

# WHY LEGAL HISTORY MATTERS

*Jim Phillips\**

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*This is the text of Professor Phillips' Salmond Lecture delivered at the Victoria University of Wellington Law Faculty on 24 June 2010. In it Professor Phillips makes the case for why legal history matters both for lawyers and historians and argues for a continued contextual approach to the study of legal history.*

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## **I INTRODUCTION**

Chief Justice, distinguished guests, ladies and gentlemen. I am greatly honoured by the invitation to deliver the Salmond Lecture. I have long known of John Salmond as the author of one of the leading early twentieth century textbooks on torts, and as someone who also wrote about legal history. What I had not known before I worked on this lecture was what a remarkable and varied career he had, as legislator, diplomat and judge as well as legal scholar.<sup>1</sup> It is indeed humbling to be giving a lecture named after such a towering figure. John Salmond's work on torts also made him a significant figure in the legal history of his period, something I will return to later. I like to think he would have approved of someone being asked to reflect generally about legal history and its importance. Whether he would have approved of the content of my remarks is another question.

When I told a friend of mine about my visit here, to talk about why legal history matters as a prelude to a legal history conference, she suggested that New Zealand is a long way to go to preach to

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<sup>1</sup> For Salmond generally see Alex Frame *Salmond: Southern Jurist* (Victoria University Press, Wellington, 1995); and Alex Frame "Salmond, John William 1862-1924" (2007) Dictionary of New Zealand Biography <[www.dnzb.govt.nz](http://www.dnzb.govt.nz)>. His major text on torts was *The Law of Torts. A Treatise on the English Law of Liability for Civil Injuries*, first published in London by Stevens and Haynes in 1907. It has run to 21 editions, the latest appearing in 1996. For his legal history work see principally *Essays in Jurisprudence and Legal History* (Rothman, Littleton (Colorado), 1891).

the converted. I may or not be preaching to the converted, but I do think it is useful for those who do legal history to reflect on these kinds of questions from time to time. Perhaps consumed by our immediate research projects, we do not do this enough.<sup>2</sup> I have been writing and teaching legal history for twenty-five years, and in that time I have often defended and defined my subject - but usually in short conversations or in slightly less than short introductions to teaching the subject. I am therefore delighted to have the opportunity to talk at some length on the topic, and to do so to such a varied audience of academics, judges, and practitioners.

I will be speaking principally as an academic, but not always with the same audience in mind. I teach law in a law school, and am convinced that history is a vital part of legal education. We are trying to teach law students not only analytical skills and substantive knowledge, but also a deeper understanding of the nature of law. And if I am right that legal developments cannot be separated from other historical trends then a sense of history is vital to understanding the law, even (or perhaps because), it tends to highlight the limitations of law. But some of my remarks will also be directed at historians. I not only teach law in a law school, I also work with history doctoral students and publish some of my work in standard historical journals. Some understanding of law is an essential part of civic knowledge and awareness for any educated layperson, and a greater appreciation of legal developments can particularly enrich historians' work, both by opening new avenues of research and also by offering a deeper understanding of the work that historians do in apparently non-legal fields. If we define legal history broadly, as I will do, to include not just high courts and general principles of doctrine but also the law made by legislatures, law's ideological role, law as practised at the micro level, and popular understandings of law and justice, then many historians already do legal history, albeit perhaps without knowing it. Legal history is everywhere, to a greater or lesser degree, for law surely is, as E.P. Thompson once famously said, imbricated, overlapping with everything else.<sup>3</sup>

In some respects, of course, the answer to the question of why legal history matters is the same as the answer to the question of why history of any kind matters. That is, it is always better to understand not just the shape that some aspect of our present world takes, but also how it got that way. Moreover, our history is more than an explanation of past developments, it is an essential form of understanding of the world around us, because it is invariably still with us, aspects of it remain embedded in every part of our society. But I want to go beyond the importance of history generally and ask why in particular legal history matters, why it is especially important to have an historical approach to *law*. I will organise my remarks around what I see as four principal reasons why *legal* history especially

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2 There are some exceptions which I have found useful. See for example John McLaren "The Legal Historian, Masochist or Missionary? A Canadian's Reflection" (1994) 5 *Legal Educ Rev* 67; KJM Smith and JPS McLaren "History's Living Legacy: An Outline of 'Modern' Historiography of the Common Law" (2001) 21 *LS* 251 at 311-324; Jeremy Webber "The Past and Foreign Countries" (2006) 10 *Legal Hist* 1; Robert M Jarvis and others "Contextual Thinking: Why Law Students (and Lawyers) Need to Know History" (1995-1996) 42 *Wayne L Rev* 1603.

3 EP Thompson *Whigs and Hunters: The Origin of the Black Act* (Allen Lane, London, 1975) at 261.

matters: that legal history teaches us about the contingency of law, about its fundamental shaping by other historical forces; that legal history shows us that the while law is shaped by other forces, it can be at the same time relatively autonomous, not always the handmaiden of dominant interests; that legal history, perhaps paradoxically, frees us from the past, allows us to make our own decisions by seeing that there is nothing inevitable or preordained in what we currently have; and that legal history exposes the presence of many variants of legal pluralism in both the past and the present. There is some overlap between the four, and others may take issue with my taxonomy. Some, if not all, of my answers will be quite familiar to many of you, but I hope that like me you will find it useful to have them discussed at some length. Lectures like this, making general theoretical assertions, can be a bit dry, and I have tried to illustrate all my points with examples derived from a number of different areas of law and jurisdictions. My examples tend to be North American, because that is the legal history I know best. Some of them come from my own work, for which I make no apology. I have always said that when you get a chance for shameless self-promotion you should take it.

## ***II THE CONTINGENCY OF LAW***

First, and in some respects most importantly in the context of legal education, legal history teaches us about the contingency of the law, about the fact that law is not a set of abstract ahistorical and universal principles, it does not exist in a vacuum. Rather, it is formed by, and exists within, human societies, and its forms and principles, and changes to them, are rationally connected to those particular societies. At the risk of going over some very familiar ground, I think it is useful, both to illustrate this point about contingency and to show how relatively new this idea is, to contrast the legal history we are familiar with today with the situation prior to the 1970s.<sup>4</sup>

As English legal historian David Sugarman, has recently put it, prior to the 1970s English legal history in the twentieth century was narrow and parochial, "preoccupied with the origins of legal doctrines and institutions, emphasizing continuity and de-emphasizing change and contingency."<sup>5</sup> Its subjects were limited to courts, judges and legal doctrine, its preoccupations were in the "origins" of those subjects, its explanatory tools mostly internal to the legal system itself, and it emphasised continuity with the past, albeit a past that ended usually with the 1535 Statute of Uses although which

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4 What follows is necessarily a brief and rather crude summary of a large historiographical change, and it is not possible here to make all of the qualifications that one would want to make. For more detailed historiographical surveys, which include such qualifications, see Smith and McLaren "History's Living Legacy" above n 2; Richard A Cosgrove "The Culture of Academic Legal History: Lawyers' History and Historians' Law, 1870-1930" (2002) 33 *Cambrian LR* 23; and David Sugarman "Great Beyond His Knowing: Morton Horwitz's Influence on Legal Education and Scholarship in England, Canada, and Australia" in DW Hamilton and Alfred L Brophy (eds) *Law, Ideology and Methods: Essays in Honour of Morton J Horwitz* (Harvard University Press, Cambridge (Mass), forthcoming 2010) 504. I am grateful to David Sugarman for allowing me to see the page proof version of his article.

5 Sugarman "Great Beyond His Knowing", *ibid*, at 510.

sometimes extended as far forward as the Glorious Revolution of 1688.<sup>6</sup> Sugarman says all this can be summed up with the phrase "Small is Beautiful. Old is Good. English is best."<sup>7</sup> This was a history unconcerned with the vast swathe of issues which concerned historians outside the law. It was possible to write a history of land law without reference to the economic situation of the gentry, or their dynastic concerns, or their place in national politics. One could discuss the doctrinal evolution of master and servant law without reference to class. And so on.

