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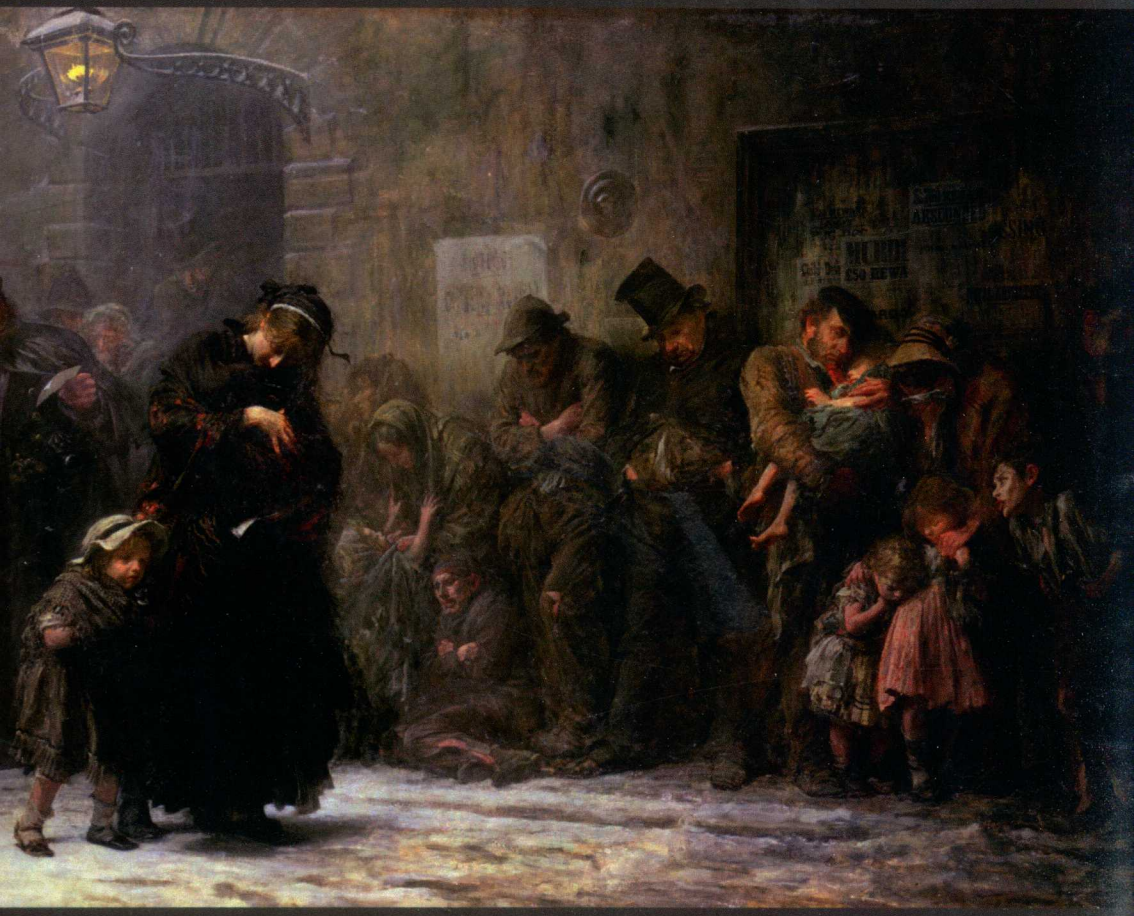
WELFARE'S FORGOTTEN PAST

A SOCIO-LEGAL HISTORY OF THE POOR LAW



LORIE CHARLESWORTH

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Welfare's Forgotten Past

That 'poor law was law' is a fact that has slipped from the consciousness of historians of welfare in England and Wales, and in North America. *Welfare's Forgotten Past* remedies this situation by tracing the history of the legal right of the settled poor to relief when destitute. Poor law was not simply local custom, but consisted of legal rights, duties and obligations that went beyond social altruism. This legal 'truth' is, however, still ignored or rejected by some historians, and thus 'lost' to social welfare policy-makers. This forgetting or minimising of a legal, enforceable right to relief has not only led to a misunderstanding of welfare's past; it has also contributed to the stigmatisation of poverty, and the emergence and persistence of the idea that its relief is a 'gift' from the state.

