Disciplinary Evolution and Scholarly Expansion: Legal History in the United States

Michael H. Hoeflich

Stephen M. Sheppard

Follow this and additional works at: https://commons.stmarytx.edu/facarticles

Part of the Law Commons

Recommended Citation
Disciplinary Evolution and Scholarly Expansion:
Legal History in the United States

In the United States, the dawn of the twenty-first century has ushered in a period of both transformation and expansion in the study and teaching of legal history. In less than a quarter century the teaching of legal history, both in law schools and in undergraduate and graduate history programs, has mushroomed from a rather esoteric subject to one that now is considered mainstream. The American Society for Legal History, the major professional organization of legal historians in the United States, now has a core membership in excess of 1000, and its annual meeting fills two days with lectures, seminars, and panel discussions. There are now three robust journals devoted to legal history, and an increasing production of scholarship in both general law journals and the print press. Among those factors most important in driving this expansion and transformation several may be singled out: digitization of sources, the maturation of a new generation of professionally trained legal historians, and the integration of new approaches into legal historical research and writing.

Journals

The past two years have witnessed the reinvigoration of one legal history journal and the birth of a second legal history journal in the United States. The American Journal of Legal History began life as the joint production of the American Society for Legal History and the Temple Law School. For many years it was the only law review published in the United States devoted exclusively to legal history. However, by the early 1980s, the relationship between Temple Law School and the Society had deteriorated to a point at which the two agreed to part company. The American Journal of Legal History ceased to be affiliated with the Society but continued to be published by Temple. The Society began to publish Law & History Review guided by its first editors, Lloyd Bonfield, of Tulane Law School, and

* M.H. Hoeflich is John H. & John M. Kane Professor of Law in the University of Kansas School of Law. Steve Sheppard is Associate Professor in the University of Arkansas School of Law.
Russell Osgoode, then of Cornell Law School and now President of Grinnell College. For several years the AJLH continued to be published on a regular schedule, but during the 1990s, as a result of editorial changes and administrative problems, the AJLH began to appear more sporadically and production quality suffered. Beginning in 2004, a new editorial arrangement showed signs of correcting these problems, back issues were published, and the journal now shows signs of health.

In the same year that the AJLH began its revival, a new specialist legal history journal began publication. Roman Legal Tradition is published collaboratively between the Roman Law Society of America, the University of Kansas School of Law, and the Civil Law Institute at the University of Aberdeen. It is edited by Professor Ernest Metzger of the University of Aberdeen, Professor Charles Donahue of the Harvard Law School, and Professor M.H. Hoeflich of the University of Kansas. The new journal publishes articles on Roman law from antiquity to the present and also publishes an annual bibliography. Two issues have so far appeared, the issues for 2004 and 2005. The issue for 2005 was a special issue which published the papers presented at a memorial conference held at the University of Aberdeen in honor of the late Professor David Daube.

Professor Metzger, one of the editors of Roman Legal Tradition, is also the proprietor of a website, iuscivile.com. This website not only publishes excerpts from articles appearing in Roman Legal Tradition, but also publishes reference tools for those interested in Roman law, including a global list of Roman law researchers, a bibliography of materials relating to the history of Roman law, and a list of corrections to the University of Pennsylvania translation of Justinian's Digest.¹

The application of digital and internet technology to the publication of legal historical material has given the subject an unprecedented boost. It would be impossible to list, let alone describe, all of the digital legal history projects underway currently in the United States. However, several projects, because of their scope and innovation, deserve particular attention.

**Digital Scholarship and Resources**

One of the most important means of assuring the continued growth of an academic discipline is the provision of modes of academic communication. The traditional means of such communication, printed scholarly journals, today pose many difficulties. They are expensive to produce, to purchase, and to store. As their sub-

---

scription costs have risen, many libraries have been forced to initiate reductions in periodicals budgets. Further, the lag between acceptance and publication in reviewed journals can often be a full calendar year or more. Student-edited journals in the United States continue to be dominated by law school subjects that student editors have studied in the early years of their course — especially constitutional law, criminal law, torts, contracts, and civil procedure — and hesitant to publish legal history, particularly articles on non-U.S. legal history. An important innovation in the modes of scholarly communication for legal historians in the United States has been the introduction and rapid expansion of two e-mail journals published electronically by the Social Sciences Research Network: “Law & Humanities Abstracts” and “Legal History Abstracts.” The first of these electronic journals, while not specifically dedicated to legal historical studies, often publishes materials of interest to legal historians. The second electronic journal, edited by professor Reva Siegel of the Yale Law School, is focused exclusively on legal history and prints abstracts both of published articles and of unpublished working papers. Even more importantly, many of these underlying articles are downloadable, by scholars at subscribing schools, from the SSRN site.

While “Legal History Abstracts” is devoted exclusively to legal history, the definition used by the editors is a very broad one. A recent edition featured abstracts of articles on the history of marriage in a global context, the history of the homestead exemption in the United States in the nineteenth century, and “The State in Savigny’s Private International Law and the Challenge of Europeanization and Globalization.” The broad scope of this journal’s coverage is confirmed by the members of the editorial board, which not only includes legal historians but scholars such as Henry Louis Gates, Jr. and Duncan Kennedy of Harvard. This journal not only makes published articles easily available to subscribing scholars but also provides a place in which scholars may publish works in progress, an important new development for legal historians in the United States.