The same was largely true of other countries in the common law tradition.<sup>8</sup> In some ways it was actually worse because what was understood as legal history was not indigenous to the country at all. To take Canada as an example, textbooks on the legal system or on land law often started with an historical introduction, one that parroted the English story until it got to the transplantation of English institutions to the colonies, and then stopped. The dominant understanding of the field, Philip Girard tells us, was to equate legal history with "early English legal history."<sup>9</sup>

In the 1970s this changed, as scholars everywhere in the common law world (albeit not all scholars) came to understand that the law's past cannot be separated from the host of other pasts that historians concerns themselves with – social history, political history, economic history, cultural history, gender history etc. Two particular historians loom large in this transformation, although I choose them not so much because of their influence (which was substantial) as for the fact that one transformed our understanding of the history of legal doctrine and the other our appreciation of the importance of history to legal systems and ideologies generally. Within the realm of common law

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6 The first edition of JH Baker's *Introduction to English Legal History* (Butterworths, London, 1971) is largely concerned with the period prior to the eighteenth century. Even when it deals with later years, it is often simply to "round out" the story, as with, for example, the abolition of the forms of action, or Chancery reform and fusion. Similarly, TFT Plucknett *A Concise History of the Common Law* (5th ed, Little, Brown, and Company, Boston, 1958) devoted some 75 pages out of 746 to the period after 1688.

7 Sugarman "Great Beyond His Knowing", above n 4, at 509.

8 For the United States see Morton J Horwitz "The Conservative Tradition in the Writing of American Legal History" (1973) 17 *Am J Legal Hist* 275; and Robert W Gordon "J. Willard Hurst and the Common Law Tradition in American Legal Historiography" (1975) 10 *Law and Soc Rev* 9. For Australia see W Prest "Law and History: Present State and Future Prospects" (1982) 1 *Law and History in Australia* 42; Stefan Petrow "The Future of the Past: The Development of Australian Legal History" (2000) 8 *Aust L J* 4; Alex Castles *An Australian Legal History* (Law Book Co, Sydney, 1982); and Rosemary Hunter "Australian Legal Histories in Context" (2003) 21 *L and Hist Rev* 607. For New Zealand see Peter Spiller, Jeremy Finn, and Richard Boast *A New Zealand Legal History* (2nd ed, Brookers, Wellington, 2001), which still bears traces of the dominance of the "English inheritance" in its institutional chapters. There were exceptions. In the United States constitutional law has long been the preserve of political scientists and historians as much as that of lawyers.

9 Philip Girard "Who's Afraid of Canadian Legal History" (2007) 75 *UTLJ* 727 at 737. For some early writing in the field that belies this interpretation see McLaren "The Legal Historian", above n 2, at 67-68, and Smith and McLaren "History's Living Legacy", above n 2, at 290-292.

doctrine Morton Horwitz's 1977 book, *The Transformation of American Law, 1780-1860*,<sup>10</sup> was very important. Horwitz argued that the changing economy and new political ideas of the late eighteenth and nineteenth centuries were responsible for substantial alterations to many common law doctrines, alterations which benefitted the new commercial and industrial classes at the expense of farmers and artisans. He also showed that this occurred through what he termed an "instrumentalist" style of judicial reasoning, one which openly and self-consciously adapted doctrine to circumstance and to changing ideologies, especially the rise of free market principles.

Horwitz's argument was attacked by many as flawed, and some of those attacks were well founded,<sup>11</sup> even if the extent of the critiques and some of the vitriol which accompanied them said more about the critics than about Horwitz.<sup>12</sup> But the idea that you can and should locate changes in judge made law not in vague ideas of times changing or the inherent genius of the law itself, but in actual material circumstances, changing ideologies, and historical context, struck a chord on both sides of the Atlantic.<sup>13</sup> We can still see its influence, I think, in the fact that the first large issue addressed in the chapter on torts in the recently published comprehensive history of English law in the nineteenth century is the extent to which judges were motivated by precedent or policy. And the answer, according to Michael Lobban, is that in some areas - and he cites workplace accidents in particular, "the policy which evolved was one which assisted enterprise, in throwing the cost of injuries on the wider community."<sup>14</sup>

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- 10 Morton J Horwitz *The Transformation of American Law, 1780-1860* (Harvard University Press, Cambridge, 1977).
- 11 See for example AWB Simpson "The Horwitz Thesis and the History of Contracts" (1979) 46 U Chi L Rev 533; Peter Karsten *Heart versus Head: Judge-made Law in Nineteenth-Century America* (University of North Carolina Press, Chapel Hill, 1997) and P Karsten *Between Law and Custom: "High" and "Low" Legal Cultures in the Lands of the British Diaspora – The United States, Canada, Australia, and New Zealand, 1600-1990* (Cambridge University Press, Cambridge, 2002).
- 12 For an excellent commentary see Laura Kalman "Transformations" (2003) 28 Law and Social Inquiry 1149. She notes that most of the reviews were "singularly snotty" and emanated largely from Horwitz's rejection of the notion of law as consensus. See also Dan Ernst "The Critical Tradition in the Writing of American Legal History" (1993) 102 Yale LJ 1019 at 1022: "for 15 years some legal scholars and historians ... compulsively frame[d] their research to refute Horwitz's claims".
- 13 An excellent example is Joel Brenner's survey of nuisance law in 19th century England, actually written before the publication of *The Transformation of American Law*, above n 10, but clearly influenced by the ideas that Horwitz had been publishing in article form for some years. Brenner asked why nuisance law did not have a profoundly limiting effect on English industrialisation, and found the answer not so much in doctrinal change – the basic precepts remained the same – but in the fact that the doctrine became site-specific. Thus it was not applied to factories and railways, and public nuisances were largely un-prosecuted. But it was still around to preserve the pristine quality of some areas: see Joel Franklin Brenner "Nuisance Law and the Industrial Revolution" (1974) 3 JLS 403.
- 14 Michael Lobban "Torts" in Lobban and others *The Oxford History of the Laws of England: Volume XII 1820-1914 Private Law* (Oxford University Press, Oxford, 2010) 877 at 886.

The second way in which legal history was revolutionised in the 1970s was via the engagement with the law of the new social history of the 1960s and 1970s. Emanating principally from Britain, in every jurisdiction this new social history in time brought the relationships between law and class, race and gender to the fore. The pioneers of this literature were the "Warwick" school of historians of England clustered around EP Thompson, and out of this group came the seminal work of Douglas Hay.<sup>15</sup> In a remarkable and still extensively cited article which has lost none of its power to dazzle and provoke readers, Hay argued that the history of crime and punishment in England could not be simply reduced to an institutional history, one in which the pre-reform eighteenth century system relying on corporal and extensive capital punishment was the product of a barbarity which eventually gave way to more enlightened ideas and to modern systems of policing and punishment through imprisonment. He analysed the logic of that system, showing how the extensive presence of capital punishment was actually made up of two pillars – terror and mercy – and how each of these elements was a reflection of the social and political order of the period. Terror was a necessary component of enforcing the law because the English feared a state police, which they equated with the absolute monarchies of Europe. Mercy was necessary because it maintained the system's legitimacy by limiting executions even as the loss of capital offences grew, and in the particular way it operated it was also ideally suited to a society based on patronage and personal influence. The criminal law was, in context, a rational system, despite what some critics claimed, rational because it grew out of and fitted into the social structure of the period. Hay's work also attracted its critics, although in my view the principal critique missed the mark.<sup>16</sup> The power of his argument is strengthened by comparative work he did on the English criminal law in post-conquest Quebec, which argued that the system did not operate in the same way precisely because of different underlying cultural assumptions.<sup>17</sup>

The developments in the USA and Britain inspired a new kind of legal history throughout the common law world, one which investigated seriously the ways in which legal forms and legal change – whether that change was in common law doctrine, procedure, statute law, or legal culture more generally – were contingent on other developments which occurred outside the law. Canadian legal history took off from the early 1980s, with the publication of the first two volumes in the Osgoode

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15 See especially Thompson *Whigs and Hunters*, above n 3; and Douglas Hay and others *Albion's Fatal Tree: Crime and Society in Eighteenth Century England* (Allen Lane, London, 1975), especially Hay's article in the latter, "Property, Authority and the Criminal Law".

