Three Papers from the Annual Meeting Held on October 26 and 27, 1961 in Williamsburg, Virginia

William F. Swindler  
*William & Mary Law School*

James A. Servies

Dudley Warner Woodbridge  
*William & Mary Law School*

Repository Citation  
http://scholarship.law.wm.edu/libevents/2

Copyright c 1961 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.  
http://scholarship.law.wm.edu/libevents
LEGAL HISTORY -- UNHAPPY HYBRID
William F. Swindler

NOT IN THE LAW ALONE
James A. Servies

WILLIAMSBURG -- A 20-MINUTE HISTORY
Dudley W. Woodbridge

Three Papers Presented at the 1961 Meeting held in Williamsburg, Virginia *** October 26-27
LEGAL HISTORY -- UNHAPPY HYBRID
William F. Swindler

NOT IN THE LAW ALONE
James A. Servies

WILLIAMSBURY -- A 20-MINUTE HISTORY
Dudley W. Woodbridge

Three Papers from the Annual Meeting Held October 26 and 27, 1961
in Williamsburg, Virginia
INTRODUCTION

As a concluding service to delegates attending the 1961 meeting of the S. E. - A. A. L. L., we are pleased to forward to you with the compliments of the Marshall-Wythe School of Law this text of the three papers delivered to the meeting by staff members of the College of William and Mary.

Inasmuch as at least one of these papers may subsequently be published in some general periodical, the present copy is limited to distribution to delegates attending the meeting, and a small number of other persons.

We at the College of William and Mary wish to add this comment: That it was a genuine pleasure and a thoroughly rewarding experience to have you with us in Williamsburg, and we look forward to your returning in the near future.

Anna B. Johnson
Law Librarian
College of William and Mary
in Virginia

November, 1961
CONTENTS

Legal History -- Unhappy Hybrid 4
Not in the Law Alone 26
Williamsburg -- A 20-Minute History 38
The title which I have given to this paper applies actually to the second of the three parts in which I propose to discuss the subject. In the first part, I should like to review for you some of the significant elements of legal history which have accounted for the growing scholarly interest in it in recent years. Then, in the second part—at the risk of stepping on some toes—I feel it necessary to point out some of the professional conflicts and ambitions which have impeded progress in the study of this fascinating subject. After that, I shall try to conclude on a positive note with some suggestions for facilitating research in legal history.

We are meeting, as you are well aware, in the area which was literally the birthplace of some of the fundamental legal institutions on which the American way of life has been built. Six miles from us, at Jamestown, was the first permanent settlement in America to be established within the framework of English legal and political concepts. There, in 1619, convened the first representative legislative assembly in the New World—an assembly which for all practical purposes has continued to the present. In Williamsburg itself, in the eighteenth century, came that flowering of political genius which then bore fruit in many constitutional propositions which made out the case for independence and provided the framework for a new republic. Finally, on December 4, 1779 at the College of William
and Mary, the first chair of law and "police (i.e., government or public affairs)" was created.

I do not recite these facts merely from a sense of pride. On the contrary, may I add this observation: Since the restoration of Colonial Williamsburg in the second quarter of this century—and with an attendant revival throughout the scholarly world of articulate advocacy of Virginia's contribution to our history—there has been some danger that we may appear to be trying merely to outshout the claims of our sister colonies. On the other hand, this fact is now generally conceded: In the nineteenth century while the South was caught in a cultural lag aggravated first by the Industrial Revolution and then by the Civil War and Reconstruction, American historiography was beginning to acquire some of the features of a mature discipline—and it was acquiring these with an almost exclusively New England orientation. As a consequence, until the growth of substantial historical research in the South in the past generation, there has been a vast void between 1492 and 1621 in the average American's idea of his own history.

But in the development of twentieth-century research which has sought to establish a balance of historical fact, there has been a tendency for the pendulum to swing to the opposite extreme. Thus, when the Chief Justice of the United States several years ago used rather loose rhetoric to picture the Mayflower bringing the common law to the New World, a chain reaction began in Virginia which ended with the fixing of a tablet to the wall of the old Jamestown church asserting that the common law came here first. An older, and perhaps better known, debate has been carried on (and still continues) concerning the claims of William and Mary in Virginia and the Litchfield School in Connecticut to be America's first in the professional study of law.
These are all, really, beside the point. It is a matter of documentary evidence, for example, that William and Mary's chair of law was created by the Board of Visitors on December 4, 1779, while the Litchfield School under Tapping Reeve generally dates its distinguished career from 1784. But these dates are really significant only in demonstrating that, if neither William and Mary nor Litchfield had done anything about legal education, some other agency would have, at about that time. The real grist for the legal history mill is, rather: What was the nature of academic preparation for the bar in the beginning of the new nation--at both of these schools? What had been the nature of preparation for the practice of law in the pre-Revolutionary period--what was the degree of influence of the study by colonials at the Inns of Court upon colonial jurisprudence--what were the political and social circumstances under which legal institutions in the United States were made independent of England?

With these representative questions, some of the most obvious opportunities for research in legal history may be identified. How vast and unworked the field really is may be dramatized by this passage from the excellent Studies in the History of American Law, by Professor Richard Morris of Columbia University:

The investigator of early American law...has to plot his own course virtually unaided. No general treatise deals at any length with the seventeenth and eighteenth centuries of American law. The absence of abridgements of the reported cases makes the principal source material more inaccessible than the Year Books. The law reports contain material as rich in significance for early American law as are the publications of the Selden Society for English legal history, and sufficient reasons exist for publishing at least important selections from this abundant material on a scale commensurate with the notable work of the society of English scholars.
To this statement of Professor Morris, one might add the observation that with the publication of such work as is being done in this area, the need and demand for much more of the same becomes more evident. Thus the volumes in the American Legal Records series published by the Littleton-Griswold Fund of the American Historical Society only tantalize the scholarly appetite--there is so very much more at hand to be explored and made available. Here in Virginia, the gigantic project known as the Colonial Records Survey is bringing to us from England and the Continent a treasure-trove of documentary materials on every conceivable facet of social, economic, political--and legal--history, at which the scholar stares with the ravening attitude of a starving man in sight of a banquet.

To demonstrate further the proposition that, the better the work which is done in this subject, the more insistent the need for further work: Some months ago Professor George Haskins of the University of Pennsylvania published his superlative study entitled, Law and Authority in Early Massachusetts, covering the period from 1630 to 1650 in what we all hope is the first of several other works by the author. But immediately it becomes more evident that we are long, long overdue for a study which will cover the same fundamental problems as applied to the colony at Jamestown. This is not by any means a demand for a proliferation of work in one strictly circumscribed segment of colonial legal history, but rather an emphasizing of the fact that, in the exploration of the legal beginnings of society in these two particular colonies, with such distinct social and economic influences at work upon them, we shall have laid an excellent foundation for the more general study of legal history throughout the entire colonial period.

Take as another example the continuing interest in the constitutional propositions set out in The Federalist papers--an interest which has resulted in three independent projects in
the past eighteen months: Our first full-scale monographic study of the essays by Professor Gottfried Dietze of the Johns Hopkins University; an excellent annotated edition of The Federalist by Dr. Jacob Cooke of Columbia; and another edition with introductory commentary by Professor Benjamin F. Wright of the University of Texas. Yet the activity in this area of constitutional history suggests at least three correlative studies which demand attention before the extended work on The Federalist may be said to have made its most complete contribution. There is, first of all, the rather obvious need to delineate the anti-Federalist position—which, far from being rejected by implication with the ratification of the Constitution, almost immediately found vindication in the ratification of the Bill of Rights. Secondly, in spite of all the substantial work which has been done on the essays by Hamilton, Jay and Madison, we have yet to analyze their papers in terms of American constitutional theory and practice. Finally, and most importantly of all, there is the need for a truly exhaustive study of the origins of constitutionalism in the American colonies, in the states during the Revolution, and in the growing state structure in the years after 1787.

There are other important projects in active operation in the field of legal history, which are providing invaluable documentary facilities for future research. Among these may be mentioned the Documentary History of the Ratification of the Constitution and the Bill of Rights, sponsored by the National Historical Publications Commission and going forward under the editorship of Dr. Robert E. Cushman, the distinguished constitutional authority who was so long identified with Cornell University.

Then there is the multi-volume history of the Supreme Court of the United States, being financed by the Oliver Wendell Holmes Devise of the Library of Congress and being
edited by a team of scholars under the general direction of Professor Paul Freund of Harvard University. If this is truly a history of the court itself—rather than a specialized discussion of constitutional law as Charles Warren's pioneer work on this subject proved to be—it will be an extremely valuable addition to the bookshelf of legal history.

Perhaps most important of all as a stimulus to scholarship in this field are the growing number of projects on the collected papers of a number of important public men. The model for all such work, of course, is the Papers of Thomas Jefferson under the editorship of Dr. Julian P. Boyd of Princeton University. Among similar projects now under way, which have a special meaning for the legal historian, are the James Madison papers, jointly sponsored by the University of Virginia and the University of Chicago; the Adams family papers sponsored by the Massachusetts Historical Society; the papers of Alexander Hamilton and of John Jay, both being edited at Columbia University; the papers of Henry Clay at the University of Kentucky; and the papers of John Calhoun at South Carolina.