One of the greatest difficulties facing those who teach legal history has been the unavailability of key documents. This problem has been mitigated in large degree through the efforts of the Avalon Project at the Yale Law School.² This project is devoted to scanning important documents and making them available free on the Web. While many of the documents come from the Anglo-American legal system, the Project does not limit itself to this area alone. The documents are divided into five categories: pre-18th century, 18th century, 19th century, 20th century, and 21st century. Among the pre-eighteenth-century documents may be found texts of the Acilian Law

of 122 B.C.E., extracts of the Anglo-Saxon laws, the Athenian Constitution, a capitulary of Charlemagne of 802, Hammurabi's Code, the foundation documents of the University of Heidelberg, Charles IV's Golden Bull, and the Laws of William the Conqueror, among others. The site permits readers to download the documents posted freely so long as they are for personal use.

Several aspects of the Avalon Project heighten its importance as a teaching tool for English-speaking legal historians. First, all of the documents are in English. Since many, if not most, law students in the United States today have no ability to read documents not in English, the easy availability of translated documents is crucial. Second, the Avalon project already incorporates dozens of historically significant legal documents, and new documents continue to be added annually. Third, access to these documents is free. This means that teachers of legal history may assign the Avalon Project documents to their students as these documents suit their course requirements and without the necessity of forcing students to buy expensive reprint collections.

The Avalon Project is just one among many digitization projects. During the 1980s and 1990s, thousands of printed and manuscript sources for legal history research were filmed and issued in microform by a number of commercial enterprises. These microform editions made many of these texts available for the first time to researchers who were unable to travel to the libraries which held the originals. Most major law school and university research libraries purchased some or all of these microform editions. While they were a great improvement over what had come before, these editions still had significant problems. They were expensive; they took up scarce shelf space, required machines to read them, and were difficult to access unless the originals contained indices. During the past five years a significant number of these microforms have themselves been replaced by digitized versions, available on CD-ROM. These new editions of primary sources are less expensive, take up virtually no storage space, can be read on virtually any computer, and are searchable with built-in search programs. Many are available without cost, including the Making of America library, funded at the University of Michigan by the Andrew W. Mellon Foundation.3

As of 2004, a considerable portion of these sources have been made available over the Internet only by paid subscription. Perhaps the most notable of these are the Early English Books On-Line and the Text Creation Partnership, which are well advanced in their projects to make every text printed in England between 1473 and 1700 available as a searchable text on the internet. Early English Books On-Line already presents the scanned images of over 100,000

3. See http://www.hti.umich.edu/m/moagrp/ (last visited September 26, 2005).
books, pamphlets, broadsides, and ephemera.\textsuperscript{4} The Text Creation Partnership – a consortium of The University of Michigan, the University of Oxford, the Council on Library and Information Resources (CLIR), and ProQuest Information and Learning – is initially recreating 25,000 of these texts into searchable text files for on-line access.\textsuperscript{5} These collections include all of the lawbooks in England prior to Queen Anne, many of which are of particular significance to the law of colonial America. A similar project for materials printed in America is also underway, based on the bibliography of Charles Evans.\textsuperscript{6} Access to such materials, however, requires either considerable expense, appropriate institutional affiliation, or both.\textsuperscript{7} As this trend towards increasing digitization continues, legal history scholars will soon be able to access the vast majority of printed and manuscript primary sources necessary for their teaching and research from their homes and offices.

Although the digitization of primary sources for writing and teaching legal history is in the process of transforming legal history studies in the United States, it is not without its own inherent dangers. In a number of cases, libraries and other repositories of these sources have viewed these digitization projects as an opportunity to dispose of the original texts, especially printed texts. This phenomenon has been particularly marked in regard to American newspapers, so much so that the matter became the subject of a much publicized book by the author and preservationist, Nicholas Baker.\textsuperscript{8} In spite of Baker’s warnings against the destruction or sale of rare newspapers by libraries and their replacement by digital versions, the process has continued in many American libraries. As scholars who work with microforms and digital versions will attest, it is important to maintain at least some copies of originals to supplement reproductions

\textsuperscript{4} Coverage is based on the entirety of A.W. Pollard and G.R. Redgrave, A SHORT TITLE CATALOGUE OF BOOKS PRINTED IN ENGLAND, SCOTLAND, & IRELAND, and OF ENGLISH BOOKS PRINTED ABROAD, 1475-1640 (Bibliographical Society, 1926) and Donald G. Wing, SHORT-TITLE CATALOGUE OF BOOKS PRINTED IN ENGLAND, SCOTLAND, IRELAND, WALES, AND BRITISH AMERICA, AND OF ENGLISH BOOKS PRINTED IN OTHER COUNTRIES, 1641-1700 (Modern Language Association, 1998); George Thomson, CATALOGUE OF THE PAMPHLETS, BOOKS, NEWSPAPERS, AND MANUSCRIPTS RELATING TO THE CIVIL WAR, THE COMMONWEALTH, AND RESTORATION 1640-1661 (British Museum, 1908); and EARLY ENGLISH BOOKS: TRACT SUPPLEMENT (UMI, 1998).