16 John Langbein "Albion's Fatal Flaws" (1983) 98 *Past and Present* 96.

17 Douglas Hay "The Meanings of the Criminal Law in Quebec, 1764-1774" in Louis A Knafla (ed) *Crime and Criminal Justice in Europe and Canada* (Wilfrid Laurier University Press, Waterloo, 1981) 77. For another application of the Hay thesis, which demonstrates an attempt to import the ideology of the English law and a concomitant failure to adapt it effectively to local conditions, see Jim Phillips " 'High Above the Generality of the People': The Ideological Origins of the Nova Scotia Supreme Court Circuit" in Jim Phillips, Roy McMurtry and John C Saywell (eds) *Essays in the History of Canadian Law, Volume X: A Tribute to Peter Oliver* (Osgoode Society for Canadian Legal History and University of Toronto Press, Toronto, 2008) 200.

Society's *Essays in the History of Canadian Law*.<sup>18</sup> The volumes are eclectic, covering custody law and workers' compensation and frontier outlawry and many other topics. But what united them was a commitment to a contextual, often nationalistic, history of the law. Even before the Osgoode Society began the search for connections between socio-economic interests and changing legal doctrine informed the early work of English Canada's pioneer modern legal historian, Dick Risk. Risk, also influenced by the work of Willard Hurst, an instrumentalist of a different stripe than Horwitz, analysed the private law of nineteenth century Canada, and concluded that legislatures were more important than courts in altering the law, and that judges were only mild instrumentalists, not radical innovators.<sup>19</sup> In Canada and elsewhere the broad influence of Hay's ideas are evident and indeed frequently attested.<sup>20</sup> A healthy development in the new legal history of what one might term the smaller fragments of the common law world produced a somewhat nationalistic history of the law. A contextual nationalism marks the work of many Canadian legal historians,<sup>21</sup> and I see it even more prominently also in the writings of people like Andrew Buck and Bruce Kercher in Australia.<sup>22</sup>

When I use the term contingency I am not suggesting that legal developments are arbitrary or random, or a set of constant short term changes. Indeed I am arguing for exactly the opposite, that

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18 See David Flaherty (ed) *Essays in the History of Canadian Law, Volume I* (Osgoode Society for Canadian Legal History and University of Toronto Press, Toronto, 1981) and *Essays in the History of Canadian Law, Volume II* (Osgoode Society for Canadian Legal History and University of Toronto Press, Toronto, 1983). The Osgoode Society continues, and has to date published more than 80 books, in all fields of legal history. See <www.osgoodesociety.ca>.

19 See RCB Risk "The Nineteenth-Century Foundations of the Business Corporation in Ontario" (1973) 23 UTLJ 207; RCB Risk "The Golden Age: The Law about the Market in Nineteenth-Century Ontario" (1976) 26 UTLJ 307; RCB Risk "The Last Golden Age: Property and the Allocation of Losses in Ontario in the Nineteenth Century" (1977) 27 UTLJ 199; and RCB Risk "The Law and the Economy in mid-Nineteenth-Century Ontario: A Perspective" (1977) 27 UTLJ 403.

20 To name just a few, Hay is cited by Bruce Kercher in his history of Australian law as a key influence on his own analysis of popular attitudes to the law, by David Neal as "seminal" in his study of the rule of law in early New South Wales, and by Canadian historian Tina Loo in her analysis of prosecutions of aboriginal people for carrying on the potlatch ceremony. See variously Bruce Kercher *An Unruly Child: A History of Law in Australia* (Allen and Unwin, St Leonards (NSW), 1995) at 206; David Neal *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (Cambridge University Press, Cambridge, 1991) at xii; and Tina Loo "Dan Cranmer's Potlatch: Law as Coercion, Symbol and Rhetoric in British Columbia, 1884-1951" (1992) 73 Can Hist Rev 125. See also the special edition of the Australian Journal of Legal History devoted to a 30-year retrospective: James Muir "Property, Authority and the Classroom" (2006) 10 Aust J Leg Hist 29; and Jim Phillips "Albion's Empire: Property, Authority and the Criminal Law in Eighteenth-Century Canada" (2006) 10 Aust J Leg Hist 21.

21 For an example see RCB Risk's various essays on legal thought and the constitution: G Blaine Baker and Jim Phillips (eds) *RCB Risk, A History of Canadian Legal Thought: Collected Essays* (Osgoode Society for Canadian Legal History and University of Toronto Press, Toronto, 2006).

22 AR Buck *The Making of Australian Property Law* (Federation Press, Sydney, 2006); Kercher *An Unruly Child*, above n 20.

legal developments are rationally and logically connected to other kinds of developments, and like other historical change the pace is often slow, with old forms co-existing for a period with new ones. To argue that the principal lesson of legal history is contingency is also to make it inevitable that different jurisdictions will have different legal histories. To some extent legal developments are necessarily "fragmented – played out in multiple jurisdictions and forums."<sup>23</sup>

Perhaps ironically, if John Salmond himself were here today, or, I should say, the John Salmond of the early twentieth century were here today, he would not be among the already converted. John Salmond would have disagreed with what I am saying. As Brian Simpson cogently explains in the first Salmond lecture in 2007,<sup>24</sup> he was one of a small group of what have been termed the classical jurists of the late nineteenth and early twentieth centuries. In a series of textbooks these men sought to transform the messy world of the common law into a set of ordered and systematic principles. Accompanying this ordering went an insistence on, and authority for, the notion of the law as autonomous and internally coherent.<sup>25</sup> His volume entitled *Essays in Jurisprudence and Legal History* deals exclusively with doctrine and with developments in the high courts, and seeks to discover in a series of areas of law what is "rational" and what is not. In the preface he says that he rejects what he calls "mere antiquarianism," and instead looks at legal history "not so much for the sake of any inherent interest it may possess, as for the sake of the assistance afforded by it to the scientific study of the first principles of law."<sup>26</sup> Salmond's rejection of what he saw as the messy and incoherent common law was a rejection of history, as I understand it. His insistence that law was a science, an autonomous and internally rationally system, was likewise a rejection of history – even though he believed that one could uncover the applicable scientific principles through a study of history.

In short, Salmond's vision of the relationship between law and history is not mine. But I prefaced my remarks on Salmond by saying if the Salmond of his own period were here. Obviously he cannot be, and as we, just as much as law, are the products of our times, I like to think that a John Salmond born in 1962 rather than 1862 might have approved of what I am saying. At least I hope he would for he would have been a formidable person to debate.

I should take pains to stress that there is no particular politics associated with this view of legal history. It is true that legal history as it has been practised in the last few decades is, as American legal

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23 McLaren "Masochism of the Legal Historian," above n 2, at 72.

24 AWB Simpson "The Salmond Lecture" (2007) 38 VUWLR 669.

25 See David Sugarman "Legal Theory, the Common Law Mind, and the Making of the Textbook Tradition" in William Twining (ed) *Legal Theory and the Common Law* (Blackwell, Oxford, 1986) 26.

26 Salmond *Jurisprudence*, above n 1, at xiii.



historian Robert Gordon has put it, "a threat to legal scholarship as conventionally practised."<sup>27</sup> Thus there is a politics to the new legal history, in the sense that it requires rejection of the position that law stands entirely separate from society. But beyond that it is possible to write legal history from a variety of political stances. I have often been struck, for example, by the similarity of the account of the nineteenth century developments in private law offered by Horwitz, which I have already discussed, and by Richard Posner, the doyen of the conservative law and economics movement in the United States. Both argue that tort and contract law doctrines changed with changing economies. Horwitz disapproves of the process, seeing it as one in which some groups in society "captured" the legal system and worked it to their advantage. Conversely, Posner approves of it, seeing it as the sensible and inevitable response of the law to the period's recognition of the primacy of the market as a way of organising economic life. For Posner nineteenth-century tort law was, and should have been, "designed to bring about an efficient level of accidents and safety."<sup>28</sup> Similarly Patrick Atiyah's *Rise and Fall of Freedom of Contract*, a history of English contract law in the nineteenth century, provides an analysis of contract law developments that is very similar to Horwitz's but which is underpinned by a rather different set of conclusions. Atiyah tells the story as the triumph of modern ideas, not as the capturing of the legal system by industrial "interests."<sup>29</sup>

Before I leave this topic, I want to address a claim about the law and its relation to history that one sometimes hears. It is said that the critique of traditional legal history is misplaced, because the common law method is actually historical, that legal history is embedded in case analysis because our system is based on precedent. But in truth the search for precedent is a search for an apparently similar case in a case report shorn of any context. Although the common law relies on the past, it relies on a past that it constructs, not a contextual, complicated past. On this point I recommend, among many others, Richard Danzig's classic article on *Hadley v Baxendale*, a case which still features large in first year contracts courses.<sup>30</sup> I like his metaphor that cases are often viewed as what he calls "doctrinal fruits on a conceptual tree", all of which are "quite erroneously treated as though they blossomed at the same time, and for the same harvest".<sup>31</sup> One does, in short, offer students half a dozen cases on point drawn from different jurisdictions decades or centuries apart, all for the purpose of illustrating

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27 Robert W Gordon "Historicism in Legal Scholarship" (1981) 90 Yale LJ 1017. See also to the same effect Sugarman "Great Beyond His Knowing", above n 4, at 504: Legal history challenged the "dominant ahistorical tendencies" in law schools and the accompanying belief that the law was "internally consistent and autonomous".

