar bodies. This is why the common law is often referred to as 'unwritten law', because it is not found or based on any legislative text. The second contrast is between the common law and local or personal customary law. Such local or personal laws or customs are not 'general' law, in that they are not common to the whole land. The third contrast distinguishes the common law from forms of law administered by other courts. These other forms of law include the law of the Church administered

⁷ This draws upon chapter 1 of Russell Sandberg, *Subversive Legal History: A Manifesto for the Future of Legal Education* (Routledge, 2021).

⁸ Frederic W Maitland, *The Constitutional History of England* (Cambridge University Press, 1941 [1908]) 22. Dates in square brackets denote date of initial publication.

by the Church courts, and this has historically included other types of law such as the law of equity, as this book will discuss.

This book examines the origins of English law and will use the label common law in the more specific sense referred to by Maitland. This book tells some of the stories of how the common law began, how it largely replaced local law and customs, and how it was affected by the growth of statute law and the rise of other forms of law. However, it is important not to overplay these developments. The growth of the common law never eclipsed other forms of law. Our focus will be on the early development of the common law, but it is possible and important to note that other stories can be told about the other laws that existed and still exist. Our focus on the common law reflects that of Maitland. He will be our guide in recounting these tales; though we will see how later legal historians have challenged and developed his accounts.

Every work on the history of the common law that has been written since the end of the nineteenth century has been influenced by Maitland. As SFC Milsom commented, his work remains ‘a still living authority’, providing ‘the foundation of all we know about the history of common law’.⁹ Historians of the common law still begin their study through the eyes of Maitland: ‘Their questions still take the form: was Maitland right?’¹⁰ Although a number of seminal works have been published before and since, Maitland is seen as the founder of the study of English legal history. This reputation rests upon both the legacy of Maitland’s work and his development of a distinct legal history method.

Maitland produced a diverse body of writing that set the content and tone for what the historical study of the common law entailed. As Milsom noted, Maitland’s ‘lifetime’s worth of seemingly miraculous writing’ has resulted in a ‘superhuman myth engulfing him’.¹¹ Perhaps his best-known work was his *The History of English Law*, co-authored with Frederick Pollock, which is popularly known as ‘Pollock and Maitland’.¹² The nickname of that book is ironic, however, given that Pollock (then the most well-known of the two authors) contributed very little to the book.¹³ One of Pollock’s limited contributions to the book was his chapter devoted to the Anglo-Saxon period, which was so disliked by Maitland that he then attempted to write the remainder of the book before Pollock could.¹⁴ The two volumes of ‘Pollock and Maitland’ cover the period up to 1272, providing a sketch of early English legal history and a discussion of the doctrines of English law in the early Middle Ages.

Maitland’s other most influential publications consist of a number of books published after his death and based on the lectures he delivered to his students at Cambridge. These books were based upon their notes. This includes a series of lectures on *The Constitutional*

⁹ SFC Milsom, ‘Introduction’ in Frederick Pollock and Frederic W Maitland (eds.), *The History of English Law* (2nd ed., Cambridge University Press, 1968 [1898]) vol. 1, xxiii, ixxi, xxiv.

¹⁰ This is underlined by Milsom’s introduction to the reissued second edition of the legendary ‘Pollock and Maitland’, which concluded: ‘Maitland himself would probably wish his work to be superseded. There is little sign that this will happen soon’ (ibid. ixixiii).

¹¹ SFC Milsom, ‘Maitland’ (2001) 60(2) *Cambridge Law Journal* 265.

¹² Pollock and Maitland, *The History of English Law*. The first edition was published in 1895, with a second edition in 1898.

¹³ As Pollock noted, ‘the greater share of the execution belongs to Mr Maitland, both as to the actual writing and as to the detailed research which was constantly required’ (ibid. vi).

¹⁴ Frederic W Maitland, ‘Maitland to Vinogradoff’ (1982), quoted in Fifoot, *Frederic William Maitland* 137.

History of England, which provided a sketch of the position in 1307, 1509, 1625, 1702 and 1887–8 (which was, for Maitland and his students, the present day).¹⁵ It therefore provided a sequel in terms of chronology to ‘Pollock and Maitland’ but had a narrower focus. At first glance, it would seem that the other books based on his university lectures had a narrower focus still. His lectures on *The Forms of Action* and *Equity* have been published together and separately.¹⁶ Despite first appearances, they are actually the broadest of all of Maitland’s legal works. *The Forms of Action* provides a history of the main developments of the common law up to the time in which Maitland was speaking. His published lectures on *Equity* explored the development of the equitable jurisdiction that was to supplement the common law throughout its history. In addition to these publications for which Maitland is most renowned today, he also authored a number of lesser-known books,¹⁷ collections of essays¹⁸ and numerous articles.¹⁹