Documenting the history and the effects of this forgetting, whilst also providing a 'legal' history of welfare, Lorie Charlesworth argues that it is timely for social policy-makers and reformists – in Britain, the United States and elsewhere – to reconsider an alternative welfare model, based on the more positive, legal aspects of welfare's 400-year legal history.

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For my mother

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Contents

Chapter 1

Introduction: a history of forgetting

> [T]he law so positively commands, that the poor of every parish, shall be maintained in and by every such parish. However, all law of this sort, all salutary and humane law, really seems to be drawing towards an end in this now miserable country.[1]

It may seem rather obvious to state that: 'Poor law was law'; nevertheless, this basic legal truth has slipped from the consciousness of those researching and publishing nationally and internationally on the history of welfare in England and Wales; internationally as English poor law is 'understood' as the historical foundation of North American relief systems. As a result of this slippage, the legal underpinnings of that system of relieving poverty have been marginalised, misunderstood and forgotten. Although most current welfare textbooks make reference to welfare's poor law past, few acknowledge that England and Wales (Scotland and Ireland have a different welfare history) possess the oldest continuous surviving legal system of welfare relief in Europe; a 400-year-old common law (later administrative law) locally funded and administered system of relieving poverty. This positive cultural norm deserves celebrating. In addition, the weight of such a socio-legal history ensures that many echoes of that past resonate in modern welfare law. In particular, these comprise some elements of localism and an acceptance, albeit sometimes grudgingly by both governments and citizens, that the poor will be relieved of their poverty. These aspects predate the modern welfare state by hundreds of years.

One consequence of this neglect, the 'forgotten' of the title, is that many scholars are unaware of the extent of those legal foundations that ensured poor law was not simply local custom, able to mutate over time in response to changing circumstances as other unofficially negotiated 'social rules'. Rather, it constituted a slowly evolving fixed legal point of reference, which sometimes failed to adapt to significant social shifts. Indeed, once in place that law in turn fixed or hardened existing duties, roles and responsibilities that in the day-to-day negotiations of ordinary life normally modify and mutate over time. In this fashion, those legal aspects of poor law discussed in this book became entrenched within society creating long-term, if often unrecognised, legal norms. The most significant of these, discussed more fully in later

chapters, is the largely forgotten, often denied and hence underestimated legal right to relief. Such denial extends to legal scholars of welfare law (see below) who might, at the very least be expected to return to contemporary legal textbooks and precedents for clarification, but prefer instead to rely upon the expertise of social and other historians for their legal knowledge. Such is the level of 'forgetting' that this book's fundamental assertion, that poor law encompasses a legal right to relief, remains controversial as counter to current orthodoxy amongst historians and in consequence a denial of this right has been followed in academic legal texts.[2] Nonetheless, this work will set out legal 'proofs', supported by archival and other research, to reveal those legal obligations, rights and duties that account for and underpin all poor law activities. Those primary archival primary sources consulted by the author are from the North West of England but, as will become clear later, a broader survey is not required as legal answers provide an explanation for local and regional differences.