28 Richard A Posner "A Theory of Negligence" (1972) 34 JLS 29 at 34.

29 Patrick Atiyah *Rise and Fall of Freedom of Contract* (Oxford University Press, Oxford, 1979).

30 R Danzig "Hadley v. Baxendale: A Study in the Industrialisation of the Law" (1975) 4 JLS 249. Danzig's conclusions have stood the test of time: see Peter Linzer and others "Symposium: Hadley v. Baxendale" (2004-2005) 11 Tex Wesleyan LR 225.

31 Danzig "Hadley v. Baxendale", *ibid*, at 250.

some abstract point of doctrine. Danzig insists – and I believe convincingly demonstrates – that in trying to understand Hadley "it matters that [it] ... was decided in 1854 in England and not in 1974 in California", and goes on to relate its meaning to transitions in the mid nineteenth century English economy and emerging ideas about the relationship between judges and juries.<sup>32</sup>

### **III THE RELATIVE AUTONOMY OF LAW**

What I have been talking about so far is putting "history," in all its richness and complexity, into "legal history." But an equally important reason why legal history matters, and a development which flowed from and closely followed the new scholarship emphasising contingency, was a recognition of the importance of law itself, both as a factor in other historical changes and as at times an autonomous agent, not wholly derivative of other histories. This may sound like a contradiction of my first reason, but I prefer to think of it as a subtle and necessary qualification, one which complicates our understanding of history and the law by making it the more precise. There is a danger in taking the idea of contingency too far. In attributing all legal change to other developments we run the risk of reducing the law to mere "superstructure." This was what the leading American legal historian Lawrence Friedman seems to do in the first edition of his *History of American Law*. For Friedman the law appears to have had no independent existence at all. He wrote: "This book treats American law ... as a mirror of society. It takes nothing as historical accident, nothing as autonomous, everything as relative and moulded by economy and society.... The legal system works like a blind, insensate machine. It does the bidding of those whose hands are on the controls."<sup>33</sup>

Many legal historians, while not denying, indeed embracing, the relevancy of other historical developments to legal ones, have shown that the law and the legal system do not constitute a "blind insensate machine." They have stressed not only that law itself has a concrete role to play, but also that it has significant symbolic and ideological power.<sup>34</sup> Thus legal historians employ the term "relative autonomy" to describe the historical role of law. Law has always had some degree of autonomy, has been to some extent impervious to change from outside influences and indeed able to influence other histories. This relative autonomy varies in significance from time to time and place to place, but it is always there.

This notion of relative autonomy actually captures a disparate variety of phenomena. Legal institutions and their leaders can resist change, often because of the aura that derives from their apparent autonomy and longevity. It took decades to effect the fusion of law and equity in many jurisdictions, for example, while criminal law codification took hold of almost everywhere in the

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32 Ibid.

33 Lawrence Friedman *History of American Law* (Simon and Schuster, New York, 1973) at 10 and 14.

34 For an excellent short summary of this argument see Michael Grossberg "Social Science and Legal History: Friedman's *History of American Law* the Second Time Around" (1988) 13 *Law and Social Inquiry* 359.

nineteenth-century except in the United Kingdom.<sup>35</sup> Both of these examples concern deep, long-term trends. At the level of individual case analyses also historians must appreciate that the law, like other institutions, has its own logic, rules, procedures that do need to be taken into account as they seek to explain legal events by reference to social factors. I often find it necessary to stress this relative autonomy to history post-graduate students, and recommend, as a simple but very illustrative example, an article by my former colleague at the University of Toronto, Carolyn Strange, now at the Australian National University, about rape prosecutions in the first half of the 20th century in Toronto.<sup>36</sup> Many social and feminist historians who have written about rape (rightfully) deprecate all the ways in which the law has historically failed to support rape victims. Onerous legal requirements, and a concomitant male distrust of any rape victim which resulted in women who complained of rape having their own characters put on trial, have combined to produce a very low conviction rate in rape prosecutions.

Yet we cannot wholly explain this phenomenon by reference to discriminatory attitudes. As Strange says, "sometimes the cases are decided by the evidence". A prosecution must present at least a reasonable case, and sometimes they did not. In her study of York County, Ontario, between 1880 and 1940, Strange shows that the rate of prosecution for rape differed widely in different decades, a fact she attributes to the rise and fall of morality campaigns in the city. Feeling the heat of public concern, not just over sexual assault but over morality generally, police and prosecutors at certain times would bring many more cases to court. They would bring strong cases and weak ones as they sought to get the numbers up, to show they were "doing something." Yet as they did so the acquittal rate rose substantially because they were too many of the weaker cases coming forward. Hence the fact that the law has standards, and there are rules, played a key role in explaining the pattern of legal behaviour she was describing.

A more fundamental aspect of the relative autonomy of the law has been the argument that the ideology of the law – the idea that it is neutral and autonomous – has given the legal system a degree of actual autonomy. Here we must return to Douglas Hay's seminal article already discussed. Hay

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35 For fusion see Patrick Polden "The Court of Chancery, 1820-1875" and "The Judicature Acts" in Polden and others *The Oxford History of the Laws of England: Volume II 1820-1914 The English Legal System* (Oxford University Press, Oxford, 2010), Part 3, chs 4 and 6. See also Michael Lobban "Preparing for Fusion: Reforming the Nineteenth-Century Court of Chancery, Part I" (2004) 22 *Law and Hist R* 389, and "Preparing for Fusion: Reforming the Nineteenth-Century Court of Chancery, Part II" (2004) 22 *Law and Hist R* 565. On codification see Keith Smith "Criminal Law" in Smith and others *The Oxford History of the Laws of England: Volume III 1820-1914 Fields of Development* (Oxford University Press, Oxford, 2010) Part 1, and J Barry Wright "Criminal Law Codification and Imperial Projects: The Self-Governing Jurisdiction Codes of the 1890s" (2008) 12 *Legal Hist* 19.

36 Carolyn Strange "Patriarchy Modified: The Criminal Prosecution of Rape in York County, Ontario, 1880-1930" in Jim Phillips, Tina Loo, and Susan Lewthwaite (eds) *Essays in the History of Canadian law, Volume V: Crime and Criminal Justice* (Osgoode Society for Canadian Legal History and University of Toronto Press, Toronto, 1995) 207.

argues that the apparent "inefficiencies" of the criminal law – such as excessive technicality that could lead to acquittals and a system of private prosecution – made the law appear separate from politics and class interests. The law manifested a life and logic of its own, the judges merely its servants, not its masters; it seemed separate and apart from those who held political and economic power. But to be effective as ideology in this way, it had at times to be autonomous, to work against the apparent interests of the rulers. That it did so made it, according to Hay, a powerful ideological weapon in asserting the very class interest that the law formally denied it was assisting.<sup>37</sup>

A very effective illustration of this notion that the ideology of the law and legality can play a significant role in particular events appears in a very fine recent book by Canadian historian Rande Kostal, on the Morant Bay Rebellion in Jamaica in 1865.<sup>38</sup> An attack on a local courthouse, which led to seventeen deaths, was responded to by the authorities with savage retribution. Hundreds of black Jamaicans were killed, many of them tortured first. The supposed rebellion itself was wholly suppressed within a few days, but most of the retaliatory violence – almost 450 killed, more than 600 viciously flogged – occurred after this, continuing throughout a 30-day period of martial law. Some were "tried" by military tribunals before execution, most were simply gunned down. The Morant Bay Rebellion had been the subject of a number of studies by historians of Jamaica and of the empire, but Kostal's book greatly enriches our understanding of the event, by writing about it as legal history. He deals principally with the aftermath in England, demonstrating that law mattered in the fierce debates over the affair, that those debates reveal a profound penetration into the language used by what he terms the "political class" of the 1860s of concepts of law and legality. The peculiar characteristics of empire, especially the non-white empire, posed considerable challenges to the English peoples' conceptions of themselves as a moral nation. Many Englishmen believed that "their countrymen had betrayed the minimum demands of civilized conduct," which was to act according to law, and that the suppression of the Morant Bay disturbance was "a matter of intense shame" for them.<sup>39</sup> At the end of the day politics prevailed over law, and attempts to prosecute Governor Eyre failed, but the long drawn out inquiries and proceedings revealed an extraordinarily spirited demand for law and legality that was a key part of the history of the rebellion and its aftermath.

