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## THE TIME FOR LEGAL HISTORY: SOME REFLECTIONS ON MAITLAND AND MILSOM FIFTY YEARS ON

RUSSELL SANDBERG<sup>1</sup>

*2018 marks the fiftieth anniversary of the publication of the re-issued second edition of Pollock and Maitland's The History of English Law.<sup>2</sup> The first edition was published in 1895 with a second edition in 1898. The 1968 reissue was important because, although the text itself was not revised, a lengthy introduction and select bibliography was added by S F C Milsom. This and subsequent publications by Milsom<sup>3</sup> developed a number of revisions of Maitland's<sup>4</sup> work which Milsom referred to as his 'heresy'.<sup>5</sup> Given the fiftieth anniversary of the reissue and Milsom's death in 2016, it seems timely to reflect upon the legacy of both of these legal historians and the future of the historical study of law in general and the study of the interaction between religion and the law in particular. The objective here is not to provide a detailed appraisal of the lives and work of Maitland and Milsom; for that the reader can look elsewhere.<sup>6</sup> The aim of this reflection is to suggest that the answers for*

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<sup>2</sup> F Pollock and F W Maitland, *The History of English Law* (2<sup>nd</sup> ed, Cambridge University Press, 1968). As Pollock noted, 'the greater share of the execution belongs to Mr Maitland, both as to the actual wiring and as to the detailed research which was constantly required': *ibid* vi.

<sup>3</sup> See especially S F C Milsom, *The Legal Framework of English Feudalism* (Cambridge University Press, 1976). These insights are integrated within S F C Milsom, *Historical Foundations of the Common Law* (2<sup>nd</sup> ed, Butterworths, 1981), the first edition appearing in 1969. Most of Milsom's essays have been published as: S F C Milsom, *Studies in the History of the Common Law* (Hambledon Press, 1985) and an important reflection on his historical method can be found in S F C Milsom, *A Natural History of the Common Law* (Columbia University Press, 2003).

<sup>4</sup> Maitland's other key works include his posthumously published lectures: F W Maitland, *The Constitutional History of England* (Cambridge University Press, 1941 [1908]); F W Maitland, *The Forms of Action at Common Law* (Cambridge University Press, 1965 [1909]); F W Maitland, *Equity: A Course of Lectures* (Cambridge University Press, 1969 [1909]). See also, the often overlooked, F W Maitland and F C Montague, *A Sketch of English Legal History* (G P Putman's Sons, 1915) and the collection of essays that are especially important in the context of law and religion: F W Maitland, *Roman Canon Law in the Church of England* (Methuen & Co, 1898)

<sup>5</sup> S F C Milsom, 'Introduction' in F Pollock and F W Maitland, *The History of English Law* (2<sup>nd</sup> edition, Volume 1, Cambridge University Press, 1968 [1898]) xxiii, xxv.

<sup>6</sup> The literature on Maitland is vast e.g., H E Bell, *Maitland: A Critical Examination and Assessment* (Harvard University Press, 1965); G R Elton, *F W Maitland* (Weidenfeld and Nicolson, 1985); J G H Hudson, *F W Maitland and the Englishness of English Law* (Selden Society, 2007); H A L Fisher, *Frederick William Maitland Downing Professor of the Laws of England: A Biographical Sketch* (Cambridge University Press,

*bringing about the resurgence of historical approaches to law can be found in the very reasons for Legal History's decline and that the work of Maitland and Milsom provide often unappreciated inspiration here. It will further be argued that historical approaches to law should not be the preserve only of legal historians but that the historical method should be part of the legal academic toolkit and that this is especially important for those who research the interaction between religion and the law.<sup>7</sup>*

## THE DECLINE OF LEGAL HISTORY

Reflecting upon the nature and importance of a historical approach to law is important given that the subject of Legal History has been described as ‘slowly and inevitably dying—or that it has been in a coma for the last 30 years, at least’.<sup>8</sup> Although it is true that there remains a rich body of Legal History scholarship with specialist journals and societies and a number of prolific figures, the discipline has become inaccessible to newcomers. Though much continues to be published in the field through specialist monographs and journals, little is aimed at a non-specialist or student-friendly readership. Legal History is increasingly absent from the Law School curriculum. Modules devoted to particular areas of law tend to include little or no historical material. They do not explain the historical trajectory of areas of law or key legal ideas but rather focus on the law as it currently stands, looking at materials from the past only in so far as they are part of the modern law and without placing such provisions within their historical context. The experience of most law students can be likened to that of a reader of a novel who is reading in isolation a chapter towards the end of that novel. By focusing on that one chapter, the reader has little if no grasp of the ‘story’ so far, the extent to which the current chapter moves that ‘story’ on or what is likely to come next.

