

INTRODUCTION:
**J. WILLARD HURST AND THE COMMON LAW
TRADITION IN AMERICAN LEGAL
HISTORIOGRAPHY***

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In 1963 the Italian historiographer Arnaldo Momigliano told an assembly of legal historians that they were gathered to celebrate “a historical event of some importance, the end of history of law as an autonomous branch of historical research.” At least in the historiography of ancient law, he said, “the elimination of history of law as independent history now seems to me to be settled.”

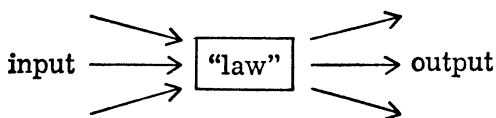
Nor is it important to debate whether it was Max Weber or the French school of sociology or the teaching of Marx and Engels or, finally, the influence of Marc Bloch that precipitated this solution. It is inherent in the general recognition that law, as a systematization of social relations at a given level, cannot be understood without an analysis of the sexual orientations, the moral and religious beliefs, the economic production and the military forces that characterize a given society at a given moment, and are expressed in associations of individuals and in conflicts. It is conceivable today that history of literature, history of art, history of science, and history of religion can each retain some sort of autonomy, inasmuch as each is concerned with a specific activity of man. But what is no longer conceivable is that history of law should be autonomous; for by its very nature it is a formulation of human relations rooted in manifold human activities. And if, in some civilizations, there is a class of jurisconsults with special rules of conduct and of reasoning, this too is a social phenomenon to be interpreted.¹

In the historiography of American law, the process Momigliano thus described as completed is only just beginning, for American legal historians have usually worked on the assumption that, at least for the purpose of dividing academic labor, it makes sense to identify a sphere of “legal” phenomena in society, and to write about how these have changed over time. It has never, of course, been possible to mark off the precise boundaries of such a field, but as a practical matter it almost inevitably turns out that they are drawn around the institutions,

* This essay owes much to conversations with Paul R. Duggan, Marc Galanter, David Hollinger, Stewart Macaulay, John Henry Schlegel, David Trubek and Mark Tushnet, and to the members of the Faculty Seminar on Law and Development of the SUNY at Buffalo Law School, who heard and criticized an earlier version. They do not by any means all share the views reported here; and are not responsible for errors and distortions.

1. A.D. Momigliano, “The Consequences of New Trends in the History of Ancient Law,” in Momigliano, *Studies in Historiography* 239, 240-241 (1966).

the occupations, the ideas and the procedures that have the appearance at any one time of being *distinctively legal*.² One might crudely represent this way of looking at law in society as follows:



Inside the box is “the law,” whatever appears autonomous about the legal order—courts, equitable maxims, motions for summary judgment; outside lies “society,” the wide realm of the nonlegal, the political, economic, religious, social; the “inputs” are social influences upon the shape of the mass of things inside the law-box, the “outputs” the effects, or impact, of the mass upon society. Within the structure of this crude model there is, of course, a great range of possible theories of law, from a theory asserting that law derives its shape almost wholly from sources within the box (i.e. that it is really autonomous as well as seeming so), to one claiming that the box is really empty, the apparent distinctiveness of its contents illusory, since they are all the product of external social forces. Yet even those who incline to the latter view³ take the contents of the box, epiphenomenal

2. This would seem to imply that no one could write the legal history of a society that had no notion of “law” as a bundle of specialized activities distinct from, and to some extent autonomous of, other social phenomena—e.g., a society that did not distinguish between legal and religious norms. Legal historians usually solve this problem by treating of the aspects of such societies that appear to serve counterpart social functions to those of the relatively autonomous legal systems. For example, courts perform certain dispute settlement functions in modern Western societies which might, in other societies of the past, have been performed by councils of warriors or village elders. The warriors or elders will therefore be treated in the legal history of the other society. Yet though dispute settlement may be done by warriors or elders in modern Western societies also, that is not “law” and is therefore usually of no interest to legal historians. This somewhat curious manner of defining the field of specialization is partly responsible for the fact that focus abruptly shifts (and narrows) whenever a society exhibits traces of an autonomous legal order. On this point, see text at notes 29–31, 40–44, *infra*. On the emergence of “autonomous” legal orders in modern societies, see *Max Weber on Law and Economy in Society* (Rheinstein ed. 1954), especially chs. 7–9, 11; for a brilliant recent reinterpretation, Roberto Mangabeira Unger, *Law in Modern Society* (forthcoming, 1976), especially at 52ff.

3. Lawrence M. Friedman probably inclines as far as anyone. See e.g., his *History of American Law* (1973):

This book treats American law . . . not as a kingdom unto itself, not as a set of rules and concepts, not as the province of lawyers alone, but as a mirror of society. It takes nothing as historical accident, nothing as autonomous, everything as relative and molded 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. . . . [T]he strongest ingredient in American law, at any given time, is the present: current emotions, real economic interests, concrete political groups.

though they may be, as the main subject-matter of concern to the legal historian. Not that this is the only way of treating law historically, as Momigliano's words make clear;⁴ but it probably is the only way for someone who defines himself as a "legal" historian; he has no choice.

Where he does have a choice, and an important one, is between writing internal and external legal history.⁵ The internal legal historian stays as much as possible within the box of distinctive-appearing legal things; his sources are legal, and so are the basic matters he wants to describe or explain, such as changes in pleading rules, in the jurisdiction of a court, the texts assigned to beginning law students, or the doctrine of contributory negligence. The external historian writes about the interaction between the boxful of legal things and the wider society of which they are a part, in particular to explore the social context of law and its social effects, and he is usually looking for conclusions about those effects.

Up until very recently, and with few exceptions, American legal history has been of the internal kind. From time to time the few proponents of external history would direct an exasperated complaint against this situation, without much altering it.⁶

Id. at 10, 14. Professor Friedman acknowledges the existence of legal phenomena that are purely "internal" or "formal"—technical aspects of the system that can be altered or adjusted without affecting much (if at all) the outside society. See his "Law Reform in Historical Perspective," 13 *St. Louis U.L.J.* 351 (1969). He also recognizes that people living in some societies may perceive their legal order to be autonomous and to associate autonomy with legitimacy; he would classify such beliefs as part of a society's "legal culture"—"values and attitudes which . . . determine the place of the legal system in the culture of the society as a whole." See his "Legal Culture and Social Development," 4 *L. & Soc'y. Rev.* 29, 34 (1969).

4. Some scholars would go further than Momigliano; see, e.g., Richard L. Abel, "A Comparative Theory of Dispute Institutions in Society," 8 *L. & Soc'y Rev.* 217, 221-224 (1973), for the views of a legal anthropologist who has given up on "law" altogether as a useful organizing concept in social research.
5. These terms are borrowed from T.S. Kuhn's treatments of (remarkably similar!) problems in the historiography of science. See especially his "Relations between History and History of Science," 100 *Daedalus* 271, 279 (1971). "External history" seems to me a better label than "social" history because it is more inclusive; specifically, it includes intellectual and cultural history.
6. The best of these are, I think, Daniel J. Boorstin, "Tradition and Method in Legal History," 54 *Harv. L. Rev.* 424 (1951); George L. Haskins, "Law and Colonial Society," 9 *Am. Q.* 354 (1957); Stanley N. Katz, "Looking Backward: The Early History of American Law," 33 *U. Chi. L. Rev.* 867 (1966); Lawrence M. Friedman, "Some Problems and Possibilities of American Legal History," in *The State of American History* 3 (Bass ed. 1970); Morton J. Horwitz, "The Conservative Tradition in the Writing of American Legal History," 17 *Am. J. Leg. Hist.* 275 (1973); Herbert Alan Johnson, "American Colonial Legal History: A Historiographical Interpretation," in *Perspectives on Early American History* 250 (Vaughan & Billias eds. 1973), hereinafter Johnson, "Colonial Legal History"; and the many

As it happens, I tend to sympathize with most of these complaints, but writing another one is not my present purpose, since others have already said trenchantly what needed to be said; and in any case the situation is rapidly improving and there is no need for one. At this point it is more interesting to ask how the tradition of internal historiography got itself established, how it managed to last so long, and what the consequences of its ascendancy were for historical writing about American law. With that kind of perspective it might be possible adequately to assess the achievement of James Willard Hurst, the legal historian who broke decisively with the main tradition over thirty years ago, and who has since become the leading exponent and practitioner of an external historiography.

With the purpose of attempting that assessment in mind, the brief essay that follows tries to sketch the broad outlines of the paths taken by American legal historians since the beginnings of their discipline in the 1880's.⁷ As I see it, there was a Classical Period from about 1880 to 1900, followed by a long slump lasting until about 1930; a First Revival of interest and activity in legal-historical studies from the 1930's through the early 1960's; then a Second Revival starting around 1970 and still going strong.⁸

historiographical contributions of Willard Hurst, of which the most comprehensive, as well as the most recent, is "Legal Elements in United States History," in *Law in American History* 3 (Fleming & Bailyn eds. 1971), hereinafter Hurst, "Legal Elements." Much acerbic and astute criticism of the state of the art has appeared over the years in the *Annual Survey of American Law's* "Legal History" sections written by John Phillip Reid (1962-66); Reid and William E. Nelson (1969-70); and Nelson (1967-69; 1973-present). I am very indebted to all the articles cited here. One of the many ironies connected with American legal history is that its shortcomings have called forth so useful a historiographical literature.

7. See Calvin Woodard, "History, Legal History, and Legal Education," 53 *Va. L. Rev.* 89 (1967) for a similar sketch arriving at somewhat different conclusions.
8. Some readers may find my idea of what constitutes "American legal history" idiosyncratic—both too inclusive and too exclusive. It includes studies in *English* legal history in the 1880s and 90s, but then drops these; and excludes constitutional, administrative, and other plausible candidates for the category of American legal history throughout. Let me try to justify this. Hardly anything one could call American legal history was written in the 1880s and 90s, but one has to say something about the legal history that was written (English, mostly), because it exerted such a strong influence on what came later. After that I try to stick to the American side, including in the "legal history" field whatever contemporaries were likely to include, which until recently meant the history of "private law" subjects and not much else except perhaps constitutional history, which I do not feel competent to discuss, but which I gather has suffered from comparable if considerably less severe limitations. See the bibliographical note, and sources there cited, in Harold M. Hyman, *A More Perfect Union* 557-560 (1973). Notions of what legal history is about are, of course, rapidly changing (as witness the essays in this issue) thanks in large part to the work of Willard Hurst and his school. See text at notes 132-135, *infra*.

Some hedges and qualifications are in order. I do not try here to provide a comprehensive bibliographical survey; there are several excellent ones available.⁹ I shall have very little to say about the literature of the Second Revival, contemporary historiography, since I plan to write about that on another occasion. And I can't do here what really ought some day to be done: a full-blooded social history of legal historiography in this country, showing the relationship of attempts to reconstruct the legal past to changes in the situation of lawyers generally, not only in the schools but in practice and in politics; and to intellectual developments outside the law, especially in philosophy and the social sciences.¹⁰ In other words, this story is properly a minor subtheme of a much larger one—which remains untold because its telling has had to wait upon the development of an external legal historiography.¹¹ In this piece there are

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9. See, e.g., Reid & Nelson, *Ann. Survey Am. L.*, *supra*, note 6; Friedman, *History of American Law*, *supra*, note 3, at 596-621; Friedman *supra*, note 6; Johnson, "Colonial Legal History"; David H. Flaherty, "An Introduction to Early American Legal History," in *Essays in the History of Early American Law* (Flaherty ed. 1969); Wythe Holt, "Now and Then: The Uncertain State of Nineteenth Century American Legal History," 7 *Ind. L. Rev.* 615 (1974); and Harry N. Scheiber, "Federalism and the American Economic Order," 10 *L. & Soc'y Rev.* 57 (1975) (in this issue, *infra*).
10. For an example of the exciting possibilities of a historiography relating law and lawyers to a wider culture, see William J. Bouwsma, "Lawyers and Early Modern Culture," 73 *Am. Hist. Rev.* 303 (1973) and the contributions already made to such a history cited in *id.* at 304 n.4.
11. Friedman, *History*, *supra*, note 13, at 567-595 sketches a provocative brief outline of 20th century American legal history. The best general secondary treatment of the history of the American bar remains, 25 years later, Willard Hurst, *The Growth of American Law: The Lawmakers* [hereinafter Hurst, *Lawmakers*] 249-375 (1950), a circumstance that probably gives the author little satisfaction. The history of legal education has been well treated recently in Robert Stevens, "Two Cheers for 1870: the American Law School," in *Law in American History* 405, *supra*, note 6; Jerold S. Auerbach, "Equity and Amity: Law Teachers and Practitioners, 1900-1922," *Id.* at 551; and William Twining, *Karl Llewellyn and the Realist Movement* (1973). Two books are especially successful at relating legal to philosophical thought in the 20th century: Morton White, *Social Thought in America: The Revolt Against Formalism* (2d ed. 1957) and David A. Hollinger, *Morris R. Cohen and the Scientific Ideal* (1975). There are several studies of Realism: among them Wilfrid E. Rumble, Jr., *American Legal Realism: Skepticism, Reform, and the Judicial Process* (1968); Calvin Woodard, "The Limits of Legal Realism; an Historical Perspective," 54 *Va. L. Rev.* 689 (1968); Twining, *supra*, this note; Edward A. Purcell, Jr., *The Crisis of Democratic Theory* (1971); and G. Edward White, "From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth Century America," 58 *Va. L. Rev.* 999 (1972). This literature on Realism, though interesting and useful, still leaves one with the feeling that something important has been left out. Except for Twining, the authors tend to treat the Realists as (rather inept) legal philosophers, quoting from their more speculative work and from their debates on the nature of law with critics like Roscoe Pound and Morris Cohen. What gets slighted in the process is most of the stuff that the Realists themselves considered their most important work: their studies of subjects like procedure and commercial law. Research

hints and whispers about the important relationships, but nothing more.

