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LEGAL THEORY AND LEGAL HISTORY

VOLUME IV

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Volume IV

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Series Preface

What are the new frontiers of contemporary legal theory? What new problems, new methods and new objects of study do the next thirty years hold for legal theorists – and how can the last thirty years help us explore them? The three volumes in *Contemporary Legal Theory, Series 2* offer answers to these questions. In so doing, these three volumes build on, and complement, the volumes in *Contemporary Legal Theory, Series 1* (2010).

Each volume in the series tackles the relationship between legal theory and another discipline: 1) legal history; 2) the humanities; and 3) the natural sciences. In each case, the co-editors have sought to identify the key themes at the intersection of these relationships – often also the key obstacles to collaboration between them. A special effort has been made not to assume that the relationship is or ought to be a collaborative one – for example, the volume on legal theory and legal history recognizes that many (theorists and historians alike) have radically distinguished between the tasks of legal theory and legal history, and thus have been sceptical about the plausibility and fruits of any dialogue between them. Nevertheless, each volume has also attempted to move beyond territorializing in scholarship, to offer ways and examples of how productive dialogue is possible.

The issues explored in these volumes are richly varied, as is appropriate given the specifics of each of the above relationships. Nevertheless, they constitute a coherent whole, for they mark the exciting changes that have taken (and are still taking) place in contemporary legal theory. Arguably, the future of legal theory lies not in the exclusive and illusory bastion of the law: it lies, at least in part, in law's complex and dynamic relations with the past and the diverse ways in which we can explore it; with our aesthetic sensibilities and the bottomlessness of human imagination; and with the challenges posed to our most familiar evaluative concepts by the natural sciences. The essays selected for these volumes look squarely at the glare of these challenges.

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Introduction

What can legal theorists learn from legal historians? What guidance can historians take from theorists in their researches? What theoretical questions underlie legal historical investigations? These are important and pressing questions, but they are not often given the attention they deserve. All too often, legal theorists and legal historians have worked largely within their own spheres, taking little heed of the lessons to be learned from each other. Historians tend to be shy of theory. As an editorial of the *History Workshop* put it in 1978, historians (in general) 'seldom explore the philosophical foundations of their subject, and when faced with conceptual difficulties, instinctively reach for the facts' ('History and Theory', 1978, p. 1). Historians, they continued, 'are suspicious of orthodoxy, dislike abstractions, and rather than waste time on what many would regard as metaphysical speculation, prefer to get on with the job', which is seen to be that of a 'confident, if self-enclosed, empiricism' ('History and Theory', 1978, p. 1). For their part, legal theorists tend to be shy of history. Although many theorists have engaged in detailed analysis of the thought of jurists of earlier eras, their aims in doing so have generally been to engage philosophically with the thoughts of the subject being studied, rather than to locate their ideas in any particular historical context. It is rare for theorists to test whether their ideas work in other temporal contexts: insofar as past legal practices contradict present understandings, or appear simply inexplicable, they are ignored. When faced with factual difficulties, one might say, jurists instinctively reach for concepts. Certainly, many would say that they would rather not waste time on what they would regard as descriptive trivialities, preferring to get on with the job – of, say, a confident, if self-enclosed, conceptualism.

Yet, as the essays in this collection show, there is a significant and growing body of work which has begun to address these issues, raising challenging questions for both theorists and historians. In what follows, we have sought to capture some of the rich variety of this work. 'Legal theory' and 'legal history' are both large and variegated fields, whose shape has changed and modified in recent decades. Where legal theory was once dominated by a jurisprudence that concentrated largely on philosophical questions of the nature of law and legal reasoning – seen in the great traditions of natural law thought and positivism – much twentieth-century legal theory turned to instrumental or critical approaches, which sought to explore law's place with and relationship to a wider society. Equally, the field of legal history has seen the development of contextual approaches alongside more traditional doctrinal ones. In each sphere, theoretical questions are raised both about the nature of the study being undertaken and about the correct methods to be used in undertaking the study. Our collection seeks to give a representative sample of some of the important work being done in these fields, without having any pretensions to being comprehensive. As our further reading list shows, there is plenty more excellent work to be explored.