On one level, this work constitutes a legal opinion that the law of settlement and removal is at the heart of the poor law, that its doctrines encompass rights, duties and obligations by all citizens of England and Wales and that the settled poor possessed a legal right to relief. This conclusion emerges from research conducted in two dimensions. The first is concerned with small stories, micro-histories of ordinary people and how they experienced law. The second dimension reconstructs law's pervasiveness, its theoretical and doctrinal nature, development and influences. This produces meta-narratives of an overarching legal framework and the legal opinion with proofs, that the law of settlement and removal is the legal basis of poor law. Such an approach, involving often contradictory methodologies, destabilises an orthodox approach to legal history, hence the title of this work is a socio-legal rather than a social or legal history. The second level of the work constitutes a revisionist reconstruction of current orthodox interpretations of poor law's history in order to [re] place that legal right correctly within its historical framework. In addition, Chapters 2 and 3 trace those contemporary juristic and contingent elements that have contributed to poor law historians adopting their incorrect legal stance. Chapters 5–9 reconstruct poor law's legal past from a number of perspectives: that of reformers, protestors, the excluded, those who administer relief and those who receive it.

In adopting a socio-legal analysis, this work demonstrates that poor law histories and empirical research, viewed through the lens of law, fully substantiate the existence of a right to relief. This remains so even where historians themselves, as we shall see in Chapter 4, believe that they are revealing cultural or political patterns of social negotiation and not a legal framework. Finally, it is important to underline that despite much resonance and some survivals, poor law is not the same as modern welfare law. That consists of public administrative law operating within a central bureaucratic framework funded by a system of national taxation and directed by whichever government is currently

in power. On the contrary, poor law, until 1865 and in some aspects beyond, constitutes an overarching common law legal 'system' that encompasses local autonomy, local financial obligations, duties and responsibilities with *ad hoc* relief patterns. Within this 'system' the localities manifest individual characteristics according to specific and contingent financial, social and property-owning circumstances. Nevertheless, all local parishes share two common elements. The first, that the Justices at Sessions annually ratify and supervise their poor law activities. The second, that all relief decisions are made in the context of a legal framework comprising the common law of settlement and removal, the right to relief, other legal 'rules' and established legal processes. This is not that model of exclusion, control and 'undeserving' that is increasingly popular as an academic reading of poor law; rather it reveals a complex, nuanced and sophisticated system based upon rights.

In summary, this work maps one topographical layer of the long history of the relief of poverty in England and Wales. It reconstructs poor law to 1865, by which time the centralised bureaucratic elements of modern welfare are established and poor law bears a markedly public-law character. This is, of course, not the final word; in challenging conventional non-legal assumptions about poor law the writer wishes to reopen a closed discussion. It is timely to refocus both lawyers and historians' intellectual attention upon those rights-based elements that socio-legal research reveals as a fundamental element of welfare's past. For their part, historians have concentrated on discovering the nature, operation and changing social impact of the poor law from the archives rather than undertaking legal reconstructions. As we shall see in Chapter 4, they list statutes and name cases, but generally not according to appropriate legal methodologies, language and techniques. To take one example from 2000, Steven King includes a chapter on the 'Legal Framework' of poor law in his reconstruction.[3] Here he asserts that: 'Case law supported, modified or invalidated [sic] statute law'.[4] A lawyer reading this would look for the word 'interpret'. More esoterically but equally to the point, one of the most fascinating aspects of judicial interpretation until the twentieth century, and equally true of poor law, is its formalism; a topic that will be discussed in Chapter 2. In consequence, there is no legal basis for King's suggestion that case law over-ruled poor law statutes, that is declared them 'invalid'. This is possible today, for example under the legal authority of the terms of the Human Rights Act 1998, but is a modern development. Thus King's 'legal framework' opens with a legal solecism. His law chapter is largely constructed around a narrative account of statutes sourced from the work of other historians, not legal texts. The overall effect explains why the legal history of poor law often repels historians; but it is considerably more than: 'one damn statute after another'.

In spite of the above comments, this absence of legal knowledge does not represent academic failure. It is rather a manifestation of a lack of 'law mindedness'; no different from that 'history blindness' afflicting many legal

academics. This lack, however, does partially explain why so many historians deny the existence of a legal right to relief. Of course, this writer acknowledges that historians produce detailed and scholarly analyses. These are derived from reconstructions undertaken within that abundance of surviving poor law archival materials. These records are held in the National Archives at Kew; in all local record offices; in many church vestries and in numerous other archives and private collections throughout England and Wales. Paradoxically, the explanation for the continued survival of these records is found in their legal nature, that they record poor law legal duties, rights and responsibilities. In consequence, both the existence and survival of these archives are evidence of the power and significance of that overarching framework of substantive legal rules surrounding the relief of poverty.