This analogy explains why the historical study of law is so important. It is not simply the study of out of date law, the kind of which that law students are usually advised to avoid. It

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1910) 2; CH S Fifoot, *Frederic William Maitland: A Life* (Harvard University Press 1971) ; M Reynell, ‘Frederic William Maitland’ [1951] 6 *Cambridge Law Journal* 67; R L Schuyler, ‘The Historical Spirit Incarnate: Frederic William Maitland’ (1952) 57 *American Historical Review* 303; M and J T Shotwell, ‘Frederic William Maitland’ (1907) 22 *Political Science Quarterly* 282; and A L Smith, *Frederick William Maitland Two Lectures and a Bibliography* (Clarendon Press, 1908). On Milsom, see J Baker, ‘Stroud Francis Charles Milsom 1923-2016’ (2017) XVI *Biographical Memoirs of Fellows of the British Academy* 333 and D Ibbetson, ‘Milsom’s Legal History’ (2017) 76(2) *Cambridge Law Journal* 360.

<sup>7</sup> This builds upon R Sandberg, *Religion, Law and Society* (Cambridge University Press, 2014) 260-263; R Sandberg and N Doe, ‘Textual and Contextual Legal History’ in N Doe and R Sandberg, *Law and History – Critical Concepts in Law* (Routledge, 2017) 1 and R Sandberg, ‘The Employment Status of Ministers: A Judicial Retcon?’ (2018) 13 *Religion and Human Rights* 27.

<sup>8</sup> D Siemens, ‘Towards a New Cultural History of Law’ (2012) 2 *InterDisciplines* 18, 19.

is, rather, the study of the trajectory of law; the elucidation and questioning of the ‘story’ of the common law; the ways in which it has evolved and devolved and its likely future development. A historical approach is needed to today’s substantive law in its context.<sup>9</sup> A grasp of history allows us to understand where we are going by showing us where we have come from. The study of Legal History deserves to be at the beating heart of the Law School Curriculum.

There are two deeper causes for the current comatose state of Legal History. First, the subject’s decline has been perpetuated by the divided state of historical scholarship within Law Schools in England and Wales.<sup>10</sup> A distinction exists between two forms of historical scholarship about law.<sup>11</sup> On the one hand, there exists the Old / Internal / Textual Legal History which is concerned with the intellectual history of law, exploring the doctrinal development of legal ideas, concepts and institutions. On the other hand, there exists the New / External / Contextual Legal History which is concerned with the social history of law, exploring how law exists as one of many social institutions and how law is shaped by (and shapes) other social institutions and society as a whole.<sup>12</sup> Old and New Legal History tends to focus on different things.<sup>13</sup> Indeed many who can be designated in the New camp would not identify themselves as legal historians. This not only means that there is little dialogue between the two camps; it also has meant that the two have often existed in opposition to one another. Hunt has described the ‘evolutionary doctrinalism’ of orthodox Legal History as ‘the major tradition which the new legal history seeks to supersede’ and as its ‘enemy’.<sup>14</sup> The

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<sup>9</sup> As McLaren has put it, ‘knowledge of the development of law, legal institutions and legal ideology in the context of political, social and economic forces is essential to an understanding of legal culture (especially one’s own), and that historical understanding increasingly provides the context in which lawyers are called upon to apply their intellectual talents and skills to live problems’: J McLaren ‘The Legal Historian, Masochist or Missionary? A Canadian’s Reflection’ (1994) 5 *Legal Education Review* 67.

<sup>10</sup> Note that a great deal of work on the historical study of law has been done within history departments and that leading Scottish Universities do tend to give weight to Legal History.

<sup>11</sup> On which see R Sandberg and N Doe, ‘Textual and Contextual Legal History’ in N Doe and R Sandberg (eds), *Law and History – Critical Concepts* (Routledge, 2017) 1.

<sup>12</sup> As Gordon has put it: ‘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’: R W Gordon, ‘J. Willard Hurst and the Common Law Tradition in American Legal Historiography’ (1975) 10 *Law & Society Review* 9, 11.

<sup>13</sup> Old Legal History focuses on the early development of the common law, zooming in on property law and the law of obligations while new Legal History focuses on the early modern period and statute law in particular paying particular attention to the history of Crime.

<sup>14</sup> A Hunt, ‘The New Legal History: Prospects and Perspectives’ (1986) 10 *Contemporary Crises* 201, 203.

criticisms of old Legal History, amidst moves within legal academia as a whole towards socio-legal research, seem to have resulted in a retreat of old legal historical scholarship. And New Legal History has tended not to engage with the old legal historical scholarship that has taken place. A schism has ensued.

Second, the subversive nature of Legal History means that it is unsettling to students and teachers. As Rowan Williams has commented, ‘good history makes us think again about the definition of things we thought we understood pretty well, because it engages not just with what is familiar but with what is strange.’<sup>15</sup> The study of Legal History shows that the law and legal institutions are not fixed, that every line drawn in the law and everything the law holds as sacred is arbitrary and that the environment that law students are socialised into is a historical construct. As Maitland put it, Legal History teaches ‘the lesson that each generation has an enormous power of shaping its own law’; the study of Legal History ‘would free them from superstitions and teach them that they have free hands’.<sup>16</sup> This flies in the face of the Law School curriculum and student expectations which value legal certainty and regard the legal system as being autonomous and timeless.