Our collection is divided into four sections. Part I explores the theoretical challenges which a study of history presents to legal theorists who wish to explain philosophically what law is and how legal reasoning works, by looking at the 'internal' view of what participants in

the practice consider law to be. History here offers a 'test-bed' for theory: did lawyers and jurists in past ages think about law in the same way or differently? Can the common law itself and its doctrines be explained in terms of modern theory? The essays in this section offer a particular challenge to positivist jurists, whose model of law may not adequately explain the common law in other eras. As the essays in this section show, modern theories of law based on present conceptions may not only struggle to explain the past – they may also themselves be a contingent product of their historical context. Part II moves on to examine how historians attempt to reconstruct the way lawyers and judges conceived of law in the past, and what models of legal reasoning historians have uncovered. Part III considers whether a historical approach to law can generate a wider theory of law, considering both the promise of a revived or amended version of 'historical jurisprudence' and the contribution of legal history to modern critical theories of law. Finally, Part IV considers the contribution history can make to understanding law in its wider social context, and explores what kind of jurisprudence 'law and society' scholarship or critical legal scholarship can offer.

Challenging the Thought of the Present

Part I explores the challenge posed to contemporary legal theory by work in legal history. It opens with an essay by Brian Simpson – 'The Common Law and Legal Theory' (Chapter 1) – known to all in this debate, and still referred to regularly, both positively by those sympathetic to its criticisms of legal theory from the perspective of the history of the common law and negatively by those who think the criticism of legal theorists, especially H.L.A. Hart, was too hasty.[1] In his essay, Simpson argues that 'to date no very satisfactory analysis of the common law has been provided by legal theory' (p. 3). Given the continuity of the common law over many centuries, a theory of the common law must accommodate the law of earlier centuries, or at least provide a view which can explain 'whatever changes have occurred in the general character of the institution' (p. 4). In Simpson's view, the dominant schools in jurisprudence, particularly the positivism of Hart, failed to give a satisfactory account of the common law.

For Simpson, the inadequacy of positivism vis-à-vis the common law could be captured in what he called its two dogmas: first, that all law is positive law, and second, that 'law exists as a sort of code … identified with a notional set of propositions' (p. 7). Under these two dogmas, 'the common law must be conceived of as existing as a set or code of rules which have been laid down by somebody or other, and which owe their status as law to the fact that they have been so laid down' (p. 7). He goes on to show that these two dogmas 'cannot be made to work' (p. 11) if one tests them against a historically informed understanding of common law practice. In doing so, he made a number of interesting claims: that the exercise of common law authority by judges was radically different to the authority carried by legislation (see p. 12); that rationality in the common law could not be reduced to rules and reasoning with rules (see p. 13); that there were no set rules as to the hierarchies of sources within the common law (see p. 13); and that there was no authoritative version of the 'rules' – there was no authentic form of words used and, as such, one could not count common law 'rules' as one would 'so

[1] For the negative reaction, see Green (2012). More positively and generally, see the other contributions in that special issue. Simpson himself reflected on the debate in his recent and posthumously published *Reflections on* The Concept of Law (2011).

many sheep, or engrave them on tablets of stone' (p. 14). This last observation means that the common law should be understood as 'basically an oral tradition, still only imperfectly reduced to published writing' (p. 23) and that, accordingly, the common law ought not to be characterized as a system, resembling as it does, more of a 'muddle' (p. 25). Judicial utterances in the common law were simply too 'tentative' in character, and were too full of 'dissension' and 'obscurity' (p. 16) to be describable as forming a system. Indeed, the common law mind was 'repelled by brevity, lucidity and system' (p. 25). Perhaps most famously, Simpson argued that the common law was best seen as a customary system of law, which consisted of 'a body of practices observed and ideas received by a caste of lawyers' which 'exist only in the sense that they are accepted and acted upon within the legal profession, just as customary practices may be said to exist within a group in the sense that they are observed, accepted as appropriate forms of behaviour, and transmitted both by example and precept as membership of the group changes' (p. 20).