In something of an aside, I might observe that it is particularly fitting when the papers of such significant figures are edited under the sponsorship of the college or university with which they were identified. Thus, Dartmouth College, which owes something to Daniel Webster, is undertaking the project involving the papers of that statesman. Similarly, we have been working at William and Mary for several years to clear the way for a project on the papers of John Marshall—one of the chief national figures on the list which the National Historical Publications Commission urges be considered for comprehensive editorial treatment. I shall refer to the Marshall project in more detail when I come to the second part of this paper.
There are, of course, innumerable regional studies demanding early attention in the broad field of legal history. Professor W. W. Blume of the University of Michigan a number of years ago demonstrated the important source materials to be searched out, and the significant facts to be gathered therefrom, in reference to the evolution of territorial law on the frontier. It is a reproach to legal scholarship that his pioneering lead has not been followed. How much we still need to know about the development of the civil law system in Louisiana, and the processes of its transition under the influence of the Americanized form of the common law! How much is to be found out concerning the Spanish legal influence in the American Southwest, about the heterogeneous influences upon California legal institutions, about mineral law as it has affected the whole law of real property in the Western states!

But there is more--far more--to stimulate the scholar confronting this subject. Professor Willard Hurst of the University of Wisconsin, one of the most dynamic and original thinkers on legal history, recently pointed out four major needs for largescale research, which may be paraphrased as follows:

1. The significant developments in the evolution of our law reflected in the legislative, executive and administrative processes--particularly in the twentieth century. Correlative-ly, the contributions of the organized bar to the legal evolution, and the social effect of laymen's attitudes toward law and law enforcement.

2. The general study of the interplay of legal and economic trends.

3. The broad effects upon law of elemental social forces in American life during its periods of major adjustment, e.g., in the Jacksonian period, during and after the Civil War, and in the Great Depression of the 1930's.
4. Correlative with the last two—and to use Professor Hurst's own felicitous phraseology—"legal history should treat as critical themes the impact of social inertia and social drift." The impact of empirical—or worse, irrational—legislation upon significant social problems created some remarkable legal propositions with which teacher, practitioner and jurist have had to deal.

The foregoing examples will suffice to demonstrate that the fields are indeed white for the harvest, but the workers are few. The signs of growing activity in legal history should be a matter of encouragement, although for some, like the English scholar A.K.R. Kiralfy, there is now more than ever ground for despair. He says:

At the present day, more and more new subjects are establishing their claims to study, while at the same time the disparate and disjointed rules of modern statute law require little background in basic traditional principles... Ultimately the law of today will take its place as the stuff of legal history, just as the broader analysis of its rules will form the subject-matter of jurisprudence. By that time, however, there will be few legal historians to deal with it.

May I suggest that the objectives listed as priorities by Professor Hurst sufficiently dispose of the dilemma suggested in the latter part of Professor Kiralfy's statement. Multiplicity of contemporary legal subjects is unquestionably a problem of today's law school, but it must not be allowed to prolong the frustration with which the study of legal history has long been met in the law school. As for legislation, it has already proliferated to a degree that requires its study now as the stuff of legal history. The effects of the executive and administrative processes have been manifest for a much longer period than even the lawyer seems to realize. In short, legal history is not an excursion in antiquarianism by any means—refer, for example, to the extremely stimulating new book by Professor Karl N. Llewellyn of the University of Chicago, on The Common Law Tradition: Deciding Appeals. The legal historian, like the
general historian, has something of incalculable practical value to tell the whole of the legal profession, if it will but give him the opportunity to gather and study his material.

A few of the problems which stand in the way of legal history will be discussed in the second section of this paper.

II

There are apparently three major frustrations which bedevil the pursuit of legal history. These are discussed in more detail below, but may be summarized here as follows:

1. Administrative apathy, either at the top institutional level, or at the law school level, or both.

2. Professional jealousies, particularly virulent between the lawyers and the historians, but only slightly less pronounced between these two groups and the political scientists.

3. Confusion of concepts as to the definition, objectives and functions of legal history.

Turning to the first of these problems—administrative apathy—it will be discerned in two forms. There are the cases where the subject is ignored altogether; it has never been offered, or has died of neglect, or has been dropped in favor of some new specialty. This form of the problem probably can be dealt with only when the second form has been resolved.

In the second form, the course is offered, but no supporting program of research in this area has been developed or is in prospect. The course is simply an elective—and an elective in that category of optional courses which is only taken in the last desperate effort to fill out the required number of hours.

Now—this is the real crux of the problem. There are enough scholars offering a legal history course that we can properly focus upon the need for supporting research rather
than starting with a missionary effort to get the subject recognized. A cursory examination of law school catalogs indicates that probably 25 per cent of them list a course in legal history. But it is another question when one seeks to learn from the catalog (if one ever learns anything from a catalog) whether a specialist in the subject has been developed on the faculty, whether the course is complemented with an appropriate research program, and whether—something which should be of particular interest to this meeting—a definite portion of the law library acquisitions program is earmarked for legal history materials, primary as well as secondary.

In the third part of this paper, I shall try to demonstrate how legal history is a subject which is particularly apt for use in the small law school or the regional law school as well as for the major school offering an exhaustive curriculum and research program. But before reaching that point we must recognize fully the problem here under consideration; perhaps it can best be stated by quoting—from a leading law teacher who has been assured that he will be anonymous—his concept of the problem:

The missionary role I see for legal historians is to campaign to introduce some dimension of time into the thinking and interests of their able young colleagues working in corporations, taxation, trade regulation and other staples of the curriculum. We teach the law we teach in our schools today in a shamefully shallow time perspective, and too little that has been done in legal history concerns the development of substantive public policy, too much time has been fastened on the inner housekeeping of the courts. There is little in the output of legal history publication to enlist recruits to the field; if most of the product is second or third rate, it is not surprising that first-rate men are not stirred to think that they might find fulfillment themselves in pursuing their interests in time dimension.

This sentiment has been rather strikingly echoed by the independent observations of several other eminent law teachers; the tenor of their observations is (1) that the problem of legal
history is an extension of or consequence of the generally limited, pragmatic concept of the teaching of law subjects as a whole; and (2) that legal history itself is handled by men who do not really believe that "the future may learn from the past" (Colonial Williamsburg's hopeful phrase) or that Santayana was right in declaring that we must repeat history if we ignore it.

As for the second of these problems—and I am giving them in an ascending order of magnitude—it is serious enough to have brought progress in legal history virtually to a standstill. Although the American Historical Association has for a number of years had a special program in legal history, in which some lawyers and historians have been able to work together, it does not take much to disrupt the uneasy truce between the professions.

In part this is due to a crystallized status-consciousness which plagues both groups. You perhaps remember the ironic commentary on the 1960 convention of the American Historical Association which appeared in the New Yorker:

"A professional historian interviewed by the reporter proceeded to divide American historians into three groups. First, there is the "in," or "white-haired," or "shoe" group, which can be defined as comprising the men who attend the smokers given by such publishers as the Columbia University Press, the University of Chicago Press, Macmillan, and Knopf, and who feel at home at them... This top group consists of possibly two hundred men... The second group, which embraces the overwhelming majority of American historians, consists of excellent teachers who for some reason just aren't eligible for the 'in' group. Maybe they didn't attend the right universities, or maybe they lacked the proper sponsorship, or maybe they haven't published enough. The third group is made up of historians who have acquired rank by the simple attrition of their colleagues, of people who staff teachers' colleges, and of men who have trouble getting and keeping jobs... At annual
meetings of the A.H.A., members of the "in" group give most of the speeches, while the "out" groups sit and listen. Members of the "in" group who don't happen to be giving speeches rarely bother to listen to their colleagues; they prefer to stand around and talk and carry on their secret bargaining...

If this sounds familiar, it is perhaps because it could almost as well be a description of the annual conventions of the Association of American Law Schools. At both meetings, there is the characteristic group of young faculty members described by the *New Yorker* as either vainly trying to get the attention of a prospective employer—and here it may be said categorically that no one can equal a law school dean in the art of what I term the unenthusiastic handshake—or as being convoyed by some former faculty adviser who makes the strategic introductions for him.

Related to this is the problem of a mystery cult which has been developed around both disciplines—i.e., only the elect (as defined by those already "in") are qualified to deal with the specialized subject matter upon which legal history depends. Professor Haskins, in the introduction to his book mentioned earlier, describes the problem thus:

Unfortunately, the domain of the law is terrain upon which the historian without formal legal education has been reluctant to intrude. One reason for this reluctance has been the traditional isolation of the law from other disciplines as a result of the professionalization of legal study in this country. Moreover, the complexities of legal doctrine and the intricacies of legal procedure have understandably tended to deter those without professional legal training from investigating the sources and operation of law even in a past civilization. Yet, because law is a social product, reflecting not only social organization but the incidence of political and economic pressures, the discovery of its past particularly requires the techniques and insights of the social scientist. Unhappily, as Professor Mark Howe has said, "lawyers consider the historians incompetent and irresponsible, and the historians consider the lawyers
unimaginative and narrow. " If the history of American law is to be written, this mutual distrust must be dispelled, and the outlooks of both disciplines combined.

