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Clio at the Bar: A Guide to Historical Method for Legists and Jurists

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> [I]t is often exceedingly difficult to plumb the original understanding of an ancient text. Properly done, the task requires the consideration of an enormous mass of material—in the case of the Constitution and its Amendments, for example, to mention only one element, the records of the ratifying debates in all the states. Even beyond that, it requires an evaluation of the reliability of that material—many of the reports of the ratifying debates, for example, are thought to be quite unreliable. And further still, it requires immersing oneself in the political and intellectual atmosphere of the time—somehow placing out of mind knowledge that we have which an earlier age did not, and putting on beliefs, attitudes, philosophies, prejudices and loyalties that are not those of our day. It is, in short, a task sometimes better suited to the historian than the lawyer.[1]

"Judges often are not thorough or objective historians."[2]

INTRODUCTION

A. THE GROWTH OF, AND PROBLEMS WITH, USE OF HISTORICAL METHOD IN THE LAW

In 1881 Oliver Wendell Holmes, Jr., penned what must be one of the most widely quoted aphorisms of American legal writing. "The life of the law," he wrote, "has not been logic: it has been experience."[3] When Holmes wrote this, he was reacting in part to the logical approach of Christopher Columbus Langdell;[4] a decade earlier, Langdell had instituted the case method of study at Harvard Law School, writing the first case-

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1. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856-57 (1989).

2. Robert H. Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 6 (1945).

3. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (Boston, Little Brown and Company 1881). Holmes also wrote, much later, that in a particular context "a page of history is worth a volume of logic." New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921). One may see an identification of experience with history in these two passages. Logic, having its basis in inference, in concluding that certain facts beyond our experience must exist, differs from history, which (despite its use of logic and inference) has its basis in experienced fact. For a further discussion of the essentials of history, see *infra* notes 91-107 and accompanying text.

4. *See* Book Note, 14 AM. L. REV. 233, 234 (1880) (reviewing C.C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS, WITH A SUMMARY OF THE TOPICS COVERED BY THE CASES (2d ed. 1879) and containing the above maxim of Holmes's). "Mr. Langdell's ideal in the law," wrote Holmes in this review, "the end of all his striving, is the *elegantia juris*, or *logical* integrity of the system as a system." *Id.* To this, Holmes responded that experience, and not logic, was "the life of the law." *Id.*

book and characterizing the law as a science in its preface.[5] Holmes conceded that the case method had merit,[6] but he obviously thought that law was not the science that Langdell claimed it to be. In subsequent years others took up his cry that the law had something to learn from disciplines such as history.[7]

As a source of legal authority, however, history suffered a handicap. Lawyers[8] and judges[9] had often relied on historical arguments, but before Holmes's day, few, if any, professional historians in the modern sense were to be found in America, and what today's researcher would call scholarly history was almost nonexistent.[10] Even as Holmes wrote his celebrated phrase, though, these conditions were changing. Spawned by such figures as Henry Adams[11] and J. Franklin Jameson,[12] the

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5. *See* LANGDELL, *supra* note 4, at viii. In 1886 Langdell spelled out his belief

> that law is a science, and that all the available materials of that science are contained in printed books. If law be not a science, a university will consult its own dignity in declining to teach it. If it be not a science, it is a species of handicraft, and may best be learned by serving an apprenticeship to one who practices it.

C.C. Langdell, Address at the "Quarter-Millennial" Celebration of Harvard University (Nov. 5, 1887), *in* 3 LAW Q. REV. 118, 124 (1887) [hereinafter Langdell Address].

6. *See* ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S, at 62-63 (1983).

7. *See* HENRY STEELE COMMAGER, THE AMERICAN MIND: AN INTERPRETATION OF AMERICAN THOUGHT AND CHARACTER SINCE THE 1880S ch. 18 (1950).

8. *See, e.g.*, Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 584-88 (1819) (consisting of attorney Daniel Webster's argument on behalf of the college by analogy to events in English history).

9. *See, e.g.*, M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 401-05 (1819) (discussing briefly the history of the Philadelphia Convention as well as that of the incorporation of the Bank of the United States).

10. "Until the last quarter of the nineteenth century," write two noted historiographers, "American history had been written almost exclusively by men who had received no special training as historians .... From this point on, however, the writing of history was dominated by professionally trained scholars educated in the universities of America and Europe." 1 INTERPRETATIONS OF AMERICAN HISTORY 6 (Gerald N. Grob & George Athan Billias eds., 6th ed. 1992). This rise of professional history coincided rather closely with the advent of Christopher Columbus Langdell's scientific approach to the study of law. *See infra* note 238 and accompanying text.

11. *See* JOHN HIGHAM, HISTORY: THE DEVELOPMENT OF HISTORICAL STUDIES IN THE UNITED STATES 12-13 (1965).

12. *See id.* at 6.

American Historical Association came into being in 1884[13] and began publishing the *American Historical Review* in 1895.[14] Adams was in the midst of publishing his massive *History of the United States During the Administrations of Jefferson and Madison*.[15] By the end of the century scores of American scholars had found their way to German universities and seminars, and returned to the United States with the fairy dust of modern scientific principles trailing from them.[16] In short, even as Holmes's nemesis Langdell announced that "law is a science,"[17] so, too, did a new generation of American historians proclaim that the same was true of their newly organized profession.[18]

In the wake of this development, and perhaps to some extent because of it, history became an increasingly important weapon in the arsenal of lawyers and judges. Today, for in-

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13. *See* PETER NOVICK, THAT NOBLE DREAM: THE "OBJECTIVITY QUESTION" AND THE AMERICAN HISTORICAL PROFESSION 21 (1988).

14. *See* THE VARIETIES OF HISTORY 171 (Fritz Stern ed., 2d ed. 1970). The first article in the *American Historical Review* began:

> Many careful students of modern life assert that they discern in society a widespread discontent with the results of historical study as pursued to-day. Assuming this feeling to be well founded, they attribute the supposed feebleness of contemporary historical writing to these causes: an unscientific method, the necessary complexity of the subject, and the incapacity of democracies to develop the imagination, either scientific or literary.

William M. Sloane, *History and Democracy*, 1 AM. HIST. REV. 1, 1 (photo. reprint 1963) (London, MacMillan 1895). Though Sloane disputed the assertions in the above passage, if we substitute "traditional legal education" for "democracies," these assertions deserve the legist/historian's careful consideration. The objective of the current work is to help remedy this state of affairs.

15. HENRY ADAMS, HISTORY OF THE UNITED STATES DURING THE ADMINISTRATIONS OF JEFFERSON AND MADISON (Antiquarian Press, Ltd. 1962) (1891-1896).

16. *See* NOVICK, *supra* note 13, at 21-24. "In Germany, young American students of history found institutions of higher education whose structure and values were totally unlike anything they had known at home. . . . In Germany they found the models that were to inspire a revolution in American higher education: the creation of new universities, like Johns Hopkins, Clark, and Chicago; the transformation of older ones, like Columbia, Harvard, Michigan, and Wisconsin." *Id* at 22. The German method was also, at least in part, responsible for the Langdellian scientific outlook upon the law. *See* STEVENS, *supra* note 6, at 122.

17. Langdell Address, *supra* note 5, at 124.

18. For these new historians, "[a] 'proper' university was a community of investigators, concerned with pursuing their researches while training the next generation of *Gelehrten*; rigorous scholarship, rather than religious or philosophical orthodoxy, was the criterion of academic excellence." NOVICK, *supra* note 13, at 22.

stance, the Supreme Court often invokes history when deciding important cases,[19] and a growing number of attorneys have learned to make historical arguments, drawing ever more heavily on "experience" as much as "logic" in their briefs to the Court.[20] In short, legists' and jurists' use of legal history is

19. *See* CHARLES A. MILLER, THE SUPREME COURT AND THE USES OF HISTORY (1969); William M. Wiecek, *Clio as Hostage: The United States Supreme Court and the Uses of History*, 24 CAL. W. L. REV. 227 (1988); *infra* note 20. Recently, however, the members of the Court have debated whether scholarly history is of any value in the judicial process. In *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), a case involving interpretation of the Eleventh Amendment, Chief Justice Rehnquist, writing for the majority, criticized the dissenters for "disregard[ing] our case law in favor of a theory cobbled together from law review articles and its own version of historical events." *Id.* at 68. Chief Justice Rehnquist concluded that the dissent's "undocumented and highly speculative extralegal explanation of [earlier caselaw] is a disservice to the Court's traditional method of adjudication." *Id.* at 68-69. Since dissenter Justice Souter in fact cited several scholarly sources, *see, e.g.*, *id.* at 103-12 & nn.2, 5 & 8 (Souter, J., dissenting), one must assume that "documentation" consists of only controlling legal authorities, no matter how well-researched and well-presented a scholarly history may be. This tendency to "official" history, in possible disregard of more accurate histories, should disturb both historians and legal scholars.

20. The number of recent sources that take a historical approach to legal topics are far too voluminous to cite here in anything approaching their entirety. The same is true even if we limit our scrutiny to recent years. The few examples that follow merely serve to illustrate the variety of sources and contexts in which historical methods have appeared: Markman v. Westview Instruments, Inc., 517 U.S. 370, 376-84 (1996) (applying the traditional Seventh Amendment "historical test" to determine the extent of the right to a jury trial); Evans v. United States, 504 U.S. 255, 263-64 & n.13, 269-70 (1992) (examining the historical development of the concept of extortion in the common law); *id.* at 278-87 & nn.1-4 (Thomas, J., dissenting) (same); Saint Francis College v. Al-khazraji, 481 U.S. 604, 610-12 (1987) (examining the historical understanding of racial classifications); Brief for Respondent Ruggenberg at 17-20, Antoine v. Byers & Anderson, Inc., 508 U.S. 429 (1993) (No. 91-7604) (discussing the historical treatment of court reporters for purposes of judicial immunity); Brief for Petitioners at 18-24, Auer v. Robbins, 519 U.S. 452 (1997) (No. 95-897) (discussing the historical development of a standard work day); EDWARD A. PURCELL, JR., LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870-1958 (1992); BARBARA J. SHAPIRO, "BEYOND REASONABLE DOUBT" AND "PROBABLE CAUSE": HISTORICAL PERSPECTIVES ON THE ANGLO-AMERICAN LAW OF EVIDENCE (1991); Susan Low Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 DUKE L.J. 561; Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995); John F. Hart, *Colonial Land Use Law and its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252 (1996); James M. O'Fallon, *Marbury*, 44 STAN. L. REV. 219 (1992).

evolving—has evolved—for better or worse, into a significant legal trend.[21]

Today many people busy themselves with the task of writing legal history. Some of these are legal scholars.[22] Others are judges, who turn to historical argument when writing opinions,[23] and attorneys who make historical arguments in their efforts to convince judges of the rightness of their positions.[24] While such arguments do not automatically win the day by virtue of their mere appearance upon the field, the practice of writing and using legal history seems well established.

Professional historians might very well be pleased to see such utilization of their products, as well as their methods, in the legal field. Perhaps, though, a more accurate term than "utilize" is the simpler, and baser, word "use." In the context of litigation, the various actors are using history in order to achieve an objective, whether it be to win a case, to prove a point, or to justify a decision. One can hardly expect detached, unbiased history to appear within the context of such an argument, for though advocates may pay lip service to the truth, their main objective is victory.[25] Whether a detached and unbiased history can ever exist is another question, which most likely appeals more to the legal scholar than to the practicing attorney. But wherever this history appears, whether in a case in which it may directly affect both lives and fortunes, or in legal scholarship, which may indirectly have the same results, a great deal of it may be, quite simply, bad history.[26]

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21. *See* Stephen B. Presser, *Confessions of a Rogue Legal Historian: Killing the Fathers and Finding the Future of the Law's Past*, 4 BENCHMARK 217, 217-19 (1990) (describing the increasing respectability of scholarly legal history during and after the 1970s).

22. *See id.* (describing legal history's improving reputation in the scholarly world).

23. *See supra* note 20.

24. *See supra* note 20.

25. *See supra* note 20; *infra* notes 363-75 and accompanying text.

26. Much of the problem consists, no doubt, in a failure to understand historical methods, historical research tools, or the process of thinking like a historian. The purpose of this article is to help the willing legist address these deficiencies. The larger problem, however, is not that legists are unable to understand and employ these devices, but that they are either unwilling to do so or oblivious to the fact that they often fail to do it. This shortsighted approach has caused the chronic appearance in legal materials of what Alfred H. Kelly once termed "law-office' history," which he described as "the selection of data favorable to the position being advanced without regard to or concern for contradictory data or proper evaluation of the relevance of the data proffered." Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965

In light of how our judicial system operates, this is cause for some concern. A decade ago the noted constitutional historian William M. Wiecek concluded that the United States Supreme Court

> is the only institution in human experience that has the power to *declare* history: that is, to articulate some understanding of the past and then compel the rest of society to conform its behavior to that understanding. No Ministry of State Security, no Thought Police, has ever succeeded in establishing that authority. This power exists irrespective of the degree to which that judicial perception of the past conforms to reality. Even where the Court's history is at odds with the actual past, that judicial history, as absorbed into a decision, and then a doctrine, becomes the progenitor of a rule of law.[27]

Wiecek's remark is something of an overstatement. Societies have often gone to great lengths, through cultural if not political mechanisms, to propagate official versions of history and to squelch accounts that disagree.[28] Lower American courts, too, may also exercise this same power to declare history, albeit to a more limited degree, subject to higher court review. Finally, even the Supreme Court's power in this regard has limits. In his *Dred Scott*[29] opinion, Chief Justice Roger B. Taney stated that at the time of the Constitution's ratification, whites did not consider blacks to be part of the American political community, or, in his infamous phrase, that blacks "had no rights which the white man was bound to respect."[30] This officially-declared history remained in force for a short time, despite Justice Benjamin R. Curtis's demonstration in his dissent that in many ways and places, blacks were part of the late eighteenth century American political community, Taney's official pronouncements notwithstanding.[31] The following decade, in consequence of the terrible war that Taney's opinion had helped to cause, the nation effectively overruled *Dred Scott*, and incidentally Taney's history, by ratifying the Thirteenth

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SUP. CT. REV. 119, 122 n.13. The premise of this article is that in the long run, practicing attorneys who take care to produce a more competent history will be doing the profession and their clients a favor, since they will be better able to defend what they have written. The same goes for legal scholars and judges.

27. Wiecek, *supra* note 19, at 227-28.

28. *See, e.g.*, STEPHEN VELYCHENKO, SHAPING IDENTITY IN EASTERN EUROPE AND RUSSIA: SOVIET-RUSSIAN AND POLISH ACCOUNTS OF UKRANIAN HISTORY, 1914-1991 (1993).

29. Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

30. *Id.* at 407 (Taney, C.J.).

31. *See id.* at 572-76 (Curtis, J., dissenting).

and Fourteenth Amendments.[32] Nevertheless, Wiecek makes an important point. If judges are going to write history, they should strive to do a competent job of it. If advocates are going to deal with precedent that contains history (and they have a lot of it to deal with), or urge a court to adopt their positions based on historical arguments, they had better understand the principles of historical scholarship. If legal scholars are going to analyze cases that include history, they had better know something of the history that they propose to explain.

The sad truth, however, is that despite the increasing mass of legal history in the law reviews, the briefs, and the casebooks, legists often have little knowledge of historical events or patterns, much less a grasp of how to conduct anything approaching sound, methodical historical research. A quarter-century ago, Morton Horwitz wrote accurately, if a bit condescendingly, that "[t]he study of the history of American law inevitably involves the mastery of technical legal doctrine, which . . . seems to have left historians paralyzed with fear."[33] As an example, Horwitz singled out the work of Perry Miller, a leading intellectual historian, on antebellum legal thought. This work, Horwitz complained, "almost never seriously comes to terms with substantive legal doctrine or with forms of legal reasoning";[34] instead, he observed, Miller drew heavily upon "legal rhetoric spun out by lawyers on celebratory or self-congratulatory occasions."[35] Rather surprisingly, Horwitz, who holds a doctorate as well as a law degree, and who has written a good deal of scholarly history, failed to consider the other side of the coin: perhaps those with legal training are likewise ill-equipped to understand the rudiments of the process of historical research and writing. The quality of their products sometimes seems to suggest as much. This may be due to what Mark Tushnet once called the "lawyers as astrophysicists" assumption, the mistaken belief "that the generalist training of lawyers allows any lawyer to read a text on astrophysics over

32. Metaphysically one might say that the Court's official history itself remained official, and that only the legal doctrine it produced changed because of the new amendments' adoption. Anyone who wishes to split this particular hair is welcome to walk into a court today and cite Taney's opinion as authority for any proposition other than that the Supreme Court can and does produce biased, poorly researched history.

33. Morton Horwitz, *The Conservative Tradition in the Writing of American Legal History*, 17 AM. J. LEGAL HIST. 275, 275 (1973) (review essay).

34. *Id.*

35. *Id.*

the weekend and launch a rocket on Monday."[36] On that occasion Tushnet reminded his readers that lawyers would fail to understand the subject of philosophy if they took this sort of approach to it, because philosophy is a technical discipline.[37] So, too, is the study of history. Historical thinking is very different from legal thinking, and the tools of historical research are certainly much more diverse and often considerably harder to use than sources of legal authority. The latter have grown much easier to use than many traditional historical sources because of such expensive but effective organizational devices as West's Key Number System and the structured approach of the *American Law Reports*, not to mention annotated codes, legal encyclopedias, and the full-text retrieval systems Westlaw and Lexis. This disparity in the state of research tools and sources of the two disciplines is a principal reason why accomplished attorneys, judges, and law professors often turn out to be poor amateur historians. Another reason is that the law's emphasis on an analytical approach to the subject is in many ways not just different from, but the antithesis of, a historical approach.[38]

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36. Mark Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307, 1338 n.140 (1979). In a recent book, Laura Kalman, who has had formal training in both law and history, remarks that historians are guilty of the same sort of condescension towards legists that legists hold towards historians. *See* LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 167-68 (1996). Here, though, our concern is with legists' views of historians and not vice versa. The intelligence of legists as a group is probably comparable to that of historians and they should thus be able to think historically and learn the rudiments of historical research. But often one sees signs that few of them take the time or trouble to do so. To continue Tushnet's analogy, some of them seem to endeavor to launch the rocket without even bothering to read the astrophysics textbook. This is probably partly because they lack the time to gain the necessary skills, or they do not see the extent of the need to do so. Another reason may be that they do not realize that historical research has a technical dimension to it. The availability of "popular" histories at the neighborhood bookstore, whether they are of high or low quality, helps to obscure the fact that a more demanding scholarly world of history, with very different standards, exists. A related reason may be that popular historians' widespread use of the straightforward language of narrative to communicate their research results obscures the more technical aspects of historical thought and method. Finally, the fragmented state of historical methodology has prevented history in the last generation or two from presenting a unified face and cohesive standards to the world, thus denying any sort of authoritative guidance to legists, or for that matter to anyone else.

37. *See* Tushnet, *supra* note 36, at 1338 n.140

38. In simplistic terms, the latter holds that one may best understand an institution by viewing its development over time, that is, by understanding

Yet the historian should not be too quick to condemn. Historians themselves have often had their agendas, be they conscious or unconscious results of the times in which they wrote.[39] Bad history may, theoretically, mislead future readers, and if it should appear in court opinions, the obvious dangers are greater.[40] The slices of history gracing the pages of reporters, however, are usually small ones, addressing particular points of fact or law; indeed, they may touch upon only a certain aspect of legislative history or an empirical fact verifiable with relative ease. One who came across such an account and wished to locate a more in-depth history would probably soon find her way into the works of the professional historians, which might rectify the misperceptions that the court's "official" history had produced. On the other hand, it might not, and even if it did, the official history might already have done damage, if only to a losing party in the case at hand. In order to avoid such outcomes, legists and jurists should strive to develop at least some knowledge of history and historical method.

From whence can legists derive such knowledge? Perhaps from their undergraduate history courses? After all, a fair number of law students, and hence lawyers and judges, were history majors, or at least took a required history course or two.[41] Such an idea, however, presumes a great deal, much of

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how it came to be; the former sees passage of time as irrelevant. *See* WILLIAM L. REESE, DICTIONARY OF PHILOSOPHY AND RELIGION 225, 226 (1980) (defining the term "history"). The latter approach certainly works with, for example, laws of physics; the law of gravitation seems a constant throughout time, though our knowledge of it may change. This is much the sort of approach to law that Langdell and many others of his generation took. The fact that they eschewed use of dates in legal citations emphasizes their view that common law principles were eternally valid. These days, of course, our outlook has changed, as has the approved citation style, coming as it has to include the dates of authorities.

39. *See infra* notes 234-86 and accompanying text.

40. *See, e.g.*, Scott v. Sandford, 60 U.S. (19 How.) 393, 410-20 (1857) (discussing the history of blacks' legal status in the early United States and concluding that the law had never considered them to be citizens); *cf. id.* at 572-76 (Curtis, J., dissenting) (concluding the opposite based upon his own historical research).

41. Actually, the number of law students who majored in history as undergraduates is rather small, at least according to the author's own unscientific study. An examination of data for the entering classes at the University of North Carolina School of Law for the past several years indicates that roughly only one in ten law students during this period were history majors.

which is self evident. (The reader here, to test this proposition, may ask herself whether she remembers enough of the methods of her undergraduate history course to feel comfortable instructing others in some aspect of the subject, which is effectively what she is doing when she incorporates historical discussions into her work.) With legal history courses now common in law schools, perhaps one can draw upon them for background. Such courses, however, share at least two flaws with undergraduate courses in terms of preparing an attorney, law professor, or judge to write legal history. First, all too often, these courses are not about history. Instead, they are about law (in the law school's case) or politics or social studies or civics (in the undergraduate institution's case). For example, the traditional American history survey course, which one finds in colleges nationwide,[42] usually covers the same topics, at least to judge by several popular texts. These books include topics such as the colonial period, the American Revolution, the writing of the Constitution, the War of 1812, the growth of slavery, the Civil War and Reconstruction.[43]

CLASS ENTERING YEAR	NUMBER OF STUDENTS IN CLASS	NUMBER OF STUDENTS MAJORING IN HISTORY	PERCENT OF CLASS MAJORING IN HISTORY
1987	243	34	13.9
1988	228	15	6.5
1989	253	29	11.4
1990	223	9	4
1991	235	17	7.2
1992	244	25	10.2
1993	249	32	12.8
1994	235	34	14.4
1995	234	28	11.9
TOTAL	2144	223	10.25 (AVERAGE)

Chart compiled from statistics on file with the Office of Admissions, University of North Carolina School of Law, Chapel Hill, N.C.

42. *See, e.g.*, BULLETIN OF DUKE UNIVERSITY 1994-95: UNDERGRADUATE INSTRUCTION 235; HARVARD COLLEGE ET AL., COURSES OF INSTRUCTION 1994-95, at 402; PRINCETON UNIVERSITY UNDERGRADUATE ANNOUNCEMENT 1994-95, at 182.

43. *See, e.g.*, 1 BERNARD BAILYN ET AL., THE GREAT REPUBLIC: A HISTORY OF THE AMERICAN PEOPLE at xiii-xviii (4th ed. 1992); 2 *id.* at xiii-xvii; JOSEPH R. CONLIN, THE AMERICAN PAST: A BRIEF HISTORY at vii-ix (1991); JOHN A. GARRATY, THE AMERICAN NATION: A HISTORY OF THE UNITED STATES at vii-xvii (7th ed. 1991); GARY B. NASH ET AL., THE AMERICAN PEOPLE: CREATING A NATION AND A SOCIETY at xi-xix (brief ed. 1992); 1 GEORGE BROWN TINDALL, AMERICA: A NARRATIVE HISTORY at vii-xi (3d ed. 1992); 2 *id.* at v-ix.

Many of these subjects—perhaps all of them—can be, and have been, of great importance to the legal profession. One need only think of the Supreme Court's myriad references to the Philadelphia Convention,[44] or the drafting of the Fourteenth Amendment,[45] to see the relevance of some of the above topics. But to repeat the above criticism, these topics themselves are not history. Instead, as they appear in the introductory textbooks, they are merely the subjects of historical study, the foci of a particular epistemological method or group of methods that we call historical inquiry. History is not a subject any more than "health care" is some human organ, or any more than "law" in its collective sense is about a particular case or statute.[46] The process of historical inquiry can be at least as demanding as any legal method, but one suspects that few lawyers and legal scholars[47] have studied it in that degree of depth. Introductory college history courses rarely teach principles of historical method and epistemology. Still more rarely do they teach the philosophy of history,[48] a body of thought that asks not epistemological but ontological questions of the process of historical study.[49] Advanced undergraduates may occasionally get a taste of historiography (a study of the history of the writing of history), but this subject is not generally the focal point of sustained interest or instruction in

44. In a recent work, the author has documented over seven hundred instances in nearly three hundred cases in which the Supreme Court alone has cited *The Federalist*. *See* Buckner F. Melton, Jr., *The Supreme Court and* The Federalist: *A Citation List and Analysis, 1789-1996*, 85 KY. L.J. 243 (1996-97). While *The Federalist* is a work more of political theory (or perhaps political persuasion), the Court's continued and recently increased interest in the two hundred-year-old essays evince a historical consciousness.

45. One of the better examples of this appears in *Brown v. Board of Education*, 345 U.S. 972, 972 (1953), in which the Court focused its attention during the case's reargument that year upon (as the Court wrote in its opinion the following year) "the circumstances surrounding the adoption of the Fourteenth Amendment in 1868." Brown v. Bd. of Educ., 347 U.S. 483, 489 (1954). Although finally dismissing the history of the amendment as inconclusive, the Court nevertheless relied on the history of segregation itself in various places throughout the opinion. *See id.* at 489-96 & n.4.

46. For some possible definitions of law, see JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW ch. 4 (2d ed. 1921); Roscoe Pound, *What is A Good Legal Education?*, 19 A.B.A. J. 627, 629 (1933).