Maitland’s reputation also rests upon his method: he pioneered the use of primary legal materials. He was acclaimed for his introductions to numerous editions of primary materials prepared for the Selden Society and other organisations. The Selden Society has been referred to as ‘the living memorial which perpetuates not only the work but also the spirit of Maitland’.²⁰ Formed in 1886 with Maitland serving as its literary director until the end of his life, the Selden Society reflected the second aspect of Maitland’s legacy: it entrenched the method of examining the history of English law by excavating the original primary sources, looking at the actual records of decisions made at the time. The volumes published by the Selden Society, several of which were edited by Maitland, provided modern English-language translations of key legal documents and records from throughout history, with lengthy introductory essays that placed the texts into their contexts. The method of painstakingly examining primary legal sources is often dated back to Maitland, not only because he used the method in his works but also given his role in the foundation of the Selden Society, which continues this work. Maitland has enjoyed the reputation of being ‘the legal historian’s historian’.²¹ His work has been celebrated not only by lawyers but also historians. For Michael Lobban, Maitland ‘was one of the central figures who helped to turn the study of history into a professional pursuit, in which the scholar was

¹⁵ Maitland, *The Constitutional History of England*.

¹⁶ Frederic W Maitland, *Equity, Also the Form of Action at Common Law* (Cambridge University Press, 1909); Frederic W Maitland, *The Forms of Action at Common Law* (Cambridge University Press, 1965 [1936]); Frederic W Maitland, *Equity: A Course of Lectures* (Cambridge University Press, 1969 [1936]).

¹⁷ On legal history, see: Frederic W Maitland, *Justice and Police* (Macmillan, 1885); Frederic W Maitland and Francis C Montague, *A Sketch of English Legal History* (GP Putnam’s Sons, 1998 [1915]). This body of work stands apart from work on political philosophy completed at the start and the end of his career: his 1875 dissertation (reprinted as Frederic W Maitland, *A Historical Sketch of Liberty and Equality* (Liberty Fund, 2000)); his translation of the work of Otto von Gierke (*Political Theories of the Middle Age* (Cambridge University Press, 1900)); and a range of late essays (Frederic W Maitland, *State, Trust and Corporation* (Cambridge University Press, 2003 [1911])). His last publication was a work of biography: Frederic W Maitland, *The Life and Letters of Leslie Stephen* (Duckworth, 1906).

¹⁸ Frederic W Maitland, *Domesday Book and Beyond* (Cambridge University Press, 1897); Frederic W Maitland, *Roman Canon Law in the Church of England* (Methuen & Co., 1898).

¹⁹ Collected in Fisher, *Collected Papers of Frederic William Maitland, Downing Professor of the Laws of England*. For Maitland’s letters, see: CHS Fifoot (ed.), *The Letters of Frederic Maitland* (Harvard University Press, 1965) and P Zutshi, *The Letters of Frederic William Maitland* (Selden Society, 1995) vol. 2.

²⁰ Theodore FT Plucknett, ‘Frederic William Maitland’ (1951) 26 *New York University Law Review* 10.

²¹ KJM Smith and JPS McLaren, ‘History’s Living Legacy: An Outline of “Modern” Historiography of the Common Law’ (2001) 21 *Legal Studies* 251, 261.

encouraged to spend long hours in the archives reading primary sources'.²² Maitland's work also emphasised to historians the importance of looking at law. He regarded legal documents as being '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'.²³

Despite ill health, Maitland produced a body of work of which the quality and quantity was impressive, almost superhuman, drawing upon mostly original sources to produce authoritative accounts that were both accessible but also demonstrated an eye to detail. His work continues to set not only the scene but the standard for legal historians. His influence upon how we understand the history of the common law is so ingrained that it is often taken for granted. In this book, Maitland will be used explicitly as our tour guide. As we will see, his work shapes our knowledge, the key debates and methods that legal historians continue to use. This is not to say that it should not be questioned. Indeed, this book will seek to dialogue with him, looking at subsequent research rather than treating Maitland as the last word on the topic. This is probably what Maitland would have wanted. When 'Pollock and Maitland' was reissued in 1968, the text was left unchanged on the basis that the work so reflected the touch of a master that it could only be weakened by editing it.²⁴ The only addition was a new introduction by SFC Milsom, who is widely celebrated as the greatest legal historian who worked in the late twentieth century. Interestingly, Milsom's introduction began by observing that:

Maitland, I think, would have been saddened by this re-issue of his book, and not only by the inadequacy of an introductory essay that is the sole addition of what last left his hands just seventy years ago. He felt sorry for those whose work became classical: it meant that vitality had been lost from the enterprise they had loved.²⁵

This book will show that Maitland's work remains vital and alive today. As we go through the centuries, we will constantly return to the publications mentioned earlier. Maitland's work remains an important, foundational and sometimes controversial part of the stories that make up the history of the English common law. It may be questioned first, however, why it is worth telling these stories at all.