Simpson's call for a better attempt to provide a theory of the common law which took into account its customary nature has to some degree been taken up by other scholars interested in theorizing custom and its place in theorizing about law (see Perreau-Saussine and Murphy, 2009). There has also been more attention given among legal theorists to the practice of the common law, though whether this is properly historically-situated is up for debate (see Edlin, 2007). Certainly, the concept of custom is a fertile area for collaboration between historians and theorists.[2] However, Simpson did not himself go on to develop a theory of the customary common law, but instead wrote a number of influential works which sought to demonstrate that the complexity of the life of the law could not comfortably be subsumed within any single theoretical model.[3] In *Leading Cases in the Common Law*, he pointed out that 'most lawyers, and indeed most academic lawyers, have little interest in high theory, and function satisfactorily without possessing a very fully worked-out theory of judicial decision. Like bumble bees, they manage to fly in spite of the theoretical difficulties in explaining how they manage to do it' (Simpson, 1995, p. 10). The method of the historian, he wrote in his last years, does not seek 'simplicity concealed beneath apparent complexity' but rather 'seeks an understanding of law and legal institutions through empirical scholarship which emphasizes complexity, and the profound difficulty in generalization or simplification in the face of the evidence' (Simpson, 2011, p. 125). Simpson's work consequently offers a challenge to the theorist: if a theoretical account of the common law is to be, as it arguably should be, responsive to the historically-situated practice of the common law, then the degree of generalization aimed for by that theoretical account has to be modest, avoiding universals and embracing contingent, at best relatively robust, features.

In Chapter 2 Morton J. Horwitz also uses the perspective of the historian to question the usefulness of the positivist tradition associated with Hart. How is it, he asks, that Anglo-American jurisprudence has 'been able to maintain its confident assumption that the analytical and the historical can be neatly separated', so that one can 'engage in the analysis of concepts whose meaning is thought to be understood independently of [their] historical

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[2] For a very recent example of a theoretically-sophisticated discussion by a historian, see Kadens (2013).

[3] Indeed, his *Leading Cases in the Common Law* (1995) showed that a number of prominent legal theories were liable to falsification if one tested them in the prism of the historical case.

context' (pp. 29–30)? The obsessively analytical nature of Anglo-American jurisprudence calls for an explanation, since (in his view) 'no satisfactory system of jurisprudence could fail to understand that different political commitments in different historical contexts invariably generate different meanings of words like right, duty, custom, morality and law' (p. 30).

In order to answer this question, Horwitz historicizes positivism itself. He argues that while the very theory was developed in a particular context with a particular political purpose – Jeremy Bentham's aim to delegitimate the common law and so prepare the way for codification – it became depoliticized by more conservative jurists, such as John Austin and A.V. Dicey: 'Just as the scientific claims of economics brought forth a methodology designed to yield a single unique equilibrium requiring no further political choice, so too analytical jurisprudence created a science of unambiguous and static definitions that could be said to be scientific because they aspired to produce single right answers' (p. 37). The closed system of meanings developed by analytical jurisprudence was politically safe, for it remained under the control of (conservative) lawyers. Politics and history were thus filtered out of constitutional law, in an era when elite lawyers feared that 'universal suffrage [would] put the "ignorant multitude" in the driver's seat' (p. 46). The Whiggish history which had hitherto fulfilled a legitimating function in explaining the constitution was consequently pared away in Dicey's vision of a distinct unhistorical constitutional *law*; for in an increasingly democratic age, such a historical approach raised awkward questions about where the constitution was heading.

In the twentieth century H.L.A. Hart's reinvigorated positivist theory also sought to defend the idea that 'monolithic meanings' could be obtained by a process of definition which excluded politics and history. Hart's rule of recognition – whose existence was 'an external statement of fact' (Hart, 1994, p. 110) – sought to provide clear criteria to determine the validity of rules, in order to avoid the indeterminacy that might be entailed by a definition that included more political or historical elements. Horwitz states that Hart did not 'acknowledge that the idea of an evolving unwritten constitution has often functioned as the equivalent of a rule of recognition in English history' (p. 49). But this was no accident, for like Austin, he sought to displace customary ideas of constitutionalism within a scientific system of jurisprudence. Like his nineteenth-century predecessors, Hart kept the sharp distinction between the legal and the political, but he did so 'out of recognition that any thick description of English constitutional history opened a Pandora's box of layers of interpretative ambiguity concerning the source and meaning of constitutional precedents under an unwritten – customary – constitution' (p. 53). Horwitz's essay shows that the very process of putting a theory of law in its historical context can reveal that theory itself is not neutral, but can be the product of particular concerns which may vary and change across time. It also suggests that theory which defines away the historical or the political may be regarded as incomplete.[4]