47. For the remainder of this article, we shall use the term "legist" to denote both practicing attorneys and legal scholars.

48. *See* HIGHAM, *supra* note 11, at 89.

49. *See* MARK T. GILDERHUS, HISTORY AND HISTORIANS: A HISTORIOGRAPHICAL INTRODUCTION 53 (3d ed. 1996).

American history programs.[50] If this fact is true of those who "consume" history as undergraduates, then how much more true must it be for legal professionals who seek to "produce" it for others in their research, scholarly writing, and even litigation without much more training in the field than the average college student?

B. THE POTENTIAL APPLICATIONS OF HISTORICAL METHOD IN THE FIELD OF LAW

An ignorance of the fields of philosophy of history, historiography, and historical research methodology can handicap the would-be legal historian in more ways than one. We can easily imagine two broad ways, which we might call substantive and procedural in deference to the legal mind, in which a historical approach might enlighten the problems that the legist faces. The substantive advantage is simply this: on many occasions some thorough historical research can reveal crucial facts that make a difference in an attorney's, client's, or lawmaker's understanding of the legal problem at hand, and without which these individuals must resort to abstract theorizing. A famous example appears in *Erie Railroad Co. v. Tompkins*.[51] In the early 1920s, more than fifteen years before *Erie*, Professor Charles Warren discovered a previously unknown draft of the Judiciary Act of 1789.[52] This draft, and the article that Warren wrote about it, helped to convince the Court in *Erie* to change its interpretation of section 34 of the Act—specifically, its pronouncement, ninety-six years earlier in *Swift v. Tyson*,[53] that state judicial opinions were not "rules of decision" within the meaning of this section that bound federal courts deciding questions of state law.[54]

A more mundane example appears in the author's own research a few years ago into the question of the extent of Congress's powers of impeachment.[55] Proceeding on the assump-

50. *See* HIGHAM, *supra* note 11, at 98-101; NOVICK, *supra* note 13, at 594. For a basic discussion of historiography, see *infra* notes 208-86 and accompanying text.

51. 304 U.S. 64 (1938).

52. *See* Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923).

53. 41 U.S. (16 Pet.) 1 (1842).

54. *See Erie*, 304 U.S. at 72-73 & n.5 (discussing Warren's article).

55. *See* Buckner F. Melton, Jr., *Federal Impeachment and Criminal Procedure: The Framers' Intent*, 52 MD. L. REV. 437 (1993).

tion that "original intent" arguments, whatever their current reputation in the scholarly world, might well be of use to the practitioner,[56] he unearthed some two hundred-year-old congressional debates that touched upon those powers. These debates appeared not in the official Senate Journal, but instead in newspapers of the day, and according to all indications, they had remained buried there almost from the day of publication.[57] This research occurred at a time when Congress was either contemplating or conducting a number of impeachments, even as the courts were hearing several impeachment-related cases.[58] While the impact of the work upon these various proceedings is questionable, the United States Senate's Office of Legal Counsel found this research of sufficient worth to merit a citation in an amicus brief in *Nixon v. United States*.[59] Although this work was not particularly original in any conceptual sense, the material on which it drew was both relevant and off the beaten path,[60] at least for those who work principally with legal sources and reference guides.

This sort of method is quite different from traditional legal research. It may well take the legist-turned-historian beyond the civilized, domesticated world of briefs, digests, annotated codes, and other conventional legal sources to which he is accustomed, and into the wilds of archives and manuscript rooms. Compared to the order that one finds in the average law library, these places may seem chaotic and will likely prove unfamiliar territory. But if the prospect of winning a case or working a significant change in the law is truly important, the

56. We will here avoid entering the fray over the merits of originalism, other than to observe that any discipline—including both history and law—that is concerned with the effect of past events on present developments (an apt description of such concepts as legal precedent) can never entirely escape originalism's reach. *See* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 8-9 (1996). For the author's thoughts on the doctrine's worth to legists, see Buckner F. Melton, Jr., *Eminent Domain, "Public Use," and the Conundrum of Original Intent*, 36 NAT. RESOURCES J. 59, 65-68 (1996). For a good one-volume compendium of various statements on the worth of originalism, see INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT (Jack N. Rakove ed., 1990).

57. *See* Melton, *supra* note 55, at 440.

58. For a description of these cases, see *id.* at 438 n.10.

59. Brief for Appellees and Amicus Curiae United States Senate at 43-45 & n.14, Nixon v. United States, 938 F.2d 239 (D.C. Cir. 1991) (No. 90-5246) (discussing and citing Buckner F. Melton, Jr., The First Impeachment: The Constitution's Framers and the Case of Senator William Blount (1990) (unpublished Ph.D. dissertation, Duke University)), *aff'd*, 506 U.S. 224 (1993).

60. *See* Melton, *supra* note 55, at 446 n.65.

legist would be wise to venture into this terra incognita: here indeed be dragons of undiscovered fact, and the legist had best find and domesticate them before opposing counsel tames them to her own hand.[61]

The other advantage a historical approach confers, the procedural or conceptual, is the result not of discovering new substantive material about the past, but instead of how one thinks about available facts, of viewing readily available information with a historian's eye and understanding. In taking this approach, the legist-turned-historian may see in such facts entirely different meanings, or recognize facts that have been before his eyes all along, though he may not have known it. For instance, the legist, by employing historical concepts, may understand the true significance of a particular holding, or comprehend some alternative means of fitting facts within an appropriate legal rule or of distinguishing or analogizing the case, if he examines more of the record than the appellate opinion.[62] This, too, may require research into unfamiliar sources, though not perhaps to the extent discussed above. The more solid one's general knowledge of history, however, the better one is likely to be at employing history in the procedural manner. After all, law exists in a larger cultural context that embraces politics, religion, philosophy, economics, and many other fields of human thought and activity. As the surrounding culture changes, the relevance of the rule may

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61. Although this article cannot provide details on how to conduct this sort of research, Part IV.A provides some very basic advice in this department, so that the legist will not be completely without armament in this unfamiliar territory.

62. *See* Warren E. Burger, *The Future of Legal Education*, STUDENT LAW. J., Jan. 15, 1970, at 18 (emphasizing and lamenting the fact that casebooks usually contain not entire cases, but appellate opinions). Writes Burger:

> The Langdell method should not have been described as the "case" method of study. It should have been called the *opinion* method or the *appellate* method.
>
> This is very important because students thought they were dealing with *cases* when they were really dealing with *opinions* and *appeals*, and there is an enormous difference. The difference is illustrated in part by the truism, which I accept, that almost any good lawyer can make a passable appellate judge but only a few can make good trial judges. One of the weaknesses of much of today's legal teaching is that it inadequately prepares students to deal with raw facts and real life problems. In appellate opinions the facts have been determined even though they may be challenged, but in the trial courts the facts are usually "the whole ball game."

Id. at 20.

change,[63] though uncritical generations of lawyers and scholars may cling to that rule out of inertia or even ignorance. In such a circumstance, the scholar or advocate whose cause would benefit from a change in the law will do well to expose the historical underpinnings of the existing rule, in order to show that time has damaged or even destroyed them.

To do this competently, however, an attorney must have more than an undergraduate's understanding of historical method. Words may mean very different things, for instance, depending upon when a speaker utters them. When James Otis said in 1761 that "AN ACT AGAINST THE CONSTITUTION IS VOID,"[64] he referred to the British Constitution, and his appeal was largely to reason and principles of natural justice. When John Marshall wrote almost exactly the same phrase a generation later,[65] he spoke not of natural law but of positive law, a written document, the United States Constitution. This simple fact means that the two statements had meanings that were almost diametrically opposed, not because of wording but because of context. Context, we thus see, is an element that is crucial to the understanding of what the speaker (or writer) meant. If one ignores the time that passed between the two occasions, and the circumstances that changed with time, then one cannot grasp the change in meaning.

An even more telling example of this phenomenon is apparent when we consider the early case of *Bayard v. Singleton*,[66] which some have cited as the first real instance of judicial review of legislation to occur in the United States. During the proceedings, the court had occasion to make "a few obser-

63. As the words of the hymn go, "Time makes ancient good uncouth." Thomas John Williams, *Once to Every Man and Nation*, *in* THE HYMNAL OF THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA 519 (1940). In legal parlance, "Cessante ratione legis, cessat et ipsa lex." *Cf.* 2 WILLIAM BLACKSTONE, COMMENTARIES *390-91.

64. MASS. SPY, Apr. 29, 1773, at 3, cols. 1-3, *reprinted in* STEPHEN B. PRESSER & JAMIL S. ZAINALDIN, LAW AND JURISPRUDENCE IN AMERICAN HISTORY 64 (3d ed. 1995).

65. "[A]n act of the legislature, repugnant to the Constitution, is void." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

66. The reader who has glanced at this footnote after reading the case name in search of the identity of the court that heard and decided this case deserves commendation for thinking like a lawyer; if he has looked here in search of the year of its decision, he merits congratulations for thinking like a historian. The absence of the usual citation information should indicate to the astute that not all in this particular passage is as it likely seems.

vations on our Constitution and system of government." What followed was a good, clear account of the events that came in the wake of the American Revolution:

> [A]t the time of our separation from Great Britain we were thrown into a similar situation with a set of people ship-wrecked and cast on a maroon'd island—without laws, without magistrates, without government, or any legal authority—that being thus circumstanced, the people of this country, with a general union of sentiment, by their delegates, met in Congress, and formed that system of those fundamental principles comprised in the constitution, dividing the powers of government into separate and distinct branches, to wit: the legislative, the judicial, and executive, and assigning to each several and distinct powers, and prescribing their several limits and boundaries ....

To the modern reader nothing is remarkable about this passage. The reader who lacks a historical mindset may still see little of interest in it even after examining the case's citation, which the author has deliberately omitted until now.[67] *Bayard* is a 1787 case; if the significance of that date is lost on the reader, then at this point he should recall that the present federal Constitution, though drafted that same year, was not yet in force. The North Carolina state court (no federal courts then existed, of course) that issued this statement in *Bayard* was speaking of the state, and not the nation. The "country" to which it referred was North Carolina; the "Constitution" it mentioned was the state constitution; the congress was neither the federal nor the Continental Congress, but North Carolina's Fifth Provincial Congress of 1776. The simple expedient of checking the date would have revealed these meanings, either directly to a person having a particular historical knowledge of these things, or indirectly to anyone who realized from the case's date that the *Bayard* court could not have been discussing the federal government. On at least one recorded occasion, however, a misreading of the *Bayard* opinion, because of a failure to read the opinion with a historian's eye, has appeared in the reports.[68]

As the *Bayard* example illustrates, the date that appears within a citation can provide a great deal of context, but only to one who reads it with a historian's eye.[69] To one who does so,

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67. Bayard v. Singleton, 1 N.C. (Mart.) 5, 5-6 (1787).

68. *See* State *ex rel.* Wallace v. Bone, 286 S.E.2d 79, 84 (N.C. 1982); John V. Orth, *"Forever Separate and Distinct": Separation of Powers in North Carolina*, 62 N.C. L. REV. 1, 7-8 (1983).

69. In Langdell's time, case citations omitted dates, perhaps because of the profession's belief that principles of law were immutable in the manner of

this context can become a valuable ally in proving the continued relevance of a particular rule of law, or conversely, in discrediting the authority of the case altogether in light of vast changes in political, economic, social, or other conditions in the years since its decision.

Even when operating within a narrower legal world, however, with less extraneous knowledge, taking a historical view of legal sources may result in an understanding of those sources' meaning very different from that which one gains at first glance. In a recent article, for instance, John V. Orth has revisited two property cases that first year law students around the country study and compare.[70] The two cases, *Russell v. Hill*[71] and *Anderson v. Gouldberg*,[72] both date from the late nineteenth century and are remarkably similar in their facts, but they reach contrary results.[73] *Russell* involved a plaintiff landowner's claim against the defendant for the value of logs that the defendant had removed from the plaintiff's land without the plaintiff's permission.[74] *Anderson* involved a suit by plaintiffs (who had cut several trees without the landowners' permission) against the defendants (who had taken the logs from plaintiffs) to recover the possession or the value of the logs.[75] The *Russell* court held that a plaintiff who charges a defendant with wrongful possession of chattels must himself show that he has title to the property in question.[76] *Anderson*, on the other hand, held that such a showing was unnecessary.[77] The *Anderson* opinion culminated in a dire warning of

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laws of nature. *See, e.g.*, LANGDELL, *supra* note 4, *passim*. Recent generations' inclusion of dates in citations of most materials perhaps indicates an increasing historical consciousness on the part of legists. But merely including the date in a citation does little to enable the researcher to take full advantage of a historical outlook. Instead she must use the date as a starting point for more thorough investigation.

70. *See* John V. Orth, Russell v. Hill (N.C. 1899) *Misunderstood Lessons*, 73 N.C. L. REV. 2031, 2031-32 & n.3 (1995).

71. 34 S.E. 640 (N.C. 1899).

72. 53 N.W. 636 (Minn. 1892).

73. *See* Orth, *supra* note 70, at 2032.

74. *See Russell*, 34 S.E. at 640.

75. *See* Anderson v. Gouldberg, 51 Minn. 294, 294 (1892) (reporting a statement of the facts that the Northwestern Reporter omits).

76. *See Russell*, 34 S.E. at 640.

77. *See Anderson*, 51 Minn. at 295-96. According to the legal community, or at least to the traditional position of property teachers, the *Anderson* court decided "correctly." Orth, *supra* note 70, at 2031-32; *see id.* at 2055-58 (recounting legal scholars' reactions to the cases).

the havoc that departure from its approach would wreak: "Any other rule would lead to an endless series of unlawful seizures and reprisals in every case where property had once passed out of the possession of the rightful owner."[78]

The traditional use of this pairing of cases is policy-oriented, focusing on the danger of endless reprisals as sufficient reason for adopting the opposite rule.[79] But Orth points out that this policy discussion, while at first blush seeming to be of some importance, is actually irrelevant; the parade of horribles that the Minnesota court predicted would flow from a *Russell*-style holding of the sort that North Carolina has followed now for very nearly a century simply has not occurred.[80] The true worth of these cases, Orth argues, lies in the technical aspects of the case that the published appellate opinions fail to reveal. He maintains that the *Russell* opinion reflected a preoccupation with common law forms of action that had only recently begun to recede in the South, and that the main concern of the *Russell* court lay with what common law form of action was appropriate given these facts—or, in late twentieth century parlance, "what to prove in order to make a case,"[81] which, Orth maintains, is a more important concern for law students than the sort of "unreal and fantastic speculation" that the *Anderson* opinion contains.[82] The *Anderson* court, on the other hand, was more blatant in its use of policy to reach a decision, and that policy—largely the result of events of the late nineteenth century—was one that valued "security of property above all else."[83]

The above examples reveal the ways that both a knowledge of the past and the knowledge of how to think about the past may help members of the legal community. Legists should be slow to think that they can become experts in Anglo-American history, or some specialized portion of it, in a few weeks or months, or that, indeed, they should do so simply in

78. *Anderson*, 51 Minn. at 296.

79. "In legal pedagogy," writes Orth, "discussion usually centers on the perceived implications for public policy of deciding in favor of defendants: Law students dutifully parrot the lesson that this will lead to 'an endless series of unlawful seizures and reprisals.'" Orth, *supra* note 70, at 2033 (quoting *Anderson*, 51 Minn. at 296).

80. *See id.* at 2033, 2055, 2060.

81. *Id.* at 2060-61.

82. *Id.* at 2057, 2061 (quoting Letter from John Chipman Gray to Editors, *in* 1 YALE L.J. 159, 160 (1892)).

83. *Id.* at 2054.

order to do their chosen job of judging, practicing, or teaching law. They should likewise, on reflection, scoff at the proposal that they can or should become experts in the historical thought process overnight.[84] On many occasions, however, a basic working knowledge of the discipline may prove of great value. The purpose of this article is to allow the interested legist to take his first steps towards developing this knowledge, as well as to suggest resources for more in-depth study should it become desirable or necessary.

C. A SUMMARY OF THE ELEMENTS OF HISTORICAL METHOD

In viewing historical method in macrocosm, rather than in its details, one may choose to categorize the issues that arise in several ways. One good, recent introduction, Mark Gilderhus's *History and Historians*,[85] groups the issues into historiography (that is, the history of historical writing, or, in other words, the historical study of history),[86] speculative philosophy of history (an approach to history that ponders ontological and teleological questions of history, the nature and purposes of chronological development of human institutions),[87] analytic philosophy of history (a study of the validity of the systems of historical epistemology and methodology, or the means of knowing historical truth),[88] and less conceptual, more pragmatic and evidentiary guides to hands-on research.[89] While this is an adequate list of the categories, Gilderhus takes a rather erratic approach to them, dividing historiography, for instance, into three non-contiguous chapters, and failing to consider the proper relationship between these subjects or the order in which a student should confront them. Here we shall borrow Gilderhus's categories, but they will appear in a different and (one hopes) more coherent order. The present section will discuss speculative philosophy of history; it will then proceed on to what Gilderhus terms analytic philosophy of history. The next step will be to apply these abstract concepts by examining how American historical scholarship reflects them. All of the foregoing should help the legist to "think like a historian." The

84. *See supra* notes 33-50 and accompanying text.
85. GILDERHUS, *supra* note 49.
86. *See id.* chs. 1, 2, 7.
87. *See id.* ch. 4.
88. *See id.* ch. 5.
89. *See id.* ch. 6.

following section will build upon the historiographical section by discussing methodological procedures, sources, and resources, with an eye to helping the legist perform historical research. At all points throughout the discussion of these matters, the principal reference will be to legal subjects, although some allusions to other fields appear when they have particular illustrative value.[90]

II. HISTORICAL CONCEPTUALIZATION

A. SPECULATIVE PHILOSOPHY OF HISTORY

A good starting point for our discussion of the nature of history is the definition of the word itself. Greek in origin, the term "history" means "to know" or "to inquire."[91] Its meaning thus resembles that of the Latin word "science";[92] thus, also, the phrase "historical inquiry" is redundant, for if definitions dictate meaning, then history, or at least the historical method, *is* inquiry. Nevertheless, "historical inquiry" remains a term of common use.

The commonality of this phrase notwithstanding, many scholars have striven to distinguish history from science[93] despite (or perhaps because of) the two words' etymological similarity. They have argued, to a greater or lesser extent, that history is quite different from the natural sciences, and that analogies between the two are misleading and improper. Nevertheless, one of the defining characteristics of post-Enlightenment historical scholarship is its employment of the

90. This article is necessarily a basic—a very basic—introduction to very complex subjects. The author asks the forbearance of his audience, and he hopes that historians will not accuse him of being too shallow, and that legists will not think him to be condescending. Any failings of this article are probably the result of the author's residing close to the scholarly border, so to speak, between law and history.

91. 7 OXFORD ENGLISH DICTIONARY 261 (2d ed. 1989).

92. *See* 14 *id.* at 648.

93. *See, e.g.*, G.R. ELTON, THE PRACTICE OF HISTORY 1, 5 n.2 (1967) (observing that modern civilization "rests upon the two intellectual pillars of natural science and analytical history" and noting that history is partly science, but that it has been so for only the last couple of centuries); LOUIS GOTTSCHALK, UNDERSTANDING HISTORY: A PRIMER OF HISTORICAL METHOD 8-9 (2d ed. 1969) (arguing that historical research methods may be scientific but that the end result of historical research is not); MAURICE MANDELBAUM, THE ANATOMY OF HISTORICAL KNOWLEDGE 122-23 (1977) (arguing that historical generalizations are much less exact than those of "any advanced science").

scientific method as a means of gaining legitimacy.[94] The result of these two conflicting views has been an uneasy relationship between history on the one hand and the natural sciences on the other. Some historians, applying the scientific method to historical study, have argued that history resembles the natural sciences, not only in methodology, but also in its attempt to prove (or at least its assumption of) the existence of certain natural laws.[95] In history's case, though, the laws in question are laws of human behavior rather than laws of physics, chemistry, or biology.

But whatever claim that historians make that history is a science, certain things still distinguish it from the natural sciences. One major distinction, for instance, is history's temporal organization. While time plays an important role in the natural sciences, it is the key organizing theme in history. Indeed, the common understanding of the word "history" is hopelessly bound up with the notion of time: history is principally the study of events that have taken place in our past. One might feel the temptation to say the same of the natural sciences; a physicist or a chemist, in a temporal progression of events, first carries out an experiment, then observes the result, and finally records that result. By the time he records the event or studies its record, that event, like historical events, has already receded into the past. But a premise of the natural sciences is that a law of nature will hold true in the present and future as well as in the past, thus making it independent of time.[96] According to this view, the passage of time has no impact on the essence or universality of scientific truth. Laws of nature do not develop, do not change; they simply are.[97] As such, they are the epitome of an ahistorical, temporally independent reality. Human understanding of these laws, and

94. Fritz Stern traces the beginning of this trend to Voltaire. *See* THE VARIETIES OF HISTORY, *supra* note 14, at 35. See also NOVICK, *supra* note 13, at 25-41 for a discussion of American historians' strong devotion to a scientific view of history beginning in the late nineteenth century.

95. *See, e.g.*, 1 HENRY THOMAS BUCKLE, HISTORY OF CIVILIZATION IN ENGLAND ch. 2 (1858).

96. *See* 16 MCGRAW-HILL ENCYCLOPEDIA OF SCIENCE & TECHNOLOGY 109-11 (6th ed. 1987). For a more in-depth discussion, see BARRY GOWER, SCIENTIFIC METHOD: AN HISTORICAL AND PHILOSOPHICAL INTRODUCTION (1997).

97. Theoretical physicists postulate that the natural laws of our observable universe may not be universal; for instance, they may not hold true in black holes. For a popular explanation of this theory, see STEPHEN W. HAWKING, A BRIEF HISTORY OF TIME 88 (1988).

thus the behavior of the universe that is subject to them, may change; the laws themselves do not, making the passage of time irrelevant to their essence. Thus, the scientist's experiment describes equally well, and may just as well happen in, the past, the present, or the future.[98]

History is another matter. The particulars of human activity change with time, just as the particular atoms of oxygen in a physicist's bell jar vary from experiment to experiment, and so what has gone before may say little about what is, or is to come. Oxygen atoms tend to behave alike, as long as the scientist introduces no new variables, with experiment after experiment producing the same result. History, in contrast, has only one Napoleon Bonaparte, and he invaded Russia only once.[99] (Indeed, once was more than enough for him.)

Whether a general rule of causation can explain discrete but similar events, thus transcending time, however, is debatable. Hitler, too, invaded Russia; one can recall what followed each invasion and say either that a general rule governs invasions of Russia in past, present, and presumably future (in that the invader loses) or that no general rule applies (in that sometimes the invader takes Moscow and sometimes he does not). The question of the existence of such generalities is a major one in the philosophy of history, and we shall examine it more thoroughly below.[100]

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98. David Hume and his philosophical heirs would disagree; Hume argued that laws of nature have no reality, being only the product of inference based on physical phenomena. *See* David Hume, *Of the Idea of Power or Necessary Connexion*, *in* PHILOSOPHICAL ESSAYS CONCERNING HUMAN UNDERSTANDING 99 (1748). Nevertheless, scientists continue to proceed as if laws of nature did exist. As Voltaire wrote, "If God did not exist, it would be necessary to create him." Voltaire, Epître à l'Auteur du Livre des Trois Imposteurs 2 (Nov. 10, 1770) (unpublished manuscript on file with the University of Minnesota libraries).

One might also argue that assuming the same conditions hold true in past and future as is the case with scientific experiments, then history too might be atemporal. As to this point, see *infra* notes 146-207 and accompanying text.

99. As one historian has explained:

> Although the scientist is necessarily concerned with particular cases when he formulates and tests his generalizations, the analysis of what happens in any single case of a given type is only incidental to his main purpose, which is to explain all cases of that type. The historian, on the other hand, attempts to explain the particular case, and he uses generalizations only incidentally for this purpose.

MANDELBAUM, *supra* note 93, at 122-23.

100. *See infra* Part II.B.

As a practical matter, however, historians look more at the particular than at the general, even when they argue in support of generalities, for the generalities proceed from particular events, much as legal rules in common law countries proceed from particular cases and fact patterns. Even one who believes in generalities (we shall call him a Positivist, for reasons that shall become apparent below)[101] must at least describe particular historical events as illustrations of the generalities he discusses.[102] To put this another way, historians may or may not write of kingship, but they always write of kings. Historical method employs a language of particulars, and these particulars change with the movement of the clock's hands. Few historians today would hold, as did the English historian Henry Thomas Buckle, that historians could successfully use their studies to predict particular behaviors or events in the future, as science endeavors with some success to do.[103] A major school of historical thought goes even further and argues that each historical event is by definition unique and irreproducible.[104]

But even accepting arguendo the truth of this statement, one may nevertheless admit the importance of the principles of causation in understanding the unfolding of past events. We can thus see that because the passage of time brings about different particulars of human activity, and because historical study cannot escape these particulars, the role of time, including the sharp line between the past on the one hand and the present and future on the other, is central to the nature of historical study.[105]

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101. *See infra* notes 155-58 and accompanying text.

102. For a more detailed discussion of the relationship between cases and legal rules, see *infra* notes 197-207 and accompanying text.

103. *See supra* note 95. Even assuming that laws of human behavior analogous to laws of the natural world exist, the number of variables and the difficulty of observing their operation through historical study makes precise use of them similarly difficult. *See infra* notes 188-95 and accompanying text.

104. *See infra* notes 176-84 and accompanying text.

105. One may, on the other hand, argue that if two events—one past, one present—are very similar, so that the past event provides guidance for those of us who face the present event, then the amount of time that has elapsed is irrelevant, even if it is thousands of years. If we take this view, then time and dates—two things that amateurs see as an inherent part of historical study—are not key parts of that study. This atemporality is a hallmark of the natural sciences, and thus of a school of thought known as Historical Positivism. *See infra* notes 156-71 and accompanying text.