III Why History?

There are numerous reasons why people study law. At degree level, perhaps the main reasons for selecting law are the subject itself and the career possibilities that it enables. Law is seen as a rigorous academic subject that scrutinises real world issues. It covers all aspects of human life and is visible not only in the public debates of the time but also in our everyday lives. Most news stories have a legal dimension, as do most of our activities: not just the 'big events' in our lives such as renting a flat or getting married, but also every purchase that we make and what we are permitted and prohibited to do throughout our lives. To study law then is to study life, and law students develop the skill of being able to

²² Michael Lobban, 'The Varieties of Legal History' (2012) 5 *Clio@Themis* 1, 4.

²³ Maitland, 'Why the History of English Law Has Not Been Written' 480, 486.

²⁴ Pollock and Maitland, *The History of English Law*. ²⁵ Milsom, 'Introduction' xxiii.

simultaneously master the details while also keeping an eye on the larger picture. This is why a law degree opens so many doors in terms of a career. The skills developed through studying law are those that are essential in a range of jobs, and, of course, prepare you if you wish to have a career in law, whether as a barrister or a solicitor.

The claim made in this book is that studying law historically will further improve the knowledge and skills that you develop as part of your legal studies. Studying law historically will make you a better law student, and will make sense of the subjects that you will study in your law degree. It will place the modules that you will study within a broader picture, and you will understand how law has developed in the ways that it has. Studying legal history will also improve your career prospects and improve your ability to problem solve, to question and to suggest new and innovative solutions.

The need for and potential of a truly historical approach can be illustrated by using a novel analogy.²⁶ Your experience as a law student is like that of a reader who has only read a chapter somewhere towards the end of a novel. By focusing on that one chapter, the reader has little if no grasp of the story so far, the extent to which the current chapter moves that story on or what is likely to come next. The same experience is true of students studying most law modules. You become experts on a very small part of the story and have little insight as to how the story has previously developed and its likely future trajectory. Indeed, you are unlikely to appreciate that it is a story, that the current system came from somewhere and, crucially, that there was a time when things were done differently. Reading those previous chapters would not necessarily show a linear movement towards progress. When read in detail, chapters in the historical development of areas of law (like chapters in a novel) often do not advance the plot directly but rather complicate or reverse plot points. Indeed, this is why starting with the later chapter and then looking back often leads to confusion. The benefit of hindsight colours the interpretation and makes a journey that was complicated and unintended look straightforward and deliberate. But focusing solely upon a later chapter without even glancing backwards is worse still: it gives the reader no understanding of the chapters yet to come and of earlier plot points that may become significant. It limits the frame of analysis.

Studying law from a historical angle will enrich your study of law. As Maitland's letter suggested, it unlocks the potential of law, broadening out the picture and showing that radical options have been possible and so can be possible.²⁷ The remainder of this section will unpack this further by exploring seven (overlapping) reasons why law students should study history.²⁸

1 History Contextualises Law

History is one way of thinking about law in a larger context.²⁹ It enables an understanding of law within the context of political, social and economic forces.³⁰ A historical perspective allows us to understand where we are going by showing us where we have come from. This should not be about instilling a linear narrative of progress but showing the

²⁶ Sandberg, *Subversive Legal History* 9. ²⁷ Maitland, 'Maitland to AV Dicey, c. July 1896' 143.

²⁸ This draws upon Sandberg, *Subversive Legal History* 11–16.

²⁹ Robin L West, *Teaching Law: Justice, Politics and the Demands of Professionalism* (Cambridge University Press, 2014) 191.

³⁰ John McLaren 'The Legal Historian, Masochist or Missionary? A Canadian's Reflection' (1994) 5 *Legal Education Review* 67.

complicated forward and backward trajectories that have resulted in the current position and the effect of political, social and economic pressures. A historical approach to law is an interdisciplinary endeavour that introduces students to the ideas and methods from elsewhere in the university. This means, in the words of Jim Phillips, that a historical approach to law teaches ‘law students not only analytical skills and substantive knowledge, but also a deeper understanding of the nature of law’.³¹

2 *History as Comparative Law*

Comparative law enables law students to understand law more deeply by comparing the legal system that they are studying with another jurisdiction. While comparative law traditionally does this by exploring different legal systems across space, using history as a form of comparative law approach does this across time.³² This approach uses the past to highlight the nature and form of the current law and to critique it by showing that other ways of doing things has been possible. This not only means seeing the past from which something can be learnt but also seeing the past as being different.³³ This requires us to consider the past in its own terms and to become immersed in the past to such an extent that this ‘forces us to probe our beliefs, compare them to the features we encounter elsewhere, and expose our assumptions to scrutiny and evaluation’.³⁴ By seeing how things operated differently in the past, our impression and understanding of the present changes.