In short, what these examples reveal is that while almost all legal historians now reject the notion that the law is in and of itself autonomous, most accept a degree of relative autonomy derived from the nature of legal institutions or the ideology of the law and legality, or both. This autonomy varies in its extent from time to time and place to place and subject to subject, but it is an important part of legal history and, consequently, an important lesson that legal history can teach about the nature of law, a lesson as important as the message of contingency.

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37 Hay "Property, Authority and the Criminal Law", above n 15.

38 RW Kostal *A Jurisprudence of Power: Victorian Empire and the Rule of Law* (Oxford University Press, New York and London, 2005).

39 *Ibid.*, at 460-461.

#### IV *LEGAL HISTORY IS LIBERATING*

My third reason why legal history matters is in substantial measure a derivative of the first. The contingency that I have described is liberating. Appreciating the message of contingency demystifies the law, removes history as authority in itself, and makes it possible for current students and practitioners to envisage other worlds, other ways of doing things. Earlier I described the state of English legal history before the 1970s. In one sense that was an unfair characterisation, because this point was understood long ago by the pioneer English legal historian, F.W. Maitland. Maitland indeed could have been the person who brought the common law world's legal history into the modern period, had he created a set of disciples rather than be effectively ignored for decades. He believed in a legal history which "brought out" all the "political, social, economic and moral aspects" of legal developments.<sup>40</sup> In a famous and often-used quotation on the question of the usefulness of legal history, Maitland asserted: "The only direct utility of legal history ... lies in the lesson that each generation has an enormous power of shaping its own law. I don't think that the study of legal history would make men fatalists; I doubt that it would make them conservatives. I am sure that it would free them from superstitions and teach them that they have free hands."<sup>41</sup>

Maitland's point has been made in different ways by many modern commentators. History destabilizes that mode of current legal argument which purportedly relies on the past as authority. There is much apparent and beguiling continuity in the law, with institutions like the jury or doctrines like "nuisance" or underlying ideas like "freedom of contract" having been around for a long time. But in many cases the words stay the same but the meaning changes. As Jeremy Webber has put it, adapting the famous aphorism "The past is a foreign country: they do things differently there," we need to appreciate "how the decisions of the past were often made in profoundly different institutional contexts and with different questions in mind."<sup>42</sup> Stuart Banner puts it this way: "History ... written according to the conventions of late twentieth century professional historians, with an emphasis on the ways in which the past differed from the present ... enormously complicates the task of legal argument. If the texts that constitute today's legal authority were written by people who used words differently from the way we use them today, who thought differently than the way we think today, ... the past no longer speaks with an authoritative voice. It can no longer serve as a safe harbour."<sup>43</sup>

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40 FW Maitland "Why the History of English Law is Not Written" in HAL Fisher (ed) *Collected Papers of Frederic William Maitland* (Cambridge University Press, Cambridge, 1911) 485.

41 "Maitland to AV Dicey, c. July 1896" in PNR Zutshi (ed) *The Letters of Frederic William Maitland, Volume II* (Selden Society, London, 1995) 105.

42 Webber "The Past and Foreign Countries", above n 2, at 2.

43 Stuart Banner "Legal History and Legal Scholarship" (1998) 76 Wash ULQ 37 at 37. See also generally Robert W Gordon "The Past as Authority and Social Critic: Stabilizing and Destabilizing Functions of History in Legal Argument" in Terrence J McDonald (ed) *The Historic Turn in the Human Sciences* (University of Michigan Press, Ann Arbor, 1996) 339.

I am not suggesting here that the understanding that we get from appreciating history and its message of contingency can lead judges or others to the "correct" contemporary answers. History may, at most, admonish us against repeating the mistakes of the past (although there is regrettably little evidence of that), but it does not provide the correct answer. For that we must exert all our other modes of interpretation and analysis, our sense of justice, our desire to see certain policies put into place that we think will benefit society.

Moreover, judges cannot make good historians, because when the judicial process turns to history it usually does so to find justification, not nuanced analysis.<sup>44</sup> The legal historians job in this respect is to discourage blind reliance on the past as justification of current decisions. We tend perhaps to think of the originalist argument in American constitutional adjudication as the most blatant example of trying to use history to find the answer – the constitution must mean in 2010 exactly and only what it meant in the late eighteenth century.<sup>45</sup> It is easy to reject this kind of originalism both because it seems absurd and because it is so uniquely American, but "originalism" operates in more subtle forms in many contexts.

The late Chief Justice of Canada, Brian Dickson, is widely considered to be a great judge,<sup>46</sup> and indeed he provides me with one of my favourite classroom aphorisms: "A page of history may illuminate more than a book of logic."<sup>47</sup> But he could also be an originalist in some areas. Whenever Dickson CJC was required to write about the jury – an exclusionary rule of evidence was the most common occasion – he tended to lavishly praise the institution and to insist that juries should be trusted to make the right decisions. He would often bolster this contemporary policy preference by a paean to the jury, talking about its centrality to the English criminal trial for centuries past, its place as part of the genius of the common law and the English constitution, etc. In *R v Corbett*, for example, he insisted that "we should retain our strong faith in juries" because, quoting the famous nineteenth-century legal historian Sir William Holdsworth, they had been a cornerstone of the system for "some hundreds of years."<sup>48</sup>

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44 For an argument that the Supreme Court of Canada recently misused labour law history even while, ironically, finding that the Charter of Rights included a right to bargain collectively, see Eric Tucker "The Constitutional Right to Bargain Collectively: The Ironies of Labour History in the Supreme Court of Canada" (2008) 61 *Labour/Le Travail* 151. See also R Blake Brown "One Version of History: The Supreme Court of Canada's Use of History in the Quebec Secession Reference" in Penny Bryden and Dimitry Anastakis (eds) *Framing Federalism for the Twenty-First Century: Historical Essays in Honour of John T Saywell* (University of Toronto Press, Toronto, 2009) 15.

45 There is a vast literature on this, much of it critical of the courts' use of history. For a useful survey see Matthew J Festa "Applying a Usable Past: The Use of History in Law" (2008) 38 *Seton Hall L Rev* 479.

46 See Robert J Sharpe and Kent Roach *Brian Dickson: A Judge's Journey* (Osgoode Society for Canadian Legal History and University of Toronto Press, Toronto, 2003).

47 *R v Wetmore* (1983) 2 SCR 284.

48 *R v Corbett* (1988) 1 SCR 670 at 693.

But this is less than convincing if we consider what we know of the eighteenth century jury. The one that operated in the English colony of Nova Scotia in the second half of the eighteenth century was based very much on the English model and followed English practice.<sup>49</sup> When the Supreme Court of Nova Scotia met for one of its quarterly terms it would select trial 36 jurors for the session, and they would sit for the whole of the session. They would hear half a dozen criminal cases a day, some of them capital, and they would do so in largely the same panels of 12, although there could be small changes here and there. At the end of each trial they would sometimes retire for 10 or 15 minutes, but sometimes they would not – they would huddle together and discuss their verdict in the courtroom. They did give a verdict at the end of each case, something which was, in the broad sweep of things, a relatively new practice. Before the late seventeenth century English juries gave their verdicts on all cases at the end of the day. It was indeed the introduction of verdicts at the end of each case that brought juries to sit together; previously jurors scattered themselves around the courtroom.