Changing particulars are not the only manifestation of the importance of the concept of time to the discipline; the relationship between these particulars is another important aspect of its centrality. Historians usually speak of these relationships in terms of cause and effect.[106] History, in other words, is not merely the study of past events; it is also the study of the relationships that exist among them. One can coherently express this relationship only in terms of cause and effect. Based upon all of this, we may adopt as a working definition of history the study of particular human events in the past in order to discover causal connections between and among various events, both past and present.[107]

Causation is of crucial importance in historical thought and study.[108] But construction of a historical explanation or narrative by using a causal model is only one of many elements of historical thinking. Another element is an understanding of the nature of both the causal relationships between a few discrete events and of the entire flow of countless events over decades, centuries, or even millennia. One sees little discussion of this metaphysical question in American historical writing.[109] Legal scholars and practitioners who examine the question briefly, however, may find that it helps enlighten their own thinking, writing, and argument in the context of more particular historical inquiries.[110]

Western thought, which has been the dominant shaping force in American historical writing, has been the source of three principal concepts of the nature of history: 1) the cyclical; 2) the linear/providential; and 3) the linear/progressive.[111] In practice each of these three constructs sometimes merges, to a degree, with one or both of the other two,[112] but a separate introductory treatment is the best initial approach. The cyclical

106. *But see* DAVID HACKETT FISCHER, HISTORIANS' FALLACIES: TOWARD A LOGIC OF HISTORICAL THOUGHT 175-76 (1970) (observing that some historians shy away from these labels, although they fail to escape from the concepts themselves); *infra* note 340 and accompanying text. Fischer's book is one of the classic works on historical method, and anyone who presumes to write serious historical accounts avoids consulting it at her peril.

107. For a more in-depth discussion of the principles of causation, see *infra* notes 299-378 and accompanying text.

108. *See infra* notes 299-349 and accompanying text.

109. *See supra* notes 48-50 and accompanying text.

110. *See infra* notes 197-207 and accompanying text.

111. *See* GILDERHUS, *supra* note 49, at 54.

112. *See infra* notes 130-40 and accompanying text.

view of history is an ancient one, visible in Hellenic and pre-Hellenic cultures.[113] The impetus behind this view was nature, with its cyclical phenomena, such as the lunar cycle, the change of seasons, and the ceaseless alteration of night and day. Observing these phenomena, ancient peoples analogized human events to those in the natural world, thus seeing human existence as cyclical.[114] This was true of the Greeks, who produced the first critical histories[115] (the reader should here recall that the term "history" is Greek in origin).[116] The cyclical view respects not only the human activity that is the principal subject of historical study,[117] but all other natural phenomena as well.[118] Strictly speaking, it is a view not so much of the history of human events as of time itself.[119] For Homer and his Hellenic audience, writes one historian, "the idea that the events of the past could influence those of the present" was an alien one. "They recognized only the continuity of timeless ideals and virtues which the heroes of the past taught to the people of the present," and they did not believe that a chronological description of events "would result in an explanatory narrative."[120]

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113. *See* GILDERHUS, *supra* note 49, at 54.

114. *See id.* at 15, 54; *see also* ERNST BREISACH, HISTORIOGRAPHY: ANCIENT, MEDIEVAL, AND MODERN 9-10 (1983). The impact of the observations of nature still continues in some quarters today, after a fashion. See, for example, THOMAS BERRY, THE DREAM OF THE EARTH at xii-xiii (1988), in which Berry discusses the impact of various historical events, such as the fall of Rome, the medieval revival of a money economy, and the Industrial Revolution upon the Western philosophy of history. Our current environmental crisis, argues Berry, requires "a new historical vision to guide and inspire a new creative period . . . for our world is a world of historical realism." *Id.* at xiii; *see also* PETER CRUTTWELL, HISTORY OUT OF CONTROL: CONFRONTING GLOBAL ANARCHY (1995) (criticizing Western historical theories' failure to consider humans' proper relationship to the environment).

115. *See* GILDERHUS, *supra* note 49, at 16-18. Many writings predate those of the Greeks; one may, for instance, learn much about Hebraic civilization by reading the Old Testament. The books of the Old Testament, however, are works of theology, not history. *See infra* note 125 and accompanying text. Unlike the early Greek historians, the authors of the Old Testament did not apply the critical methods of Herodotus and Thucydides, the earliest historians.

116. *See supra* note 91 and accompanying text.

117. *See infra* notes 177-81 and accompanying text.

118. *See* GILDERHUS, *supra* note 49, at 54.

119. *See* PAGE SMITH, THE HISTORIAN AND HISTORY 13 (1964) ("The Greeks . . . [did not change] historical thought because the Greeks . . . placed themselves quite consciously outside the flow of time.").

120. BREISACH, *supra* note 114, at 7.

In contrast to the cyclical view stands the more familiar Judeo-Christian linear view, which sees history as moving sequentially from a beginning to an end. Like the cyclical view, the linear view is an ancient one. Ready evidence for this appears in the first few words of Genesis: "In the beginning."[121] While evident in the earliest Hebrew writings, the doctrine developed gradually over the course of centuries, first in the Judaic, then in the Christian traditions. "No other primitive sacred writings," declared noted historian G.R. Elton, "are so grimly chronological and historical as is the Old Testament, with its express record of God at work in the fates of generations succeeding each other in time." He continues, "the Christian descendant stands alone among religions in deriving its authority from a historical event."[122] In Christian thought one sees this development first, rather tentatively, with Saint Paul, who sees in Christ a breaking off of the new from the old.[123] A more complete expression of the idea emerges in the writings of

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121. The idea here is that this "beginning" is the beginning of time, and not merely the beginning of God's act of creation, or to put this another way, that God's act of creation *was* the beginning of time. (God, of course, is without beginning or end, so the word "beginning" here does not refer to God's existence.) The most familiar English translation runs, "In the beginning God created the heaven and the earth." *Genesis* 1:1 (King James). Recent translations adopt a wording that illustrate this notion a bit more clearly. *See Genesis* 1:1 (New Revised Standard Version) ("In the beginning when God created the heavens and the earth . . . ."); *Genesis* 1:1 (New English Bible) ("In the beginning of creation, when God made heaven and earth . . . ."). *The New Jerusalem Bible*, however, concludes that the traditional interpretation is the more accurate, in that "creation was not an atemporal myth but an integral part of history, and its absolute beginning." THE NEW JERUSALEM BIBLE 17 n.1(b) (1985). Viewing this passage from a later, though not necessarily exclusively Christian, perspective, one scholar writes:

> the statement of the Creed "I believe in God, the Father Almighty, the Creator [of heaven and earth]," was an assertion not only about God but also about history. God created . . . not in the sense of shaping up previously existing materials . . . but by saying "let there be" and there was.

Roland H. Bainton, *Patristic Christianity*, *in* THE IDEA OF HISTORY IN THE ANCIENT NEAR EAST 215, 222-23 (Robert C. Denton ed., 1955) [hereinafter Bainton].

122. ELTON, *supra* note 93, at 2. The above treatment of the Judaic concept of history, as is the case with the other accounts in this section, is an extreme simplification of a complex subject. As one specialist has written, the Old Testament contains "many ideas of history," yet the central theme is that of explaining the scriptures' authors' present in terms of their past. *See* Millar Burrows, *Ancient Israel*, *in* THE IDEA OF HISTORY IN THE ANCIENT NEAR EAST, *supra* note 121, at 102-05.

123. *See* Erich Dinkler, *Earliest Christianity*, *in* THE IDEA OF HISTORY IN THE ANCIENT NEAR EAST, *supra* note 121, at 181-91.

Saint Augustine of Hippo who, in arguing that all things transpired according to God's ordained plan for humanity, emphasized the importance of causally-related sequences of historical events.[124] All of these writers, and many others, saw history as the product of Divine action. While the Hebrews, for instance, did not employ the relatively critical methods of a Herodotus or Thucydides, they did seek to explain historical events. Their explanation was one of God's interaction with humanity and shaping of human history for God's own purposes.[125] Augustine, likewise, emphasized God's role in human affairs, as well as rejecting the cyclical view of history. "For Augustine," writes Gilderhus,

> endless revolvings and pointless repetitions [of the cyclical view] would have rendered history meaningless—in effect, a nullification of divine influence and purpose. Rather, he thought of history as moving along a line with a clear beginning, marked by the Creation, a middle, and an end. The birth and death of Christ denoted the central events, and the salvation of all believers at the termination signified the completion of the process.[126]

Both the cyclical and linear/providential views of history survived antiquity, with the latter being the predominant one for over a thousand years, although the cyclical view resurfaced from time to time (during the Renaissance for instance).[127] Eventually, however, elements of these two *Weltanschauungen* merged to form a third sort of outlook. The cyclical view stressed the role of natural forces and critical thought, rendering these forces cognizable to human powers of explanation;[128] the linear/providential view on the other hand, stressed the role of the supernatural.[129] When Sir Isaac Newton set forth his laws of gravitation, and called Western civilization's attention not only to the laws of nature, but to hu-

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124. *See* Bainton, *supra* note 121, at 232-33. God "gives earthly kingdoms to both good and bad . . . according to the order of things and times, which is hidden from us, but thoroughly known to Himself; which same order of times, however, He does not serve as subject to it, but Himself rules as lord and appoints as governor." AUGUSTINE, THE CITY OF GOD bk. 4, ch. 33, *reprinted in* 2 A SELECT LIBRARY OF NICENE AND POST-NICENE FATHERS OF THE CHRISTIAN CHURCH 82 (Philip Schaff ed. & Rev. Marcus Dods trans., 1979).

125. *See* SMITH, *supra* note 119, at 6-7.

126. GILDERHUS, *supra* note 49, at 22; *see also* REINHOLD NIEBUHR, FAITH AND HISTORY: A COMPARISON OF CHRISTIAN AND MODERN VIEWS OF HISTORY (1949) (comprising a general discussion of the subject).

127. *See* GILDERHUS, *supra* note 49, at 22-23, 54.

128. *See id.* at 15, 54.

129. *See* SMITH, *supra* note 119, at 20; *supra* note 124.

manity's ability to discover those laws, to describe them, and to use them to predict future natural behavior,[130] time was ripe for a merger. The new historical outlook was a blend of Judeo-Christian linear time and Greek naturalism. Time and history, in this new view, were still linear, but the actions of nature replaced the will and presence of God as the motivating force.[131] Because the Enlightenment was a time of optimism in human abilities, moreover, the perceived direction of human development became one of progress (hence the name linear/progressive).[132] At the same time, writers such as Voltaire stressed the need to apply scientific methods in historical research.[133]

The break, however, was not a clean one, and indeed, many permutations appear. Hegel's philosophy of history, for example, is in some ways the mirror image of the linear/progressive; from Greek thought it borrowed not the naturalism, but some of the cyclical outlook, evident in Hegel's dialectic approach of thesis, antithesis, synthesis, antithesis, synthesis, and so forth.[134] At the same time, Hegel borrowed from the linear/providential view the providential component, since for Hegel, God remained the prime mover in human history.[135] Marx then modified Hegel's view, in effect setting up capital and labor as thesis and antithesis that ultimately, through revolution and dictatorship, would produce a final resolution of a classless, propertyless society[136]—that is, a linear-style end to history.[137]

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130. *See* CRANE BRINTON, IDEAS AND MEN: THE STORY OF WESTERN THOUGHT 290 (2d ed. 1963).

131. *See* SMITH, *supra* note 119, at 30-31:

> The Age of Reason . . . drew a picture of the powers of human reason, progressively developed in harmony with the laws of nature, and in the process of freeing itself from ignorance and superstition . . . . [The Enlightenment] represented, in a sense, a variation of the Christian doctrine, inasmuch as it looked ahead to a new Garden of Eden and suffused its age with a dauntless optimism about the future of the race, not in some celestial region, but in the world itself.

On this last point, see also CARL L. BECKER, THE HEAVENLY CITY OF THE EIGHTEENTH-CENTURY PHILOSOPHERS (1932).

132. *See* GILDERHUS, *supra* note 49, at 57-59.

133. *See* THE VARIETIES OF HISTORY, *supra* note 14, at 35-36.

134. *See id.* at 14.

135. *See* GILDERHUS, *supra* note 49, at 45.

136. *See* BRINTON, *supra* note 130, at 374-77.

137. *See id.* at 376-77.

On the other hand, the end that Marx prophesied resembles strongly the beginning of history that he described, since for Marx human civilization had, at its outset, possessed the same classless and propertyless qualities as the ultimate outcome of the proletarian dictatorship.[138] Marx also based his argument, at least according to his critics, on the "prophetic faith" that is by definition incapable of empirical proof,[139] thus partaking of the providential element, though Marx's position on religion is notorious.[140]

Other variations on the linear/progressive interpretation of history exist, some of them of far greater relevance for American legal scholars than are the theories of Hegel or Marx. But by this point the reader may be asking what Greek theories of time have to do with conducting legal research or making legal arguments. Admittedly, these subjects appear to have little in common at first glance, and, concededly, the primary impact of the foregoing developments, for our purposes, was to set the stage for what follows. The current relevance of these competing historical outlooks, however, is apparent in Roscoe Pound's observation that "the life of a rule of law in the strict sense is relatively short." Based on his study of American case reports covering the period from 1774 to 1924, he concluded that "[t]he general run of rules of law had a life of simply one generation."[141] At first glance, this statement encourages one to see American case law development as linear (and perhaps, if our present generation suffers from temporal snobbery, progressive), with newer and "better" laws constantly replacing older and "worse" ones. On the other hand, if we consider as an example the fate of *Pennoyer v. Neff*[142] over the last century or so—first appearing as the definitive statement on personal jurisdiction, then eclipsed two generations later by *International Shoe*,[143] but then re-emerging to a degree in the 1980s as a factor to consider in personal jurisdiction inquiries[144]—some

138. *See* GILDERHUS, *supra* note 49, at 60.

139. *See id.* at 61; R.R. PALMER & JOEL COLTON, A HISTORY OF THE MODERN WORLD SINCE 1815, at 491-95 (6th ed. 1984).

140. *See* PALMER & COLTON, *supra* note 139, at 491-95.

141. Roscoe Pound, *Survey of the Conference Problems*, 14 U. CIN. L. REV. 324, 329 (1940).

142. 95 U.S. 714 (1877).

143. International Shoe Co. v. Washington, 326 U.S. 310 (1945).

144. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (1980) (discussing the continued vitality of the same concept of state sovereignty that underlay the *Pennoyer* opinion).

circularity, at least, seems plain. To take a longer view, what is the typical workmen's compensation statutory scheme but a modern application to an industrial workforce of the medieval Germanic Wergild system, which valued various members of an injured person's body?[145]

More relevant for today's legal scholar, however, is the debate over the nature of history that emerged largely as a result of the union between history and the natural sciences that the Enlightenment produced. The story of that debate is our next inquiry.

B. ANALYTICAL PHILOSOPHY OF HISTORY

The appearance of Sir Isaac Newton's *Principia* in 1687[146] represents the onset of the age of Enlightenment, which was largely the result of a new emphasis on reason and naturalism. While historians and other thinkers of the Middle Ages had emphasized the role of God, that is, the supernatural, in human affairs,[147] the thinkers of the seventeenth and eighteenth centuries, inspired by the examples of Newton and others,[148] came to believe that the human mind, by examining nature closely, could understand and explain everything, thus, at its most extreme, "banish[ing] God and the supernatural from the universe."[149] Newton demonstrated this approach plainly in the natural sciences, but the rationalists of the Enlightenment saw no reason why the same approach would not work in the realms of morals, theology,[150] and history.[151] Perhaps the ultimate, most all-encompassing statement of the deification of reason came from the pen of the French astronomer Pierre Si-

145. *See* 1 ALBERT KOCOUREK & JOHN H. WIGMORE, EVOLUTION OF LAW: SELECT READINGS ON THE ORIGIN AND DEVELOPMENT OF LEGAL INSTITUTIONS, SOURCES OF ANCIENT AND PRIMITIVE LAW (1915) (comprising a translation of King Aethelbirht's Dooms, ca. 600 A.D.); *cf.* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 467 (1897) (observing likewise, years before the advent of modern workers' compensation systems, that "It is conceivable that some day in certain cases we may find ourselves imitating . . . the tariff for life and limb which we see in the Leges Barbarorum.").

146. *See* BRINTON, *supra* note 130, at 297.

147. *See id.* at 262; *supra* notes 125-27 and accompanying text.

148. *See id.* at 290.

149. *Id.* at 262.

150. *See id.* at 263, 290-92.

151. *See infra* notes 160-63 and accompanying text.

mon Laplace, whom many scholars have called the "Newton of France."[152] In the early nineteenth century Laplace wrote:

> The Present state of the system of nature is evidently a resultant of what it was in the preceding instant, and if we conceive of an Intelligence who, for a given moment, embraces all the relations of beings in the Universe, It will be able to determine for any instant of the past or future their respective positions, motions, and generally their affections.[153]

When coupled with an extremist Enlightenment view of a deterministic universe, in which human beings were soulless machines,[154] Laplace's was the ultimate statement of mathematical precision for any field of human knowledge, including, of course, history. If all events are the product of prior, at least theoretically quantifiable, events, then all of history is, again in theory, knowable, and the future of humanity is predictable through quantification.[155] If one accepts this view as valid, the potential for history is clear. As a consequence of this outlook, in fact, the nineteenth century witnessed the rise of what today we call Historical Positivism. This philosophy closely resembled the Legal Positivism of the same era, which Langdell so clearly represented and so eloquently expressed when he wrote

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152. ROGER HAHN, LAPLACE AS A NEWTONIAN SCIENTIST 1 (1967).

153. *Id.* at 17 (quoting and translating 8 PIERRE SIMON LAPLACE, OEUVRES COMPLETES DE LAPLACE 144 (1891)). The original reads:

> L'état présent du système de la Nature est évidemment une suite de ce qu'il était au moment précédent, et, si nous concevons une intelligence qui, pour un instant donné, embrasse tous les rapports des êtres de cet Univers, elle pourra déterminer pour un temps quelconque pris dans le passé ou dans l'avenir la position respective, les mouvements, et généralement les affections se tous ces êtres.

LAPLACE, *supra*, at 144.

154. *See* BRINTON, *supra* note 130, at 291; JULIEN OFFRAY DE LA METTRIE, L'HOMME MACHINE (1748).

155. Interestingly, a good statement of this theory appears in a famous series of science fiction works. Isaac Asimov's *Foundation* books postulate the development, in the distant future, of a branch of science known as Psychohistory, which enables its practitioners to predict, and thus to control, their own civilization's future with great accuracy. *See* ISAAC ASIMOV, THE FOUNDATION TRILOGY: THREE CLASSICS OF SCIENCE FICTION (1951). One should not confuse Asimov's creation, however, with that sub-field of today's scholarly history that goes by this same name, and which applies a type of psychoanalysis to historical figures to interpret their characters and actions. *See, e.g.*, JACQUES BARZUN, CLIO AND THE DOCTORS: PSYCHO-HISTORY, QUANTO-HISTORY, AND HISTORY (1974); HENRY LAWTON, THE PSYCHOHISTORIAN'S HANDBOOK (1988); PETER LOEWENBERG, DECODING THE PAST: THE PSYCHOHISTORICAL APPROACH (1983); PSYCHO/HISTORY: READINGS IN THE METHOD OF PSYCHOLOGY, PSYCHOANALYSIS, AND HISTORY (Geoffrey Cocks & Travis L. Crosby eds., 1987).

that "law is a science."[156] The Positivists held that individual historical events could and did resemble similar events, or, in other words, that the historian could begin with specific events, infer generalizations from those events, and then apply the generalizations in such a way as to explain or even predict other, similar events, past or present.[157] In this respect, Historical Positivism was much like the case method; with the latter, the student begins with the particular facts of a given case, and then, proceeding by induction, she arrives at a general rule of law that governs all similar fact patterns.[158]

One of the chief expositors of Historical Positivism was the English historian Thomas Buckle. In 1858 he observed that a statistically predictable number of people mailed letters without remembering to address them. Drawing upon this fact as an illustration, he made a provocative assertion. "To those who have a steady conception of the regularity of events," he wrote,

> and have firmly seized the great truth that the actions of men, being guided by their antecedents, are in reality never inconsistent, but, however capricious they may appear, only form part of one vast scheme of universal order, of which we in the present state of knowledge can barely see the outline,—to those who understand this, which is at once the key and the basis of history, the facts just adduced . . . will be precisely what would have been expected, and ought long since have been known. Indeed, the progress of inquiry is becoming so rapid that I entertain little doubt that before another century has elapsed, the chain of evidence will be complete, and it will be as rare to find an historian who denies the undeviating regularity of the moral world, as it is now to find a philosopher who denies the regularity of the material world.[159]

Even as Langdell's Legal Positivist system was transforming American legal education in the nineteenth century, the Positivist sentiments of Buckle and others were simultaneously giving rise to a new professionalism among American historians. But because many of these historians studied in Germany,[160] they took as their role model not the English Buckle but the German scholar Leopold von Ranke, who be-

156. *See supra* note 5 and accompanying text.

157. *See* GILDERHUS, *supra* note 49, at 80.

158. *See* STEVENS, *supra* note 6, at 56, 68 n.40.

159. 1 BUCKLE, *supra* note 95, at 24. Buckle also observed that predictable murder, suicide, and other crime rates further supported his assertions. *See* 1 *id.* at 19-23.

160. *See* NOVICK, *supra* note 13, at 25; *supra* note 16 and accompanying text.

came, for them, the "father of modern historical scholarship."[161] From his example Americans took the lesson of critical methodology and empiricism, so much so that the American profession began to discourage inquiry into the philosophy of history.[162] In light of this degree of scientific predictability, wrote one leading American historian to another, "What do speculations of any kind matter?"[163]

The irony here is that Ranke was actually the antithesis of all that he represented for his American disciples.[164] But while many Americans who studied in Germany had heard of Ranke, they believed that he was the ultimate Positivist because of their reliance upon some few statements, both mistranslated and out of context.[165] Ranke, in fact, was much closer to Hegel in his philosophy,[166] adhering to the "fundamental principle that the course of history revealed God's work."[167] Nevertheless, his great legacy among American historians was an almost religious belief in Positivism, and in this regard historians had much in common with Langdell and his followers.

The Legal Formalism of the day stressed the "discovery" of principles of "natural law," much as Historical Positivism held that other human behavior was subject to such laws as well. "The library," wrote Langdell, "is to us all that the laboratories of the University are to the chemists and physicists, the museum of natural history to the zoologists, the botanical garden to the botanists."[168] The Supreme Court largely fell under the sway of this mechanistic view in the late 1800s and early 1900s, adopting the view that "whenever social or economic facts conflicted with the theoretical assumptions of natural law, the facts must give way to the assumptions."[169] Long after Legal Formalism had reached its apex, Jerome Frank summarized the movement by stating one of its fundamental premises

161. NOVICK, *supra* note 13, at 26.

162. *See id.* at 30.

163. *Id.* (quoting letter from Albert Bushnell Hart to Henry Adams, May 2, 1910 (on file in the Henry Adams Papers, with the Massachusetts Historical Society)).

164. *See* NOVICK, *supra* note 13, at 26-27.

165. *See id.* at 28-29.

166. *See id.* at 27. See *supra* notes 134-35 and accompanying text for a discussion of Hegel.

167. NOVICK, *supra* note 13, at 27.

168. Langdell Address, *supra* note 5, at 124.

169. COMMAGER, *supra* note 7, at 371-72.

in mathematical terms, mathematics being the preeminent expression of Enlightenment-style scientific reason.[170]

> For convenience, let us symbolize a legal rule by the letter *R*, the facts of a case by the letter *F*, and the court's decision by the letter *D*. We can then crudely schematize the conventional theory of how courts operate by saying
>
> $$R \times F = D$$
>
> In other words, according to the conventional theory, a decision is a product of an *R* and an *F*. If, as to any law suit, you know the R and the *F*, you should then, know what the *D* will be.[171]

Although Frank was the one to state the rule most abstractly and clearly, he did not do so out of devotion to it. Indeed, the entire chapter in which this formula appears consists of a devastating attack upon the formula's deterministic certainty.[172] For Frank, the rules had long been in flux[173] and facts were always subjective.[174] Frank, in short, was not a Positivist but a Legal Realist.

Just as Frank was a Realist, and just as Legal Realism emerged to challenge the fundamental assumptions of Legal Formalism—its adherence to natural law, mechanistic discovery of laws, and scientific application of logical rules—so, too, did Historical Idealism emerge at about the same time to attack the principles of Historical Positivism. The general thrust of Idealism was that no historical generalities existed. Each event was unique, and this singularity prevented the historian from inferring general principles from particular events, or from describing two events as similar to each other.[175]

One of Idealism's early powerful adherents was the nineteenth century thinker Wilhelm Dilthey, whose arguments regarding the subjectivity of historical knowledge produced developments in American historiography of immense importance to American legists and others.[176] The foremost

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170. *See* BRINTON, *supra* note 130, at 290.

171. JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 14 (1949); *see also* Jerome Frank, *What Courts Do in Fact*, 26 ILL. L. REV. 645, 651 (1932) (comprising the first place in which Frank published this formula); *cf.* Orth, *supra* note 70, at 2056 (reducing the facts of the *Russell* case to a generally applicable, though basic, formula of mathematical notation).

172. *See* FRANK, *supra* note 171, at 14-36.

173. *See id.* at 14-15.

174. *See id.* at 15-16.

175. *See* R.G. COLLINGWOOD, THE IDEA OF HISTORY 222-23 (1946).