I

At the beginning of professional legal historiography in the United States which, for convenience, may be taken to be the publication by Henry Adams and his students of their *Essays in Anglo-Saxon Law* in 1876, nobody would have drawn a distinction between legal history and any other kind. For the first generation of professional historians in this country borrowed from Germany not only the name and method of "scientific" historiography, but also the idea of the proper subject-matter of that science: the development of political institutions from their remotest origins to the present. In the hands of the leading professionals in England like Freeman and Stubbs, and in America like Herbert Baxter Adams and John W. Burgess, this turned out to mean that virtually all history was to be legal and constitutional history: they were going to do for Anglo-American political forms what their German models had done for the Roman. Thus there was nothing eccentric about the young Henry Adams's choice of Anglo-Saxon law as his Harvard seminar project in medieval history, or about the young O.W. Holmes's decision to study first Roman law and then the early forms of common law: the most exciting intellectual problems of the day were problems concerning origins of present political and legal forms, and the hottest debates over whether these origins were Roman or Teutonic.¹²

This preoccupation with origins resulted, of course, from the subscription of 19th century historians to various kinds of evolutionary assumptions about the development of political institutions. These assumptions varied greatly in their particulars and patrimony from historian to historian: some learned an idealist historical jurisprudence from Savigny; others picked up Freeman's idea of history as the gradual unfolding of political liberty; still others borrowed metaphors from anthropology or comparative philology. At the common core of these theories were the assumptions that all societies undergo comparable processes of development from the simple to the complex, the

now being done by John Henry Schlegel should help to correct this. Jerold S. Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* (1976) appeared too late to be consulted for this essay.

12. On the significance of Henry Adams' seminar, see Helen M. Cam, *Law Finders and Law-Makers 176-182* (1962); on the influence of German writers on Holmes, Mark DeWolfe Howe, *Justice Oliver Wendell Holmes: The Proving Years, 1870-1882*, ch. 5 (1963).

primitive to the civilized; that these processes are continuous and progressive; and that the business of scientists was to discover, through the comparative study of developed and undeveloped peoples, the laws governing the growth of civilizations.¹³ The particular business of historians was to trace the development of customs and ideals of already developed civilizations back to their ancient beginnings. For the extremely influential historians H.B. Adams and Burgess, who were especially impressed by German conceptions of history as the science of the state, this program dictated studying the development of political institutions, in their legal and constitutional forms.¹⁴ National and racial ethnocentrism then combined to make Anglo-American civilization the focus of study; and this in turn made of the historiography of North America simply the study of the most recent stages of a long, continuous process beginning in the ancient Teutonic forests.¹⁵

Institutional-evolutionary studies in legal history flourished in the law schools too in the 1880s and 90s, especially at Harvard; it was under the influence of this school (to varying degrees) that Holmes, Bigelow, Thayer and Ames made their contributions to the study of early English law.¹⁶ The point of dwelling on the assumptions of the historical school is not to depreciate the achievement of these men, who were among the few people Maitland found it worthwhile to correspond with on professional subjects;¹⁷ it is that these assumptions have continued to linger around the law schools to the present day, like radio-active matter with an abnormally long half-life. Professional histor-

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13. J.W. Burrow, *Evolution and Society, A Study in Victorian Social Theory* (1966) emphasizes the variety of 19th century evolutionary theories; Robert A. Nisbet, *Social Change and History* 166-188 (1968), their similarity.
 14. See especially Jurgen Herbst, *The German Historical School in American Scholarship* 112-116 (1965); and John Higham, *History: Professional Scholarship in America* 158-161 (1965). Out of 15 history courses given at Harvard in 1890-91, "twelve were wholly or partly concerned with constitutional development." Cam, *supra*, note 12, at 182.
 15. The titles of some of H.B. Adams' articles will convey the flavor of some of his scholarship: "The Germanic Origin of New England Towns," *Johns Hopkins Studies in History and Political Science* (ser. 1, no. 2, 1882); "Saxon Tithing-Men in America," *id.* (ser. 1, no. 4, 1882); "Norman Constables in America," *id.* (ser. 1, no. 8, 1883).
 16. James Barr Ames, *Lectures on Legal History and Miscellaneous Legal Essays* (1913); Melville M. Bigelow, *Placita Anglo-Normannica* (1879) and *History of Procedure in England from the Norman Conquest* (1880); O.W. Holmes, Jr., *The Common Law* (1881); James Bradley Thayer, *A Preliminary Treatise on Evidence at the Common Law* (1898).
 17. See C.H.S. Fifoot, *Frederick William Maitland: A Life*, at viii, 69-70, 75-76, 80 (1971).

ians—helped and sometimes led by the legal historians—soon repudiated the simpler tenets of this school, such as the theories of a unilinear evolutionary development and of the Teutonic origins of Anglo-Saxon civilization; and most of them went on to shake off its influence almost entirely. What we have to account for is the survival of 19th century evolutionary theory not only in amateur legal writing—the brief “historical introductions” to textbook or article—but in various indirect ways in monographic legal history as well.¹⁸

The solution to the puzzle lies, I think, in the reasons that the new law schools were so hospitable to legal-historical studies in the first place: their faculties (at least initially) perceived no conflict between historical research and the strictly professional ambitions of the schools. To be sure, the founding generation of law teachers defined a role for themselves in the profession differing from the practitioner’s. The legal scholar was not simply to train his students in the law as it was, but to ascertain the principles truly underlying the law through scientific research, to the end of reforming existing law by bringing it into conformity with those principles.¹⁹ History was supposed to be the primary field of research. But ultimately the results of research were to be grist for the judicial mill. Ames, for example, thought of historiography simply as one of the useful lawyer’s tasks that the professor, because of his freedom from the press of business, could attend to with the greater efficiency that comes from specialization of function. What was wanted was:

a high order of treatises on all the important branches of the law, exhibiting the historical development of the subject and containing sound conclusions based on scientific analysis. . . . Too often the just expectations of men are thwarted by the action of the courts, a result largely due to taking a partial view of the subject, or to a failure to grasp the original development and true significance of the rule which is made the basis of the decision.

As an instance he cites the rule denying enforceability to creditor’s agreement to release debtors on part payment of the debt: this “unfortunate rule”, says Ames, “is the result of misunderstanding a *dictum* of Coke. In truth Coke, in an overlooked case, declared in unmistakable terms the legal validity of the creditor’s agreement.”²⁰

18. See text at notes 23–27, 32–44, *infra*.

19. See Auerbach, “Equity and Amity,” *supra*, note 11 at 553–72.

20. James Barr Ames, “The Vocation of the Law Professor,” in Ames, *supra*, note 16 at 366. [The reference is clearly to *Foakes v. Beer*, 9 App. Cas. 605 (1884), citing *Pinnel’s Case*, 5 Co. Rep. 117a (1602).]

If only historians had earlier brought to light Coke's other case! Ames, plainly, felt none of Maitland's skepticism about the results of mixing legal dogma and legal history. Maitland said: "The lawyer must be orthodox otherwise he is no lawyer; an orthodox history seems to me a contradiction in terms."²¹ Like most of his colleagues, Ames did not see the contradiction. He hoped to subordinate the development of dogma to historical science. In fact, things turned out exactly the opposite: legal history was subordinated to legal technique, the immediate needs of the profession to keep current dogma rationalized in line with past authority. The historical school's view of law as the continuous development of institutional forms lent itself beautifully to these needs, since that view made it easy to confuse the history of law with the "common law tradition"—the fictional continuity that each generation of common lawyers imposes, in its own fashion and for its own ends, on the development of judicial doctrine.²²

Institutional-evolutionary studies prospered in the law schools because they had something to offer the profession: documentation of the unbroken chain of connection between living lawyers and an ancient tradition. The successors in historiographical fashion to the historical school, however, could offer nothing of the kind. The second generation of American institutional historians, C.M. Andrews and H.L. Osgood in particular, rejected the idea of universal and necessary legal development; and picked up from the research of Maine, Brunner, Maitland,

Ames also saw a role for the law professor as an "expert counselor in legislation," by which he meant advisor on technical law reform. *Id.* at 367-68.

21. "Why the History of Law Is Not Written," *Collected Papers*, I, 480, 493 (1911).
22. Horwitz, *supra*, note 6 at 282-83, calls attention to the "incredibly striking" parallels between lawyer's legal history and scientists' history of science, quoting T.S. Kuhn, *The Structure of Scientific Revolutions* 137-38 (2d ed. 1970):

Textbooks . . . begin by truncating the scientist's sense of his discipline's history and then proceed to supply a substitute for what they have eliminated. Characteristically, textbooks of science contain just a bit of history, either in an introductory chapter or, more often, in scattered references to the great heroes of an earlier age. From such references both students and professionals come to feel like participants in a long-standing historical tradition. Yet the textbook tradition in which scientists come to sense their participation is one that, in fact, never existed . . . [S]cience textbooks . . . refer only to that part of the work of past scientists that can easily be viewed as contributions to the statement and solution of the text's paradigm problems. . . . No wonder that textbooks and the historical tradition they imply have to be rewritten after each scientific revolution. And no wonder that, as they are rewritten, science once again comes to seem largely cumulative.

and Vinogradoff (among others) the program of studying the effects upon legal forms of specific and local variations in social environment.²³ Meanwhile the New, or Progressive historians led by Turner and Beard were carrying off much of the historical profession in their challenge to the primacy of the study of the development of political institutions, insisting that legal and constitutional forms were only secondary derivatives of economic and social forces. Beard was of course the most influential proponent of a revised notion of law as the expression, not of the evolving ethical ideals of the Anglo-Saxon race, but of economic interests pursued through factional politics.²⁴

The law schools had small use for either of these modes of practising history, even though Holmes and Pound, both law teachers, had been instrumental in promoting them. Very little American history of any distinction in the institutional vein of Andrews and Osgood was written in the law schools between 1900 and the revival of legal-historical studies in the 1930's; this is probably because history, like liberal learning generally in that period, fell victim to the case method's exclusive claim on the undergraduate law curriculum. Moreover the institutional approach demanded long and patient study in primary materials, time taken away from, and not yielding any particularly valuable results in aid of, treatise and case-book writing.²⁵ As for Pro-

23. On the new institutional (or "imperial") historians, see Higham, *supra*, note 14 at 162-166; Johnson, "Colonial Legal History." Maine is usually thought of as an evolutionist; but Kenneth E. Bock has persuasively argued that he was an opponent of the theory of a unilinear evolutionary development, and not interested in hunting for origins among primitive peoples, but instead was concerned to study law in relation to the entire surrounding culture, including its "relatively recent history." (I.e., Maine was disposed to explain ancient law by ancient history, but not modern law.) "Comparison of Histories: The Contribution of Henry Maine," 16 *Comp. Stud. in Soc'y & Hist.* 232, 247 (1974).

24. On the Progressives, see Richard Hofstadter, *The Progressive Historians* (1968), especially 181-218; and Higham, *supra*, note 14 at 171-182.

25. The case method, in Langdell's original conception a way of getting across the basic principles of legal science, rapidly acquired its present-day justification as a pedagogic vehicle for the teaching of legal method. Thus justified, it became the device for teaching every undergraduate law course, tending to drive out subjects (such as legal philosophy and history) not suited to being so taught. See Stevens, *supra*, note 11 at 435-449. In 1960, commenting bitterly on the anti-intellectualism accompanying the spread of the Harvard method in the late 19th and early 20th centuries, Karl Llewellyn recounted that when

[William A.] Keener was called to Columbia in 1890 to put that law school on a footing worthy of a great University, he brought with him two policies: (1) "The" case-system . . . (2) All that noise which is not "law" must go out; a "law" curriculum must cast out Ishmael. Columbia . . . had therefore to amputate from any official "law"-connection what became the Department of Political Science. Thus the Roman Law Perspective of a Munroe Smith, the scholarship

gressive history, it was simply anathema. When the Progressives took over American constitutional history they pretty well wiped out internal—doctrinal and intellectual—approaches among the historians, leaving these to be cultivated (with great distinction, as it turned out) by political scientists like Corwin and McIlwain.²⁶ They could obviously not have converted many lawyers to their method in the early part of this century, since in its extreme forms it denied the existence of any autonomous content to law, and hence any meaning to legal historiography as traditionally practiced. The Progressives did not themselves produce (at least, until Willard Hurst began to write) any significant body of work on private law; but their hostility helped effectively to split off legal history from the main action in American scholarship and to isolate it in the law schools.²⁷

Confined to the law faculties, reduced to the status of auxiliary service for strictly professional tasks, and written for the most part by amateurs, legal historiography suffered a rapid narrowing of scope. The old historical school had held out the promise of connecting the history of law and of society. In the study of medieval English law, that promise was being fulfilled. In America it was cut short, and legal history was reduced to internal history.

In part this happened because the historical school's organic theory of culture paradoxically encouraged scholars to disregard the social context of law, just as the "comparative method," by generalizing patterns of development in a single civilization to

and vision of a [Frank J.] Goodnow, the power and range of our greatest international lawyer, John Bassett Moore [who trained, among others, Julius Goebel, Jr.], flourished not within the law curriculum, nor for it, but across the barbarian border In 1915, when, already our foremost jurist, [Roscoe Pound] became Dean at Harvard Law School, he deliberately took his own Jurisprudence course out of the undergraduate curriculum. He kept it out, lest his bulk of graduates be distracted—or contaminated.

Llewellyn, "The Study of Law as a Liberal Art," in *Jurisprudence* 375, 377-78 (1962). [Italics Llewellyn's; interpolations mine.]

26. See generally, Herman Belz, "The Realist Critique of Constitutionalism in the Era of Reform," 15 *Am. J. Leg. Hist.* 288 (1971); Paul L. Murphy, "Time to Reclaim: The Current Challenge of American Constitutional History," 69 *Am. Hist. Rev.* 64 (1963).
27. It is not always appreciated how wide the split was. One can get some sense of it from casual remarks made recently by non-lawyer historians who have become interested in law. For example: (a) Eugene Genovese: "[T]he fashionable relegation of law to the rank of a superstructural and derivative phenomenon obscures the degree of autonomy it creates for itself." *Roll, Jordan, Roll* 25 (1974). (b) Harry N. Scheiber, speaking of recent developments in economic history, refers to "new lines of inquiry that stress institutional and doctrinal development in American law . . ." "Government and the Economy: Studies of the 'Commonwealth' Policy in Nineteenth Century America," 3 *J. Interdisc. Hist.* 135, 151 n. 44 (1972) [Italics added]. Historians are discovering law, lawyers society.

all others, in fact justified ethnocentricity. James Coolidge Carter, Savigny's chief popularizer in this country, give the game away when he said that the field of research for judges trying to locate the true or just rule of law for a case by the historical method was "the habits, customs, business and manners of the people, and those previously declared rules which have sprung out of previous similar inquiries into habits, customs, business, and manners."²⁸ This was certainly a convenient method for legal scholars: it meant that in practice they carried no greater research burden than would any legal positivist, for whom legal history was only the history of past state commands, rather than the history of an entire culture.