If one lesson to be drawn from Simpson's and Horwitz's work is that theorists of the common law may offer an imperfect understanding of it if they ignore its history, the following two essays – drawn from a recent debate on the role of history in theories of private law – reveal some of the problems which may arise for the contemporary theorist when she draws on history. The instigator of the debate was S.M. Waddams' *Dimensions of Private Law* (2003), some aspects of which are summarized in his essay included here as Chapter 3. Unlike the writers we have discussed so far, Waddams is not particularly worried by the fact that jurists

[4] For another attempt to historicize positivism, see Dyzenhaus (2004).

may ignore the past in constructing conceptual or prescriptive theories of law. Any jurist, Waddams argues, is free to define her terms as she pleases – and thereby to construct a theory of what constitutes contract, tort or unjust enrichment. For instance, a theorist might argue (from a careful analysis of juridical concepts) that 'restitution for wrongs' has nothing to do with the law of 'unjust enrichment'. Insofar as such a statement is a logical conclusion from certain premises, it cannot be contradicted as a theory. However, jurists often construct theories which 'include or imply actual assertions about the past' (p. 63), and which claim at the same time to be descriptive of what was decided in past cases, where judges may in fact have articulated any number of different reasons for their decision. Waddams is troubled by jurists who argue that past cases when 'properly understood' – that is, when understood in light of the theory they are advancing – support the theory of law being proposed: 'Proposed accounts of Anglo-American law have usually been in part derived from and in part imposed upon historical materials, the reader being invited to understand the past in light of the account, and then to apply the account to past, present, and future as a universal criterion of right judgment' (Waddams, 2003, p. 22). In his view, one needs to distinguish between conceptual analysis and historical inquiry: 'historical enquiry alone cannot tell us what kinds of legal rules might be logical, elegant, or otherwise desirable, and neither conceptual analysis nor aspirations for the future can supply an account of the past' (p. 82).

If we want to make claims about the past, we need to respect the evidence. This is why Waddams is so critical of some attempts at the mapping and classification of private law: to the extent that these are claims about the past, they do not respect the evidence. The evidence shows private law to be in a considerably messier, often unresolved and unstable, state than mapping or classification would have us believe. Conceptual maps of the law are neither stable nor timeless – they are themselves contingent and change over time. Detailed analysis of certain cases – cases that were not initially important, but which became so over time – reveals, for instance, that many categories are in play simultaneously, operating concurrently and cumulatively to justify a particular resolution of the case (see, for example, Waddams' analysis of the Johanna Wagner opera cases; Waddams, 2003, ch. 2). Others working at the intersection of legal theory and legal history have recognized the importance of this characterization of common law reasoning. For example, according to Geoffrey Samuel (reviewing Waddams, 2003), what Waddams does is devise the need for an analysis that shows the complexity of the common law – its 'three-dimensionality', as he puts it (Samuel, 2005, p. 292). Not only does Waddams display the need for that analysis – he also gives us some of the tools to analyse with, especially by virtue of his notion of concurrent and cumulative reasoning. As Samuel summarizes it: 'It is in the nature of common law reasoning to have recourse to a whole range of describers, to intermix them; and common lawyers do this because facts are so complex and their analysis requires the interaction of describers … for example, contract can have an important role in cases that are not necessarily contract cases' (2005, p. 284).

Waddams' argument that historical cases cannot be used as authority to support modern conceptual apparatuses which would have meant nothing to those who decided the cases is robustly challenged by Allan Beever and Charles Rickett in a review essay republished here as Chapter 4. They regard Waddams' work as the fullest statement of an argument which they say is 'based on a significant and widespread error that must be identified and eliminated'

(p. 83).[5] Beever and Rickett reject Waddams' argument that one must distinguish between the descriptive and the prescriptive, arguing that he has failed to recognize the role for a particular kind of theorizing about law, namely 'interpretative legal theory' (see pp. 84–85). The aim of this approach is to find the theory which best explains the existing case law, thereby uncovering an intelligible order in law. For example, an interpretive theorist seeking to understand the doctrine of negligent misrepresentation will seek to identify the theory which has the best explanatory power 'consistent with the general structure of private law' (p. 86). They claim that the explanatory model they have identified for this area of the law 'is the right view of the past, despite the fact that judges have thought otherwise, and that it will be the right view in the future as long as the scope of liability for negligent misrepresentation remains roughly as it is presently is' (p. 87).[6]