More specifically, at base all these records owe their origins to three legal imperatives contained within poor law. First, that every parish and vestry in England and Wales had a legal duty to raise a rate to maintain its poor under the authority of an Act for the Better Relief of the Poor 1601.[5] Second, a common law presumption underpinning that Act and so understood and expressed in all subsequent case law, that every person born in England and Wales possessed a settlement somewhere and in that place a settled person was legally entitled to relief if destitute. That precise geographical place could only be established via legal interpretation of the 'rules' and precedents contained within the law of settlement and removal. The settlement entitlement was codified and first expressed in statute in 1662, whose formal title is An Act for the Better Relief of the Poor.[6] For some reason, historians persistently cite this as the 'Settlement Act', one of a number of solecisms that will be noted and not followed throughout this work.[7] The third imperative was that a poor person could only be removed to their settlement parish by operation of law if they appeared likely to, before 1795 (see Chapter 3), or actually sought poor relief. Thus, it was not social altruism and custom that motivated the provision of poor relief, rather long-standing legal 'rules'. In short, underpinning all poor law documents recording the activities of officials administering the system, setting and collecting a poor rate, recording details of those relieved, indeed the very system of poor law itself, is the legal right of the settled poor to relief when destitute. From a lawyer's perspective it appears perverse that this legal 'truth', constantly attested to in case law and stated within contemporary legal texts and Justices' manuals, is rejected by historians and thus lost to legal and other academics who follow their lead. This book aims to undermine this incorrect yet persistent stance. One explanation for that law-blindness (more will be explored in Chapter 3) may be found in assumptions concerning the legal nature of the reforms implemented via the terms of the Poor Law Amendment Act 1834. This initiated the new poor law, a baby born of Benthamite positivism and Whiggish reformist theories of political economy. The birth of this baby heralded the arrival of the hated new poor law with its national system of prison-like workhouses. Although settlement law remained

after 1834 as did the right to relief, the manner of that relief became bureaucratised and the poor a problem to be contained, controlled and stigmatised out of their state of poverty. This direction cast the die for English welfare, pathologising poverty, and may have served to further influence historians' continuing rejection of the existence of legal rights possessed by the poor.

What is more, so influential and pervasive were the negative social effects of those reforms that a cultural stigma surrounding poverty persists today despite the establishment of the Welfare State in 1948. This work reconstructs how elements of that new poor law mind-set developed and continue as negative assumptions and presumptions concerning the poor today. Such persistent deformation, dichotomising welfare values, represents a problem that continues to profoundly affect the modern application of welfare law, thus forming part of the inspiration for this book. For this reason, the work is not intended as a study of an historical curiosity but rather an exploration of when, how and why such negativity arose and how it continues to hold sway despite the 'abolition' of the last of those hated poor law remnants by the Beveridge reforms. In consequence of that past, the horrors of the post-1834 poor law system are well known, although not those positive rights-based aspects whose origins lie much earlier.

There are other factors that may have contributed to current misunderstanding of welfare's legal past. The first is the persistence of a negative ideology prevalent within Sidney and Beatrice Webb's poor law histories, prompted by their political agenda that saw little good in the poor law.[8] Their works remain influential and although they have been subject to criticism they remain part of the poor law canon, for many scholars both in Britain and North America; they provide a wealth of detail unsurpassed in quantity and coverage. The second problematic is that the 'abolition' of poor law in 1948, swept away by the new broom of Beveridge, left a message that nothing in welfare's past had value for society and the poor. The third is a result of that legal abolition; namely that poor law as a legal subject has utterly disappeared from legal practice and legal memory. Although the right to relief was diluted operationally by those many administrative and bureaucratic reforms from 1834 yet until abolition in 1948 all contemporary lawyers understood that the right existed and was so stated in all legal texts and sources. The fourth element derives from that last point; such legal knowledge was by the time of abolition a technical esoteric doctrinal matter and not an immediate matter of concern to poor law administration. It appears likely that all these factors helped to obscure the right to relief.