176. *See infra* notes 232-50 and accompanying text.

adherent of historical Idealism, however, is our own century's R.G. Collingwood, whose posthumously-published 1946 work *The Idea of History* is still the best statement of the subject. Denouncing history's endeavor to emulate the natural sciences' pattern of thinking, Collingwood defined the raw ingredient of history as human thought, and not things relating to "bodies and their movements."[177] Such material and mechanical affairs Collingwood described as "the outside of the event,"[178] for example, "the passage of Caesar, accompanied by certain men, across a river called the Rubicon at one date, or the spilling of his blood on the floor of the Senate house at another." By contrast, "the inside of an event"[179] for Collingwood was the non-materially extant realm of thought: "Caesar's defiance of Republican law,"[180] for example, "or the clash of constitutional policy between himself and his assassins."[181] In legal terms, one might give as an example of an outside of an event a judge walking into his chambers and signing a temporary restraining order, while the inside of the event would be the judge's decision that signing the order was the correct action to take.

For Collingwood, the only way to recapture the insides of events, since direct empirical evidence of such events does not exist[182] and inference is all-important, is for the historian to relive them in his own mind, "to think himself into [the] action, to discern the thought of its agent."[183] The problem with this approach for the would-be Positivist is that it necessarily subjectifies history. "Types of behaviour do, no doubt, recur," Collingwood conceded, "so long as minds of the same kind are placed in the same kinds of situations." "The behaviour-patterns characteristic of a feudal baron," he wrote by way of example, "would no doubt be fairly constant so long as there were feudal barons living in a feudal society. But [general patterns] will be sought in vain . . . in a world whose social structure is of another kind."[184] In a post-Freudian age, in which we know that any number of subconscious and unconscious factors

177. COLLINGWOOD, *supra* note 175, at 213.
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.*
182. *See* Carl L. Becker, *What are Historical Facts?*, 8 W. POL. Q. 327 (1955).
183. COLLINGWOOD, *supra* note 175, at 213.
184. *Id.* at 223.

may have influenced even feudal barons in different ways, Collingwood may even have conceded too much to Positivism. Frank suggests a similar point as he writes of the process of judging:

> The influences operating on a particular trial judge, when he is listening to, and observing, witnesses, cannot be neatly caged within the categories of his fairly obvious social, economic and political views.... Francis Bacon included in his "Idols" those of the "Den," that is, errors due to causes peculiar to a specific individual. The "new psychology," Freudian or otherwise, properly emphasizes these peculiarly individual factors.[185]

As a result, Frank concluded, even two judges of similar cultural and socioeconomic backgrounds, hearing the same case, might well reach different decisions.[186]

Laura Kalman, in attempting to explain how historical study fits into the world of law, adopts what is essentially an Idealistic position in her recent book *The Strange Career of Legal Liberalism*. There, she declares that past events lack authority in present decisionmaking; her reasons are essentially Idealistic. "I doubt any historian considers the past authoritative," she writes.

> At best, it may be edifying, but to the historian, there are no "lessons from the past." True, Santayana said that those who do not understand the past were condemned to repeat it. He might have told us that study of the impact of "the Munich syndrome" on policymakers between the end of World War II and the Gulf crisis might inform the way politicians view the Bosnian crisis, but surely he would have reminded us that it would not reveal the stance today's politicians *should* assume toward Bosnia. For the historian, the past is relevant to the present insofar as it shows how other people lived their lives. It does not explicitly tell historians or their contemporaries how to conduct their own.[187]

Another name for this "should" of Kalman's is policy; another might be "value judgment;" and her view of it is that of an Idealist. In short, she focuses on the element of what *should* happen based on a generation's values, rather than upon what *must* happen, based on immutable laws of history. If we view legal decisionmaking as value- or policy-driven, the role of Idealism in modern legal process is clear. But more on

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185. FRANK, *supra* note 171, at 151 (footnote omitted); *see also* JEROME FRANK, LAW AND THE MODERN MIND 338-39 n.7 (describing some of the "external stimuli which influence the attention of any observer").

186. *See* FRANK, *supra* note 171, at 150-51.

187. KALMAN, *supra* note 36, at 180. A generation's values, and what appears to be free will in deciding a course of action in Bosnia, are exactly the sorts of things that Collingwood might describe as the insides of events.

Idealism in the courtroom later. What of Positivism's viability after the onslaught of Idealism?

Even denying arguendo the role of God in human history as supposed by Hegel[188] and Ranke,[189] and accepting arguendo a deterministic, mechanistic universe, a high degree of historical predictability after the fashion of the natural sciences is still probably doomed because of the sheer mass of data that would be necessary for the historian to possess in order to "predict the future." For Laplace's theory to hold true,[190] and for humanity to be able to act upon it, the location and velocity of every particle of matter in the universe must be not only knowable, but known, for some given instant. Such knowledge is obviously beyond our technical abilities at present, and if laws of quantum mechanics as we currently understand them, and particularly the Heisenberg principle of uncertainty,[191] retain their apparent validity, then we will never be able to gain this knowledge, no matter how fantastically advanced our technology may become. On the other hand, some remarkable examples of prediction do exist, and these predictions may well have been the result of some form of generalization. One of the more remarkable was the work of Ivan S. Bloch, a Polish banker. Drawing upon the lessons of recent wars, he produced at the close of the nineteenth century a treatise in which he described, in detail, his estimate of the nature of the next general war, including the use of machine guns and trench warfare.[192] His prognostications were frighteningly accurate, although few heeded his work until too late, when the Armageddon that was World War I became a reality.[193]

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188. *See supra* notes 134-35 and accompanying text.

189. *See supra* notes 165-67 and accompanying text.

190. *See supra* notes 152-55 and accompanying text.

191. The Heisenberg principle posits that the very act of observation at the subatomic level affects either the location or the trajectory of the subject of that observation. In short, by observing a phenomenon, we change it, and so we interfere with the data. According to this principle, then, the knowledge of which Laplace wrote is not only technologically, but empirically, impossible for us to gain. *See* ENCYCLOPEDIA OF PHYSICS 1327, 1328 (Rita G. Lerner & George L. Trigg eds., 2d ed. 1991). "In these days of Einstein's relativity and Heisenberg's uncertainty," writes theoretician James Gleick, "Laplace seems almost buffoon-like in his optimism." JAMES GLEICK, CHAOS: MAKING A NEW SCIENCE 14 (1987).

192. *See* 6 JAN S. BLOCH, THE FUTURE OF WAR IN ITS TECHNICAL, ECONOMIC AND POLITICAL RELATIONS xxxi, lxxix (R.C. Long trans., 1903).

193. *See* THEODORE ROPP, WAR IN THE MODERN WORLD 218-22 (revised ed. 1962).

The utility of such predictions is open to attack. An obvious criticism is simply that given enough persons writing on a given topic, one of them is likely to be correct, but this knowledge does little to help us discern the correct interpretation before the fact. Even if a single individual has a high batting average, possessing (to continue the military parallel) the Nelson touch, or what Frederick the Great termed the *coup d'oeil*, the ability to grasp the salient points of a situation summarily,[194] this quality seems more of an instinct than a learned skill. Any attempt to tame it, to institutionalize it, and to teach it mechanically will probably fail (though the evolution of the general staff systems among the Great Powers around the time that Bloch wrote his treatise was essentially an attempt to do just that).[195] As any advocate knows, countless precedents exist in law, as in any other field of human endeavor; the talent is in knowing which one is the "correct" one. This talent is at least as much art as science, a fact so obvious that we often forget that partly because of it some attorneys win more cases and can bill their clients at higher rates than others.

How, then, is an attorney to make use of history, if historical generalities do not exist and prediction is a matter of instinct? Several ways suggest themselves. If all is instinct and intuition, we would do well to heed Langdell's warning that law may be a species of handicraft[196] and thus give up our efforts at trying to learn methodically how to use it more effectively. (Of course, that would require us, among other things, to do away with law schools, at least in the sense that we understand them.) In the years since Langdell penned this statement, we have never taken this attitude toward the law, however much Frank, Lewellyn, and the adherents of the Critical Legal Studies movement argue that formalistic law is a chimera. At some level we continue to have an Enlightenment-style faith in rationalism, at the very least *acting* as if reason played a role in our intellectual growth, and in judges' decisions. If we accept this approach in law, why not treat history likewise when it appears before the bar?

194. *See* FREDERICK THE GREAT ON THE ART OF WAR 142-43 (Jay Luvaas ed., New York Free Press 1966).

195. *See* WALTER GOERLITZ, HISTORY OF THE GERMAN GENERAL STAFF 1657-1945, at 96-98 (Brian Battershaw trans., 1985); ROPP, *supra* note 193, at 195-96.

196. *See supra* note 5.

One example appears in one of the most commonplace uses of history in the legal profession: the citing of precedent. Attorneys may, and often do, make policy-based arguments, telling the court what it should do, or what would be wisest for it to do, but with all of these arguments, attorneys still cite precedents to a very great degree, thus perpetuating the $R \times F = D$ formula. Courts themselves cite precedents heavily. While they may do so in order to give the appearance of maintaining the fiction that the law and not the judge controls the case's outcome, the precedents probably serve as some limits on the judge's freedom,[197] forcing him into at least a somewhat formalistic, positivistic pattern of decisionmaking. Judges could theoretically resort to summary affirmances, reversals, orders, and such, but the tradition, perhaps now so strongly engrained as to be a part of due process, is to provide an opinion in which the court explains why it is ruling as it is (or why it *must* rule as it does, for those who reject Frank's interpretation of the judicial function). Insofar as the fiction of Positivism holds, then, attorneys would do well to acquaint themselves with its principles.[198] In other words, even if each case is unique, courts largely expect attorneys to speak in terms of general rules, much as Oliver Wendell Holmes, Jr., once reminded an advocate that "[t]his is a court of law, young man, not a court of justice."[199]

As a legist undertakes such a mission, understanding the difference between Positivism and Idealism can help clarify his thinking on how best either to present a case (for advocates), or to expound upon it (for scholars). Positivism and Idealism, in their historical manifestations, parallel in at least one way the dichotomy between common law and equity; an understanding of the difference between Positivism and Idealism, one hopes,

197. See HENRY CAMPBELL BLACK, THE LAW OF JUDICIAL PRECEDENTS 10-11 (1912) for a list of principles from which this proposition would seem to follow. *But see* KARL N. LLEWELLYN, THE COMMON LAW TRADITION 76-91 (1960) (presenting a strong argument to the contrary).

198. *See infra* notes 299-378 and accompanying text (discussing the principles of causation).

199. LAWYER'S WIT AND WISDOM 152 (Bruce Nash & Allan Zullo eds., 1995). Better documented is Holmes's statement to C.H. Wu: "I have said to my brethren many times that I hate justice, which means that I know if a man begins to talk about that, for one reason or another he is shirking thinking in legal terms." Oliver Wendell Holmes, Jr., Letter to C.H. Wu (July 1, 1929), *reprinted in* JUSTICE HOLMES TO DOCTOR WU: AN INTIMATE CORRESPONDENCE, 1921-1932, at 53 (1947).

will consequently enlighten a legist's choice of legal or equitable analysis of a case.

The familiar adage runs, in one version, "when the law is against you, argue the facts; when the facts are against you, argue the law; and when the law and the facts are against you, argue loudly." Applying both this saying and Frank's formula, one may view a case as a function of both legal rules and precedent on the one hand, and fairness and facts on the other. As its name indicates, a rule of law, which a court may announce in one particular case and then apply in later, similar cases, presumes that later cases can be similar, or at any rate sufficiently similar to warrant application of the prior case's rule. This would seem to be the rationale behind both the concept of precedent, by which a higher court binds a lower court,[200] and stare decisis, by which a court purports to bind itself in subsequent cases absent a reason to do otherwise.[201] Citing of precedent, then, as well as applying it, are inherently acts that accept the validity of Historical Positivism, and one who cites precedent in justification of a position must show how the case at bar (or under the commentator's microscope) resembles the precedents on which the legist is relying. Even in distinguishing precedent, the legist acknowledges the validity of Positivism, saying in effect, "I acknowledge that case *X* establishes rule *A*, and that if case *Y* (the case at bar) fell into the same universal category as case *X*, then rule *A* would admittedly apply to it as well. Case *Y*, however, does not resemble case *X* sufficiently so as to be within the same universal category,[202] and so rule *A* does not apply. Case *Y* in fact resembles case *Z*, and thus falls under rule *B*."

Viewed in this light, the facts in case *Y*, or in any case, have no unique qualities about them. Essentially (that is, in their very essence, when one transcends their superficial and unimportant distinctions) the facts of case *Y* are identical to those in case *Z*, or at any rate similar enough to warrant the application of rule *B*. Under this formalistic approach, history has, if only constructively, repeated itself, all of Collingwood's

200. *See* BLACK, *supra* note 197, at 10-11.

201. *See id.*

202. In real life, the argument would more likely be that case *Y*, while somewhat resembling case *X*, is not close enough in its facts to warrant application of rule *A*. In arguing this point, the legist will need to resort to an even more openly scientific approach, identifying variables and comparing the variables in *X* and *Z* to one another.

protestations to the contrary. By "arguing the law," therefore, or finding one's self in a position in which "arguing the law" is advantageous, the legist would do well to acquaint himself with the tenets of Positivism, and the arguments against Idealism. The legist need not burst into some animated exposition of the philosophy of Thomas Buckle, Auguste Comte, John Stuart Mill,[203] and other Historical Positivists to do this. Nor must he devote several pages of a law review article (as this one necessarily does by way of background) to a discussion of the metaphysics of historical nomothetics. An understanding of the basic assumptions of Positivism, and a framing of arguments in such a way as to incorporate Positivistic historical principles, should usually suffice to add credibility to the legist's position, and to equip her, if she is engaged in an adversarial process, to anticipate and defuse her opponent's arguments.

Those who oppose such arguments, in fulfillment of the second part of the adage of law versus facts, will probably take exactly the opposite tack. If, under the applicable precedents, a party will probably lose a case, then the goal is somehow to prevent the application of those precedents to the case at bar. One method of doing this is Positivistic in nature; the litigant simply plays the game of logic to distinguish case *Y* from case *X* because of their factual differences. Presumably case *X* and case *Y* are at least somewhat similar, or else case *X* would never have presented itself during the case *Y* litigation as a potential authority. But *some* sort of difference must exist, even if it is merely that of a party's name. The Positivist trick is to convince the court that whatever difference exists is significant enough to bar the application of the precedent to the current case. Failing all else, the advocate would here do well to recall that case *X* includes a date in its citation. If background facts have changed since that date and political, social, economic, or other factors are no longer as they were when the court decided case *X*, then the advocate can distinguish case *X* from case *Y* even if the immediate facts of each case are identical.[204]

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203. *See* GILDERHUS, *supra* note 49, at 78-80.

204. Two excellent examples of very similar fact patterns and very different political/economic realities are: 1) James Otis's and John Marshall's nearly identical statements regarding the invalidity of unconstitutional acts, *see supra* notes 64-65 and accompanying text, and 2) the divergent outcomes in *Anderson v. Gouldberg*, 53 N.W. 636 (Minn. 1892), and *Russell v. Hill*, 34 S.E. 640 (N.C. 1899), *see supra* notes 70-83 and accompanying text, although

A more extreme method of denying the authority of case *X*, however, or at least its applicability to the facts of case *Y*, is to argue not only that the facts of case *X* and case *Y* are different, but that they must necessarily be different. The former proposition will usually, given even some slight factual similarity between *X* and *Y*, be debatable. The latter is also debatable, but in a way that changes the whole nature of the debate. If the advocate maintains that the facts of case *Y* are unique because all historical events are unique, then the debate becomes one of the validity of universals in history. Such a position carries among other things a tactical advantage with it. A debate between advocates as to whether case *X* does apply is more conventional, and thus more easily anticipated. This is the game of analogy and distinction that all lawyers have played from their first days in law school, and presumably they are equipped to handle it. A debate over the very nature of precedents, on the other hand, can throw this paradigm into disarray, perhaps forcing one's opponent into unfamiliar territory in which the Idealist has the advantage.

As is the case with a Positivist approach, however, the Idealist need not make some grand statement of idiographic theory that will leave the judge wondering about the relevance of what he has just heard or read. The American legal system already contains a conceptual model based very largely upon principles akin to Idealism, namely, equity. The origins of equity lie in the concept of injustice, the realization that though a case *Y* may seem to be on all fours with case *X* and all its predecessors in all empirical respects, some unique element bars the application of rule *A* nevertheless. As the Chancery Court wrote in the time of James I, the raison d'être of equity is that "Mens Actions are so divers and infinite, That it is impossible to make any general Law which may aptly meet with

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this latter example involves a difference that is not so much temporal as it is one of legal culture. John V. Orth has pointed out, however, that the different outcomes resulted because the Minnesota Supreme Court was in some sense living in the past. *See* Orth, *supra* note 70, at 2053-55 (arguing that the *Anderson* court's theory of title, "[f]or all its appearance of modernity . . . is in fact consonant with the medieval approach to property," effectively creating a greater temporal gap than the dates of the cases would indicate). This sort of sophisticated historical argument can be very intricate, but it can also be very compelling, especially if one uses the proper practical methodological tools to develop it. *See infra* notes 384-444 and accompanying text.

every particular Act, and not fail in some circumstances."[205] As two English legal scholars put it:

> The process of deciding a dispute between antagonists involves determining who is to win and why. The reason for a decision contains within it the germ of a rule of law, because it will be recorded or remembered and referred to in later disputes resembling the earlier dispute in some particular. When a series of precedents has come into existence, a rule of law is extracted from them by quoting the facts and decisions in abstract form, such as, *a person claiming as beneficiary to enforce an incompletely constituted trust will fail unless he has given consideration.* When the rule has become accepted, it is possible that a case will arise in which its application, owing to the particular circumstances, will result in injustice. In that case the judge may either exercise an equitable jurisdiction so as not to apply the rule (or so as to apply it in modified form) or stick to the rule in its full rigour.[206]

Whether the judge decides to grant equitable relief, or instead to "stick to the rule in its full rigour" may well be, in Realist terms, a function of how well an attorney can argue for the existence of an undefinable something that sets this case apart from its predecessors, despite any formal similarities. The foregoing knowledge of Positivism and Idealism may well be the first step towards effective argument. But whether adopting a Positivist or an Idealist approach, the legist-turned-historian will need some understanding of the big historical picture, or at least of historical method.

When an attorney views law as history, then the case law itself, in terms of both its rules and facts, becomes the raw material of history. In fact, the appellate opinions, the records of proceedings below, and the rules of law themselves are historical records. The attorney's job in this context becomes that of using them effectively. Many occasions may arise, however, in which these materials fail to present enough facts about the earlier cases, or enough facts about why earlier courts viewed

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205. The Earl of Oxford's Case, 21 Eng. Rep. 485, 486 (Ch. 1615).

206. GEORGE W. KEETON & L. A. SHERIDAN, EQUITY 1 (3d ed. 1987). Of course, at some point the court may well develop precedent and rules that govern equity as well, *see id.* at 2, which is precisely what happened in the English tradition. As this development illustrates, the concept of equity embraces far more than the doctrine discussed above; for a survey, see 5 SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 215-338 (3d ed. 1945). In the United States, legal and equitable actions merged in the form of proceeding known as the civil action. *See* FED. R. CIV. P. 2. Nevertheless, the kernel of the concept the court described in *Oxford's Case* yet remains under the Federal Rules, as Rule 1, with its emphasis on the end of justice (among others) illustrates. *See* FED. R. CIV. P. 1.

these cases the way they did and adopted the rules of law that they did. The realization that the rise of the tort concept of fault and the advent of the fellow servant rule occurred during a time of rapid industrial development, for instance,[207] can help a legist to see that doctrine in a new light. She can then argue either that the rule remains relevant or that it is itself the product of historical development rather than a statement of an immutable legal principle, as circumstances require.

But in order to adopt either of these positions the legist may well have to know something of the political, social, economic, or cultural context from which the legal rule in question emerged. The obvious reaction to such a realization would be to reach for a history book and do a bit (or more than a bit) of reading to gain the necessary background. The more astute legist would likely soon learn that the library contained more than one account of a historical era or episode, and moving from this knowledge to the knowledge that different writers might discuss different events or even reach different conclusions would be a short step. One critically important fact, however, might yet elude our legist-turned-historian: this is the fact that different schools of historical thought and different generations of professional historians whose work she consults have tended to follow certain fairly predictable patterns of thought during the writing of the histories that now line library shelves. In fact, historians spill quite a lot of ink discussing this phenomenon and critiquing their fellow historians who represent different schools of thought. Should her opponent, the bench, or the scholarly community for which she writes be aware of this fact, and use it to challenge her recently acquired historical background at its weak points, she could find herself the target of an unpleasant scholarly attack by opposing counsel, by the court, or by her fellow scholars. To avoid this subtle but potentially fatal trap, as well as to increase the efficiency of her initial research, we must examine the principles of that branch of historical study known as historiography.

207. *See* KERMIT L. HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 124-25 (1989); G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 51 (1980).

III. HISTORIOGRAPHY AND THE ADVERSARIAL USE OF EXISTING SCHOLARLY HISTORIES

While a knowledge of the rudiments of the philosophy of history may help legists to think about legal problems in new and useful ways, a knowledge of historiography may be more directly useful, especially to a legist who needs to cite a scholarly history in a brief, treatise, or law review article.[208] The word has come to mean, essentially, the history of the writing of history, the practice of viewing historians themselves, and their written work, as the products of historical forces.[209] As such it may help the legist choose a particularly favorable history or find the weaknesses in a history that an opponent cites.

Any survey of the evolution of legal doctrine will reveal that that doctrine may, and usually does, change as time passes.[210] This change is often attributable to a shift in social, economic, or political circumstances. One need only contemplate the 1937 "switch in time" that effectively ended the Supreme Court's resistance to the New Deal[211] to see these factors in action.[212] On the other hand, the statement or wording of a rule may remain the same, but its interpretation may change considerably due to changing mores, intellectual trends, or social, cultural, or even political trends. An example is the Court's divergent interpretation in *Plessy v. Ferguson*[213] and

208. This trend is becoming more and more widespread in legal circles. "In the past two decades," Hall writes, "this concern with the *external* history of the law has taken on greater urgency. The legal historian still has to know what went on [with legal doctrine], but now he or she must also address a large set of causal relationships." HALL, *supra* note 207, at 4.

209. *See* HIGHAM, *supra* note 11, at 89; *infra* notes 231-32 and accompanying text.

210. *See supra* notes 141-45 and accompanying text.

211. The degree to which politics played a role in the Court's reorientation remains debatable, but that it had at least some effect seems clear. A standard work on constitutional history gives the best statement: although denying that Chief Justice Charles Evans Hughes and Justice Owen Roberts ended their opposition to New Deal legislation for political reasons, it concedes that the two jurists could not have been "unaware of the political implications of the Court's shift." 2 ALFRED H. KELLY ET AL., THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 488 (7th ed. 1991). As Chief Justice Hughes wrote in rejecting a party's formalistic argument against a major New Deal law, "We are asked to shut our eyes to the plainest facts of our national life." NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 41 (1937).

212. See *supra* notes 141-45 and accompanying text for an additional example.

213. 163 U.S. 537 (1896).

Brown v. Board of Education[214] of the Equal Protection Clause, the text of which changed not one whit in the intervening half-century between the two decisions. Another excellent example is the meaning of James Otis's (and later John Marshall's) legal proposition that "an act against the constitution is void," a statement having two different meanings because of a changing *zeitgeist*.[215]

Still another example is the divergent concepts of law that appear, respectively, in *Swift v. Tyson*[216] and in *Erie Railroad Co. v. Tompkins*.[217] The former case concerned the meaning of a federal statute that required federal courts to accept state law as rules of decision in federal cases.[218] Writing for the court, Justice Joseph Story found that "law," within that statute's meaning, referred only to the state statutes and not to state judicial decisions.[219] This opinion allowed federal courts, when they heard diversity actions, effectively to ignore state case law when and if they wished.[220] This approach both reflected and perpetuated a view of law as a universal entity that applied everywhere and needed to make no allowance for regional differences.[221] The latter case, by contrast, shattered this concept of a universal law, although it may have lessened

214. 347 U.S. 483 (1954).

215. *See supra* notes 64-65 and accompanying text.

216. 41 U.S. (16 Pet.) 1 (1842).

217. 304 U.S. 64 (1938).

218. *See* Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92 (current version at 28 U.S.C. § 1652 (1994)).

219. *See Swift*, 41 U.S. (16 Pet.) at 18-19.

220. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860, at 250 (1977) ("[T]he much-heralded quest for legal uniformity that *Swift v. Tyson* is supposed to have represented can also be seen more concretely as an attempt to impose a procommercial national legal order on unwilling state courts.").

221. "Most critics of *Swift* contend that Story's jurisprudence was unsound, that he believed there existed, outside and independent of the decisions of courts, some entity called The Common Law." Note, Swift v. Tyson *Exhumed*, 79 YALE L.J. 284, 294 (1969). The author of this note argues that this is not what Story meant. *See id.* at 294-95. The fact that so many other jurisprudes took the case to stand for this proposition, however, says something about how the generations that came after Story viewed the law. Langdell exemplifies this outlook, arguing "that the general principles of law derived from [the case method of study] cut across state lines and perhaps across natural boundaries .... In time, this particular assumption of national applicability was to undermine the idea that each state was a viable legal system in its own right." STEVENS, *supra* note 6, at 52.

the danger of forum shopping between a state court and a federal court in that same state.[222]

As concepts of the law may change, so too may concepts of history, as we saw in the previous section. More to the point, when concepts of history change, historical accounts do so as well.[223] In the *American Historical Review*'s first article, William M. Sloane asked rhetorically why, if the great classical historian Thucydides had discovered all of the essential principles of historical scholarship, history was not a static discipline. "The answer is plain," he replied. As one applies these principles "to new knowledge under changed conditions" historical accounts necessarily change. "History will not stay written," Sloane declared. "Every age demands a history written from its own standpoint,—with reference to its own social condition, its thought, its beliefs, and its acquisitions,—and therefore comprehensible to the men who live in it."[224] Thus two historians of two different eras, or even two historians who write at the same time but who may have very different concepts of history, may write radically different histories of the same event, institution, or other historical element. As this phenomenon has become more visible in American historical scholarship,[225] the idea of some absolute, objective historical account has gone the way that Justice Joseph Story's *Swift*[226] doctrine did as a result of *Erie*.[227] John Higham recognized

222. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 75 (1938) ("In attempting to promote uniformity of law throughout the United States, the [*Swift*] doctrine had prevented uniformity in the administration of the law of the State.").