\textsuperscript{5} See http://www.lib.umich.edu/tcp/ebook/ (Last visited September 25, 2005).

\textsuperscript{6} See, Readex Archive of Americana, including Early American Imprints, Series I. Evans (1639-1800), and Early American Imprints, Series II. Shaw-Shoemaker (1801-1819), at http://www.readex.com/digital/digcoll.html (Last visited September 26, 2005).

\textsuperscript{7} As of May 2005, roughly 175 institutions, largely in the U.S., but also in Canada, the U.K., and other countries, belong to the Text Creation Project; one hundred more belong only to the Early English Books On-Line project. See http://eboo.chadwyck.com/home.

when necessary. Reproductions are rarely perfect; pages are missed, text is illegible; matter in the margins is sometimes lost. Failure to retain some originals cannot but have a severely negative impact on the ability of legal historians to do their work in the future.9

**Reprints of Classic Texts**

In addition to the increasing availability of historical legal sources in electronic format, legal historians in the United States have also been much helped by two reprint publishing programs devoted, in part at least, to law texts. The Liberty Fund, a not-for-profit publisher of primary texts, has recently expanded its list of reprints to include a far larger number of important legal texts, often with extensive prefaces and commentaries by current scholars. The list of these legal reprints includes such important and otherwise difficult to obtain works as Sir Edward Coke’s speeches and writings from his *Commentaries and Reports*, edited by Professor Steve Sheppard of the University of Arkansas, Fayetteville, School of Law. Particularly notable among these are a forty-volume series of books on the enlightenment and early modern natural law, edited by Professor Knud Haakonsen of Boston University.

The Lawbook Exchange, Ltd., a bookseller and publisher based in New Jersey, has also undertaken a legal reprint series, which has been adding titles in the past two years at an unprecedented pace, often as many as five per month. The over-500 titles chosen for this series have been eclectic, ranging from early printed English and European legal texts to nineteenth- and twentieth-century U.S. treatises. Many of these titles have been given new scholarly introductions. As a result many obscure or otherwise hard to obtain works have now become available widely to both scholars and research libraries.

In 2004, the Tarlton Law Library of the University of Texas School of Law began to publish a series of reprints of important American law library catalogues. The first of these catalogues to be reprinted was the 1846 auction catalogue of Justice Joseph Story.10

**Greater Depth and Breadth in the Discipline**

The past several years have also seen a generational shift in U.S. legal history. Twenty-five years ago, few law schools employed legal historians and those who were employed were often hired not for

---

9. This process will undoubtedly accelerate, both for good and for ill, as larger web services providers accelerate the enterprise. For example, Google in 2004 announced an ambitious and controversial plan to scan whole libraries. See http://scholar.google.com/scholar/about.html (Last visited October 4, 2005).

their historical expertise but, instead, for their work in modern law. Even fewer law schools offered more than one legal history course. On history faculties the same situation was common; few, if any, faculty members worked in legal history and even fewer taught courses in the subject. In law schools, in particular, there was virtually no interest in hiring faculty with professional history qualifications without law credentials and little interest even in those possessing credentials in both fields. The most typical law school legal historian was a lawyer who had an ancillary interest in history. This is not to say that these "lawyer-historians" did not produce significant scholarship. Without the contributions of pioneers such as Willard Hurst and Mark de Wolfe Howe, legal history in the United States would not have achieved what it has today.

All of this began to change in the late 1980s and early 1990s, when new generations of legal historians, many of whom possessed both law degrees and graduate degrees in history and related subjects, began to enter law and history faculties. Notable among this younger generation of scholars are Mary Sarah Bilder, Alfred Brophy, and Dan Hulseboch on the law school side and Richard Ross, Ann Fidler, and Laura Kalman on the history faculty side. Many of these younger scholars have now achieved permanent tenure on their respective faculties and have become major scholars in the field.

A number of factors may account for this new, wider accepted embrace of dual-degree legal historians both in United States law schools and history faculties. First among these may be the efforts of several older legal historians, many of whom do possess dual degrees, to train and find academic employment for this younger generation. Morton Horwitz of Harvard Law School, whose path-breaking work revolutionized the study of nineteenth-century U.S. legal history, has been very active in training J.D.-Ph.D. Students. Harry Scheiber of the University of California, Boalt Hall School of Law, and his colleagues have pioneered a graduate Ph.D. program at the law school, a program devoted, in part, to legal history. William Nelson, at N.Y.U. Law School, founded the Golieb Fellows program to provide a postdoctoral year for young legal historians. All of these, and other similar efforts, have made possible the development of this new generation of legal historians whose careers and scholarly productivity have become to transform the study and writing of legal history in the United States at the beginning of the twenty-first century.