That forgotten right is the focus of this study. In 'forgetting', hence dismissing, the legal, personally enforceable right to relief located within the possession of a legal settlement, historians have underestimated its role and significance within the lived experience of the poor. As a result, a 'history of poverty' has developed which denies the power and legal formality of that right or, at best, seriously underestimates its significance for the poor, local ratepayers and those who administered the system. This book aims to redress that

imbalance to provide an historical reconstruction of a 'legal' history of welfare placed within a wider traditional historical context. As a result, it is one reply to that rhetorical question posed by Richard Evans: 'What has law to say to history?' This writer suggests that for poor law studies at least, an inter-disciplinary historico-socio-legal approach viewing welfare's past through the lens of law opens other windows to that past to disclose an alternative landscape. Examining its topography reveals that poor law was law, that a legal framework informs all poor law activity and that there was a common law right to relief. Such rights, enforceable by the poor themselves are rare indeed and deserve to be remembered and celebrated. That is the purpose and function of this book.

This aspect of welfare's past will require further analysis once the legal nature of poor law is acknowledged and returned to its rightful place within legal and other scholarship. Indeed, as Peter Bartlett suggests, the socio-legal project itself must recognise the fundamental challenge that history poses to academic law. Chief amongst these is an acceptance by doctrinal legal scholars that:

> The message from history, however is that the rights of Englishmen ... [and others] ... are in fact not transcendent at all, but contingent, flowing from political and social factors in the past. In part this re-enforces an important lesson for lawyers, socio-legal and otherwise: the rights we have, such as they are, were won through political struggle and they are therefore always at risk. Complacency is not an option.[9]

Finally, the expectation that law evolves in a linear purposive way, from an imperfect to an improved state through a rational process of law reform is deeply entrenched within the discipline of law. It is one that is commonly found in the introduction of standard law textbooks used to initiate first-year law students into an understanding of the allegedly progressive nature of law and legal process, including legal developments and the reform of law.[10] Empirical support for this assumption is non-existent and this book treats such a position as one to be questioned rather than a self-evident starting point. To that end, it rejects any suggestion of teleology or that a linear 'improved' model of the development of welfare can be supported by an examination of legal and historical evidence. In short, this work suggests it is important to revisit that alternative, positive, rights-based past as a model rather than considering welfare provision from the perspective of current theories based upon incorrect legal reconstructions of that past. This is pertinent, as those negative aspects of settlement discussed later, of not belonging and worse of exclusion, remain 'understood' within much modern welfare provision. Contrarily, how might a welfare system look if based on personal, legal and humanitarian rights? This is one question raised by the research project and posed by this book.