#### THE FUTURE OF LEGAL HISTORY

These two causes of decline, however, also point to the future of Legal History. The first cause shows that there is a need for both the Old / Internal / Textual Legal History and the New / External / Contextual Legal History. They need for both approaches to work together. The choice should not be made between doctrinal / black letter and socio-legal / interdisciplinary approaches to law.<sup>17</sup> It is true that individual works may rely on one method at the expense of the other but that is a reflection of the research questions. As a whole, fields of knowledge need to draw upon both approaches. Put another way, Legal History needs to include at least the study of the intellectual history of the law and the social history of the law.

Although both Maitland and Milsom are both seen as old legal historians in that they largely provide a doctrinal account of the development of legal ideas and practice, their work is

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<sup>15</sup> R Williams, *Why Study the Past?* (Longman and Todd, 2005) 1.

<sup>16</sup> F W Maitland, ‘Maitland to AV Dicey, c. July 1896’ quoted in C H S Ffoot, *Frederic William Maitland* (Harvard University Press, 1971) 143.

<sup>17</sup>R Sandberg, *Religion, Law and Society* (Cambridge University Press, 2014) chapter 6.

inspirational in that they do not remain entirely within the Old Legal History box. The fact that they were mostly concerned with the mostly medieval subject-matter beloved of Old Legal History does not mean that the categorisation is correct. As Rose has argued that, although Maitland's work 'is internal to the extent that it is based on primary sources that are legal', it 'has ceased to be entirely internal and positivist. Much of it involves political, social, and economic contexts, as internal legal sources cannot be fully understood in a vacuum that ignores the external context':<sup>18</sup>

'Although his best-known work, *The History of English Law ...*, focuses on institutional and doctrinal development, it is not purely legal, as he understands the relationship of law to a broader social and political context. Moreover, his work is extensive, varied, and eclectic, abounding in ideas, insights, and concepts'.<sup>19</sup>

This is even more true of Maitland's other publications. As for Milsom, his work provides possibly the best example of an intellectual history of legal ideas. His work is focuses on how the legal system – as a system made up of people – functioned and functions over time. How in each age practitioners sought to get their client out of the legal difficulties of the day. Milsom's work consider the past in its own terms and is an inspiration for legal historians to become immersed in the past to such an extent that this 'forces us to probe our beliefs, compare them to the features we encounter elsewhere, and expose our assumptions to scrutiny and evaluation'.<sup>20</sup> A historical approach to law becomes, then, an exercise in comparative law. Insisting on Legal History as being comparative is distinct from the argument as to the value of comparative Legal History: that is, the historical comparison of more than one jurisdiction.<sup>21</sup> Insisting on Legal History as being comparative means embracing the insight famously expressed by Hartley, that 'the past is a foreign country: they do things differently there'.<sup>22</sup>

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<sup>18</sup> J Rose, 'Studying the Past: the Nature and Development of Legal History as an Academic Discipline' (2010) 31(2) *The Journal of Legal History* 101, 118-119.

<sup>19</sup> Ibid 114.

<sup>20</sup> J Webber 'The Past and Foreign Countries' (2006) 10 *Legal History* 1.

<sup>21</sup> On which see D Ibbetson, 'The Challenges of Comparative Legal History' (2013) 1:1 *Comparative Legal History* 1 and subsequent publications in that journal.

<sup>22</sup> L P Hartley, *The Go-Betweens* (Penguin, 2004 [1953]) 5.

This point is underscored by one of Milsom's most significant contributions: his revisionist contribution to the debate on the origins of trespass.<sup>23</sup> The writ of trespass is the origin for both the modern laws of Tort and Contract.<sup>24</sup> It emerged at the start of the thirteenth century but there is a long-standing debate as to its origins.<sup>25</sup> Three main theories as to its origin can be identified. First, for nineteenth century theorists like Maitland, Holmes and Ames, trespass had simply derived as the successor of the appeal.<sup>26</sup> Whereas the appeal provided both criminal punishment and civil compensation, its successor the assizes only provided criminal sanction and so the writ of trespass filled this gap in terms of providing civil compensation. However, this argument largely rested upon the linguistic similarity between the writs and, as the research of Woodbine has shown, the phrase was rarely used in the early trespass writs.<sup>27</sup> For Fifoot, the evidence 'is more slender than its frequent repetition would suggest. ... No legal inference is more dangerous than one based upon linguistic analogy'.<sup>28</sup> Second, for Plucknett, the writ of trespass came from the local courts.<sup>29</sup> However, this did not really solve the origins issue and the evidence he used showing that the writs were used at the same time at both levels meant that the influence could have equally been the other way around.<sup>30</sup> Third, Woodbine saw the origin of trespass as providing a remedy in situations where a third party had tried to take land from you but had been unsuccessful.<sup>31</sup> However, Woodbine had been critical of Maitland's theory on the basis that the allegation of force in trespass was collective not physical force. This argument can be used against Woodbine's own theory which also

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<sup>23</sup> S F C Milsom, 'Trespass From Henry III to Edward III: Part 1: General Writs' (1958) 74 *Law Quarterly Review* 195; 'Part 2: Special Writs' (1958) 74 *Law Quarterly Review* 407; 'Part 3: More Special Writs and Conclusions' (1958) 74 *Law Quarterly Review* 561.