An additional factor in this transformation and acceptance of young dual-degree legal historians in United States law school has been the growing power of the law and economics movement. In many law schools, it was law and economics scholars who overcame the ingrained prejudice against dual-degreed faculty in their battles to have law schools hire faculty with both professional qualifications
in law and economics. In addition, several of these law and economics scholars, such as Franco Parisi at the Hastings College of Law, possess interests in legal history as well. Once prejudices against J.D.-Ph.D. combinations were overcome for the law and economics faculty, it was far easier for faculty to accept dual-degree legal historians, so much so that by the middle of 2005 some law faculty were advising their best students that they should obtain the Ph.D. if they wished to become law teachers in the United States in these specialized fields.

The growing presence of faculty members with both law and history credentials in the United States in the past decade has also had an important effect on the direction in which legal history scholarship has moved. In the past few years, a number of important works have appeared both as monographs and in scholarly journals, which bring new perspectives to the study of legal history by U.S. legal historians. Among these various new perspectives three stand out: (1) the history of the law book and legal reading, and (2) material culture and the law, and (3) the history of professionalism and ethics.

**History of the Book**

The study of the history of printing, publishing and reading, what has come to be known as "book history" or the "history of the book" has revolutionized general historical studies. The work of such scholars as Robert Darnton on the eighteenth century and Anthony Grafton and Ann Blair on the sixteenth and seventeenth century has changed not only the way in which intellectual history is written, but the way in which historical sources are used. In the past several years, a number of younger scholars have brought the insights of book history to the study of legal history. Richard Ross has produced a series of monographic articles which have put the production of legal documents and the development of law in early modern England into a stark new light.\(^\text{11}\) Mary Sarah Bilder, in her brilliant 2004 study, *The Transatlantic Constitution: Colonial Legal Culture and the Empire*, has opened up countless new paths for research into colonial legal culture through her study of imported legal literature in colonial Rhode Island.\(^\text{12}\) Ann Fidler, building upon her still unpublished but immensely valuable dissertation, "Young Limbs of the Law," has published a series of articles on nineteenth-century lawbooks and legal reading, which are doing for this period what Profes-

---


2006] DISCIPLINARY EVOLUTION AND SCHOLARLY EXPANSION 31

sor Bilder has done for the earlier. Alfred Brophy also has published a number of important articles on the libraries and reading of early American lawyers, including a piece on the library of Daniel Francis Pastorius of colonial Pennsylvania.

Although their works appeared some years ago, the work of none of these younger scholars could have been accomplished without the appearance of Herbert Johnson’s study of imported law treatises in the United States in the eighteenth century, of William Hamilton Bryson’s numerous bibliographical studies of early Virginia legal literature, and of the magisterial Bibliography of Early American Literature by Professor Morris Cohen.

MATERIAL CULTURE AND LAW

The study of material culture in its historical setting has become one of the most innovative and most interesting of the new “histories” of the early twenty-first century. Once the province only of anthropologists, museum curators, and students of popular culture, the study of how people lived has become more respectable in “mainstream” historical circles. This interest in material culture has also spread to the study of legal history, broadly defined, and a landmark work in this genre was published by Martha J. McNamara in 2004. Her book, From Tavern to Courthouses: Architecture and Ritual in American Law 1685-1860, brings a fresh and important new perspective to the study of American legal history. Little work has been done in the past 25 years on the material context within which lawyers and judges operated during the antebellum period. We know a great deal about the literature of the law, but a good bit less about how lawyers obtained the books which transmitted this literature. We know a fair amount about theories of trial procedure, but scarcely anything about the courtrooms in which lawyers and judges practiced. Indeed, we know very little about the lives of lawyers and judges themselves, other than of those who achieved contemporary fame like Marshall, Story, or Kent and, thereby, merited a biography. In her book, Professor McNamara demonstrates how much we lose by not knowing these things and how much we can gain by learning about them. Importantly, she combines the knowledge and aesthetic

15. This and following sentences are taken from a review of Professor MacNamara’s book by M.H. Hoeflich, which appeared in the March 2005 issue of Common-Place, the magazine of the American Antiquarian Society. www.common-place.org/vol-05/no-03/reviews/hoeflich.shtml (Last visited October 10, 2005).
sensibilities of an architectural historian with the expertise of a legal historian. Thus, she is able to put the development of early trial procedure into its contemporary context. From her we learn not just the details of trial procedure, but also how law buildings were built to further the goals of the procedural rules and how those rules were, in turn, affected by the courtrooms within which trials were held. We learn from her study of the evolution of legal space from being part of multipurpose community buildings to becoming law-specific sites separated from the general commerce of the community that the legal profession and the judiciary depended upon the symbolism as well as the reality of architecture to elevate its professional image and prestige.

**Professionalism and Ethics**

The study of legal ethics and professionalism became of great importance during the last quarter of the twentieth century in the wake of the Watergate scandals. However, little attention had paid by ethics scholars to the history of the regulation of the legal profession until the past few years. A few scholars, Thomas Shaffer of Notre Dame Law School, David Mellinkoff of UCLA Law School, and Robert Gordon of the Yale Law School, published pioneering works over the past decades, but a concentrated effort to understand the history of legal ethics had not been made. This has now changed to a large degree through the efforts of several scholars. Professors James Brundage of the University of Kansas and Jonathan Rose of the Arizona State Law School have, over the last decade, published a series of articles on the European and English antecedents of modern legal ethics. In addition, many law schools, notably the Arizona State Law School and the University of Chicago Law School, have sponsored a series of conferences on legal history with an emphasis on the history of legal ethics, the proceedings of which have been published.16

**Interpreting American Law**

*General Histories*

Given the increased professionalism of legal historians, as well as their greater numbers and outlets for scholarship, it is unsurprising that the scope of American legal history has continued to increase. Fueled in part by contemporary debates and in part by the general enterprise of ongoing study, the shelves of libraries are acquiring journals and monographs of American legal history at an accelerating pace.