But of course the main reason lawyer's history became, and remained, internal—confined to the boxful of distinctively legal things—is that it was written from inside the box, was itself a "form of professional activity within the legal system—like adjudication, or advocacy, or counseling."²⁹ As long as the common law tradition was a source of normative authority, the doing of legal history was conceived to be a professional task; as long as it was a professional task it was bound to be internal. Legal scholars not only took the boxful of legal things as their exclusive subject-matter, but whenever possible adduced as factors explaining the development of legal things only *other* legal things. The rule seemed to be: stay inside the box; the most common application of the rule was explanation of current case-law doctrine by means of prior case-law doctrine.

This is why, long after the discrediting of evolutionary theories of history, legal history was still so frequently written as if these theories still held sway. For the historian who restricts his sources to the strictly legal, there often is no explanation available other than the genetic. Suppose one wanted to explain the use of the "fellow-servant" rule to limit liability of employers for the costs of industrial accidents in the 19th century, and one's search were confined to the rule's predecessors in form. One would learn a good deal about the common law of master and servant and the writ of trespass on the case, but

28. *The Ideal and the Actual in Law* 10-11 (1890).

29. This is how Richard L. Abel describes a "law book," a "study [that] identifies, defines, organizes the rules [that legal institutions apply] by means of criteria proper to the legal system—it *rationalizes* them in Weber's sense." He contrasts such a "law book" to a "book about law," which is a "mode of *reflection* upon the legal system". "Law Books and Books About Law," 26 *Stan. L. Rev.* 175, 176 (1973) [*Italics* Abel's]. This is another (and very effective) way of stating Maitland's distinction between legal history and legal dogma, text at note 21, *supra*.

nothing about the 19th century industry, however useful such knowledge might be.³⁰

Limitations of method thus kept driving American lawyers backwards in search of the ancestors of current legal categories in early English forms. When they got there they found a historiography that was often extremely technical, but not internal; the further back one went, the more one found law connected to social structure, economic organization, agricultural method, administrative practice, currents of religious and philosophical speculation. The great researchers of the classical period and their successors had given medieval law a context. But as one approached more recent times, legal history started to thin out to the distinctively "legal" again, and explanations for the shape of legal things to revert to the genetic.

Around 1900 then, at the point serious work in legal history slumped in American law schools, scholarly convention in the field suggested it was all right to try to account for old law by external circumstance, but not new law. This way of looking at things matched nicely with the contemporary jurisprudential theory that the common law, though it had started out derived from Custom, had come, as its administration was brought under a professional judiciary, to be based upon Reason.³¹ It is tempting to suggest that the law schools were not interested in developments in historiography that would tend to controvert this theory. At any rate, the configurations that legal-historical

30. The late Professor Goebel employed his gift for Latinate asstringency to characterize this method as treating

the growth of doctrine as something projected on a horizontal plane of rational manipulation unmindful of its perpendicular support in time or circumstance. In expositions of the doctrine of consideration, the judgments of his majesty's judges in the seventeenth century rub shoulders with those from the American backwoods two hundred years later. To legitimate the control of business, Tudor sumptuary statutes are forcibly wedded to the legislative indiscretions of the seventy-third Congress . . .

That so fantastic a conception of history should prevail as a convention in the bulk of our legal literature is attributable in some degree to the intellectual tyranny which the judicial opinion exerts. It is a truism that to know the common law its history must be known. Our courts, however, seek enlightenment on the past chiefly in the judgments of their predecessors. These judgments are rarely treated as single but complex assessable facts, for the mass of relevant data of which they are merely parts is usually ignored. In consequence, the antecedent judicial opinion is elevated to a status of preposterous importance as a source. . .

Julius Goebel, Jr., *Felony and Misdemeanor* xvii-xviii (1937).

31. Beale was expounding this theory to Harvard law students in 1909, according to notes taken by Robert Lee Hale of his lectures on jurisprudence in that year. These notes are published, with an introduction, in Warren J. Samuels, "Joseph Henry Beale's Lectures on Jurisprudence, 1909," 29 *U. Miami L. Rev.* 260 (1975). See *id.* at 288-293.

scholarship achieved by 1900 were decisive for the future shape of the field—especially in American legal history.

Look for example at the Association of American Law Schools' *Select Essays in Anglo-American Legal History* (1907), which purported to collect in three volumes the cream of current scholarship in the field.³² This includes some wonderful stuff—e.g. Maitland's famous essay on "English Law and the Renaissance"—but is mostly interesting now for the subjects it includes. Most of the essays (after the traditional start with Teutonic Law) have to do with English law; after some broad surveys, the essays tend to be organized by type of court (Chancery, Admiralty, etc.) and doctrinal field (assumpsit, agency, trover, defamation, etc.). The stress is on the common law, though equity receives seven essays in all, and there are brief treatments of canon law, admiralty, and the law merchant. With very few exceptions, the essays are concerned with tracing the early forms of modern practice categories—"The Historical Development of Code Pleading"—"Early Forms of Partnership"—"The Early History of Negotiable Instruments"—and the exceptions are the essays set in early English history and unabashedly making no pretence at current relevance.

The American entries are of most interest. They cluster around colonial legal history and are primarily devoted to exploring the extent to which colonial law was influenced or determined by English models. Then there are treatments of 19th century attempts at procedural reform in the common law, dealing with proposals to simplify pleading and the organization of courts and with the fate of schemes to codify the common law in whole or in part, from Bentham to David Dudley Field. Lacking (as yet) only the addition of something on the reception of English law after the Revolution, the basic canon of American legal history was fixed—and fixed almost before any work had been done!—upon transplantation to America of the common law and the subsequent challenge and defeat, save for partial accommodation in the form of Code Pleading, of the common law's arch rival, codification. Even to the present, general surveys and collections of materials on American legal history are faithful to the broad outlines of this canon. This is a wonderful example of the survival of form beyond its inspiring context, for these

32. And did so in fact. Its nearest rival was a compilation of essays in American legal history put out by members of the Yale Law School faculty, *Two Centuries' Growth of American Law, 1701-1901* (1901), sketching the antecedents of some 18 fields of contemporary practice, and now interesting mostly as revealing how little access even learned lawyers had to their own past.

subjects are the vital ones of American experience only within a theory such as the old historical school's—by which American history simply records the later stages of the common law's triumphant struggle for continuous development through Anglo-Saxon civilization.

There were two jarring notes in this collection. One was the famous attempt by Reinsch, a disciple of Turner's at Wisconsin, to demonstrate the domination of colonial law not by English models but the primitive law of the frontier.³³ Oddly enough this environmental (and later proved erroneous³⁴) explanation was absorbed along with the rest of the 1907 collection into the orthodox view of the American past. The assumption of the continuity of Anglo-American legal development was neatly rescued despite the Reinsch theory by Roscoe Pound, who simply moved up the period of "reception" of English law in America to a "formative era" after the Revolution.³⁵ The other oddity in the collection was the presence of contributions by Simeon Baldwin and the young Samuel Williston on early corporation law.³⁶ Corporation law too was to find a niche in the permanent canon of appropriate subjects, either as a subspecies of commercial law or on its own. These particular articles, like the others, tended to emphasize the most formal aspects of corporations and the earliest forms at that; there was nothing here like Maitland's speculations on the social functions of different forms of group legal personality.³⁷ Nonetheless, corporation law had so obviously responded to political and economic pressure in recent history that the inclusion of it in the standard canon was prophetic. Sooner or later, it would be the most promising candidate for external historiographical treatment; and so it eventually proved to be.³⁸

33. Paul Samuel Reinsch, "English Common Law in the Early American Colonies," *Select Essays in Anglo-American Legal History*, I, 367 (1907).

34. By the work of Goebel, Morris, and Haskins in particular. See Johnson, "Colonial Legal History," and the essays collected in Flaherty, *supra*, note 9.

35. Pound, *The Spirit of the Common Law* 113-118 (1921); *The Formative Era of American Law* 6-12, *et passim* (1938). For an account of Pound's "enormous influence on the study of American law" with these two books, see Michael G. Kammen, "Colonial Court Records and the Study of Early American History: A Bibliographical Review," 70 *Am. Hist. Rev.* 732, 738 (1965); and Katz, *supra*, note 6.

36. Baldwin, "History of the Law of Private Corporations in the Colonies and States," in *Select Essays*, *supra*, note 33, at III, 236; Williston, "The History of the Law of Business Corporations before 1800," *id.* at III, 195.

37. Maitland's essays on trusts, corporations, and unincorporated bodies are all collected in *Maitland: Selected Essays* (Hazeltine, Lapsley & Winfield eds. 1936), as well as in Maitland, *supra*, note 21.

38. There is a fuller literature on the history of the American corporation

Anyone who is skeptical about the extraordinary persistence through our time of this late 19th century view of the proper scope of legal history should pick up any of the standard history texts published for law students.³⁹ Or he might look at the historical section of any recent law review article. I am looking at one now, chosen because it is near at hand and because it is one of the best things of its kind, not one of the worst: an excellent synthesis of anthropological and historical literature about contract law.⁴⁰ The article is explicitly evolutionary; it begins with economic transactions in "primitive" societies and ends with 20th century American contracts; in between lie ancient Rome, England from medieval to modern times, and 19th century America. The sections on primitive society are rich in detail about the relation of forms of transactions to social life—to kinship systems, religion, land tenure, warfare.⁴¹ Even by the time he reaches medieval England, the author is still interested in externals: we learn for example something about theological views of contract.⁴² But from the moment the common law courts get into the picture, the focus of the narrative shifts almost exclusively to institutional and doctrinal forms: case, assumpsit, indebitatus assumpsit, consideration, up to Slade's Case in 1602, whereupon, saving a brief "Epilogue", the article ends!⁴³ It ends presumably because the story of doctrinal developments is now complete; the Epilogue treats summarily of the high point of "freedom of contract" in the 19th century and of the tendency in the 20th to limit this freedom by legislation.⁴⁴ Except for passing references to the work of Weber, Hurst, and Lawrence Friedman, there is scarcely a word on the tremendous changes that have taken place in the nature of economic exchange relationships between the 17th century and the present, no allusion even to the standard economic histories of Europe and America for that time. It would be absurd to

than on any other subject that plausibly belongs in the field of American legal history. See the bibliography in Willard Hurst, *The Legitimacy of the Business Corporation in the Law of the United States, 1780-1970* at 165 (1970).

39. See, e.g., William F. Walsh, *A History of Anglo-American Law* [Bobbs-Merrill] (2d ed. 1932); Max Radin, *Handbook of Anglo-American Legal History* [West Hornbook Series] (1936); Frederick G. Kempin, Jr., *Historical Introduction to Anglo-American Law in a Nutshell* [West Nutshell Series] (1973). Of course these vary greatly in quality: Radin's is the outstanding one.
40. E. Allan Farnsworth, "The Past of Promise: An Historical Introduction to Contract," 69 *Colum. L. Rev.* 576 (1969).
41. *Id.* at 578-88.
42. *Id.* at 591.
43. *Id.* at 592-99.
44. *Id.* at 599-607.

blame this situation on the author, who is a scholar of distinction; he was working with materials that are at hand to tell the story that has commonly been thought the one worth telling. The point is to show how deeply ingrained in the consciousness of the modern lawyer is the late 19th century's subordination of legal history to the common law tradition.

II

American legal historiography began to revive in the late 1920's. It is not clear why this happened. Perhaps in part it was simply because the students whom Andrews and Osgood had interested in the study of primary source material on British imperial administration were starting to turn out their own work; in part because some of the younger law teachers, especially at Columbia, were trying to break down the hedges that had grown up between other university departments and the law schools. In 1930 the American Historical Association organized a conference of lawyers and historians to draw up a program to publish American legal source materials: this resulted in the American Legal Records series.⁴⁵ In the same year, private and foundation gifts established the Foundation for Research in Legal History at Columbia Law School, under the direction of Julius Goebel, Jr., which underwrote research and publication expenses of new secondary work.⁴⁶

For the purposes of this essay, the most interesting aspect of this period of revival, which lasted through the mid-1960's (and is perhaps still going on—these periodizations never work out very neatly), is that its scholarship did not bring about any very substantial redefinition of the field of legal history. (There were exceptions, which will be noted). On the face of it, this is rather surprising. The period was dominated by work in colonial law done by historians of formidable talent—Goebel, George L. Haskins, Mark DeWolfe Howe, Richard B. Morris, Joseph H. Smith. None of these historians believed that law develops primarily according to the logic of an internal dynamic, independently of surrounding political, social, and economic con-

45. The committee consisted of Charles McLean Andrews, Carroll T. Bond (Chief Judge of the Maryland Court of Appeals and editor of the first volume in the series), John Dickinson, the ubiquitous Felix Frankfurter, Everts B. Greene, and Richard B. Morris. See Everts B. Greene, "Foreword" to *Proceedings of the Maryland Court of Appeals, 1695-1729* (American Legal Records, I; Bond ed. 1933). Greene acknowledged "the encouragement, given at an early stage of the development of this project, by Mr. Justice Brandeis . . ." *Id.* For a list of publications in the series, see Kammen, *supra*, note 35 at 733.

46. See Goebel, *supra*, note 30 at ix.

ditions; indeed each thought that belief one of the failings of the amateur historiography of the early 20th century, for among other errors it propagated the theory of the process of reception and development of English law taking place in a uniform manner and rate across all of early America. Though some members of this fresh group of colonial historians, notably Morris,⁴⁷ were eventually again to emphasize similarities among colonial legal patterns, all of them recognized that any generalizations would have to be based upon archival study of local materials in individual colonies.