<sup>24</sup> Although there was a medieval law of contracts – the actions for covenant, debt, detinue and account – the rigidity of these writs meant that they fell into disuse. The action on the case for assumpsit – a development of the action on the case which was itself a development from the action of trespass – superseded the medieval actions. The law of Tort is the successor of the trespass writ and action on the case. See generally D J Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford University Press, 1999), A W B Simpson, *A History of the Common Law of Contract* (Clarendon Press, 1975) and C H S Fifoot, *History and Sources of the Common Law* (Stevens & Sons, 1949).

<sup>25</sup> See *ibid* 44-56

<sup>26</sup> See, e.g, F Pollock and F W Maitland, *The History of English Law* (2<sup>nd</sup> edition, Volume 2, Cambridge University Press, 1968 [1898] 512, 526: 'The writs of trespass are closely connected with the appeals of felony. The action of trespass, we may say is an attenuated appeal'.

<sup>27</sup> G E Woodbine, 'Origins of the Action of Trespass' (1924) 33 *Yale Law Journal* 799; Origins of the Action of Trespass' (1925) 34 *Yale Law Journal* 343.

<sup>28</sup> This argument: C H S Fifoot, *History and Sources of the Common Law* (Stevens & Sons, 1949) 44, 45

<sup>29</sup> T Plucknett, *A Concise History of the Common Law: Book one* (4<sup>th</sup> ed, Butterworths) 349

<sup>30</sup> C H S Fifoot, *History and Sources of the Common Law* (Stevens & Sons, 1949) 47.

<sup>31</sup> G E Woodbine, 'Origins of the Action of Trespass' (1924) 33 *Yale Law Journal* 799; Origins of the Action of Trespass' (1925) 34 *Yale Law Journal* 343. Had the third party been successful then the writ of Novel Disseisin would have been available.

suffers from causal problems. As Fiffoot put it, to link up actions in land and trespass and to ‘identify the one as a child of the other is to betray a too causal a view of childhood’.<sup>32</sup>

Milsom’s work revolutionised this debate by discovering the word ‘trespass’ in the thirteenth and fourteenth centuries was not a technical legal word.<sup>33</sup> His work showed that all of the previous participants in the debate had taken an anachronistic approach. They had assumed ‘that it was from the beginning what is today’ and ‘that what came into being in the thirteenth century was a single entity, a definite tort with the essential ingredient of direct forcible injury’.<sup>34</sup> In contrast, Milsom discovered that the word ‘trespass’ simply came from the Latin *transgresso*, meaning ‘wrong’. This is what the word meant up to at least the sixteenth and seventeenth century.<sup>35</sup> Historians had ‘‘misunderstood the early developments by reading back a later and narrower meaning, and by imagining substantive ideas where contemporaries were concerned only with jurisdiction and proof.’’<sup>36</sup> This mistake led to significant conceptual errors. Milsom wrote that had textbooks been written at the time, ‘trespass’ ‘would have been the title, not of a chapter, but of the book’ because there was ‘no entity equivalent to our tort of trespass, and that the only concept denoted by the word trespass was the elementary one of wrong. It was a generic term’.<sup>37</sup> Milsom’s work on the origin of trespass therefore provides a neat illustration of the need for Legal History to be an exercise in comparative law. Tracing the changing legal and non-legal meanings of words over time can shed light on their current usage.<sup>38</sup> Current understandings of legal ideas and mechanisms cannot be read back into earlier times. It needs to be remembered that the ‘past is a foreign country’,<sup>39</sup> not only to appreciate its differences but also to note that we can learn from these differences. As with studies of comparative law generally, a historical approach to law shows how other legal

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<sup>32</sup> C H S Fiffoot, *History and Sources of the Common Law* (Stevens & Sons, 1949) 54.

<sup>33</sup> S F C Milsom, ‘Trespass From Henry III to Edward III: Part 1: General Writs’ (1958) 74 *Law Quarterly Review* 195; ‘Part 2: Special Writs’ (1958) 74 *Law Quarterly Review* 407; ‘Part 3: More Special Writs and Conclusions’ (1958) 74 *Law Quarterly Review* 561.