There the matter stands at the moment. One or both of two procedures obviously need to be followed: (1) We may encourage the training of a very small group of specialists in both disciplines—e.g., a law school graduate with advanced work in history and related social sciences. This, however, breeds its own problem—the scholar who is not accepted by either group because he is tainted with the characteristics of the opposition. From this comes the description of legal history which is the title of this paper. (2) Alternatively, we may seek a collaboration of a lawyer and a professional historian. Unfortunately, this has some fundamental ideological as well as practical disadvantages; and to date, at least, there has been no conspicuous example of a lion and a lamb in these areas lying down together.

A moment ago I mentioned the interest of the College of William and Mary in undertaking a comprehensive editorial project on the papers of Chief Justice John Marshall. Some of our experiences in clearing the way for such a project illustrate the fundamental clashes of interest which develop. First of all there is the question, Is such a project primarily within the area of legal history with the emphasis on the term "legal"—or is the project essentially historical with only an incidental "legal" pertinence? By what objective standards is such a question to be settled? Let me dispose of this last question by simply advising that, if there are objective standards which could be applied, they have not yet been resorted to. Let me further add the off-the-record comment of one individual who sought to aid in the implementing of the project; he declared that of all the scholarly editorial projects under way or in prospect—those I mentioned a while ago—the Marshall Papers presented "the damnedest confusion" in his experience.
Why this confusion? First of all, note that Marshall is the only one of the several public figures whose papers are currently being gathered, who is primarily a legal figure. Hamilton comes closest to Marshall as being identified with the law; but Hamilton, Jefferson, Clay and Calhoun are essentially and properly described as political leaders. John Jay may also fall into the category with Marshall, but his career is not so exclusively bound up with the law. The point is, that from the outset of a proposed project on John Marshall, the natural tendency is to consider the possibility of support for the project from the legal profession.

I shall not take you through all the labyrinthine avenues which we had to follow in the course of bringing the Marshall idea at least to a position where it could seriously be considered by this institution. Suffice it to report that the first serious setback to the project developed when the American bar through its national agency declined to be identified with it. There were several good and sufficient reasons why the bar could not sponsor the project at the time; but the real damage was done by the bar's statement that it was not interested in legal history as such, but was committed to a research program essentially ad hoc and pragmatic and contemporary.

Now, this illustrates precisely the apathy toward legal history as a significant element in professional legal training and practice to which I referred a moment ago. Coming from the practitioner rather than from the law schools, it suggests a major reason why the law schools generally have the attitude that they do.

I submit that this is a tragic development. The attitude of the organized bar in disclaiming any professional responsibility for the comprehensive study of a giant in the law, is damning confirmation of the contention that the law is oblivious to its own cultural heritage.
On the other hand, the "closed shop" attitude of the professional historians hardly encourages the hope that collaboration between specialists on both sides can be attained in the near future.

Finally, as to the third—and perhaps greatest—problem bedeviling legal history at the present: The confusion of concepts. I submit that this problem is manifested in two independent forms:

1. There is the running dispute between the historians (in law) and the comparativists (in law). I prefer to describe this as the conflict between the "horizontal" and the "vertical" approach to the subject—and I shall explain what I mean by this in a moment.

2. Then there is the failure of reconciliation of two other viewpoints of legal history: one of these I shall term the view of legal history generally; the other, the view of legal history as the synoptic frame of reference for a contemporary subject.

Before dealing with these two forms of the problem, let us illustrate the problem as a whole by considering some of the definitions of legal history by which the organized efforts in the field are being influenced. In establishing the American Journal of Legal History several years ago, Professor Erwin Surrency of Temple University described it in these terms:

First, legal history is the study of the development of legal doctrines through statutes, court decisions, and the opinions of any lawmaking body considered in relation to social, political and economic history.

Second, legal history embraces the history and development of people and institutions such as courts, legislatures, law enforcement agencies, etc.

Third, legal history should embrace the evaluation of the contribution of judges to the development of law. Included in this would be biographical material, on the lives of judges and lawyers emphasizing their professional accomplishments.

Fourth, legal history needs bibliographical information as to articles and books on its subjects.
This is obviously a basic definition. It suggests certain fairly orthodox avenues of approach to a subject which obviously has been so completely unexplored that a number of other avenues need also to be developed. While it does not necessarily suggest a conflict of ideas, I should like to have your indulgence while I quote somewhat at length from a paper by Professor Hurst, to which I have already referred; I recommend it in its entirety to you, as it appears in the October 17, 1960 issue of the Proceedings of the American Philosophical Society.

Four limitations of the general product attest the want of philosophy in the study of North American legal history. (1) Historians have exaggerated the work of courts and legal activity immediately related to litigation. (2) They have paid too little attention to the social functions of law. (3) They have not distributed their effort with adequate response to the facts of timing and the reality of major discontinuities in the country's growth in relation to the uses of law. (4) They have exaggerated areas of conscious conflict and deliberated action, at the expense of realistic account of the weight of social inertia and the momentum of social drift.

* * * * *

Most of the business of the bar through the nineteenth century had to do with the property and contract affairs of clients, and most of the law of these fields was common (that is, judge-made) law, so that through the formative period of our main legal tradition the focus remained on the judicial process. * * * * * * * *

This bias of professional thinking was not affected by the fact that through the nineteenth century Congress and the state legislatures churned out large quantities of important legislation, or by the fact that in great areas of policy which did not lend themselves easily to common law development the framework of the law was erected mainly in statutes (as in the law of the public lands, public education, public utilities, highways, health and sanitation, or the organization of local government). From limited beginnings in the late nineteenth century, executive and administrative law-making grew to
great proportions alongside the statute law. Judicial law-making was never as exclusively important as the concentration of legal writing might seem to show. From the 1870's on, legislative, executive, and administrative processes definitely became the principal sources of formed policy. The course offerings of even the better law schools were slow to reflect this reality. But legal research was even slower, with legal historians badly lagging the field.

* * * * *

The bulk of legal history writing has been about topics defined by legal categories. We have much writing about commerce clause doctrine, but little about the meaning of commerce clause doctrine for the development of operation of sectional or nationwide marketing organization, or about the impress which such business history may have made on constitutional principles. There is some rather formal history of property law, but little history of the significance of fee simple title for types of land use, for the private and social accounting of income and costs of alternative land uses, or for the political and social balance of power. There are some essays on the history of contract law, but little or no effort to define or appraise the meaning that contract law had for the functioning of the market, the provision of credit, or the allocation of gains and costs of business venture. There are scattered writings about the history of the mortgage, the corporate indenture, the receivership and tax law, but we lack the good studies we should have of the historic relations of law to the growth and channeling of investment capital. There is a good deal in print about various aspects of the Bill of Rights, but no connected story of the implications of civil rights doctrines for the shifting balance of power among various kinds of groups and between the individual and official and private group power at different stages of the country's growth. Though better than a generation has gone by since we heard the call for a sociological jurisprudence, legal history writing has made little response, but continues content on the whole to let the formal headings of the law fix its subject matter.

* * * * *

In the total distribution of effort, there has been a disproportionate attention in legal history writing to beginnings—and to beginnings in their most obvious sense—at the expense of proper development of hypotheses concerning the main lines of growth through to our own time. Much attention has focused on colonial origins, on the period of constitutional experiment from 1776 to 1790, and on the successive frontier phases of national expansion.
do not quarrel with the worth of attending to such formative periods taken in themselves, but only with the tendency to fasten onto origins without equal curiosity to follow through, and with failure to see that in terms of law's relation to gathering issues of power and social function there were other less obvious periods of beginnings which should also be studied. First, as an example of the want of follow through, it is odd that for so many states we have writing which with care sometimes verging on antiquarian enthusiasm traces the beginnings of territorial and state courts (once again, the excessive preoccupation with judicial process), but little good writing on such basic themes as law's relation to the creation of transportation networks, the law's response to the business cycle, or the relation of tax policy to the fortunes of agriculture and other extractive industries.

* * * * *

Second, on the neglect of the less obvious beginnings, the most notable examples are the relative inattention to the sharp changes in direction and pace of social movement which came about in the 1830's, the 1870's, and the 1930's.

Now as to the two major forms of the problem of definition of legal history, suggested by the foregoing quotations and by the two forms of the problem I mentioned before that.

First, as to the confusion between the "vertical" school, as I have called it, and the "horizontal" school of comparative lawyers. By "vertical" I mean a chronological historical approach--from the origins of a legal proposition or institution to its ultimate effects. An example would be any given rule of contract or property law traced back to the earliest records and forward to its current application. The comparative approach, of course, is essentially contemporary--the study of the same rule, let us say, under different modern jurisdictions. Ideally, of course, but probably only theoretically, there should be a "vertical" approach which is also "horizontal" at every chronological level. Until that nimble bit of research can be accomplished, however, we shall simply have to concede an equal degree of validity to both schools. This does not really solve the problem, of course--it simply evades an answer.
The other form of the problem—that which I have called the generic vs. the synoptic view—brings us back again to the characteristically pragmatic and usually short-sighted attitude of many practitioners and all too many law schools. This is the attitude that legal history derives its primary validity as the documentary background to a current problem of law; that legal history is the legal history of something, some element in a subject in litigation. From there it is but a step to the assumption that all legal history is either of practical use in an ad hoc situation, or is insufferably pedantic. This is what I call the synoptic view; I am not sure that the dictionary agrees with this definition of "synoptic"—but so much the worse for the dictionary, this may be offered as an original contribution to knowledge.