In addition, all this was taking place in a small community, with the inevitable result that jurymen often knew prosecutors and the accused. In one case a man sat on a jury for the first trial of the day, came off it to prosecute the second case (the vast majority of criminal cases before the nineteenth century were by private prosecution by the victim), and returned to the jury for the third. This kind of personal knowledge of all those involved was not considered a bad thing, it helped juries to weight evidence and character. My point here is that I have just described an institution with the same name as one we now have, and formally similar (12 people, sitting together) but which operated entirely differently. An understanding of those differences would surely caution anybody against historical longevity as justification. There are good and not so good arguments for keeping the jury; history is not one of them.

Before leaving this section, it is useful to consider a critique of this apparently limited view of the utility of legal history. Recent decades have seen law schools become much more interdisciplinary, and as a result we now have legal scholars arguing not simply that law is best understood through the lens of economics or philosophy, but that these other disciplines can provide normative answers to difficult questions – the very thing that I have said history cannot do. History is therefore, our critics might say, simply much less useful than other disciplines. It seems to me that there are two answers to this. One is that, assuming that economics, for example, does show us the right way forward, then by showing that the past cannot be simply relied on for justification history allows the ground to be cleared for the application of some other theory or policy to contemporary problems. Paraphrasing

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49 For what follows see Jim Phillips "The Criminal Trial in Nova Scotia, 1749-1815" in G Blaine Baker and Jim Phillips (eds) *Essays in the History of Canadian Law, Volume VIII – In Honour of RCB Risk* (Osgoode Society for Canadian Legal History and University of Toronto Press, Toronto, 1999) 469 and "Halifax Juries in the Eighteenth Century" in Simon Devereaux, Greg Smith, and Allyson May (eds) *Criminal Justice in the Old World and the New: Essays in Honour of JM Beattie* (University of Toronto Centre of Criminology, Toronto, 1998) 135. For a similar account of the English trial jury in the eighteenth century see JM Beattie *Crime and the Courts in England, 1660-1800* (Princeton University Press, Princeton, 1986).

Maitland, legal history frees the hands of the followers of Richard Posner. I would not want the law to follow Posnerian dictates, but that is another issue for another day. The point is that history and other disciplines can be complementary, the one going to our understanding of how we got where we are the other arguing for a future path.

My second response is rather less conciliatory. In some respects the assertion of interdisciplinary scholars is not simply that law ought to follow a certain line of development, but that it already does, that it is in its very nature a distinctive way of thinking about the world of social relations.<sup>50</sup> In short, formalism has it right and the law is separate from the world in which it operates. Or, as some assert, the law is entirely determined by the natural laws of the market. Here legal history cannot merely complement the economists and philosophers, it is a direct challenge to them. History shows us that a complex set of phenomena have shaped our law and legal institutions, whether we like it or not. John Weaver convincingly shows that governments, not private ordering, were crucial to what he calls "The Great Land Rush" of the European empires, whatever conservative development economists might like to assert.<sup>51</sup> At the other extreme, Edward White, a leading American torts history scholar, many years ago was required to defend his thesis – that tort law emerged as a result of the parallel emergence of "conceptualism" in American thought – against critics who deprecated the suggestion that he had painted a picture of law as transitory: "It may well be threatening to persons whose principal business is the production of scholarship in which they seek to persuade others of the soundness and validity of their ideas to be told that the prominence of ideas is culturally determined and the lasting power of ideas only temporary. But the history of tort law in America suggest that view."<sup>52</sup>

## **V LEGAL HISTORY, LEGAL PLURALISM AND ALTERNATIVE VISIONS**

The fourth reason why legal history matters for understanding the complexity of law is that it allows us to see that what we think of as the law today, and then assume to have always been the case, has in fact not always predominated. The jury example I have just used to make a different point is an example of this. Not just the practices of the institution but also the ideas underlying those practices were radically different from what they are today. More generally, like all history, legal history produces "winners" and "losers." Losers are those whose vision of society and belief systems lost out in the struggle with other visions. Legal history enables us to excavate the past for such phenomena, to

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50 See for example Ernest J Weinrib *The Idea of Private Law* (Harvard University Press, Cambridge, 2005).

51 John C Weaver *The Great Land Rush and the Making of the Modern World, 1650-1900* (McGill-Queen's University Press, Montreal, 2003), especially ch 2.

52 G Edward White *Tort Law in America: An Intellectual History* (2nd ed, Oxford University Press, Oxford, 1984) at xi.



show that there have been, and thus are, arguably legitimately different ways to think about many things, including legal orders.

There are many illustrations of what many would call legal pluralism but which I like to term "alternative visions" that I could use here. I will begin with examples of alternatives that have actually become the norm after a period of being lost. An excellent illustration of this is the role of history in the modern development of the law relating to aboriginal rights in Canada,<sup>53</sup> and this is an especially good example because as I understand it a similar story could be told about Australia and New Zealand.<sup>54</sup> In a famous statement in 1969 then Canadian Prime Minister Pierre Trudeau announced that there was no such thing as rights for aboriginal people distinct from those held by all other Canadians. In a sense he was right, for one could not find any judicial or legislative statement to the contrary in the twentieth century. But those few legal historians who had looked at the question had found a variety of sources – some cases and also government policies, some dealing with areas that became part of Canada, others dealing with other parts of the empire – that said differently, that said that at one time it was part of the common law that indigenous peoples had rights in their land and other kinds of rights. But that legal tradition that had been effectively erased from the law books and thus from the world view of society and politicians. Indeed in Canada it was so much lost that in 1927 it was made an offence to raise money for the purpose of prosecuting Indian land claims without the consent of the superintendent general of Indians.

When the matter did finally get into a courtroom, and to the Supreme Court of Canada in the *Calder* case in the early 1970s, the Court relied on cases and practices long forgotten to assert, or rather re-assert, the idea of native title.<sup>55</sup> Here there was a particular irony, for the last decades of the nineteenth century saw a dispute between the federal government and the province of British Columbia about native title. The later denied its existence, while the former asserted it, indeed could hardly do otherwise because it had devoted considerable resources in the 1870s to negotiating a set of treaties to extinguish it in much of the Canadian west. In the early twentieth century the federal government decided to test the issue in court, and a legal opinion was prepared in the Department of Justice. That opinion was so comprehensive and so much in line with what the Supreme Court of Canada finally decided that it could have been simply adopted as a judgment by the Court seventy

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53 For what follows see Hamar Foster "Letting Go the Bone: The Idea of Indian Title in British Columbia, 1849-1927" in Hamar Foster and John McLaren (eds) *Essays in the History of Canadian Law, Volume VI: British Columbia and the Yukon* (Osgoode Society for Canadian Legal History and University of Toronto Press, Toronto, 1995) 28; Hamar Foster "The Romance of the Lost: The Role of Tom MacInnes in the History of the British Columbia Land Question" in Baker and Phillips (eds) *Essays in Honour of RCB Risk*, above n 49, at 171; and Hamar Foster, Heather Raven, and Jeremy Webber (eds) *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (University of British Columbia Press, Vancouver, 2007).

54 See Henry Reynolds "The Judges Judged: Mabo and the Disaffected Historians" (2007) 11 *Legal Hist* 231.

55 *Calder v Attorney-General of British Columbia* (1973) 34 DLR 3d 145 (SCC).

years later. Yet at that time, because of an intervening election, the case was never brought forward and the legal opinion literally "lost" in the Department archives.

A second aspect of the Canadian story about aboriginal rights involves legal pluralism. Again, it was asserted throughout the twentieth century that there was no place in Canadian law for anything other than European law. Yet historians investigating practice in the period before extensive settlement found judges and officials perfectly willing to accept that in many *inter se* matters aboriginal law was the touchstone for dispute resolution. The most famous such case occurred as late as the 1860s, when a Quebec court found valid a marriage of a Cree woman and a Hudson's Bay Company employee carried out in the north west territories according to Cree law. It was not simply valid in the territories, it was valid in Quebec for determining succession to the husband's property there. In deciding the case Mr Justice Monk found the idea that Cree law was abrogated by British sovereignty "monstrous."<sup>56</sup> This case, and other historical excavations, are now playing a role in arguments about aboriginal sovereignty under the Canadian constitution.