223. *See supra* notes 141-45 and accompanying text (suggesting the different meaning attributable to a historical observation depending upon the concept of history—cyclical or linear—that one adopts).

224. Sloane, *supra* note 14, at 5; *see infra* notes 236-40 and accompanying text. *But cf. infra* note 232 (recounting Dilthey's argument that the principles themselves, and not merely the conditions, change). Did Sloane mean that historical truth has an absolute, objective existence, and that different historical accounts were merely the result of different perspectives and emphases? Or did he mean that historical truth itself changed as the perspectives and emphases changed? The reader will have to make this metaphysical determination. *See infra* notes 351-57 and accompanying text.

225. The trend has become particularly pronounced in the latter half of the twentieth century. *See* NOVICK, *supra* note 13, at 415-17 (attributing this fragmentation in part to the collapse of ideological consensus in American society in the 1960s).

226. Swift v. Tyson, 41 U.S. (16 Pet.) 1, 19 (1842) (applying general commercial law principles, rather than state precedent, to a diversity suit).

227. *Erie*, 304 U.S. at 79 (describing the *Swift* doctrine as resting falla-

some time ago that the subjectivization of history, as is apparent in historiography, makes the products of the discipline adversarial:

> Historiography . . . is a critical weapon. Since it blends historical explanation with critical appraisal, it provides a vehicle of emancipation from ideas and interpretations one wishes to supersede. Accordingly, it flourishes in response to conflict and revision in historical thought. In its polemical function historiography has ratified many a rebellion. Unfortunately, it usually loses thereby some of its historical integrity. Historiography is ordinarily written by the winning side, which tends to present the losers' intentions and presuppositions in a partisan light. Over the course of time the criticisms that successive generations make of their predecessors may accumulate in the historiographical record.[228]

Laura Kalman has described what this phenomenon means to the legal profession. "Academic lawyers should stop viewing historians as repositories of useful facts," she declares, and grow "more sensitive to the varieties of historical interpretation. Historian John Hope Franklin has said: 'In virtually every area where evidence from the past is needed to support the validity of a given proposition, an historian can be found who will provide the evidence that is needed.'"[229] In terms still simpler and more familiar to legists, "scholarship is a form of advocacy."[230]

An awareness that historical accounts may change with the times is largely a reflection of what the German Historical Idealist Wilhelm Dilthey called Historicism.[231] This doctrine denied the existence of an objective history and declared that every historian, and thus his viewpoints, were captive to his own generation.[232] American historiography so far seems to

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ciously "upon the assumption that there is 'a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute'") (quoting Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 532-36 (1928)).

In *Erie*, coincidentally, Justice Brandeis made use of the historical scholarship of Charles Warren in concluding that Story's interpretation of section 34 of the Judiciary Act of 1789 was erroneous. *See supra* notes 51-54 and accompanying text.

228. HIGHAM, *supra* note 11, at 89.

229. KALMAN, *supra* note 36, at 206 (quoting John Hope Franklin, *The Historian and the Public Policy*, *in* RACE AND HISTORY: SELECTED ESSAYS, 1938-1988, at 310 (1989)).

230. Peter Irons, *Clio on the Stand: The Promise and Perils of Historical Review*, 24 CAL. W. L. REV. 337, 354 (1988).

231. *See* NOVICK, *supra* note 13, at 157.

232. For Dilthey,

> [e]very age expresses its attitude to life and the world in certain prin-

support this argument, and for the advocate who is "shopping around" for the history most suited to his needs, this fact can be as much of a boon as forum shopping.

Many legists have the need for a balanced understanding of history, of course. Judges, or their clerks, who are striving to understand the past as well as litigators who seek to see the big picture, should realize that a basic understanding of historiography, and of the concept of historicism, is crucial if they are to find this balance. A good practice for avoiding too narrow an outlook is to read at least two histories, by different authors, of an event or era. But for the litigator who needs a certain "slant" on history, and for others who seek to use professional historical scholarship to persuade some legal audience, the worth of such an understanding is also clear. Just as an attorney may select, within certain limits, those cases that most support the proposition that she is putting forward, so too will she most likely seek out a scholarly historical account that will best justify her position.[233] As a practical matter, however, a legist may lack time and resources, or sufficient training, for effective "history shopping." In fact, however, in many fields of American history certain patterns of scholarship are fairly obvious: once one knows something of those patterns in light of this fact, a basic guide to various schools of historical thought is both possible and desirable.

Although Peter Novick's book *That Noble Dream*[234] is perhaps the most detailed and resource-rich book on American historiographic development, a much better and more focused work for the legist who is in the market for a historical account with a certain "angle" is Grob and Billias's two-volume *Interpretations of American History*, particularly the introductory essay that appears at the beginning of each volume.[235] Here

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> ciples of thought and conduct, which are regarded in that age as absolute and unconditionally valid .... The historian discovers these principles in every age which he studies, but he also discovers that they vary from age to age, and that, in spite of the claim to absoluteness which is always made, changed circumstances always result in changed principles, which are therefore historically relative. The historian who discovers this has of course principles of his own, and these will appear in the manner in which he writes history.

H.A. HODGES, WILHELM DILTHEY: AN INTRODUCTION 32-33 (1944).

233. *See, e.g.*, Seminole Tribe v. Florida, 116 S. Ct. 1114, 1146-50 & nn.2-9 (1996) (Souter, J., dissenting) (relying upon a variety of scholarly histories despite criticism from the majority).

234. *See* NOVICK, *supra* note 13.

235. 1 INTERPRETATIONS OF AMERICAN HISTORY, *supra* note 10.

the editors trace a thumbnail sketch of the major stages of American historical writing: 1) the "era of the Puritan historians during the seventeenth century;"[236] 2) the era of the "Patrician historians, which persisted until the late nineteenth century;"[237] and 3) the "period of the professional scholars," which began slightly over a century ago.[238] The Puritan historians adhered closely to the Augustinian/pre-Enlightenment linear view of history, and therefore lack some credibility in the eyes of those more accustomed to the scientific rational approach. The Patrician historians, drawing upon Enlightenment principles, modified this approach in a reprise of what had happened to the linear view of history on the Continent.[239] In scientific terms their work thus tends to be more palatable to the modern scholar; the Patricians, however, had an agenda of nationalism that served to color their accounts in a rather pronounced fashion.[240] Additionally, the fact that these men (and most, if not all, were not only men, but white men of means) wrote from a fairly uniform perspective makes them a somewhat restricted resource in an age in which we are accustomed to different perspectives in scholarly writing.[241] As if this fact were not enough to limit the utility of early histories, still another—as important today as in Sloane's time[242]—is the constant discovery of new materials.[243] Along these same lines, new methods of information classification and retrieval, such as Lexis and Westlaw, mean that we may now have, at least in practical terms, more information available to us than earlier

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236. *See* 1 *id.*; 2 *id.* at 1-2.

237. *See* 2 *id.* at 2.

238. *See* 2 *Id.*

239. *See* 2 *id.* at 3-4.

240. *See* 2 *id.* at 5.

241. *But see* NOVICK, *supra* note 13, chs. 15-17 (discussing the current fragmentation of historical outlooks).

242. *See supra* note 224 and accompanying text.

243. In 1954, the noted American historian Allan Nevins wrote that a principal reason for the rewriting of history

> is simply because the constant discovery of new materials necessitates a recasting of our view of the past. We might think that this would one day cease, but it never does. . . . One would have said that all the material for the history of the Confederate War Office had been studied and restudied; but behold!, the diary of the third officer of that department, Kean, is suddenly deposited in the University of Virginia, and we find it possible to make a sweeping reassessment of the Southern military administration.

Allan Nevins, *Should American History be Rewritten?*, SATURDAY REV., Feb. 6, 1954, at 7-8.

generations; thus, presumably, our history writing is more accurate today than it was in ages past, possessing as it does more data points. Historical accounts that are both more recent, then, as well as more "professional," will likely be of greater worth to the modern legist.[244]

Accounts meeting these criteria are principally the product of the third era of American historical writing, that of the professional historians, and this is the era upon which Grob and Billias concentrate.[245] These editors divide this era into several sub-eras or genres. The progression is for the most part sequential, but some overlap does occur. These sub-eras tend to have common elements; at the same time, two histories of the same subject written by scholars from different historical schools may well reach different results, and often employ different methodologies.[246] A more thorough understanding of the sub-eras, then, and the differences that mark them, should be of great benefit to one who seeks a particular historical thesis.

From the late nineteenth century to the mid-twentieth, according to Grob and Billias's categorization, the American historical profession came under the successive domination of different schools of thought; the first of these were those of the new professional historians such as the two unrelated Adamses, Henry and Herbert Baxter, who dominated the discipline from around 1870 to 1910,[247] and the Progressive historians, who came to prominence around the turn of the century and remained dominant until around 1945, and included such figures as Charles A. Beard, Vernon L. Parrington, and Carl L. Becker.[248] Beginning in the late 1940s, however, as foreign threats to national security began to grow more ominous, the Neoconservative school of historical scholarship appeared.

244. Of course, this fact might be because the consumer of history—the judge—may have a scientific outlook, and view the legitimacy or accuracy of a history partly in terms of the quantity of data.

245. *See* 1 INTERPRETATIONS OF AMERICAN HISTORY, *supra* note 10, at 6-27.

246. *See* 1 *id.*

247. *See* 1 *id.* at 6-7. Grob and Billias treat that pivotal figure in American historiography, Frederick Jackson Turner, as one of the first professional historians because of his use of the scientific method, *see id.* at 7, while Novick categorizes him as an early Progressive historian. *See* NOVICK, *supra* note 13, at 92 & n.12. This disagreement highlights the danger of applying historiographical labels in too rigid a fashion.

248. *See* 1 INTERPRETATIONS OF AMERICAN HISTORY, *supra* note 10, at 8.

Some of the Neoconservative historians more familiar to legists include Daniel J. Boorstin and Benjamin F. Wright.[249]

The Neoconservative school was not the only one to emerge because of social, political, or foreign pressures. Indeed, all of the above movements, and all historians, are products of history as well as observers of it.[250] The first professional historians emphasized scientific detachment and objectivity because those elements were what the *Zeitgeist* demanded of them and to which it exposed them.[251] The Progressive historians, who saw history as a conflict between competing interests, were themselves living through a time when social and economic forces were in flux.[252] The Neoconservatives, in contrast, emphasized the consensus and unity of American society in the face of foreign threats as World War II approached.[253]

One example of how these three genres differ that may be of widespread interest to legists is in the area of the drafting of the federal Constitution. The view that most historians of the late nineteenth century took was one that stressed consensus and national unity,[254] as one might expect in the post-Civil War era.[255] Wrote George Bancroft, one of the foremost Patrician historians, "By calm meditation and friendly councils [Americans] had prepared a constitution which... excelled every one known before; and which secured itself against violence and revolution by providing a peaceful method for every needed reform."[256]

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249. *See* 1 *id.* at 12-13.

250. *See* 1 *id.* at 14.

251. *See supra* notes 160-70 and accompanying text..

252. *See* 1 INTERPRETATIONS OF AMERICAN HISTORY, *supra* note 10, at 8.

253. *See* 1 *id.* at 12-13.

254. *See* 1 *id.* at 160.

255. Ralph Henry Gabriel comments that in the ante-bellum era national symbols of unity included George Washington and the Declaration of Independence, but not the Constitution since the slavery and states' rights debate implicated constitutional interpretations and made the document controversial. *See* RALPH HENRY GABRIEL, THE COURSE OF AMERICAN DEMOCRATIC THOUGHT 94-99, 443 (2d ed. 1956). After the Civil War, however, this problem disappeared, and between the first and second world wars the Constitution, with its emphasis on the rule of law and individual liberty, emerged as a major symbol of national unity in the face of totalitarian threats. *See id.* at 442-45. This shifting paradigm shows well how even popular perceptions of the past change with time.

256. 2 GEORGE BANCROFT, HISTORY OF THE FORMATION OF THE CONSTITUTION OF THE UNITED STATES 366-67 (1882). Grob and Billias cannily point out that in this passage "Bancroft conveniently overlooked the bloody Civil War that had just been fought." 1 INTERPRETATIONS OF AMERICAN

For the Progressives, on the other hand, who lived through a time of marked economic conflict, the Constitution was not the product of "calm meditation and friendly councils."[257] One of the most famous scholarly American historical works in any field is *An Economic Interpretation of the Constitution*, which Charles A. Beard wrote at the very height of the Progressive Era in 1913.[258] Beard's work emphasized economic class conflict rather than the consensus that older historians saw at work in producing the document.[259] Specifically, Beard argued that most of the men who drafted and promoted the Constitution held one or more of four types of personal interests; these were "money, public securities, manufactures, and trade and shipping."[260] The Constitution received the backing of these men because it would protect them and their investments.[261] In order to secure ratification, moreover, this economic group worked to insure that the "propertyless masses" had no vote, and indeed, of the small number of Americans eligible to vote on ratification, virtually all were white male property owners.[262]

HISTORY, *supra* note 10, at 161. This observation has a great deal of merit, weakening as it does the force of Bancroft's argument, but the scholar skilled in the use of adversarial historiography can counter it. In the years after the bloodbath that was World War I, many historians saw earlier wars through the lens of that then-recent conflict. James G. Randall, writing in 1940 as World War II began, argued that the country could have solved the crisis peacefully with the Constitution and the tools it had at hand; the fault lay not with these tools, as Grob and Billias intimate in their jab at Bancroft, but rather with the "blundering generation" of political leadership whose decisions produced the "human slaughterhouse" of the Civil War. James G. Randall, *The Blundering Generation*, 27 MISS. VALLEY HIST. REV. 3, 7 (June 1940-Mar. 1941). Randall's argument challenges Grob and Billias's while reinforcing Bancroft's.

257. 2 BANCROFT, *supra* note 256, at 366.

258. *See* 1 INTERPRETATIONS OF AMERICAN HISTORY, *supra* note 10, at 164.

259. Beard was not alone in holding this opinion of early American national history; he was merely the most famous. The most succinct expression of this interpretation came from Carl L. Becker, another famous Progressive historian, who wrote that the American Revolution involved not only the question of "home rule," but that of "who should rule at home." Carl Lotus Becker, *The History of Political Parties in the Province of New York, 1760-1776*, *in* 2 BULLETIN OF THE UNIVERSITY OF WISCONSIN 3, 22 (O. Clarke Gillett ed., 1909-10).

260. CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 324 (1913).

261. *See id.* at 63.

262. *See id.* at 64-72.

Beard's book was tremendously influential[263] and the Beardian point of view held sway completely until the rise of the Neoconservatives, who emphasized consensus rather than conflict.[264] Among these were Benjamin F. Wright, who in his 1938 volume *Consensus and Continuity*, stressed the fundamental agreement among the framers on the major issues they faced, including "representative government, elections at fixed intervals, a written constitution which is a supreme law and which contains an amendment clause, separation of powers and checks and balances, a bicameral legislature, a single executive, and a separate court system."[265] Another Neoconservative, Robert E. Brown, not only challenged the validity of Beard's research methodology, but his conceptualization of America as torn by economic class conflict. By stressing that most Americans were small landowners who met the property qualifications for voting, Brown undercut Beard's argument that significantly different economic classes existed at all.[266]

The historical relativism that Dilthey postulated, and both the advantages and dangers of a diverse historical scholarship, are thus readily apparent in the first three stages of the era of professional history. But beginning in the 1960s, American historiography split asunder as never before, both in conceptualization and methodology, thus apparently validating principles of Historicism to an even greater degree. The social and political instability of the 1960s produced a Neoprogressive school of history, which Grob and Billias dub the "New Left," and which, like its Progressive predecessors, emphasized conflict rather than consensus.[267] "New Social historians," on the other hand, did not so much reinterpret existing themes in American history as shift their scrutiny to new themes. Traditional history writing in America was rich in political and constitutional themes; New Social history, by contrast, "focused more on social groups rather than on individuals, on the masses rather than on elites, and on ordinary folk rather than

263. *See* 1 INTERPRETATIONS OF AMERICAN HISTORY, *supra* note 10, at 165.

264. *See supra* notes 253-55 and accompanying text.

265. BENJAMIN F. WRIGHT, CONSENSUS AND CONTINUITY, 1776-1787, at 36 (1958).

266. *See* ROBERT E. BROWN, CHARLES BEARD AND THE CONSTITUTION: A CRITICAL ANALYSIS OF "AN ECONOMIC INTERPRETATION OF THE CONSTITUTION" 148-56 (1956).

267. *See* 1 INTERPRETATIONS OF AMERICAN HISTORY, *supra* note 10, at 16-18.

prominent people,"[268] emphasizing "women, races, workers, ethnics, immigrants and national minorities."[269]

The new social historians introduced novel types of evidence, especially quantitative evidence,[270] as well as conceptual methods drawn from other disciplines, including the social sciences.[271] While this trend often allowed historians to reconceptualize their fields of study,[272] it also led to a fragmentation in the methodology of the field and, to a degree, a loss of identity within the historical profession.[273] Since history now borrowed so heavily from other disciplines, and no single method presented itself as a standard for historical inquiry or research,[274] the discipline soon fell into the same intellectual disarray that plagued many of the social sciences as well.[275] Some of the more important genres that produced constitutional history include the New Intellectual History movement of the 1950s and the 1960s[276] and the Neoprogressive outlook, which included many diverse writings on the subject during and after the 1960s.[277] The former school de-emphasized economic considerations, instead stressing political philosophy, "tak[ing] the ideas of the founding fathers seriously and [accepting] their rhetoric as reflecting more their view of reality."[278] The leading work within this genre is Gordon S. Wood's *The Creation of the American Republic, 1776-1787*, in which the author interpreted the framing of the Constitution in light of the English classical

268. 1 *id.* at 19.

269. 1 *id.* at 19-20.

270. One of the most notorious examples is *Time on the Cross*, a 1974 economic analysis of the institution of slavery. Historians seeking the basis for the authors' conclusion that slaves were only moderately exploited, Novick writes, were told that the answer was to be found in a complex mathematical formula. *See* NOVICK, *supra* note 13, at 588 (discussing ROBERT FOGEL & STANLEY ENGERMAN, TIME ON THE CROSS: EVIDENCE AND METHODS—A SUPPLEMENT (1974)).

271. *See id.* at 383-87.

272. *See id.*

273. *See id.* at 573-629.

274. The author submits that chronological, causal organization remains the distinguishing feature of historical methodology, and that narrative is its principal means of communication. He is well aware, however, that in doing so he opens himself to charges that he is old-fashioned.

275. *See* NOVICK, *supra* note 13, at 573-629.

276. *See* 1 INTERPRETATIONS OF AMERICAN HISTORY, *supra* note 10, at 168-71.

277. *See* 1 *id.* at 176-78.

278. 1 *id.* at 168.

republican tradition and its permutations.[279] The Neoprogressive school was Progressive in the sense that it emphasized economic conflict as the primary motivating force in American history. Beyond that, however, the Neoprogressive works rarely had much in common with each other.[280] Finally, developments in recent years have produced a wide range of scholarly treatments of the framing that include a variety of methodological approaches that are not so easily categorizable.[281]

This diversity (perhaps the better word is confusion) of approaches in constitutional history alone, one hopes, is sufficient to reveal the wealth of historical viewpoints that the legist may use. One may often safely bet that, whatever one's position and need, some scholarly historical interpretation or account supports it; the problem is then merely one of locating that particular piece of scholarship. Several means of accomplishing the task are available. Grob and Billias's volumes, and especially the introductory essays, are a good starting point. Once a legist is acquainted with the time frame of the genres, then she will be able to discern, at least to some extent, the premises and thesis of a work from its date. Another is to use a good finding aid that lists several sources on a subject; by comparing both dates and titles,[282] the legist can get a feel for the flow of historical scholarship on the subject over the years, especially if a work's author has taken care to choose a particularly descriptive title.[283]

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279. *See generally* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (1969).

280. *See* 1 INTERPRETATIONS OF AMERICAN HISTORY, *supra* note 10, at 176. Some of the leading Neoprogressive works include those by Jackson Turner Main and E. James Ferguson. *See* 1 *id.* at 177-78 & n.23.

281. *See* 1 *id.* at 178-79 & n.25.

282. In constitutional history, of course, the leading finding aid is Kermit L. Hall's five volume work and its supplement. *See generally* KERMIT L. HALL, A COMPREHENSIVE BIBLIOGRAPHY OF AMERICAN CONSTITUTIONAL AND LEGAL HISTORY, 1886-1979 (1984) [hereinafter HALL, COMPREHENSIVE BIBLIOGRAPHY].

283. The title of any scholarly work ideally should be highly descriptive and relatively narrow, especially in the computer age when a keyword search may choose or reject a work depending upon the terms the title uses. Because a bibliographic entry may omit subtitles, the main title is the most crucial. Examples of bad titles include, for instance, *The White Umbrella* and *Dear Miss Em.* The former will fail to inform the neophyte that it is a survey of Indian political thought; the latter will probably fail to inform anyone that it is a compilation of Robert L. Eichelberger's wartime correspondence with his future wife. *See* D. MACKENZIE BROWN, THE WHITE UMBRELLA: INDIAN POLITICAL THOUGHT FROM MANU TO GANDHI (1953); ROBERT L. EICHELBERGER,

While historians' increasing use of other disciplines' methodologies may contribute greatly to this corpus of historical writing, as well as result in more diversity and offer the legist a greater range of options, it also reflects the disarray into which the historical profession has fallen.[284] The riot of competing methodologies, in fact, may be at least partly to blame for the profession's failure to develop some uniform methodological benchmarks by which to measure the competence of historical works.[285] Despite these complications, some scholars nevertheless retain the belief that temporal, causal, narrative explanation, grounded in a heavy and critical use of what historians term primary sources, still define the nature of historical inquiry.[286] Proceeding on the assumption that these approaches yet possess some validity, and that, perhaps, nonprofessional historians may think of these things when they think of historical inquiry, the following section sets forth the rudiments of a historical method in which these elements are central.

IV. LOCATION AND USE OF SOURCES: MECHANICS AND CONCEPTS

A. LOCATING SOURCES OF HISTORY

In performing traditional legal research, the legist uses a relatively standard and uniform set of finding aids (digests, legal encyclopedias, and annotations) and authorities (constitutions, cases, statutes, administrative materials, books, law reviews and other legal journals). The finding aids are extensive and highly organized, as are the compilations of sources. While the student may struggle with them at first, their logical arrangement is impressive.

The researcher who undertakes historical study involving other sources, in contrast, may easily find her way into a morass. Finding aids are spottier; crucial sources are all too often unpublished. Even a foray into the relatively civilized world of

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DEAR MISS EM: GENERAL EICHELBERGER'S WAR IN THE PACIFIC, 1942-1945 (Jay Luvaas ed., 1972). In light of the main title of the current work, however—"Clio at the Bar"—the injunction should be "Do as I say, not as I do." *But cf., e.g., supra* notes 44, 55-56; *infra* note 383.

284. *See* NOVICK, *supra* note 13, at 573-629.

285. *See supra* note 50 and accompanying text.

286. For a discussion of the attractions and dangers of narrative and literary quality in historical writing, see NOVICK, *supra* note 13, at 621-25.

government publications, with its Byzantine classification system,[287] may seem to the legist an adventure in the wilderness.

Because any field may serve as the object of historical study (since history is a method, rather than a discrete subject),[288] the legist may find herself studying any number of fields when doing historical research. By way of example, they may include such widely divergent and legally relevant topics as the history of Native Americans;[289] the history of slavery and racial prejudice;[290] the history of abortion and fetal rights;[291] and the history of asbestos.[292] The number of possible sources for historical study, consequently, is staggering; the number of finding aids alone is daunting. Legists conducting research into more orthodox political, legal, or social historical topics do have some standard works available to them,[293] but for other matters, the research must begin with more general guides.[294]

Once the researcher has begun to locate documents of interest, the next step is that of determining the accuracy of the documents' contents, and to understand how the information in those sources relates to other information. Here the concepts of causation and powers of criticism play a useful role. One

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287. A useful guide is JOE MOREHEAD & MARY FETZER, INTRODUCTION TO UNITED STATES GOVERNMENT INFORMATION SOURCES (4th ed. 1992). Older, but still useful is LAURENCE F. SCHMECKEBIER & ROY B. EASTIN, GOVERNMENT PUBLICATIONS AND THEIR USE (2d rev. ed. 1969).

288. *See supra* notes 42-47 and accompanying text.

289. *See, e.g.*, Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 280, 286-88 (1955).

290. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 291-94 (1978).

291. *See supra* note 19 and accompanying text.

292. *See* BARRY I. CASTLEMAN, ASBESTOS: MEDICAL AND LEGAL ASPECTS 112-13 (3d ed. 1990).

293. For a guide to bibliographies and secondary sources, see HALL, COMPREHENSIVE BIBLIOGRAPHY, *supra* note 282. A more general guide to secondary, historical literature is the serial publication *Writings on American History*. A two-volume guide to both American and non-American works is THE AMERICAN HISTORICAL ASSOCIATION'S GUIDE TO HISTORICAL LITERATURE (3d ed. 1995). An excellent, though now somewhat dated, outline of American history by chronology and subject that incorporates extensive references to leading primary and secondary sources is the two-volume HARVARD GUIDE TO AMERICAN HISTORY (Frank Burt Freidel ed., rev. ed. 1974); its single volume predecessor also remains useful.