The generic view of legal history, I submit, while it does not solve the problem of the vertical and horizontal schools I have described since it applies to either of them, rather deals with legal history as legal history rather than as the legal history of something. In case we lost each other on that last sentence, this view of legal history accommodates the project which deals with isolated particulars as well as with synthesizing studies. It is sympathetic to the approach which deals exhaustively with the subject within the definition set by the researcher. It is ultimately pragmatic, but not in the sense of the synoptic idea I described above. But until it gains ascendancy, the pursuit of legal history will continue to breed unhappy hybrids.

III

Having briefly reviewed some of the opportunities, and rather tortuously reviewed some of the problems, let me now quickly conclude this paper with my few suggestions for advancing the cause of legal history. It goes without saying, I trust, that the necessary prerequisite for any advance is a demonstrated willingness of law schools and their affiliated insti-
tutions to encourage the work of the specialist in this field, to provide him with research opportunities and to include his primary source materials among the basic collections of the library.

The first practical opportunity which seems apparent is for the development of first-rate regional studies. This is what I had in mind when I suggested a few moments ago that the small law school and the regional law school might well develop legal history as an important element in its curriculum. With such an enormous range of subjects to be investigated, there can hardly be conceived to be any law school which does not have rather abundant source material at hand for a study in depth of some specific topic in legal history. The local application of a given rule of law—and, more significantly, the local factors which gave the peculiar local coloring to the rule—is an obvious type of project within the definition of regional studies.

Secondly, there are studies auxiliary to the specialties of a given law school. For example, since an advanced program in law and taxation is offered at William and Mary, it is rather obvious that a number of subjects in the history of law and economics in taxation policy and context would be in order. Here, again, regional studies are in order, although the specialty itself may be confined to the larger law schools.

In the more distant future is a third possibility, of coordinated projects (there are sad connotations to the word "cooperative")—e.g., the study of the same subject by different scholars under different jurisdictions. This awaits the day when legal history has become sufficiently developed as a discipline to stimulate a uniform or centralized national program. That day, it must be admitted, is some distance in the future—indeed, the burning question
before the legal profession at the moment is whether the time has yet arrived for collective efforts through national organization. Both the promising Journal inaugurated by Temple University and the Society organized to bring together those interested in legal history, are groping for a definition of their proper functions. The fact that an early legal history society died almost aborning is less an indication of lack of interest in legal history than evidence of the lack of adequate standards of achievement, based upon enough published research of high significance, to persuade the best minds in this subject that something more can be accomplished in concert.

The quality of the work of the Selden Society in England, and of individual English scholars like Maitland and Holdsworth and Plucknett, indicates the level at which American research must operate. But this does not necessarily mean that legal history research on this side of the Atlantic must restrict itself to the early documentary materials and their interpretation, which has been the high achievement of the Selden Society. Rather, the opportunity for American legal history—and the responsibility—is considerably greater: As Morris of Columbia has said, we urgently need to uncover our original source materials—but as Hurst of Wisconsin points out, we need equally urgently to devote our attention to the historic development of the law in its complete social, economic and political context. American legal history has twice as challenging a task, as a result.

It should be evident from what has been said in this paper that the bibliographic problems of promoting research in legal history are among the most demanding in the law library field. More than for any other subject in law, legal history requires for its proper pursuit access to the whole field of social science material as well as basic documents in law itself.
It is said that when one of our leading authorities in legislation was asked, a few years ago, to draft an exhaustive bibliography on the subject of contemporary state constitutional problems, he responded with more than 25,000 references.

Legal history can only be studied with ready access to the source materials of the general historian, the complete range of government publications, the personal papers and works of leading individuals of the period under study, plus a sympathy from the researcher's institution which guarantees time to work in these rich materials. When that day arrives, legal history will change from an unhappy hybrid to a hardy independent branch of legal learning.
It is a great honor for me to have the privilege to speak to you today in the Great Hall of the Sir Christopher Wren Building. Our decorations—specifically the podium on which your humble servant now stands—deserve a word of explanation. The College is not normally so conscious of the dignity of the Librarian as to provide such a noble and impressive grandstand. This superstructure, let me hasten to say, was put to a far more impressive use just two weeks ago, upon the occasion of the inauguration of Dr. Davis Young Paschall, our twenty-third President, at which time the College was honored to have as its guest Sir Ernest Pooley, who presented, on behalf of the Draper's Company of London, the magnificent portrait of Queen Anne which you see over the mantel.

So now, with Good Queen Anne looking over my shoulder, I should like to tell you about this Hall, this College, and its early experiences in the teaching of law.

For lack of a catchier phrase, I have allowed Mrs. Johnson to give as a title to this informal address, "Not in the Law Alone." This is somewhat of a quote from the inaugural address of one of Dr. Paschall's predecessors, Thomas Roderick Dew, the thirteenth president of the College. I might read the full text to you:

One of the great advantages of establishing a Law School in a college is, that the student, whilst pursuing his professional studies, is enabled at the same time to give a portion of his attention to other subjects of a kindred character, and thus ultimately to enter his profession with the great and inestimable advantage of a proper elementary education, which must ever give him a decided superiority to him who is educated in the law alone.
This, although taken from a speech given in 1836, seems to reflect our belief today--
I mean, the belief that the College and the Marshall-Wythe School of Law are interde-
pendent, and if not the success certainly the completeness of the one depends upon the
other. I think this is what Dr. Paschall had in his mind when he said in his inaugural ad-
dress two weeks ago:

"...I cannot over-emphasize the importance of the Marshall-Wythe School of Law--not for the reasons of its being first in America or even in its superb record of excellence--but because it is so vitally essential to the enrichment of the learning of the undergraduate at this particular College."

So when I talk about the College you must remember that what I say about its heritage applies to the Marshall-Wythe School of Law just as it does to you and me who, as Americans, share in these things.

We are meeting today in the oldest academic building in the United States. The first bricks of this structure were laid on August 8, 1695--a little over 266 years ago. Much has happened to this building and to the College since that time, and if it were not for the hard work and patronage of such a diverse assemblage as Queen Anne, Governor Alexander Spotswood, Colonel Benjamin S. Ewell, Lyon G. Tyler, and John D. Rockefeller, Jr., I am afraid we would not be gathered here today. While I certainly do not have the time to discuss in adequate detail the contributions of each of these "friends," I do owe them the courtesy of this brief recognition.

But about "The Great Hall." The first mention of this room--which by the way, was part of the first unit constructed in 1695; the Chapel wing, you see, was not added to the building until 1732--the first mention of this room was on April 29, 1699, when the Clerk of the General Assembly of Virginia was asked to command the immediate attendance of the
House of Burgesses in the "Great Hall." This building literally began its service, therefore, as the headquarters of the Royal government of Virginia. There are many references to the meetings of the House of Burgesses and the Colonial Council (the executive branch of the government) in this room. It conveniently held the governmental functions from 1699 until 1704, when the Capitol at the east end of the Duke of Gloucester Street was completed; and again from 1747 until 1752 when that public building burned and before a new capital could be erected. So the College enjoyed perhaps a unique distinction: it was as well the very headquarters of the foremost colony on the continent, a colony extending from the Atlantic ocean on the east, across the Blue Ridge, and into the unknown wilderness as far as the eye could see or the mind imagine. The 30 or 40 Burgesses who met in this room were concerned with an exciting range of legislative problems—and so were the students with whom they mingled in this very building.

Now the Great Hall must have been somewhat different than the form in which you now see it. Its appearance today, of course, is one result of the restoration of Williamsburg in the 1920's and 1930's. The Great Hall in the eighteenth century certainly had a gallery, I imagine somewhat like that in the Chapel wing which I hope we can see a little later. By the door, there was a small, winding stairway by which one could reach the rooms above. There are several reasons why we know this stairway existed: Jefferson drew a floor plan of the Wren Building about 1779 and he shows it clearly; also we have record of the misde-meanour of one John Sincock, who was taken into custody in 1701 for nonchalantly walking down the stairs and wandering through this hall while the House of Burgesses was in session. Much later, and on into the 19th century this area—I mean the rooms above us now used in strange ways by the Psychology Department—was called "Nova Scotia" by the
boys who roomed there. One of our prized letters in the College Archives was written by a
student who roomed in that cold, out-of-the-way place and who complained to his sister
that the poor light and tightly spiralled steps made it hazardous for any student--especially
those who might return to their rooms somewhat inebriated.

But the Great Hall had more important uses. In British educational parlance, this
was the "Commons." The boys ate here, until the Chapel Wing was built in 1732 they at-
tended church here--and it was the site of all public examinations and commencements.
Just before the first building burned, on October 29, 1705, it was visited by Thomas Story,
a Quaker, who noted in his journal that he met The Rev. James Blair, founder and first
president of the College. He called him a man "of pleasant natural temper" (a rather dif-
ficult statement to interpret, for Blair was anything but that) who showed him about the
College. He visited this room and quotes Blair as saying it was the most "useful place in
all the College-- Here we sometimes preach and pray, and sometimes we fiddle and
dance; the one to edify, and the other to divert us."