However, according to Beever and Rickett, this does not involve making historical claims or claims properly criticizable by historians: 'we are not', they state, 'attempting to rewrite history so that it fits our theory' – but at the same time 'nor are we allowing history to determine how we interpret the law' (p. 86). Further, the interpretive legal theorist 'does not try to interpret the judges' actual intentions, but to determine what their intentions should have been' (p. 87). An interpretative legal theorist analyses the law in order 'to provide a better legal understanding of the law so that the routine appeal to policy is not necessary' (p. 99). Moreover, unlike Waddams, they believe that it is possible 'to illuminate the law's fundamental and enduring structure' (p. 92). Indeed, the process of identifying its general structure may lead interpretive legal theory to call for changes in positive law. For if history provides theory with the latter's 'starting point', the 'legal theorist does and must go beyond this starting point', engaging a 'process of reflective equilibrium' (p. 97):

> The theorist begins with what appear to be salient features of the case law. She then attempts to produce a theory that explains these features. In doing so, she may discover that some of what appeared at the outset to be salient features of the law conflict with her theory. When this occurs, the theorist has a choice. She could revise her theory, or she could decide that the relevant feature of the positive law that conflicts with her theory is erroneous and should therefore be rejected. (p. 88)

Beever and Rickett argue that interpretative legal theory 'is perfectly compatible with the quite different, and also important, attempt to understand legal concepts in terms of their origin and development'. Indeed, in their view 'Legal history and interpretive legal theory are not in competition; they are partners in developing our (clearer and better) understanding of private law' (p. 91). On the other hand, they clearly set up a hierarchy: as noted above, they see legal history as setting the scene for the work of legal theory. And, more strongly: 'History is objectionable *qua* legal theory, and it is legal theory, not legal history, that lies at the heart of lawyering' (p. 98).

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[5] Some have called this critique of Waddams 'unfair' (see Hedley, 2008, p. 211).

[6] It may be interesting to ask here in what sense Beever and Rickett think they are proposing 'the right view of *the past*' (emphasis added)? After all this seems to be a different sort of claim from one about how best to interpret the law in the future: a simplification, say, in the manner of generalizing from particular cases to certain principles, advocating they guide adjudication in such-and-such an area (see p. 94).

Beever and Rickett thus defend the project of obtaining a theory of private law for present purposes from a reinterpretation of past cases. It might be argued (especially in light of some of the other contributions to this volume, such as Ibbetson's) that common lawyers have always engaged in creative reinterpretation of past cases in order to make them fit present purposes. Lawyers striving for a coherent understanding of legal doctrine to apply to present cases have surely always been open to the charge of misinterpreting the past cases they need to rely on as authority. However, one might also argue that each generation of lawyers – and perhaps different lawyers within each generation – may do this differently. This might pose a challenge to Beever and Rickett's view that there is an underlying intelligibility which is somehow timeless. Their method also raises some interesting theoretical questions on the nature of the boundary between the descriptive and the prescriptive. The jurist reinterpreting a past case is in effect identifying what the judge in the case should have said (rather than what he did say). But insofar as the law from the case derives from the judge's actual pronouncements, the case itself cannot be seen as authority for the reinterpreted proposition of law. Rather, it is the set of facts which offers the jurist a retrospective opportunity to have 'another go' at identifying what would be a better ratio for the case. By that token, the interpretive jurist is being prescriptive, identifying what the law should have been, rather than descriptive. But, as Jeremy Bentham famously pointed out, the common law itself, composed of an endless array of individual cases whose particular decision was addressed only to the parties, existed nowhere but in the mind of the interpreter, who was in effect speculating on what the outcome of the next decision might be.

Reconstructing the Thought of the Past

The essays in Part II explore the place of theory in the history of the common law in more detail. A number of them explore the question of what lawyers and jurists in the past thought the common law was, and how the historian can come to understand those thoughts. The focus of attention in these essays is primarily the history of legal ideas and legal doctrines – what is sometimes called 'internal' legal history – rather than the 'external' social, economic, cultural or political history of law. However, as David Ibbeston demonstrates in Chapter 5, a history that focuses on the 'internal' dimension of law must immediately face the question of 'what we mean by *law*' (p. 104).