<sup>34</sup> S F C Milsom, ‘Trespass From Henry III to Edward III: Part 1: General Writs’ (1958) 74 *Law Quarterly Review* 195.

<sup>35</sup> This original meaning can still be found in the Lord’s Prayer:

<sup>36</sup> S F C Milsom, *Historical Foundations of the Common Law* (2<sup>nd</sup> ed, Butterworths, 1981) 285.

<sup>37</sup> S F C Milsom, ‘Trespass From Henry III to Edward III: Part 1: Part 2: Special Writs’ (1958) 74 *Law Quarterly Review* 40. He argued that ‘the question was not whether a wrong qualified as a trespass, but whether it was the kind of trespass which the royal court could or would handle’. The only conceptual unity underpinning the various trespasses, he argued, was the fact that they belonged in the jurisdiction of the King’s Court because: ‘The allegation of breach of the king’s peace makes it a plea for the Crown and, as such, as the Great Charter reaffirmed, outside the sheriff’s competence’: S F C Milsom, *Historical Foundations of the Common Law* (2<sup>nd</sup> ed, Butterworths, 1981) 287.

<sup>38</sup> For a recent excellent example see S Thompson, ‘In Defence of the “Gold-Digger”’ (2016) 6(6) *Oñati Socio-Legal Series* 1225.

<sup>39</sup> L P Hartley, *The Go-Betweens* (Penguin, 2004 [1953]) 5.

structures and solutions are possible and therefore opens the door to the prospect of wider and deeper legal change.

The second cause of Legal History's decline – its subversive state – also points towards its future. The historical study of law should embrace its subversive nature. Critical Legal History has been described as 'any approach to the past that produces disturbances in the field - that inverts or scrambles familiar narratives of stasis, recovery or progress; anything that advances rival perspectives (such of those as the losers rather than the winners) for surveying developments, or that posits alternative trajectories that might have produced a very different present'.<sup>40</sup> Critical Legal History is typically presented as a form, though not the only form, of the New Legal History.<sup>41</sup> However, given that the inertia of Legal History has been caused in part by the splintering of different groups, Critical Legal History should not be regarded as a specialist form of Legal History. Rather, being critical should be seen as a necessary characteristic of Legal History. Critical Legal History is not only about causing a disturbance. It is rather about causing a particular type of disturbance by changing the lens through which law is seen.<sup>42</sup> It may be seen as being subversive rather than critical. A subversive approach is concerned with the disturbing the narrative of Legal History by focusing on the question of power, complicating linear accounts of progression and rewriting conventional accounts to emphasize the agency of disadvantaged individuals both in terms of campaigning for reform and also in using use law strategically. It is also concerned with disturbing the sources of Legal History, utilising a much wider range of primary and secondary materials based on an insistence that law cannot be understood in isolation; it is not a question of studying law 'and' society but law 'in' society.

Again, although conventionally Maitland and Milsom's work would not be characterised as being part of Critical Legal History, their works do demonstrate subversive tendencies. As

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<sup>40</sup>R Gordon, 'The Arrival of Critical Historicism' (1997) 49 *Stanford Law Review* 1023, 1024.

<sup>41</sup>See, e.g. J Rose, 'Studying the Past: the Nature and Development of Legal History as an Academic Discipline' (2010) 31(2) *The Journal of Legal History* 101,119-120.

<sup>42</sup>The study of Women's Legal History provides an example of how this could develop. See, e.g., the essays in T A Thomas and T J Boisseua (eds) *Feminist Legal History: Essays on Women and Law* (New York University Press, 2011).The appropriateness of the term 'Women's Legal History' may be questioned. An alternative label may be to speak of 'Feminist Legal History' underscoring how this approach is focused on critically exploring power imbalances and relationships that exist on the basis of gender. This would reflect the differences between women's history and feminist history: J Purvis, 'Doing Feminist Women's History: Researching the Lives of Wome n in the Suffragette Movement in Edwardian England' in M Maynard and J Purvis, (eds) *Researching Women's Lives from a Feminist Perspective* (Taylor & Francis, 1994) 166-167.

Bell has noted, Maitland's work 'was never channelled in a single groove or pointed too single end; he has a lively, flexible mind that was always ready to follow a hint from the data that it happened to be processing'.<sup>43</sup> This included the questioning of received wisdoms and a 'spirit which causes one to go around looking for skeletons in closets which might be exposed'.<sup>44</sup> Milsom's work was also often characterised by work that can be seen as providing a disturbance and of unsettling familiar strategies by means of painstaking research of the primary materials as shown by his work on the origins of trespass described above.