Yet though a conviction of the importance of the influence of social surroundings on law was what drove historians of this period to research in local sources in the first place, it did not carry most of them so far as to write external legal history. They stayed chiefly within the orthodox canon of subjects—the reception of English common law in America and its 19th century rivalry with “codification”—and continued to take their materials from the box of distinctively legal things. Their teaching materials, enriched by the results of their research in primary sources, were enormously more sophisticated than similar products of the old institutional-evolutionary school; but they were organized by the same categories as the old school’s (reception, codification, corporations, etc.), and the detail filling the old categories, though new, was all *legal* detail.⁴⁸ Symbolically, the most important collective effort of professional American legal historians at the end of the period was of the same kind as at the beginning—publication of colonial legal records.⁴⁹

One must point out immediately that there were significant exceptions to this pattern; and that historians of this period did make major contributions to an external legal historiography. Daniel Boorstin’s study of Blackstone’s *Commentaries* and Mark

47. See his *Studies in the History of American Law* (1958); and Johnson, “Colonial Legal History” at 258-261.

48. See, e.g., Julius Goebel, Jr., *Cases and Materials on the Development of Legal Institutions* (2d ed. 1937) [but see Ch. 3 of this book, on “Social, Economic and Intellectual Factors Conditioning Legal Development,” which mostly accords with tradition in confining discussion of such factors to the earlier English law, but not entirely: cf. *id.* at 620-626 on American corporations]; Mark DeWolfe Howe, *Readings in American Legal History* (1949); and Joseph H. Smith, *Cases and Materials on the Development of Legal Institutions* (1965).

49. The William Nelson Cromwell Foundation underwrote in whole or in part: *Colonial Justice in Western Massachusetts (1639-1702): The Pyncheon Court Record* (Smith ed. 1961); *Legal Papers of John Adams* (Wroth & Zobel eds. 1965); and *The Law Practice of Alexander Hamilton* (Goebel *et al.*, eds. 1964-). I am not complaining about this; these volumes are superbly edited, and if there is one place where lavish spreading of technical detail is surely justified, it is in the edition of a primary text.

DeWolfe Howe's of Holmes's *Common Law* both succeeded in connecting law books to wider regions of the thought of their time.⁵⁰ After a series of monographs written in a more cautious mode, George L. Haskins built a new framework for colonial legal studies by taking as his subject not the specialized concerns of lawyers, but the whole governmental and clerical apparatus of social control in 17th century Massachusetts.⁵¹

But these, like the work of Hurst and his followers to be discussed later, were exceptions. The main business of the period was to make a start at giving American law historicity, localizing it to specific times and places. Under the spell of evolutionism and professional habit, the earlier school of lawyer-historians had ransacked the past for ancestors of their own day's categories, though these categories might have possessed no significance, or a very different one, for the previous generations back through whom they were traced. The researchers of the 1930's and onward corrected this by showing us colonial law through the eyes of contemporaries—but usually through the eyes of contemporary lawyers, and abnormally bookish lawyers at that. Research that adopted a different perspective was not likely to be considered “legal” history at all, even if it relied primarily on legal sources as evidence—e.g. Richard Morris's great study of colonial labor conditions and regulation⁵² or the studies of 19th century “public policy” in the states.⁵³

What can account for the almost unrelenting preoccupation with internals? Daniel Boorstin and Calvin Woodard, who at different times both called for a more catholic vision of the scope of legal history, both attributed its unsatisfactory state in part to the pragmatic temper of legal studies since the 1930's. Boorstin said: “[N]early every American contribution to legal history which ought to be considered a classic was made *before* the movement [to integrate law and the social sciences]”; he blamed the law schools' fads for policy science, social science, and clinical education.⁵⁴ Woodard reproached legal scholars “somewhat intoxicated with the delusion of complete freedom from the past” for promoting among students the view that law

50. Boorstin, *The Mysterious Science of the Law* (1941); Howe, *supra*, note 12.

51. Haskins, *Law and Authority in Early Massachusetts* (1960). The influence of this approach may be detected in the range (as well as the title) of a recent collection of essays, *Law and Authority in Colonial America* (Billias ed. 1965).

52. *Government and Labor in Early America* (1946).

53. See Scheiber, *supra*, note 27.

54. “The Humane Study of Law,” 57 *Yale L.J.* 960, 963-64 (1948).

is merely "engineering," or "the vector of so many mid-20th century social forces rationalized in accordance with the personal preference of so many contemporary judges and legislators."⁵⁵

The trouble with this explanation is that it was precisely those people who took the most pragmatic view of present law that tended to urge the study of the past—urged it, indeed, partly for the sake of ridding the present of the deadwood of irrelevant survivals. Maitland took this view, for example;⁵⁶ so did Holmes, the founder of American pragmatic legal thought.⁵⁷ In fact a very large number of lawyers associated with the pragmatic movement⁵⁸ took more than a passing interest in legal history. Pound's lectures on the "formative era of American law" influenced several generations of historians;⁵⁹ Frankfurter was not only instrumental in obtaining research funding for legal history, but also wrote histories of the Commerce Clause, and (with others) of federal jurisdiction and labor injunctions;⁶⁰ Karl Llewellyn, Jerome Hall, Walton Hamilton, Walter Nelles, and Hessel Yntema, all Realists, all did some of their own work in history⁶¹ and followed closely what was done by others.

55. Woodard, *supra*, note 7 at 110-114.

56. See, e.g., Maitland writing to Dicey in 1896 (cited in Fifoot, *supra*, note 17 at 143):

The only direct utility of legal history (I say nothing of its thrilling interest) 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 it would make them conservatives. I am sure it would free them from superstitions and teach them that they have free hands.

57. See, e.g., "Law in Science and Science in Law [1899]", in Holmes, *Collected Legal Papers* 210, 225 (1920):

From a practical point of view, [the use of history] is mainly negative and skeptical . . . [I]ts chief good is to burst inflated explanations. Everyone instinctively recognizes that in these days the justification of a law cannot be found in the fact that our fathers have always followed it. It must be found in some help which the law brings toward reaching a social end which the governing power of the community has made up its mind that it wants . . . [H]istory is the means by which we measure the power which the past has had to govern the present in spite of ourselves, so to speak, by imposing traditions which no longer meet their original end.

58. This phrase seems broad enough to encompass Holmes's pragmatism, Pound's sociological jurisprudence, and the many varieties of legal Realism.

59. See note 35, *supra*.

60. Frankfurter, *The Commerce Clause under Marshall, Taney, and Waite* (1937); Frankfurter and James M. Landis, *The Business of the Supreme Court, A Study in the Federal Judicial System* (1928); Frankfurter and Nathan Greene, *The Labor Injunction* (1930).

61. Llewellyn: "On Warranty of Quality and Society," (Pts. 1 & 2) 36 *Colum. L. Rev.* 699 (1936), 37 *Colum. L. Rev.* 341 (1937); "Across Sales on Horseback," 52 *Harv. L. Rev.* 725 (1939); "The First Struggle to Unhorse Sales," 52 *Harv. L. Rev.* 874 (1939). (This superb quartet on the history of sales law may be Llewellyn's most

Pragmatic legal studies were at their height during the revival of professional legal historiography in the 1930's; Goebel was one of the young Turks at the Columbia Law School; Howe was a clerk to Holmes and protégé of Frankfurter's; Haskins was inspired by Pound's theory of interests; and—as will be seen—Hurst's work is written out of an explicitly pragmatic theory of law. The failure of the period of revival to develop an extensive external historiography of law does not stem from pragmatic thinking, but—I am persuaded—from loss of nerve in the face of the implications of that thinking; not from reckless disregard of the common law tradition, but from an anxious solicitude to preserve it.

The program set forth by pragmatists like Holmes and Pound for development of a science of law called for reconnecting legal

durable work. Yet he said [of "Warranty of Quality," Pt. 1, *supra* this note at 699 n.*] he was not writing "history, . . . [but] an appeal for history. It is a sad commentary on our dogmatics that sales cases over a hundred and fifty years and more than fifty jurisdictions have been treated as if they floated free of time, place and person. Whereas it is time, place, person and circumstance which give them meaning. A few major trends are here presented. But not as history. History calls for detailed knowledge, for detailed background, and for discrimination even more detailed.")

Hall: *Theft, Law and Society* (1935).

Hamilton: "The Ancient Maxim *Caveat Emptor*", 40 *Yale L.J.* 1133 (1931).

Nelles: "*Commonwealth v. Hunt*," 32 *Colum. L. Rev.* 1128 (1932); "Towards Legal Understanding," (Pts. 1 & 2), 34 *Colum. L. Rev.* 862, 1041 (1934).

Yntema: *Sourcebook on Roman Law* (1929) (with A. Arthur Schiller).

But see Grant Gilmore, Book Review, 21 *The Law School Record* (Chicago) 38 (Summer, 1975):

When I studied law at Yale in the early 1940's there was no suggestion, in any of the instruction which I received, that there was any point in thinking about law as a historical process. The implicit philosophical or jurisprudential bias which the entire law faculty seemed to share was that law was a sort of mystical absolute waiting to be discovered, described, catalogued, mapped out, so to say, reduced to possession. [Gilmore adds that his instructors included some noted Realists.] It was not until considerably later—if we must have a date, 1960 will do as well as any—that a historical approach to law seemed, almost overnight, to become fashionable, at least among academic theorists.

The absence of a historical approach at Yale in the 1940's does not surprise me; the intellectually curious and innovative phase of legal pragmatism was by then over. I am somewhat perplexed by the reference to a new fashion for history starting about 1960. In 1963 Edward Re surveyed law school curricula to find legal history courses other than "development of Anglo-American legal institutions" (often shortened to DLI) virtually non-existent; and even DLI was rare. (DLI was sometimes real history camouflaged as evolutionism, as in John P. Dawson's splendid Harvard Law School version; more often [to judge from course descriptions cited in Re] simply orthodox evolutionism.) Of course this is not necessarily inconsistent with Gilmore's recollection; "a historical approach to law" does not have to mean legal history courses. But legal history courses provide some evidence of the seriousness of commitment to the approach. See Re, "Legal History Courses in American Law Schools," 13 *Am. Univ. L. Rev.* 45 (1963).

to social history, since the contribution of historical study to the program was to liberate the present from law that had arisen out of entirely different social contexts and modes of thought and was not, as a consequence, necessarily suited to modern needs. This was potentially quite a radical view, since it repudiated the whole concept of tradition. Scholars like Langdell (and to a lesser extent Ames) tended to equate historical method and legal science: accurate tracing of the historical development of rules would reveal their immanent principles. Holmes and Pound said that since the end of law was the efficient adjustment of conflicting social interests, *real* legal science consisted in accurate measurement of those interests. The role of history was the important but auxiliary one of clearing away the rubbish of pointless old law.⁶²

Outside the law schools these ideas had considerable influence on historians, especially constitutional historians, among whom the impact of economic, social and political factors upon judicial decision-making was a commonplace idea well before the ascendancy of legal Realism.⁶³ Yet among the lawyers the pragmatic prescription for legal science, assisted by a historiography devoted to destroying instead of beatifying the common law tradition, perhaps not surprisingly failed to make complete converts even of its chief proselytizers. Without knowing for sure what cut short the pragmatic movement as a whole, it is hard to tell what happened to the minor appendage of a program for an external historiography. But here are some ideas.

Training in the common law tradition was what gave a significant elite of the American bar its sense of identity as a mandarin of masters of an ancient technique; the tradition associated law with both science and high culture, and justified

62. See Pound, *Interpretations of Legal History* 152 and Ch. 7 *passim* (1923); Holmes, "The Path of the Law [1897]," in *supra*, note 57 at 167, 191-195. The difference between Holmes's and Ames's views on tradition and function in law is really only one of emphasis: in practice they often arrived at the same conclusion. Ames believed that traditional authority, accurately interpreted by means of scientific historiography, would also produce the socially functional results he thought desirable. Holmes rejected, of course, the idea that the past could supply "correct" legal doctrine, but argued nonetheless for judicial conservatism towards reforming traditional doctrine—" . . . because I believe the claim of our especial code to respect is simply that it exists, that it is the one to which we have become accustomed . . ." "Law in Science," *supra*, note 57 at 239.

63. See Herman Belz, *supra*, note 26 and "The Constitution in the Gilded Age: The Beginnings of Constitutional Realism in American Scholarship," 13 *Am. J. Leg. Hist.* 110 (1969); Richard Hofstadter, *The Progressive Historians* 200-202 (1968). Charles Beard acknowledged Holmes, Pound and Goodnow as forerunners in *An Economic Interpretation of the Constitution of the United States* 9 (1913).

the prestige and power of its practitioners.⁶⁴ Law was authoritative because autonomous; and its autonomy derived from two sources, its formality (or technicality) and its antiquity. An evolutionary and internal legal historiography contributed, like legal scholarship generally, to reinforcing the tradition.⁶⁵ To deprive lawyers of the tradition entirely, as the pragmatists apparently (but, as will be seen, only apparently) proposed to do, was to make orphans of them. It was a threatened professionalism, among other things, that squashed legal pragmatism in the end.

This professionalism more likely arose from within than without the law schools. I doubt that the common law tradition had much mythic significance for the great majority of American lawyers, who probably were content to think of themselves as technicians rather than mandarins.⁶⁶ Even among the elite practitioners there can have been few who knew or cared much about the kind of legal history that was being done at the law schools; though if they had known it is entirely possible that they would have favored inculcation of the text-

64. Beale: "[L]aw is a traditional manner of thought about right behavior; the lawyers and judges are experts in it." *A Treatise on the Conflict of Laws* xiii (2d ed. 1935). He developed the idea in his 1909 lectures (Samuels, *supra*, note 31 at 292-93):

[The principal characteristic of the common law] is that it requires a scientific knowledge on the part of a legal caste, thus coming back to a characteristic of the most ancient times, where it was in the knowledge of a priestly caste. . . . How can you tell what is the law of Massachusetts today? You can of course ask the judges, as special experts; but they will not say unless a case is brought before them. The law of Massachusetts is what the body of the Massachusetts bar thinks it is.

I use Beale to stand for orthodoxy because the Realists, especially Frank, did so; and Beale did not seem to mind. How seriously members of the bar took the image of a priesthood is another question, which would require much more research to answer.