---

Perhaps pride of place for the last several years might go to several general histories of U.S. law. Most significantly, Professor Lawrence M. Friedman of Stanford University has both updated his one-volume history and has written a remarkable and comprehensive narrative of law in the last century, *American Law in the Twentieth Century*, which considers the development of American law in the context of larger social changes, ranging from wars and the rising awareness of social inequality to technology and urbanization.

On a more intimate scale, a similar effort to narrate twentieth-century law in a single state yielded new studies of great interest, particularly William E. Nelson's *The Legalist Reformation: Law, Politics, and Ideology in New York, 1920-1980* and *Blue Laws and Black Codes: Conflict, Courts, and Change in Twentieth-Century Virginia* by Peter Wallenstein. Such histories are more often based on the history of the profession, and while these books on lawyers have their value, the wider context of the law and society in a particular state, such as Wallenstein's and Nelson's, are certainly the more valuable.

While not a single history, a particular series of monographs has continued throughout this period, which in sum provides a remarkable history of landmark litigation in the United States. The University Press of Kansas has published Landmark Law Cases and American Society, a series of short, well written monographs on great cases, both in federal and state courts, that has become the gold standard of narratives of cases in their historical context. Although commenced in 1997, the last several years have seen the list of cases considered grow to 33, many written by the leading scholars of the field.

A similar but distinct series of narrative anthologies was published by Foundation Press, capitalizing both on the growing use of narratives and stories in the teaching of law and on the growth of case histories. Under the general editorship of Gerald Korngold at Case Western Reserve University Law School, the series presents a volume of narratives, usually around major cases, in most of the fields of substantive law school coursework. These books have yet to

---

attract significant scholarly attention, yet they are important contributions to the respective fields.\textsuperscript{22}

Arguments from history over the nature of American law, particularly its role in wartime America and its institutional sources, were particularly important, not only in the wake of the judicial determination of the 2000 presidential election,\textsuperscript{23} but also as America entered a new engagement with terrorism and wars abroad.

\textit{Law and War}

The events following the attacks in the United States on September 11, 2001, have had profound effects on the law, and it is no surprise to see that the lens of history has been important both in explaining and in criticizing these effects. The stage for the more polemic uses of the history of law and war was set beforehand, when Chief Justice William Rehnquist entered the lists with his now seemingly prescient 1998 history of the courts during American wars in the light of the Ciceronian maxim that \textit{silent enim leges inter arma}.\textsuperscript{24} His apologia was tested by several cases brought since then, testing his view that the courts must give great – but not total – discretion to the commander-in-chief during war.\textsuperscript{25}

The nature of war, the concept of the state, and the roles of the law and of the military have been under great tension since the end of the Cold War, and the most theoretical history of this tension was developed by Philip C. Bobbitt, at the University of Texas School of Law. His \textit{Shield of Achilles} develops what has become a recurrent theme in the circles of international law, that the model of the military state is evolving into a model of market states, which project influence through trade more than through warfare.\textsuperscript{26} A thick and
well-illustrated argument, *Shield of Achilles* was developed before the attacks of late 2001, yet it has proved to be an important point of historical comparison in the years since.

War has been the basis for a variety of redefinitions of the American legal experience, not the least being one of the darkest hours for the common law in North America – the witchcraft trials in colonial Massachusetts. This episode is commonly held out as a metaphor of provincial law captured by religion, unreason, or politics. After decades of studies that reinforce these views, Mary Beth Norton of Cornell University has written a definitive reinterpretation of the trials, seeing them as integrally related to the failing war policies of the colonial government. Norton examines the trials in the light of the state propaganda that explained military defeats and governmental failures as the work of Satan, showing then how allegations of Satanic influence by young girls fresh from towns raided by enemy natives gave rise to an unusual acceptance by the colonial elites, setting the stage for a crisis of criminal prosecution and arrest that threatened the government's collapse. Impeccable archival work is coupled here with a new narrative that both reassures and provokes new fears from one of the famous episodes of American law.

Among the many American works dealing with law and war that have been produced during this period, one other deserves particular discussion, Geoffrey Stone's study of speech during American wars, *Perilous Times*. Stone, the former dean of the University of Chicago Law School and provost of that university, has crafted a significant history of the regulation of public discourse during America's crises, which will have an enduring significance in the history of American liberty. In a narrative arc rooted in the Sedition Act of 1798 and extending into the "War on Terror," Stone illustrates the excesses of presidents keen to suppress dissent and disloyalty, while showing that the threat posed by such speech has rarely threatened the republic as much as have executive over-reaction and judicial acquiescence. Even so, Stone's tale is an optimistic one, emphasizing country's increasingly moderate response to challenges through its public discourse.