Moreover, Milsom's self-confessed heretical critique of Maitland's discussion of the origins of English land law was inspirational in showing that legal historical accounts need to be conscious of the social context in which legal change takes place and subversive in terms of questioning 'top-down' accounts that assumed that legal change was designed and intended. Maitland's account of the early development of the writ system starting in the reign of Henry II (1154-1189) suggested that the writ system in allowing litigants to seek remedies in the King's Court pointed towards the growing centralisation of justice and this paved the way for the development of the common law.<sup>45</sup> Milsom's critique questioned the speed of this process but not the overall direction. His critique emphasised the continuing importance of the feudal courts and the localisation of justice and suggested that the early writs did little to replace this.<sup>46</sup> Turner has characterised these two approaches as being 'royalist' and 'feudalist'

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<sup>43</sup>H E Bell, *Maitland: A Critical Examination and Assessment* (Adams & Charles Black, 1965) 108.

<sup>44</sup>He added that, 'Perhaps it is putting it too strongly to imply that Maitland had a polemic spirit, but there is no doubt that when he thought he saw a historical truth, he hewed to the line and let the chips fall where they might': J R Cameron, *Frederick Maitland and the History of English Law* (University of Oklahoma Press, 1961) 65

<sup>45</sup> This was particularly true of the *praecipe* writ meant that the dispute would always be heard in the King's Court. While originally this was only used in the context where the dispute arose at the top of the feudal pyramid where the king himself was the feudal lord, under Richard I (1189-1199) and John (1199-1216) in particular the use of the *praecipe* writ became a matter of whim. As Maitland observed, this 'was regarded as a tyrannical abuse' which was struck down by chapter 34 of *Magna Carta*: F W Maitland, *The Forms of Action at Common Law* (Cambridge University Press, 1965 [1909]) 23. The writs of entry, which were part of a rapid growth of the writ system that occurred during the reigns of Richard, John and Henry III (1216-1272), provided further and sustained centralisation in that they ordered that either the land was to be given back or the matter was to be brought to the King's Court: F W Maitland, *The Forms of Action at Common Law* (Cambridge University Press, 1965 [1909]) 42. The dating of this development is, however, unknown. Milsom has cautioned that 'they are probably later than we have thought': S F C Milsom, *The Legal Framework of English Feudalism* (Cambridge University Press, 1976) 101.

<sup>46</sup> Indeed, this point is noted by Maitland who noted that the writ of right, which required that a royal writ was required when there was a dispute as to freehold land, did not lead to all land disputes being heard in the King's Court but simply required that such disputes be heard in the feudal courts. The writ was sent from the King to the feudal (or other) lord of the land. The writ would require the feudal lord to do 'full right', meaning to do full justice, stating that if the lord did not deal with the dispute the sheriff would. This would usually mean that the feudal lord would hold a feudal court would then determine the dispute: F W Maitland, *The Forms of Action at Common Law* (Cambridge University Press, 1965 [1909]) 23.

respectively.<sup>47</sup> However, it is important not to overstate the starkness of the debate. These two systems – the feudal system and the writ system – were both crucial to the development of the English common law.<sup>48</sup> A binary choice between the two systems does not need to be made. The question is rather how the two systems interacted; the relationship between the two. It is a question of emphasis. While Maitland emphasized the importance of the writ system, Milsom stressed the significance of the feudal system. Both authors agreed as to the end result. As Milsom noted: ‘The result of the whole development, intended or not, has been seen as bringing virtually all litigation about freehold land into the king’s court’.<sup>49</sup>

That reference to intention is the key to the Maitland-Milsom debate. In Maitland’s account it is suggested that this result was deliberate. According to this view, Henry II and his advisers ‘took steps to protect tenants’ proprietary interest, providing procedures that reduced lords’ jurisdictional rights’.<sup>50</sup> While there was some disagreement as to details, legal historians following Maitland tended to accept this royalist interpretation.<sup>51</sup> It was not until the work of Milsom that Maitland’s interpretation was challenged. Milsom questioned Maitland’s assertion that the King’s motive was centralisation.<sup>52</sup> For Milsom, ‘the only intention behind’ the early writs ‘was to make the seigniorial structure work according to its own assumptions’.<sup>53</sup> This revision has become accepted.<sup>54</sup> Turner asserted that ‘it is unfashionable today to see

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<sup>47</sup> R V Turner, ‘Reflections and Reconsiderations’ in R V Turner, *Judges, Administrators and the Common Law in Angevin England* (Hambledon Press, 1994) ix, x-xi.

<sup>48</sup> It should be noted that the labels we have given these systems were retrospectively applied: medieval litigants would not have spoken of systems in theoretical terms (including speaking of the ‘legal system’) and systems do not exist in pure forms; talk of a feudal or indeed capitalist system is ‘a paradigm rather than a social reality’: T G Watkin, ‘Feudal Theory, Social Needs and the Rise of the Heritable Fee’ 10 *Cambrian Law Review* 39.

<sup>49</sup> S F C Milsom, *Historical Foundations of the Common Law* (2nd ed, Butterworths, 1981) 145.

<sup>50</sup> R V Turner, ‘Reflections and Reconsiderations’ in R V Turner, *Judges, Administrators and the Common Law in Angevin England* (Hambledon Press, 1994) ix, x-xi.