294. One can suggest, as the most basic possible guide to finding aids, the following: GUIDE TO REFERENCE BOOKS COVERING MATERIALS FROM 1985-90 (Robert Balay ed. 1992); GUIDE TO REFERENCE BOOKS (Eugene P. Sheehy ed., 10th ed. 1986).

hopes, for example, that legal researchers avoid the trap of thinking that an appellate court's recital of the facts of a case necessarily comprises a complete and accurate statement of what actually happened. True, this statement consists of the "legal" facts that the court usually must accept as true,[295] but these "facts" may bear little resemblance to those that occurred in the "real world."[296] Likewise, the researcher should beware of taking statements that she finds in historical documents, and the suggested relationships between them, at face value. Even discounting Carl L. Becker's subjective view of historical facts,[297] and assuming arguendo that the researcher can "know" in some essential way the information in the source, the danger remains that that information may not be what it purports to be, or say what it at first appears to say. The researcher has several means available to test the source;[298] be-

295. *See* Burger, *supra* note 62, at 20 (noting that "[i]n appellate opinions the facts have been determined"). Of course, the court's skillful selection or portrayal of the facts may allow it to convey the impression that it must necessarily reach a certain result when actually the judge is quite consciously choosing the outcome that he wishes. One scholar describes a particular variety of this phenomenon as the "Judicial 'Can't.'" In this construct, a judge condemns a legal rule as immoral even as he upholds or applies that rule anyway, often while stating that he is bound to do so. *See* ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 119-23 (1975).

296. The relationship between the actual and legal worlds is an interesting one. For instance, if a legislature has declared the speed limit on a certain highway to be 55 miles per hour, then legally a driver is incapable (assuming the state allows no legal excuses or justifications for speeding) of driving faster than 55 miles per hour. *Actually* he may be driving 60, 70, or 80 miles an hour, but *legally* he can be going no faster than 55. This lack of congruence between the facts and the law is why our driver may well end up in traffic court.

297. *See* Becker, *supra* note 182, at 336 (arguing that what we call "historical facts" are really only indirect empirical evidence of past events, which necessarily subjectifies history). Writes David Hackett Fischer of Historicism: "It is true that history is something which happens to historians. And it is correct to argue that no historian can hope to know the totality of history as it actually happened. But it is wrong to conclude that objective historical knowledge is therefore impossible." FISCHER, *supra* note 106, at 43. He elaborates that "relativism mistakenly argues that because all historical accounts must be partial in the sense of incomplete, that they must also be partial in the sense of false." *Id.* at 42 n.4. "An incomplete account can be an objectively true account," he insists, although he concedes that "it cannot be the whole truth." *Id.*

298. One of the best guides to historical source criticism appears in HOMER CAREY HOCKETT, THE CRITICAL METHOD IN HISTORICAL RESEARCH AND WRITING 13-62 (1955). A more modern account appears in JACQUES BARZUN & HENRY F. GRAFF, THE MODERN RESEARCHER chs. 5-8 (5th ed. 1992).

fore we turn to these, however, a brief discussion of the more abstract issue of causation might be useful.

B. PRINCIPLES OF CAUSATION IN HISTORY

The subject of historical conceptualization and research, especially in light of its borrowings from other disciplines in recent decades,[299] is a complex one. A detailed summary of all the issues involved is impossible here; many fine and not-so-fine books on the subject are extant.[300] Causation is essential, however, and as such it deserves some attention here.

Causation is an important element in both historical investigation and narrative.[301] Merely stating that causation is a key element of historical study, however, does nothing to reveal what the historian means by "causation," or to define either of the words "cause" and "effect." The natural sciences, too, rely heavily upon these principles, but whether "causation" means the same thing to a historian, or any student of human action, as to a natural scientist is not at all clear.[302] (In fact, natural scientists themselves may be unclear about what they mean by the concept.) In generic terms, however, for the purposes of this article, we may quite tentatively characterize a cause as the state of things C that may result, or will result, in a subsequent state of things E. We may go further and say that when C has always, to our knowledge, resulted in E, (or as a natural scientist would say, when C must always produce E), then C is a sufficient cause;[303] when C must be present to produce E on the other hand, but C alone will not always suffice to produce E, then C is a necessary cause, a sine qua non, a but-for cause, or, to use the term familiar to those who have studied torts, a cause-in-fact.[304]

Given that causation is actually this simple a phenomenon, and given that history purports to study the relationship

299. *See* NOVICK, *supra* note 13, chs. 13-16; *supra* notes 270-75 and accompanying text.

300. Two of the best are BARZUN & GRAFF, *supra* note 298, and FISCHER, *supra* note 106.

301. *See* FISCHER, *supra* note 106, ch. 6.

302. *See, e.g.*, H.L.A. HART & TONY HONORE, CAUSATION IN THE LAW ch. 1 (2d ed. 1985). *But see* MANDELBAUM, *supra* note 93, at 199-204 (critiquing Hart and Honore).

303. *See* WILLIAM L. REESE, DICTIONARY OF PHILOSOPHY AND RELIGION 84, 381 (1980).

304. *See id.*

among and between past and present human activities, how might a legal scholar make use of them? The example of teaching suggests itself. One may use the historical model to postulate two, and perhaps only two, reasons for including a case within a casebook. Each of these two reasons is a function of the historical cause/effect supposition. To state matters simply, a teacher may present a case either as cause or effect. One may go further and argue that at least insofar as it represents the current state of the law, a case appears in a casebook either to illustrate a cause or an effect, and for no other reason. In terms of legal doctrine, a case is a "cause" when it has fundamentally changed the legal principles that lower courts must follow, and that the deciding court itself must follow in subsequent cases. Such cases abound, for instance, in constitutional law courses, partly because most cases in constitutional law casebooks are United States Supreme Court cases,[305] which by definition bind other courts in the country.[306] Likewise, scattered throughout other casebooks are staples that shaped the law; among others are *Armory v. Delamirie*,[307] a basic personal property "finding" case; *Hadley v. Baxendale*,[308] a somewhat more recent leading contracts damages case; and *McPherson v. Buick Motor Company*,[309] a key products liability case of our own century.

On the other hand, many cases in law school casebooks merely illustrate what the current law is for the benefit of the beginning student, without themselves contributing much to the development of that law. A case such as this has no particular significance itself, and the editors may well have chosen any of a hundred other cases. For instance, a particular illustrative case may fit in well with the scheme of a casebook, resembling neighboring cases in its fact patterns[310] or even in-

305. *See, e.g.*, PAUL BREST & SANFORD LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING (3d ed. 1992); DANIEL A. FARBER ET AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY (1993); GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW (2d ed. 1991).

306. One need only think of such cases as *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), or *Roe v. Wade*, 410 U.S. 113 (1973) to see the point.

307. 93 Eng. Rep. 664 (1722).

308. 156 Eng. Rep. 145 (1854).

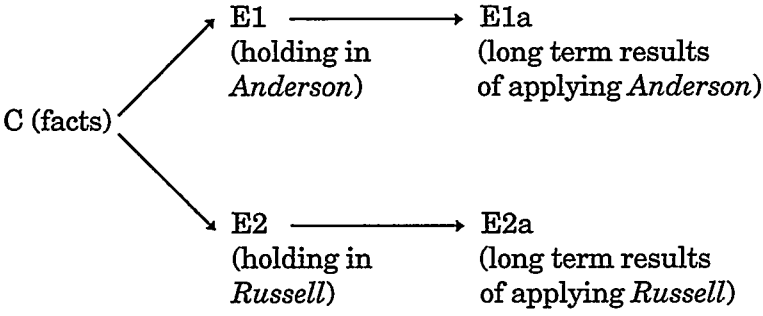
309. 111 N.E. 1050 (N.Y. 1916).

310. *Russell v. Hill*, 34 S.E. 640 (N.C. 1899), and *Anderson v. Gouldberg*,

jecting some humor into the book's pages,[311] but as a statement of the law it may have nothing unique about it.

Again, this is a simplification. *Russell v. Hill*,[312] for instance, is neither a "cause case" nor an "effects case" in the above sense, since as conventionally presented it merely reveals the dangers that its theory of property would present if courts adopted that theory instead of the "correct" theory of its companion case, *Anderson v. Gouldberg*.[313] Even in this instance, however, the case serves as a kind of negative illustration. Two different courts face essentially the same facts and from them draw different conclusions, thus propagating two divergent policies. The casebooks, and the professor, ask the student to see each case as a cause, and to see each case's effects on subsequent legal and social developments in turn.

In cause/effect terms, we may picture the process thus:



with the student speculating upon both the nature and desirability of *E1a* on the one hand and *E2a* on the other.

Another fact complicates the simple model of a case as being either a cause or an effect: a case may be at once both a cause and an effect. One such decision that comes to mind is

53 N.W. 636 (Minn. 1892), exemplify this use of cases. *See* JOHN E. CRIBBET ET AL., CASES AND MATERIALS ON PROPERTY 139-42 (6th ed. 1990); *supra* notes 70-79 and accompanying text.

311. *See, e.g.*, Cordas v. Peerless Transp. Co., 27 N.Y.S.2d 198 (1941), *reprinted in* WILLIAM L. PROSSER ET AL., CASES AND MATERIALS ON TORTS 168-71 (7th ed. 1982). The opinion, which one can only describe as hilarious despite the calamities that it recounts, appears in Prosser's casebook in the context of the discussion of the standard of care in negligence cases.

312. 34 S.E. 640 (N.C. 1899).

313. 53 N.W. 636 (Minn. 1892); *see supra* notes 70-83 and accompanying text.

Meinhard v. Salmon.[314] Justice Cardozo there noted that a trustee's fiduciary duty is the product of strong tradition, an observance that characterizes this as an "effects" case. At the same time, Cardozo's eloquent and concise statement of this duty ("Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior")[315] has made the case influential in many subsequent fiduciary duty cases.

All of this is well for a law professor who is teaching legal doctrine, but what about the professor who is more fact-oriented, such as an evidence or trial advocacy teacher, or an attorney who may be more interested in the facts than legal arguments? Actually, the process is the same. The above casebook discussion characterized the cases as causes or effects, viewing the cases themselves as historical events. One may likewise categorize other actions, for instance, a person dropping a package of explosives[316] or one dog owner accidentally hitting the other in the eye with a stick[317] as causes and effects.[318]

In telling a coherent story, whether it be to the jury in an opening statement, to an appellate bench that needs some grasp of the facts of the case, or to the readers of a law review article, the one who tells the story needs to make that story coherent. A temporally organized narrative is an excellent means of doing so, striking a responsive chord in human nature (and particularly in our own society, with its desk calendars, wrist watches, and time slots). One can otherwise scarcely explain why so many stories begin with "Once upon a time."[319] One must temper the narrative, however, with some

314. 164 N.E. 545 (N.Y. 1928), *reprinted in* WILLIAM L. CARY & MELVIN ARON EISENBERG, CASES AND MATERIALS ON CORPORATIONS 72-77 (7th unabridged ed. 1995), *and in* ROBERT W. HAMILTON, CASES AND MATERIALS ON CORPORATIONS, INCLUDING PARTNERSHIPS AND LIMITED PARTNERSHIPS 47-52 (4th ed. 1990).

315. *Meinhard*, 164 N.E. at 546.

316. *See* Palsgraf v. Long Island R.R., 162 N.E. 99, 99 (N.Y. 1928).

317. *See* Brown v. Kendall, 60 Mass. (6 Cush.) 292 (1850).

318. *See, e.g.*, Wendy Collins Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and* Pennoyer *Reconsidered*, 62 WASH. L. REV. 479, 480-90 (1987) (recounting the facts that resulted in the case of *Pennoyer v. Neff*, 95 U.S. 714 (1877)).

319. Narrative is not indispensable to the communication of historical knowledge, but it is one of the most comprehensible, especially to legists. *See supra* note 107 and accompanying text. Two leading scholars in the field agree. *See* BARZUN & GRAFF, *supra* note 298, at ix (discussing the need to be proficient at both "the techniques of research and the art of expression"). In

consideration for causal relationships, or else the story becomes, in the words of one history critic, "just one damn thing after another."[320] To write that the the First Congress met in early 1789 and that the storming of the Bastille occurred a few months later is to recount a story that is correct in temporal, or sequential, terms; in causative terms, however, the story is misleading, for it does nothing to relate the two events or to explain either the causes or effects of the inauguration of the new federal government or the storming of the Bastille.[321] Thus we see that a mere recitation of events in chronological order may explain nothing; worse, it may only cause confusion. To the degree that history undertakes to explain the past, then, it must concern itself not merely with facts but with questions of causation, that is, with questions of relationships

addition to adopting narrative, both the historian and the legist-historian would profit from treating history as well as law, in Samuel Eliot Morison's words, as "literary art." HANDLIN ET AL., *supra* note 293, at 44. Indeed, the criticism that Morison leveled at American historical writing a generation or two ago applies even more strongly to most American legal writing today. He readily admitted that his profession had produced many good and useful written products; but he castigated the style that they adopted as "terrible stuff.... Long, involved sentences that one has to read two or three times in order to grasp the meaning; poverty in vocabulary, ineptness of expression, weakness in paragraph structure, constant misuse of words and, of late, the introduction of pseudoscientific and psychological jargon." *Id.* at 45. Legists sometimes defend themselves from these charges by claiming that complexity of legal thought and the need for precision dictate this syle for legal writing, but this defense, though often valid, has limits. Of course precision is of crucial importance, but law has no corner on the market of complexity, and at any rate these two reasons are often simply excuses. The true art in legal writing, if it survives today or ever existed, lies in one's ability to marry complexity and precision with a clear, readable style. Sadly, most legal writers today apparently either deny this truth, or are oblivious to it, or never had an opportunity to develop the skill of style while attending the Langdellian, science-driven law school.

320. FRANCES FITZGERALD, AMERICA REVISED: HISTORY SCHOOLBOOKS IN THE TWENTIETH CENTURY 161 (1979).

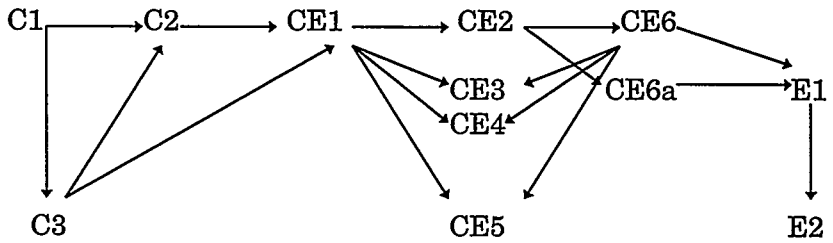
321. At some level each of these two events may conceivably be the effects of a single, underlying cause, *see* R.R. PALMER, THE AGE OF THE DEMOCRATIC REVOLUTION: A POLITICAL HISTORY OF EUROPE AND AMERICA, 1760-1800, at 5-7 (1959), but insofar as one takes the above two events as the "whole" story, this story is lacking in causative cohesion. Palmer, incidentally, discusses the problems of historical generalization. *See id.* at 9 (discussing the relevance of late eighteenth to twentieth century revolutions).

An aside: An old saw among historians is that one may tell whether a historian specializes in American history or instead in European history by her instinctive answer to the question "What was the big event of 1789?" The former will answer with a remark about the organization of the federal government; the latter will mention the Bastille.

between and among facts. Nevertheless, one of the principal means of discovering the proper relationships is by first arranging them chronologically. Since an effect by definition cannot precede a cause, chronological arrangement for purposes of analysis immediately eliminates the possibility that the storyteller will mistakenly perceive relationships between events that cannot in reality exist.

What are some of the dangers that may survive the use of narrative and chronological arrangement? For one thing, a single event, as the casebook discussion above reveals,[322] may be at once a cause and an effect. Another danger is that of imposing temporal limitations on the account that are too confining. The defendant may indeed cause the plaintiff's injury, and if the story begins and ends with these two events, legal liability might well follow. The plaintiff's prior conduct, however, might have placed him in a position in which the defendant's actions would result in the injury, and if the plaintiff's actions were negligent, this fact might well reduce or eliminate the defendant's liability to him. To make matters still more complex, a single cause may have several effects, some of them necessary, some of them not, and any effect may have many possible causes.

A graphical representation of some historical episode may thus appear as follows. In this graph, *C* represents a cause; *E* represents an effect; and *CE* represents an effect that is itself a cause of other effects. For the sake of simplicity, the graph does not distinguish between necessary and sufficient causes.



This graph is the visual representation of a conventional account of de jure segregation from before *Plessy v. Ferguson* [323]

322. *See supra* notes 305-18 and accompanying text.
323. 163 U.S. 537 (1896).

to a time shortly after *Brown*.[324] In this chart, *C1* represents racism; *C2*, *Plessy*; *C3*, de jure segregation; *CE1*, black activism; *CE2*, *Missouri ex rel. Gaines v. Canada*,[325] a forerunner of *Brown*, in which the Supreme Court held that the University of Missouri's facilities for a black law student did not meet equal protection requirements because they were not equal to those for white law students; *CE3*, *Sweatt v. Painter*,[326] another forerunner of *Brown*, in which the Court reached a similar holding as it had in *Sweatt*; *CE4*, *McLaurin v. Oklahoma State Regents*, a similar decision respecting graduate school,[327] still another forerunner of *Brown*; *CE5*, increasing white awareness of the evils of de jure segregation; *CE6*, *Brown I*; CE6a, *Brown II*;[328] *E1*, school desegregation cases; *E2* later desegregation cases.[329]

This chart reveals the complexity of causal analysis in many ways; first, by the number of events; second, by the classification of an event as a *C*, *CE*, or an *E*; third, by the relationship between the events (How many arrows should we draw? Between what events should we draw them?). Here the author has been arbitrary regarding all of these factors; with a bit of thought the reader may substitute her own chart of the same events. A fourth question is whether the chart is sufficiently inclusive in chronological terms (for instance, should a *C0* appear? an *E3*, or an *E10*?). A fifth question is equally troubling: even within the half century chronological frame we have here, are all the relevant events present in this chart? The answer to this last question is almost certainly "Of course not," but this answer does nothing to help us determine which additional events, of all the events that occurred from the 1890s to the 1950s, should appear on the chart. But despite all these questions, such a chart might prove a valuable analytical tool for those who need to construct a chronological narrative or rely upon some other visual conceptual model. (Indeed, if the chart has encouraged the reader to think at all about the proper number and placement of arrows, for instance, as a conceptual model it has already served an important instructional purpose, whatever its other failings.)

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324. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

325. 305 U.S. 337, 349-50 (1938).

326. 339 U.S. 629, 634 (1950).

327. 339 U.S. 637, 642 (1950).

328. Brown v. Bd. of Educ., 349 U.S. 294, 298-301 (1955).

329. *See* WILLIAM H. CHAFE, THE UNFINISHED JOURNEY: AMERICA SINCE WORLD WAR II 146-57 (1986); 2 KELLY ET AL., *supra* note 211, at 581-611.

The questions that this chart produces probably outnumber the answers that it provides, but for purposes of the following analysis, we shall confine ourselves to three: 1) Does the chart display properly the causal relationships among the listed facts?; 2) Are the events that the chart lists actual, discrete historical facts?; and 3) Given that the answer to question 2 is "yes," why do these facts, and not others, deserve a place in the chart? In other words, does this chart represent all of the relevant facts, in their proper relationships with each other, and nothing else?

1. Does the chart display properly the causal relationship among the listed facts?

This question, while perhaps the least perplexing of the three we shall examine, is still hard to answer. If, for instance, the chart listed only two temporally discrete events, only two possible causal states could exist between them: a) a state in which the one that occurred first caused, produced, or resulted in the one that occurred second, and b) a state in which the one that occurred first did not cause, produce or result in the one that occurred second. But even this simplistic history assumes that these two events constitute the entire universe of elements in a historical episode, that is, that no other events exist that the chart fails to represent. When we begin to add elements to the chart, the number of permutations increases dramatically.

Legists in some respects—for instance, those who deal with the tort law question of cause-in-fact—are accustomed to simplifying causal explanations, usually choosing to interpret and/or portray the problem as one of necessary or "but-for" causation.[330] This principle often serves attorneys well enough in such a context, else tort doctrine would have rejected this construct long ago. But the legist who is performing historical research, especially if she is accustomed to thinking of causation in this particular sense, must be aware of, and prepared to apply, a variety of different causal concepts. The "but-for" concept is too limited, and in fact Fischer identifies it as one of his fallacies.[331] Calling it the "reductive fallacy,"[332] he describes it

330. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 265-72 (5th ed. 1984); *see also* HART & HONORE, *supra* note 302, at 15-16 (discussing the simplified approach to causation that lawyers take).

331. *See* FISCHER, *supra* note 106, at 172.

as "the asking of one kind of causal question, and the answering of it with another and less comprehensive causal question."[333] In the leading cause-in-fact case of *Summers v. Tice*,[334] for instance, in which the two defendants shot simultaneously toward the plaintiff, who suffered injury from only one gun,[335] the causal question the court faced was whether the injury would have occurred absent the negligence of one or the other of the defendants.[336] The court ignored, however, other facts that clearly, in a larger sense, caused the injury, both purely physical phenomena (What if defendant's powder had been wet? What if a branch or stone had caused the plaintiff to slip and fall out of harm's way an instant before the gunshots?) and human reaction (What if one or both of the defendants had paused, not out of fear of being negligent otherwise, but instead to get a better grip on their guns or to make sure they had loaded and cocked them, or that they wanted to shoot at this particular moment?). Even discounting purely physical, Caesar-crossing-the-Rubicon phenomena,[337] the historian can imagine a number of possible "why Caesar crossed the Rubicon"[338] causal explanations of the *Summers* injury just in the moments immediately preceding the tragic occurrence. The *Summers* court probably avoided these questions because it felt that they had no bearing upon the question of liability, but all of them are clearly relevant to the issue of cause-in-fact. Thus the court asked a single cause-in-fact question, and perceiving the question to be unanswerable, deemed it irrelevant and adopted a policy-based approach to liability.

Of course, if the legist/historian identifies a great many causal factors he creates another danger that Fischer also described. This danger he describes as the fallacy of "indiscriminate pluralism,"[339] in which the historian cites many causal components without distinguishing between their relative importance. In attempting to explain all the causes of an

332. *Id.*

333. *Id.* at 174.

334. 199 P.2d 1 (Cal. 1948).

335. *See id.* at 1-2.

336. The facts available to the court were insufficient for a finding of this sort, and the court ultimately had to base its decision on policy grounds. *See id.* at 4.

337. *See supra* notes 177-81 and accompanying text.

338. *See supra* notes 177-81 and accompanying text.

339. FISCHER, *supra* note 106, at 175.

event, the legist/historian ultimately explains nothing in causal terms. "Indiscriminate pluralism," Fischer writes,

> is an occupational hazard of academic historians, who are taught to tell comprehensive truths. It is particularly powerful in the present generation, when all monisms are under the ban.... One hardly ever sees a contemporary reference to *the* cause of an event, but often to a multiplicity of "causes," "factors," "elements," "origins," "influences," "impulses," "stimuli," etc.[340]

Fischer rightly denounces this approach to causation for the vacillation that it is:

> The resultant explanation, for all its apparent sophistication and thoroughness, is literal nonsense. It is also self-contradictory, for an indiscriminate pluralism is not really a pluralism at all, but a perverse kind of monistic unity comparable to William James's idea of an infant's idea of the universe—"one big blooming buzzing Confusion."[341]

Tort lawyers, perhaps, have invented at least a partial remedy for themselves with the concept of proximate cause. This doctrine seeks to draw a relatively arbitrary line between events that are too remote in some sense from the injury, although meeting the requirements of cause-in-fact. The logical place for this line is the subject of such well-known cases and doctrines as *Polemis*[342] and *Wagon Mound*,[343] with their discussions of direct cause, and *Palsgraf*,[344] with its doctrine of foreseeability applied to plaintiffs rather than consequences. Courts have even discussed proximate cause in terms of time[345] and space[346] limitations. These may be adequate devices for screening out, for legal purposes, some causal elements, allowing courts to deal with causal principles "in such a limited way as is practical and as is within the scope of ordinary human understanding."[347] While this is an admirable effort to

340. *Id.*

341. *Id.* (quoting WILLIAM JAMES, PSYCHOLOGY 16 (1948)).

342. *In re* Polemis, 3 K.B. 560 (Eng. C.A. 1921).

343. *See* Overseas Tankship (U.K.) Ltd. v. Morts Dock & Eng'g Co., (Wagon Mound I) 1961 All E.R. 404 (P.C.) (appeal taken from Austl.).

344. 162 N.E. 99 (N.Y. 1928).

345. *See, e.g.*, City of Brady v. Finklea, 400 F.2d 352, 357 (5th Cir. 1968) (discussing, in proximate cause terms, the importance of lapse of several years between a defective construction job and a resulting injury).

346. *See, e.g.*, Hoffman v. King, 55 N.E. 401, 403-04 (N.Y. 1899) (discussing, in terms of proximate cause, the distance between the source of a fire that the defendant negligently allowed to start and the location of the plaintiff's destroyed property).

347. Atlantic Coast Line R.R. Co. v. Daniels, 70 S.E. 203, 205 (Ga. Ct. App. 1911).

avoid Fischer's fallacy of indiscriminate pluralism, one suspects that in a sense it succeeds too well, proceeding perhaps out of a sense of judicial administration and practicality, and thus approaching too closely the reductive fallacy.

The historian, by contrast, is (or should be) more concerned with cause-in-fact. In doing so, he must often speak of causal connections that range not only over thousands of miles, but thousands of years as well; though he may perforce operate on a tight budget, moreover, and though he may soon be facing approaching publication deadlines, one hopes that efficiency concerns are less important for him than a full investigation of the facts. As Sir Frederick Pollock wrote of the problem, "The lawyer cannot afford to adventure himself with philosophers in the logical and metaphysical controversies that beset the idea of cause."[348] Given judicial time and resource constraints this observation no doubt remains valid, but to the extent that the courts, and the parties, can address realities of causation with administrative efficiency, then they should certainly do so. Some knowledge of causation on the part of legists, and what philosophers, scientists, and historians mean by the term, may be useful in this regard.