Notes

1 William Cobbett, *Rural Rides*, 1830, George Woodcock (ed.), London: Penguin Books, 1967, p. 341.
2 See for example: Nick Wikely, *Child Support Law and Policy*, Oxford: Hart Publishing, 2006; Amir Paz-Fuchs, *Welfare to Work: Conditional Rights in Social Policy*, Oxford: Oxford University Press, 2008.
3 Steven King, *Poverty and Welfare in England 1700–1850*, Manchester: Manchester University Press, 2000, pp. 18–47.
4 Ibid., p. 18.
5 So expressed in all precedents until 1948: 43 Eliz. I *c.* 2 (1601).
6 13 & 14 Car. II *c.* 12 (1662).
7 Aschrott seems to be the instigator of this. He titles a section of his book: 'The Act of Settlement of 1662' [sic]: P.F. Aschrott, *The English Poor Law System Past and Present*, 2nd edn, London: Knight & Co., 1902, p. 9.
8 S. Webb and B. Webb, *English Local Government Vol. 2, The Manor and the Borough*, Part. 1, 1908, reprint London: Frank Cass and Co., 1963;— *English Local Government Vol. 3, The Manor and the Borough*, Part. 2, reprint, London: Frank Cass and Co., 1963;— *English Poor Law History, Part I, The Old Poor Law*, 1929, reprint, London: Frank Cass and Co., 1963;— *The English Poor Law History, Part II, The Last Hundred Years*, 1929, reprint, London: Frank Cass and Co., 1963.
9 Peter Bartlett, 'On Historical Contextualisation: A Lawyer Responds', *Crimes and Misdemeanours*, 1, 2, 2007, 102–6, at 105.
10 M. Doupe and M. Salter, 'The Cheshire World View', *King's College Law Journal*, 11, 1, 2000, 49–77.

Chapter 2

Rights of the poor: towards a negative modernity

As this text is written from within the discipline of law, a conventional beginning would take an overview of current and likely future welfare provision. However, the dramatic collapse of global markets from 2008 followed by international financial disaster have ensured that whatever developments were planned in Britain, the United States or elsewhere, all bets are off. The future is uncertain, current trends are no longer current, the poor are more vulnerable than ever, their numbers are increasing daily and no one can predict how and when the crisis will end. Today, schemes for the unemployed in Britain that concern forms of 'workfare' operated in partnership with private companies are failing as those companies withdraw their support. In all these contexts, it is likely that governments themselves are unsure what will be needed or what funds available to relieve poverty in the short term, never mind long-term trends. Worse, it is unclear what ideological, political, juristic or cultural norms will inform those choices. This book has no solutions and 'history' offers no lessons, save that we have continuously relieved poverty in England and Wales for hundreds of years through many economic and political crises, originally as a common law obligation. In reconstructing that legal past this work aims to demonstrate that welfare is not simply the brave new world of Beveridge, but a fundamental cultural and legal norm long embedded within our society. As Britain faces major financial problems it is timely to consider how in the past themes of negativity, bureaucracy and control became embedded within welfare provision and the role jurists played in those changes. It is important to note, therefore, that welfare scholarship in law and history has implications beyond academic careers and may influence changes that resonate unpleasantly upon the immediate personal experience of the most vulnerable in our society, the unemployed, the young, the sick, the disabled and the elderly amongst others. This is the reason for a consideration below of a recent publication on workfare, which illustrates, amongst other matters, how current theories concerning conditional welfare 'rights' draw largely upon the negativity of juristic and operative elements that were fundamental within the new poor law.

In short, although long abolished poor law remains of concern today for many of its later positivist assumptions and presumptions remain embedded within the current welfare system. As we shall see in Chapter 3, the 'modern' Welfare State action of paying benefits is itself of ancient lineage. Equally, it also contains a specific negativity that may be traced back to 'improvements' introduced by the welfare reforms of 1834. To that end, this work explores the complex origins of a legal dichotomy that surrounds the relief of poverty, as mistrust of the poor crystallises into the dominant social convention; most notably at its tipping point in 1834. Some of that negativity remains entrenched within modern welfare provision. In that context, Pat Thane has written persuasively of those continuities in the cultural and institutional legacies left by the old and, more especially, new poor law.[1] In particular, such echoes of the past can be seen in loans from the Department of Work and Pensions to the unemployed from a capped local fund; the right (or otherwise) to be rehoused when homeless; the [mis]treatment of refugees; the continuation of the 'means test' by other names and aspects of the current Benefit Appeals system. Although this study is written from a twenty-first century perspective, similar new poor law 'values' may be observed within many aspects of the Welfare State at any point since the abolition of the poor law in 1948.