According to Ibbetson, the answers offered by contemporary positivism prove singularly unhelpful. Ibbetson identifies 'four difficulties' with applying Hart's model to the past. These are, first, that the further back in time one goes, 'the harder it becomes to identify any Rule of Recognition precise enough to be useful' (p. 104). Second, 'the rule-based model is over-reductivist, ignoring or marginalizing the non rule-based standards that in fact play a very important part in legal thought' (p. 104), this being of particular significance for the legal historian because 'the legal historian has to take into account not simply the rules but also the ideas lying behind the rules, and the doctrinal or conceptual framework joining the rules together' (p. 105). Third, what a focus on rules and such 'abstract phenomena' does not identify are the 'background beliefs generally held within a society', which are often crucial in understanding how 'legal rules are ordered' (p. 105). And, fourth, what the Hartian approach irons out, or at least makes it more difficult to see (let alone find valuable), is the uncertainty, ambiguity and indeterminacy of the law, and in particular the 'conceptual frameworks' via

which it is understood (p. 106). All these are obstacles for the historian, whose account of legal change is obscured by them – the point being that it makes it difficult if not impossible to recognize that 'one of the principal causes of legal change has been the friction between frameworks, or the shift from one framework to another' (p. 106).

To understand the development of law over time, one needs to acknowledge that there are often multiple conceptual frameworks in play at the same time, and that these frameworks are provisional, subject to continuous change and disagreement. As Ibbetson puts it powerfully:

> central to the whole endeavour of the legal historian – at least the historian of the common law – is the recognition that the law is perpetually in a state of flux: not simply in that its rules are repeatedly being changed but that the intellectual structures linking together those rules are always themselves provisional. If we are to think of law not simply as the dots, but as the picture that is obtained when the dots are joined together 'properly', then it is essential for the legal historian to point to the way that the picture is changing, to give at least as much weight to the indeterminacies in the links between the dots as to the fixed rules represented by the dots themselves. (p. 110)

Ibbetson borrowed the simile of legal history being like the children's game of joining numbered dots to form a picture from S.F.C. Milsom, who pointed out that for the historian, unlike the child, 'the dots are not numbered'. Nor did they reveal the broader framework into which the picture fitted, or the assumptions on which it rested. Moreover, Milsom stressed that 'No major proposition in legal history is ever likely to be final, and any single picture must be a personal one' (1981, p. 8).

Milsom's own work, represented in this collection by an essay originally delivered as an Inaugural Lecture at the London School of Economics in May 1965 (Chapter 6), revolutionized the way legal historians saw their subject. In it, he invited and urged historians to get into inside the 'minds of lawyers who advised plaintiffs' (p. 122). To get inside those minds means recreating the immediate and practical environment in which they operated – and thus resisting the temptations of grand plans and visions. A plaintiff's lawyers do not set out to 'make history' – they are trying to solve problems for their clients. As Milsom shows, 'There has been no plan in the development of the common law' – indeed 'the absence of plan has been a condition of progress' (pp. 112–13). Instead, 'each step has involved an intellectual problem to be solved by the application of elementary legal ideas' (p. 113). This involved creativity and flexibility on the part of lawyers. Where novel cases arose which were not covered by established principles and reasoning, lawyers reacted by approaching the question 'with a different set of legal ideas' (p. 113). When the rules of contract were found to yield an unacceptable result, they simply used ideas from tort. This is not to say that lawyers were strategists paving 'the way for a change which is probably beyond imagination' (p. 114). What the historian has to avoid is the wisdom of retrospection, looking back and seeing 'an unbroken line of development', becoming 'beguiled into supposing that the end was aimed at when early steps were taken' (p. 114), there by crediting 'the lawyers with too much vision' (p. 125). Milsom adds that to see the law through the eyes of the lawyer of an earlier age, we need to put aside what we know came afterwards, and work only within the 'framework of elementary legal ideas accommodating the practice of local courts as well as the forms of action available in the king's courts' (p. 128). Only then is there a chance we will not credit lawyers 'with more than human cunning, and less than ordinary sense'. Looking from this

perspective we may understand how the common law had a 'method of development which produces great logical strength in detail and great overall disorder' (p. 128).

Milsom's work has jurisprudential as well as historical significance, for it addresses both the nature of legal reasoning and the nature of legal change. 'Elementary legal ideas' in the hands of lawyers may drive the process of change, as lawyers seek to solve problems for their clients: but the direction in which they are taken, and their consequences for the elegance of wider doctrine, may be haphazard and unpredictable.