Many other questions of causation remain,[349] but again, space limitations deny us the opportunity to peruse them here. The point for the legist-turned-historian to remember is that to produce, or use, a credible history, he must be prepared to understand, accept, and argue the validity of principles of causation that may differ widely from those in use in legal doctrine. With this warning in mind, we turn our attention to the related, and perhaps more difficult, question of treatment of facts.

2. Are the events that the chart lists actual, discrete historical facts?

This question immediately invites division into component issues. For instance, in referring to the example that the chart above portrays,[350] before we decide whether "black activism" is a discrete historical fact, we must decide whether it is a fact at

348. *Overseas Tankship*, 1961 All E.R. at 413-14.

349. The reader will find a thorough working guide to both fallacies of causation and useful models of causation in Fischer's book. *See* FISCHER, *supra* note 106, at 164-86.

350. *See supra* notes 323-29 and accompanying text.

all. The well-known American historian Carl L. Becker, taking his lead from the Idealists, once authored an article in which he addressed this point.[351] In this article, Becker asked not only what a historical fact was, but where it resided and when it existed. Using as an example the "fact" of Abraham Lincoln's assassination,[352] he concluded that "[i]n truth the actual past is gone; and the world of history is an intangible world, recreated imaginatively, and present in our minds."[353]

A historian, Becker argued, has available to him not an actual past event, but instead some record or evidence of that event—"a symbol which enables us to recreate it imaginatively."[354] Lincoln's assassination happened in Ford's theater in 1865; the newspapers and other writings of the day refer to the assassination, but "[t]he records are after all only paper, over the surface of which ink has been distributed in certain patterns."[355] The fact, therefore, does not exist at present in records, but instead, if anywhere, within the mind of the reader.[356] "If the historical fact is present, imaginatively, in someone's mind," Becker continued, "then it is now, a part of the present," even though this "present" is itself as transitory as consciousness.[357]

The implications of this compelling logic are clear. Historical accounts become the product of an interplay between the actual events, the record of these events, and the interpretation the historian/reader gives the record, since "our own present purposes, desires, prepossessions, and prejudices all . . . enter into the process of knowing" these events.[358] To a degree this process mirrors that of statutory or constitutional construction, in which the intent of the framers comprises the event; the words of the provision in question constitute the symbols; and the interpretation of the lawyer/judge/reader consists of the final link in the chain.[359] Theories of statutory con-

351. Becker, *supra* note 182.

352. *Id.* at 331-35.

353. *Id.* at 333; *cf.* COLLINGWOOD, *supra* note 175, at 215 (arguing that "[t]he history of thought, and therefore all history, is the re-enactment of past thought in the historian's own mind.").

354. Becker, *supra* note 182, at 330.

355. *Id.* at 331.

356. *See id.* at 331-332.

357. *Id.*

358. *Id.* at 336.

359. One may easily categorize all theories of statutory interpretation as falling into one of three groups; one that privileges to a greater or lesser ex-

struction that recognize either a provision's words, or the intent of its drafters, as authoritative to any degree thus engage in historical inquiry and conceptualization, although sometimes in a fairly limited way. Other historical inquiries can produce far more complex problems. Discerning legislative intent, for instance, may be difficult: among other things the researcher must ask whose intent matters (the majority's? the minority's? the swing vote's?). In the case of a constitutional provision, do the intents of those who voted to ratify the constitution or the amendment matter? Should we consider the intent of some group that voted in favor of the provision, but for reasons that diverge sharply from the bulk of the majority?[360]

But in this scenario, at least, the historical event in question is pretty clearly the intent of a more or less definable group on a relatively narrow subject—that is, the framers' (and in the case of a constitution the ratifiers') intent about a particular constitution, constitutional provision, or statute. The question grows much more complex when one must first decide what a given event includes and what it does not. "Black activism," for example, is an abstract concept that may extend over years or generations, and include dozens or hundreds of sub-events. If we count the attendance of each individual at Martin Luther King, Jr.'s 1963 "I have a dream" speech at the Lincoln Memorial as a discrete event, for instance,[361] and we treat all other individuals' activities throughout the era in a similar fashion, we may easily see "black activism" as consisting not of a single event, but instead as a convenient label for millions of events in the years between *Plessy v. Ferguson*[362] and the present. But convenient labels can impede true understanding. The actions of Thurgood Marshall, Rosa Parks, Martin Luther King, Jr., and Malcolm X may be of very different

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tent the framers' intentions; one that privileges to a greater or lesser extent the words of the provision; and one that privileges to a greater or lesser extent policy concerns of interest to the lawyer/judge/reader. *See* Carlos E. González, *Reinterpreting Statutory Interpretation*, 74 N.C. L. REV. 585, 594-624 (1996).

360. *See* Melton, *supra* note 56, at 65-66.

361. *See* CHAFE, *supra* note 329, at 310-12. These may indeed, for the purposes of some historical accounts, be separate events; they may not, however, be such for accounts with a different focus. "[E]very fact in history," Fischer wrote, "is an answer to a question, and that evidence which is useful and true and sufficient in answer to question B may be false and useless in answer to question A." FISCHER, *supra* note 106, at 62.

362. 163 U.S. 537 (1896).

natures; placing them within the same category may well distort the meaning of each.

How, then, do we decide which of all these sub-events is not an event in itself but instead something that is merely part of the event that we have labeled "black activism?" The decision is necessarily arbitrary. Each sub-event, assuming we have the means of reliving it in our minds, *is* an event, or at least it meets Becker's definition of a historical fact. An individual's act of civil disobedience, or her attendance at King's speech, no doubt was an effect of other events; no doubt it produced its own effects, at the very least for that individual. If we choose not to categorize it as a discrete event in our chart, therefore, and we are being intellectually honest, then we make that choice because that event, taken in isolation, is not unique or does nothing of itself to reveal the operation of causes or effects in which we are interested for the purposes of our particular research. In other words, we determine an event *A* in which we are interested (the ongoing process of legal desegregation); we decide that the attendance of one anonymous individual *B* at one rally has no discrete impact in the development of *A*, no matter what other effects it may have, such as the effect on *B* herself; we thus decide not to define that fact as a discrete event. In short, our categorization and conceptualization of the facts is result-oriented. Our identification of a historical fact as a discrete event is therefore bound up with the question of what facts we think are relevant. Thus we see that we cannot escape our own circumstances in writing history any more than could the Patricians, the Nationalists, or the Progressives. Historians write their accounts for a purpose and that purpose varies with the historian and the particular task at hand. But does this mean that our hoped-for result determines the content of the narrative that we write or cite? For the legist-advocate the answer is obviously "yes," for no sane advocate will, absent a legal duty to do so, intentionally introduce evidence that damages her own case. This is not to say, however, that the legist should abandon the attempt to take a detached, scientific view of the subject in which she is interested. Many who work in legal fields need balance and as much objectivity as possible, and even the advocate needs to know both sides of a question. Anyone can write a "history" of an event that consists of pure fabrication designed to prove some point or another, but if the author has used no sources, or has ignored undeniable facts, then the reader will evaluate the

history as worthless. The honest historian, then, must recognize her biases and try to subdue them, even as she realizes that to some degree she will probably fail. The effort, however, is one of the things that makes the history credible.

Regardless of the degree to which the historian suppresses bias, however, she will no doubt decide that some facts are more relevant to her account than are others. This brings us to our third question.

3. Why do the facts we have chosen, and not others, deserve a place in the chart?

As the previous section concluded, relevance is a major concern as we identify a historical fact as a discrete event. It also is of major concern in determining whether that event merits a place in a causal historical scheme, even if it does count in our thought as a discrete event.

Relevancy, of course, is a legal term of art to judges, litigators, and indeed any law student who has taken an introductory course in evidence.[363] The legal community has entire compilations of rules to control what evidence a litigant may offer in support of her claim or defense. The legist who is at all familiar with these rules, and who finds himself doing historical research for presentation to a judge or jury, may feel some predilection for applying these familiar rules and rationales of evidence law in his work. In doing so, however, he would be committing a grave error.

The short answer to the question of what facts the legist should include in his historical account is this: he should include those facts that help him win his case, enact his bill into law, or uphold his legal interpretation. To do that, he must offer his audience some sort of credible historical framework and believable explanations of causal relationships. The particular objective that he seeks will suggest or even dictate that he discuss certain events, and that he exclude, or at least distinguish or downplay, others. All this is well and good; in this sense, the question of what to include is one of the easiest ones to answer. But how he goes about this process needs explanation, for he cannot use the familiar, legal approaches to historical evidence to achieve these goals.

363. *See* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 4.1 (1995).

The problem with applying rules of legal evidence to historical research, even when the researcher intends to use the product in litigation, is that those rules are designed to govern an adversarial proceeding. Historical research, in contrast, is a very different undertaking, Peter Irons' statement that "scholarship is a form of advocacy"[364] notwithstanding. If we accept the possibility that objective truth exists, and if we view the goal of the historian as that of approaching the truth as closely as possible, then we must recognize that the historian's goal is at some level incompatible with the litigator's. As John H. Wigmore noted, we accept that the goal of the scholar is truth,[365] and as a moment's reflection will tell us, we cannot say the same of the litigator. "Despite our untested statements of self-congratulation," Judge Marvin Frankel wrote of the legal advocate some years ago, "we know that others searching after facts—in history, geography, medicine, whatever—do not emulate our adversary system. . . . [W]e know that many of the rules and devices of adversary litigation as we conduct it are not geared for, but are often aptly suited to defeat, the development of the truth."[366]

How can this be, when courts declare expressly that "[t]he basic purpose of a trial is the determination of truth"[367] and other scholars dispute Frankel's statement that disciplines such as history are not adversarial?[368] The answer lies partly in the structure of the trial in an adversarial system. The advocate represents the interests of the client rather than the truth, despite the ideal that the operation of the system as a whole will discover truth. If historical research is adversarial, then that research at least makes the pursuit of truth a paramount goal, unlike our judicial system, and the structure of the scholar's adversarial system differs so much from that of the courts that applying the evidentiary rules of the one to the processes of the other would lead to bizarre results.[369] As an

364. Irons, *supra* note 230, at 354.

365. *See* JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1692 (James H. Chadbourn rev. 1976).

366. Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1036 (1975).

367. Tehan v. United States *ex rel.* Shott, 382 U.S. 406, 416 (1966).

368. *See, e.g.*, KALMAN, *supra* note 36, at 187-88; Monroe H. Freedman, *Judge Frankel's Search for Truth*, 123 U. PA. L. REV. 1060, 1060-61 (1975).

369. Any argument that the Federal Rules of Evidence and their state counterparts sometimes produce bizarre results even in the courts is irrelevant, since our goal is not to reproduce the inadequacies of the judicial system

illustration, let us consider for a moment the process of scholarly publishing to be an adversarial legal proceeding and try to figure out which individuals play which roles. We may see the historical researcher, for instance, as the advocate; a colleague who takes a different view of the subject as opposing counsel; a peer reviewer of the manuscript as opposing counsel, or perhaps a judge, in that he may challenge the validity of the research and recommend, with greater or less authority, that it not go before the scholarly community at large; other specialists in the field who read the published work as the jury, in that they decide whether it merits citation and consultation, or opposing counsel, if they write revisionist accounts of the same events. These analogies are obviously only approximate, however, and they are sufficiently fluid to make the application of legal rules of evidence downright dangerous for the truth.[370]

Another reason why Frankel's statement is accurate is that the stated goal of trial as truth is not itself "the whole truth." Many authorities recognize that a trial, and the rules of evidence applicable therein, seek to secure things in addition to the truth. One recent authority on the subject, for example, lists five principal rationales that underlie legal rules of evidence.[371] One of these, to be sure, is "to insure accurate factfinding."[372] This rationale, however, ranks fourth on the list. The first one is to prevent lay juries of "amateur factfinders" from placing improper weight on hearsay, character evidence, and other authority.[373] The authors describe another reason as "pragmatic—to control the scope and duration of trials."[374] Two others are "to further substantive policies" both related and unrelated to the matter of litigation, such as allocating properly the burden of persuasion in the type of case at bar and to

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in our historical research but to avoid them.

370. On the other hand, when the historian comes into the courtroom as an expert witness, she must clearly play by the attorney's rules. This can be quite a shock to the historian and a distortion of the picture of the past that she seeks to paint for the court. *See* KALMAN, *supra* note 36, at 196-98. "[T]he expert witness route is a dangerous one," she writes. "The historian who becomes an expert witness cannot control the use of his or her testimony.... Historians may be tripped up in exchanges with lawyers who think more quickly on their feet." *Id.* at 198.

371. *See* MUELLER & KIRKPATRICK, *supra* note 363, § 1.1, at 1-3.

372. *Id.* at 2.

373. *See id.* at 1-2.

374. *Id.* at 2.

affect generally husband-wife relations by use of spousal privilege, respectively.[375]

The Federal Rules of Evidence themselves countenance an approach that recognizes values besides that of truth. Rule 102, for instance, mandates that the rules as a whole "shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that truth may be ascertained and proceedings justly determined."[376] One may argue that despite the various rationales that here appear, the rule's express objective is truth; but "just determination" also appears as an objective, and to avoid redundancy, this phrase must mean something other than truth.[377] Some—Judge Posner, for instance—argue that keeping costs of litigation low is a major driving force behind the rules.[378]

Consider the rules relating to relevancy,[379] which sacrifice completeness of information to the overburdened judicial calendar, in order to avoid (in the words of Federal Rule 403) "undue delay [or] waste of time."[380] As Holmes once noted of the introduction of collateral matters, this proscription on the introduction of what even legal rules of evidence may admit is relevant is "a concession to the shortness of life"[381] rather than an effort to discover all that we possibly can about a matter (though many historians have dedicated their entire careers to discovering "the whole truth" about a historical event or era).

The argument here is not that the attorney should seek continuances for decades (or that the law professor plead for an extended deadline from her law review editor) so that she may compile "the whole truth," but that she realize at the outset of research that as an amateur historian she must approach ma-

375. *See id.*

376. FED. R. EVID. 102.

377. "[T]he Rules . . . recognize that there are other policies served by rules of evidence aside from reaching accurate decisions as to what happened in a particular case. In dealing with offers to compromise, evidence of insurance, subsequent remedial measures, and privileges, for example, the Trial Judge must consider factors other than accurate reconstruction of historical facts." 1 STEPHEN A. SALTZBURG AND MICHAEL M. MARTIN, FEDERAL RULES OF EVIDENCE MANUAL 13 (5th ed. 1990).

378. *See* 1 *id.* (citing Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399 (1973)).

379. *See* FED. R. EVID. 401-12.

380. FED. R. EVID. 403.

381. Reeve v. Dennett, 11 N.E. 938, 944 (Mass. 1887).

terials with a very different set of tools from those she may be accustomed to wielding. The goal here is not efficiency but completeness. If a trial is, in the sarcastic words of one of Frankel's critics, "the rape of Truth in the courtroom,"[382] then historical scholarship is an effort to ransack the past, to lay bare the secrets of its inhabitants with no concern for their privacy or reputation, to seek out any detail, no matter how small, that may bring more of that past to light. We cannot otherwise explain the gusto with which historians request declassification of government materials, or pore over and publish personal correspondences that so very often bear on their face the injunction "Burn this letter."[383]

We need no further inquiry to understand that application of these legal rules of evidence to the process of historical research would be improper. The same is true of the rationales that Mueller and Kirkpatrick suggest underlie them. Perhaps an attorney who prepares a case is on a tight deadline, or has a crushing caseload; but preparing an inaccurate, shoddy history will in the end hurt not merely the truth-finding process but the attorney as well, subjecting him to historical counterattack from an astute adversary. Mistrust of the audience's ability to weigh the evidence the legist provides likewise rings hollow as a justification. Presumably a judge or fellow law professor can weigh the evidence for herself competently and with some dispassion; that is, after all, a major part of these peoples' jobs. As for furthering substantive policies unrelated to the subject of historical scholarship, contemplation of possible policies is enough to make one shudder. A rush to publication in order to secure tenure, a deliberately biased approach in order to further an ideological agenda, or even a heartfelt concern for the reader's patience for detail all perforce do violence to the quality of the scholarship in question.

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382. H. Richard Uviller, *The Advocate, the Truth, and Judicial Hackles: A Reaction to Judge Frankel's Idea*, 123 U. PA. L. REV. 1067, 1067 (1975).

383. One good example is Letter from William Blount, United States Senator, to James Carey (Apr. 21, 1797), *reprinted in* 7 ANNALS OF CONGRESS 41-43 (1797) ("When you have read this letter over three times, then burn it."). Carey's failure to follow Blount's order resulted in Blount's impeachment, and his near-simultaneous expulsion from the Senate, less than three months later. *See* BUCKNER F. MELTON, JR., THE FIRST IMPEACHMENT: THE CONSTITUTION'S FRAMERS AND THE CASE OF SENATOR WILLIAM BLOUNT chs. 2-3 (1998). For a study built largely on one leading figure's reluctance to follow such instructions, see 1 PAGE SMITH, JOHN ADAMS 2 (1962).

Insofar as the legist wants accuracy in his history, then, finding and determining the relevancy of historical facts by applying legal rules of evidence simply will not do. The legist must instead adopt some different principles. To a degree, how she applies these principles will depend upon the nature of the source.

C. SOURCE CRITICISM: PRACTICAL APPLICATION OF PRINCIPLES OF HISTORICAL METHODOLOGY

Historians generally speak of sources as being either primary or secondary.[384] By this they mean something quite different from legists, for whom the terms respectively denote "authorized statements of the law by governmental institutions" and "statements about the law . . . used to explain, interpret, develop, locate, or update primary authorities."[385] For the historian, a record is a primary source when its author was a participant in, or an immediate observer of, the event in question.[386] A secondary source, on the other hand, is the product of one who knows the event only indirectly, through consulting primary sources—that is, through reports and reasoning rather than through participation or direct observation.[387] One may consider secondary sources as a form of hearsay, and some rationales of hearsay apply nicely to secondary sources. For example, reliance on a secondary source alone prevents the researcher from subjecting the primary sources on which it is based to the criticisms described below (or, in legal parlance, the fact that a work is a secondary source prevents a researcher using it from thereby cross-examining the primary sources on which it is based).[388] The author of the secondary source, like a witness who recounts the statements of an out-of-court declarant, may have misperceived the context or meaning of the primary source.[389] The author of the secondary source

384. *See, e.g.*, BARZUN & GRAFF, *supra* note 298, at 114.

385. J. MYRON JACOBSTEIN ET AL., FUNDAMENTALS OF LEGAL RESEARCH 2 (6th ed. 1994).

386. *See* BARZUN & GRAFF, *supra* note 298, at 114.

387. *See id.*

388. *Cf.* MUELLER & KIRKPATRICK, *supra* note 363, § 8.2, at 1052-53 (describing the need for cross-examination as one reason for excluding hearsay).

389. *Cf. id.* at 1050-51 (discussing witness ambiguity).

may also somehow distort in his retelling the content of the primary source, either unconsciously or, worse, deliberately.[390]

One should not, however, take the hearsay analogy too far. In fact, a secondary source may be more balanced, impartial, and accurate than the primary sources on which it builds, especially if the primary sources are particularly partisan and the secondary source's author is relatively disinterested and has greater perspective than any one primary source author. Nevertheless, presumably because of the above rationales, the trend in historical research is to rely heavily on primary sources.[391]

Another means of dividing sources, whether primary or secondary, is into narrative and non-narrative categories. A leading legal/constitutional history of medieval England describes narrative sources as chronicles and biographies;[392] to this we might add any source that communicates through nar-

390. *Cf. id.* at 1050 (discussing witness insincerity). One excellent example appears in the book *Man of the House*, which purports to be the memoir of House speaker Tip O'Neill and which is written in the first person. Although O'Neill was the copyright holder of record, his name does not appear as that of author, despite the use of the first-person narrative. Instead, a collaborator's name appears on the title page, thus indicating that the work is partly or largely a secondary source due to the intervening presence of the ghostwriter. *See* MAN OF THE HOUSE: THE LIFE AND POLITICAL MEMOIRS OF SPEAKER TIP O'NEILL (1987). At one point O'Neill (or his collaborator) writes derisively of a representative whom he identifies as "Old Carl Vincent [sic]." *Id.* at 136. The context clearly indicates that he was referring to Representative Carl L. Vinson of Georgia. The writer, be he O'Neill or his collaborator, should have been able to identify Vinson (and the correct spelling of his name) with ease, had he been so inclined. *See* JOINT COMMITTEE ON PRINTING, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774-1989, at 1985 (Bicentennial ed., Comm. Print 1989). (The United States Navy, in fact, found Vinson and his service on the House Naval Affairs and Armed Services Committees so noteworthy that it not only named a *Nimitz*-class aircraft carrier after him, but did so while Vinson was still alive (an almost unheard-of honor). *See* JANE'S FIGHTING SHIPS 1975-76, at 425 (Captain John T. Moore ed., 1975-76); *USS Rickover Commissioned In Ceremony*, WASH. POST, July 22, 1984, at A19.) The only reasonable conclusion is that O'Neill or his collaborator deliberately chose to slight Vinson in this account, thus distorting the historical record, however inconsequentially. Though this sort of error is relatively harmless, others may be at once much more dangerous and difficult to detect.

391. *See, e.g.*, HOCKETT, *supra* note 298, at 89. Hockett also notes the important fact that a single source may be primary for some purposes but secondary for others: "Theodore Roosevelt's *Winning of the West* would be a secondary history of that subject but a [primary] source for anyone studying Roosevelt as a writer of history." *Id.* at 89-90.

392. *See* BRYCE LYON, A CONSTITUTIONAL AND LEGAL HISTORY OF MEDIEVAL ENGLAND 3, 6-8 (1960).

rative, including, perhaps, minutes or debates. Non-narrative sources, on the other hand, include statutes, charters, constitutions, and various statistical compilations.[393] As is the case with primary and secondary sources, however, narrative sources are not inherently less or more accurate than non-narrative sources. While the latter appeal to scholars who see at least a degree of objective truth in quantifiable data,[394] one would do well to remember that the criteria for inclusion, or the collection methods, may have been either consciously or unconsciously the result of bias.[395] Nevertheless, the type of source that one faces may well play a role in how one approaches and criticizes it.

This regimen of criticism is an intrinsic, and an important, part of the research process. If hearsay is a more-or-less apt analogy for secondary sources, then cross-examination is likewise a very rough equivalent of source criticism. This criticism is of two main types: *external*, which asks whether the document itself is what it appears to be,[396] rather than a fabrication or forgery, and *internal*, which has as its emphasis not the document, but the quality of the substantive information.[397]

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393. *See id.* at 3-6. The best example for medieval England is Domesday Book, a 1086 body of information compiled to inform William the Conqueror of estimated revenues due him from England. *See id.* at 5, 109. The choice of a medieval history as an illustration of this twofold division was not happenstance. Rather, it serves as a jumping-off point into the realization that, depending upon the researcher's particular problem and era, his use of sources may be vastly different than use of sources in other contexts. Although medieval English sources are more abundant than those of some other countries and regions of the day, sources in other areas of classical or medieval history sources may be very scarce indeed. When facing this problem the researcher must subject each source to the most searching inquiries in order to milk every possible ounce of information from it. On the other hand, a researcher who is compiling a history of federal appropriations bills in the 1800s and 1900s, or making use of the voluminous Adams Family Papers, may easily suffocate under an avalanche of documents; his approach to the records, therefore, must be rather different, subjecting some documents to close scrutiny, but necessarily paying others less attention. The legist working in a field of American legal (or other) history is likely to run across variants of each of these types of problems, depending upon the exact issue in which he is interested.

394. *See* NOVICK, *supra* note 13, at 588-89 (describing the quantitative approach to history known as Cliometrics).

395. The quotation that Mark Twain attributed to Disraeli comes to mind. "There are three kinds of lies: lies, damned lies and statistics." 1 MARK TWAIN, MARK TWAIN'S AUTOBIOGRAPHY 246 (1924).

396. *See* HOCKETT, *supra* note 298, at 14.

397. *See id.* at 41.

(One historian refers to these types of criticism, in terms rather more familiar to legists, as examining a source's authenticity and its credibility, respectively.)[398] The second of these is further divisible into positive criticism, which emphasizes the researcher's accurate perception of the source's information (as opposed to his misperception due to his own bias, expectations, or unfamiliarity with the field),[399] and negative criticism, which most closely approximates the cross-examination function of testing the credibility of the source's substantive information and author.[400]

1. External Criticism

The possibility of relying upon a forged document may seem low, but in fact the danger is a real one. One of the most famous examples in history is the alleged Donation of Constantine, memorialized in a document by which the Roman Emperor Constantine gave the Church various powers of government over the Western Roman Empire in the fourth century.[401] This document was one basis for the medieval Church's claim to exercise such powers;[402] not until the Renaissance, and the rise of the new practice of source criticism, did scholars realize that the language of the document dates from a much later time than that of Constantine's reign, and thus that the document could not be what it purported to be.[403] Another more pe-

398. *See* GOTTSCHALK, *supra* note 93, at 118, 139.

399. *See* HOCKETT, *supra* note 298, at 41.

400. *See id.* at 44. According to Becker, of course, one does not engage in a dialogue with a source's author simply by consulting the source. *See supra* notes 351-58 and accompanying text. On the other hand, analogizing to principles of statutory interpretation, one may view the purpose of examining the source as that of moving beyond it into the mind of its author. *See id.* This is an approach, perhaps, with which even Becker and the Idealists might agree. *See id.*

401. *See* GOTTSCHALK, *supra* note 93, at 118-19; HOCKETT, *supra* note 298, at 26-27.

402. *See* HOCKETT, *supra* note 298, at 26-27.