65. The point is forcefully made by Horwitz, *supra*, note 6, "The Conservative Tradition in the Writing of American Legal History," that preoccupation with formality and technique in legal history is ideological, in that it serves the interests of the profession to write about law as if it were autonomous from politics and inaccessible to the uninitiated. I think this is right but in some need of qualification and elaboration, which the text following this note tries to supply.
66. See Maxwell Bloomfield, "Law v. Politics: The Self-Image of the American Bar (1830-1860)," 12 *Am. J. Leg. Hist.* 306 (1968), a study of 19th century lawyers suggesting that most of them disavowed intellectual pretensions and presented themselves as practical businessmen and skilled craftsmen. Jerome Carlin's study of individual practitioners found that "[t]hese lawyers although generally handling matters that require little in the way of technical legal skill, still have fairly frequent contact with the courts and are thereby able to find a link with the most commonly accepted image of a lawyer . . . [T]he big firm lawyer, in their view, has not only lost his identity as a real lawyer by virtue of his more infrequent contact with the courts . . . but his independence as well." *Lawyers on Their Own* 187 (1962). In short, their identification is with the image of the trial lawyer, not with the more mandarin image of the appellate judge.

book view of Anglo-American legal "development" which still permeates legal rhetoric.⁶⁷ But law teachers too think of themselves as lawyers as much as professors, and usually more so;⁶⁸ it was the professional identities of the legal pragmatists themselves that the tendencies of their movement most threatened. As Leslie Stephen said of Gibbon: "Insects who are eating the heart out of an old tree are not generally gratified, it may be supposed, by the crash and thunder of the fall."⁶⁹

The intellectual currents that eventually converged in Realism, one of which was the proposal for a legal historiography relativized to social and economic surroundings, challenged the professional viewpoint in several ways. (1) Pragmatism promoted research into non-legal materials. The amateur legal historians had stuck to the case reports; their professional successors had added legal manuscript sources of all kinds; but pragmatic legal history would apparently require the historian to step outside the box of distinctively legal things entirely. How far outside one could venture and remain a *legal* scholar? (2) Ames's conception of the legal-scholar-scientist gave him an inside role in the legal system, expert confidant to the judge (and in the extreme case where some statutory adjustment might be required) to the legislature. Pragmatic legal science offered at best a "negative and skeptical" role to the legal historian in present-day practice, whose relation to the judge would be the relatively indirect one of pointing out the irrelevance of the past to the solution of current problems—the role of an outsider, and a critical outsider at that. (3) The proposed field of research not only promised to transform legal scholars into some kind of subspecies of social scientist, but also to displace the judge from the center of the intellectual universe. The judge is of course the key figure in studies of the common law tradition, since he

67. See, e.g., William D. Guthrie, *Magna Carta and Other Addresses* (1916) and Elihu Root, *Addresses on Government and Citizenship* (1916), for a view of Anglo-American history as the progressive realization of the principle of individual liberty against the state. Guthrie and Root were the two leading Wall St. practitioners of their time. But it is dangerous to generalize too far. Some Wall St. men belong, now as then, to the quasi-academic bar, which restates the law in the American Law Institute, serves on law reform commissions and the Cromwell Foundation, takes an active and informed interest in the curricula of the schools, and is familiar with scholars' legal history. It is worth remembering that there are several elites of lawyers—a municipal bond elite, a trial elite, etc.—and that they are not much like one another.

68. I have no authority for this beyond my own observation of teachers and colleagues.

69. *History of English Thought in the Eighteenth Century*, I, 379 (1876). Stephen thought Gibbon's skeptical views had helped to bring about the French Revolution which horrified him.

is the carrier of the tradition. The pragmatic view of law—that it arises out of social needs and is to be evaluated by the efficiency with which it serves social functions—merges law into administration; the judge becomes simply one kind of official among many, and often not the most important. (4) Finally, and inevitably, the program of studying law in its social context opened up for discussion the whole explosive issue of the relationship between the inside and the outside of the law-box; of how far legal decisions are determined, or influenced by external pressures and how far by internal criteria; in short, of the reality of the idea of an autonomous legal order in modern society.

Social research in law along pragmatic lines was a quagmire for legal method and legal ideology. The program of investigating the social contexts and effects of law, to the end of discovering how efficiently it performed its social functions, made potentially relevant to legal study the entire universe of experience outside the law box. Some of those who ventured into that universe to gain broader perspectives on law never came back—Daniel Boorstin and David Riesman, for example. For others immersion in social research brought about something close to religious conversion: the story is told of Underhill Moore that he was found one day in his office,

pulling drawers from his filing cabinets and dumping the contents into wastebaskets, cursing meanwhile most frightfully. The student inquired what was going on. "It's my life work," said Moore, "all the notes I have taken in a lifetime of research and it's all wrong." Moore had decided to discard everything he had ever done [he was an authority on Bills and Notes] and start over again, devoting the rest of his life to the experiments needed to work out a scientific theory of legal control in terms of behavioristic psychology.⁷⁰

This episode took place at Columbia Law School in the 1920's, where Moore and others who were to form the core of the Realist movement made the first real attempt to institutionalize the "functional" study of law-in-society in a law school. This famous attempt failed; what is especially instructive about it for our purposes is that it began with the strictly professional purpose of reforming the curriculum to prepare students better for "the actual work in modern law practice";⁷¹ and ended with many of its backers convinced that social research in law could not be performed in a professional setting at all.⁷² (Some of

70. Julius Goebel, Jr. *et al.*, *A History of the School of Law, Columbia University* 251 (1955).

71. Stevens, *supra*, note 11 at 472 n. 28.

72. For the Columbia experiment, see especially Twining, *supra*, note 11, ch. 4 (and the annotations to that chapter at 399-402, which con-

them went off to found the short-lived Johns Hopkins Institute.) But most of the Columbia reformers—those who went off to Yale as well as those who stayed on—avoided falling into the quagmire by fashioning lifelines of limiting principles on the scope of their legal research, which kept them connected to traditional professional identities.

One such lifeline, for example, was the notion that the purpose of social research in law was to explore the gap between “law on the books and law in action,” or the “limits of effective legal action.” (Both these famous slogans were, of course, coined by Pound, who pioneered not only the pragmatic movement in law but the later retreat from it.⁷³) This program solved two problems at one stroke. It gave the study of extralegal “action” a restricted scope symmetrically co-extensive with that of the law-box itself: one looked for the counterpart in “reality” of a law in the “book.” It also annexed social research to a respectable professional and ideological purpose, i.e. closing the gap, making legal action more effective.⁷⁴ After the burst of empirical studies done at Yale in the 1930’s, research in this mode largely vanished from the law schools. It never did much influence legal history, though it produced a large body of “impact research” in sociology and political science.⁷⁵

The pragmatic lawyers soon found a lifeline that was stronger and more enduring. This was simply to revive Ames’s conception of the law professor as a scholar who helps the judge ensure the sound development of case law, and thus to limit research to such social facts as were potentially relevant to judicial decision-making. To be sure, they expected such research to range farther afield than traditional research, because the judge, to be properly advised, would need to know much more than traditional research could tell him.⁷⁶ Julius Goebel,

tain some useful warnings against generalizing about the Realists too broadly).

73. See text at notes 88-96, *infra*.

74. For the preoccupation of social-legal research with the gap between law on the books and law in action, see Abel, *supra*, note 29 at 185-89 and Marc Galanter, “Notes on the Future of Social Research On Law” (unpublished ms. on file with the *Law & Society Review*).

75. For discussions of these impact studies, see Stephen L. Wasby, *The Impact of the United States Supreme Court: Some Perspectives* (1970); Richard Lempert, “Strategies of Research Design in the Legal Impact Study: The Control of Plausible Rival Hypotheses,” 1 *L. & Soc’y Rev.* 111 (1966); Martin Shapiro, “The Impact of the Supreme Court,” 23 *J. Leg. Ed.* 77 (1971).

76. This position probably came easiest to the teachers of commercial law, a field in which facts of business practice had been supposed to have some relevance to adjudication since Mansfield’s time.

for example, thought the judge ought to have an immensely detailed acquaintance with 18th century criminal procedure.

Our law is one of the few occupations where history is of direct and specific utility. Traditionally it is by an inquiry into what the law was or has been that the solution of present perplexities is sought. The further back in time this quest is pressed, the more difficult is the finding, and it is then that the aid of the legal historian is sought. Where such a historian, therefore, undertakes to speak of the past, since it is something a future court may need and use, he assumes a responsibility not lightly to be dismissed. This is a moral obligation the implications of which are far-reaching, for not only must the judge put trust in his word, but the parties-litigant whose rights and whose fortunes will be affected by it. . . .⁷⁷

This was all the more astonishing as it came from someone who certainly could not have been accused of writing practitioner's history, and who was one of the fiercest critics of textbook legal history. Yet he was even more hostile to laymen's trespasses on law; for he felt himself to be first and foremost a lawyer. His work locates colonial law in its full political context of imperial administration and shows how much its forms owed to that context; yet the relation of lawyer's detail is so thorough and minute that it tends to occupy almost the whole foreground—presumably because it is the lawyer's detail that will most interest the 20th century judge.⁷⁸

The instance of Goebel may seem unique, and in a way it is—no one had a greater command of the legal sources or delighted more in flourishing them in the faces of the ignorant⁷⁹—but the strategy for saving professional identity was entirely typical. The persisting case-law centeredness of legal scholarship hardly needs documentation, but it is worth noting that all those commonly named as principals in the revolt against formalism—Holmes, Gray, Pound, Frank and Llewellyn—contributed to it;⁸⁰

77. Goebel & T.R. Naughton, *Law Enforcement in Colonial New York* xxxiii-xxxiv (1944).

78. Goebel's legal history materials are the first to stress extralegal influences on law (*supra*, note 48); as director of the Foundation for Research in Legal History he sponsored the publication of studies of the history of corporations that were the most ambitious attempts yet to relate modern law to social and economic context [Armand DuBois, *English Business Companies after the Bubble Act* (1933); Shaw Livermore, *Early American Land Companies* (1939) 1; and his background essays in *The Law Practice of Alexander Hamilton*, *supra*, note 49, especially those on "The Law and the Judicial Scene," *id.* at I, 1 and "The Economy in Hamilton's New York," *id.* at II, 29, reveal a grasp on extra-legal detail as sure as on the law. It is especially striking that someone with so much range should have deliberately unbalanced so much of his work towards the internal.

79. See, e.g. "Ex parte Clio," 54 *Colum. L. Rev.* 450 (1954), reviewing W.W. Crosskey, *Politics and the Constitution* (1953).

80. Frank did try to direct attention away from appellate and toward trial courts in *Courts on Trial* (1949). Llewellyn, in his general work in legal sociology, notably "What Price Contract —An Essay

and before long I hope a history of American legal pragmatism will properly stress its conservatism in this respect as much as its iconoclasm in others. Pound's life (1870-1964) spanned the entire period. His biographer has related how his professionalism, his dislike (heightened by the New Deal) of administrative regulation, and his increasingly uncritical admiration of the judiciary steadily narrowed his interests to the point where, in the late 1940's, the prophet of "sociological jurisprudence" stopped reading social science altogether in order to give his full time to Anglo-American case reports.⁸¹ Pound had been one of the first to venture outside the law-box. After a while he did not like what he saw, so he went back in and slammed the door.

This was an extreme version of a common process of withdrawal. It is once again necessary to emphasize that this limitation of scope to gathering fodder for the judge, even the fantastically erudite and open-minded judge of the legal pragmatists' imagination, was, in view of their general intellectual program, almost completely arbitrary. They undertook to look at law from the point of view of the functions it performed in society: this led them to the position that for the purpose of organizing research, it was useful to think of law as a system of social control, or as what officials do about disputes, or lawyers do for a living. By any of these standards litigation in courts (especially litigation to appeal) was only a fragment of diverse complex processes, and through the 20th century a rapidly shrinking one; few of the graduates of the schools where the legal pragmatists taught were ever likely to have much contact with it.⁸² Yet the continuing preoccupation of legal research, including legal history, with the work of judges is so taken for granted that its extraordinary perversity is rarely even noticed.

Why this should have happened remains something of a mystery. Undoubtedly the great success of the case method as a teaching device had something to do with it: practically the whole curriculum has been organized around criticizing the work of the appellate bench and this has carried over to research

in Perspective," 40 *Yale L.J.* 704 (1931), showed he was perfectly aware of the limits of the case-lawyers' view—which makes it all the more interesting that he settled down into that view in *The Common Law Tradition: Deciding Appeals* (1960). See text at notes 97-99, *infra*.

81. David Wigdor, *Roscoe Pound, Philosopher of Law* 207-81 (1974).

82. On changes in the role of courts and types of law practice, see Hurst, *Lawmakers* 85-87, 301-305; Robert T. Swaine, *The Cravath Firm and its Predecessors*, II, 461-66 *et passim* (1948).

because law professors tend to direct their research towards ultimate incorporation in teaching materials. But by itself this explanation will not serve. Judicial opinions cannot, for instance, be *that* much better teaching tools than administrative opinions, yet courses in Administrative Law tend to be about judicial review of administrative action. That is probably because judges have something administrators do not have: the capacity to represent the learned and cultivated side of law practice,⁸³ immunity from at least the more obvious kinds of client or constituent pressure, and the ideal of the law-giver who derives his authority from sources independent of the dominant forces in society. Yet the learning, immunity, and authority that judges were supposed to symbolize all followed from their expertise in the common law tradition, which the legal pragmatists had spent two decades deriding.⁸⁴ That was all right when their basic pro-

83. See the extraordinary elegy of Julius Goebel, Jr., "Learning and Style in the Law—An Historian's Lament," 61 *Colum. L. Rev.* 1393 (1961), in which the author calls up the classical learning of great past judges ("Diversion . . . was on a level almost incomprehensible to us. I cannot picture Holt, or Hardwicke, or Mansfield viewing a so-called 'better' program on television, or, if trapped into so doing, esteeming what they had looked upon to be a fit subject of conversation." *Id.* at 1395-96.); and contrasts it invidiously with the present situation:

A reasoned opinion that rests upon impeccable authority and that carries conviction by reason of this and of its inner logic, unquestionably is difficult to compose. Fortunate it is that there are so many written. Such are, alas, much outnumbered by those patchworks of cases stated, passages from cyclopedias and snippets from a *Restatement*. This is a style highly esteemed in some trans-Appalachian jurisdictions . . . [This has been accompanied by] the desecration of allusive and epigrammatic writing, which so conduces to elegance . . .

Surely the law must lose something of majesty if its oracles think of their pronouncements in terms of threading a pipe or of contriving a passable mitre joint. Let us leave such ideas to the legislators. To judges and lawyers the past calls out that we should cherish writing as the exercise of art. This let us not forget.

Id. at 1398-1400.