So this room was the public area for many years at the College, if not in the entire
capital of Virginia, it was the first portion to be restored or rebuilt after the fire of 1705
and long before the Building was completely rebuilt we find that glass was ordered from
England to put the finishing touches to the windows in this popular hall.

Some day I would like to write a book about the fortunes of this Building--about
life in "Nova Scotia," about some of the more imaginative student pranks, such as that of
the young man who drilled a hole in the floor of one of the rooms on the second floor
(above his French class) and who poured a pitcher of water on the bald head of his professor--
perhaps even about the fights, duels, and petty affairs of students, faculty, townspeople
and visiting dignitaries who walked on these squeaky floors for over 250 years. But we know, after all, only a small portion of the history of the College. Most of its early records and all of the 18th century library (with the exception of three volumes) were destroyed by fire in 1859 or by the fortunes of war in 1781 and 1862.

Would that we had, for example, the minutes of the Board of Visitors or even some of the private correspondence of the members who attended the historic session of December 4, 1779. A lot of things happened that day: the College became the first American "university;" the old grammar school and Divinity school were discontinued; a school of medicine was inaugurated (the second in the United States); and a department of Modern Languages was started under professor Bellini (the first in the United States). The elective system of study was instituted at that time, the ultimate revolutionary step. But this was not all. That meeting of the Board of Visitors also established a professorship of Law and Police, the second oldest chair of common law in the English-speaking world, second only to the Vinerian chair at Oxford whose first incumbent was Sir William Blackstone.

The man picked for our professorship has a very great local reputation—he was, I believe, the finest teacher ever to set foot in this building—George Wythe. Mr. Wythe may be known in the world at large to some degree today, for he was, after all, a signer of the Declaration of Independence, and most students of the history of American law recognize his name in connection with the establishment of the "moot court." He is not generally known, unfortunately, for his tremendous ability both as a practicing lawyer and as a teacher. One of his better students, Thomas Jefferson, had this to say about him:
"He had not the benefit of a regular education in the schools, but acquired a good one of himself, and without assistance; insomuch, as to become the best Latin and Greek scholar in the State. It is said, that while reading the Greek Testament, his mother held an English one, to aid him in rendering the Greek text conformably with that. ... He engaged in the study of law ... and went early to the bar of the General Court, then occupied by men of great ability, learning, and dignity in their profession. He soon became eminent among them, and, in process of time, the first at the bar, taking into consideration his superior learning, correct elocution, and logical style of reasoning...

No man ever left behind him a character more venerated than George Wythe. His virtue was of the purest tint; his integrity inflexible, and the justice exact; of warm patriotism, and, devoted as he was to liberty, and the natural and equal rights of man, he might truly be called the Cato of his country, without the avarice of the Roman; for a more disinterested person never lived. ... Such was George Wythe, the honor of his own, and the model of future times.

Another one of his students, Littleton Waller Tazewell, later Governor of Virginia, wrote, in a still unpublished diary:

In the autumn of 1786, I was placed ... under the guidance of Mr. Wythe. ... I was the youngest boy he had ever undertaken to instruct. ... His mode of instruction was singular; ... I attended him every morning very early, and always found him waiting for me in his study by sunrise. When I entered the room, he immediately took from his well-stored library some Greek book, to which any accidental circumstance first directed his attention. This was opened at random, and I was bid to recite the first passage that caught his eye. Although utterly unprepared for such a task, I was never permitted to have the assistance of a Lexicon or a grammar but whenever I was at a loss, he gave me the meaning of the word or structure of the sentence which had puzzled me. ... Whenever in the course of our reading any reference was made to the ancient manners, customs, laws, superstitions or history of the Greeks, he asked me to explain the allusion, and when I failed to do so satisfactorily (as was often the case) he immediately gave full clear and complete account of the subject to which reference was so made. Having done so, I was bidden to remind him of it the next day, in order that we might then learn from some better source, whether his explanation was correct or not; and the difficulties I met with on one day, generally produced the subject of the lesson of the next.
Indeed, I would like to read more of Littleton Waller Tazewell's remarks about the methods of instruction of this great teacher, George Wythe. There is much more about him in the Tazewell diary, and my hope is that it will not be many years before it is published. Perhaps it would not be too inappropriate for me to suggest that the members of this group conduct a pilgrimage to the home of this great American lawyer. You do not have too far to go; a few blocks down the Duke of Gloucester Street, turn left at Bruton Parish Church and facing Palace Green you will see the charming restored home of this gentleman. My children and I go there often; for some reason it is my favorite building in old Williamsburg.

The genesis of the Marshall-Wythe School of Law, therefore, is derived from the curriculum revolution brought about by Thomas Jefferson and the dynamic leadership afforded this department by the Honorable George Wythe, the first incumbent of this chair. There seems to be a running battle between the forces in Williamsburg and those in Litchfield, Connecticut, over the priority of William and Mary College and the Litchfield Law School in this matter of the "first" school of law in the United States—an argument which delights me in its futility. Of course, the whole matter is readily dismissed here because Litchfield's claims transcend the reason of neutral observers. Suffice it to say that Litchfield claims the first "structure" in which the law was taught; William and Mary claims the first law school. If you would like to pursue this confusing subject may I refer you to the 1960 issue of our WILLIAM AND MARY LAW REVIEW in which one of our students, Mr. Fred B. Devitt, Jr., exhausts the subject most satisfactorily.

First or not, William and Mary's Law School developed quite a reputation in its early years. Less than a year after the school was begun, Richard Henry Lee wrote to his
brother, Arthur, and emphasized the admiration with which Wythe's lectures were received.

During this first year, Mr. Wythe had about 40 students—John Marshall was one of them; so was William Branch Giles, later a governor of Virginia, and so was Spencer Roane, Marshall's nemesis and most likely the man who would have been appointed as Chief Justice of the United States had not President Adams appointed John Marshall just before Jefferson took office. John Breckenridge attended here, as did Philip Pendleton Barbour, another Associate Justice of the Supreme Court. Also James Monroe, Edmond Randolph, Henry Clay, and, of course, Jefferson can be numbered among Mr. Wythe's prominent students. But, of course, Jefferson "read law" under Wythe several years before the formal opening of the school of law, and Clay attended his "informal" classes after Mr. Wythe had moved to Richmond.

There is no doubt that Mr. Wythe's success was due to his vast intellectual attainments superimposed on a temperament and a way of life which, so I believe, made Mr. Wythe a natural teacher.

He loved to have a house full of boys who could learn from him; even though they were too young to enter the College, they would board with him, recite their lessons, and look on as Mr. Wythe uncrated a valuable carton of books or scientific equipment shipped to him by one of his many friends overseas. Little Waller Tazewell stayed with him the year Mr. Wythe imported "a very complete Electrical apparatus. And when this arrived, most of our leisure moments were employed in making philosophical experiments, and ascertaining the causes of the effects produced. ...So that this year passed away with me more profitably than even the preceding."
But Mr. Wythe's home during those years must have been sublimely chaotic, in marked contrast to the dignity and charm it has today. Tazewell again comments on Mr. Wythe's "boarding school:"

The experience of the year taught Mr. Wythe what almost any other man than himself would have foreseen, that ... the presence of a numerous family (Tazewell means the young students; Wythe had no children) about him must occasion much more trouble than he could sustain. The necessary domestic duties occupied so much of his time, broke in upon his pursuits, and interrupted even his business and his amusements. He was irritated and vexed by a thousand little occurrences. ... He therefore very properly decided to apply the only remedy, which was to break up his boarding establishment and to live by himself.

Thus, Mr. Wythe's "boarding school" was discontinued; but he could not do without students. So he continued as long as he resided in Williamsburg to take in for instruction any promising young man in the community.

In the words of another student, John Brown, later Kentucky's first Senator in the United States Congress, Mr. Wythe was "ever attentive to the improvement of his pupils."

One of Mr. Wythe's innovations was, as I have previously mentioned, the moot court. Senator Brown said:

"Mr. Wythe and the other professors sit as judges at the court. Our audience consists of the most respectable of the citizens, before whom we plead causes given out by Mr. Wythe."

The moot court met once a month, or oftener, so it was more of an instructional device than such affairs today which are usually somewhat ceremonial and showy. Mr. Wythe's other improvement—and a considerable improvement it was considering the plodding method of legal instruction in his own generation—was the establishment of a mock Legislative Body. In this affair, about which I wish I had time to quote many interesting stories, Mr. Wythe
acted the role of Speaker of the House and, according to Brown, took

All possible pains to instruct us in the Rules of Parliament. We
meet every Saturday and take under our consideration those Bills drawn
up by the Committee appointed and alter (I will not say amend) with the
greatest freedom.

Young John Brown, later a boisterous member of Congress, added in a letter written
while a young student here: "I take an active part in these Institutions (that is the Moot
Court and the "Legislative Body") and I hope thereby to rub off that natural bashfulness
which at present is extremely prejudicial to me."