3 *History Shows That Law Is Not Fixed*

As Phillips notes, a historical perspective shows that law ‘is not a set of abstract ahistorical and universal principles’.³⁵ A historical approach shows how law has changed and how the actual changes that occur have not been inevitable. This suggests that further change is possible and that this change is similarly likely to be unpredictable. History shows how law is contingent. It underscores how law is in flux and is shaped by a range of internal and external factors. Understanding law as a historical construction underscores that law is the product of human interaction and is the response to the specific challenges of a particular time. This suggests that the reconstruction of the law is possible and necessary in light of new challenges.

4 *History Highlights the Necessity of Legal Change*

A historical approach to law teaches us that the current law is not perfect and is not necessarily the finished product. The way in which legal actors have grappled with problems

³¹ Phillips, ‘Why Legal History Matters’ 294.

³² For an application and discussion of this, see John H Baker, *English Law under Two Elizabeths: The Late Tudor Legal World and the Present* (Cambridge University Press, 2021). It is possible to combine the two: comparative legal history is the historical comparison of more than one jurisdiction. See David Ibbetson, ‘The Challenges of Comparative Legal History’ (2013) 1(1) *Comparative Legal History* 1 and subsequent articles in that journal.

³³ Jonathan Rose, ‘Studying the Past: The Nature and Development of Legal History as an Academic Discipline’ (2010) 31(2) *The Journal of Legal History* 101, 101–2.

³⁴ Jeremy Webber ‘The Past and Foreign Countries’ (2006) 10 *Legal History* 1. ³⁵ Phillips, ‘Why Legal History Matters’ 295.

over time in different social conditions shows the pragmatic and therefore ultimately unpolished nature of law. As John McLaren put it, legal history ‘provides a valuable antidote to the arrogant belief that we are likely to produce a legal regime of innate comprehensibility, completeness, intellectual perfection and practical attractiveness’.³⁶ More optimistically, it also shows that since the legal landscape is not pre-determined, significant amounts of legal change can occur. A historical perspective requires us to disregard progress narratives that limit legal change to modest incremental developments.

5 *History Highlights the Nature of Legal Change*

A historical perspective does not only show that change is possible and necessary, reference to a longer time scale also enables a more sophisticated understanding of legal change. As Alan Watson has argued, historical approaches can provide a ‘way to measure the speed – or absence thereof – of a response to changed circumstances’.³⁷ They can also show the factors that tend to lead to change, how change comes about and the effectiveness of different forms of change. Historical analysis focuses on the complex relationship between change and continuity. This includes exploring how continuity can often accompany change. It also involves examining the relationship between legal and social change including the two may be out of sync. Watson noted that in addition to studying change and innovation, we should also study situations when ‘a legal change did not occur when society changed’.³⁸ A historical perspective can highlight and critique common generalisations. It can question linear simplifications that reduce legal and social change to straightforward sequences of cause and effect, and that overplay the intentional evolution of legal and social change, ignoring how every cause arose in instances where a range of choices were possible. History presented in all its complexity can question the progress narratives where, as Rosemary Auchmuty put it, ‘there is always a sense in that law is essentially benevolent and will get there in the end’.³⁹ A historical approach showing the ebbs and flows of legal change can be used to question simplistic and misleading narratives of progress and can broaden the question of cause and effect to take into account overlooked developments.

6 *History Questions the Relationship between Law and Society*

A historical approach raises the question of the extent to which legal change is the product of internal developments within the legal system or of external social and political influences. As John McLaren observed, a historical approach allows legal change to be understood ‘in a way which is sensitive not only to doctrinal and institutional development’ as well as recognising ‘the political, social and economic forces which have shaped or

³⁶ McLaren ‘The Legal Historian, Masochist or Missionary?’ 83.

³⁷ Alan Watson, *Legal Origins and Legal Change* (Hambledon Press, 1991) 72.

³⁸ Alan Watson, ‘Legal Change: Sources of Law and Legal Culture’ (1983) 131(5) *University of Pennsylvania Law Review* 1121, 1123; reprinted as Watson, *Legal Origins and Legal Change*, chapter 7.

³⁹ Rosemary Auchmuty, ‘Land Law and Equity and Trusts’ in Caroline Hunter (ed.) *Integrating Socio-legal Studies into the Law Curriculum* (Palgrave, 2012) 69, 76.