In order to reconstruct that journey from past to present, it is necessary to recognise the jurisprudence of poor law as an integral part of its legal history. An overview of that jurisprudence serves in part to explain why poor relief as a legal right has been disregarded and why historians have denied that legal right in their poor law reconstructions. Poor law has become a victim of its juristic past. To that end, what follows considers those legal theories which are relevant to an analysis of poor law. These include work by twentieth century jurists, as much of our current understanding of concepts introduced by Jeremy Bentham and John Austin has derived from the work of modern theorists. In consequence, it would be intellectually indefensible not to refer to them. The discussion that follows will concentrate upon the jurisprudential shift in poor law which occurred from 1834 that first engendered, then accompanied a transformation from common law personal rights towards administrative procedures. That legal transformation was achieved through implementation of the terms of the Poor Law Amendment Act 1834 to create what is now known as the 'new poor law'. Its main administrative features were that parishes in England and Wales were joined together into poor law unions, often based upon the ancient County sub-divisions of Hundreds. Each union was instructed to build a workhouse to house the able-bodied poor and relief was only to be given in the workhouse; there, families were divided and a prison-like regime, diet and discipline bound all from babies to the elderly. As we shall see, the new poor law constituted a centralised bureaucratic system controlled, supervised and enforced from London; its creation marks the birth of English administrative law. However, it also represents the physical manifestation of elements of utilitarianism and positivist jurisprudence.

This may seem an odd assertion, for jurisprudence is not generally 'seen' and is more usually understood through its purposes, including the evaluation of law as a discipline. This is a reflection of how law in practice has been accompanied from the earliest times by a struggle to give intellectual form to concepts such as 'justice' and to define law's fundamental nature. It is traditionally accepted that Coke was the most influential English common lawyer and jurist of the early modern period. Appointed Chief Justice of the Common Pleas in 1606, his opinions dominated legal thought until the emergence of positivist theories of law and state. In his readings of legal history, Coke 'discovered' a lineage tracing back to ancient constitutions from the Anglo Saxon age. His methodology revealed to him that judge-made law is custom and therefore represents the wisdom of generations of predecessors; more, that law-wisdom was of unchanging authority from time immemorial.[2] His view became universal among common lawyers and led Theodore Plucknett to declare that Coke's view of the supremacy of common law: 'represented public feelings based upon centuries of medieval thought which had always looked to law rather than the state'.[3] This assumption, of unchanging authority, lay at the heart of common lawyers' attitude towards and interpretations of history; an intensely superior intellectual position. Consequently, legal judgements were deemed to provide historical evidence of law's immemorial nature.[4] Coke and the common lawyers constantly reiterated the consensual fiction that law was 'discovered' and not made. As a result, common lawyers learnt about history from the study of law alone and thus English lawyers came to regard their law as a: 'self enclosed, natural process which could only be comprehended in its own terms and according to its own logic'.[5] Unsurprisingly, as this is a powerful elitist position, Coke is venerated by many common lawyers today, but as we shall see, those claims of historical right and tradition became perceived by reformers and other as an outmoded jurisprudence during the nineteenth century.

Later William Blackstone, who wrote *Commentaries on the Laws of England* between 1765–69, expressed a desire to harmonise the practising lawyer's vision of the medieval writ system as a gift from the Crown, with the view that legal rights derived from an original social contract.[6] He reiterated Coke's position; that the cornerstone of English law was the common law derived from immemorial custom, from time to time declared in the decisions of the courts of justice. Blackstone's larger purpose was a harmonisation of traditional law with the recognition of the reality of parliamentary supremacy.[7] Both these scholars considered 'history', as they understood the term, to be a fundamental element of the common law method. In order to read the present into the past Coke researched the records for precedents and today a version of this technique accompanies English common law interpretation.[8] In a perceptive account F.W. Maitland characterises this as:

> That process which old principles and old phrases are charged with a new content is from the lawyer's point of view an evolution of the true