Lest it be thought that this kind of role for legal history is restricted to arguments about indigenous rights, other examples could easily be provided. One comes from the debate over same sex marriage in Canada. Among other arguments, opponents of the notion frequently offered a beguiling but fundamentally flawed view about the historical consistency of marriage rules. Yet it is clear that these have changed, and not infrequently, over time.<sup>57</sup>

I am not contradicting my earlier argument history does not provide answers. My point is that history shows that ways of thinking other than conventional wisdom are possible. At the end of the day courts and legislatures must make their own decisions. And, as with the jury example, legal history shows us that we cannot resolve the question with a simple appeal to an inadequately understood past.

The role that legal history can play in exposing the degree of legal pluralism in our system, past and present, is by no means restricted to ideas that were once the mainstream, became forgotten, and have now been revived. Legal pluralism appears in many other guises historically, and these may well have a contemporary co-existence with other legal orders. Studying the past, for example, enables us to chart the co-existence with state based law of "forms of private ordering." To John McLaren these include "the rules, practices and processes of corporations, trading companies, market regulators,

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56 *Connolly v Woolrich and Johnson* (1867) 11 Lower Canada Jurist 197 (Que SC).

57 See Robert Leckey "Profane Matrimony" (2006) 21 Can JL and Society 1. See also generally Sarah Carter *The Importance of Being Monogamous: Marriage and Nation Building in Western Canada to 1915* (University of Alberta Press, Edmonton, 2008).

professional bodies," and others.<sup>58</sup> They also include the remarkable prevalence of local jurisdictions even in a country as apparently centralised as Britain, as Harry Arthurs has so ably demonstrated.<sup>59</sup>

Increasingly in recent years historians' have also turned their eyes to another form of legal pluralism, what has been termed "low law." Here the goal is to examine the law as it operates not in high courts or among elite lawyers, but as it is made, operated and interpreted by lay, local officials. Douglas Hay and Paul Craven's monumental study of master and servant law in the British empire is perhaps the best-known example of this,<sup>60</sup> and there are many others as we increasingly bring under the historians' eye Justices of the Peace, municipal officials, and the like.<sup>61</sup> When we do so we find a world in which legal actors carried out their functions largely unsupervised and unconstrained by the governments and high courts who were supposedly their superiors. The result was that those who experienced the "law" administered were as much subject to the rule of men as laws – a salutary reminder that the "modern" world of law and government is neither as well-rooted nor as ubiquitous as we think. A current doctoral student of mine is looking at the history of Canadian extradition law and practice, and one of his key findings is that of the prevalence of what we might perhaps generously term "informal" extradition in the nineteenth century. Another word for this is kidnapping, easily done across the Canadian-American border. Some of this kidnapping was wholly outside the legal system, but on plenty of occasions local police, magistrates and jailors either turned a blind eye to what was under their noses or actually participated in the process.<sup>62</sup>

A perhaps even more fundamental challenge to traditional legal history and thinking about law is the legal pluralism which emerges from legal norms outside the state ordered ones. History shows us that law is not always limited to what we call "formal" or "state" law, that the law world often involves popular understandings of law and justice which are different to official norms, or methods of dispute resolution which ignore or by pass official ones. I am not suggesting these are somehow superior, but they are at times highly significant. They represent a form of pluralism which has long existed in most legal systems. Probably the best-known example of this is Dirk Hartog's famous article on "Pigs and Positivism," which explored the issue of whether or not it was legal to let pigs run on the streets in

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58 McLaren "The Legal Historian", above n 2, at 73.

59 Harry W Arthurs *Without the Law: Administrative Justice and Legal Pluralism in Nineteenth-Century England* (University of Toronto Press, Toronto, 1985).

60 Douglas Hay and Paul Craven (eds) *Masters, Servants and Magistrates in Britain and the Empire, 1562-1955* (University of North Carolina Press, Chapel Hill, 2004).

61 Laura Edwards *The People and their Peace: Legal Culture and the Transformation of Inequality in the post-Revolutionary South* (University of North Carolina Press, Chapel Hill, 2009).

62 See Bradley Miller "The High and Low Law of Nations: State Power and Community Justice on the Border, 1810-1910" (Paper presented to the Canadian Historical Association Conference, Montreal, June 2010). This is part of a soon to be completed doctoral thesis at the University of Toronto, "Emptying the Den of Thieves: International Fugitives and the Law in Canada, 1810-1910."

early nineteenth century New York. A court said it was not, but there was a competing custom which permitted them, and which worked to mean that they stayed on the streets for many years, whatever the law said.<sup>63</sup> To similar effect, the history of marriage and divorce, as opposed to the history of marriage and divorce law, often reveals the prevalence of self-divorce, of informal ways in which people not only separated in fact but considered that they had a right to do so, and to remarry.<sup>64</sup> There are also many accounts from British settler societies of the importance of "informal" land titles in delineating patterns of settlement and, often, aboriginal dispossession.<sup>65</sup> The earliest work on this kind of "customary" law came out of the new English social history of the 1960s and 1970s, much of it concerned with what EP Thompson called "alternative definitions of property rights" as opposed to "property, supported by law, against no property."<sup>66</sup>

In line with my earlier comment about self-promotion, the example I most like to use for this point is drawn from a book which a colleague and I wrote a few years ago, about a murder trial in early twentieth century Seattle, Washington, which turned on something called the "Unwritten law."<sup>67</sup> The story is a fascinating one, and the book is of course still available at a very reasonable price. The story involved an early twentieth century radical preacher, part of what was termed the holiness movement, a movement that grew into pentecostalism a few years later. The preacher had a small but very devoted following in a small town in Oregon, a following consisting principally of women, who were so devoted to salvation that they forsook family and children and respectability to follow him. The first example of informal law came about when the men of the community took him from his residence one night, paraded him through the town, and tarred and feathered him. Should he return they said, a much worse fate would await him. The men who did this believed, and stated publicly, that there was a higher law than that of the state of Oregon, a law that gave men the right to take action against someone who ruined their families and corrupted their womenfolk. Later, after the preacher had managed to re-gather his flock elsewhere, a brother of one of his followers simply gunned him

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63 Hendrik Hartog "Pigs and Positivism" (1985) Wis L Rev 899.

64 Jamie Snell *In the Shadow of the Law: Divorce in Canada 1900-1939* (University of Toronto Press, Toronto, 1991).

65 See, *inter alia*, Bruce Kercher "Formal and Informal Law in Two New Lands: Land Law in Newfoundland and New South Wales under Francis Forbes" in C English (ed) *Essays in the History of Canadian Law, Vol IX: Two Islands, Newfoundland and Prince Edward Island* (Osgoode Society for Canadian Legal History and University of Toronto Press, Toronto, 2005) 147; Weaver *The Great Land Rush*, above n 51; Bruce Ziff and Sean Ward "Squatters' Rights and the Origin of Edmonton Settlement" in Phillips and others (eds) *Essays – A Tribute to Peter Oliver*, above n 17, 446. See also Kercher in this volume.

66 Thompson *Whigs and Hunters*, above n 3, at 261. The phenomenon is explored in detail in EP Thompson *Customs in Common* (New Press, New York, 1991). See also the extensive literature on custom as law in whaling and similar resource industries, an example of which is the excellent article by Anderson in this volume.

67 Jim Phillips and Rosemary Gartner *Murdering Holiness: The Trials of Franz Creffield and George Mitchell* (University of British Columbia Press, Vancouver, 2003).

down in cold blood in the streets of Seattle, and then claimed the sanction of another kind of higher law, the so-called "Unwritten law".

This doctrine, used in many cases in the second half of the nineteenth century although of course never part of any state code (except that of Texas which tells you all you want to know about Texas), said that a man had the right to take the life of another in revenge for offences committed against his female family members or to protect them from sexual dishonour. The young man, George Mitchell, claimed that he killed the preacher to prevent him from "ruining" his younger sister. Mitchell's crime fuelled a furious press and public debate over the validity of his action, with half the city in favour and half opposed. And the jury who tried the case acquitted him. Hence his defence struck a chord with popular attitudes about what the law should be. What is interesting about the two instances in this book, the tarring and feathering and the murder, is not that people decided they had the right to operate outside the law, but that they believed in their right to act according to a different vision of law. In their minds it was not lawlessness but a higher vision of law than anything the state could offer. And lest it be thought that such reliance on popular visions of law is confined to the "wild west," or in this case the still somewhat untamed west, one can find similar examples elsewhere, including the acquittal of servant girl Carrie Davis for gunning down a scion of the Toronto establishment in 1915.<sup>68</sup>

As an aside, but a relevant one giving the events of the next two days, this book is an example of a methodology we are seeing increasingly used – that of case studies, or sometimes called micro history or legal archaeology. Part of the reason for its popularity is precisely the fact that it enables the historian to say something substantial about legal pluralism. Survey histories invariably privilege the process of getting to the end result, case studies seek to capture a moment in time.