84. David Riesman pointed this out in 1951:

To be sure, most lawyers today recognize that their most important work is done in the office, not in the courtroom; the elaborate masked ritual of the courtroom holds attraction only for the neophyte and the layman. Yet it is astonishing how strongly the image of the judge stands as the image of the lawyer-hero. While at the better law schools at least one and often nearly three years are spent in debunking upper-court opinions, in showing their largely derivative quality, their endless fallacies, their interminable self-confusion as to what they are "actually" deciding (as against what they say they are deciding), the better products of the better law schools want nothing more exciting when they get out than a chance to serve as clerk [as I did] to an appellate judge—the "upperer" the better. And as members of the bar they will move heaven and earth to get on the bench themselves (which is the source of much dirt in our political system, since many congressmen have partners who itch to be judges), although they know from prac-

gram was critical, e.g., revealing the personal and class bases of Supreme Court decisions invalidating social legislation, or the confusions and contradictions of Langdellian method. When the Court switched directions in 1937, the growth of executive power in the New Deal seemed to some lawyers to portend administrative tyranny unless checked by the courts; and when the Germans reduced their courts to tools of the Nazi Party, even the most skeptical lawyers felt compelled to reassert the idea of legal autonomy.⁸⁵ Under this compulsion, perhaps because no better substitute had been found in the meantime, perhaps no better could be found, the notion of the common law tradition revived.⁸⁶

The revival took several forms, all the way from Catholic natural law theory and Hutchins' and Adler's neo-Aristotelianism to Thurman Arnold's view that the idea of neutral and wisely applied law above men is a myth, but one whose general acceptance (by powerholders as well as others) is necessary to civilized society.⁸⁷ Two forms that were especially significant for legal historiography found their archetypes in the work of Pound and Llewellyn.

tical experience how little power the judge has under the American system and how skilled lawyers are in emasculating that little.

"Towards an Anthropological Science of Law and the Legal Profession," in Riesman, *Individualism Reconsidered* 440-41 (1954). See also *id.* at 462-63.

85. I am uttering here what is rapidly becoming the standard social-political explanation for the decline of Realism. See Edward A. Purcell, Jr., "American Legal Realism Between the Wars: Legal Realism and the Crisis of Democratic Theory," 75 *Am. Hist. Rev.* 424 (1969); G. Edward White, "The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change," 59 *Va. L. Rev.* 279, 281-285 (1973); both of which stress the attacks associating the positivism and skepticism of the Realist movement with fascism, and later with communism.

And yet I wonder. One might have thought that the rise of Nazism and Stalinism would as likely have promoted social research in law as put an end to it, would have encouraged Americans to investigate the sociological bases of the rule of law rather than simply to assert its autonomy from social conditions. This is the sort of work that C.J. Friedrich, Franz Neumann, and Friedrich Hayek all did (from rather different perspectives); was there similar work going on in the law schools? I am not sure, but I think the answer is not much even among the émigré lawyers. *The Journal of Legal & Political Sociology*, started in 1942, began to address these issues (Karl Llewellyn and David Riesman were among the first contributors), but it petered out after a few numbers. The retreat from external social perspectives on law in the late 1930s and 40s is only just beginning to be explained. We need to know a lot more about the politics of law teachers, their attitudes towards the New Deal, towards communism and civil liberties in the 1950s; more also about the contribution of the émigré scholars, about how they altered (and failed to alter) our perspectives on study of the legal system.

86. Or perhaps simply survived; it may never have been abandoned.
87. On the Catholic natural lawyers and Hutchins and Adler, see Purcell, *supra*, note 11; on Arnold, see his *Symbols of Government* (1962); Rumble, *supra*, note 11 at 217-220.

Pound's contribution was his famous idea of a "taught legal tradition." He began to develop this idea well before the general crisis of pragmatic thought in the 1930's (as has been mentioned already, his was one of the earliest retreats from pragmatism), as a method of attacking the "economic interpretation" of legal history, the domesticated and vulgarized Marxism of the historians who assumed law to be nothing more than an instrument for realizing the self-interest of a dominant class, wielded by judicial members of that class.⁸⁸ Proponents of this interpretation were most vulnerable when they were most specific, as when they tried to explain results in individual cases by reference to the class position of the winning party or the judge.⁸⁹ Pound was able to run rings around them, showing that contemporary judges with the same backgrounds had reached opposite conclusions on the same issues; and that big economic interests had sometimes won in the courts and sometimes lost.⁹⁰ It was a completely sterile debate, since both sides assumed that decisions in the appellate courts accurately represent the extent to which the legal system responds to the claims of economic interests⁹¹ (even if this were valid the case samples were too thin to prove anything either way). The interesting aspect of the debate was that when it provoked Pound into insistence upon a degree of autonomy for law, this is what he came up with:

Tenacity of a taught tradition is much more significant in our legal history than the economic conditions of time and place. These conditions have by no means been uniform, while the course of decision has been characteristically steady and uniform, hewing to common-law lines through five generations of rapid political, economic, and social change, and bringing about a *communis opinio* over the country as a whole on the over-

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88. For an early American version, see Brooks Adams, *Centralization and the Law* (1906). The "economic interpretation" was most effective in the robust muckraking and debunking histories of the Supreme Court: notably Gustavus Myers, *History of the Supreme Court of the United States* (1918) and Louis B. Boudin, *Government by Judiciary* (1932). Other reductionist theories of law prevalent in the 1930's, such as Watsonian behavioristic psychology, apparently failed to influence historical writing.
89. Francis H. Bohlen, "The Rule in *Rylands v. Fletcher*," 59 *U. Pa. L. Rev.* 298 (1911); Walter Nelles, "*Commonwealth v. Hunt*," *supra*, note 61.
90. Pound's attacks on the "economic interpretation" may be found in "Political and Economic Interpretations of Legal History," *Proc. Am. Polit. Sci. Ass'n* 95 (1912); *Interpretations of Legal History*, ch. 5 (1923); *The Formative Era of American Law*, *supra*, note 35; "The Economic Interpretation and the Law of Torts," 53 *Harv. L. Rev.* 365 (1940).
91. For example, Pound concluded from the fact that interpretations of corporate and partnership law restricted businessmen's choice of forms of doing business and of ways of operating across state lines that "capitalists" (whom he conceded were the dominant class at the end of the 19th century) had suffered as much from courts' hanging on to traditional forms as had "laborers." See his *Interpretations of Legal History*, *supra*, note 90, at 111-112.

whelming majority of legal questions, despite the most divergent geographical, political, economic, social and even racial conditions . . . Economic and political conditions of time and place have led to legislative abrogations and alterations of rules and even at times to attempts to alter the course of the taught tradition. But such changes are fitted into the traditional system in their interpretation and application, and affect slowly or very little the principles, conceptions and doctrines which are the enduring law. The outstanding phenomenon is the extent to which a taught tradition, in the hands of judges drawn from any class one will, and chosen as one will, so they have been trained in the tradition, has stood out against all manner of economically or politically powerful interests.⁹²

Have we seen this before? Of course: it is our old friend, the common law tradition, the continuous, uniform development of law over time by masters of a method. The obviously political part of law, legislation, is "fitted into the traditional system" by interpretation, without much affecting it.⁹³ Otherwise, the only role for economic and social factors is that of supplying problems for the aloof inhabitants of the law-box to resolve by resort to their learned technique.⁹⁴

The "economic interpretation" refused to concede any autonomy to law: your law-box, its authors said, is really empty. Pound rightly denied this, but when pressed to say what was in it, fell back on the old identification of legal autonomy with formal doctrinal development. This had two bad effects: it prevented the leading advocate of a sociological legal history (and most of the legal historians who followed him) from seeing how much American law *could* quite satisfactorily be explained as the outcome of organized economic interest-group pressure.⁹⁵ It

92. Pound, *Formative Era*, *supra*, note 35, at 83-84.

93. Pound explained the vulnerability of legislators to economic pressures by their lack of training in the tradition: "The legislator . . . has no settled habits of applying an authoritative technique to authoritatively given materials." "Economic Interpretation," *supra*, note 90, at 366. A colleague to whom I showed this passage suggested that since many judges are legislators who have failed of reelection, the critical training experience might be the crucible of failure.

94. The "taught tradition" idea seems particularly hard to square with Pound's historical account of various theories he supposed had influenced American judicial decision-making in the 19th century (law-of-nature theory, analytic and historical theories, etc.) or with his frequent criticisms (especially in his earlier years) of late 19th century courts on the grounds that they had prevented necessary adaptations to social and economic needs, including adaptations sought to be accomplished by legislation. He worked himself into the position of saying that the taught tradition, apparently proof against "all manner of economically or politically powerful interests," fell victim to the influence of any jurisprudential scribbler who happened to be in the neighborhood; and also that the autonomy of courts consisted in their being perpetually out of tune with modern needs—the very quality for which he had once attacked them.

95. For fine recent examples of what might be called a "neo-Progressive" approach, see Lawrence M. Friedman, "The Usury Laws of

also prevented them from inquiring further into what could not—into the ways in which the specialized activities inside the law-box might be variables independent of and directing, channelling, diverting or obstructing those pressures. If there was one thing that the realists had made clear, and left as their enduring legacy, it was that the autonomous element in law was *not*—at least not necessarily, not always—its surface formality; that indeed such formality was most likely to mask the unexamined (or at any rate unacknowledged) presence of outside political or economic influences. But if it wasn't that, what was it? Pound's regression to the "taught tradition" discouraged any attempt to find out.⁹⁶

The other contribution that the pragmatic movement made to the eleventh-hour revival of the idea of tradition in law was given its best and fullest expression in the work of Llewellyn. He saw the "common law tradition" not as a continuously developing body of doctrine but as historically diverse methods ("craft-styles") of judicial decision-making:

the general and pervasive manner over the country at large, at any given time, of going about the job, the general outlook, the ways of professional knowledge, the kinds of thing the men of the law are sensitive to and strive for, the tone and flavor of the working and of the results. [Craft-style] is well described as a "period-style"; it corresponds to what we have long known as period-style in architecture or the graphic arts or furniture or music or drama.⁹⁷

There were thus several traditions, each specific to a period; the period 1820-1860 having been dominated by a "grand style," 1880-1910 by a "formal style;" the period from 1930 onwards, Llewellyn believed, by a renaissance of the "grand style." (It is hopeless to explain Llewellyn's typology properly in a short space, but for those unfamiliar with it, here are the basics: a grand-style judge is concerned not only to harmonize his decisions, wherever feasible, with past case-law, but to justify them as functional; he tries to work out over time general approaches to handling recurrent types of dispute situations, approaches that will "make sense" to people in the disputants' positions. The formal-style judge, by contrast, cares only about making sure that each decision logically fits into a pre-existing doctrinal

Wisconsin: A Study in Legal and Social History," 1963 *Wisc. L. Rev.* 515; Robert S. Hunt, *Law and Locomotives* (1958).

96. I don't wish to imply that the *net* effect of Pound's influence on legal historiography was baneful. In this field as in so many others, he called attention to the right problems and pointed to suggestive lines of inquiry; and the fact that the Dean of the Harvard Law School uttered phrases like "sociological jurisprudence" gave social research in law respectability it could have acquired in no other way.

97. Llewellyn, *Common Law Tradition*, *supra*, note 80 at 36.

scheme: "the rules of law are to decide the cases; policy is for the legislature, not the courts."⁹⁸) This was the most ingenious reconciliation yet of tradition and function in law. It did not turn its back on the idea of law as pragmatic method, social engineering; neither did it reject the work of past judges: it married the two in the tradition of the grand style. Tradition was preserved, but as exemplary rather than authoritative. Whatever its merits as jurisprudence,⁹⁹ this way of looking at law had incidental benefits for legal history. It encouraged the study of grand-style judges from the point of view of what made them exemplary, since the historian working in an age of unabashedly "policy-oriented" jurisprudence will try to bring out, rather than suppress as unfortunate or irrelevant, past judges' view of their society and of what law is needed for it. It is possible to see the two best judicial biographies of recent times, Levy's of Shaw and Reid's of Doe,¹⁰⁰ both grand-style judges, as reflecting the influence of pragmatic legal thought in treating their subjects as architects of bodies of socially serviceable case-law. Llewellyn also taught legal scholars to read judicial opinions more carefully, for rhetoric as well as result, for sources of analogy and authority, for facts used and facts ignored, and above all for the characterization of implications for future cases. (His own excursions into history are probably the best examples of the deployment of the method.)¹⁰¹ Finally, the concept of period-style (though ahistorical in one of its premises, i.e., that present-day judges were recapturing the reasoning modes of 19th century ancestors fundamentally different in mental outlook)¹⁰² suggested possibilities for historical-sociological theories of legal reasoning styles along the lines of Max Weber's, possibilities that are beginning to be realized in the work of Friedman, Horwitz, Nelson and Tushnet.¹⁰³

98. *Id.* at 39. The most effective statement of the concept of craft-style is in Llewellyn, "On the Good, the True, the Beautiful in Law [1942]", in Llewellyn, *supra*, note 25 at 167.

99. For effective criticisms from differing perspectives, see Charles E. Clark & David Trubek, "The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition," 71 *Yale L.J.* 255 (1961); Duncan Kennedy, "Legal Formality", 2 *J. Legal Studies* 351 (1973).

100. Leonard W. Levy, *The Law of the Commonwealth and Chief Justice Shaw* (1957); John Phillip Reid, *Chief Justice: The Judicial World Of Charles Doe* (1967). Howe's biography of Holmes, *supra*, note 12, doesn't count as "judicial" biography because it ends before Holmes goes on the bench.

101. See Llewellyn articles cited *supra*, note 61.

102. Though perhaps not so different in their aspects with which Llewellyn was particularly concerned, as judges in commercial cases.

103. Lawrence M. Friedman, "On Legalistic Reasoning—A Footnote to Weber," 1966 *Wisc. L. Rev.* 148; Morton J. Horwitz, "The Emergence

Yet though Llewellyn's concept of tradition, unlike Pound's, pointed towards a more expansive historiography, it maintained the insider's perspective on law, specifically that of insider-as-advisor-to-the-judge. And there are disadvantages to the perspective even of the most social-context-conscious, cosmopolitan insider: everything gets filtered through the lens of professional working concerns and categories. This may have any or all of the following consequences.