<sup>51</sup> Ibid xi. Stenton wrote how Henry II’s royal writs led to an ‘Angelvin leap forward’: D M Stenton, *English Justice between the Norman Conquest and the Great Charter* (Allen & Unwin, 1965). Van Caenegem found that the development of the common law was an evolutionary process dating back to before the Norman Conquest evolving into the writs and assizes of Henry II: R C Van Caenegem, *Royal Writs in England from the Conquest to Glanvill* (Selden Society vol 77, 1959).

<sup>52</sup> Milsom argued that cause was more particular. The Anarchy that had followed the death of Henry I had meant that land had often changed hands. The victorious had taken the land of the vanquished and granted it to their supporters and when the vanquished themselves became victorious they had done the same. The writ of right, therefore, argued Milsom, ‘reaches back to undo things done in the past’: S F C Milsom, *Historical Foundations of the Common Law* (2nd ed, Butterworths, 1981) 129. It had the particular motive of returning the land to those who had held it at the death of Henry I: S F C Milsom, *The Legal Framework of English Feudalism* (Cambridge University Press, 1976) 179.

<sup>53</sup> At first, it was all ‘about the feudal relationship rather than about ownership and possession’: S F C Milsom, ‘Introduction’ in F Pollock and F W Maitland, *The History of English Law* (2<sup>nd</sup> edition, Volume 1, Cambridge University Press, 1968 [1898]) xxiii, xlibv.

<sup>54</sup> There have been three main groups of criticisms. First, it has been suggested that later research has questioned some of Milsom’s assumptions. Watkin saw ‘the period 1176-9’ as ‘acquiring great significance’ contending that it was after the assize of Novel Disseisin that ‘royal activity in relation to land-holding becomes regular’: T

behind this shift in Henry II's time any deliberate plan by the king, any great legislative vision'.<sup>55</sup> This shows how a legal historical approach needs to be contextual and needs to take into account agency. It needs to expand focus beyond seeing law – and the political / legal system – as being autonomous and self-perpetuating. The risk of not doing this is to adopt a too simplistic and misleading line of causation.

## CONCLUSION

The catalyst for this reflection is the fiftieth anniversary of the re-issued second edition of Pollock and Maitland's *The History of English Law*.<sup>56</sup> The fact that this anniversary is likely to be ignored reveals much about the comatose status of Legal History in England and Wales today. This is to be regretted. Every review of a case law is a historical exercise but in the vast majority of lecture halls and tutorial classrooms historical method and context is overlooked and cases are presented as authorities which exist in a historical vacuum. The decline of Legal History is linked to it being seen as a specialism of the select few and to tensions within that field, between the old and the new legal histories. This can be overcome by existing camps working together and by legal academia reclaiming Legal History as a subversive approach that allows staff and students to question legal change and what is possible. The writers who contributed to the re-issued second edition of *The History of English Law*, Maitland who researched and wrote most of the content and Milsom who contributed a ground-breaking introduction, are rightly celebrated within Legal History but they are erroneously seen as being part of the Old Legal History. This reflection has sought to begin to correct this showing how their work can provide inspiration for seeing Legal History as an exercise in comparative law and as being subversive. This is designed also to

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G Watkin, 'Feudal Theory, Social Needs and the Rise of the Heritable Fee' (1979) 10 *Cambrian Law Review* 39, 55. Second, there has been concern as to the vagueness of Milsom's argument: the use of the term feudalism and whether underestimated the strength of public authority at 1200. As Turner put it, the evidence of frequent intervention by Anglo-Norman kings in the courts of the lords casts doubt on 'on Milsom's picture of independent feudal lordships': R V Turner, 'Henry II's Aims in Reforming England's Land Law: Feudal or Royalist' in R V Turner, *Judges, Administrators and the Common Law in Angevin England* (Hambledon Press, 1994) 1, 10. Third, Turner has argued that Milsom has overplayed the extent to which Henry II endorsed feudalism pointing out that the King's relations with his own tenants 'did not show any great respect for feudal custom' (ibid 11). By providing tenants with a royal court protection against their lords, Henry II and his advisers would appear to 'have had an anti-lord, or perhaps better a pro-tenant bias, if not an anti-feudal one' (ibid). Biancalana found that Henry II and his counsellors 'imagined an organized central power' to overcome the failures of justice in the lords' court (J Biancalana, 'For Want of Justice: Legal Reforms of Henry II' (1988) 88 *Columbia Law Review* 433, 446, 483, 534); while Brand argued that the developments during the reign of Henry II 'were in many cases the result of careful and deliberate changes made by the king and those who advised him' (P Brand, *The Making of the Common Law* (Hambledon Press, 1992) 101).

<sup>55</sup> R V Turner, 'Henry II's Aims in Reforming England's Land Law: Feudal or Royalist' in R V Turner, *Judges, Administrators and the Common Law in Angevin England* (Hambledon Press, 1994) 1.