In 1791, Chancellor Wythe moved to Richmond to assume the duties in the General
Court of Virginia to which he had been appointed. His place was filled at the College by
another of his former students, St. George Tucker, the author of Tucker's Blackstone, the
first legal textbook published in America. Another of our proud possessions in the College
Library is Mr. Tucker's own copy in manuscript of the third, and unfortunately, unpublished
version. Due to Tucker's influence, I am sure, the College catalog of 1792 contained a
most interesting requirement—that of establishing a Bachelor of Arts degree as a prerequisite
for the degree of Bachelor of Law. The catalog added that the student must "be well ac-
quainted with civil history, both Ancient and Modern, and particularly with municipal Law
and police."

This requirement was held to for many years—in fact, until the termination of the
first period of service of our Law School in 1861. In that year, 100 years ago, the first
law school—and, indeed, the College itself—closed its doors. For the next four years, the
soldiers of the Blue and the Gray swarmed back and forth across the Virginia peninsula, the
Battle of Williamsburg was fought just to the east of town in May of 1862, and this very
building was occupied by them, in turn, until the fall of Richmond. Some of the Library was sent to the Eastern State Hospital for preservation; what remained was taken up as souvenirs—-one volume has since been returned to us with notations that explain its strange journey via the descendants of a boy in the Pennsylvania volunteers. Our President's House and "the Brufferton" were used as officers' quarters; the Wren Building, and this very hall, was used as a hospital for the wounded.

Although the College reopened its doors in 1865, it struggled along until 1881 when, from lack of funds to pay both faculty salaries and its corporate indebtedness, it closed. In 1888 William and Mary reopened with the assistance of a modest grant from the Commonwealth of Virginia affording us the opportunity to serve as a normal school; in 1906, the College became fully state-supported, although its physical plant was less extensive than at any time prior to 1732. Through all these years the Law School remained but a memory in the minds of those who knew its greatness in the years before the Civil War. In the 1920's when the physical plant and significance of William and Mary, was greatly enlarged, the law school was revived. This is the story up to now.

The College of William and Mary, like dozens of its sister institutions on the Atlantic seaboard, is proud and—-as you can see—-a little self-conscious of its past. Unlike my own experience at other colleges and universities (all of them much younger), the evidences of this past seem very real to me, indeed. We have, because of some of the tragedies I have alluded to, relatively few musty manuscripts to pour over in search of an understanding of our past or in search of a guide to the present. Instead, the very walls and chimneys of this 18th century town have sprung from the dust and we find the life of two centuries ago thrust upon us every day. Yet, incongruously, this is an aid to living in the
1960's. None of us in Williamsburg, after living here a while, sees anything strange about a young apprentice in a tri-cornered hat riding home from a hard day's work at the blacksmith's shop in a Volkswagon. And all of us are really less concerned about the revolt against George III than we are about the very real 20th century fallout shower produced by a 30-megaton atomic explosion in Siberia.

I have tried to give you a fleeting background of the College and of its heritage as one argument for my belief that our present Law School will again contribute as before to the greatness of the College. The obligations which necessarily accompany a record of such grandeur; an articulate emphasis on a sound undergraduate program; and a continuing, multilateral relationship between our College faculty and students and our Marshall-Wythe School of Law seem to me to be correlates of our ideal professional education. Not in the law alone can we place our ultimate faith.

Finally, let me extend to our guests and friends our sincere pleasure in having you with us, and in the name of Their Majesties Royal College of William and Mary in Virginia bid you welcome to our campus.
LEGAL HISTORY -- UNHAPPY HYBRID
William F. Swindler

NOT IN THE LAW ALONE
James A. Servies

WILLIAMSBURG -- A 20-MINUTE HISTORY
Dudley W. Woodbridge

Three Papers Presented at the 1961 Meeting held in Williamsburg, Virginia *** October 26-27
LEGAL HISTORY -- UNHAPPY HYBRID
William F. Swindler

NOT IN THE LAW ALONE
James A. Servies

WILLIAMSBURG -- A 20-MINUTE HISTORY
Dudley W. Woodbridge

Three Papers from the Annual Meeting Held October 26 and 27, 1961 in Williamsburg, Virginia
As a concluding service to delegates attending the 1961 meeting of the S. E. - A. A. L. L., we are pleased to forward to you with the compliments of the Marshall-Wythe School of Law this text of the three papers delivered to the meeting by staff members of the College of William and Mary.

Inasmuch as at least one of these papers may subsequently be published in some general periodical, the present copy is limited to distribution to delegates attending the meeting, and a small number of other persons.

We at the College of William and Mary wish to add this comment: That it was a genuine pleasure and a thoroughly rewarding experience to have you with us in Williamsburg, and we look forward to your returning in the near future.

Anna B. Johnson
Law Librarian
College of William and Mary
in Virginia

November, 1961
CONTENTS

Legal History -- Unhappy Hybrid 4
Not in the Law Alone 26
Williamsburg -- A 20-Minute History 38
WILLIAMSBURG -- A 20-Minute History

By Dean Dudley W. Woodbridge
The Marshall-Wythe School of Law
The College of William and Mary
in Virginia

Mrs. Johnson, President and Mrs. Paschal, Ladies and Gentlemen:

First of all, I wish to add my voice to that of President Paschal in welcoming you to the College and to the City of Williamsburg. We all hope your stay with us has been and will be relaxing, inspiring, and one of pleasant memories.

But, as the title to my remarks indicates, I am going to break two rules of common decency, I am going to bore you by talking about ourselves rather than about you, our honored guests, and I am going to base all my talk on a completely false assumption, namely that you are not already thoroughly acquainted with the history of Williamsburg. I heard a teacher of public speaking once say, "No speaker has the right to bore his audience," and I seemed to hear Mr. Hohfeld reply, "Correct you are; while none of them has such a right, they most certainly do have the power, and power corrupts, and a twenty-minute power corrupts for twenty minutes.

Every person, every place, and indeed every law library has a history, and in dealing with all such matters history cannot be ignored.

In preparing this talk I have drawn heavily on the work of Rutherford Goodwin, a son of Dr. W. A. R. Goodwin, rightfully referred to as the father of the Restoration, namely "A Brief and True Report for the Traveller Concerning Williamsburg in Virginia" (1935); The Dietz Press, Cary Street, Richmond, Virginia.
On May 13, 1607, three small ships bearing 120 adventurers, one of whom, John Smith, was in irons, anchored off of what is now Jamestown Island some six miles from where we are now assembled. On the next day they disembarked and founded the first permanent English settlement in America. They chose a site somewhat removed from the seacoast to lessen the danger from attacks by the Spanish. These colonists needed the bare necessities of life but the London Company which sponsored the venture demanded gold of which there was none. This impossible situation resulted in terrible tragedy. In the winter of 1609-1610, of some 500 inhabitants but 60 hollow-eyed creatures were alive in the spring. The colony was saved from extinction by the timely arrival of Lord Delaware with one hundred and fifty settlers and provisions. In 1612 John Rolfe introduced a new kind of gold, one that could be used by burning it up and the culture of tobacco soon became the mainstay of the colony. (At that time, no one worried about lung cancer) In 1614 Rolfe married the Indian Princess Pocahontas. This led to peace with the Indians until her untimely death three years later in 1617. In 1619 there were about a thousand settlers at Jamestown. There were three outstanding events in that year. On July 30, the first representative legislative assembly was held in America. The other two events, which have caused us all to make adjustments from time to time ever since, were first the bringing over of a shipload of women, pure and undefiled, so that there would be wives for the settlers, and right there, I fear, was the start of the American Population Explosion, and secondly, the introduction of Negro slavery into the colonies. In 1622 there were around 1240 people in the colony. In March of that year one-fourth of them were killed in the first of the Indian massacres. As a result of this tragedy, it was determined to build a palisade across this Peninsula from a branch of the James River on the southwest to a branch of the York River on the northeast; to eject all Indians east
of the palisade, and to settle colonists therein. One such settlement was made in what is now Williamsburg in about 1633. Since this settlement was half way across the Peninsula, it was called Middle Plantation, and it was strongly fortified. In 1644 there was a second Indian massacre, but by that time the colonists numbered some 12,000 and they were able to give a good account of themselves.