Besides the effects of wars and terrorism in the intellectual climate, two anniversaries sparked considerable narration and re-interpretation of events affecting the powers of the courts. The first, the bicentennial of *Marbury v. Madison*, fed a continuing appetite in U.S. legal history for considerations of judicial review. The second, the golden anniversary of *Brown v. Board of Education of Topeka*,

Kansas, did the same for the legal aspects of racial discrimination and equity.

Courts and Judicial Review

In the twenty-first century, the community of American legal scholars continued to squabble over the history and legitimacy of the judicial review of legislation. Fueled by conferences celebrating or deriding Marbury, many authors argued anew the origins and extent of judicial review in the English common law, the significance of Justice Marshall's opinion in 1803, and the legacy of judicial review over the last century. No single work attracted as much attention, however, as The People Themselves, by New York University Law School professor Larry Kramer.

In The People Themselves, Professor Kramer has attempted a signal reinterpretation of American constitutional tradition, indeed of American culture. His book has been fairly compared in its ambition to the efforts of Charles Beard, who redefined the efforts of America’s constitutional framers in economic terms. Through a reinterpretation of the history of constitutional interpretation, Kramer hopes to re-establish the significance of popular interpretation of the Constitution, restoring a people's understanding of constitutional requirements rather than an elite, legalistic, and juridical interpretation.

30. 347 U.S. 483 (1954). The opinion was announced on May 17.
33. Daniel J. Hulsebosch, Bringing the People Back In, 80 NEW YORK UNIVERSITY LAW REVIEW 653 (2005).
tion of them. His argument proceeds along a history broken into phases. Prior to the constitutional convention, he describes popular participation in lawmaking and extra-legal influence of the constitutional culture, coupled with a weak tradition of judicial interpretation of legislation. In the early nineteenth century, he sees a judiciary that makes but rare and limited forays into constitutional judicial review, during a time of great popular engagement in lawmaking and constitutional politics; party formation was much more important to the early federal government than was judicial review. The tension between popular and elite views of the Constitution that developed was asserted throughout the twentieth century, most obviously in Franklin Roosevelt's court-packing plan in the face of judicial resistance to the New Deal and in the civil rights movement, in which popular acquiescence in an elite judicial interpretation left an imbalance in constitutional culture. From this point, Kramer hopes a new balance can be established, with a proper respect for the judgment of the people, particularly political resolutions that are only rarely tampered with through judicial intervention. The arguments have raised numerous critics and defenders, both as to Kramer's thesis and as to his historical detail. Regardless of one's view of such debates, Kramer has launched an important enterprise that stands as a potential curb against an increasingly conservative, activist bench that, as is often claimed, is out of touch with the mainstream of America.

Even so, the history in which Kramer's argument starts has been more carefully attended elsewhere, particularly in two books considering the origins of the legal culture from which *Marbury* emerged. John Philip Reid's *The Rule of Law* is a summation of his most important research and thought over the last several decades. In it, Reid, an emeritus professor also at NYU's law school, reconsiders the origin and extent of the rule of law in the centuries before American independence. His narrative of the law as a bridle of both royal power and parliamentary excess, locates the rule of law as a fundamental justification for the American Revolution. Reid views the common law as a transatlantic enterprise with abstract concepts that transcended particular statutes but proceeded from significant settlements in critical documents, capable of providing determinate answers that contradicted executive policy of the crown. This same result was reached in Mary Sarah Bilder's path-breaking study of Rhode Island's colonial laws, *The Transatlantic Constitution*, discussed above.


The continuing argument over the significance of judicial power and its role in balancing, correcting, or distorting the will of the people was also an essential aspect of the other great anniversary during this period, the end of American apartheid commenced in 1954.

Civil Rights

Without doubt, one of the greatest moments in the history of American law was the decision of the United States Supreme Court to dismantle the system of legal separation of the races that it had encouraged in the nineteenth century. That decision, however, courageous as it was in itself, was only the institutional response to the campaigns of lawyers, activists, and leaders begun decades earlier. The stories of these campaigns were brought again onto center stage in a national recognition of Brown's fiftieth anniversary.

The most comprehensive telling of the tale was Michael Klarman's massive volume, From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality. Klarman, a law professor at the University of Virginia, has produced a history that will be the standard reference on the legal and social developments of civil-rights law in twentieth-century America. Thus, it is particularly interesting that Klarman goes to great lengths to demonstrate that the Supreme Court was not the essential character in that drama. Its justices, drawn from the elite of the bar, still reflected the evolving cultural understanding of race, and the growing awareness of the inequity of racial disenfranchisement. Rather, Klarman's emphasis is, quite rightly, on the social movements that gave rise to, but were in turn encouraged by, litigation.