(1) The insider's categories to which even extra-legal detail tends to be assimilated may, while rendering it familiar and manageable to lawyers, seriously distort it in other ways. A good illustration from our legal history is the category of "codification," under which has been subsumed a vast diversity of behavior: evangelical antilegalism; backwoods resistance to debt-collection; merchant creditors' pressure for more efficient debt-collection; anglophobe propaganda; small legal practitioners' complaints about pleading complexities; aesthetic distaste for the disorderliness, and democratic distaste for the feudal origins, of the common law; Jefferson's, Bentham's, and Field's plans for codes; the Massachusetts Laws and Liberties of 1648, Field's procedural code, the Federal Rules of Civil Procedure, and the Uniform Commercial Code, not to mention the Law of the Twelve Tables and the BGB. There are few purposes indeed for which it makes any sense at all to lump all this stuff together; yet our historiography to a greater or lesser degree repeatedly did so, combining most of it into a single prolonged "codification movement" that supposedly lasted throughout the 19th century and achieved its greatest successes in the 20th.¹⁰⁴ Scholarship

of an Instrumental Conception of Law," 5 *Perspectives in Am. History* 287 (1971); William E. Nelson, "The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America," 87 *Harv. L. Rev.* 513 (1974); Mark Tushnet, "The American Law of Slavery 1810-1860: A Study in the Persistence of Legal Autonomy," 10 *L. & Soc'y Rev.* 119, *infra*. So far as I know, nobody has taken up Llewellyn's hint that it might be valuable to apply methods of art or architectural history to law.

104. The codification theme can be tracked from Charles M. Hepburn, "The Historical Development of Code Pleading in America and England," in *Select Essays*, *supra*, note 33 at II, 643; through Charles Warren, *A History of the American Bar*, Ch. 19 (1911), Alison Reppy, "The Field Codification Concept," in *David Dudley Field Centenary Essays* (Reppy ed. 1949); Pound, *Formative Era*, *supra*, note 35; and Howe, *supra*, note 48. The theme was picked up by Perry Miller in *The Life of the Mind in America* (1965) (Book 2, "The Legal Mentality"); and has recently been sounded again in Carl B. Swisher, *The Taney Period, 1836-64* at 339-56 (Oliver Wendell Holmes Devise History of the U.S. Supreme Court, V, 1974). One reason for what must be described as the obsession of our legal historians with this theme is that 19th century American lawyers were obsessed with it also; "codification" was the staple topic of their occasional essays, articles in law periodicals, and orations at bar dinners and memorials. They had as great a capacity to as-

is only recently beginning to break this "movement" up into its component parts.¹⁰⁵

(2) Appellate case-law comes to stand for the whole "legal system." This would be troublesome if only for the obvious reasons that it limits research to the legal business that happens to flow into the appellate courts; prevents institutional comparisons showing how alike courts are to other parts of the system, and how different, and how power and business are allocated among the various parts. (Prevailing jurisprudential theories of appropriate institutional jurisdiction or competence are likely seriously to misrepresent historical actualities in these matters.) It can also lead to a tendency to overintellectualize, to see the law as a complex body of attempted judicial and academic solutions to a set of philosophic puzzles. Obviously an extremely elaborate jurisprudential literature is an important cultural product, worth studying on its own terms; but as an *exclusive* approach to legal history, this can result in a perception of law as an elevated activity engaged in for its own sake by the lawyers and their clients, and thus fundamentally betray the nature of the subject.

(3) Perhaps most important, history from the lawyer's perspective, if it pays any attention to the world outside the law-box, is bound to focus more closely on inputs than on outputs, and mostly on those inputs that the insiders consciously employ as materials of their craft. This is bound to leave out of consideration major (it is not necessary to argue primary) determinants of the shape and content of the law-box—the reasons for there being any law-box in the first place—i.e., what it is that people in society demand, or expect, of their legal order.

III

The readers of Willard Hurst's first major work, *The Growth*

simulate everything to their own categories as we do. Even the great Haskins may have been somewhat taken in by the appeal of the "codification" category: compare his "Codification of Law in Colonial Massachusetts: A Study in Comparative Law," 30 *Indiana L.J.* 1 (1954) (Massachusetts Law and Liberties of 1648 is the first modern law code in the West) with Ronald G. Walters, "New England Society and the Laws and Liberties of Massachusetts," 106 *Essex Inst. Hist. Colls.* 145 (1970) (the "Laws" is not "basically a code of law but rather something more mundane: a handbook for justices, an instrument for the use of a public and a body of magistrates likely to be of uncertain and conflicting knowledge." *Id.* at 167).

105. See especially Richard E. Ellis, *The Jeffersonian Crisis* (1971); William E. Nelson, *Americanization of the Common Law*, ch. 5 (1975); Friedman, "Law Reform," *supra*, note 3; Maxwell Bloomfield, "William Sampson and the Codifiers: The Roots of American Legal Reform, 1820-1830," 11 *Am. J. Leg. Hist.* 234 (1967); Gerald W. Gawalt, "Sources of Anti-Lawyer Sentiment in Massachusetts, 1740-1840," 14 *Am. J. Leg. Hist.* 283 (1970).

of *American Law* (1950), could tell from the first few pages that although the book purported only to synthesize existing secondary materials, the synthesis represented something new in American legal history. This was a history of law-making agencies—not only courts, but constitutional conventions, chief executives, administrative agencies, and the bar—inquiring into the social functions these agencies had served since the founding of the Republic. Though described with an insider's understanding and grasp of detail, its perspective on the operations of the legal system was that of an outsider: it was a critical Inspector General's report on how legal institutions had served the society that supported them. Hurst had formulated and announced his program of defection from the main line of legal historiography as early as 1942.¹⁰⁶ *The Growth of American Law* was the cornerstone for the imposing body of external legal history that he, and the Wisconsin school of legal studies he founded,¹⁰⁷ have been writing since, and are still adding to.

This essay has advanced the argument that the actualization of pragmatic legal theory in historical writing was stunted and sometimes choked off entirely by the reluctance of legal scholars to shake off their old roles of interpreters of the common law tradition. But in Hurst's work pragmatic legal theory reached full flowering, probably unexcelled anywhere else in American legal scholarship. Others have appraised,¹⁰⁸ some of them brilliantly,¹⁰⁹ his work in general: my concern here is only to try to show how his ways of thinking about law dissolved the constraints most legal historians had felt upon taking an external approach.

For this purpose, it is useful to consider Hurst's work as an effort to apply the general insights of pragmatic theory, especially as formulated by John Dewey,¹¹⁰ to the study of the

106. "Legal History: A Research Program," 1942 *Wisc. L. Rev.* 319.

107. The works of this school on Wisconsin legal history are: Lawrence M. Friedman, *Contract Law in America* (1965); Hunt, *supra*, note 95; Spencer Kimball, *Insurance and Public Policy* (1960); George J. Kuehn, *The Wisconsin Business Corporation* (1959); James A. Lake, *Law and Mineral Wealth: The Legal Profile of the Wisconsin Mining Industry* (1962); Francis W. Laurent, *The Business of a Trial Court, 100 Years of Cases* (1959); Samuel Mermin, *Jurisprudence and Statecraft: The Wisconsin Development Authority and its Implications* (1963); Earl F. Murphy, *Water Purity* (1961).

108. See the "Bibliography," *infra*, this issue, § V.

109. The outstanding ones are both, as it happens, by contributors to this volume: Harry N. Scheiber, "At the Borderland of Law and Economic History: The Contributions of Willard Hurst," 75 *Am. Hist. Rev.* 744 (1969), and Mark Tushnet, "Lumber and the Legal Process," 1972 *Wisc. L. Rev.* 114.

110. There are other significant influences detectable in Hurst's work, notably Max Weber's; but as a factor shaping Hurst's external per-

specific historical phenomenon of American law in the 19th and 20th centuries. "Law" is here a general label for several species of applied social intelligence, which may be understood only by reference to the conditions out of which they are generated and by the consequences to which they give rise. The basic function of law, as of any other form of social intelligence, is to increase men's ability to achieve rational control over social change in order to liberate their natural capacity for growth. Men achieve rational control through experimental method, which expands their empirical appreciation of the consequences of their conduct; expanded awareness of consequences enlarges their ideas of what is desirable as well as of the most efficient means of attaining it; and this leads to growth in the range and quality of life experience, especially emotional experience, for "reason probably finds justification ultimately as an instrument by which men achieve more subtle, more varied and more shared emotion."¹¹¹

The special focus of Hurst's attention is governmental activity, the work of agencies and of those who interpret and apply it; Hurst calls this "law." (It is not a definition of law, since Hurst does not try to define law; it is a term of convenience without any precise boundaries.) His reason for concentrating on official action is that the state possesses special characteristics that impart to the exercise of directive intelligence through its agencies an exceptional social significance. Of all associations in society, it is the public organized in the state, acting through the legal order, that stands the best chance of increasing rational control over social change. This is not to say that American law has lived up to its potential in this respect. Far from it: one of Hurst's main themes is that social change has usually been permitted to take place by "drift," "default," or "inertia," by which is meant experience transmuted into social action without the intervention of reflective intelligence. The consciousness from which people draw their desires and preferred means of satisfying them tends to be imprisoned in habitual modes and forms,¹¹² but old forms are continually coming up against and mixing with one another, in different combinations, thus con-

spective, American pragmatic thought seems to me to have been more significant.

111. Hurst, "The Law in United States History," 105 *Proc. Am. Phil. Soc.* 518, 519 (1960). For Dewey on the same themes, see, e.g., *Experience and Nature*, ch. 10 (2d ed. 1929).

112. For Hurst on drift, see *Law and Social Process in United States History* (1960), especially at 66-75; cf. Dewey on habit, *Human Nature and Conduct*, Pt. 1 (1922).

tinually producing a new social environment.¹¹³ Acted upon by new conditions, the old forms will of course yield new consequences. Men's failure to subject new conditions to experimental evaluations means that they are constantly being surprised and baffled by experience, instead of being able to achieve some mastery over it in the interests of human growth.

For Hurst, as for American Progressives generally, the most conspicuous example of "drift" is the persistence through the late 19th and early 20th centuries of the habitual consciousness of private-market-and-business-oriented individualism.¹¹⁴ In the early 19th century this had been a mode of thinking more functional for growth: it had released human talents and energies for the purpose of settling a continent and fulfilling the basic economic conditions for community existence. But at the same time it had defined business as the main arena for the exercise of talent, so that instrumental intelligence was rarely directed toward the elaboration of any but the most short-term economic consequences of social action. Private economic interests had thus in time come to overwhelm social life, with the results that: (1) men's consciousness of the desirable and how to reach it came to take account only of immediate economic costs and benefits (a method of thought Hurst calls "bastard pragmatism") and not of longer-run consequences for more various modes of growth; and (2) men had lost the talent for politics, that is, for organizing to promote, through the legal agencies of the state, ideas of the general good of their communities less parochial than purely economic interest.¹¹⁵

Hurst thus follows the main tradition of Progressive thought in relating the exercise of social intelligence to conditions of social organization: its effectiveness depends upon the wide dispersal of power among diverse solidary communities of shared values. Thus rational policy-making, dispersal of power, and community solidarity are all conditions of one another's existence; and all three are conditions of social growth.¹¹⁶ The

113. This phrase tries very clumsily to give a brief impression of Hurst's intricate theoretical account of how imprisonment in habit produces social drift. For this account in its most developed form in Hurst's work, see his *Justice Holmes on Legal History* 11-13 *et passim* (1964).

114. For typical descriptions of this consciousness, see Hurst, *id.* at 39-50; *Law and Social Process*, *supra*, note 112 at 54-55.

115. Hurst's most powerful expression of these ideas remains that in the final chapter of his *Lawmakers*, *supra*, note 11, at 439-446 *et passim*; see also *Law and the Conditions of Freedom in the Nineteenth Century United States* (1967). Here the allegiance to Dewey is especially strong: see *The Public and its Problems* (1927).

116. Hurst, "Legal Elements," *supra*, note 6 at 88-89; see Dewey, *id.*, especially at chs. 5-6. There is an excellent discussion of this aspect

importance of law in society (though Hurst keeps insisting that like other forms of rational planning law can never have more than a marginal directive impact on social change) is that it has special equipment to help nudge these conditions into being. In particular, as the monopolist of legitimate force, the state has authority to hold private power accountable to the general welfare and in extreme cases to adjust its distribution in society, either by breaking up power centers or balancing them with countervailing powers. But perhaps the most important feature of state action is that it is normatively rational, is supposed to operate through forms and procedures designed to encourage deliberate, informed, and accountable decision-making. More than any other association the government is subject to expectations that its decisions will not be habitual reflexes, but will be mediated through careful reflection upon long-run consequences; and it has extraordinary resources (e.g. the ability to call upon a wide range of expert opinion representing diverse interests in legislative investigation, administrative rule-making, etc.) to generate the appropriate laboratory conditions for the operations of experimental intelligence. In other words, the norms of American constitutionalism ought to provide an especially favorable environment for pragmatic method.¹¹⁷

The legal historian's task, as Hurst sees it, is to measure the actual past performance of government against this potential. It takes a historian to do this, because only a perspective on several generations can reveal the habitual modes that have conditioned decision-making as well as the long-run consequences of the actual decisions. The present generation of lawyers needs to know, and needs history to inform it, which circumstances promote, and which prevent, intelligent direction of society in favor of growth. Hurst's rebellion against the dominant tradition in legal scholarship was not made in the name of disinterested reconstruction of the past; he is an intensely committed moralist, for whom the past is full of dreadful warnings.

But for the purpose of this essay, I want to look at these issues exactly backwards from the way Hurst does. He is always

of Progressive thought in David E. Price, "Community and Control: Critical Democratic Theory in the Progressive Period," 68 *Am. Polit. Sci. Rev.* 1663, 1672 (1974).

117. For a representative passage on the constitutional ideal, see Hurst, "Legal Elements", at 3-7. Hurst never goes quite so far as to equate constitutionalism and his own normative pragmatic method (though he is not entirely innocent of sometimes confusing them in his discourse), since the constitutional ideal has held officials and private holders accountable to serve *individual* life, but not (at least not consistently) to serve social or community life. See *Law and Social Process*, *supra*, note 112 at 3.

concerned to see how history can contribute to the living lawyer's exercise of pragmatic method in the public interest; but it is also worthwhile to ask how his vision of pragmatic method contributes to his work as a historian. I think the answer is that, while the general theoretical apparatus outlined above creates some troublesome problems of its own in Hurst's work, it is effective in freeing that work from the limitations of the insider's perspective.