During the reign of Charles I, Sir William Berkeley came as governor. He was ousted for a short time while Oliver Cromwell ruled England, but came back into office on the ascension of Charles II. Restrictive measures were passed which Berkeley enforced with an iron hand. There was great dissatisfaction and in 1676 (a century before the Revolutionary War) Nathaniel Bacon rallied the colonists to his standard. He drove Berkeley from Jamestown, and to prevent his return, burned the town. With this fire Jamestown itself all but passed away. In 1699 the Assembly gathered at the home of Mrs. Sarah Lee, and voted to remove the seat of government to Middle Plantation, i.e., Williamsburg. The change was made at the instance of Colonel Francis Nicholson, who with a ring of hope in his voice, proclaimed that in Middle Plantation "clear and crystal springs burst from champagne soil" (Just between us, it was artesian water rather than champagne) while at Jamestown the settlers were plagued with "Marsh Fever" and mosquitoes. In fact, one of the chief complaints made of the early colonists was that some of them could not even stand to be bitten by mosquitoes. The new Capital was called Williamsburg in honor of William III, and Jamestown was abandoned. Ladies and Gentlemen—\[s\] I was brought up on Carpenters Geographical Readers, published by the American Book Co. of Cincinnati, Ohio, as I suppose some of you were. In his Carpenter's North America, he described a visit to Norfolk, and from Norfolk his imaginary party went up the James River to Richmond in about the year 1900. He states
that on the way up the River they go past Jamestown, the first permanent English settlement in America. He notes that there is no town there--just a ruined church tower, overgrown with weeds and vines. The only signs of life were a few grazing sheep and the croaking of the frogs. Even the very island itself was eroding away, the victim of wind, waves, and tides until the United States Government built a seawall in 1907. Some twenty-four years ago the Federal Government decided to create an historical park in this area which would embrace portions of Yorktown, Williamsburg, and all of Jamestown Island. These three localities have been connected by a parkway known as the Colonial National Parkway. It became necessary to acquire about nine-tenths of Jamestown Island by eminent domain proceedings.

The owners (other than the Society for the Preservation of Virginia Antiquities, which had acquired the upper portion of the Island) contended that the Island was unique and worth at least a million dollars. The United States contended that no one would pay any more for the land than a few dollars per acre--all it was worth for agricultural and commercial purposes. So we had the strange problem as to how to evaluate the invaluable! The sum of $62,000 was finally paid.

Williamsburg was thus an offshoot of Jamestown. It is the oldest incorporated city in the oldest state in the United States. But it had been of some importance even before its incorporation in 1699 for in 1693 the College of William and Mary, second oldest college in the United States, was established here.

I have had many arguments in my day, as what Law School professor and dean has not, but the strangest one of all took place a few years ago. I spoke pleasantly to two elderly and distinguished looking visitors whereupon they informed me that they were
especially interested in William and Mary because they were graduates of the second oldest college in the United States. That puzzled me somewhat, but I said, "Welcome back to the old College. What class did you graduate in?" Imagine my amazement when they said, "Harvard, 1906." I had a hard time convincing them that Harvard was older than William and Mary, though, to be sure, if they were talking about law schools rather than colleges this is a school of a different color.

Williamsburg was a planned city, planned by Governor Francis Nicholson. The principal street was laid off to run due east and west and is five-eights of a mile long. It is a wide street running from the College at its west end to the Capitol at its east end and was called Duke of Gloucester Street in honor of the eldest son of Queen Anne. Two parallel streets, one on either side of Duke of Gloucester Street were named by the Governor more or less modestly after himself—Francis Street and Nicholson Street.

As the Capital, Williamsburg sprang into immediate prominence. It became the social center of all Virginia, and at that time Virginia was the principal colony. The great men of the colony came to attend the meetings of the General Assembly which was composed of the House of Burgesses and the Council. Of course, the Royal Governor resided here. The college was the leading institution of higher learning well supplied with funds and land as was befitting a royal institution.

George Washington came to it as a young man to receive his commission as a surveyor. Thomas Jefferson received his liberal education here; and what an education that was! John Marshall studied briefly under George Wythe, the first Professor of Law in the United States. Wythe in one way or another also taught Thomas Jefferson, Henry Clay, and James Monroe, and was one of the first judges to promulgate the doctrine of judicial review. Wythe was also a signer of the Declaration of Independence, a member of the Constitutional Convention, the
leading proponent of the adoption of the Federal Constitution by Virginia. He was poisoned by his grandnephew and namesake, George Wythe Sweeney, when Wythe was over eighty years of age. This horrible crime was perpetrated to cover up some forgeries and to take the sooner under his uncle's will. Fortunately, Wythe lived long enough to change his will before succumbing after terrible suffering.

One of the restored buildings you will all wish to see is the Wythe House adjoining Bruton Parish Church. It served as Washington's headquarters during the Yorktown Campaign and was the home of the first Professor of Law in the United States.

Before and during the Revolutionary War many stirring events took place in Williamsburg. Patrick Henry made his famous speech against the Stamp Act at the Capitol in which he dramatically stated, "Caesar had his Brutus, Charles the First, his Cromwell"—and you all know the rest.

In the building known as the Powder Horn, the gun powder of Virginia was kept—an essential to the existence of the Commonwealth in view of the continued hostility of the Indians. George Rogers Clark secured his powder from it to conquer the Northwest Territory, out of which have been carved the States of Ohio, Indiana, Illinois, Michigan and Wisconsin. It was Lord Dunmore's attempt to keep these supplies of powder from falling into the hands of the revolutionaries that precipitated the war against the mother country in Virginia. The day after the battle at Lexington in Massachusetts, Patrick Henry, and, after him, Thomas Jefferson, were elected as the revolutionary Governors of Virginia and lived in the Governor's house, or rather palace, since it was charged by the radicals of that day that the Colony was bled white to maintain a sumptuous palace for the royal governors. Their terms as governors were
marked by popular excitement, the civil war between the Whigs and the Tories, a feeling of almost utter despair during the dark days of the Revolution, and then final victory at Yorktown.

George Washington met his wife, the widow Custis who resided in Williamsburg. Speaking of George Washington, he may have been first in war, first in peace, and first in the hearts of his countrymen—but he was only second, at least in time, in the heart of his wife, the widow Custis.

The first law school connected with a college or university in the United States was established on December 4, 1779, by Thomas Jefferson. Antedated only by the Vinerian professorship at Oxford, established 21 years earlier, and held by Sir William Blackstone, the author of Blackstone's Commentaries, the chair of law at the College of William and Mary thus became the second in the English speaking world.

The Capitol, however, was moved to Richmond in 1780 in order to provide a safer and more central location, and thus came to an end the first era of Williamsburg—one which lasted almost one hundred and fifty years and during which time no city in all America had surpassed it in influence and development.

But one more exciting episode soon engulfed the town. In 1781, the British under Lord Cornwallis marched into Virginia which was poorly defended as a result of the help she had given her sister states to the point of exhaustion. Cornwallis made his headquarters in the home of the President of the College of William and Mary, the town was plundered, smallpox was epidemic, and great clouds of flies swarmed through the city. Cornwallis then crossed the James River at Jamestown and invaded Norfolk and Portsmouth, and then recrossed the James River to Yorktown (only some thirteen miles from here). Soon thereafter General George Washington and his Army with the help of Lafayette and the French, and the French
Fleet, succeeded in bottling up Lord Cornwallis and the British forces and capturing them on October 19, 1781. Both the French and Americans had their headquarters in Williamsburg during this campaign, and one can only imagine the excitement and rejoicing that took place on Victory over Cornwallis day—the day the Revolutionary War for all practical purposes came to a successful conclusion.

But alas, alack, for Williamsburg. Most of the population followed the state government to Richmond. The College no longer had Royal support, or the support of the Church of England, and had to sell its lands piece by piece to keep operating. The great Thomas Jefferson withdrew his support and founded the University of Virginia, and is said by some to have referred to Williamsburg as Devilsburg. The old buildings deteriorated year after year. First the Palace, later the old Capitol, and in 1859, the Wren Building of the College, were all destroyed by fire. The Wren Building was rebuilt, but without the grandeur that was Sir Christopher Wren's, only to be burned again a few years later by the Union forces in the War Between the States.

When that war broke out the President of the College, the Professors thereof, and the students therein joined the Confederate Army. All available funds of the College were invested in Confederate Bonds. The Federals held Fort Monroe at the east end of the Peninsula, and the Confederates were in their Capital in Richmond to the west. General McClellan attempted to advance up this very Peninsula in an effort to capture Richmond, and to end the War quickly. This was called the Peninsula Campaign. The Battle of Williamsburg was fought on May 3, 1862. McClellan had an overwhelming numerical advantage, and the public buildings of Williamsburg were once more filled with the wounded and the dying. At
nightfall the Confederates withdrew according to plan, and the Federals stayed in Williamsburg for the balance of the war, (except one day), although held completely at bay in the swamps of the Chickahominy long before they reached Richmond.

After the war followed the terrible days of reconstruction. Every man of substance had lost all he had; Williamsburg had no Rhett Butlers. By a prodigious effort the Wren Building was again rebuilt and classes were resumed on a limited scale, this time without a law school. Finally in 1881 stark poverty forced the College to close its doors--its halls were empty, its faculty were on leave without pay, its friends were penniless. But its indomitable President, the late Colonel Ewell, kept the College Charter by ringing the bell at the beginning of each college year.

Imagine, Ladies and Gentlemen, my resentment, some years ago when I read an article in the Journal of Legal Education by a law teacher at a northern college to the effect that while a certain law school boasted that it was the oldest in the United States, it had only a comparatively insignificant library. I couldn't help writing him and questioning him as to how many times his law school had been burned, how many times wars were fought through its halls, how much had it lost by patriotically investing its funds in its Country's cause, and for how many years had it been ruled vindictively by its conquerors. While we do not want pity, or even sympathy, we do appreciate understanding, for no war is more bitter than a civil war. It was easier to raise funds to rebuild Hiroshima than to ease the burdens of the Confederate rebels.

