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Legal History—Unhappy Hybrid

by WILLIAM F. SWINDLER, *Professor of Legal History, Marshall-Wythe School of Law, College of William and Mary*

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.

I

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.¹

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,

¹ Morris, *Studies in the History of American Law* (Philadelphia, 2d ed. 1958), 259.

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 Cali-

ifornia 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 large scale 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. Correlatively, 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.²

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:

² Hurst, *The Law in United States History*, 104 Proceedings of the American Philological Society, 523-4 (1960).

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.³

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

³ A. K. R. Kiralfy, *English Legal History* (London 1957) V.

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 pol-

icy, 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. . . .⁴

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.,

⁴ *New Yorker*, January 14, 1961.

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.⁵

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 characteristic of the opposition. From this comes the description of legal history which is the title of this paper.

⁵ Haskins, *Law and Authority in Early Massachusetts* (New York, 1959), ix.

(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 damndest 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. Ham-

ilton 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 *generically*; 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, Pro-

fessor 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. I 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.⁶

Now as to the two major forms of the problem of definition of legal his-

tory, 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 or 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

⁶ *loc. cit.* n. 2, *supra*, at 521 *et seq.*

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 institutions 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 advance 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 a-borning 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.