403. *See id.* For an English version of the Renaissance scholar Valla's "refutation of the instrument of the Donation," see CHRISTOPHER B. COLEMAN, THE TREATISE OF LORENZO VALLA ON THE DONATION OF CONSTANTINE 27 (1922). This work also contains an excerpt of the medieval legal scholar Gratian's rendering of the Donation in his *Decretum*. *See id.* at 10-19. For an English version of the entire document, see SELECT HISTORICAL DOCUMENTS OF THE MIDDLE AGES 319-29 (Ernest F. Henderson ed. & trans., 1896).

destrian example of external criticism inheres in the story of the ancient Greek coin that bore upon it the date of 500 B.C.[404]

The relatively brief interval that American history spans means that such problems are in some ways less for Americanists; nevertheless, the danger remains, and it sometimes assumes considerable notoriety and magnitude. A famous example is the supposed correspondence between Abraham Lincoln and Ann Rutledge, which appeared in the *Atlantic Monthly* in 1928.[405] The pitfalls are still with us; Barzun and Graff point out that the danger of fabrication in American sources is on the increase, largely because "during the last fifty years, new modes of communication and entertainment have exploited in pseudo-historical fashion the recent and remote past alike, and this popular (and profitable) enterprise has led to a noticeable weakening of the standards of evidence and truth-telling."[406] The Internet comes to mind at once as an area that will spawn similar problems in the future. A researcher may visit a Web page today and see one thing; she may visit again tomorrow and find something quite different. The source itself changes, though all the information that one uses to locate it remains the same. The very technology that allows unprecedented dissemination of information also increases the chances of inadvertent or deliberate fabrication or modification of the source.[407] Likewise, digital manipulation of audio and video sources, as well as of photographs and artwork, are ever-increasing hazards.

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404. *See* BARZUN & GRAFF, *supra* note 298, at 99.

405. *See The Discovery*, 142 ATLANTIC MONTHLY 834 (1928), and Wilma Frances Minor, *Lincoln the Lover*, 142 ATLANTIC MONTHLY 838 (1928), *discussed in* GOTTSCHALK, *supra* note 93, at 119.

406. BARZUN & GRAFF, *supra* note 298, at 108-09; *see supra* note 390.

407. The editors of the Bluebook have acknowledged the growing utility and danger of Web-based research in the wary stance they have taken toward such sources in the sixteenth edition of their work. "Because of the transient nature of many Internet sources," reads the Bluebook, "citation to Internet sources is discouraged unless the materials are unavailable in printed form or are difficult to obtain in their original form." In any case (other than that of electronic journals) the citation should include the date of the last modification or visit to the Web site in question. *See* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 124 (16th ed. 1996). Questions of fraud aside, many gross inaccuracies appear on the Web, and they shall continue to appear in the future. But the fact the the Bluebook discourages the citation of Web sources will not stem the rising tide of citation and use of Web resources. Would that it could; the life of the twenty-first century historian in this regard is sure to be interesting.

2. Positive Internal Criticism

Of greater importance to the historian, especially when working with more conventional legal sources, is the skill of internal criticism. Two of the greatest dangers that positive internal criticism seeks to defuse are: 1) the danger that the researcher may read into the source's language some fact or idea that he would like to find in the source, but which in fact the source does not contain;[408] and 2) the related danger that the researcher's lack of background knowledge about the general subject or era he is studying might blind him to the true meaning of some of the source's information, or even the presence of some information.[409]

Each of these ideas presents its own conceptual problems. For instance, an extreme relativist would assert that the researcher, by definition, reads *everything* into the source's language—that everything the writer intended to say is filtered through the reader's perceptions and subjective understanding of that language. This no doubt occurs to a degree, but only to a degree. As Fischer and others have argued, "[T]o say that all knowledge is subjective is like saying that all things are short. Nothing can be short, unless something is tall. So, also, no knowledge can be subjective unless some knowledge is objective."[410] One need not accept Fischer's argument in its entirety to recognize that some facts, even if not objectively true, are so widely accepted as to be very nearly objectively trustworthy. The Western calander springs to mind as a good example in

408. *See* BARZUN & GRAFF, *supra* note 298, at 186; HOCKETT, *supra* note 298, at 41.

409. "The more one understands at the beginning, the more one finds to question and ascertain." BARZUN & GRAFF, *supra* note 298, at 119; *cf.* HOCKETT, *supra* note 298, at 42-43 ("The first question to be asked is, what does the statement say? The question may seem foolish until one reflects that statements are often made in a foreign language, or in unfamiliar terms, or in an unusual sense of familiar words."). This last is particularly reminiscent of some remarks that Karl Llewellyn directed to beginning law students:

> Now the first thing you are to do with an opinion is to read it. Does this sound commonplace? Does this amuse you? There is no reason why it should amuse you. You have already read past seventeen expressions of whose meaning you have no conception .... You are outlanders in this country of the law. You do not know the speech. It must be learned. Like any other foreign tongue, it must be learned ....

K.N. LLEWELLYN, THE BRAMBLE BUSH: SOME LECTURES ON LAW AND ITS STUDY 34 (1930).

410. FISCHER, *supra* note 297, at 43 n.4. (citing Christopher Blake, *Can History Be Objective?*, 72 MIND 61-78 (1955)).

American history, despite occasional complications over such matters as Julian and Gregorian dating.[411] Likewise, much, though not all, of the English language is fairly straightforward. Of course, if all words had a perfectly fixed and rigid meaning, we would be able to tell what a writer meant by his words with much less trouble; as legists know all too well, however, one often has difficulty making, in Learned Hand's words, "a fortress out of the dictionary."[412] Yet enough standardization exists to allow the reader to move beyond his own predilections, through the medium of language, and into the writer's mind, or at least to maintain the fiction that he does so.

The conceptual problem with the second danger is that one must start *somewhere* when learning about a new field, and that somewhere, presumably, is ignorance. If one must know something of a subject in order to study the subject, then one may never begin a study of the subject at all. While the problem seems insurmountable if we phrase it thus, one would do well to remember that a researcher may carry over less particularized knowledge from other fields of study. If the researcher's language is English, for example, he can use his knowledge of that language to understand older English-language documents, and then began educating himself in the ways of the earlier style. His understanding of the dating system may likewise provide an entrée into the source.

These two dangers are not, therefore, insurmountable; nevertheless they are very real. We have already seen, perhaps, one example of the general problem, in a relatively recent court opinion that misconstrued the language of *Bayard v. Singleton*.[413] Another example will suffice to illustrate both of the problems. In *Filartiga v. Pena-Irala*,[414] a leading case on the issue of whether customary international law is federal common law, the court concluded, based on an examination of eighteenth century law and precedent, that the law of nations was in fact part of federal common law.[415] In a recent article,

411. For a discussion of this problem and how to avoid it, see BARZUN & GRAFF, *supra* note 298, at 83.

412. Cabell v. Markham, 148 F.2d 737, 739 (2d Cir.), *aff'd*, 326 U.S. 404 (1945). In fact, in this passage Hand argued that "a mature and developed jurisprudence" should *not* take an inflexible approach to language. *See id.*

413. 1 N.C. (Mart.) 5 (1787); *see supra* notes 66-68 and accompanying text.

414. 630 F.2d 876 (2d Cir. 1980).

415. *See id.* at 886.

however, Professor A.M. Weisburd has demonstrated that the court was in error on this point.[416] Weisburd's analysis, moreover, suggests that the court erred essentially because in studying early legal sources it fell afoul of both of the dangers that internal criticism is designed to prevent.[417] One suspects that, given the grisly facts of *Filartiga*, which involved allegations that the defendant had tortured and killed plaintiff's decedent,[418] the court wanted to find that the law of nations was part of federal common law, for unless this was so, the statute upon which plaintiffs relied to obtain American jurisdiction over the defendant[419] would violate Article III of the Constitution. Assuming this to be the case, the court consequently read the precedents in such a way as to uphold jurisdiction, even though the true meaning of the precedents might not have supported such a reading.[420] An alternate, or an additional, reason for the court's misreading,[421] which Weisburd stresses, is that it failed to realize that early American courts saw the law of nations in a very different light from modern courts, and that without this realization, what the early courts seem to a modern reader to have held may be something very different from what they actually held, in the context of their own time and understanding.[422] Essentially, the early cases saw the law

416. *See* A.M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT'L L. 1, 29-31 (1995).

417. *See id.*

418. *See Filartiga*, 630 F.2d at 878.

419. Alien Tort Claims Act, 28 U.S.C. § 1350 (1994).

420. Whatever the reasons, the court did find the Act to square with Article III, thus upholding jurisdiction. *See Filartiga*, 630 F.2d at 886.

421. *See* Weisburd, *supra* note 416, at 29-30.

422. *See id.* at 29; *supra* notes 64-69 and accompanying text. This dichotomy raises the metaphysical question of whether a holding is static, based upon the authority of those who issued it, or changing, varying with the frame of reference of the interpreter. If it is the former, it would seem to be a universal, existing ahistorically, for changing circumstances would not affect its validity. Absolute rules may exist, but one of the premises of both the legal and historical methods is that if circumstances change, then different rules may apply. The purpose of this article is not to inquire as to the existence of such absolute rules. Rather, it concerns itself with addressing a different problem, which arises when an advocate or judge seeks to analogize a current case to an earlier one, but misunderstands the earlier holding by applying his own frame of reference to it, thus effectively altering the earlier holding. The practical result is that the holding changes, though the legist may state, and believe, otherwise. The purpose of the present work is to help legists who employ such an approach to authority to understand some of the methods that are necessary to venture down the path towards understanding historical authority, whether or not that authority illustrates the existence and opera-

of nations, which includes both admiralty law and customary international law, as a type of general law, or natural law, which was an object for "'discovery' by judicial inquiry and reflection."[423] Early federal case law, however, established that federal courts were not courts of general law.[424] This understanding of the early American concept of law is key to a realization that the early federal courts saw the law of nations as something distinct from the law of the United States, even though the courts might apply that law independently of their power to apply the law of the United States in certain specific contexts countenanced by Article III.[425] A greater familiarity with the prevailing judicial philosophy of the early nineteenth century, then, may have helped the *Filartiga* court avoid this mistaken interpretation.[426]

3. Negative Internal Criticism

In the above examples of positive criticism (or, more accurately, of the *Filartiga* court's failure to apply the principles of positive internal criticism), one can see that these principles have as their objective the determination of what the source says, and what the writer meant, to the greatest degree possible.[427] Negative internal criticism, in contrast, seeks not to establish truth or meaning of a statement, but to call it into question;[428] Hockett has written that negative criticism "seeks to discover every possible reason for *doubting*" the source's statement.[429] "It is the rule," he continues, "that every statement must be doubted as long as any reasonable ground for doubt can be found."[430] While the desirability of this particular

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tion of universals.

423. Weisburd, *supra*, note 416, at 29.

424. *See id.* (citing United States v. Hudson, 11 U.S. (7 Cranch) 32 (1812) and other cases).

425. *See id.* at 30-31. Article III extends the judicial power to cases "arising under this Constitution" in one context and "to all Cases of admiralty and maritime Jurisdiction" in another. U.S. Const., art. III, § 2. Thus, federal courts can apply international law principles of admiralty without those principles being part of the law of the United States.

426. The reader may note that a failure to understand James Otis's declaration that an act against the constitution is void is a failure to apply principles of positive internal criticism very similar to that of the *Filartiga* court. *See supra* notes 64-65 and accompanying text.

427. *See* HOCKETT, *supra* note 298, at 43-44.

428. *See id.* at 44.

429. *Id.*

430. *Id.*

standard of proof may be open to debate, the rationale for it is sound enough, and its similarity to that of cross-examination is clear. The latter is useful, indeed indispensable, for testing witnesses' knowledge, capacity, and truthfulness; negative internal criticism performs these same functions for historical sources. Of course, cross-examination principally involves a personal interaction between an advocate and a witness who can respond actively to the advocate's questions. The need for this element, in fact, underlies the ban in some jurisdictions on the introduction of printed sources such as treatises as evidence.[431] Many of the same concerns that motivate advocates during cross-examination are applicable to negative internal criticism of the historical sources; the fact, however, that the researcher cannot engage those sources in a dialogue, at least in the same way as he can a living human witness, changes the dynamics of the process somewhat. A brief discussion of how to apply the tools of negative internal criticism is thus in order.

John H. Wigmore wrote of the importance of a witness's opportunity to observe the matters upon which he testifies,[432] and Robert Keeton likewise stated that "[p]roof of poor opportunity for observation is one of the customary methods of discrediting the testimony of a witness."[433] In the same manner, Hockett declared that "[i]n testing competence the first concern of the critic is to ascertain what opportunity the maker of a statement had to know the facts."[434] In examining opportunity, moreover, one also begins to evaluate the reliability of the observer and his recorded observation. An account of an event may be unreliable for many reasons, even if the writer did have a good opportunity to observe the event; but absent such opportunity, the chances of reliabilty are poor from the outset of the investigation.

Many means exist to test opportunity and reliability. Two of the best, when they are available, are: 1) to compare the account in question to other observers' accounts of the same event; and 2) to compare it to accounts by the same observer of other events at other times. With each system, of course, the accounts that the researcher uses for purposes of comparison

431. *See, e.g.*, Jacober v. St. Peter's Medical Ctr., 608 A.2d 304, 310 (N.J. 1992); O'Brien v. Angley, 407 N.E.2d 490, 493-94 (Ohio 1980) (discussing the possibility of author bias).

432. *See* 3A WIGMORE, *supra* note 365, § 994.

433. ROBERT E. KEETON, TRIAL TACTICS AND METHODS 112 (2d ed. 1973).

434. HOCKETT, *supra* note 298, at 44.

should have a known degree of accuracy.[435] If such accounts are not available, then the researcher must rely on matters such as inconsistencies within the same document to alert him to the presence of inaccuracies and, with luck, what those inaccuracies are. Finally, if this approach bears little fruit, the researcher must fall back upon generalities. Was the observer/writer a *trained* observer, such as a soldier? Was she elderly, and thus perhaps especially forgetful, at the time she observed or participated in the event, or at the time she wrote her account? Did enough time elapse between the event and the making of the record to cloud the observer's recollections, or, conversely, to cool her passions and create a degree of detachment from hotly partisan events and positions? These and other factors may help to enlighten the researcher. A similar approach is to consider the nature of the source itself. A newspaper article whose author wrote it in a rush to make a deadline may contain more inaccuracies than a report or letter that the author wrote at her leisure.[436]

Beyond the generalities, however, the researcher cannot go. He cannot ask questions of the document in order to elicit further details that may reveal an inconsistency or inaccurate observation (or, at any rate, the document will not answer, if the researcher did a good job at the outset of positive internal criticism).[437] In the final analysis the source, unlike the living

435. This, of course, raises a bootstrapping problem of establishing the veracity of a benchmark. To achieve this goal, one should seek accounts of trained observers, or of individuals who earned a reputation for honesty and meticulous observation; the legal notions of means, motive, and opportunity for accurate reporting suggest themselves. The researcher should avoid the temptation of uncritically relying on readily available and generally accepted reports, for these may fail to meet the necessary criteria despite their availability.

436. On the other hand, it may not. The reader will recognize, of course, that these factors are only general guides, rather than predictors of the accuracy of particular sources or writers. One should take passage of time only as an indication of the forces that may be at work upon the writing of the document. It may mean that those forces are those of mature reflection and deliberation; it may, on the other hand, mean other things that are more detrimental to the truth. For instance, Ulysses S. Grant published memoirs ten years after leaving the White House and twenty years after Appomattox. In his case, however, he was desperately racing the clock, battling a terminal case of throat cancer to produce a work that would sell well enough to pay his massive debts and provide for his family after his demise. *See* ULYSSES S. GRANT III, ULYSSES S. GRANT: WARRIOR AND STATESMAN 427-51 (1969); ULYSSES S. GRANT, PERSONAL MEMOIRS OF U.S. GRANT (1885). These goals could not but affect what he wrote.

437. *See supra* notes 408-26 and accompanying text; *cf.* KEETON, *supra*

witness, is purely passive; once the researcher has reached a certain point in developing and judging all the testimony that the source has to offer, then any further refinement—whether it be toward or away from increased accuracy—is purely the result of the researcher's own changing perceptions of the source.

To say that a document is passive, however, is not to say that it is incapable of deceiving its reader. Indeed, the author has endeavored to show in the last few pages the many ways in which a source can be misleading. A few ways yet remain, and one of them is what most persons, including legists, likely think when they think of deception; this is conscious deception on the part of the declarant, or at least some unconscious bias that results in distortion.

At first glance, Keeton's statement that "[m]ost witnesses are biased by the time they are called to testify in a case"[438] seems to have little bearing upon historical research. After all, the author of a historical source, especially if it is non-narrative, would not seem in most instances to be writing as a litigant. A moment's reflection, however, will explode this misapprehension. In the first place, and especially if the researcher is engaged in preparing a legal history, the original author of a source may well be a party to a lawsuit, or commenting upon it, and thus is open to bias as Keeton suggests. In a much broader sense, furthermore, many historical documents are similarly partisan, though no actual court contest may be involved. One need consider the accounts that came from Southern pens in the wake of the Confederacy's defeat, as writers such as former President Jefferson Davis and former Vice President Alexander H. Stephens attempted to convince contemporaries and as yet unborn generations that their cause had been just, or at least misunderstood.[439]

By now the point should be clear; bias, or at least the potential for bias, inheres in any such historical source, even non-narrative ones when the compiler or originator may have been biased, consciously or unconsciously, in her choice of filters or selection criteria when preparing, for instance, some statistical

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note 433, at 129 (noting that "[a] number of techniques of effective cross-examination involve repetition and elaboration of the direct testimony").

438. KEETON, *supra* note 433, at 116.

439. *See* ALEXANDER H. STEPHENS, A CONSTITUTIONAL VIEW OF THE LATE WAR BETWEEN THE STATES (1868).

compilation.[440] Here too, however, certain mechanisms for perceiving the presence, nature, and extent of bias exist. The nature of the writing—letter from an attorney, public address on a national holiday, letter to lover, fiancée, or spouse, or confidential diplomatic dispatch—all should raise different questions in the researcher's mind. Again, however, as is the case with observations on observers' reliability, these are generalities. The level and type of bias in a diplomatic dispatch, for example, may vary widely depending upon whether the intended recipient is the sender's superior or his opposite number in an unfriendly government with whom the sender's own government is currently embroiled in some international crisis. So, too, a letter from an attorney may vary greatly depending upon whether the attorney writes as a counselor or as an advocate.[441]

Finally, in this brief survey of internal negative criticism, we should note one last hazard. "Careful inquiry," wrote Keeton, "will often disclose that things the witness says as if they were his own observations are actually only repetition of what some other person has told him."[442] Hockett agrees, labeling such statements more bluntly as "Gossip, rumor, and slander." "Nothing is more common," he insists of historical sources, "than for persons to repeat, often with embellishments, what others have told them, often without any attempt to ascertain the truth." One example that is growing more widespread is that of the ghostwriter, which we have already discussed.[443] Hockett warns that prominent persons are often the target of such tales,[444] but the researcher should be on guard for this danger in any circumstance.

This section has been an all-too-brief, but highly necessary, tour through the world of source criticism. Of necessity, it has only touched upon the main themes of the subject and recounted a few of the most basic points. When taken in con-

440. *See supra* note 436 and accompanying text. As for non-narrative sources, one would do well to remember Disraeli's quip about the credibility of statistics. *See supra* note 395.

441. *See* HOCKETT, *supra* note 298, at 54-62 (describing this phenomenon more extensively).

442. KEETON, *supra* note 433, at 122.

443. *See supra* note 390 (discussing Tip O'Neill's book). This example clearly involves O'Neill's bias, or his co-author's negligent or deliberate misspelling of Carl Vinson's name. No other reasonable explanation, short of printer's error, is possible.

444. *See* HOCKETT, *supra* note 298, at 51.

junction with the preceding, equally brief sections on historical conception and historiography, however, it should serve as at least a starting point for serious historical research in legal and related fields.

CONCLUDING THOUGHTS

When the legist has need of consulting scholarly histories, or undertakes to research and write such a history, she probably does so for generally pragmatic reasons, such as preparing a case for argument, or critiquing the law or advocating its change or preservation. Were one to ask the legist, therefore, why she was in fact producing or consuming scholarly history, one would expect a pragmatic answer: "To win my case," or "To question the recent Supreme Court opinion."[445] But if one presses beyond this point and asks the legist how she expects the history in question to help her achieve whatever objective she has espoused, then the answer may be less predictable, and quite possibly less clear. Perhaps one response would be a Positivistic statement to the effect that the law should follow an earlier similar historical example—or, for that matter, that the law should break with the past and adopt a new approach, since history reveals that the old approach has failed in the past. Other answers might be forthcoming, but most of them would probably rest, at least implicitly, on the assumption that past events are in some way relevant to present legal issues and future legal development. If the past is not relevant, after all, even if only in the sense of revealing potential alternatives for our present and future (as with the *Anderson* and *Russell* cases[446]) or demonstrating how *not* to do things in the future, then why cite it? The whole system of precedent, furthermore, maintains at least the fiction of historical generality that lies at the root of Positivism,[447] so perhaps an outlook among legists that accepts Historical Positivism as at least a viable fiction, if not a statement of reality, is understandable. Many of the arguments of Idealism, however, are compelling, and in light of them, one must ask, in the final analysis, how relevant history really is. Is history, in its partial (and if one believes fully in

445. Perhaps an answer that one might occasionally get, if the speaker were a particularly candid law professor, might even be "to get tenure." Nevertheless, this end is also utilitarian in some sense.

446. *See supra* notes 70-83 and accompanying text.

447. *See supra* notes 197-99 and accompanying text.

the tenets of Idealism and relativism, total) unknowability, nothing more than sophism, as Chief Justice Rehnquist recently suggested?[448] Or may the law somehow benefit from the application of the historical method as Justice Souter maintained in the same case that occasioned Rehnquist's remarks?[449]

During his early years in the historical profession, the author once engaged in a discussion of Francis Fukuyama's thesis in his controversial article "The End of History"[450] with a retired Air Force general officer with whom he was acquainted.[451] Fukuyama maintained, in Hegelian fashion, that the end of the Cold War occasioned an end of the forces that have driven recent history, and that it also heralded an age in which "Western liberal democracy" would triumph "as the final form of human government."[452] During this discussion the general maintained firmly that, with the increasing international movement towards "democracy" that he perceived at the time (the late 1980s), that war, at least in the West, had become a thing of the past. To support his proposition, the general stated firmly that (the author remembers the sentence exactly[453]) "History teaches that liberal democracies don't make war on each other."

A more Positivistic statement would be hard to find, and in fact it was too Positivistic for the author, even though he is in fact somewhat sympathetic to Positivistic statements. Being a junior scholar, however, and much younger than this educated

448. *See* Seminole Tribe v. Florida, 116 S. Ct. 1114, 1129-30 (1996) (criticizing the use of scholarly history); *supra* note 19.

449. *See Seminole Tribe*, 116 S. Ct. at 1146-52 (Souter, J., dissenting); *supra* note 19.

450. Francis Fukuyama, *The End of History*, NAT'L INTEREST, Summer, 1989, at 2. For a more thorough treatment of Fukuyama's ideas, see FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (1992).

451. The author is proud to have studied under Professor I. B. Holley, Jr., of the History Department of Duke University, who holds the rank of Major General, United States Air Force Reserve (Retired). For the record, the author wishes to state expressly that the officer in question is not Professor Holley, whose influence is nevertheless apparent, in more positive ways, in many other portions of this article.

452. That Fukuyama would thus describe the result of the downfall of Marxism, which itself drew upon Hegelianism and foresaw an end of history as the end of conflict over property, is ironic. *See supra* notes 134-40 and accompanying text.

453. At any rate, he believes he does. This might prove a good opportunity, however, for the reader to practice applying the principles of source criticism that appear in the preceding section.

and accomplished soldier, he held his tongue. Nevertheless, several criticisms occurred to him, among them the lack of an exact definition in our conversation of "liberal democracy" or, for that matter, of "war." Another is the fact that, using any common definition of "liberal democracy," this sort of government has been around in profusion for at best two or three centuries, and when compared with humanity's history of five millennia, this is a rather short span on which to make generalizations. After all, such a comment not only undertakes to predict the future in broad brush strokes; it also undertakes to prove a negative. A single war between two liberal democracies at any point in either the near or the extraordinarily remote future will force the abandonment, or at least the modification, of the general's rule.[454]

Yet the author himself, during his early days in the profession, made similar Positivistic statements. He finally weaned himself from this practice and for several years has avoided making such statements, principally because he had a terrible track record of predicting the future. On almost every occasion he undertook to apply a historical generality to a current event, subsequent events proved him wrong. Such an experience might well make a relativist of one (somehow the term "Idealist" carries the wrong connotations here). But one event prevented the author from abandoning his Positivist outlook: this was a particular occasion when he was correct. While completely immersed in impeachment research, he predicted that the pattern of federal impeachment litigation, both remote and recent, suggested strongly that a court would soon take the step that the judiciary had up to that time avoided and find an impeachment controversy to be a justiciable question. Within the year the United States District Court for the District of Columbia did just that.[455] The eventual vacating of this holding did nothing to abate the author's elation. (In fact, it relieved him, for he believed the district court's rule to be a bad one).

This track record suggests that haphazard or insufficiently thorough historical research, like haphazard or insufficiently

454. A final criticism of this statement appears in the adage, attributed to Holmes, that "No generalization is wholly true, not even this one." *See* GEORGE SELDES, THE GREAT QUOTATIONS 328 (1966).

455. *See* Hastings v. United States, 802 F. Supp. 490, 493-98 (D.D.C. 1992), *vacated*, 988 F.2d 1280 (D.C. Cir. 1993). Of course, this may have been just a lucky guess on the author's part.

thorough legal research, is at best useless, and is at worst dangerous. Perhaps this is too obvious to need mentioning. The author's correct prediction in his principal area of expertise, however, suggests that historical inquiry can in fact prove to have some value. Many pitfalls exist; nevertheless, and relativism notwithstanding, a careful application of the historical method by any reasonably capable legist can speak clearly and cogently to current issues, while allowing the legist to view and present those issues in ways both new and useful.