The stories that arose from this litigation were the subject of other studies, the most essential an update of the classic narrative of Brown by Richard Kluger, along with new histories that emphasize the stories of those involved in Brown and its allied cases. One of the most significant reinterpretations of the civil rights movement is Arkansas historian David Chappell's shift of emphasis from the political to the personal and the religious. Moreover, the books in these years also reflected a greater awareness of local events in the sweeping arc of civil-rights reform, not only in cities such as New York.

and Detroit\textsuperscript{41} but also in the riots of Tulsa\textsuperscript{42} and Atlanta.\textsuperscript{43} These narratives are bracketed by a variety of thoughtful reflections on Brown's continuing significance as a sometime unwaved banner for progress.\textsuperscript{44}

Last, but hardly least, the literature of this period saw an increasing inclusion of the civil rights efforts of other groups in American history. Perhaps the largest body of recent work considers the social and legal treatment of immigrants.\textsuperscript{45} Recent electoral politics have also accentuated interest in the history of access to marriage and the diminishing legal discrimination against same-sex couples.\textsuperscript{46}

In some degree of contrast with such politically charged topics, traditional areas of legal history continued to flourish during this period in the U.S. Of the many areas that might be marked for particular notice we will conclude this survey with a brief mention of two of the most essential, English legal history and institutional legal histories, and one field of growing significance, the history of Islamic law.

**Canon, Medieval, and English Law**

Surely one of the more outstanding recent efforts of history for history's sake are the various contributions to the Oxford History of the Laws of England, edited by the indefatigable Professor Sir John Baker, the first volume of which is by University of Chicago canonist Richard Helmholz. Helmholz's massive study, The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s,\textsuperscript{47} updates his 1990

---

\textsuperscript{41} KEVIN BOYLE, ARC OF JUSTICE: A SAGA OF RACE, CIVIL RIGHTS, AND MURDER IN THE JAZZ AGE (Henry Holt and Co., 2004).


\textsuperscript{43} See MARK BAUERLEIN, NEGROPHOBIA: A RACE RIOT IN ATLANTA, 1906 (Encounter Books, 2002).


\textsuperscript{47} R. H. HELMHOLZ, THE OXFORD HISTORY OF THE LAWS OF ENGLAND: THE CANON LAW AND ECCLESIASTICAL JURISDICTION FROM 597 TO THE 1640S (Oxford University Press, 2004). Though the first volume in the series, the canon volume is in fact the second volume to appear, the first being the volume by the series editor, who, while
text, extending it earlier by a millennium, as well as reflecting work that Professors James Brundage of Kansas, Kenneth Pennington of Syracuse, and of course John Baker of Cambridge and NYU. Helmholz has combed the canon materials not only from their medieval heyday but also from their waning hours after the Elizabethan settlement, as ecclesiastical courts fell prey to competition with the common law. After artfully narrating the story, Helmholz then considers eight procedural and substantive questions, which will have considerable influence on the history of evidence, early economic regulation, testamentary disposition, church history, and marriage, as well as defamation and criminal law.

The other monumental contribution to legal history during this period was Harold Berman's other shoe. In 1984, Berman released his path-breaking work of continental legal history, Law and Revolution. Then the James Barr Ames Professor at Harvard Law School, Berman's interdisciplinary history rooted the modern law of Europe in the papal consolidation of law and independence from monarchical authority led to competition between papal and national courts, as well as commercial, manorial, and urban law, demonstrating that this competition led to a concept of liberty protected by laws. In his long-awaited sequel, Berman, now Woodruff Professor of Law at Emory University, continues his tale, updating it to account for the Protestant Reformations in Germany and in England. Berman's account, centering on Philip Melanchthon and Johann Oldendorp in Luther's Germany and on Edward Coke in post-Henrican England, is subtle and wide ranging in both instances, considering both changes in the substance of the laws and the re-establishment of secular foundations for national jurisprudence.

English common law as a singular study remains particularly strong in the United States. Not only is there a large membership of the Selden Society in the U.S., many courses in legal history in the United States remain predominately courses on early English law. The anthology of the works of Sir Edward Coke, discussed above, was complemented by the first volume of a new biography of Coke by scholar-lawyer Allen Boyer, as well as studies of Coke by Dan Hul-


Indeed the transmission of English legal history still runs both ways, as demonstrated by the interest in the American Society of Legal History for the discussion between Susan Reynolds of London and Paul Brand of Oxford concerning the professionalism of thirteenth-century English bar.

**History of Islamic Legal Systems**

Undoubtedly, the global events of the last five years have spurred a greater interest in the Islamic world in the west. Even so, the growth of Islamic populations in the United States, and the growing sophistication of comparative lawyers in the U.S. had already led to an increased study of the *Sharia* in recent years. Recent writings have been more specialized in the particular schools of Islamic legal theory, and they have been both more encyclopedic and more focused on traditional questions of law. A particular interest in the treatment of women has grown, too, as an important arena for study.

Yet even as American interest in such once-esoteric fields grows, interest persists unabated in the everyday life of lawyers, courts, and the institutions of American law. As a last topic, we suggest that the continuing enterprise of narratives about lawyers and law schools have flourished during this period, with some predictable, if some novel, results for the literature.