One of the lessons of legal history is that there are a variety of ways in which legal doctrine can be articulated and in which it can develop. Judges and jurists can and do make use of a number of different intellectual strategies in response to new problems. Legal reasoning is not monolithic, but adaptive and reactive. The different forms of legal reasoning deployed in facing different doctrinal problems is explored by Michael Lobban in Chapter 7, which looks at the contrasting nature of the development of aspects of the law of contract (insurance contracts) and tort (negligence) in an era of significant legal change. Jurists dealing with the law relating to insurance, he argues, were able by the late eighteenth century to identify the 'first principles' on which the doctrine was founded. He demonstrates that judges and jurists developed a body of law on those foundations by using four different kinds of reasoning, two of which were broadly analytical in nature (and might be described as 'formalist' and 'functionalist'), while two were more normative (invoking moral or policy arguments). Which type of reasoning was used by judges and jurists depended on the nature and context of the problem which the courts faced. By contrast, jurists in this era could not draw on an agreed set of first principles on which to develop a law of negligence: instead, they had to search out underlying principles at the same time as they were responding to new problems generated by social and economic change. These and other differences in the development of the two laws resulted in the employment of different modes of reason.

What Lobban's essay illustrates is the importance, for instance, in constructing a theoretical account of common law reasoning, of paying attention to the variegated levels of development of different areas of the law. We cannot have a general theory of legal reasoning for all times and places: what we do is identify certain modes and devices of legal reasoning that are used, and are useful, in certain moments and not in others. Lobban's models of reasoning are not set up as timeless modes, inevitably and necessarily relied on in legal reasoning – they are rather descriptive of different modes turned to at a particular time in a particular area of development. We reach, once again, that middle-order level of modest generalization – avoiding the Siren Song of universals and the alleged nature or essence of things.

P.G. McHugh's essay on the common law status of the colonies (Chapter 8) also draws attention to the fact that a study of historical cases that seeks to be faithful to the contexts in which they were decided can reveal the inadequacies of retrospective interpretations of those cases for presentist purposes. He points out that much contemporary scholarship on the rights of indigenous populations has focused on the question of whether the colony in question was regarded at common law as a settler colony or as conquered, since (in the view of these scholars) the distinction between them had significant ramifications for the rights of the indigenous peoples (leading some to call for the retrospective reclassification of the common law status of their country). Against this, McHugh argues that the common law status of the colonies is 'one of the reddest herrings in the scholarship of Aboriginal rights' – though it has

been 'constructed and projected back into a past that, when inspected a little more closely, hardly sustains the doctrinal envelope in which it is Whiggishly enclosed' (p. 170).

McHugh's essay commences with some important methodological points which touch on some of the themes we have already discussed. Like Simpson, McHugh notes that the positivist vision of law as a set of imposed rules misunderstands the nature of the early modern common law; like Horwitz, he notes that the language of the common law in this era was part of a much wider political discourse. McHugh thereby provides a criticism of narrowly black-letter, positivistic approaches and their influence on interpretations of legal history. The 'black-letter' view of legal history has, says McHugh, become so reductionist, that 'common lawyers today have scant awareness of the political history of the tradition in which they participate' (p. 167).

McHugh's aim is to restore some of that awareness in the specific instance of indigenous rights in common law colonies. McHugh critiques the contemporary literature that has either argued or assumed that the 'common-law status of a colony' had 'a bearing on native rights' (p. 195). To make this argument or assumption, he says, is 'to Whiggishly impose a contemporary template over the past' – to do this, in turn, is 'to use the past as a source of authority … making it give answers to questions that are not its own' (p. 195). Instead of seeing Aboriginal title for what it is, namely a 'contemporary response to historical principles of Crown conduct', the authors in question repackage the principles 'with a retroactive coherence' (p. 197). This, says McHugh, is not 'properly speaking, an historical' study (p. 195). If one conducts such a study, as McHugh briefly does in this essay, then what we see in the 'history of the development of the common law rules regarding the status of colonies is the absence – or, at least, the marginality – of Aboriginal peoples' (p. 195). Debates over different types of possession in common law colonies 'did not revolve about the status of the native inhabitants, but [was] squarely about the relation of the Crown and its colonizing subjects' (p. 195). McHugh's powerful argument illustrates the dangers if jurists apply a particular kind of theoretical understanding of law to the past – dangers that may in fact make their work un-historical.