These case studies can be broadly divided into two types. One kind of legal archaeology involves taking a well-known case and investigating the deep background to it. My immediate predecessor in giving the Salmond lecture, Brian Simpson, has popularised this approach,<sup>69</sup> and in the US one press has brought out a whole series of books on leading Supreme Court cases.<sup>70</sup> Simpson explains why he embarked on his work by noting that "cases need to be treated as what they are, fragments of antiquity, and we need ... gently to free these fragments from the overburden of legal dogmatics, and try, by relating them to other evidence ... to make sense of them as events in history and incidents in the evolution of the law."<sup>71</sup>

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68 Carolyn Strange "Wounded Womanhood and Dead Men: Chivalry and the Trials of Clara Ford and Carrie Davis" in France Iacovetta and Mariana Valverde (eds) *Gender Conflicts: New Essays in Women's History* (University of Toronto Press, Toronto, 1992) 149.

69 See especially AWB Simpson *Leading Cases in the Common Law* (Oxford University Press, Oxford, 1995).

70 This is the University Press of Kansas' series of Landmark Law Cases and American Society.

71 Simpson *Leading Cases*, above n 69, at 12.

I have recently done two of these "leading cases" studies myself, and the results were interestingly different. In one, a Canadian Supreme Court case on picketing on private property, we were able to provide a fuller understanding of the case, but nothing that surprised us or made us feel any differently about the result.<sup>72</sup> The second, a study of the leading Supreme Court of Canada case on de facto expropriation, was a case that I have taught for twenty years – without, I am now painfully aware, really knowing anything about it. The reported decision is so lacking in significant context, and indeed factually wrong in some respects, that I have had to completely change the way I teach it.<sup>73</sup> Like American historian Deborah Threedy, the experience has made me "destabilize the received wisdom about the case and to suggest other ways of looking at the litigation."<sup>74</sup>

Not all case studies involve "leading cases." In other instances the case chosen is not a well known case at all, it may not even be reported. Here the historian starts from the case but writes about it as much as a social issue as a legal one. Our book on the Seattle case is an example of that, and there are many others – the best-known probably still being Natalie Davis' *The Return of Martin Guerre*.<sup>75</sup> Using cases in this way enables historians to gather evidence about social practice unavailable elsewhere. One of the papers to be given in the conference which follows this lecture concerns breach of promise of marriage. The evidence from that case about how a middle class couple courted in nineteenth century Wellington contradicts what family historians have assumed to be the norm, a norm derived from reading idealistic etiquette manuals and similar literature.<sup>76</sup> But while advocating the use of legally derived evidence to enhance social history, I repeat a caution made above. Case files or similar legal evidence are not simply a repository of information about the past, such source material has a context, was produced by a legal, not some other, system. As I have suggested in my earlier remarks on relative autonomy, a lack of attention to the ways in which legal ideologies and legal process affected events, even in a case where the purpose is not apparently to study legal history, distorts the story.

## VI CONCLUSION – LEGAL HISTORY AND LEGAL EDUCATION

At the start of this lecture I referred to the fact that I come at this subject from the point of view of a legal educator, and I want to finish with the relationship between legal history and legal education,

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72 Philip Girard and Jim Phillips "A Certain Malaise: *Harrison v. Carswell*, Shopping Centre Picketing, and the Limits of the Postwar Settlement" in J Fudge and E Tucker (eds) *Work on Trial: Canadian Labour Law Struggles* (Osgoode Society for Canadian Legal History and Irwin Law, Toronto, 2010) 249.

73 Jim Phillips and Jeremy Martin "*Manitoba Fisheries v The Queen*: The Origins of Canada's De Facto Expropriation Doctrine" in James Muir, Eric Tucker and Bruce Ziff (eds) *Property Law Stories in Canadian History* [title provisional] (Osgoode Society for Canadian Legal History and Irwin Law, Toronto, forthcoming 2012).

74 Debora Threedy "A Fish Story: *Alaska Packers Association v. Domenico*" (2000) Utah L Rev 185 at 221.

75 Natalie Davis *The Return of Martin Guerre* (Harvard University Press, Cambridge, 1983).

76 See Simpson in this volume.

and with something of a lament. If indeed the law has always been shaped by circumstances and context, has never been a wholly independent force, then we need to appreciate this in order to impart students with a proper understanding of the law. We do them a disservice by not teaching enough legal history, enough, that is, to show them the law in context. There is no question that the number of legal history courses available in most jurisdiction's law schools has declined in the last couple of decades, ironically during the same period that the subject has become more popular among academics in both law and history departments.

In an odd way this is perhaps not a bad thing, for some of those courses were simply adjuncts to a neutral and ahistorical view of law reflected everywhere in the curriculum. We should not wish for revival of those kinds of courses, but we can wish for more engagement with history. It is not likely, given the demands of other things, that we will see a serious attempt anywhere to make modern legal education compulsory in law schools, even though doing so would impart a much greater understanding of law as well as improve students ability to think contextually. But what we can do is to operate somewhat subversively in the interstices of the courses we do teach. I teach property, and my students have, remarkably, been known to complain about history coming into my first year property course, but most appreciate the greater understanding that they get from it. I do of course explain tenure and estates through history, else how else would anybody make sense of the basic concepts of English land law. That is standard fare. But I put history into lots of other things as well.

Very early in the course we deal with the threshold issue of what can be "property," using, among other things, the famous case of *International News Service v Associated Press*, in which the US Supreme Court had to decide in 1919 whether a news agency could "own" its news, at least to the extent of being able to prevent a competitor from using it for a period of time.<sup>77</sup> The decision is written largely in the abstract, with only Brandeis J's dissenting judgment offering any hint of the context. Yet it is very important to know that the case arose because British and French authorities denied access to news sources to the International New Service, because it was owned by William Randolph Hearst, Citizen Kane, who opposed the allied side in the war, wanting to see the old European empires weakened and a new American empire take their place. So he simply took the news published by the Associated Press and reproduced it in his own papers. Students who study this case through other instructors know it as a case about whether information can be property. My students know it as a case about that too, of course, but also very much as a case about the concentration of news services, about monopoly.<sup>78</sup>

Finally, I also started by saying that I have had lots of short conversations about legal history with colleagues over the years. One concern they sometimes express is that the message of contingency,

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77 *International News Service v Associated Press* 248 US 215 (1918).

78 See Douglas Baird "Common Law Intellectual Property and the Legacy of *International News Service v. Associated Press*" (1983) 50 U Chi L Rev 411; and Douglas Baird "Property, Natural Monopoly and the Uneasy Legacy of *INS v AP*" (June 2005) SSRN Electronic Paper Collection <[www.ssrn.com](http://www.ssrn.com)>.

the suggestion that judges respond to social context, risks, in our system, some kind of nihilistic descent into excessive judicial law making. I have three answers to this. First, as I have suggested, legal history is actually about much more than doctrine and high courts. It is a complex mix of common law and statute, of high and low law, of formal and informal law. Second, and narrowing the answer to courts and doctrine, we should not be ostriches. If I am wrong about what legal history teaches us, then say so. Make an argument that the formalist view of legal history is correct. But don't say you should not say something because people might lose faith. Third, to talk about the broad ways in which legal change reflects social change is not to suggest that lawyers cannot go about their everyday business without faith that the law is generally stable in their time, that we cannot trust judges not to make good faith efforts to decide the vast majority of cases according to what they see as established law. Few people now seriously contend that judges are not themselves the product of their time and not influenced by broader social considerations. We turn our minds now not to the existence of some degree of judicial creativity, but to its legitimate limits, and that is an intriguing and healthy debate. As Maitland would have said, your hands are free to debate that issue.