**Individuals and Institutions**

Judicial biography remains an important genre of U.S. legal history. Judicial life stories tell often compelling tales of the origin and careers of the bench, but they also illuminate the practice of law and the nature of the law as it was dispensed in the courtroom, which remains as central as ever to American justice.
Appellate judges remain a continuing focus of the field. The most controversial biography of a judge in some years was Lafayette College historian Bruce Murphy's study of Justice William O. Douglas. Drawing on newly opened archives, Murphy's story emphasizes Douglas's human failings, particularly suggesting that Douglas engaged in self-aggrandizement, consistently lying to promote his reputation, was cruel to his staff, and was relatively uninterested in his work. This overzealous debunking has attracted some corrective scholarship, and the resulting aspect of Douglas, one of the great liberal dissenters of the twentieth century, is more human and more interesting than ever.

Such mud-slinging biographies are rare for former justices of the U.S. Supreme Court. More often the biographer attempts to mine the archives for more fundamental reinterpretations of the accepted tale, not merely assaults on character. In this vein, Loyola-New Orleans historian Michael Ross's study of mid-nineteenth-century justice Samuel Miller is an archetype. Ross has successfully reversed Miller's long-held image as an opponent of Reconstruction to place him in the rare light of a reconstructed slave holder who advances the rights and equality of freed slaves following the Civil War. Careful and contextual scholarship of this sort marks two other biographies during this period, the important restatement of the life of John Marshall by University of Connecticut law professor Kent Newmyer, and the fascinating study of grey flannel justice Wiley Rutledge by Judge John Ferren.

A more traditional story, if a less traditional judicial life, emerges from Justice Sandra Day O'Connor's chronicle of her youth, in her partial autobiography, *Lazy B: Growing up on a Cattle Ranch in the American Southwest*. O'Connor, who will soon leave the court and has become Chancellor of the College of William and Mary, paints a beautiful picture of a nearly idyllic youth on a desert ranch,

---


62. SANDRA DAY O'CONNOR & H. ALAN DAY, LAZY B: GROWING UP ON A CATTLE RANCH IN THE AMERICAN SOUTHWEST (Random House, 2002).
sprinkled nicely with lessons to develop the future justice's character from parents, nature, and the Depression of the 1930's.

As counterpoint, we can turn to the hard-boiled world of the New York trial judge. Two fascinating biographies emerged during this period, one from the federal and one from the state bench. Federal district judge Edward Weinfeld found a sympathetic but careful chronicler in his former law clerk and holder of the Weinfeld professorship, William Nelson of NYU. Nelson's portrait is rich in the context of the obstacles of immigrants breaking the cultural barriers to practice in New York in the early twentieth century, but it is also subtle in its treatment of Weinfeld's legendary management of cases large and small in the federal courts of New York City. An even grittier commentary emerges in lawyer-curator Richard Tofel's chronicle of the end of Tammany Hall machine, prompted in part by the mystery of Judge Joseph Crater, who was appointed to the state trial court by then-New York governor Franklin Roosevelt, who then suddenly vanished and has remained lost for 75 years. Tofel's history is understandably light on the life of Crater after his disappearance, but his story of Crater's appointment and the corruption of his times is a compelling tale of the darker aspects of American judicial politics.

Judges hold no monopoly on legal biography, and a continuing raft of books on attorney's lives, particularly by themselves, is a reliable aspect of the legal history of any period in contemporary America. While some, indeed probably all, of these narratives are skewed to put the author in the best light, and some are utterly lacking in context, they remain a useful archive of the practice, particularly as seen by the practitioners.

As a last entry, perhaps the calmer field of institutional history is more appropriate than the often tawdry reflections of trial lawyers. For that, we can turn to one of the institutions most keenly aware of lawyer's reputations, the law schools.

Several important new histories of American law schools were prepared during this period. The most important work in this field did not, however, appear. The Harvard Law School bicentennial history project, under the supervision of Boston College and Harvard

legal historian Daniel Coquillette, continues to grow toward its eventual publication. In the mean time, Yale has benefited from several new histories. The first, a collection of well researched essays by Yale legal historians, considers aspects of the development of that law school from 1845 to the beginning of the present century. The second, though, is Laura Kalman’s new installment in her long-running history of the school; it is a richer and more profound history, placing Yale’s law school firmly in the current of American culture in the 1960’s. Other shorter histories of particular programs have continued to develop a richer understanding of the place of legal education in the larger history of American law.

CONCLUSION

In such a brief summary, large areas of scholarship are necessarily elided. Work in the history of corporations, environmental law, contract and tort, and many other fields of American law has continued through this time, with considerable vigor and controversy. The emphases in this period on both professionalism and digitization, and on the issues of the day are, we believe, especially helpful in understanding the continuing evolution of the discipline of legal history in America. The changes in the book and the increasing access to once-rare sources by an increasingly skilled and growing corps of historians will inevitably alter not only how these works are perceived, but also how future works are developed. And as each era has its particular concerns to distract its writers from more pure study of the past for its own sake, so have the effects of war and politics tugged the sleeves of American legal historians in this age.

The result here may be unfair in its depiction of seeming order. Legal history is becoming increasingly disorderly, as its tools are appropriated increasingly in aid of other research in the law, influencing not only standard analysis but also more polemical writing in the various sub-disciplines of American law. The obvious threat posed by this distraction from history qua history may be offset, at least in part, by the growth in size and capabilities of the field itself. Eventually, we believe that lawyers will come to see almost all questions of U.S. law as questions of legal history.