What we see here is the yawning gap between legal theories like Hart's positivism and the operation of law in the past, as shown to us by the historian. Perhaps it is this gap that persuades Sir John Baker to assert in Chapter 9 that there is 'no easily describable method, perhaps no method at all apart from the indulgence of curiosity' in the work of legal history (p. 199). Indeed, Baker goes further and suggests that 'there may be some merit' in this absence of a method (p. 199). Insofar as one can speak of a method – or, perhaps better, a beginning point for inquiry – Baker's preference is to 'delve into the available sources first and see what kinds of question they raise or might answer' (p. 199), avoiding the trap of imposing allegedly fundamental questions on the past. Baker takes considerable inspiration from Milsom, and like him, asks us to 'switch our minds over to the same thought processes as the lawyers of the period in which we are working', which means, in part, perceiving 'the limitations which the procedural framework placed on the questions which could be asked at the time and therefore on the questions which can be answered now' (p. 201). The bulk of Baker's essay is taken up by his account of the labours involved in this archaeological stance: the editing, listing and cataloguing of the sources of the legal historian. But he also recognizes that there comes a time when one has to emerge from the archives and, essentially, tell a story, whether that be

in the form of a changing institution or an evolving idea (see p. 208). In an arresting passage, drawing on a metaphor first introduced by Milsom, Baker states that

> The historian, like the lawyer, has to find something above and beyond the sources – a story, a changing institution, or an evolving idea … Let us say that we are faced … with an enormous tea chest full of jumbled jigsaw pieces, without any box lids to guide us in assembling the pictures. We can start by sorting the pieces according to thickness and style, trying to establish how many puzzles there might be: that is the editing stage. We might then make some basic deductions – a lot of sky suggests an outside scene. But most of the pieces are missing. And our pieces of legal history, not being physical objects, can in truth be assembled into a number of different pictures … How do we achieve this? In conformity with my theme, I would suggest that this creative process cannot really be reduced to a describable method. We must have stored in the backs of our minds numerous questions arising from our reading of the secondary literature, from our knowledge of what went on in other periods and places, and above all from the sources themselves. As we uncover more evidence, and try to sift out what is useful, we are simultaneously relating it to our older questions and formulating new ones, until now and again we see enough light to propose some answers. We never produce final answers, but we help to take the general understanding forward. It is a collective exercise … I therefore think of most historical work as continual revision. (pp. 208–209)

What the theorist might say in response to this is that he or she is trained in precisely reflecting on those 'questions' that Baker suggests are 'stored in the backs of our minds'. In other words, the theorist brings those questions to the foreground. The history of legal theory could be seen to be a history of the kinds of questions one may want to ask about law,[7] including its most particular and messy archival fruits. Of course, this is not to say that the questions legal theory examines are themselves available *a priori* – they come no doubt, from experiences of law that theorists have 'stored in the backs of their minds'. What a collaboration between legal theory and legal history promises, then, is a more rigorous reflective equilibrium between questions and experiences.[8]

The Promise of History for Jurisprudence

Part III turns to the question of whether history can offer a theory of law, or whether there can be such an enterprise as historical jurisprudence. Is history a helpmate or test-bed for

[7] See also Baker (2000), in which Baker asks some of those questions (by way of reflecting on 'what is law for the purposes of history'): 'Is the law what courts do; or what they say, or think, they do? Or is it what lawyers predict that courts would, or might, do if a question were pressed upon them tomorrow, preferably with the benefit of their own arguments? Or is it what courts ought to do, in the opinion of the best legal minds of the day …? Is the law as found in written legal authorities different from professional practices and understandings which are not written down? These are questions not merely for abstract philosophers, because they affect what we study and teach in law schools, and what we write about in law books' (2000, p. 66).

[8] As Michael Lobban recently put it: 'Perhaps the richest kind of legal history now done is that done by those scholars who undertake deep archival research, which seeks to answer historical questions, but whose subject matter makes us rethink familiar legal and jurisprudential subjects. One recent example of this is Paul Halliday' (2012, p. 28). Lobban here has in mind Halliday's *Habeas Corpus: From England to Empire* (2012).