For one thing, Hurst does not feel out of place or pulled apart by being an historian in a law school; he sees no opposition between social research in law and lawyer's business. His view is in keeping not only with Dewey's insistence on the unity of thought and action but with the "Wisconsin idea"—that social science research in the university should lead to social reform through legislation. Historical research and legislative drafting are just specialized aspects of the operations of instrumental intelligence. His paradigm example of law's working the way it should work is the development of workmen's compensation in Wisconsin in the early 20th century: John Commons's university research seminars helped Charles McCarthy's legislative research department develop the legislation; and advisory committees of employers, unions, insurance companies, and the public helped administer it.¹¹⁸ In fact, if one had to sum up in a phrase Hurst's deviation from the mainstream of legal historiography, it would be that his allegiances are to the Wisconsin Progressive tradition of lawmaking instead of the common law tradition.¹¹⁹

This has important consequences for his work. His first book made clear that he had no interest in linking law practice to the authority and complexity of common law tradition, since he

118. Hurst, *Law and Social Process*, *supra*, note 112 at 37-41.

119. But it would be misleading to conclude that Hurst simply carried on a going tradition at the Wisconsin Law School, since the Law School was only really brought into the Wisconsin tradition after World War II. In the heyday of the Wisconsin idea before World War I, the faculty consisted mostly of part-time practitioners; after World War I, "the faculty's major service contribution related not to legislation, but to law in the courts," i.e., work on the Restatements. John E. Conway, "The Law School: Service to the State and Nation," 1968 *Wisc. L. Rev.* 345, 346. The "law-and-society" approach that now distinguishes the Wisconsin Law School was pioneered after World War II by men recruited to the faculty by Dean Lloyd K. Garrison just before it: notably Jacob H. Beuscher and Willard Hurst. See W. Scott Van Alstyne, Jr., "The University of Wisconsin Law School 1868-1968: An Outline History," *id.* at 321, 330-31; and Fran Thomas, *Law in Action: Legal Frontiers for Natural Resources Planning—The Work of Professor Jacob H. Beuscher* (Land Economics Monographs No. 4, 1972).

Hurst therefore had to cut all his own trails. But of course it is not likely that his enterprise could have prospered anywhere else as well as in Madison.

thought that a stubborn clinging to traditional images of the profession was in part responsible for the bar's failure since 1870 to realize its possibilities for exercising social leadership: there were too many lawyers who were just technicians with no sense of the larger social effects of their jobs.¹²⁰ (The bar's contributions to "law reform" with Restatements, uniform laws, and the like don't count; the Wisconsin Progressive wants social reform through law, not technical law reform.¹²¹) Nor does he need to preserve the centrality of courts in legal study for their symbolic capacity to legitimate the legal order as a whole through their claims to autonomy derived from the distinctiveness of their doctrines and procedures: since far from thinking law achieves its capacity for control over social change from its distinctive forms, he believes one of the common causes of "drift" is mindless adherence to such forms.¹²² Like Llewellyn, he replaces tradition-as-doctrine with pragmatic method as the source of what little directive influence law is ever likely to achieve—you don't achieve control by denying you're part of society but by recognizing how much you are a part of it—but does not go on to equate pragmatic method with case-law craftsmanship; because although courts continue to have an important public role as protectors of liberties against arbitrary state action, their pre-Civil War careers as major planners and coordinators of state policy have long since ended.¹²³

The great strength that his historical work derives from his pragmatist's vision is the outsider's perspective: everything is to be examined for what it tells us about law's capacity to overcome the heavy odds in favor of social drift. Hurst's masterwork, the huge study of the legal history of the Wisconsin lumber industry,¹²⁴ responds to a single accusing question: how did it come about that the legal system so failed in its job of providing rational processes to increase awareness of long-run consequences that it permitted Wisconsin lumbermen to cut 30 million acres of forest to exhaustion?¹²⁵ Answering this leads him

120. See Hurst, *Lawmakers* at 370.

121. For an illuminating discussion of the distinction, see Friedman, "Law Reform," *supra*, note 3.

122. See, e.g., *Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin, 1836-1915* (1964) [hereinafter, Hurst, *Law & Lumber*] at 99, 298.

123. See Hurst, *supra* note 82; and *Law & Lumber* 249-50 (on built-in institutional limitations of common law litigation as decisionmaking method).

124. *Law & Lumber*.

125. I do not mean that this book is accusing in tone; on the contrary it is a model of scholarly neutrality, full of warnings against applying the criteria of the present age to the 19th century. (The earlier

into (a) an account of the basic social and cultural conditions (scarcity of working capital, abundance of land, an aggressive manipulativeness towards nature, etc.) that engendered the consciousness of 19th century Wisconsin policy-makers; (b) a description of the consciousness itself ("bastard pragmatism," measurement of benefits by short-term money yields); and (c) an analysis of the results of the applications of this consciousness to legal policy towards the lumber industry (fragmentation of decision-making into one-at-a-time resolution of strictly local problems; great ingenuity in promoting—finding non-monetary subsidies for, allocating power and resources in favor of, inventing financing devices to benefit—those interests believed most capable of getting timber cut, transported, and marketed; also complete failure to bring to awareness, and hence to deal with, problems like depletion of the forest or the conditions of lumber labor).

By his choice to organize his work around the concept of "law", Hurst has committed himself to a version of the box model of the legal order in society, but it is a wonderfully different box from those of the standard legal histories. It is much larger, of course, since it includes all official activity: its contents are the habitual modes and forms of official thought—dialect variations, as it were, of the dominant consciousness of the surrounding culture—such as a legislative disposition to protect working men through labor liens but not through state accident insurance. The dialects are significant data for Hurst if and only if they are likely to be consequential for a society's growth; this means that although his work is rich in detail, it is all detail accumulated towards generalization about its social function. As a result—

(1) It tends to be what we might call democratic detail. Legal historians have favored aristocratic detail, worked into intricate tapestries by jurisconsults out of the appellate case law; Hurst's concern is with the system's routine business. This is partly because the effectiveness of law as an instrument of growth has to be assessed by its impact on the ordinary people in society¹²⁶ but also because habitual consciousness is formed

Lawmakers is much more overtly didactic.) But it is a grim and passionate book all the same, the more impressively so for its outward reserve.

126. Cf. Hurst's very Brandeisian early statement of this position: Emphasizing the economic setting, [a legal history course] would deal [in part] with the security and values of individual personality in a world increasingly marked by centralized, large-scale power arrangements. The emphasis

out of the cumulation of tiny decisions. The study of big decisions fundamentally misleads, since it is only by tracking long sequences that it is possible to sketch the dynamics of drift.

(2) A remarkably small proportion of Hurst's detail consists of the technical stuff of doctrine and procedure beloved of internal legal historians. At least in 19th century Wisconsin law related to lumber, on which Hurst has read *everything*, and reported everything he thinks significant, the particular forms of lawyer's law simply do not seem to have possessed much social significance.¹²⁷ The legal variables that *do* matter by his criteria tend to be broader institutional or conceptual traits of the system—e.g. adversary process in litigation as a means of organizing facts and bringing them to the awareness of decision-makers; or the survival into new contexts of thought-patterns formed in old ones, such as the fee simple as the desirable mode of conveying timberland, or the English practice of treating standing timber as an ordinary commodity of trade.¹²⁸ And Hurst always makes it clear that peculiar dialect-forms of the legal order survive and flourish in part *because* of outside social conditions, not (as Pound's "taught tradition" theory holds) despite them; thus, for example, the 700 lumber-industry contract cases Hurst studies have autonomous characteristics (are "contract-law cases first, and lumber industry cases second" and doctrinally stable over the industry's lifetime) because the abstraction of contract doctrine met the industry's immediate needs for security of market dealings; and the lumbermen's modes of thought did not encourage them to seek anything beyond those needs.¹²⁹

(3) Hurst's organization around the concept of social function encourages comparison among official institutions, and between official and unofficial institutions.

It must be added that Hurst's theory also has some disadvantages for his history.¹³⁰ Two of a general nature might be mentioned here:

(1) The theory associates normatively adequate exercise of pragmatic method, or instrumental intelligence, with growth, and

would be on the small man—laborer, white-collar worker, farmer, small business man.

Hurst, *supra*, note 106, at 331.

127. See, for one of the rare instances in which Hurst cites a pleading form as significant, *Law & Lumber* 354-55 (where he also points out that it wasn't *very* significant).

128. See citations to *Law & Lumber*, *supra*, notes 122, 123.

129. *Law & Lumber* 289-90.

130. For other criticisms (in the course of generally appreciative treatments) of Hurst's work as theory and history, see the articles by Scheiber and Tushnet, *supra*, note 109; Julius Stone, Book Review, 78 *Harv. L. Rev.* 1687 (1965); and Richard B. Abrams, Book Review, 24 *Stan. L. Rev.* 765 (1972).

failure adequately to exercise it with inertia and drift. This makes it hard to deal with historical situations in which, in retrospect, it appears that heightened awareness of consequences would have been dysfunctional for growth (as Hurst conceives it) and a relative lack of awareness functional. This is most likely to happen when people's interests are in fundamental opposition, but at least one side doesn't know that: and Hurst himself suggests this situation has been a common one:

[O]n the whole contemporary community values supported, acquiesced in, or were indifferent or unseeing toward most of what private interest sought and obtained from law concerning exploitation of the Wisconsin forest. Undoubtedly there would have been more conflict, and more skulduggery, had contemporary attitudes and energies existed to bring more of these matters to explicit issue. . . . [But in this history] the limitations of men's perception, imagination, and will were more significant than their purposes.¹³¹

To the extent that a condition of growth is the accommodation of conflicting interests, it may be more functional for the legal system to obscure consequences rather than to reveal them,¹³¹ to legitimate social change by pretending that it all accords with comfortable old forms. I am perhaps suggesting here that Hurst's normative view of the decision-making process may somewhat blunt a sense of historical irony.

(2) Hurst's history relies upon a model of the interaction of law and society drawn chiefly from the peculiar context of 19th century American state promotion and regulation of economic enterprise, which may be difficult to apply outside that context. In a way, Hurst has got hold of the easiest case: (a) the social actors to whom legal regulation is addressed may be counted on to look to extract short-term economic advantage from every decision; (b) they have relatively clear access to legal decision-makers (legislature and courts); (c) the decision-makers pretty much share their views of what is generally desirable for the society; they are really part of the same subculture of entrepreneurs; (d) the rest of society shares or passively accepts the same norms as they do; (e) regulation is almost all promotional and facilitative, rather than adversary; so that there are few significant problems of enforcement.

One could go on, but the point is that these particular conditions all combine to minimize the terrible problems of method faced by those who would practice an external historiography. They make it possible to infer social conditions and consequences

131. Tushnet, *supra*, note 109 at 125-26 points out in this connection (citing Albert Hirschman on unbalanced growth) that economic development may sometimes *depend* upon concealment of externalities.

to a large extent from the legal materials themselves:¹³² which in other contexts, involving groups whose norms are alien to those of the decision-makers, or whose access is limited, or who seek symbolic legitimacy for themselves and condemnation of others rather than economic gain from the legal system, or seek nothing from it because they can get what they need outside it, or who resist compliance with its decisions, one cannot safely do.

But even for the study of contexts differing from those out of which he developed his theory, Hurst's milking of legal detail for every ounce of social significance has contributed not only a theoretical account of the social function of law, but some extremely refined techniques for what might be called the intellectual history of government action: how the state, through legal process, expresses social values; the devices by which it ratifies and legitimates certain values and ranks them in relation to others. These techniques—which enable the reader to discover basic notions about prevailing views of favored economic interests, the nature of property rights, or the appropriate role of government from such clues as how a statute allocates burdens of proof—are useful in their own right, whether or not the context also permits inferences as to the actual effects of law on social behavior.

Hurst's main contribution has been to expose the hitherto invisible ways in which the apparently most commonplace incidents of a legal order illuminate social values. By so doing he managed, almost single-handed, to lower from inside the drawbridge over the moat isolating American legal from general historiography.

Others had been bridging the moat from the outside—with studies of 19th century public policy and corporations, of public lands, and of administrative history¹³³—but it required an in-

132. Tushnet, *id.* at 122, says that purely legal materials cannot adequately test even Hurst's theory, and that his "law centeredness seems totally ingenuous." This is unfair. Hurst is acutely aware of the problems of law-centered research, and repeatedly qualifies the inferences he thinks permissible to draw from it. See, e.g., "Legal Elements" at 21-22; *Law & Lumber* at 225-227 (where Hurst also makes it clear he did not use business records because none existed). But *some* inferences about the effects of law on extra-legal behavior can be drawn from the legal sources: e.g., the output of the legal system may be supposed to be important, or at least to be thought important, to people who resort frequently to it (seek amending acts in the legislature, litigate in the courts); and less important to those who could use it but do not (like the big lumber companies that tended to refrain from litigation). *Law & Lumber* 200, 226, 321 *et passim*.

133. See Scheiber, "Federalism and the American Economic Order," *infra* at 57.

sider with unassailable lawyer's as well as historian's credentials to throw open the gates. For a time, Hurst's work was about the only view law students obtained on the social context of the history of their law.¹³⁴ But since what I have called the Second Revival of American legal history started a few years ago, his perspective is becoming the dominant one.¹³⁵ One of the events signifying the revival was the devotion of an issue of *Perspectives in American History* to legal history. That was a joint effort by lawyers and historians; and of course the leading article was written by Willard Hurst.¹³⁶

I believe the present collection will also show how busily the traffic has been humming across the drawbridge between law and history. I think it best to let these essays, written by people trained in law, in history, and in both fields, speak to the reader for themselves, unmediated by any attempt on my part to generalize factitiously upon the relationships and resemblances among them. I am only sorry that in the nature of the case this collection could not include another contribution to the external historiography of American law by the field's most distinguished, most prolific and most active practitioner.

134. See Re, *supra*, note 61.

135. See, e.g., the large number of respondents stressing the necessity of an external approach to legal history (and taking such an approach in their courses and publications) in Joseph H. Smith, *Report on the Teaching of Legal History in American Law Schools* (AALS Legal History Section; Nov. 1973).

136. This is his "Legal Elements," *supra*, note 6.