With State support the College re-opened in 1888 on a very small scale. In 1893 the Federal Government made partial compensation for the burning of the Wren Building,
and in 1906 the College became a state institution whose purpose was mainly to train white male teachers for the public schools of Virginia which had been established in this Commonwealth.

There has been one institution in Williamsburg all this time which I have not mentioned, and that is the oldest mental hospital in the United States. Today it is known as Eastern State Hospital. Since William and Mary was not a co-educational institution until 1918, and since there were no colleges for young ladies in the vicinity, the principal college social event of the year was for some time the Christmas party given for the College students by the female patients of Eastern State Hospital at which a good time was had by all.

And so for many years Williamsburg slept. Occasionally some new building appeared looking like a patch on an old garment. The most exciting thing to happen in this time was the battle of the undertakers— At that time there were two undertakers in the city and they were bitter rivals. An elderly gentleman died survived by two maiden sisters. One of these sisters called one undertaker and the other sister called the other undertaker. Of course, one of the undertakers arrived first and took the corpse. Shortly thereafter the second undertaker appeared on the scene and jumped to the conclusion that the first undertaken was a brazen interloper. He and his assistants went to the first undertaker's mortuary, ran into it, and with a swoosh seized the body and made off with it in triumph. The first undertaker fortunately had a sense of humor and a sense of propriety so there was no actual tug of war for the body. Then everybody went to their lawyers and wanted to know their rights, and that I leave as a research problem for you law librarians.

And then came World War I. The City of Penniman with a population of some 50,000 sprang up some seven miles away on the York River as the need for ships and more ships, and supplies, and explosives became the necessities of the hour. Business again boomed in
Williamsburg and speculators and sharpsters came here from all parts of the country. The new became blended with the old in a crazy hodgepodge. Telephone wires appeared in the center of Duke of Gloucester Street, gasoline filling stations and stores sprang up helter skelter. This time there was no planning except for a fast buck.

It was during this period that a certain pleasant stranger number one went into a local hotel and remarked to the proprietor that he certainly had a wonderful business, and would he consider selling it for $70,000? $70,000—that was a fabulous sum for anyone who had been brought up in poor, old, sleepy Williamsburg. So he gave the inquirer an option under seal on the hotel for $70,000 good for ten days. A couple of days later another pleasant gentleman arrived on the scene. He complimented the proprietor on the fine hotel and wondered if the proprietor would sell. The proprietor answered that there was an outstanding option. The smooth gentlemen pretended to be greatly disappointed. He said, "I hope you got at least $90,000 for I am prepared to pay as much as $100,000 for a place as good as this." "Perhaps," said the pleasant stranger, "you could buy back the option. I'll come back next Tuesday at 7 P.M. prepared to give you $100,000 if you can give me a good title." The proprietor sought out the first pleasant stranger and sheepishly said that he would like to cancel the option. The first man expressed surprise and regret. He said that he had practically made up his mind to accept and had just completed the necessary financial arrangements and that he thought the hotel was a gold mine. However, if the proprietor would give him $10,000 he would most reluctantly as an act of pure friendship surrender the option. The proprietor paid the money demanded and received back the option, and, of course, that was the last he ever say of either of the two pleasant gentlemen.
At the close of the World War I, Penniman became a ghost town and a post war depression hit Williamsburg. All the grandiose plans fell through. A huge hotel half built at Yorktown was abandoned at a tremendous loss. But there came to Williamsburg two eminent men of great energy and imagination. One of these was Dr. J. A. C. Chandler who came as President of the College of William and Mary. There was a post war surge of college students and over the violent protests of some of the more conservative William and Mary alumni, women were admitted to the College, a 100% violation of centuries of tradition and history. Operating on a shoe string, (financially speaking), Dr. Chandler succeeded in getting the physical facilities needed for 1200 students, and he bought up large tracts of land adjoining the College when values were very low so that the College now has ample room for any expansion that may become necessary or desirable. As a result, the chief part of Williamsburg became the College rather than the Insane Asylum although there have always been those who have contended that some members of the College community ought to be in the other institution and vice versa. Dr. Chandler's enthusiasm and confidence were contagious and he interested many persons in the College and in the community. With the backing of such people as the late Robert M. Hughes, Sr., John Garland Pollard, Sr., Judge Alton B. Parker of the New York Court of Appeals, and some members of the Cutler family of Rochester, New York, and inventor of the Cutler Mail Chute, the Marshall-Wythe School of Government and Citizenship was established. Out of this School the old Law School was reborn in 1922.

In 1903, a Reverend William A. R. Goodwin assumed the Rectorship of Bruton Parish Church—the oldest church in continuous use in the United States. He became fascinated in the fine history of his ancient Charge and to use his language, he set about in his own feeble way to raise money for the repair and restoration of the interior. This work was finished in
1907 and Dr. Goodwin went elsewhere. But he did not forget.

In the year 1925, he spoke before the Phi Beta Kappa Society in New York City concerning the College of William and Mary and its historic environment. Mr. John D. Rockefeller, Jr. was in attendance at this lecture following which Dr. Goodwin invited him to visit Williamsburg. This Mr. Rockefeller did within the next few months, and in the course of this visit, Dr. Goodwin presented and explained to him the thought which had long been in his mind of restoring the City to its colonial appearance and of preserving it both for the future and from the fate which seemed imminent.

Please note that of all the principal old colonial cities, it was only here that such a project was practical. Boston, New York, Philadelphia, Baltimore, Charleston, and Savannah were out of the question—even for a Rockefeller!

Phi Beta Kappa was founded in 1776 by students of the College of William and Mary in the Raleigh Tavern near the Capitol at the other end of Duke of Gloucester Street. One hundred and fifty years later Mr. Rockefeller returned again to Williamsburg to attend the dedication of a Phi Beta Kappa Hall memorial to the founders of Phi Beta Kappa and in the course of this visit the preparation of preliminary restoration drawings was authorized. In the year 1927, Mr. Rockefeller made the decision to undertake the fulfillment of Dr. Goodwin's plan which was soon defined as "an endeavor to restore accurately and to preserve for all time the most significant portions of an historic and important city of America's Colonial Period."

In order to prevent an inordinate rise in land values the plan was kept secret for some months during which time Dr. Goodwin purchased in his own name much of the land that would be needed. And great was the wonder of the populace as to how a poor preacher could buy
so much real estate. His actions, my friends, have furnished me with a most apt illustration of the doctrine of the undisclosed principal. Most of the land was purchased outright, but here and there were homes that had been family estates since the memory of man ran not to the contrary and the inhabitants of which could not be humanely transplanted. In such cases the property was frequently purchased subject to a life right in the seller. As the Restoration did not have the power of eminent domain, it was unable to acquire at one fell swoop all the lands needed for its purpose. At the present time zoning laws protect Colonial Williamsburg from improper imitation or restoration on the part of individuals who still own property in the portion zoned "historical."

The restoration even of this small town has been a tremendous undertaking. It was necessary to remove all the modern and quasi-modern buildings, most of which had been cheaply constructed. Literally thousands of rats were deprived of their shelter and left to shift for themselves as best they could.

Then a great deal of research was required for no pains were spared to make the restoration as authentic as possible.

There were no engineers among the early colonists, and men trained in Europe had to be imported. Fortunately an engineer was attached to the forces of General Lafayette. We do not even know his name, but we do know that for some unknown reason he made a detailed map of Williamsburg—so detailed as to even show the location of trees. Excavation work on an extensive scale has shown this map to be an extremely reliable one. By chance this map came into the possession of someone in Norfolk who presented it to the College some years before the Restoration was commenced. This map is commonly referred to as the Frenchman's Map.
Some thirty tons of relics have been obtained from excavation and these, too, have helped a great deal to determine what was in the buildings before their destruction. Research in the libraries of England and France was undertaken on a large scale, and in some cases work was stopped, or work already done even torn out, as a result of the findings of the research workers.

The three principal buildings of the College—The Sir Christopher Wren Building, the President’s House, and the Brafferton, or Indian School, were restored to their original beauty and design.

On the east approach to the Sir Christopher Wren Building stood a statue of Lord Botetourt, the most beloved of the Royal Governors. It is the oldest piece of statuary in America and amazingly enough survived the Revolutionary War, the War of 1812, the War Between the States, two World Wars, numerous sleet and wind storms, including Hazel’s recent visitation, and the depredations of our friendly, rival student bodies before the big football games. But unfortunately as vandalism became more prevalent, it was decided to warehouse this famous and unique statue until a suitable place, perhaps in our New Library, can be provided.

The Restoration is many things to many people. To some it is just a work of great beauty—beautiful architecture, beautiful gardens and landscaping, beautiful antiques, beautiful furnishings. To others it is a student’s paradise full of source materials on early American History and culture; to a few cynics it was a way for some wealthy persons to reduce taxes and is a shameful commercial exploitation of a never ending flow of gullible tourists; to still others it is a place to which to make a pilgrimage for here more than at any one spot, perhaps, originated the American way of life, standing for equality before the law,
freedom of speech, of the press, or religion and representative, constitutional government.
Here men dared resist tyranny and in so doing nourished the tree of liberty with the blood of patriots. A man's soul must be dead, indeed, if it cannot derive inspiration from what is found here.