<sup>56</sup> F Pollock and F W Maitland, *The History of English Law* (2<sup>nd</sup> ed, Cambridge University Press, 1968).

underscore the relevance of Legal History and the fact that the historical study of law should not be solely the preserve of legal historians. The historical method should be regarded as part of the toolkit for all those who study law.

This is especially true for those who study the interaction between religion and the law. Understanding the historical establishment of the Church of England and the piecemeal process of toleration is critical for understanding English religion law today.<sup>57</sup> Moreover, the work of Maitland provides an inspiration here. Maitland not only realised that the history of English law would be ‘shamefully incomplete’ without discussion of ‘ecclesiastical jurisprudence’,<sup>58</sup> he also crucially subjected ecclesiastical law to the same level of analysis as any other form of law. This is most notable in his essays published as *Roman Canon Law in the Church of England*<sup>59</sup> but can also be found within his other works.<sup>60</sup> The influence of Maitland’s approach can still be found today in Law and Religion scholarship not only in the works of Richard Helmholz and John Witte Jr amongst others who provide lucid historical accounts of ecclesiastical matters but also in the forensic legal analysis of Norman Doe and Mark Hill QC which follows Maitland’s example of subjecting the law of the Church to the same if not higher academic scrutiny as that afforded to the law of the land. Moreover, the issues raised by Maitland continue to be of great and growing significance to Law and Religion scholars. As Donahue pointed out, in *Roman Canon Law in the Church of England* Maitland was exploring the question of whether it is ‘possible for two different legal systems - canon law and common law - to operate simultaneously in the same geographic area, particularly when those two legal systems make overlapping jurisdictional claims’.<sup>61</sup> These questions continue to be of great interest, especially in the last decade given the focus on religious legal pluralism – or the fear of Sharia – that was reflected in and perpetuated by the

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<sup>57</sup> R Sandberg, *Law and Religion* (Cambridge University Press, 2011) chapters 2 and 4.

<sup>58</sup> F W Maitland, *Roman Canon Law in the Church of England* (Methuen & Co, 1898) v.

<sup>59</sup> On which see R Sandberg, ‘F W Maitland’ in R Helmholz and M Hill (eds) *Great Christian Jurists in English History* (Cambridge University Press, 2017) 301.

<sup>60</sup> In *The History of English Law* and his lectures on constitutional history, Maitland sketched the relationship between Church and State in medieval England and the penultimate section of his lectures was dedicated to ‘The Church’: F Pollock and F W Maitland, *The History of English Law* (2<sup>nd</sup> edition, Cambridge University Press, 1968 [1898]); F W Maitland, *The Constitutional History of England* (Cambridge University Press, 1941 [1908]) 506-526.

<sup>61</sup> C Donahue, ‘Roman Canon Law in the Medieval English Church: Stubbs vs. Maitland Re-Examined after 75 Years in the Light of Some Records from the Church Courts’ [1974] 72 *Michigan Law Review* 647, 655.

2008 lecture by the then Archbishop of Canterbury Dr Rowan Williams leading to an abundance of literature on the topic.<sup>62</sup>

The fiftieth anniversary of the re-issued second edition of Pollock and Maitland's *The History of English Law* should therefore be seen as an opportunity to further develop the historical study of law not only in the context of Law and Religion studies but within Law Schools generally. As Cameron pointed out, Maitland 'was one of the first scholars to become interested in the history of the law for its own sake rather than as a mere adjunct to some other dominant concern'.<sup>63</sup> The historical study of law is important to make sense of today's law and to be able to assess the possibilities for tomorrow's law. Legal History should therefore not be seen as yesterday's specialism – a niche field of study displaying comatose characteristics.<sup>64</sup> Rather it should be at the beating heart of the law curriculum and of legal research, reflecting the way in which historical context shapes every legal development or concept we write or teach about and historical method needs to be part of the toolkit for all legal writers. We need to reclaim Legal History as a subversive way of analysing and critiquing law. We are all legal historians now.

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<sup>62</sup>R Williams, 'Civil and Religious Law in England – A Religious Perspective' (2008) 10 *Ecclesiastical Law Journal* 262. For an analysis see, e.g., the essays in R Sandberg, (ed) *Religion and Legal Pluralism* (Ashgate, 2015), R Sandberg and S Thompson, 'Relational Autonomy and Religious Tribunals' (2017) *Oxford Journal of Law and Religion* 137 and R Sandberg and S Thompson, 'The Sharia Debate: The Missing Family Law Context' (2016) 177 *Law & Justice* 188.

<sup>63</sup>J R Cameron, *Frederick Maitland and the History of English Law* (University of Oklahoma Press, 1961) 62-63

<sup>64</sup>Cf. D Siemens, 'Towards a New Cultural History of Law' (2012) 2 *InterDisciplines* 18, 19